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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ADRIAN MARTINEZ-LOYOLA, Appellant.	No. 86040-2-I DIVISION ONE OPINION PUBLISHED IN PART

MANN, J. — Adrian Martinez-Loyola appeals his conviction of child molestation in the first degree. He makes several arguments, including that the trial court erred when it concluded that racial or ethnic bias did not affect the verdict after conducting an evidentiary hearing under State v. Berhe, 193 Wn.2d 647, 444 P.3d 1172 (2019) and Henderson v. Thompson, 200 Wn.2d 417, 518 P.3d 1011 (2022).

In the published portion of this opinion, we conclude that the trial court did not abuse its discretion when it denied Martinez-Loyola's motion for a new trial because the trial court applied the correct legal standard and substantial evidence supported the trial court's findings.

In the unpublished portion of this opinion, we address the remainder of Martinez-Loyola's claims, all of which ultimately fail.

We affirm.

I

A

In January 2023, L.N. woke up to Martinez-Loyola with his hand underneath her underwear. At the time, Martinez-Loyola was in a romantic relationship with L.N.'s mother Elizabeth,[1] but L.N. and Martinez-Loyola had never shared a bed before. Elizabeth testified that when she arrived home from work L.N. disclosed to her that Martinez-Loyola had touched L.N.'s genitals. Elizabeth stated that L.N. initially described penetration but later recalled only external touching.

Elizabeth confronted Martinez-Loyola. He denied the allegations and suggested that Elizabeth take L.N. to the hospital. Elizabeth and E.V., L.N.'s older sister, took L.N. to Skagit Valley Hospital where L.N. disclosed her version of the events to a triage nurse, Christy Gonzalez.

B

The State charged Martinez-Loyola with one count of child molestation in the first degree.

On July 6, 2023, a jury found Martinez-Loyola guilty as charged. After the verdict, the trial judge and the attorneys spoke with jurors, as is customary in the county. Juror 6 immediately asked the trial judge and the attorneys about Martinez-Loyola's immigration status.

The defense's sentencing memorandum included a statement that Martinez-Loyola's only possible regret was the language barrier and the use of interpreters as

[1] For clarity, we refer to the victim's family by their first name or initials.

intermediaries because the jury was not able to hear him in his own words and that the jury appeared to consist of white, non-Hispanic, non-Spanish speaking individuals. After reviewing the sentencing memoranda, and considering juror 6's question, the trial court sua sponte requested the attorneys address the applicability, if any, of the ruling in Henderson.

On August 10, 2023, Martinez-Loyola filed a CrR 7.8 motion for relief from judgment requesting that the court vacate the jury verdict and order a new trial in the interest of substantial justice based on the influence of implicit racial and national origin bias.

On August 25, 2023, the trial court ordered an evidentiary hearing after concluding that Martinez-Loyola had made a prima facie showing under Berhe. The court concluded that an evidentiary hearing under Berhe and Henderson was necessary because an objective observer could view race as a factor in the verdict based on Martinez-Loyola being of Hispanic origin, using a Spanish-language interpreter, and at least one member of the jury asking the court and the attorneys about his immigration status after rendering the verdict.

At the evidentiary hearing, the trial court called each juror individually and ask them identical questions. The attorneys had the opportunity to ask follow up questions of each juror.

Juror 6 testified that they were the juror who inquired about Martinez-Loyola's immigration status and explained:

> Q: Can you tell us why you made that inquiry, please.
> A: It was just out of curiosity, nothing against him.

