No. 101026-5

Court of Appeals No. 55615-4-II
Lewis County No. 20-1-00821-21

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Plaintiff / Respondent,

v.

CORY MICHAEL CALDWELL,
Defendant / Petitioner.

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ON REVIEW FROM
THE COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION TWO
AND
THE SUPERIOR COURT OF
THE STATE OF WASHINGTON,
LEWIS COUNTY

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# PETITION FOR REVIEW

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RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. *IDENTITY OF PETITIONER AND DECISION BELOW*

Cory Michael Caldwell, Petitioner herein and appellant below, asks the Court pursuant to RAP 13.4(b)(3) to grant review of the decision terminating review issued by Division Two, *State v. Caldwell*, __ Wn. App.2d ___ (unpublished) (2022 WL 1556025), issued May 17, 2022. A copy is attached as Appendix A.

B. *ISSUE PRESENTED FOR REVIEW*

> Mr. Caldwell was convicted of committing second-degree assault of 9-year-old D, for allegedly lifting D up by his neck and choking him for several seconds.
>
> The Court of Appeals found that trial counsel's performance was constitutionally deficient for 1) allowing a CPS investigator and a police officer to testify about uncharged, unproven physical abuse by the accused of D, 2) allowing testimony about further inadmissible, uncharged and unproven claims about other victims, and 3) opening the door to inadmissible testimony from the named victim's mom about her fear that Mr. Caldwell would "take his anger "out" on the other children if she reported the incident for which he was charged or tried to get D medical help.
>
> Despite established law on the extreme prejudice such improper evidence is wont to cause, the Court of Appeals did not apply the controlling test for determining when counsel's constitutionally deficient performance is prejudicial.
>
> ***ISSUE PRESENTED:*** Should this Court grant review under RAP 13.4(b)(4), where the Court of Appeals applied an improper version of the relevant prejudice

test, thus failing to correctly determine whether counsel's deficient conduct was constitutionally prejudicial under the Sixth Amendment and Article 1, § 22?

C. *STATEMENT OF THE CASE*

Petitioner Cory Caldwell faced a charge of second-degree assault of D, the 9 year old son of Sara Stacy, for an incident which occurred in the motel room where they and Ms. Stacy's four other children all lived. CP 1-2; RP 129-30, 135-36, 183-84.

Mr. Caldwell had never been accused of abuse or neglect and had no prior convictions for alleged abuse or neglect of D or any of the other children. CP 65-73. Pretrial, counsel described Mr. Caldwell's conduct during the incident as "disciplinary actions." CP 40. Counsel moved to exclude any testimony about uncharged allegations of similar "disciplinary actions" of D or any of the other children. CP 40.

Although the motion was a single page and bereft of any citations, the State's attorney recognized the motion as involving "404B stuff," and agreed to it being granted. RP 14, 16-17.

Testimony at trial established that Child Protective

Services (CPS) had gone with police to check on the family because of concerns that D, who is autistic and has Attention Deficit and Hyperactive Disorder, might be malnourished. RP 132-33, 184. Ms. Stacy admitted at trial that she had not been properly feeding D. RP 110-14, 154-56, 184.

CPS took D into custody that day. RP 110-14. He was physically checked and there were no bruises or anything similar seen. RP 115. After a subsequent interview with CPS, however, the same investigator and police went back to the motel room to arrest and interrogate Mr. Caldwell for a claim that he had choked D for several seconds one day many months before. RP 122-25, 132, 158-60, 185-86.

Ms. Stacy testified that Mr. Caldwell had grabbed D by the neck and sort of held him off the ground against the wall for a few seconds, then released him after she intervened. RP 133-36. Ultimately, however, Ms. Stacy admitted she had not actually seen what was happening and was only speculating that D had been picked up or held off the ground by the throat. RP 134, 143-44, 157.

Ms. Stacy also conceded that the small bruises she said she saw on D's neck the next day were not on both sides but

only one. RP 128, 137.

D testified that Mr. Caldwell had grabbed him by the neck so D could not breathe and the squeezing got tighter. RP 164-70. D had previously told a social worker, however, that he could breathe the whole time. RP 173-74. He also said he could talk during the entire incident. RP 170-71.

