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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MURUGANANANDAM ARUMUGAM, Appellant.	DIVISION ONE No. 84455-5-I (consol. with Nos. 84456-3-I, 84457-1-I) OPINION PUBLISHED IN PART

DWYER, J. — A jury convicted Murugananandam Arumugam on three counts of child rape as to one child and on three counts of child molestation of another child. Arumugam appeals, contending that (1) the trial court made evidentiary errors by admitting hearsay statements under the medical diagnosis or treatment exception and admitting evidence of his arrest on unrelated federal charges, (2) the prosecutor engaged in misconduct, (3) his trial counsel failed to provide him with constitutionally sufficient representation, and (4) cumulative error deprived him of a fair trial. He also seeks reversal of his convictions for reasons set forth in a pro se statement of additional grounds.

We agree that the trial court erred in admitting evidence under the medical diagnosis or treatment exception to the hearsay bar but conclude that the error was harmless. We disagree with all of Arumugam's remaining contentions and affirm his convictions. However, we remand the matter to the trial court with instructions to strike the victim penalty assessment (VPA) and DNA collection fee

from the judgment and sentences.

I

In 2002, Arumugam and D.S. wed through an arranged marriage in India. The couple had their first child, Kv.M., in 2004, and immigrated to the United States on Arumugam's work visa two years later. The couple's second child, K.M. (T.M.),[1] was born in 2009 in Washington.

In 2010, the family moved into the neighborhood where they have since resided. Soon thereafter, D.S. befriended C.F., another mother in the neighborhood whose daughter, J.F., was several months younger than T.M. T.M. and J.F. became best friends in 2016, when they attended the same elementary school. The children spent hours together nearly every day after school and during the summer. J.F. frequently went to T.M.'s house where they played video games, rode bikes, watched television, and played outside.

In early 2018, Arumugam was arrested on federal charges related to the possession of child pornography.[2] He was in jail for one day on those charges before being released and returning home. Once C.F. learned of Arumugam's arrest, she forbade J.F. from going to T.M.'s house but continued to allow T.M. to visit their home.

In May 2020, J.F. (age 10 at the time) told C.F. that Arumugam touched her inappropriately in 2016, when she "started going over" to T.M.'s house.

[1] K.M., who is also identified as "V." at times in the record, was born female. But prior to and throughout trial, K.M. identified as male under the name "T.M." To avoid confusion, this opinion uses T.M. and male pronouns to refer to "K.M." and "V."

[2] The circumstances giving rise to the child pornography charges are not at issue in this appeal.

When C.F. called D.S. and Arumugam to inquire about these allegations, Arumugam denied any improprieties. A few days later, C.F. reported the allegations to the police.

On June 4, 2020, King County Sheriff Detectives Laura Peckham and Patrick Sobczyk went to Arumugam's home to interview the family members. Peckham spoke with T.M. who did not report "anything of concern" or "any kind of touching." Arumugam agreed to speak with Peckham and allowed the detective to audio record the interview. After Peckham read the Miranda[3] warnings to him, the interview began as follows:

> [PECKHAM]: Okay. So this has nothing to do with 2018, I wasn't here, I don't know anything about that, but there are some new things that we have to talk about. Do you have any idea what that might be? Okay, about a neighbor.
>
> [ARUMUGAM]: What?
>
> [PECKHAM]: About a neighbor that you have.
>
> [ARUMUGAM]: Okay.
>
> [PECKHAM]: Do you know anything about that?
>
> [ARUMUGAM]: No.
>
> [PECKHAM]: Okay. Did you want to talk to me today about – about that?
>
> [ARUMUGAM]: Tell me, what do you have? What do you – what do you have?
>
> [PECKHAM]: We have a neighbor that is – has some allegations against you for touching, inappropriate touching. Is that something you want to talk to me about?
>
> [ARUMUGAM]: Um, no, I – I'm – I did not do that. I don't touch anybody inappropriately. You can ask my – you can ask

[3] Miranda v Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

them here. You can do any – anything.

[PECKHAM]: Okay. Because I did talk with the – a neighbor of yours, and I did do an interview with a neighbor of yours. And we did – she did say that you touched her inappropriately.

[ARUMUGAM]: So she cannot prove it, you don't have anything, and my – my – you can ask my family. You can ask them in front of me.

[PECKHAM]: What is your family going to know about it?

[ARUMUGAM]: I haven't – I haven't done anything like that, no.

[PECKHAM]: Okay. Okay.

[ARUMUGAM]: You can (indiscernible) – they know the situation, how did it happen with this, probably that's –

[PECKHAM]: What situation already happening with you?

[ARUMUGAM]: Yeah, it's 2018 (indiscernible) you are talking about.

[PECKHAM]: Okay, 2018 stuff.

[ARUMUGAM]: Yeah, so probably that would have been, you know, my – we've been – I know what you are talking about. I – we've been very close to each other, and we've known for each other a long, long time and this never – I mean, I'm not that kind of person (indiscernible).

. . . .

[ARUMUGAM]: You can ask – you can interview my daughter. You can interview my wife, and you can ask them. Even you can ask them – so, you know, we – she called us and talked about – talked to – talked – talked about it. I was so shocked.

[PECKHAM]: When did she call you?

[ARUMUGAM]: Like, a couple of days ago.

[PECKHAM]: What did she say?

> [ARUMUGAM]: She said, this happened and we – she discussed with us, and we discussed in details it's never happened such a thing. And I always present with my wife. I always present with (indiscernible) and we never do that. I'm a handicap person, I don't have any of those intentions to do anything to – and then again, she's – you – tiny little – I mean, I don't have that kind of intention. I have, in my past history, whoever I've been with, I don't have any intention of touching anything, and never happened to anyone. Why would it happen with tiniest one?