Q: Do you recall whether the defendant's immigration status was mentioned or discussed by you or any other juror during your deliberations or after reaching a verdict?
A: No, it was not.
Q: Do you recall whether the defendant's national origin was mentioned or discussed by you or by any juror during your deliberations or after reaching a verdict?
A: I do not believe it was.
Q: Was the defendant's immigration status or national origin something that you personally thought about or considered during your deliberations, even if nothing was said out loud to any other juror?
A: No, it had no bearing whatsoever.
Q: Was the defendant's use of an interpreter or the defendant's lack of ability to speak in English, something that was mentioned or discussed in deliberations by you or any other jurors?
A: I don't believe it was mentioned in deliberations, other than it made it difficult and took longer because of that, when he did speak English.
Q: Do you recall specifically anything that was said about this issue?
A: Just that it was hard because one of the interpreters spoke louder and it made it more difficult to understand, you know. She was talking in the background; so it was hard to understand throughout the deal. But no, it had nothing to do at all with anything during deliberations of his nationality or whether he was an immigrant or anything like that. That was just out of curiosity at the end.
Q: This is a related question, you may have touched on it briefly in your previous answer. But was the defendant's use of an interpreter or the defendant's lack of ability to speak in English, something that you specifically considered in reaching your personal verdict in this case, even if you did not say anything out loud about this?
A: No, not at all. What was at stake was what happened to the little girl. And I believe during jury selection I was the one who pointed out that while it really disturbed me what the charge was that everyone is innocent until proven guilty. So no, it had nothing to do with it.
Q: Was the defendant's race or ethnicity something discussed in deliberations by you or any other juror?
A: No, not at all.
Q: Was the defendant's race or ethnicity something you personally considered during your deliberations, even if you did not say anything out loud to the other jurors?
A: Absolutely not.
Q: Is there anything else you would like to share with us today in connection with these issues?
A: No, nothing.

The attorneys then elicited the following testimony:

> Q: [Juror 6], you said you had a curiosity about his immigration status, I think you said at the end. Your curiosity about his immigration status, is that something that kind of came to your mind after you had reached a verdict or was that something that was on your mind while the jury was deliberating about guilt[y] or not guilty?
> A: It had nothing to do with anything during deliberations. It was just at the—when the thing was over, I personally wondered if he was a U. S. citizen, was just a question I had. And now I sure wish I wouldn't have said it.
> Q: You are certainly not in any trouble for having that question or curiosity, so please don't think that. Did your curiosity have to do with, I guess, the question of whether or not there would be immigration consequences because of the jury's verdict? Is that what the curiosity was or was it something else?
> A: With the way the world is today, and all of the immigrants that are coming across, and we are spending so much money to take care of things, I just wondered. But he honestly, seemed like he [is] a very nice man. I was the one having a hard time making a decision. And we had to re-watch the video several times of her giving her story over, and over, and over again to convince—I think there were five of us. Do we send him away when if there's a question or if there's not. So I needed to be sure. And yes, as far as the other, that has nothing to do with anything while we were deliberating, never even thought of it. At the end it was like, okay, now I want to know.
> . . . .
> Q: You talked about having just, you know, curiosity, natural curiosity. My question would be was there anything in particular that [piqued] that curiosity for you?
> A: No, I think it was just a general question. Like I said, the border situation, the way it is right now and everybody coming across, I just wondered at the very end if that was the case in this or not.
> Q: Was there anything in particular that made you think that or that the defendant in this case was an immigrant?
> A: We never really knew much about his other children, where they were, if he saw them. So I didn't know if they were still in Mexico, or if they were here or, yeah, no, I mean, I wasn't trying to jump to any accusations or anything like that. It was like I said, pure curiosity. And we all found out as a jury to come to our decision it was over. And it was just now I personally wanted to know that question.
> Q: And I guess you mentioned Mexico. You mentioned Mexico. You mentioned the southern border. I guess I'm just wondering, let me ask you more specifically, do those two things come to your mind based on Mr. Martinez-Loyola's physical appearance and the language that he

> spoke? Would it be fair to say that those two things were factors in saying that you're wondering about immigration status?
> A: It had in nothing to do with his appearance or nothing like that. I just wondered. There's a lot of immigrants here, that's all I wanted to know. I'm not being a racist. I just wanted to know.

The remainder of the jurors testified that they personally did not take Martinez-Loyola's immigration status or use of interpreters into consideration when rendering a verdict. After the hearing, the trial court concluded that the State met its burden of proving racial bias was not a factor that affected the verdict. The court explained:

> There is no reason within the record to disbelieve any of the jurors who testified that immigration status, national origin, use of an interpreter, race, or ethnicity was not considered by any of the jurors in reaching their individual verdicts or in the deliberations of the entire group. Even the juror who asked the question about Mr. Martinez-Loyola's immigration status affirmed that she was curious, and that these considerations and any personal views she may hold did not affect her deliberations or verdict in this case. Additionally, there were no statements made by any members of the jury that tied any of these issues to any assumption about the commission of the crime alleged, propensity, or character evidence. There were also no statements from any of the jurors that would indicate to the Court that any of the jurors were dishonest about or concealing the nature of the jury deliberations.