Mr. Caldwell testified about grabbing D by his waist and sort of lifting D up off his feet, holding him against the wall and telling him to be quiet and stop crying. RP 194-95. They were at risk of losing the motel room if he kept being loud and if they were kicked out the whole family would become homeless. RP 200-201.

Mr. Caldwell said he was supporting D with his other hand the whole time and not holding him by the neck. RP 197. He had also denied ever lifting the child up by the neck. RP 197.

During trial, in an out-of-court interview of Ms. Stacy with both prosecutor and defense, Ms. Stacy said that the reason she had not reported the alleged choking to anyone was because she was scared that if she did so Mr. Caldwell would hurt the other kids. RP 149.

After that interview, on direct examination of Ms. Stacy, the State's attorney asked about that fear. RP 138. Ms. Stacy testified that she had not taken D to see a doctor after the alleged choking because she was scared of "[w]hat would happen." RP 138. Before the witness could say more, however, counsel's objection was sustained and the statement stricken. RP 138.

On cross-examination, counsel strangely returned to the issue. RP 147-48. In several questions, he cited a *different* reason why Ms. Stacy had not gone to get medical help or reported the incident, i.e., that the incident and injuries had not really been "real significant" despite Ms. Stacy's prior testimony stating her reason as being fear. RP 147-48.

With the jury out a few moments later, the prosecutor then argued - successfully - that counsel's cross-examination had now "opened the door" to the otherwise inadmissible testimony from Ms. Stacy that "she was afraid that the defendant would take her reporting it out on the other children." RP 154-55. Because counsel had "opened the door," the court allowed Ms. Stacy to tell jurors about her fear that, if she told anyone about the alleged choking, Mr.

Caldwell "**would take his anger out on my other kids.**" RP 154-55 (emphasis added).

A little later at trial, Centralia Police Department Officer Alan Hitchcock testified about reading the transcript of D's forensic interview and so knowing about the accusations being made prior to going to the motel for the arest. RP 160-61. Without defense objection, the officer testified about overhearing the CPS questioner asking Mr. Caldwell "questions related" to what D had "disclosed," i.e., "**about abuse as far as hitting or choking the kids[.]**" RP 160-61 (emphasis added).

The officer further testified that, when the CPS worker had asked Mr. Caldwell about these claims, Mr. Caldwell had responded that "**he never choked the children, but he had hit them and disciplined them**." RP 160-61 (emphasis added). Again, counsel sat mute. RP 160-61.

Later, when the CPS investigator testified, she told the jury she had interviewed Mr. Caldwell not only about D's "disclosures about being choked" but also "**other disclosures regarding physical abuse**." RP 188 (emphasis added). Counsel objected but did not ask for the improper testimony

to be stricken. RP 188.

A few moments later, when counsel moved for a mistrial, the prosecutor successfully argued that there really was not much additional prejudice from the improper testimony about other uncharged, unproven claims of physical abuse from the error, because the evidence counsel had "opened the door" to had already exposed jurors to the specter of Caldwell having committed "other acts of violence against the children." RP 187-88. Even while stating a concern about uncharged misconduct being admitted, the trial court agreed that there was minimal further prejudice because of what had already been admitted because counsel had "opened the door." RP 189.

In closing argument, the prosecutor referred back to the evidence to which that door was opened: Ms. Stacy's fears that Mr. Caldwell might harm the other children if she got D help for or reported the alleged choking. RP 138. After counsel tried to minimize it in closing by suggesting, again, that Ms. Stacy's real reason was "she wasn't that concerned" about the injuries, on rebuttal the prosecutor again drew attention to Ms. Stacy's fear of violence by Mr. Caldwell

against the other kids, exhorting jurors to listen to Ms. Stacy on what her reason was instead of the arguments of counsel. RP 154.

On review, Division Two applied the strong presumption that counsel's performance was reasonable but still concluded that counsel's performance was constitutionally deficient. App. A at 5-7. The Court affirmed, however, finding counsel's deficient performance not "prejudicial." App. A at 7-8.