Arumugam told Peckham of a time—years prior—when he witnessed J.F. and T.M. chatting inappropriately with boys online, claimed that this encounter was the basis for J.F. conjuring up her allegations, and suggested that he was an easy target due to the 2018 matter:

> [ARUMUGAM]: No, it's not – it's not – it's not – I haven't done that. I think this couldn't have happened. So probably – because there was a time when they were in – so, they were playing so they were in on a chat, I saw her doctor, two boys, they were talking – they were – they were – you know, two boys on a chat room.
>
> . . . .
>
> [ARUMUGAM]: A chat room in the sense of the chat, the – they were in a – I don't know chat, but they were on a call. Two young boys, and their age probably, they were talking something nasty. And then I happened to saw them doing that, both were giggling and, you know, joking. They are – those boys were using the bad words and everything. So, I got so shocked – I was passing by, and then, hey, what are kids doing? What is this very bad, I'm going to tell your mom and my daughter was also there. I tell her mom then this is not good. ([I]ndiscernible) they were scared – scared, and she was crying, please don't tell (indiscernible). That's it. So, right. So, okay, fine. Go back. Go – (indiscernible) give me the card – and then I told my wife.
>
> There was other times, my son also got the same thing. Same situation. They got him.
>
> [PECKHAM]: Okay.
>
> [ARUMUGAM]: Right? So this happened – I – my – my

> things is this, I think, probably her daughter probably engaged some kind of things and they got caught. She got caught probably. And then, okay, how can I – probably [C.F.] or [J.F.'s father] would have asked, why would you do this? How – where do you learn all this from? Probably she might have built up the story, some kids do that.
>
> . . . .
>
> [ARUMUGAM]: We were like really, really close friends. And then, if – I am not the person who will bring anything to their family or to my family.
>
> [PECKHAM]: Okay.
>
> [ARUMUGAM]: So, this happened – my – my suspicions is my – I was – when they were talking to us, I explained this to her, so could have been this. I am not the person who will, you know, think like that. And probably, she might have engaged who – her daughter might have engaged the chats, and then she might have got caught by the parents. She – and then she might have built a story against –
>
> [PECKHAM]: Okay.
>
> [ARUMUGAM]: Because she – remembered this incident.
>
> [PECKHAM]: Okay. Okay.
>
> [ARUMUGAM]: So, it's – and then with our situation, she sees target. I am an easy target.

The interview ended with Arumugam reiterating his denial of ever inappropriately touching the children:

> [PECKHAM]: Okay. Did you ever touch [J.F.] when she was here?
>
> [ARUMUGAM]: Honest to God, no, I can promise on anything, on me, or on my children, my wife, honest to God—
>
> . . . .
>
> [PECKHAM]: Okay. Did you ever touch [J.F.] inappropriately on her private parts?

> [ARUMUGAM]: No, ma'am.
>
> [PECKHAM]: Okay. Did you ever touch your daughter inappropriately on her private parts?
>
> [ARUMUGAM]: No, way. No.

Meanwhile, during Arumugam's interview, Sobczyk talked to D.S. "trying to find out if she knew about the allegations" and "if she would cooperate with [law enforcement] and CPS on creating a safety plan to make sure that the kids were safe." D.S. did not report any allegations of abuse within her family, did not report any inappropriate touching of J.F., nor did she express any concerns about Arumugam. Kv.M. told the detectives that he had never witnessed Arumugam touching either T.M. or J.F. inappropriately.

At the conclusion of the interviews, Arumugam was arrested and charged with three counts of child molestation in the first degree involving J.F. He remained in jail from that point forward.

Jazie Smith, a Child Protective Service (CPS) investigator with the Department of Children Youth and Families, also went to Arumugam's home on June 4, 2020 to speak with Kv.M. and T.M. but "it was very chaotic" and she "did not speak with them" that day. Later that month, Smith met D.S., Kv.M., and T.M. again. The family was not forthcoming with information at that point. To Smith, the family appeared "worried about the father's situation" and "about law enforcement and CPS being involved," so she offered them resources.

Several months later, in December 2020, D.S. contacted Smith and reported that T.M. had said that Arumugam had sexually abused T.M. This

caused Smith to open a CPS investigation, contact Peckham, schedule T.M. to undergo a forensic interview, and assist T.M. in getting a sexual assault examination. Smith also gave D.S. information regarding a "U visa,"[4] as D.S. was worried about having to take the children back to India.

That same month, Peckham went to Arumugam's home to interview D.S. and T.M. D.S. told the detective that Arumugam had physically forced her to perform oral sex on him,[5] while T.M. reported that Arumugam had raped T.M. Next, Shana MacLeod, a forensic interviewer in the special assault unit of the King County Prosecutor's Office, interviewed T.M. about the rape allegations.

In January 2021, D.S. took T.M. (then age 11) for a sexual assault examination with nurse practitioner Joanne Mettler. In the "history of the child" portion of T.M.'s medical record, Mettler wrote:

> She told me how, when she was eight years old, her dad touched her private parts, that he raped her until she was about 10 when she went through puberty. I asked her what she meant by rape, and she said sex and that she did not like it at all. So I said, okay, when you say sex, what do you mean by that? Then I told her, if I could ask her a question about that, if I got something wrong, that she should correct me. I said, so when you say rape or sex, do you mean penis to vagina? She said, yes. I said, are there other things that happened? . . . She said, he made out with her. I said, are there other things? She said . . . squished my boobs. I said, are there other things? And she said, no. And then I said, well, what about your bottom? Did something happen to your bottom? She said, he tried, but I said, no. And then I clarified with her the last time and, she said it was before puberty. She told me she thought that this was normal and that she did not tell because she was scared and thought it was normal and that she felt like sex is disgusting. We talked a little bit more about the exam and more

[4] "A U visa grants temporary legal resident status to a person who is the victim of a qualifying crime and who helps law enforcement investigate or prosecute that crime." State v. Romero-Ochoa, 193 Wn.2d 341, 344, 440 P.3d 994 (2019).

[5] Based on this allegation, the State charged Arumugam with rape in the second degree, domestic violence, of D.S.

> worries about her body. She said she felt her body was fine, and that she did not feel that she needed to do the exam.[6]

Next, Mettler physically examined T.M.'s body and tested T.M. for sexually transmitted infections.

The State charged Arumugam with three counts of child rape in the first degree, domestic violence, of T.M. Later, the three sets of charges involving J.F., D.S., and T.M. were joined for trial before a single jury. Arumugam pleaded not guilty to all charges.

Prior to trial, the State moved to admit J.F.'s and T.M.'s reports of abuse to their mothers as "fact of complaint" evidence in its case in chief. The trial court granted the motion in part. The State also moved to admit the statements that T.M. made to Mettler under ER 803(a)(4), the medical diagnosis or treatment exception to the hearsay rule. The trial court reserved its ruling on this motion.