Accordingly, the trial court denied Martinez-Loyola's motion for a new trial and sentenced Martinez-Loyola to 51 months.

Martinez-Loyola appeals.

II

Martinez-Loyola argues that the trial court erred when it concluded that racial or ethnic bias did not affect the verdict. We disagree.

A

The Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant a fair trial by an impartial

jury. State v. Gaines, 194 Wn. App. 892, 896, 380 P.3d 540 (2016); U.S. CONST. amend. VI; CONST. art. I, § 22. An impartial jury is one that is unbiased and unprejudiced. State v. Bagby, 200 Wn.2d 777, 787, 522 P.3d 982 (2023). A defendant is deprived of their right to an impartial jury "when explicit or implicit racial bias is a factor in a jury's verdict." Bagby, 200 Wn.2d at 787 (quoting Berhe, 193 Wn.2d at 657). "[A]llowing bias or prejudice by even one juror to be a factor in the verdict violates a defendant's constitutional rights and undermines the public's faith in the fairness of our judicial system." Bagby, 200 Wn.2d at 787 (quoting Berhe, 193 Wn.2d at 658).

Generally, under the no-impeachment rule, the jury is prohibited from divulging what considerations went into its deliberations or controlled its actions. Berhe, 193 Wn.2d at 658. But the Washington Supreme Court has held "the no-impeachment rule must yield in 'cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged.'" Berhe, 193 Wn.2d at 658 (quoting Warger v. Shauers, 574 U.S. 40, 135 S. Ct. 521, 529 n.3, 190 L. Ed. 2d 422 (2014)).

In Berhe, the Washington Supreme Court outlined a framework for determining whether racial bias affected a verdict:

> The ultimate question for the court is whether an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict. If there is a prima facie showing that the answer is yes, then the court must hold an evidentiary hearing.

193 Wn.2d at 665. Accordingly, a trial court must grant an evidentiary hearing if there is a prima facie showing of evidence that if "taken as true, permits an inference that an

objective observer who is aware of the influence of implicit bias could view race as a factor in the jury's verdict." Berhe, 193 Wn.2d at 666.

At the evidentiary hearing, the trial court must presume that racial bias affected the verdict, and the party benefiting from the alleged racial bias has the burden to prove it did not. Henderson, 200 Wn.2d at 435. "If the party that benefited from an appeal to racial bias cannot prove it did not affect the verdict, then substantial justice has not been done, and the court must order a new trial." Henderson, 200 Wn.2d at 440. Lastly, "where racial bias has had an effect on the verdict, we will not consider any claim that the error was harmless." Henderson, 200 Wn.2d at 440.

B

First, the parties dispute the applicable standard of review after a trial court conducts an evidentiary hearing under Berhe/Henderson. Both parties acknowledge that this issue has yet to be addressed by any Washington appellate court.

Martinez-Loyola asserts that the standard of review should be de novo because that is the standard when an appellate court reviews the trial court's application of the objective observer test in the peremptory context. We disagree.

In Simbulan v. Nw. Hosp. & Med. Ctr., 32 Wn. App. 2d 164, 555 P.3d 455 (2024), we held that the standard of review for whether there was a prima facie showing entitling a party to a Berhe/Henderson evidentiary hearing is de novo because "the determination as to whether a prima facie showing has been made relies on the objective standard under GR 37 and incorporates the totality of the circumstances at trial, we review the prima facie showing de novo." We rejected an abuse of discretion standard because the trial court made no credibility determinations that would require

deference and the decision to grant an evidentiary hearing involved no subjective trial court discretion. Simbulan, 32 Wn. App. 2d. at 174-75.

But here, neither party disputes on appeal that Martinez-Loyola made a prima facie showing that an objective observer could view that racial or ethnic bias impacted the verdict. Therefore, unlike Simbulan, we are not tasked with applying the objective observer standard to determine whether an evidentiary hearing is necessary. Instead, we are reviewing the trial court's findings and conclusions after it holds an evidentiary hearing under Berhe/Henderson, and whether the findings and conclusions support its denial of Martinez-Loyola's motion for a new trial.