D. *ARGUMENT*

THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS CAST ASIDE THE WELL-ESTABLISHED STANDARD FOR FINDING WHEN COUNSEL'S DEFICIENT PERFORMANCE IS PREJUDICIAL

1. *There is a well-settled standard for determining when counsel's performance is constitutionally "deficient" and when that deficient performance is prejudicial*

The right to counsel guaranteed by the Sixth Amendment and Article 1, §22, includes the right to "effective assistance." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see In re Personal Restraint of Crace*, 174 Wn.2d 835, 846, 280 P.3d 1102 (2012).

Counsel fails to provide effective assistance when, despite a strong presumption of "reasonableness," counsel's performance was "deficient" and "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 688; *see State v. Stenson*, 132 Wn.2d 668, 705-706, 940 P.2d 1239 (1997). Counsel's performance is "deficient" when his conduct falls below an objective standard of competence. *Stenson*, 132 Wn.2d at 706.

Here, the Court of Appeals properly found that counsel's performance was deficient below, in multiple ways. App. A at 6. First, counsel repeatedly failed to object to highly prejudicial ER 404(b) testimony from a CPS investigator and a police officer indicating that the accused had committed *other uncharged* acts of violence against D, the named victim. App. A at 5-6. Second, counsel repeatedly failed to object to similar prejudicial ER 404(b) testimony of alleged acts of violence against uncharged child victims. App. A. at 5-6. And even when he objected to admission of the CPS investigator's improper testimony about uncharged "other disclosures regarding physical abuse," counsel failed to move to strike the offensive testimony when given. RP 188.

Fourth, the Court of Appeals found counsel's performance constitutionally deficient in opening the door to the inadmissible, highly prejudicial evidence of Ms. Stacy's "fear," raising the specter of Mr. Caldwell "taking out"his anger on other, younger kids. App. A at 5-7.

These determinations that trial counsel's performance below was constitutionally deficient are correct. But Division Two then departed from the well-settled *Strickland* standard in deciding that counsel's deficient performance did not cause "prejudice" and thus compel reversal.

The question of whether the "reasonable probability" prong of *Strickland* has been met is a mixed question of law and fact. *See State v. S.M.*, 100 Wn. App. 401, 409-10, 996 P.2d 1111 (2000). To prove prejudice under *Strickland*, the defendant must show there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would be different." *Strickland*, 466 U.S. at 688; *see State v. Lopez*, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018). In *Strickland*, the Court further explained that the accused need not prove he would not have been convicted absent the errors; "the question is whether there is a reasonable

probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U.S. at 695.

The Court also set out the burden of proof for prejudice. 466 U.S. at 695. It determined that the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case" to meet that burden. *Strickland*, 466 U.S. at 693. Instead, the defendant need only show it likely by less than a preponderance of the evidence, that a jury would have had a reasonable doubt, absent the improperly admitted evidence. *Id*.; *Lopez*, 190 Wn.2d at 116.

A "reasonable probability" is thus one merely sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The issue is determined by looking at all the facts of the individual case. *See Lopez*, 190 Wn.2d at 116.

2. *The Court of Appeals applied the wrong standard*

In deciding there was no prejudice below, the Court of Appeals parsed out the "two issues" it saw at trial: 1) whether Mr. Caldwell had strangled D, and 2) whether his conduct was reasonable parental discipline. App. A at 7.

Regarding guilt, the Court conceded that the evidence at trial was conflicting, because Mr. Caldwell said he had not

choked D and D said he had. App. A at 7. The Court of Appeals then held that guilt depended upon "credibility." App. A at 7. Instead of then properly applying *Strickland*, however, Division Two simply declared there was "no reasonable probability the outcome of the trial would have been different" if the highly prejudicial evidence had not been admitted, because D "clearly testified" that he had been strangled and Ms. Stacy testified about seeing bruising on D's neck the next day. App. A at 7-8. For the issue of whether there was "reasonable parental discipline," the Court relied on an *uncharged* push into the wall and that Ms. Stacy had testified that there were bruises on the child's neck, concluding that "although the inadmissible testimony indicated that there were other allegations of abuse," "[n]o reasonable jury would find" that the conduct was "reasonable parental discipline." App. A at 8.