Finally, the State moved to admit Arumugam's 2018 arrest involving the federal child pornography charges as res gestae to explain the timing of J.F.'s and T.M.'s disclosures and as "a reference point" for various witnesses, and proposed a limiting instruction. After hearing oral argument, the trial court granted the State's motion, explaining:

> I think the Court should let this in as long as it's sanitized to not refer to any crimes of a sexual nature with a limiting instruction to the jury that the only reason that it's being admitted is so the Court can consider [J.F.'s] reasons for the timing of the allegations that she made. . . . And I think it will be important for the jury to be told not to speculate about the nature of the arrest or the charge that went with it.

[6] This quotation maintains the original female pronouns that Mettler used in the medical report. The record is not clear if T.M. identified as female or male at that point.

The trial court further clarified: "I mean, the reason why, frankly, the child pornography charges is so explosively prejudicial is because in the minds of most lay people, it would be incredibly relevant." In short, the court ruled that "the fact of the arrest is admissible, but the nature of the charge is not" and, without objection, Arumugam's attorney responded: "Excellent."

The trial court also admitted Arumugam's recorded interview with Peckham following a CrR 3.5 hearing and determining that his statements were made knowingly, intelligently, and voluntarily.

Over the course of trial, the State presented the testimony of 10 witnesses, beginning with Peckham. Peckham detailed the circumstances of her recorded interview with Arumugam. The entire recording of Arumugam's interview was then played for the jury.[7] Peckham clarified that she was not involved in investigating the "2018 incident," which prompted the court to give an oral limiting instruction on that topic.

Kv.M., who was age 18 at the time of trial, testified about how Arumugam was violent toward him and T.M. when they were younger. Kv.M. recalled a time when he was late for a piano lesson, which caused Arumugam to get "really mad." Consequently, according to Kv.M., Arumugam used "a stick" to hit him to the point where "there was like blood pouring down my face." Kv.M. testified Arumugam once beat T.M. for telling C.F. "that she was on her period." Furthermore, he testified to denying any allegations of abuse to law enforcement

[7] Although the record does not contain a separate transcription of this interview, it appears that the interview was lengthy given that it took 20 pages in the report of proceedings to capture the entire interview.

and CPS in June 2020 because:

> I was—I was afraid. Like, in case I said something and [Arumugam] did come back, like he would know that and I'd have to face that. And also, like, he—he had told us before like not to say any—anything bad, just say good things about him. So like, yeah, we just would tell—tell them whatever, like, good things that he would say to tell them.

Smith testified about her contacts with the family in June 2020 and about her December 2020 investigation into T.M.'s allegations of abuse. She spoke about recommending that T.M. undergo a sexual assault exam, providing resources, and giving D.S. a gas voucher to take T.M. to the examination.

Forensic interviewer MacLeod testified how "[d]elayed disclosure is one of the most common ways that abuse is reported," and that she had interviewed J.F. in June 2020 and T.M. in December 2020, and how both children appeared to be open during the interview. On cross-examination, MacLeod confirmed that the purpose of her interviews was "to gain as much information as possible to support a prosecution."

Sobczyk testified to interviewing D.S in June 2020. He observed that D.S. appeared worried about "what would happen to her and her family should [Arumugam] go to jail." He also clarified that the detectives felt they had probable cause to arrest Arumugam "based off of a forensic interview from a child" who "said she was molested."

Next, the State called Mettler to testify about T.M.'s sexual assault examination. Prior to such an examination, Mettler said, her custom was to always "ask the child for permission to examine them" and if the child "said no, the answer is no," and she "would not examine" the child. Mettler then testified to

gathering T.M.'s medical history, physically examining T.M., and concluding that the examination was "normal" with no sign of physical injury. At this point, the trial court excused the jury so that Mettler could be further questioned and the parties could argue the admissibility of T.M.'s statements contained in Mettler's written report.

During the evidentiary discussion, Mettler testified that the medical purpose of a sexual assault examination six years after the incident was looking for sexually transmitted diseases "and looking at the body to make sure that it looks fine, normal." The State argued that T.M.'s exam was for sexually transmitted infection testing and "also to see if there's mental therapeutic things." Arumugam argued that the examination was for evidence-gathering purposes only, not medical treatment. The trial court admitted T.M.'s statements contained in Mettler's report "without identifying that the perpetrator was the defendant." When the jury returned, Mettler read from her report and noted that T.M. said: "[S]ince she was eight, that she was touched, and that she had been raped up until she was 10 years of age;" it stopped "when she started to go through puberty;" that "rape" or "sex" meant "penis to vagina;" Arumugam "squished my boobs;" that "she thought it was normal, that she was scared to tell;" and "she felt sex was disgusting."[8]

C.F. testified about her response to J.F.'s disclosure of abuse, confronting D.S. and Arumugam, and reporting J.F.'s allegations to the police. C.F. also said that J.F. never "lied about anything big."

[8] Again, this quotation maintains the female pronouns used in the original testimony.

J.F. testified to Arumugam putting his hands under her underwear, starting when she was in kindergarten, and how she "couldn't really comprehend it" at the time, but that "it felt uncomfortable." Arumugam would touch her, J.F. claimed, "almost every time I went over if—if he was present." J.F. said, by the end of second grade, she felt that Arumugam inappropriately touching her was "really wrong," but that she "just didn't have the guts to tell anybody until May of 2020."[9]

D.S. testified about her arranged marriage to Arumugam and how he physically abused her. She recounted the family's immigration journey and how they depended on Arumugam's sole income. She detailed how Arumugam forced her to perform oral sex on him, which stopped in 2016.

D.S. also testified that when T.M. first told her "dad is touching my private parts," she did not do anything about the allegation. Later, after T.M. entered puberty, D.S. recalled T.M. saying: "'Mom, dad had sex with me.'" D.S. testified to being "so scared" at that point, given that Arumugam "had lost his job" and the family was "financially struggling." On cross-examination, D.S. agreed that her life was "a lot better now without [Arumugam] around," as her emotional "stress is gone" and she has peace of mind.

T.M., age 13 at trial, testified to Arumugam raping him. T.M. described the first time that Arumugam raped him, at age eight, which occurred in the master bedroom closet:

A I remember he tried – he showed me a porn video.

Q Okay. And what was on the video?

[9] J.F. testified that learning about Arumugam's 2018 arrest did not have any influence on her disclosing the abuse to her mother in May 2020.