We conclude that because the trial court was charged with hearing testimony from the jurors, judging credibility, and determining whether the State met its burden to prove that the jury verdict was not affected by racial bias, that our review of the trial court's findings and conclusion should be treated as a motion for a new trial.

We review a decision on a motion for a new trial for abuse of discretion. Henderson, 200 Wn.2d at 430. Under this standard, the trial court's decision will not be reversed unless it was manifestly unreasonable or based on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). "Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). "We will not substitute our judgment for the trial court's, weigh the evidence, or adjudge witness credibility." Greene v. Greene, 97 Wn. App. 708, 714, 986 P.2d 144 (1999).

Accordingly, we reject Martinez-Loyola's argument that we review the findings and conclusions de novo and turn to whether the trial court abused its discretion when it denied his motion for a new trial.

C

Martinez-Loyola argues that the trial court erred because the trial court found that juror 6's question was neutral and that there was no reason to disbelieve the jurors' testimony. We disagree.

In its letter ruling, the trial court outlined the applicable legal standard. By the time of the evidentiary hearing, the trial court already concluded that Martinez-Loyola made a prima facie showing that an objective observer could view that racial or ethnic bias affected the verdict. Accordingly, Martinez-Loyola's contention that the trial court did not presume that race impacted the verdict is unfounded.

After hearing testimony from each juror, the trial court found that no juror personally considered racial or ethnic bias when rendering the verdict. This finding is supported by substantial evidence because each juror testified that it was not considered in deliberations. The trial court also concluded that there was no reason to disbelieve any juror. The trial court also found juror 6's testimony credible and that they did not allow their personal feelings toward immigration be a factor in the verdict. These findings are supported by substantial evidence.

Accordingly, the trial court did not abuse its discretion when it denied Martinez-Loyola's motion for a new trial because the trial court applied the correct legal standard and substantial evidence supported the trial court's findings.

A majority of the panel having determined that only the foregoing potion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record under RCW 2.06.040, it is so ordered.

III

Martinez-Loyola argues that the trial court abused its discretion when it excluded inquiry into E.V.'s past sexual abuse. We disagree.

A

The State moved in limine to exclude evidence of prior sexual abuse of non-victim witnesses. The State explained that the parties were aware that L.N.'s sister E.V. had been a victim of sexual abuse but argued it was not relevant. The defense objected. The trial court granted the State's motion concluding that there was no relevance.

Martinez-Loyola then elicited the following testimony from L.N.:

> Q: I want to ask about your big sister, [E.V.]. Was there a time she told you . . . to not spend any time with [Martinez-Loyola]?
> A: [E.V.] didn't like [Martinez-Loyola], but when he was sick she told me I should sleep with her because . . . she told me she was super nervous because she thinks something will happen.
> Q: Did she tell you that men are bad?
> A: No, she said that if something goes wrong or something happens, she will—she told me that's why I need to sleep in her bed after that night.

Before Elizabeth testified, the parties engaged in questioning outside the jury's presence. Elizabeth testified that E.V. was a victim of sexual abuse when she was around nine years old, before L.N. was born. Elizabeth explained that L.N. has limited understanding of what happened to E.V.—only that E.V. told L.N. that she could not be alone with any man because they were bad.

After that testimony, Martinez-Loyola renewed his objection and requested that questioning of E.V.'s prior sexual abuse be allowed during cross-examination of Elizabeth and potentially E.V. The trial court concluded:

> At this point, based on the testimony I've heard from [Elizabeth] the only relevant information from what I can tell about [E.V.]'s past sexual assault is what [L.N.] knew or what was discussed with or around her. Based on the testimony that we just heard a moment ago, [E.V.] told [L.N.] not to be alone with any man because they are bad, and that was the extent of that discussion. She said they don't discuss it in front of [L.N.]. I don't have any link here about this that past sexual assault impacted this case or [L.N.]'s report. So what will be admissible is anything that was discussed with or in front of [L.N.].

B

Criminal defendants have a right under both our state and federal constitution to confront the witnesses against them. U.S. CONST. amend. VI; CONST. art. I, § 22. The constitutional right to confrontation "guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" State v. Lee, 188 Wn.2d 473, 487, 396 P.3d 316 (2017) (citing Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985)). Accordingly, trial judges have discretion to impose limits on cross-examination based on concerns including "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Lee, Wn.2d at 487.