Thus, the Court of Appeals applied a different standard than that required under *Strickland* in finding there was no "prejudice" from counsel's unprofessional failures below. The question is not whether, absent the inadmissible evidence, there would have been sufficient evidence to convict, taken in

the light most favorable to the State, as the Court of Appeals did here. *See State v. Gunderson*, 181 Wn.2d 916, 921, 926, 337 P.3d 1090 (2014). The question is whether the defendant has met an extremely forgiving burden of proving by even less than a preponderance that a jury would have had a reasonable doubt about guilt had the highly prejudicial, inadmissible evidence not been improperly admitted based on counsel's unprofessional errors. *See id.*

The evidence improperly admitted here because of counsel's unprofessional failures was 1) inadmissible and highly prejudicial evidence from multiple state investigators of uncharged, unproven acts of violence by Mr. Caldwell against the named victim, *and* 2) similar testimony of uncharged, unproven acts of violence against *the other* children (including an alleged admission from Mr. Caldwell of "hitting" the kids), *and* 3) admission of the children's mother's fear that Mr. Caldwell would "take his anger out" on the other children if she reported or tried to get help.

Evidence of such uncharged misconduct is so highly prejudicial that under ER 404(b) it is presumed inadmissible at trial. *See State v. DeVincentis*, 150 Wn.2d 11, 17-18, 74 P.3d 119

(2003); *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Indeed, this Court has declared that such "propensity" evidence of "other crimes, wrongs or acts" is so prejudicial that a trial court determining whether to admit it is to err on the side of exclusion. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). Before such evidence can be admitted at trial the State has to establish that it is admissible for a permissible purpose, which requires the trial court to go through a lengthy analysis on the record, weighing the importance of the evidence and making sure the probative value is not outweighed by its prejudicial effect. *Gunderson*, 181 Wn.2d at 916.

In deciding that admission of this inadmissible evidence was not prejudicial, the Court of Appeals treated the evidence as "[v]ague references to fear or other allegations of discipline" as unlikely to affect a jury "without any specifics related to strangulation," instead of as improper, highly prejudicial "propensity" evidence of uncharged, unproven physical abuse of not only the named victim but of other children. Notably, the evidence came from the CPS investigator and police officer - witnesses a jury would

reasonably believe would know of such accusations. The CPS worker and officer were state agents, too, and this Court has recognized the special weight jurors give to such testimony. *See, e.g.*, *State v. Demery*, 144 Wn.2d 753, 762-63, 30 P.3d 1278 (2001).

The Court of Appeals applied a quasi-sufficiency standard, pointing to D's claim of choking and the bruises but not discussing whether, given the scant and conflicting evidence of guilt and the fact that guilt depended on credibility, there is more than a reasonable probability that the jury could have evaluated the crucial issue of Mr. Caldwell's credibility in a different light. App. A at 5-8. *All* of the improper evidence was extremely prejudicial evidence about uncharged, unproved assaults of not only D but other children. It is difficult to conceive how admission of such "propensity" evidence in a credibility case involving essentially the same kind of conduct of assault of a child was not constitutionally prejudicial, if the proper *Strickland* standard was applied.

After first successfully moving to exclude the inadmissible "propensity" evidence of uncharged, unproven accusations of physical violence by the accused against the

named victim or other children, counsel then did not object when multiple state witnesses introduced such evidence, or failed to move to strike on the evidence to which he raised objection. Worse, counsel's unprofessional failures opened the door to the inadmissible evidence of Ms. Stacy's "fear" that getting help for D or reporting the alleged choking would result in Mr. Caldwell "taking it out" on the other children.

The Court of Appeals applied an improperly high burden, inconsistent with the *Strickland* standards. This Court should grant review. Under RAP 13.4(b)(3), the Court will grant review where there is a significant question of state or federal constitutional law. In this case, the issue is whether applying a higher burden of proof than set forth in *Strickland* is consistent with the Sixth Amendment and Article 1, § 22, rights to counsel. Petitioner submits that this issue is a significant question of both state and federal constitutional law.