A It was a – this girl. She was on a chair, she was white and she was wearing this red hoodie. I remember this very vividly.

Q Okay.

A She had no pants, and she doesn't – she didn't have any underwear.

Q Okay.

A And then there was this guy, he was naked, he was also white. And he was, like, fucking her. And I remember there was this woman or a girl, I don't know the age approximately, but she did sound older than 18. And I remember she was, like, laughing and, like, recording the video.

Q Got it. And what was your dad doing while he was showing you this video?

A I'm pretty sure he was naked and he was, like, do you want to do this? I don't remember giving a response.

Q Okay. You said he was naked. Were you dressed at all?

A I do not remember.

Q You don't remember. Okay. And after he showed you the – what happened next?

A I'm pretty sure he raped me.

. . . .

A It was like an [sic] missionary pose.

. . . .

Q Okay. Let me be a little bit more specific with my question. Did his penis penetrate your vagina?

A Yes.

T.M. testified to witnessing Arumugam ejaculate after the assault and said

"I remember he told me to get a tissue to clean it up." Afterward, T.M. "was visibly disgusted," "did not feel good," and "mentally, I did not like it." T.M. went on to say that Arumugam raped him "multiple times" over "a span about two years," that they had sex in the closet, in the master bedroom, and "on the downstairs couch," and that the two of them had "oral sex." T.M. stated that the rapes stopped "when I got my period." And, as to why he did not tell the police about any of this abuse in June 2020, T.M. said: "Well, my dad said no. And if I said yes, and my dad found out, I would get beat again."

Arumugam testified in his own defense. While he admitted to being a "drill master" and getting face-to-face with the children to yell at or "shake them" when they misbehaved, Arumugam said: "I'm not the guy who hit, or abuse, or beat them up, no, I'm not that guy." He denied ever having sex with T.M. He denied touching J.F.'s vagina. He also claimed that any oral sex with D.S. happened when they lived outside of the United States. Arumugam reiterated what caused him to think that J.F. had made up her allegations.

Gerard Cattin and Amber Ghosh, two defense witnesses, did not offer any exculpatory testimony. Cattin, who first met Arumugam in 2012 when they both worked for the same company, said that he moved to Idaho in 2015 and that his relationship with Arumugam "essentially from 2016 and on sort of stopped." Ghosh testified to moving next door to Arumugam in 2013 and speaking with him occasionally. She never had any direct interaction with T.M. She did not have much interaction with Arumugam's family since 2015, but said that she was the person who "bail[ed] him out" when Arumugam was arrested "four to five years

back."

Following the close of the evidence, the trial court instructed the jury and gave two limiting instructions: one regarding J.F.'s and T.M.'s disclosures to their mothers and, the second, regarding Arumugam's 2018 arrest.[10] During closing argument, Arumugam proclaimed that J.F., T.M., and D.S. were not credible and that each of them had motive to testify falsely against him. The jury found Arumugam guilty on all counts of child rape and of child molestation, but acquitted him of rape of D.S.

Arumugam appeals.

II

Arumugam first asserts that the trial court erred in admitting T.M.'s statements to Mettler under the hearsay exception for medical diagnosis or treatment. We agree, but hold that error did not impact the outcome of his trial.

A

A trial court has wide discretion when ruling on the admissibility of evidence. We will not disturb such a ruling absent an abuse of the trial court's discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Abuse of discretion occurs "only where the decision of the trial court was manifestly unreasonable or based on untenable grounds." State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001) (citing Powell, 126 Wn.2d at 258). We may affirm the trial court's rulings on any grounds the record and the law support. State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

[10] Arumugam did not object to the trial court's final instructions.

ER 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." "Hearsay is not admissible except as provided by these rules, by other court rules, or by statute." ER 802. "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment," "are not excluded by the hearsay rule, even though the declarant is available as a witness." ER 803(a)(4).

"[T]he test for statements made for medical diagnosis or treatment considers the subjective purposes of both the declarant and the medical professional." State v. Burke, 196 Wn.2d 712, 740, 478 P.3d 1096 (2021). For "the statement to be 'reasonably pertinent' to medical diagnosis or treatment under ER 803(a)(4), *the declarant's motive in making the statement must be to promote treatment* and the medical professional must have relied on it for the purposes of treatment." Burke, 196 Wn.2d at 740 (emphasis added) (citing State v. Doerflinger, 170 Wn. App. 650, 664, 285 P.3d 217 (2012)). "Statements attributing fault are generally inadmissible under this exception, but statements 'disclosing the identity of a closely-related perpetrator' may be reasonably pertinent to treatment in certain situations like domestic violence or sexual abuse 'because part of reasonable treatment and therapy is to prevent recurrence and future injury.'" Burke, 196 Wn.2d at 740 (quoting State v. Williams, 137 Wn. App. 736, 746, 154 P.3d 322 (2007)).

B

Here, the State avers that T.M.'s statements qualified for admissibility pursuant to the medical diagnosis or treatment exception. At trial, the State argued that the subjective purpose of nurse Mettler was to provide T.M. with medical treatment, including testing for sexually transmitted infections, reassuring T.M. that his body was normal, and providing a counseling recommendation. The State failed, however, to present any evidence of *T.M.'s subjective purpose or motive* for undergoing the sexual assault examination. Moreover, to the extent that the State or its witness was concerned about T.M.'s health in the years between the rapes alleged and the examination, we note that the record does not contain any medical evidence or records concerning T.M. either before or after the examination at issue.

The record unmistakably establishes that T.M. did not want to be physically examined by Mettler. Mettler testified to always asking a child for permission to examine them before doing so and to not examining a child "if they really don't want to be examined." However, here, T.M. expressly told Mettler that he "felt h[is] body was fine" and "did not feel that [he] needed to do the exam." Nevertheless, Mettler did not follow what she testified to be her standard practice of declining to examine children who do not want to be examined.

We infer from the circumstances that Mettler examined T.M. only after obtaining D.S.'s consent to do so.[11] Parents are authorized to provide informed

[11] An action for medical battery lies "where a health care provider fails to obtain any consent, or where the patient refuses care by a particular provider." Bundrick v. Stewart, 128 Wn. App. 11, 17, 114 P.3d 1204 (2005). While minors may consent to receive or refuse medical treatment without parental or adult authorization in several instances, T.M.'s situation does not

consent to medical providers on behalf of their minor children to undergo treatment, as a matter of legislative grace:

> Persons authorized to provide informed consent to health care, including mental health care, on behalf of a patient who is under the age of majority and who is not otherwise authorized to provide informed consent, shall be a member of one of the following classes of persons in the following order of priority: . . .
>
> (iii) Parents of the minor patient.