We apply a three-part test to determine whether the trial court exceeded its discretion by limiting cross-examination:

> First, the evidence must be of at least minimal relevance. Second, if relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Finally, the State's interest to exclude prejudicial evidence must be balanced against

> the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld.

Lee, 188 Wn.2d at 488 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.2d 1189 (2002). We review the first part of the test for abuse of discretion, and if that is met, then we review the second and third part de novo. State v. Clark, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017).

Martinez-Loyola contends that evidence that E.V. had a history of sexual abuse was relevant because his defense theory was that E.V. primed L.N., intentionally or inadvertently, to believe that Martinez-Loyola would abuse her if they slept in the same bed. We disagree.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The "threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." Darden, 145 Wn.2d at 621. For evidence to be relevant, "there must be a logical nexus between the evidence and the fact to be established." State v. Cochran, 102 Wn. App. 480, 486, 8 P.3d 313 (2000).

As the State acknowledges, evidence that E.V. disliked or distrusted Martinez-Loyola was relevant. Similarly, whether E.V. told L.N. to stay away from Martinez-Loyola, or to never sleep in the bed with him, was relevant. This evidence is relevant to the defense's theory that E.V. may have primed L.N. to think something bad would happen if she slept alone in the bed with Martinez-Loyola.

But whether E.V. was a victim of sexual abuse was irrelevant. The jury heard that E.V. warned L.N. and that E.V. did not like Martinez-Loyola. The jury did not need to know that E.V. herself was abused nine years before trial and that may be why she has those opinions. The reason that E.V. told L.N. to stay away from men was irrelevant. It was only relevant that E.V. made those statements to L.N.

For those reasons, we conclude that the trial court did not abuse its discretion when it excluded inquiry into E.V.'s history of sexual abuse.

IV

Martinez-Loyola argues that the prosecutor committed misconduct when the prosecutor elicited testimony from an expert witness claiming that she uses interview techniques that yield reliable and accurate information from a child. We disagree.

A

Martinez-Loyola moved in limine to exclude any reference by the State and child forensic interviewer Courtney Long that current child interview protocol is reliable or a reliable way to get testimony. The court granted the motion and explained that "reliable in this case is a comment on the credibility of the witness and the process." The court clarified, "assuming foundation is applied, certainly Ms. Long may testify to the purpose of this and what she is aiming to do when she is . . . conducting a forensic interview without using that specific terminology."

Long testified that scientific research shows that interviewers should ask open-ended questions in order to get the most reliable answers. Long outlined the history of child forensic interviewing and explained how it has evolved to elicit the most reliable and accurate information from children.

B

To establish prosecutorial misconduct, Martinez-Loyola must establish that the prosecutor's comments were both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). If the defendant objected at trial, the defendant has the burden to prove that the misconduct "resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). But if the defendant did not object, the defendant "is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Emery, 174 Wn.2d at 760-61.

Martinez-Loyola asserts the error is preserved through the motion in limine prohibiting Long or the prosecutor from telling the jury that child forensic interviewing techniques produce reliable testimony. In the alternative, Martinez-Loyola argues that the prosecutor's conduct was flagrant and ill intentioned. We disagree.

If a trial court makes a final ruling denying a party's motion in limine, the party generally has a standing objection and need not object during trial to preserve the issue. Powell, 126 Wn.2d at 256. In contrast, the party who successfully moved in limine does not have a standing objection. State v. Sullivan, 69 Wn. App. 167, 172, 847 P.2d 953 (1993). The rationale for this rule is:

> It is appropriate then that, where the evidence has been admitted notwithstanding the trial court's prior exclusionary ruling, the complaining party be required to object in order to give the trial court the opportunity of curing any potential prejudice. Otherwise, we would have a situation fraught with a potential for serious abuse. A party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.

Sullivan, 69 Wn. App. at 172.

Accordingly, Martinez-Loyola did not have a standing objection through the motion in limine because he was the successful party. Therefore, Martinez-Loyola must prove the comments were so flagrant and ill intentioned that they could not have been cured with an instruction. Emery, 174 Wn.2d at 760-61.