E. *CONCLUSION*

The Court of Appeals correctly held that trial counsel's performance fell below an objective standard of reasonableness in failing to object to or move to strike and opening the door to a horde of highly improper, prejudicial and inadmissible evidence below. The Court then erred, however, in applying an improper standard, inconsistent with *Strickland*, for determining there was no "prejudice." This Court should grant review.

DATED this 16th day of June, 2022.

**ESTIMATED WORD COUNT: 4,163**

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel at County Prosecutor's Office via the Court's upload service and caused a true and correct copy of the same to be sent to appellant by depositing in U.S. mail, with first-class postage prepaid at the following address: Mr. Cory Caldwell, DOC 427217, WSP, 1313 N 13th Ave., Walla Walla, WA. 99362.

DATED this 16th day of June, 2022.

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Filed
Washington State
Court of Appeals
Division Two

May 17, 2022

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>CORY MICHAEL CALDWELL,<br><br>Appellant. | No. 55615-4-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

LEE, J. — Caldwell appeals his conviction for second degree assault of a child, arguing that he received ineffective assistance of counsel. Although defense counsel's performance was deficient, Caldwell was not prejudiced by the deficient performance. Therefore, Caldwell's ineffective assistance of counsel claim fails. We affirm.

## FACTS

Sara Stacy was living in a motel with Caldwell and her five children, including D.R.M., who was nine years old. D.R.M. is autistic and has attention deficit hyperactivity disorder. In September 2020, law enforcement and child protective services took D.R.M. into protective custody because of concerns regarding his nutrition.

After being taken into protective custody, D.R.M. participated in a forensic interview. During the forensic interview, D.R.M. made allegations of abuse. The State charged Caldwell with second degree assault of a child against D.R.M.

Prior to trial, Caldwell filed a motion in limine to preclude the State from bringing up Caldwell's other disciplinary actions against D.R.M. or the other children. The State agreed to the motion, and the trial court granted the motion. The case proceeded to a jury trial.

At trial, D.R.M. testified that Caldwell choked him by grabbing him by the neck and squeezing. It was difficult for D.R.M. to breathe and he kept trying to wiggle away. Cory released D.R.M. after D.R.M. said he was sorry multiple times. D.R.M. also testified that Caldwell looked angry while he was holding D.R.M. by the neck.

Stacy testified that, prior to the incident, D.R.M. had been crying because one of his siblings took his teddy bear. When D.R.M. would not stop crying, Caldwell picked him up off the ground by his neck. Caldwell was holding D.R.M. about a foot off the ground. Stacy testified that D.R.M. was crying, kicking his feet, and saying that he could not breathe. The next day Stacy observed two small bruises on the left side of D.R.M's neck.

During Stacy's testimony, the State asked if Stacy told a doctor about the incident. Stacy said she did not because she was scared. Caldwell objected, and the trial court sustained the objection and instructed the jury to disregard Stacy's answer.

Caldwell cross-examined Stacy, focusing on whether she was concerned about the injuries caused by the incident. Caldwell specifically asked Stacy if she called a doctor about the incident. Stacy admitted she did not contact a doctor about the incident.

After cross-examination, the State informed the court that Stacy had stated in an interview that day that she did not disclose the incident because she was afraid Caldwell would take it out on the other children. The State sought permission to ask Stacy about the reason for failing to disclose the incident on redirect. Caldwell argued that it was improper but stated he would defer to the court. The trial court ruled that the State could ask Stacy about why she failed to disclose

the incident because it was directly addressed in cross-examination. During redirect, the following exchange took place:

> [STATE:] Okay. Now, you were also asked by [Caldwell's counsel], you didn't take [D.R.M.] to the hospital or tell anyone about this?
> [STACY:] Correct.
> [STATE:] And why not?
> [STACY:] I was worried what would happen to my other kids if the defendant found out.
>
> . . . .
>
> [STATE:] What did you fear would happen?
> [STACY:] He would take his anger out on my other kids.