RCW 7.70.065(2)(a). This statute allows parental consent to be imputed to a minor for medical care but does not impute the parent's motive or purpose to that minor. No other statute or rule does so either. Put differently, RCW 7.70.065(2) simply allows for adult authority to overcome a minor's stated desires regarding medical treatment.

On the record before us, there is no evidence of T.M. articulating a desire to obtain medical treatment as a result of being raped by Arumugam. To be clear, as to the sexual assault examination specifically, the record establishes nothing more than T.M.'s submission to adult authority. Nothing in the record indicates that T.M. sought to "promote treatment" by submitting to an intrusive examination. Because the case law requires that the patient's desire to "promote treatment" must be established for the hearsay exception to apply, Burke, 196 Wn.2d at 740; Doerflinger, 170 Wn. App. at 664, the trial court erred in admitting T.M.'s statements to Mettler pursuant to ER 803(a)(4).

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appear to be one of them. See RCW 7.70.050(4) (any age, emergencies); RCW 7.70.065(2)(b) (any age, homeless child); RCW 9.02.100(1) (any age, birth control); RCW 9.02.100(2) (any age, abortion services) RCW 70.24.110 (age 14 or older, STI testing); RCW 71.34.500, .530 (age 13 or older, mental health services).

For its part, the State contends that Burke compels a different result. In that case, K.E.H. went to the emergency department at a Tacoma hospital around 1:30 a.m. on July 3, 2009, and "reported that she had just been raped." Burke, 196 Wn.2d at 717. After being "medically cleared" shortly before noon that same day, K.E.H. elected to wait at the hospital for several more hours to undergo a sexual assault examination with nurse Kay Frey. Burke, 196 Wn.2d at 718. Over defense objections, K.E.H.'s statements to Frey were admitted at Burke's trial under the medical diagnosis or treatment exception. Burke, 196 Wn.2d at 718-19. Ultimately, the Supreme Court held that the trial court did not abuse its discretion in admitting the statements because "[i]t is reasonable to believe that K.E.H.'s motive was to promote treatment and that Nurse Frey relied on the statements for the purposes of treatment" and "[h]er answers to the questions about penetration, ejaculation, contraception, strangulation, grabbing, and her position during the assault were also likely motivated by a desire to promote medical treatment specific to sexual assault." Burke, 196 Wn.2d at 741.

Burke does not stand for the proposition that all those who undergo a sexual assault examination do so for the subjective purpose of promoting medical treatment. Nor is Burke factually on point. In that case, K.E.H. voluntarily underwent an examination within 24 hours of her assault. Here, T.M. was examined years after Arumugam's actions and did so only after acquiescing to adult authority. Of significance is that T.M. had a very good reason not to want a stranger to probe his genitalia or view his naked body. As mentioned previously, T.M. is a person who has questioned the gender identity that was

assigned to T.M. at birth. T.M.'s disinclination to subject T.M.'s body to an intrusive examination years after the events at issue is, in the context of T.M.'s life, easily understood. Nothing in Burke commanded the trial court to impute to T.M. a desire or purpose that T.M. understandably disclaimed.

C

The erroneous admission of hearsay evidence is a nonconstitutional error and is therefore harmless if, within reasonable probabilities, the error did not materially affect the outcome of the trial.[12] State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Here, the evidence of child rape was of a great magnitude. At trial, T.M described how Arumugam attempted to prime him with a pornographic video of a man having sex with a girl and asking "do you want to do this," detailed the manner in which Arumugam raped him for the first time, and spoke of how the acts of rape continued over a two-year span and occurred in various locations. The depth and scope of T.M.'s trial testimony exceeded that of any of his statements contained in Mettler's report. Therefore, we conclude that, within reasonable probabilities, the outcome of Arumugam's trial would have been the same if the challenged hearsay statements had been excluded.

Arumugam relies on State v. Carol M.D., 89 Wn. App. 77, 948 P.2d 837 (1997), withdrawn in part on other grounds, 97 Wn. App. 355, 983 P.2d 1165 (1999), to argue that the trial court's error was prejudicial and requires reversal. In that case, parents were charged with multiple sex offenses involving their four children, including nine-year-old M.D. Carol M.D., 89 Wn. App. at 83. "At trial,

[12] Arumugam is not asserting a confrontation clause challenge in this appeal.

M.D. stated Detective Perez had defined 'secret touch,' and she had told him she did not remember her parents molesting her." Carol M.D., 89 Wn. App. at 82. "M.D. also denied being abused when Dr. Shipman questioned her." Carol M.D., 89 Wn. App. at 82. Relying on ER 803(a)(4), the trial court admitted the testimony of M.D.'s counselor, Cindy Andrews. Carol M.D., 89 Wn. App. at 82-84. Andrews "testified about statements M.D. made to her during these sessions," including about how "both her mother and father had put their fingers in her 'crotch.'" Carol M.D., 89 Wn. App. at 82-83.

Reversing the trial court, Division Three held that M.D.'s statements to Andrews were inadmissible under ER 803(a)(4) because the record did not affirmatively establish that the child had a treatment motive for making her statements. Carol M.D., 89 Wn. App. at 87. It then concluded that the error was prejudicial because:

> M.D.'s direct testimony at trial was not as detailed as her hearsay statements. Additionally, the defense's cross-examination of M.D. raised serious questions about the reliability of her testimony. In these circumstances, [the therapist's] hearsay testimony assumed greater importance. We therefore hold a reasonable probability exists the erroneous admission of these hearsay statements affected the outcome of the trial.

Carol M.D., 89 Wn. App. at 88 (citing State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991)).

Carol M.D. does not require reversal of this case. Unlike the declarant in Carol M.D., at the trial of this case, T.M. did not deny that Arumugam raped him. Furthermore, here, T.M.'s trial testimony was far more detailed than were his statements to Mettler. This is entirely unlike the circumstances present in Carol

M.D. Similarly, here, no "greater importance" were placed on the generic statements in Mettler's report than were placed on T.M.'s in-person elaboration of Arumugam's actions at trial. To the contrary, T.M.'s in-person testimony was unquestionably more central to the State's case than were the utterances contained in Mettler's report.