Martinez-Loyola relies on State v. Cook, 17 Wn. App. 2d 96, 484 P.3d 13 (2021). There, the court concluded that the prosecutor committed misconduct under the following circumstances:

> [H]aving Detective Scott clearly imply to the jury he believed Cook's accusers. In response to the prosecutor's question, the detective testified that if he thinks someone is making a false report, he will include this in his report and also speak to the prosecutor about it. The prosecutor then asked the detective whether he did that here. The detective answered that he did not. The questions and answers clearly implied that Detective Scott thought Cook's accusers were reporting the truth. This invaded the province of the jury and impacted Cook's right to a fair trial.
>
> The prosecutor again committed misconduct by having forensic examiner Bedolla testify that the procedure she uses has been extensively tested to produce truthful and accurate information, and that children who disclose sexual abuse are truthful. Both of these statements, disguised as facts, are improper opinions that invaded the province of the jury and substantially impacted Cook's right to a fair trial.

Cook, 17 Wn. App. 2d at 106-7. The defense objected to Detective Scott's testimony but not Bedolla's testimony. Cook, 17 Wn. App. 2d at 101-03. The trial court also analyzed several other instances of prosecutorial misconduct regardless of whether they were objected to or not because of the cumulative effect of several statements. Cook, 17 Wn. App. 2d at 106.

We conclude that the prosecutor did not commit misconduct, and in any case, the comments do not rise to the level of flagrant and ill intentioned. First, unlike Cook, Long never testified that L.N.'s testimony was reliable because she uses reliable techniques or that people who disclose sexual abuse are telling the truth. Rather, Long testified about scientifically-proven methods that can elicit the most accurate information from children.

Second, the court in Cook considered the cumulative effect of multiple statements from several witnesses to be flagrant and ill intentioned. Here, Martinez-Loyola only asserts prosecutorial misconduct in Long's testimony because of a few mentions of "reliable." This was not repeated acts of vouching for L.N.'s credibility. And even assuming that line of questioning was improper, a curative instruction that told the jury that they are the sole judge of credibility could have cured any prejudicial effect. State v. Sivins, 138 Wn. App. 52, 61, 155 P.3d 982 (2007) ("Jurors are presumed to follow the instruction of the court.").

Because Martinez-Loyola fails to show that Long provided opinions regarding L.N.'s credibility, we conclude that his unpreserved error regarding opinion testimony is waived.

V

Martinez-Loyola argues that it was error for the trial court to exclude testimony as hearsay from Elizabeth that Martinez-Loyola suggested that she take L.N. to the hospital. We disagree.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). "Where an out-of-court statement is offered for the truth of what

someone told a witness, the statement is hearsay." State v. Rocha, 21 Wn. App. 2d 26, 31, 504 P.3d 233 (2022). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." ER 801(a). Whether a statement is hearsay is reviewed de novo. State v. Heutink, 12 Wn. App. 2d 336, 356, 458 P.3d 796 (2020).

Assuming that the statement is not hearsay, Martinez-Loyola's argument fails because he cannot show that there was a reasonable probability that the error affected the verdict. Martinez-Loyola testified that he told Elizabeth to take L.N. to the hospital. Thus, the evidence was already presented to the jury. Martinez-Loyola argues because the prosecutor argued that his testimony was self-serving in closing arguments, it would not have been cumulative evidence. We disagree because the State likely would have characterized the statement as self-serving regardless of who testified to it. Accordingly, any erroneous exclusion of the statement was harmless.

VI

Martinez-Loyola argues that defense counsel at trial performed deficiently on three occasions: (1) failing to impeach Detective Howard, (2) failing to elicit Elizabeth's testimony that L.N. had initially described vaginal penetration, and (3) failing to object to the expert witness testimony. We disagree.

A

A defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A claim of ineffective assistance of counsel presents a mixed question of fact and law that we review de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d

610 (2001). To prevail on a claim of ineffective assistance of counsel, a party must establish that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant's case. Strickland, 466 U.S. at 687. If a defendant fails to satisfy either prong, we need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To demonstrate prejudice, the defendant must show that, absent counsel's unprofessional errors, the result of the proceeding would have been different. McNeal, 145 Wn.2d at 362. When reviewing an ineffective assistance of counsel claim, there is a strong presumption that counsel's representation was "adequate, and exceptional deference must be given when evaluating counsel's strategic decisions." McNeal, 145 Wn.2d at 362.

B

Martinez-Loyola first argues that defense counsel was ineffective for failing to impeach Detective Bill Howard because he testified that he did not learn about another eyewitness to L.N.'s initial disclosure until the investigation was closed but his own report of the incident noted the additional witness. We disagree.

First, defense counsel's decision to not impeach the detective could have reasonably been a legitimate trial tactic. Second, even if we assume that the conduct was deficient, Martinez-Loyola still cannot demonstrate prejudice because Detective Howard's credibility was not central to the case and merely testified about responding to the incident.

C

Martinez-Loyola next argues that defense counsel was ineffective for not impeaching Elizabeth with a pretrial interview in which she told defense counsel that L.N. initially described vaginal penetration but then changed her story to only external touching. As Martinez-Loyola details, defense counsel elicited some testimony about L.N.'s initial disclosure but did not attempt to impeach Elizabeth with the transcript of the pretrial interview. Under an objective standard of reasonableness, this may have been a strategic trial decision. Defense counsel may have thought that discussion of penetration would be harmful to his client. But to the extent it could be considered deficient performance, it was unlikely to have changed the outcome of the case because the remainder of L.N.'s disclosures were overwhelmingly consistent.

D

Lastly, Martinez-Loyola argues that his defense counsel was ineffective for not objecting during Long's testimony when she described the techniques as reliable. Because we concluded above that the testimony was not improper, his defense counsel's conduct cannot be considered deficient.

VII

In a statement of additional grounds, Martinez-Loyola argues that there was insufficient evidence for a jury to convict him because the State failed to prove that he touched L.N. for the purpose of sexual gratification. We disagree.

Due process requires that the State prove every element of a crime beyond a reasonable doubt. State v. Johnson, 188 Wn.2d 742, 750, 399 P.3d 507 (2017). To determine whether sufficient evidence supports a conviction, we decide whether a

rational trier of fact could find the elements of the crime beyond a reasonable doubt. State v. Bergstrom, 199 Wn.2d 23, 40-41, 502 P.3d 837 (2022). The State's evidence is admitted as true, and circumstantial evidence is considered equally reliable as direct evidence. State v. Scanlan, 193 Wn.2d 753, 770, 445 P.3d 960 (2019). And we defer to the fact finder's resolution of conflicting testimony and their evaluation of the evidence's persuasiveness. Bergstrom, 199 Wn.2d at 41.

"A person is guilty of child molestation in the first degree when the person has . . . sexual contact with another who is less than twelve years old and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.083(1). "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(13). If the contact is with a body part "in close proximity to the primary erogenous areas," a jury may determine that the part is intimate and infer that sexual contact occurred. State v. Harstad, 153 Wn. App. 10, 21, 218 P.3d 624 (2009) (internal quotation marks omitted).

Sexual gratification is not an essential element of the offense, but it clarifies the meaning of sexual contact, which is an essential element. State v. Lorenz, 152 Wn.2d 22, 34-35, 93 P.3d 133 (2004). We look to the totality of the circumstances to determine whether the element of sexual contact was established. Harstad, 153 Wn. App. at 21. Where an adult touches a child's intimate parts while the adult is "not involved in any caretaking function," the jury may consider "the circumstantial evidence surrounding the touching" and infer that the touching was done for sexual gratification. State v. Wilson, 56 Wn. App. 63, 68, 782 P.2d 224 (1989).

At trial, L.N. testified that she woke up to Martinez-Loyola with his hand underneath her underwear. When asked where she was touched, L.N. pointed to her vaginal area. L.N. also disclosed her version of the events to Gonzalez, a triage nurse at Skagit Valley Hospital, and Long.

Considering the evidence most favorable to the State, we conclude that a rational fact finder could have found Martinez-Loyola guilty of child molestation in the first degree. The jury was permitted to infer that the touching was done for sexual gratification because Martinez-Loyola was not engaged in any caretaking function. Therefore, his argument that the State did not prove sexual gratification fails.

We affirm.[2]

Mann, J.

WE CONCUR:

ACJ

[2] Martinez-Loyola argues that cumulative error denied him of a fair trial. The cumulative error doctrine "only applies if there were several trial errors, none of which standing alone is sufficient to warrant reversal, that when combined may have denied the defendant a fair trial." State v. Hartzell, 156 Wn. App. 918, 948, 237 P.3d 928 (2010). Because we conclude that the trial court did not commit multiple errors, there was no accumulation of error.