1 Verbatim Report of Proceedings (VRP) (Mar. 1, 2021) at 154-55.

Corissa Beairsto, a CPS investigator, testified that she was present during D.R.M.'s forensic interview. Beairsto testified that after the interview, CPS filed a dependency petition for one of D.R.M.'s siblings and contacted law enforcement regarding D.R.M.'s disclosures. Caldwell did not object. When asked if Beairsto spoke with Caldwell about D.R.M.'s allegations, Beairsto responded, "I interviewed [Caldwell] regarding [D.R.M.'s] disclosures of being choked by [Caldwell], as well as other disclosures regarding physical abuse." 1 VRP (Mar. 1, 2021) at 187.

Caldwell moved for a mistrial based on Beairsto's testimony that D.R.M. made other allegations of abuse against Caldwell. The trial court denied the motion for a mistrial, stating that as long as the other allegations were not addressed further, there was no prejudice.

Officer Alan Hitchcock of the Centralia Police Department testified he was present when Beairsto interviewed Caldwell. Hitchcock testified that Caldwell told Beairsto that he never choked the children, "but he had hit them and disciplined them." 1 VRP (Mar. 1, 2021) at 161. Caldwell did not object to Hitchcock's testimony.

Caldwell testified that D.R.M. had been crying for 45 minutes to an hour at the time of the incident. Caldwell also testified that he grabbed D.R.M. by the waist and chest and pushed him up against the wall to get D.R.M. to stop crying. Caldwell explained that D.R.M. was able to breathe and speak while being held against the wall. Caldwell testified that he did not intend to cut off D.R.M.'s air supply and only wanted to get D.R.M. to stop crying. Caldwell also explained that he was concerned about D.R.M.'s crying because he did not want to get kicked out of the motel.

The trial court instructed the jury that to convict Caldwell of second degree assault of child, the State had to prove that Caldwell assaulted D.R.M. by strangulation. The trial court also instructed the jury on fourth degree assault as a lesser included offense. The trial court further instructed the jury that reasonable parental discipline was a defense to assault. The instructions stated that the jury may, but was not required to, infer that interfering with a child's breathing is unreasonable.

During closing argument, Caldwell argued that he was not guilty of second degree assault because he did not intend to strangle D.R.M. Caldwell also argued that his actions were reasonable because he was concerned about getting kicked out of the motel and he was just trying to get D.R.M. to stop crying. Caldwell further argued that Stacy admitted that there was no injury to D.R.M. and she was not concerned about the incident. Specifically, Caldwell argued:

> The next day Ms. Stacy said there were a couple little bruises right here, and it lasted for two days. She didn't call the doctor; she didn't take him to the doctor.
>
> Now, the State's trying to assert that, you know, it's because of my client and fear for him, but then she admitted she was concerned about the malnutrition for [D.R.M.], which is ultimately why he was taken. So her motive wasn't as altruistic as she would make you think.

1 VRP (Mar. 2, 2021) at 247.

The jury found Caldwell guilty of second degree assault of a child. The trial court imposed a standard range sentence of 31 months confinement.

## ANALYSIS

Caldwell argues that he received ineffective assistance of counsel because defense counsel committed multiple errors resulting in the jury hearing evidence of abuse allegations regarding Stacy's other children. We disagree.

### A. LEGAL PRINCIPLES

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert. denied*, 574 U.S. 860 (2014). We review ineffective assistance of counsel claims de novo. *State v. Lopez*, 190 Wn.2d 104, 116-17, 410 P.3d 1117 (2018).

To prevail on an ineffective assistance of counsel claim, a defendant must establish that counsel's performance was deficient and that counsel's deficient performance prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33. If a defendant fails to establish either prong of an ineffective assistance of counsel claim, the claim fails. *Id.* at 33.

### B. DEFICIENT PERFORMANCE

Counsel's performance is deficient if it falls "'below an objective standard of reasonableness.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). We engage in a strong presumption that counsel's performance was reasonable. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A defendant can overcome the presumption of reasonableness by showing that "'there is no conceivable legitimate tactic explaining counsel's performance.'" *Id.* at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130,

101 P.3d 80 (2004)). If counsel's conduct can be characterized as a legitimate trial strategy or tactic, then counsel's performance is not deficient. *Id.* at 33. However, the relevant focus is whether defense counsel's actions were reasonable, not simply whether they were strategic. *See State v. Vazquez*, 198 Wn.2d 239, 255, 494 P.3d 424 (2021) ("'The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.'") (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)).