In short, although T.M.'s statements to Mettler were proved to have been not made for the purpose of T.M. promoting T.M.'s treatment, the trial court's decision to admit these statements has been proved to be harmless.

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

III

Arumugam next contends that the trial court erred by admitting evidence of his 2018 arrest in violation of ER 404(b). The State counters that the arrest was admissible as res gestae evidence and as a key point of reference in the timelines of multiple witnesses. We agree with the State.

Again, our review of this evidentiary ruling is for an abuse of discretion. Powell, 126 Wn.2d at 258. "All relevant evidence is admissible." ER 402. However, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b). In State v. Sullivan, we clarified that

> "res gestae evidence 'more appropriately falls within ER 401's definition of "relevant" evidence, which is generally admissible

> under ER 402,' rather than an exception to propensity evidence under ER 404(b)." State v. Dillon, 12 Wn. App. 2d 133, 148, 456 P.3d 1199 (quoting State v. Grier, 168 Wn. App. 635, 646-47, 278 P.3d 225 (2012)), review denied, 195 Wn.2d 1022 (2020).
>
> . . . .
>
> In sum, evidence that completes the story of the crime charged or provides immediate context for events close in both time and place to that crime is not subject to the requirements of ER 404(b). Such evidence is not of *other* misconduct of the type addressed in ER 404(b). See Grier, 168 Wn. App. at 647.

18 Wn. App. 2d 225, 236-37, 491 P.3d 176 (2021) (footnote omitted).

As was the case in Sullivan, ER 404(b) analysis does not apply to the evidentiary challenge in this matter.[13] 18 Wn. App. 2d at 237. Prior to trial, the court ruled that the "State may admit evidence that the defendant was arrested and charged with a crime to help explain the timing of J.F.['s] disclosure," but "may not admit the exact nature of the charge," and a limiting instruction would be required. At that point, the admission of the arrest as res gestae was not an abuse of discretion.

Once trial commenced, the State presented Arumugam's recorded interview with Peckham, which referenced the 2018 arrest. At the close of Peckham's testimony, the trial court gave the following oral limiting instruction to ensure that no prejudice resulted:

> All right. I'll say this, ladies and gentlemen, you've heard a couple of references now to another case, and Detective Peckham has said something about it being on a Federal level. *The only reason you're hearing about it is because reference to it may be relevant to the timelines of certain things happening in the case* that you are considering.
>
> I want to make sure that you don't speculate or try to guess about what that might relate to. You shouldn't do that, okay? The

[13] Arumugam's briefing does not address Sullivan's guidance on the proper standard for admitting res gestae evidence.

> only reason, again, it's being brought up is because it may influence the timeline regarding events that are relevant to this case.

(Emphasis added.)

In accordance with this ruling, other witnesses then used the 2018 arrest as a keystone in the timeline of their testimony concerning Arumugam. It was a marker for J.F. and C.F. as the time when J.F. stopped going to T.M.'s house (and stopped being molested by Arumugam).[14] It marked the point at which D.S. and Kv.M. began to worry about their family's financial situation and ability to remain in the United States. It also served as a reason why D.S. and T.M. failed to disclose any allegations of abuse to law enforcement in June 2020, as they were afraid that he would not be in jail for long, given his stay of only a day in jail following the 2018 arrest. Even Arumugam's defense witness, Ghosh, mentioned Arumugam's arrest "four or five years ago" and being the one who bailed him out of jail at that time.

In its final instructions to the jury, the trial court buttressed its oral limiting instruction with Instruction 8, which conformed to the evidence presented:

> Certain additional evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony about another arrest or legal trouble Mr. Arumugam faced in 2018. This evidence may be considered by you only to give context to J.F.'s, K.M.'s, and D.S.'s decisions to report the alleged abuse years after its occurrence. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

[14] This remains true even if there were other reasons J.F. stopped going to T.M.'s house.

"The jury is presumed to have heeded the instructions of the court." State v. Lord, 117 Wn.2d 829, 861, 822 P.2d 177 (1991) (citing State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982)).

Because the 2018 arrest was relevant, constituted res gestae evidence, and any potential prejudice was tempered by limiting instructions, we conclude that there was no error in admitting evidence of the arrest for a limited purpose.

Arumugam relies on State v. Acosta, 123 Wn. App. 424, 98 P.3d 503 (2004), to contend otherwise. His reliance is misplaced. There, in response to Acosta's diminished capacity defense at trial, the State called "a psychiatrist who, over defense objections, testified" to a "laundry list" of Acosta's 23 prior arrests and convictions, inclusive of the names of the charged offenses. Acosta, 123 Wn. App. at 429, 432. On appeal, this court concluded that "the admission of the arrest and conviction evidence affected the outcome of the trial with reasonable probability, and it was therefore an abuse of the trial court's discretion to admit the 'laundry list' of arrests and convictions." Acosta, 123 Wn. App. at 439.

This case is unlike Acosta. Here, we do not have a laundry list of arrests and convictions. Instead, the jury in this case heard limited evidence of only one arrest and never heard anything about the nature of the charges involved. In addition, proper limiting instructions were given to the jury. There was no error.

IV

Arumugam next argues that the prosecutor engaged in misconduct by repeatedly eliciting fact of complaint evidence in violation of the trial court's pretrial ruling. Because he did not object to any of these remarks at trial,

Arumugam now claims that the prosecutor's actions were so flagrant and ill intentioned that no objection was required. We disagree.

Before trial, in granting the State's motion allowing "fact of complaint" evidence, the court ruled that "the moms can say, 'my child, [J.F.,] or my child, [T.M.,] told me something, and as a result, I call[ed] the police'" and such testimony "doesn't have to mention touching or sex, or anything along those lines." Arumugam did not oppose this ruling.

At trial, the prosecutor (1) in opening statements, told the jury that it would hear C.F. testify that J.F. told her Arumugam touched her inappropriately, (2) elicited from C.F. that J.F. disclosed the abuse in 2020 and C.F. added that she was "shocked because it didn't seem in the character of that person," (3) elicited from J.F. that she told her mother in 2020 that Arumugam touched her inappropriately, (4) elicited from D.S. that T.M. made multiple reports of allegations to her, and (5) elicited from T.M. all of the disclosures he made to D.S.