Here, defense counsel was deficient for not objecting to various testimony that violated the pretrial motion in limine ruling, which precluded testimony about Caldwell's other disciplinary incidents involving Stacy's children. Stacy's testimony that she did not tell a doctor about the incident because she was scared was otherwise inadmissible—as demonstrated when the trial court initially sustained the objection and struck Stacy's first testimony regarding being afraid of reporting. The testimony was only permitted because defense counsel opened the door by asking questions intended to minimize the seriousness of the incident. Although this may have been strategic, a strategy that allows inadmissible evidence is not reasonable. *See Id.* at 254-55 (holding defense counsel's failure to object to defendant's inadmissible prior convictions in order to try to portray defendant as drug user rather than drug dealer was not reasonable).

Further, Beairsto's and Hitchcock's testimony was also inadmissible. Defense counsel was aware that Beairsto's testimony about D.R.M.'s other allegations of abuse was inadmissible because he moved for a mistrial. However, defense counsel did not attempt to have the court instruct the jury to disregard Beairsto's testimony. And defense counsel did not object to Hitchcock's testimony at all. Hitchcock's references to Caldwell's admission that he had hit and disciplined the children were inadmissible under the trial court's ruling on the Caldwell's motion in limine. Failing to object to clearly inadmissible evidence is not reasonable because it would not

contribute to the trial strategy of attempting to minimize the incident as minor discipline. *See Id.* at 258 (holding failure to object to inadmissible evidence was not reasonable because the evidence was counter to defense counsel's trial strategy).

Because defense counsel's actions allowed inadmissible testimony to be presented to the jury and were not reasonable strategic decisions, defense counsel's performance was deficient.

C. PREJUDICE

Although defense counsel's performance was deficient, it was not prejudicial. To establish prejudice, the defendant must "prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862.

"A person is guilty of assault in the second degree if he . . . [a]ssaults another by strangulation or suffocation." RCW 9A.36.021(1)(g). "'Strangulation' means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe." RCW 9A.04.110(26).

Here, there were two issues at trial: whether Caldwell strangled D.R.M. and whether his actions were reasonable parental discipline. The inadmissible evidence presented at trial had no reasonable probability of affecting the jury's determination on either issue. First, none of the inadmissible evidence indicated that Caldwell had strangled D.R.M., or any of the other children, prior to this incident. Therefore, whether Caldwell strangled D.R.M. was a credibility issue between D.R.M.'s and Stacy's testimony that Caldwell was holding D.R.M. by the neck, and Caldwell's testimony that he was pushing D.R.M. into the wall by his chest. Because D.R.M. clearly testified that Caldwell was holding him by the neck, squeezing, and making it difficult to breathe and Stacy observed bruising on D.R.M's neck the next day, there is no reasonable

probability that the outcome of the trial would have been different if the inadmissible evidence had not been presented to the jury.

Further, although the inadmissible testimony indicated that there were other allegations of abuse, there is not a reasonable probability that this evidence affected the jury's determination that this was not reasonable parental discipline. Caldwell admitted that he pushed D.R.M., a nine-year old autistic child, into a wall for crying when his teddy bear was taken. And Caldwell's actions left bruises on D.R.M.'s neck. No reasonable jury would find that Caldwell was engaged in reasonable parental discipline. Vague references to fear or other allegations of discipline, without any specifics related to strangulation, did not have a reasonable probability of affecting the jury's verdict in this case.

Because there was no reasonable probability that the inadmissible evidence in this case affected the outcome, Caldwell cannot meet his burden to show prejudice. Therefore, Caldwell's ineffective assistance of counsel claim fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, P.J.

Veljacic, J.

# RUSSELL SELK LAW OFFICE

## June 16, 2022 - 4:32 PM

## Transmittal Information

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| **Appellate Court Case Number:** | 55615-4 |
| **Appellate Court Case Title:** | State of Washington, Respondent v. Cory Michael Caldwell, Appellant |
| **Superior Court Case Number:** | 20-1-00821-9 |

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