The State concedes that the prosecutor violated the pretrial ruling on three occasions but avers that none of them were flagrant or ill intentioned. To be clear, none of the prosecutor's questions to J.F. and T.M. violated the court's ruling because the children were permitted to testify as to the details of their allegations of abuse.

A defendant's failure to object to a prosecutor's acts of misconduct waives such errors, unless such conduct "is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized

by an admonition to the jury." State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) (citing State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)). "When evaluating whether misconduct is flagrant and ill intentioned, we 'focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.'" In re Pers. Restraint of Phelps, 190 Wn.2d 155, 165-66, 410 P.3d 1142 (2018) (quoting State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012)). "In other words, prosecutorial misconduct is flagrant and ill intentioned only when it crosses the line of denying a defendant a fair trial." Phelps, 190 Wn.2d at 166.

Here, the prosecutor's acts were not flagrant and ill intentioned. The opening statement remark appears to be a misstatement. When the prosecutor asked C.F. about J.F.'s report of abuse, C.F. responded and offered additional testimony that she was "shocked," which the court then interrupted sua sponte. And, despite the prosecutor's proper questioning, D.S. offered unprompted answers in response when testifying.

Arumugam argues unpersuasively that the prosecutor's actions in this case are comparable to those at issue in State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009). In that case, "the trial court expressly conditioned the admission of evidence of physical abuse on defense counsel's making an issue of Melanie's delayed reporting," but the prosecutor preemptively introduced the evidence. Fisher, 165 Wn.2d at 747. Our Supreme Court explained:

> Instead of using the evidence to rebut a defense argument that Melanie's delay in reporting the sexual abuse means that she is not credible, the prosecuting attorney used the evidence to generate a theme throughout the trial that Fisher's sexual abuse of Melanie

> was consistent with his physical abuse of all his stepchildren and biological children, an impermissible use of the evidence.

Fisher, 165 Wn.2d at 748.

The Fisher court then held that there was a "substantial likelihood that the prosecuting attorney's misconduct affected the jury, thus meriting Fisher a new trial." Fisher, 165 Wn.2d at 749.

Here, no prejudice is established as resulting from the prosecutor's violations. This is so because J.F. and T.M. testified as to their disclosures to their mothers and to the details of their abuse by Arumugam. The jury was well aware of the identity of the alleged perpetrator. Moreover, Arumugam's recorded interview disclosed all of the information, as to J.F., before any of the mothers or children ever testified.

Additionally, the trial court gave limiting Instruction 7, to reduce the risk of any potential prejudice:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony by [C.F.] that J.F. told her that she had been touched inappropriately, and testimony by [D.S.] that [T.M.] told her that [T.M.] had been touched inappropriately. This evidence may be considered by you only as evidence that J.F. and [T.M.] made these reports to their mothers, and the circumstances surrounding the statements, and not for the truth of the matters asserted. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Arumugam has not demonstrated that the remarks were flagrant and ill intentioned, or that further curative instructions to the jury would have been ineffective. Accordingly, we conclude that appellate relief is not warranted.

V

Arumugam next asserts that he received constitutionally ineffective

assistance of counsel. The State argues that he has failed to show any such ineffective assistance.

To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. Stenson, 132 Wn.2d at 705-06. A strong presumption of effective assistance exists, and the defendant bears the burden of demonstrating an absence of a strategic basis for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). "To show such error, it must be established that the assistance rendered by counsel was constitutionally deficient in that 'counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment.'" Nix v. Whiteside, 475 U.S. 157, 164-65, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986) (quoting Strickland, 466 U.S. at 687). Prejudice occurs if there is a reasonable probability that the outcome of the proceedings would have been different had counsel's performance not been deficient. McFarland, 127 Wn.2d at 335. Failure to establish either prong of the test is fatal to an ineffective assistance claim. Strickland, 466 U.S. at 687.

Arumugam first avers that his attorney rendered deficient performance by not objecting to the prosecutor's elicitation of fact of complaint evidence from various witnesses. Because Arumugam discussed fact of complaint information in his recorded interview with Peckham, and because J.F. and T.M. both testified

as to their disclosures of abuse, defense counsel had a legitimate trial strategy in not calling undue attention to the fact that the children disclosed abuse. Nor was there any resulting prejudice, as discussed above.

Next, Arumugam contends that his attorney's performance was deficient for failing to object to C.F.'s opinion and character testimony regarding J.F. When the prosecutor asked C.F. if J.F. "ever lied about small stuff," C.F. responded:

> A Oh, sure. Yeah, typical, you know, real white lies, she'll – she'll tell, even now, and especially now that she's 12.
>
> Q Right.
>
> A Yes.
>
> Q Teenagers. Has she ever lied about anything big?
>
> A Oh, no, never.
>
> Q And part of the –
>
> [DEFENSE]: Objection, Your Honor. This is impermissible character evidence and vouching for the witness.
>
> THE COURT: All right. Let's, let's not go further down this road. I think the objection came a little late, but we won't go further down this road.
>
> [PROSECUTOR]: Sure. I will stop it.
>
> [DEFENSE]: Your Honor, I'd ask the Court to admonish the jury not to regard – to disregard that statement.
>
> THE COURT: Not at this time. We can take it up a little bit later. Again, the objection is supposed to come after the question, not after the answer.

Although the objection was "a little late," Arumugam's attorney did make the objection and did ask the court for a curative instruction. A slightly late

objection does not constitute deficient performance. Indeed, only "'in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.'" State v. Vazquez, 198 Wn.2d 239, 248, 494 P.3d 424 (2021) (quoting State v. Crow, 8 Wn. App. 2d 480, 508, 438 P.3d 541 (2019)). This is not such a circumstance.

Arumugam also asserts that his attorney's performance was deficient in cross-examining (1) Peckham, and eliciting that this case means a lot to the detective and that the detective is very invested in this case; (2) Sobczyk, and eliciting that the detective knew Arumugam was going to be arrested because he believed that police had probable cause; and (3) Smith, and eliciting that the investigator had a "gut feeling" that something "fishy" was going on with D.S., Kv.M., and T.M. not disclosing more information in June of 2020. However, this assertion ignores Arumugam's defense theory throughout the entire trial. His theory was that the allegations were false, the complaining witnesses were not credible, and that the law enforcement and investigating witnesses were biased against him. The cross-examination of these witnesses was clearly a strategy consistent with the defense theme.

Finally, Arumugam claims that his attorney's performance was deficient in failing to renew an objection to the 2018 arrest evidence when J.F. later testified that the arrest had nothing to do with her disclosure, thereby, invalidating the purported purpose for which the State claimed the arrest was relevant. But, by the time J.F. testified, it was clear that the 2018 arrest was also relevant to the timelines of other witnesses and the trial court had given an oral limiting

instruction on how such evidence could be used. No error is shown.

In sum, we conclude that Arumugam has not demonstrated that he was prejudiced by the alleged ineffective assistance provided by his trial attorney.

VI

Arumugam argues for reversal of his convictions due to cumulative error. The cumulative error doctrine, which requires reversal when the combined effect of several errors denies the defendant a fair trial, "does not apply where the errors are few and have little or no effect on the outcome of the trial." State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Because Arumugam has identified only one error, which we determined was harmless, the cumulative error doctrine does not apply in this case.

VII

Arumugam contends that he is entitled to relief from the VPA and the DNA fee imposed pursuant to his convictions. In 2023, the legislature added a subsection to RCW 7.68.035 that prohibits courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3), and amended RCW 43.43.7541 by removing language that made imposition of the DNA collection fee mandatory. See LAWS OF 2023, ch. 449, §§ 1(4), 4. The State does not dispute that Arumugam is indigent and concedes that this matter should be remanded to strike the VPA and DNA fees from Arumugam's judgments and sentences.

We accept the State's concession and remand the case to the trial court with instruction to strike the VPA and DNA fee.

VIII

Arumugam, pro se, seeks relief in a statement of additional grounds (SAG) filed pursuant to RAP 10.10. He sets forth five grounds for relief, which are set forth below:[15]

Ground 1: "My wife [D.S.] has threatened me on the King County Jail phone call that, if I do not give her Blank power of Attorney, She will take drastic measures against me. That she will file false charges against me, which she did eventually, by filing false charges using my daughter and herself. My request to my Defense Counsel to produce the phone calls records to the Court & Jury. But Defense Counsel denied and refused to do so."

Ground 2: "At Federal case investigation, they found Strong evidence against my wife [D.S.], producing explicit images on my son in my absence. I have requested Defense Counsel to produce the exculpatory evidence to the court and to the jury. But Defense Counsel and prosecution knowingly blocked that evidence to the court."

Ground 3: "My daughter [T.M.] has school records that Shows she caused multiple incidents due to her chronic behavioral issues of elaborate lies and stealing. I requested Defense Counsel to produce the school records to the Court and to the Jury. But Defense Counsel refused to do so."

"State and Defense Counsel both aware that both [T.M. and J.F.] Stories contradicted each other. Even though they cleansed the facts and presented to the trial that sounded very incriminating towards me."

[15] The SAG is handwritten. Therefore, the grounds are transcribed to the extent they are legible and maintains the original grammatical and spelling errors.

Ground 4: "The first two CPS records were omitted from the discovery. CPS Report#1 Shows basically how Best family we were. The CPS Investigator stated that, 'She never founded any issues, out of her 20 year carrier my family is one of the best family She encounte[red]. CPS Report #2 was inquiry on my wife involvement of explicit images that were produced by her as when requested to produce those records to the court and to the Jury. Defense Counsel and prosecution denied my request."

Ground 5: "Judge Darvas, was very biased against me from the beginning of the trial. She commented multiple times something like following manner: 'If it walk like duck, quack like duck, it must be a duck' [and] 'whole family trying to get rid of him But he still want care about them?' She also discussed with defense counsel and/or prosecutor in my absence and/or Defense/prosecutor's absence."

The record contains no information regarding the issues set forth in grounds 1-4. Defense counsel did not raise any of these issues before the trial court. When a claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. McFarland, 127 Wn.2d at 335. If a defendant wishes to raise a claim of deficient representation that requires facts not in the existing record, the appropriate means to do so is through a personal restraint petition. McFarland, 127 Wn.2d at 335. Accordingly, we decline to further consider grounds 1-4.

As to ground 5, Arumugam does not establish that the trial judge had conversations with one party, while the other party or he personally were not present. Nor has he established any bias regarding the "duck" reference. During

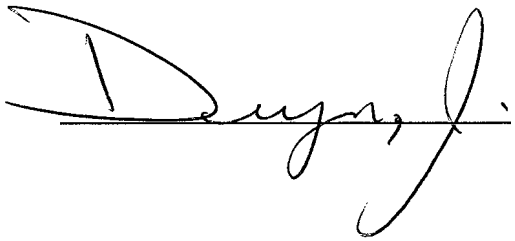
discussion of the final jury instructions, the prosecutor and judge talked about the court not giving a "no corroborative instruction." In the course of this discussion, the following colloquy occurred:

> THE COURT: Yeah, I'm not comfortable with lawyers telling jurors what the law is unless it's from an instruction that the Court is giving.
>
> [PROSECUTOR]: Would the Court be comfortable with me saying if corroboration was required, you certainly would have been instructed to that fact?
>
> THE COURT: I can't think –
>
> [PROSECUTOR: Because – and I think I'm not telling them the law.
>
> THE COURT: I can't think of a reason why that would be improper. [Defense counsel], do you have a reason?
>
> [DEFENSE]: No.
>
> THE COURT: Okay.
>
> [DEFENSE]: I think that's perfectly proper.
>
> THE COURT: Okay.
>
> [DEFENSE]: So, so that's –
>
> THE COURT: And I'm not trying to tie people's hands. I want to give you all a chance to fairly argue your case.
>
> [PROSECUTOR]: And this is an argument – not an argument, but this is an issue – I think I have every single one of these kind of cases, and it comes up frequently, this is why I'm fairly familiar with it. So –
>
> THE COURT: Yeah, I realize – I think it was Division II, I'm not sure, it doesn't really matter. I realize the Court of Appeals said it's not a comment on the evidence, but *it sure looks like one, and smells like one, and walks like one*.

(Emphasis added.)

The emphasized portion of the judge's comment appears to be what Arumugam claims was an articulation of bias against him. However, the context makes clear that the judge was not directing this comment at Arumugam. We reject Arumugam's claim of judicial bias.

Affirmed in part and remanded.



WE CONCUR: