No. 318966

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

RYAN ALLEN REID, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

Dan B. Johnson
Law Office of Dan B. Johnson, P. S.
4407 N. Division Street, Suite 601
Spokane, WA 99207
(509) 483-5311

INDEX

I- TABLE OF AUTHORITIES

WASHINGTON CASES **Pages**

SUPREME COURT CASES

CONSTITUTIONAL PROVISIONS

WASHINGTON STATUTES

COURT RULES

OTHER AUTHORITIES

APPENDIX

II. ASSIGNMENTS OF ERROR

1- The Court committed manifest reversible error by allowing Detective Estes to give improper opinion testimony as to the credibility of the witnesses for the State, in comparison to credibility and guilt of the Defendant, in violation of the Defendant's Constitutional right to a fair trial and an impartial jury under article 1, Sect. 21 of the Washington State Constitution, and the Sixth Amendment to the United States Constitution, and should result in a new trial being granted.

2- The Court committed manifest reversible error by allowing the children's mother, Tina Woodraska, to give her personal opinion on the Defendant's guilt in violation of the Defendant's Constitutional right to a fair trial and an impartial jury under article 1, Section 21 of the Washington State Constitution, and the Sixth Amendment to the United States Constitution, and should result in a new trial being granted.

3- Defense counsel failed to object to numerous, inadmissible and prejudicial items of evidence and his failure to do so violated the Defendant's Constitutional right to effective assistance of counsel under the Sixth Amendment to the Constitution of the United States, and/or Due Process under the Fifth and Fourteenth

Amendment, and WASH. CONST. Art. 1, Sect. 3, and should result in a new trial being granted.

4- The cumulative effect of the many errors in this case resulted in denial of a fair trial, and should result in a new trial being granted.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1- During his testimony, Detective Estes repeatedly was allowed to compare and contrast the versions of facts given by the witnesses for the State, with that of the Defendant and indicated that the Defendant's versions raised a "red flag". Was this testimony an unconstitutional comment on the credibility of witnesses and/or the guilt of the Defendant and is this improper testimony sufficient to require a new trial?

2- During her testimony, Tina Woodraska, the mother of the two alleged victims, made an explicit statement that she knew "for sure" the Defendant sexually abused the children. Was this testimony an unconstitutional comment on the guilt of the Defendant sufficient to require a new trial?

3- Did trial counsel provide ineffective assistance of counsel by failing to object to the foregoing unconstitutional evidence given by Estes and Woodraska; failure to object to child hearsay by Woodraska that did not comply with RCW

9A.44.120, and the Constitutional right to confront witnesses; failure to object to improper 404(b) prior bad acts evidence by Woodraska, and her son, A. E; and failure to object to irrelevant and prejudicial evidence given by Karen Winston, among other items of evidence?

4- Did the failure of defense counsel to provide effective assistance of counsel prejudice the Defendant such that the outcome would have been different had he properly represented Defendant, and was his failure to do so a violation of the Sixth Amendment right to effective assistance and/or Due Process under the Fifth and Fourteenth Amendments, and WASH. CONST. Art. 1, Sect 3?

5- Was there cumulative error which resulted in a denial of a fair trial, and should a new trial be ordered?

IV. STATEMENT OF THE CASE

On January 4th, 2012, an Information was filed charging Defendant with three counts of Child Molestation in the First Degree, RCW 9A.44.083. CP 1-2. The Information was amended prior to trial. CP 61-62.

At trial, the State called A. R., age 7, to the stand. She attended Willard Elementary and just finished second grade and was questioned regarding whether she could differentiate truth from a lie. RP 135-138.

She denied knowing Ryan Reid, and why she was there that day. RP 138-139. She denied anybody touching her in a place that is private when she was a little girl, or whether she could find him in the courtroom. RP 139.

She also denied remembering talking to Karen Winston and could not remember her 5th birthday, but remembered her 6th as when she went to Chuck E. Cheese. RP 140. The Prosecutor had no further questions and defense counsel had no questions. RP 141.

Karen Winston, testified that she was employed by Partners with Families and Children, as the program director and a forensic child interviewer. RP 141-143.

She claimed to have interviewed approximately five thousand children. RP 144. She indicated that she has a Master's Degree in social work, with an emphasis on child sexual abuse, incest, and drug-endangered children, and also participates in continuing education and research and was a member of several organizations. RP 144-145.

On November 30th, 2010, she did a forensic interview of A. R.. RP 145-146. The Prosecutor played exhibit 1, the video of the forensic

interview of A. R. for the jury. The Court had previously entered an Order allowing this child hearsay to be admitted. CP 63-65. (Child Hearsay Hearing FFCL).

In summary form, during the videotaped interview, the child claimed that Ryan had touched her pee pee, with his finger. Tr. 13-14 (Exhibit P-1-Transcript of Video interview dated November 30th, 2010, designated "Tr"). She did not remember whose house it took place at. Tr 15. She indicated she was two and didn't talk when it took place. Tr 15. She said he touched her pee pee when she was three, but not four or five. Tr 15. She did not answer the question when asked: "Now, if, now if you were two years old how do you remember that Ryan touched your pee pee?" Tr 15-16. When shown a diagram she claimed Ryan touched her pee pee and butt, on the outside and inside. Tr 17-18. She claimed it felt like an owie. Tr 18. When asked: "Did Ryan say anything to you when he did this?" her response was; "Um he said yeah and I said no. Actually I was a baby so I didn't say no". Tr 18. She denied anybody else touched her like Ryan, or showed their body parts to her. Tr 18-19. She claimed that Ryan touched her pee pee hundreds of times. Tr 19. The following conversation took place:

" Q Does your mom like Ryan?
A No, not at all.
Q Why doesn't she like Ryan?

A Because he's a bad man.
Q What does he do bad?
A He touched my peepee.
Q Okay.
A Yuck....." Tr 19.

After the video was played, the Prosecutor asked follow up questions, discussing the use of background questions to build rapport with child witnesses. RP 148-149. She indicated that pre-schoolers have less ability to resist suggestibility, but upon questioning regarding A. R., claimed that: "I wouldn't say she was pretty suggestible. I think she was a pretty strong individual, this little girl, and pretty self-assured and had a real sense of what she wanted to say and didn't want to say. You know, unless I actually did some kind of a study it would be hard to say, yes, she's definitely suggestible, or no, she's not at all. But by five kids can resist things being suggested to them if they're not right." RP 149-150.

When asked about the point where A. R. disclosed that Ryan had touched her pee pee with her [sic] finger and touched her butt, and Ms. Winston asked A. R. who told her that, she indicated: "Well, that's sort of hypothesis testing, sort of, where did you find that out, where did that information come from, to encourage a child to tell me, mom told me, my uncle told me, I just knew it or, you know, that kind of thing. RP 150-151.

Exhibits 2, 3, 4, and 5 were introduced as the drawings prepared by the child. RP 151-154.

Ms. Winston did no further follow up with the child. RP 154-155. However, she did testify that she followed up with the child's mother and wanted to make sure she would keep the child away from the Defendant. RP 155. Despite the lack of relevance and the prejudicial nature of this line of questioning, there was no objection by the defense.

The Prosecutor asked follow up questions regarding A. R. and memory when she was ages two and three. Despite the fact that she stated "...I'm not an expert on children's memory, so I really wouldn't be able to expound on that..." she went ahead and did anyway, without objection. RP 156. She was also asked to expound on why the child was unable to testify at trial and was allowed to do so without objection. RP 157.

She also discussed her suggestion to get a medical exam, but indicated that in many cases it doesn't show anything. RP 158.

On cross, Ms. Winston indicated that a medical exam was conducted by Dr. Grubb, and admitted that if the exam had positive findings, that she would have heard about it. RP 161. She could not determine whether the alleged touching was sexual in nature, and admitted that she never discussed diaper changing with A. R., and denied that it occurred to her that A. R. could have been discussing diaper changing. RP 162.

Melly Woodruff stated that she was a CPS supervisor and was present when the forensic interview took place. RP 171-175. On cross, she verified that there was a note dated November 5th, 2010, which confirmed that Ms. Woodraska had called her and told her that she stopped visits between Mr. Ryan Reid and her children, going against a court order. RP 176-177. She was allowed to state that Ms. Woodraska noted that she was suspicious of an incident that happened a couple years ago and that a request was made to involve CPS.

A. E., age fourteen, had just finished 8th grade. He was a lifelong resident of Spokane, and had two sisters, including A. R. RP 184. His Mother is Tina Woodraska, and his former step father was Ryan Reid, the Defendant. RP 185. He indicated that he did not get along very well with the Defendant and claimed that he was choked and "stuff" against the wall and be violent. RP 185.

He claimed that the Defendant got in the shower with him. RP 186. He then went on to claim that the Defendant took his hand and put it on his penis and masturbated him. He described the process. RP 186-187. He claimed that the penis was hard and that it took about ten minutes, but he didn't remember exactly, and that there was skin to skin contact. RP 187. He was in his pajamas, but does not remember if they remained on him at the time. RP 188. He indicated that the touching took place at

night, but did not remember if the Defendant was in the bed all night. RP 188.

He thought it took place when he was eight or nine, but claimed he could not remember if it happened more than just the one time. RP 189. He did not remember if the Defendant said anything to him at the time of the alleged incident. RP 190. A.E. claimed that the Defendant told him not to tell anyone. RP 190-191. He indicated that it would have been embarrassing to tell anyone. Years later the police came to talk to him. RP 191.

He claimed that it did not surprise him that the police came to him and that Ryan might tell someone. RP 191. On cross he denied talking to his step father Michael Woodraska or his Mother, prior to talking to the detective. RP 194.

Tina Woodraska testified that she stayed at home with her kids, ages fourteen, seven, and six. RP 198-199. In February, 2008, she claimed that she got the Defendant out of her house by claiming that he had hurt her son, A. E. RP 201. During the June, 2007 to February, 2008, time frame, A. R. was two to three years of age. RP 202.

She described an incident where she came home from work and heard noises coming from A. R.'s bedroom. She tip toed to the door, pushed it open and claimed that the Defendant bounced up and she saw A.

R. with the bottom half of her completely naked. She screamed "What are you doing?" RP 202. She indicated that his face was "down in her area", her private parts, and that his face was approximately 10 inches to a foot away and saw his hand was in that area but she also stated: "...I couldn't really tell exactly where he was touching..." RP 203.

She claimed that the Defendant appeared to be startled. RP 203. After she screamed, What are you doing, he got red in the face and said, I was checking an owie. He yelled, I was checking an owie, bit his tongue, shook his head and walked, stormed out the door. RP 204.

At that time, A. R. was still on the bed and she dressed her. She claimed that A. R. did not wear diapers when she was two during the daytime. She claimed that A. R. did not need changing, nor was there anything to indicate an accident. RP 204-205. A. R. seemed upset according to her, but was not crying. She did not remember what she did after getting A. R. dressed. RP 205. She claimed to have turned the matter in to CPS, but had never previously seen the Defendant reacting with A. R. that way. RP 206.

At that age, A. R. was capable of talking but made no comment, or complaint of concerns, and Ms. Woodraska did not ask her. She then claimed that later on A. R. vaguely made comments to her about the Defendant having hurt her in her private parts. RP 207-208. Despite the

fact that the testimony involved hearsay, there was no objection by the defense. There had been no prior determination as to the admissibility of this hearsay statement, and the defense attorney failed to object.

Karen Winston told her there wasn't much to the interview, and that Detective Estes would look into it. RP 208-209. She then responded to a question as to an inference that she wanted to restrict visitation with the Defendant and stated: "Well, I don't want him to hurt them. I don't want them—I mean, he's physically abusive. And as far as I know, he sexually abused them. I know for sure. I don't want them to get hurt. And that's the only reason I would ask that he just not hurt them anymore." Despite the fact that she was offering an opinion on the Defendant's guilt, there was no objection by defense counsel. RP 209.

She never observed any kind of sexual contact between A. E. and the Defendant, nor did her son ever disclose any abuse to her. She did not learn about the allegation until later on when Detective Estes told her. RP 210-211. She claimed that it was not common for A. E. to sleep in the same bed as the Defendant, nor would he lay in bed with him. RP 212.

She admitted that in the final Parenting Plan, she would not get what she initially wanted and agreed that the Defendant's proposed Parenting Plan called for a joint custody arrangement with visits on alternate holidays. RP 221. She also previously sought an anti-

harrasment order in 2005, against the Defendant. RP 225-226. She could not recall telling Detective Estes that she found it hard to believe her daughter at five years of age could recall a touching incident when she was two, but admitted she could have. RP 231-232.

She told Detective Estes that the Defendant was fully clothed when she walked in as described previously, and that she did not know what to believe. RP 231. Ms. Woodraska admitted that in November, 2012, she may have told Melly Woodruff (CPS) that she was in contempt for not following the final Parenting Plan. RP 233-234.

She claimed that her child stopped wearing diapers at about age two, but later was uncertain. RP 236-237. She stated that she has discussed the fact with A. R. that the Defendant was her father, but denied ever telling A. R. that Defendant was a bad man, or that Defendant was a bad man because he touched her pee pee, and denied talking with A. R. about what she was going to talk about with Karen Winston, during the forensic interview. RP 238-239.

When asked about talking with her son, A. E., she indicated that she did not hear anything from his mouth, but later she asked if there was anything at all that was inappropriate between you and Ryan, and her son said: "no, not at all." RP 239-240.

Eric O'Leary, was a Spokane Transit bus driver and Tina Woodraska is his biological sister. RP 245. He claimed that in the years 2007 and 2008 that he would frequently go to his sister's home on North Stevens, sometimes without calling and claimed he had a key, or would usually just walk in the door. RP 245. He testified that there was an occasion during that time period where he walked in unannounced and felt like he caught the Defendant off guard. He stated that he knocked on the door, there was no answer and he went in through the front door. There was no one in the kitchen area, then heard something down the hallway in a bedroom. He opened the door and claims that he saw Ryan kneeling or standing over the baby (A. R.). Ryan claimed that he was changing the diaper, but the witness did not see any diapers or other similar items. RP 246-247. He testified that A. R. was on the floor, with the Defendant's back to the door. He did not see exactly what the Defendant was doing with his hands and indicated that the Defendant did not say "hi" but just went into explanations. RP 247-248.

The first thing out of the Defendant's mouth was that he was just changing the diaper, and the witness thought that he wasn't making eye contact with him. He thought that it was odd that A. R. was unclothed but she had a diaper on. He could not say whether the diaper was partially off or on or whatever, due to the blockage to his vision. RP 249. He indicated

that he did not see any powder or wipes. After he walked in to the room, he saw the Defendant fasten the diaper and just walked out of the room. He thought that A. R. was about two years old. He never saw any other similar activity that caused him concern. RP 249.

On cross he recalled telling Detective Estes that he thought the incident had occurred in the summer of 2008, but did not recall the exact time. He admitted that A. R. would have been three years old and that she was still wearing diapers. RP 251. He thought that A. R. acted normally at the time of the incident. RP 251.

He admitted that when the alleged incident took place that A. R. did not run to him, or hide or do anything that was out of the ordinary, but still thought it was weird. RP 253-254. On re-direct, he thought that the alleged incident took place in the summer of 2007. RP 254.

Mark Ferguson, of the Spokane Police Department, stated that on January 21st, 2011, he conducted a voluntary "specialized" interview with the Defendant. RP 256-257. Detectives Estes and Lebsock were listening in. RP 258. He indicated that he gave *Miranda* warnings and the Defendant expressed no confusion or concern about his rights and voluntarily participated in the interview. RP 258. The purpose of the interview was to clarify some issues where Mr. Reid was accused of sexual activity with A. R. RP 259. He informed the Defendant of the

reason for the interview, but the Defendant then talked about an event with A. E. that he had not ever told anybody else about. A. E. was the Defendant's step son. RP 260.

The Defendant described an evening where A. E's mother had been angry and called her son, a "homo" and a "fag". A. E. was upset and Defendant went to console him and discuss what a "homo" was. The Defendant stated that he tried to explain it as best he could, and that A. E. requested that the Defendant spend the night with him, which he agreed to do. RP 261. The Defendant told the witness that he woke up with an erection, with A. E. playing with his erect penis, demonstrating with his hand, with his index finger out, as if A. E. was bouncing his finger across the Defendant's penis and said A. E. was giggling at the time. RP 262. His reaction was to immediately pull his body away as soon as he realized what was going on and stated that A. E. was nine years old at the time. RP 262. Mr. Ferguson said that the disclosure surprised him since it was not information that he was looking for at that interview. RP 262.

The Defendant denied that he had any sexual contact with his daughter and that he believed that Tina was making the story up and that he had been honest when talking with the detectives. The Defendant reiterated that he was changing a diaper on her bed. RP 263.

On cross, Mr. Ferguson indicated that the Defendant was "nervous, but cooperative?" He stated that he had explained the purpose of the interview to the Defendant, and that after that discussion, the Defendant divulged or volunteered information about A. E. RP 267. He admitted that it was a reasonable assumption that the Defendant was forthcoming to avoid later concerns. RP 268. On re-direct, he stated that suspects sometimes disclose matters because they think the police know more than they really do. RP 268-269.

Paul Lebsock, a City of Spokane Detective, with 20 years on the force, stated that he was on the Special Victim's Unit in 2011, and assisted Detective Estes and witnessed two in-person interviews of the Defendant by Detective Estes, January 19th, 2011, and February 11th, 2011. RP 271-273. He also overheard the interview by Corporal Ferguson. RP 273. He provided general information regarding the interviews. RP 274-281.

Detective Benjamin Estes, testified that he worked for the City of Spokane since 1984, and was then assigned to the Major Crimes Unit. RP 284. He had been in law enforcement for 39 years, with related experience in Idaho from 1974 until 1981 when he came to Spokane. RP 285. He also testified regarding the numerous law enforcement courses he had taken over the years, including being a training officer, and a SWAT team member and trainer. In 1990, he was promoted to Detective and

indicated that he was on the board of directors for the Spokane County Domestic Violence Consortium and tought DV investigation for a number of years. RP 286. He has given numerous lectures over the years at schools, as well. RP 287.

He started out as a detective in the property crimes unit, then went into sexual crimes for a few years, culminating in the Major Crimes Unit, which includes homicides, suicides, SIDS deaths, unattended deaths, violent assaults and robberies, and also worked on a homicide task force for 4 years regarding Robert Yates, then worked with the Spokane Regional Drug Task Force. RP 277-288. He claimed that "...there's really not any kind of crime I can think of that I haven't been involved in some investigations in. " RP 288.

In 2010 to early 2011 he was assigned to the SVU, special victim's unit/sexual assault unit and was assigned to this case, due to alleged disclosures by A. R. to a counselor at Lutheran Services. RP 289-290. He decided to have Karen Winston conduct the interview of the child, since he thought that it would make the child feel more comfortable. RP 290.

Detective Estes indicated that he and other people listened in to the interview from an adjoining room. RP 291-292. The Detective claimed that he remains totally objective and suggested that he was always careful when there is a serious allegation, especially when there is a real

contentious divorce, or what not, going on, so he was aware of possible motives being involved. RP 293.

He indicated that the Defendant was "very aggressive and demanding to come in" before the Detective was ready for him, incessantly calling, yelling, and screaming on the phone. RP 293.

The interview took place on January 19th, 2011 at the detective's office. RP 296. He identified Ryan Reid as A. R.'s biological father. RP 297. Detective Lebsock assisted with the interview, but Detective Estes was the lead. RP 297. He testified that he advised Mr. Reid that it was alleged that he'd had two inappropriate contacts, one witnessed by Tina and one witnessed by Mr. O'Leary. RP 298. Detective Estes was then asked about testimony of Tina Woodraska and Eric O'Leary and how the Defendant was looking closely at A. R. He was asked how the Defendant addressed that concern and the Detective proceeded to comment on the credibility of the Defendant's version, that it raised a "red flag". RP 298-299. When asked about the Defendant's explanation of touching A. R., Detective Estes once again compared and contrasted the evidence between the State's witnesses and the Defendant and again indicated that the Defendant's version raised a red flag. RP 299.

When asked about the alleged incident involving Eric O'Leary's observations, Detective Estes recounted the Defendant's version, but again

compared and contrasted the versions and commented on credibility. RP 303-304.

The Defendant's description of the child's position on the bed, were the same. RP 301. When asked to describe what his wife had seen, the Defendant indicated trouble with their daughter wiping fecal matter on other items, and he explained that he carefully cleaned her. RP 303.

He listened in on the interview with Corporal Ferguson and overheard the Defendant volunteering a sexual contact incident with a nine year old boy, A. E. He was surprised by this and claimed that there was no follow up at that time. RP 307-308. He indicated that he heard the Defendant state that A. E. had an issue with his Mother accusing him of being gay because of his high pitched voice and because of the way he acted. The Defendant indicated that he slept in the same bed with A. E. and the next morning he woke up because he felt someone playing with his penis, and heard some giggling. The Defendant told A. E. to stop that kind of activity and blamed that contact on A. E. RP 308.

Prior to the next interview with the Defendant on February 11th, Detective Estes interviewed A. E., and others. RP 309-310. He described A. E.'s demeanor at the interview as being shocked and embarrassed, and claimed that he attempted to calm him. RP 310-311. Also, Detective Estes was allowed to indicate that the version he was told by A. E. was

consistent with his trial testimony, but that it was minimized at trial by A. E. RP 311-312.

When asked why he wanted additional details, Detective Estes stated:

> "A. I wanted to know—I wanted to know all the details. I wanted to know if there was a crime, who the victim was, who the suspect was. I wanted—I didn't want to be accusatory of Mr. Reid without more facts. Abdul didn't –or Mr. Reid didn't go into all the facts when he talked to Mr. Ferguson. I wanted to know, you know, from Mr. Reid what happened and how it happened with Abdul. I wanted to know if—I'd already interviewed A. E., and Mr. Reid I don't believe he knew that. I don't know if he did or not but I – when I interviewed A. E., A. E's version was very contrary to what Mr. Reid disclosed to Corporal Ferguson. And it was one or the other, and I wanted to get down to what the truth was of that sexual contact, see it there was a crime or not."
>
> RP 312-313. (A. E. used for child's name).

He described additional facts provided by the Defendant to the effect that there was a confrontation about Ms. Woodraska's allegation and that the Defendant continued to indicate that he was changing a diaper. RP 314-316. He indicated the nature of this third interview as, "I started talking to him more about a couple of inconsistencies..." RP 314, lines 23-25.

The Defendant indicated that he had showered with A. E. when A. E. was five, but that there was no sexual contact and also denied ever watching A. E. change his clothes. RP 319-320.

On cross, Detective Estes indicated that while listening to the Winston interview he quoted A. R. as saying: "Mom doesn't like him because he's a bad man and he touched my pee pee." RP 323-324. Also, when he interviewed Tina Woodraska in December of 2010, she stated that she found it hard to believe that A. R. could recall a touching incident by her father when she was two, and the reason was because A. R. was five, and also said that A. R. doesn't remember anything else from when she was that age range. RP 325-326.

Detective Estes also stated that with respect to Tina Woodraska's observations in 2007, she could not clearly see what was happening and she could not state that Ryan was doing anything of a sexual nature. RP 327.

Ms. Woodraska referred her brother to Detective Estes regarding his claim to have witnessed something. RP 327. During his interview with O'Leary, it was admitted that A. R. was wearing a diaper during the incident when he claimed he walked in and it was in either 2007, or 2008. RP 328.

Detective Estes admitted that since the incidents allegedly took place 2 to 2 ½ years prior, that the incidents may not have been the same, stating: "Anything is possible.". RP 331-332. Tina did not find out about

A. E. until Detective Estes told her. RP 334. The State rested. RP 348. The defense made no motions at that time.

The Defendant testified that he and Tina Woodraska were married on September 14th, of 2004, and divorced in August, 2006. They had two children in common, A. R., and another daughter. RP 355. The Defendant lived at 6111 North Stevens with his then ex-wife from February, 2007, until the last Sunday of February, 2008. RP 356.

In December, 2010, when he became aware of allegations against him, he was upset and hurt and indicated that the parenting/custody arrangements were contentious. RP 357-358.

At the first interview in January, 2011, with Detective Estes, he denied ever inappropriately touching A. R. and felt scared and belittled. RP 359-360. He agreed that when interviewed by Corporal Ferguson he stated that A. E. was touching his penis and that he had told A. E. to stop. He pulled his body completely away from A. E. and covered himself up. RP 361. He said he volunteered the A. E. information to be honest and denied ever taking A. E.'s hand and putting it on his penis, nor did he make him do an "up-and-down motion." RP 362-363.

He always answered law enforcement questions and agreed that he was aggressive and angry due to the false allegations being made. RP 363-364.

On cross, he indicated that his conversation with A. E. regarding the term "gay" took place in the afternoon. As a result of being scared, A. E. asked the Defendant to sleep with him and the Defendant agreed. A. E. was nine years old. The Defendant agreed that it was not common to sleep with his step son. RP 366-367.

The Defendant reiterated that he woke up to a giggling A. E. and looked him in the eye and said: "Don't ever do that. That's not acceptable." RP 368. He did not know if he had the erection before, or if the touching by A. E. caused it. RP 369.

He never told his ex- wife about the contact with A. E. RP 373. With respect to allegations of inappropriate touching of A. R., the Defendant denied anything was sexually inappropriate and only was changing diapers and was meticulous about it. RP 375-377. The Defendant rested and there was no rebuttal by the State. RP 381.

The jury found the Defendant guilty of Counts 1 (CP 91) and 3 (CP 93), and not guilty on Count 2. (CP 92). On August 15th, 2013, the Court sentenced the Defendant to a minimum term of 89 months among other conditions. CP 113-126- Felony Judgment and Sentence. The Defendant filed his Notice of Appeal on August 21st, 2013. CP 139-140.

V. ARGUMENT

A- THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND TO HAVE AN IMPARTIAL JURY MAKE AN INDEPENDENT EVALUATION OF THE FACTS WAS VIOLATED DUE TO IMPROPER OPINION EVIDENCE BY DETECTIVE ESTES AS TO THE CREDIBILITY OF THE STATE'S WITNESSES AND THE CREDIBILITY AND GUILT OF THE DEFENDANT

The case law is clear that testimony containing opinions on a defendant's guilt are unconstitutional. "No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." Such an opinion violates the defendant's right to a trial by an impartial jury and his right to have the jury make independent evaluation of the facts." *State v. Wilber,* 55 Wn.App. 294, 297, 777 P.2d 36 (1989) (quoting *State v. Black,* 109 Wn.2d 336, 348, 745 P.2d 12 (1987). The case law also clearly shows that witness opinion as to another witness' credibility is improper. "[N]o witness may give an opinion on another witness' credibility." *State v. Carlson,* 80 Wn.App. 116, 123, 906 P.2d 999 (1995).

Opinion testimony as to the guilt of a defendant "violates his constitutional right to a jury trial, including the independent determination of the facts by the jury." *State v. Carlin,* 40 Wn.App. 698, 701, 700 P.2d 323 (1985), *overruled on other grounds.* Comments on the credibility of a key witness may also be improper because issues of credibility are

reserved for the trier of fact. *City of Seattle v. Heatley,* 70 Wn.App. 573, 577, 854 P.2d 658 (1993). This infringement on the province of the fact-finder suggests an error of constitutional magnitude. *State v. Demery,* 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

The Court reviews a trial court's decision to admit or exclude a law enforcement officer's statements during an interrogation for an abuse of discretion. *State v. Demery*, *Supra.* at *758.* (plurality opinion); *see State v. Darden,* 145 Wash.2d 612, 619, 41 P.3d 1189 (2002).

Particularly where an opinion on the veracity of a defendant is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the factfinder and deny the defendant of a fair and impartial trial. *State v. Dolan,* 118 Wn.App. 323, 329, 73 P.3d 1011 (2005).

In determining whether a statement constitutes improper opinion testimony, the court considers the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. *State v. Montgomery,* 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

Improper opinions on guilt are subject to a constitutional harmless error analysis. *State v. Hudson*, 150 Wn.App. 646, 656, 208 P.3d 1236 (2009); *See also*, *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182

(1985) (stating the constitutional harmless error analysis). Thus, such error is presumed prejudicial, and it is the State's burden to prove "beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. " *Id.* at 656.

In a criminal case, an error of constitutional proportions will be found to be harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Other tests, followed in earlier cases, apparently have been abandoned. *State v. Mendoza-Solorio*, 108 Wash. App. 823, 33 P.3d 411 (Div. 3 2001) (error based upon alleged vouching for credibility of informant held harmless); *State v. Guloy, Supra.*

In *State v. Siers*, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012), the court held: "We review allegations of constitutional violations de novo."

The Defendant contends that the testimony of Detective Ben Estes, and his then wife, Tina Woodraska, violated the foregoing Constitutional rules and violated his right to a fair trial and his right to have an independent jury evaluate the facts.

RAP 2.5 provides, in pertinent part, as follows:

> "(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ....(3) manifest error affecting a constitutional right."

Under *State v. Kirkman*, 159 Wn.2d 918, 926-927, 155 P.3d 125 (2007), "[t]he defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. 'manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice.' "Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. *Kirkman*, 159 Wn.2d at 935.

In *State v. Barr*, 123 Wn.App. 373, 380, 98 P.3d 518 (2004), the Court stated:

> "We determine whether an error is a manifest constitutional error by applying a four-step process: (1) we first determine whether the alleged error is in fact a constitutional issue; (2) next, we determine whether the error is manifest, that is, whether it had "practical and identifiable consequences"; (3) we then address the merits of the constitutional issue; and (4) finally, we pass upon whether the error was harmless. *State v. Lynn*, 67 Wash.App. 339, 345, 835 P.2d 251 (1992)."

It is the Defendant's contention that the opinion and credibility testimony that was given in this matter by Detective Estes, and Tina Woodraska, constituted "manifest error affecting a constitutional right" and this court should review the errors, despite the lack of objection by trial counsel. However, if the Court does not find the error is reviewable under RAP 2.5, then defense counsel's failure to object to this evidence,

among other items of evidence, violated the Defendant's Constitutional right to effective assistance of counsel as argued hereinafter.

Testimony of Ben Estes (the names of the minor children are abbreviated by counsel as per the rules, thus altering the verbatim transcript to that extent):

It is the Defendant's contention that Detective Estes was allowed to comment on credibility issues, almost at will, while he was testifying in the instant case.

The following questions and answers took place:

> "**Q.** And we've heard the testimony of Tina Woodraska and Eric O'Leary. Was that what they testified to today about the unusual kind of looking very closely; is that what you're referring to?
> **A.** Yes.
> **Q.** Okay. Mr. Ryan Reid having his face very close to the privates of A. R. as disclosed by Tina and Eric?
> **A.** Yes.
> **Q.** Okay. All right. And did Mr. Ryan Reid, was he able to address that concern?
> **A.** He answered questions. He volunteered a lot of things. Early on in the interview I noticed a lot of real inconsistencies from what he told me as to what Tina told me, inconsistencies as opposed to what Eric O'Leary told me and what he told me. The crux of the case as far as the touching and what not was totally different, but there was -- there was areas that there was so many inconsistencies about issues that were kind of nebulous issues that don't really matter is kind of a red flag to a detective that somebody is not telling the truth, and if somebody is either fabricating, exaggerating, minimizing or lying, it's really hard to continue to lie and do that about little things. And a lot of times to bolster the crux of the accusation, they will exaggerate or minimize or change things surrounding that that doesn't matter.

Q. All right. Thank you. And I understand the interview is a search for the truth, and I want to be clear on what my question means. I'm sure not asking you to offer an opinion as to whether somebody is telling the truth or not, okay?
A. Okay."

RP 298-299.

There was no objection by defense counsel to this testimony despite the fact that it was a comment on the credibility of the Defendant and the State's witnesses and that it included hearsay statements. Even the Prosecutor felt a need to correct the officer, but his violations continued unabated.

The testimony continued:

"**Q.** All right. In answering the concerns or addressing the concerns about touching of A. R., did Mr. Ryan Reid offer you an explanation of any time he might have been touching A. R.?
A. Yes, he did.
Q. What did he tell you?
A. He told me that -- I talked to him about the incident where Tina alleged that she came home unannounced and caught him in the room with A. R. First thing is that the time frame was inconsistent. Mr. Reid said that it was about 2:30 p.m. in the afternoon. He acknowledged that that incident occurred, that there was an incident, but he said it happened around 2:30, which is inconsistent with Tina's explanation that it was midmorning. He said that he knew she was going to be home. He wasn't surprised and that it wasn't unannounced because he knew she was going to be home for lunch at around 2:30. He implied that was her lunch time. Tina told me that her lunch time was between 1:00 and 1:30, inconsistent. So, the version of her lunch, having been married for some time, was inconsistent. So he told -- so that was kind of a red

flag, but, you know, some things -- people remember things different.
He went on to say, it was consistent, as she testified, that she walked in the room and said what are you doing. He said the same thing. His version of it was more animated and exaggerated. His version of it was contrary to hers, in that Ryan Reid told me that she walked in the room and yelled and reiterated at least three times, What are you doing, what are you doing, what are you doing? And he told me that he challenged her with that, asking her what she was implying. And -- and he said that he responded to her, his response to her, what he told me verbatim was, I'm changing the fucking diaper. He said that he felt like she was accusing him of some kind of a sexual abuse or sexual misconduct, and he insisted that he was changing A. R.'s diaper is what he told me and that she made a big fake reaction and overreacted is what he told me.
Now that, that explanation on that interview is inconsistent in that Tina told me she just walked in and said, What are you doing, like she was kind of confused or like a wife would come home and see the husband, saying what are you doing. That was kind of her explanation to me about that inquiry.
And the other inconsistency was that he insisted that his explanation was everything about the diaper. Ms. Woodraska told me there was no mention of a diaper, there was no diaper involved. She told me verbatim that he was, his response was, I'm checking an owie, or implying that there was an injury or something that he was checking on the -- on the daughter. So whether it was an owie explanation or a diaper explanation was totally contrary, which is a red flag in an interview that, you know, you can't quite quantify those two. That's something that's hard to explain.
THE COURT: Let's have another question, Counsel.
MR. JOHNSON: Thank you, Your Honor."

RP 299-301.

Once again, there was no objection by defense counsel to this testimony despite the fact that it was a comment on the credibility of the

Defendant, and the State's witnesses, and that it included hearsay statements.

The Prosecution then turned to the alleged incident involving Eric O'Leary's observations. The questioning and answers continued as follows:

> Q. All right, Thank you, sir.
> And now we talked about the incident that Tina Woodraska observed and communicated to you and Mr. Ryan Reid's explanation of that. Did he discuss anything about the incident observed by Eric O'Leary?
> A. Yes, he did.
> Q. And what was his—what were his thoughts on that incident?
> A. As far as his interaction with Eric, he denied that that incident ever happened. He did talk about Eric coming to his home, which was inconsistent with what Eric told me, as opposed to Tina told me about Eric's habit. He kind of went into an elaborate explanation that Eric absolutely never came to their home unannounced. He said he was not welcome in the home. He said that there's only one time Eric ever came into the home unannounced and that he was not a frequent visitor. He said that Eric did not have a key. He said that it was not—it was not an uncommon—it was not common for Eric to walk in unannounced or to walk in and announce himself. He said there was only one time that happened, and it wasn't acceptable. He said he confronted Eric about it. Mr. Reid said there was one time where he was standing in his kitchen, Eric walked in unannounced, and they had an argument about it., and it just wasn't acceptable. So that was kind of another inconsistency that, you know, there shouldn't be a mistake or misunderstanding on that, in my opinion." RP 303-304.

Despite Detective Estes made a clear statement of opinion attacking the Defendant's version, there was no objection by defense counsel.

Detective Estes continued his attack on the Defendant's version as compared to the State's version:

"A. He told me that he woke up one morning and A. E. was playing with, he said verbatim, I put in quotations marks, I woke up one morning and A. E. was playing with my penis. He explained the situation, that he slept with A. E. that night, and he said it was because A. E. asked him to sleep with him. He said it was because his mother told him he was gay. He reiterated that it was A. E. who asked him to sleep with him. And there was kind of an inconsistency in his explanation of that, because he told me it was on a twin bed in A. E.'s bedroom. And I recalled A. E. explaining during his interview that it was on a mattress on the floor, because—and he recalled that specifically because they had just moved into this house, everything was in disarray, there wasn't a bed set up. But Ryan Reid is telling me that they slept in a twin bed in this bedroom. Another kind of inconsistency about this night…"

RP 318-319.

Throughout the foregoing testimony, Detective Estes continuously compared the hearsay statements from the government's key witnesses with the Defendant's version, and by his answers clearly conveyed his opinion that the Defendant was guilty and his version could not be believed. Defense counsel allowed a seasoned Detective to take advantage of him and give opinion testimony in support of the credibility of the version by the State's witnesses versus that of the Defendant. By using the term "red flag" when referring to the Defendant's version, the

Detective was clearly able to compare and contrast the version of the State's witnesses, with that of the Defendant, and his answers clearly conveyed that this very experienced Detective believed the State's witnesses and did not believe the "red flag" version of the Defendant. The testimony by Detective Estes violated the Defendant's Constitutional right to a fair trial, as well as his Constitutional right to have the jury make a fair and impartial determination of the facts, without testimony that invades the province of the jury.

As stated previously, in determining whether a statement constitutes improper opinion testimony, the court considers the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. *State v. Montgomery*, *Supra* at 591:

The type of witness involved- Detective Estes testified in great detail and depth about his over 39 years of experience in police work.

Specific nature of the testimony- As previously stated, the testimony that is objectionable involved the Detective reiterating the version he was told by the victim's Mother, brother, and son, and then comparing and contrasting this with the "red flag" version of the Defendant. It is not mistakable as to what he was conveying and that was that he believed the version he was told by the State's witnesses and did

not believe the Defendant's "inconsistent" version. He was allowed to use this improper technique on numerous occasions, including comparing A. E's versions with the Defendant's version and commenting on the inconsistencies.

The nature of the charges- This case involved allegations of child sexual abuse on a then 2 or 3 year old girl and a 9 year old boy. There was no physical evidence, hence the credibility of the witnesses, including the Defendant was of paramount importance.

Type of defense and other evidence before the trier of fact- The other evidence in this case consisted of conjecture on the part of Tina Woodraska, and her brother, Eric O'Leary, that incidents that they claimed to have witnessed several months prior to their statements constituted child molestation of A. R. This was claimed, despite their acknowledgment that A. R. exhibited no signs of wrongful touching at the time of their alleged observations. The Defendant denied that he did anything improper with his daughter, and had a different version of the contact with his then wife, and totally denied any incident with Eric O'Leary took place. The testimony by A. E. and the Defendant were polar opposites as to who initiated the touching and was a credibility contest. Applying the four part test set forth in *State v. Barr*, *Supra.*, the first part

of the test is met since the improper opinion testimony by Estes was a constitutional issue as a comment on witness credibility and guilt

Secondly, an error is "manifest" if it had "practical and identifiable consequences in the trial of the case." *Lynn,* 67 Wn.App. at 345. Third, was the testimony an impermissible opinion on guilt? The testimony by Detective Estes and his use of the term "red flag" and that the Defendant's version was "inconsistent" with the State's witnesses clearly conveyed his opinions on credibility of the State's witnesses and the credibility and guilt of the Defendant and was highly prejudicial and clearly affected the credibility decisions to be made by the jury. Fourth, in light of the facts of this case and the importance of credibility determinations, the State cannot show that the errors herein were harmless beyond a reasonable doubt.

The relentless attack on the Defendant's testimony and the adoption of the State's versions by indicating that the Defendant's versions were inconsistent and raised a red flag clearly had "practical and identifiable consequences" since credibility was a paramount consideration in this case. This was clear Constitutional error, with prejudice requiring a new trial. In *State v. Barr, Supra.*, the court analyzed officer testimony and reversed. Part of the testimony included the officer using the words "big flags" when referring to the Defendant's version. The court held that this was improper.

B- THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND HIS RIGHT TO HAVE AN IMPARTIAL JURY MAKE AN INDEPENDENT EVALUATION OF THE FACTS WAS VIOLATED DUE TO IMPROPER OPINION EVIDENCE BY THE ALLEGED VICTIMS MOTHER WHEN SHE GAVE OPINION EVIDENCE AS TO THE GUILT OF THE DEFENDANT

While testifying, Tina Woodraska, the alleged victim's Mother, responded to a question as to an inference that she wanted to restrict visitation with the Defendant and stated:

> "Well, I don't want him to hurt them. I don't want them—I mean, he's physically abusive. And as far as I know, he sexually abused them. I know for sure. I don't want them to get hurt. And that's the only reason I would ask that he just not hurt them anymore."

Despite the fact that she was offering an opinion on the Defendant's guilt, there was no objection by defense counsel.

RP 209.

Admitting impermissible opinion testimony regarding a defendants's guilt may be reversible error because admitting such evidence "violates [the defendant's] constitutional right to a jury trial, including the independent determination of the facts by the jury. *State v. Demery*. *See also*, *State v. Montgomery* (inappropriate testimony in criminal trials includes opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses).

In *State v. Johnson*, 152 Wn.App. 924, 219 P.3d 1958 (2009), the court overturned the defendant's conviction of second degree child molestation. The court held that admitting testimony about a confrontation between the defendant's wife and the child amounted to improper opinion testimony on the defendant's guilt. After the child described the defendant's penis and how he masturbated, the wife started crying, "flipped out", apologized for not believing her, and tried to commit suicide. The court held that admitting this evidence served only to convey to the jury that the defendant's own wife believed that the child was telling the truth and that the defendant was guilty. The court held that this manifest error denied the defendant his constitutional right to a fair trial, citing *State v. Montgomery, Supra.* And therefore the defendant could challenge admission of the opinion testimony on appeal for the first time if he could show a manifest error that caused actual prejudice or practical and identifiable consequences. *Johnson, Id* at 934.

The testimony by the Defendant's ex-wife and mother of the two children who were alleged victims in this case clearly served no purpose except to prejudice the jury. This was clear Constitutional error, with prejudice requiring a new trial. The evidence was just as prejudicial to Mr. Reid as the evidence was in the *Johnson* case.

C- DEFENSE COUNSEL'S FAILURE TO OBJECT TO NUMEROUS ITEMS OF INADMISSIBLE AND INFLAMMATORY EVIDENCE WAS INEFFECTIVE ASSISTANCE IN VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND HIS RIGHT TO DUE PROCESS

To establish that counsel was ineffective, the defendant must prove that counsel's performance was deficient and that, as a result, the defendant was prejudiced. *State v. Townsend,* 142 Wn.2d 838, 843, 15 P.3d 145 (2001). If either part of the test is not satisfied, an ineffective assistance of counsel claim fails. *State v. Hendrickson,* 129 Wn.2d 61, 78, 917 P.2d 563 (1996). A defendant suffers prejudice if there is a reasonable probability that, but for counsel's performance, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

A defendant proves deficient performance by demonstrating that the representation provided by counsel fell below an objective standard of reasonableness. *Townsend,* 142 Wn.2d at 843–44. Prejudice is established by showing that "there is a reasonable probability that, but for counsel's error, the result would have been different." *Townsend,* 142 Wn.2d at 844.

Courts approach ineffective assistance claims with a strong presumption that counsel's representation was effective. *Townsend,* 142 Wn.2d at 843. Competency is determined by considering the entire record

at trial. If counsel's actions were the result of legitimate trial strategies or tactics, an ineffective assistance claim fails. *Townsend,* 142 Wn.2d at 847.

In addition, the Defendant contends that the representation he was provided at trial violated his Constitutional right to Due Process.

A claim of ineffective assistance of counsel presents a mixed question of fact and law which is reviewed de novo. *State v. Sutherby*, 165 Wash. 2d 870, 204 P.3d 916 (2009).

In *State v. Ermert,* 94 Wn.2d 839, 849, 621 P.2d 121 (1980), the Court discusses Due Process and assistance of counsel and stated: "The issue of the effectiveness of trial counsel denying due process was first raised in the petition for review. However, the question is appropriately raised at any point in the proceedings and a conviction will be overturned if counsel was so ineffective as to violate the defendant's right to a fair and impartial trial. The standard for determining the existence of such a violation in this state has been to determine if, " ' "(a)fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State v. Myers*, 86 Wash.2d 419, 424, 545 P.2d 538 (1976). In *State v. Adams*, 91 Wash.2d 86, 90, 586 P.2d 1168 (1978), this court discussed the development of a "more 'objective' standard ... akin to that used in legal malpractice cases" to determine ineffective assistance of counsel...."

In the instant case, defense counsel was very deficient in his failure to object to numerous items of evidence. The failure to do so appears to be based on a lack of understanding of the rules of evidence, and Constitutional issues. A defendant who has a right to counsel is entitled to the "effective" assistance of counsel. *State v. Adams*, *Surpa.* In order to establish a denial of that "effective" assistance of counsel, an appellant has the burden of proving (1) he was denied effective representation, and (2) that he was prejudiced thereby. *Strickland v. Washington, Supra., State v. Jeffires,* 105 Wn.2d 398, 717 P.2d 722 (1986), *cert denied,* 479 U.S. 922 (1986). Appellant has accepted that burden and the record demonstrates herein that, although defense counsel arguably provided effective representation in other parts of the trial on other issues, with respect to the following issues and those argued previously, trial counsel was so ineffective as to prejudice the defendant and deprive him of a fair trial.

1- Defense Counsel's failure to object to Detective Estes credibility and guilt testimony

The failure to appreciate the prejudicial effect of allowing a seasoned Detective to take advantage of him and be able to give opinion testimony in support of the credibility of the version by the State's witnesses versus that of the Defendant was ineffective assistance. By using the term "red flag" when referring to the Defendant's version, the

Detective was clearly able to compare and contrast the version of the State's witnesses, with that of the Defendant and his answers clearly conveyed that this very experienced Detective believed the State's witnesses and did not believe the "red flag" version of the Defendant.

Defendant incorporates the testimony given by Detective Estes by this reference from section A above, including the legal arguments, as though fully set forth. There is clearly no strategic decision being made for the failure to object to Este's testimony. He took hearsay statements from the State's two key adult witnesses, Tina Woodraska, Eric O'Leary, , and A. E., and vouched for their versions over that of the Defendant's "red flag" version. The failure to object to these items of evidence given by Detective Estes, was ineffective assistance of counsel.

2- Defense counsel's failure to object to Tina Woodraska's opinion on guilt, child hearsay, and other crimes acts evidence

Defense counsel further was ineffective when he failed to object to the child hearsay testimony that was given by Tina Woodraska. He allowed her to testify with respect to a statement she claimed was given by her daughter. She testified:

> "A. She—there was one time when we were in the Steven's house, and I saw her sitting up in bed late at night. I don't remember what time. She was just sitting up, kind of rocking back and forth, and that was strange to me. She wouldn't have done that. And so I asked her, What's wrong? Are you okay? I was thinking she had a bad dream. And she just stood there completely

> out of it and just said, Ryan hurt me, or I don't remember exactly how she said it. But she said, Ryan hurt me, and then I said, How? And she just said, A finger, and pointed down at her private parts." RP 207-208.

Despite the fact that the testimony involved hearsay, there was no objection by the defense. There had been no prior determination as to the admissibility of this hearsay statement, and the defense attorney failed to object.

This was clearly hearsay and was objectionable since the State had not complied with the Child Hearsay statute, RCW 9A.44.120, and was further objectionable as a violation of the Defendant's constitutional right to confront witnesses, under both the State and Federal Constitutions. In addition, he allowed her to testify as to allegations that the Defendant had physically abused her children. There was no compliance with rule of evidence 404(b).

Defendant incorporates his argument from section B herein as though fully set forth with respect to the unconstitutional comment on the Defendant's guilt, including the legal authorities.

3- Defense counsel's failure to object to Karen Winston's testimony regarding post interview follow up with the child's mother was ineffective assistance since it was not relevant, highly prejudicial and not admissible

During witness Karen Winston's testimony, the following questions and answers took place (the names of the minor children are

abbreviated by counsel as per the rules, thus altering the verbatim transcript in that respect):

> "**Q.** (BY MR. JOHNSON) I do want to be clear, after this interview of A. R., was there any follow up that you did with her personally?
> **A.** With A. R.?
> **Q.** Yes.
> **A.** There was no follow up with A. R. following the interview. There was a follow up with her mother following the interview to have some discussion with her about the interview itself, make sure, you know, that she had safety measures in place and offer some recommendations.
> **Q.** And what's -- what was the purpose of providing recomendations to A. R.'s mom?
> **A.** Well, I want to make sure that a mother has a clear idea of how to keep her child safe in the instance that this is someone who has access to the child and so that was one of the things I wanted to talk to the mother about. You know, I wouldn't want her to have unlimited unsupervised contact with the person that she's naming as the suspect in this case. I also want to make sure that the child had had a recent medical exam and that the mother had access to that information. So I checked on that.
> And then I also wanted to make sure that if she's naming her father as the person who's touched her, that the mother has in place some safeguards in terms of the child and the contact, that either it's supervised or if the detective suggests no contact, then that there be no contact."

Despite the lack of relevance and the prejudicial nature of this line of questioning, there was no objection by the defense. This evidence has a tendency to show that Ms. Winston, a credentialed expert, who claimed to have interviewed over five thousand children, believed the child and felt a need to make sure that the mother of the child would take steps to keep the

child away from the Defendant. This testimony shed no light on the facts about whether a crime was committed and was a prejudicial comment on the case. Defense counsel could have no strategic reason for allowing this testimony to go unchallenged and the failure to object is another example of ineffective assistance of counsel.

4- Defense counsel's repeated failure to object to 404(b) type evidence was ineffective assistance of counsel

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity with that character. ER 404(b). But such evidence may be admitted where it is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs its prejudicial effect. *State v. Ragin*, 94 Wn.App. 407, 411, 972 P.2d 519 (1999). Evidence is relevant if it has any tendency to make the existence of any material fact more or less probable. ER 401.

Even relevant evidence may be inadmissible if the danger of unfair prejudice substantially outweighs its probative value. ER 403. "The danger of unfair prejudice exists even when evidence is likely to stimulate an emotional rather than a rational response. *State v. McCreven*, 170 Wn.App. 444, 457, 284 P.3d 739 (2012)(internal citation omitted).

On numerous occasions during the trial, the State presented evidence of other alleged crimes, including physical abuse. The following evidence was allowed into the case by defense counsel's failure to object:

During A. E.'s testimony, the following took place:

> "Q. All right. Thank you. And if you can, how did you get along with Ryan Reid when he was in the house? How would you describe your relationship?
> A Not very well.
> Q. Okay. And specifically, were there any reasons why you guy's didn't get along very well?
> A. Sometimes he would choke me and stuff against the wall and be violent." RP 185.

There was no objection to this prior bad acts evidence, nor was there a motion to strike.

Tina Woodraska was allowed to state: "..Ryan had physically hurt A. E., and that was a way to get him out of the house…". RP 201. There was no objection to this prior bad acts evidence, nor was there a motion to strike. She was also allowed to state:

> "Well, I don't want him to hurt them. I don't want them—I mean, he's physically abusive. And as far as I know, he sexually abused them. I know for sure. I don't want them to get hurt. And that's the only reason I would ask that he just not hurt them anymore."
>
> RP 209.

The evidence with respect to whether the Defendant had been previously abusive or violent was simply not relevant to the charges in this matter and only served to severely prejudice the Defendant with the jury.

The failure to object to this evidence, move to strike it, or otherwise deal with it, was ineffective assistance of counsel.

5- The Defendant was prejudiced by defense counsel's numerous failures to object to inflammatory and inadmissible evidence.

In the instant case, there was no physical evidence of any kind to support the charges. The hearsay testimony of the child was sparse and could have been due to diaper changing and cleaning as alleged by the Defendant. The fact that she was two or three years of age when the alleged crimes took place and likely could have no memory due to her age militates against the conclusion that sexual touching took place.

Neither Tina Woodraska, nor Eric O'Leary, testified that they directly observed the Defendant doing anything improper. On both occasions when they claimed they observed him with his daughter, they indicated that the child acted pretty normally and displayed no indications that she had been molested. In fact, the jury acquitted the Defendant of Count 2. With respect to the testimony of alleged victim A. E., the Defendant volunteered his version without prompting in an effort to be open and honest with the investigating Detectives. When confronted with this issue, it is very easy to predict the response of an almost teenage boy. Of course he is going to deny that he was the one who felt his Step father's penis while he was asleep. This was clearly a case of one person's word

against that of another and the opinion evidence of guilt and credibility by Detective Estes, as well as the clear statement of guilt by the children's mother when she testified, tainted the trial. She stated:

> "Well, I don't want him to hurt them. I don't want them—I mean, he's physically abusive. And as far as I know, he sexually abused them. I know for sure. I don't want them to get hurt. And that's the only reason I would ask that he just not hurt them anymore." RP 209.

Her testimony was a violation of 404(b), clearly was a comment on the guilt of the Defendant, and was clearly inadmissible, inflammatory and objectionable and a constitutional violation. There was no strategic reason to not stop these Constitutional violations and this was clearly prejudicial ineffective assistance of counsel.

Defendant contends that the numerous errors by his counsel at trial deprived him of his Constitutional right to effective assistance of counsel, and Due Process, and the results of the trial would have been different if the evidence had been kept out of the case by proper representation and application of the Rules of Evidence as they were intended.

D- THE CUMULATIVE EFFECT OF THE MANY ERRORS IN THIS CASE RESULTED IN DENIAL OF A FAIR TRIAL

Even if this court could determine that one or more of the errors are not prejudicial enough to warrant reversal, the cumulative effect of the many prejudicial errors in this case warrants reversal. *See, e.g. State v.*

Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)(holding, "a series of errors, each of which is harmless, may have a cumulative effect that is prejudicial."). *See also, State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

"It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless." *State v. Lopez*, 95 Wn.App. 842, 857, 980 P.2d 224 (1999). "Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence." *Id.* "Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error." Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial." *Id.* Errors of defense counsel which prevent defendant from having a fair trial may be raised for the first time on appeal. *State v. Ermert, Supra.* (counsel failed, inter alia, to object to an instruction that incorrectly set out elements of crime).

In *State v. Alexander*, 64 Wash. App. 147, 822 P.2d 1250 (1992), the court was willing to consider a number of errors that had not been raised at trial because, the court said, the cumulative effect of the errors

denied the defendant a fair trial.

Here, there were several Constitutional errors, including Detective Estes, and the children's mother, invading the province of the jury through their testimony; Detective Estes relentlessly attacked the credibility of the Defendant and vouching for the State's witnesses by repeatedly comparing and contrasting the versions told by the witnesses for the State and "red flagging" that of the Defendant; Tina Woodraska was allowed to state, in pertinent part: "...And as far as I know, he sexually abused them. I know for sure. I don't want them to get hurt..."; and, the court allowing evidence of Mr. Reid's prior alleged bad acts that were irrelevant and unduly prejudicial.

Trial counsel provided deficient representation, in violation of the Defendant's Sixth Amendment right to effective assistance, and Due Process, by his failure to apply rudimentary rules of evidence to object to the improper opinion testimony, improper child hearsay testimony by the child's mother (without compliance with RCW 9A.44.120), and other failures set forth herein. The evidentiary errors in this case served to portray Mr. Reid in a negative light before the jury. Had these errors not occurred, a reasonable jury could likely have reached a contrary result. The evidence was not so overwhelming that any jury would have an "easy" or "slam dunk" decision in this case. Accordingly, due to the

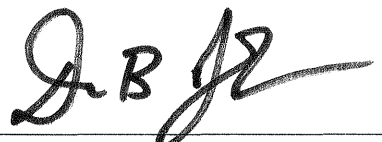
cumulative errors in this case, Mr. Reid respectfully requests that this Court reverse and remand for further proceedings, including a new trial.

VI. CONCLUSION

Mr. Reid was denied his right to a fair trial by the erroneous admission of highly prejudicial evidence, including opinion evidence of guilt, and credibility, that violated the Defendant's Constitutional rights. His trial counsel was woefully inadequate with respect to his knowledge and application of rudimentary rules of evidence and this failure to competently represent the Defendant violated the Defendant's Constitutional right to effective assistance, and Due Process. Finally, the cumulative error doctrine requires a new trial in this case.

Respectfully submitted this 2 day of May, 2014.

Law Office of Dan B. Johnson P. S.

By: 

DAN B. JOHNSON- Attorney for Appellant- WSBA #11257

APPENDIX

ER 401

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 404

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the

purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

RCW 9A.44.083- Child Molestation in the First Degree

(1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the first degree is a class A felony.

RCW 9A.44.120- Admissibility of child's statement-Conditions

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined

by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

WASH. CONST. Art. 1, Sect. 3

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

WASH. CONST. Art. 1, Sect. 21

SECTION 21 TRIAL BY JURY. The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. Amend. XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CERTIFICATE OF SERVICE

I certify, under penalties of perjury under the laws of the State of Washington, pursuant to RCW 9A.72.085 that on the 2nd day of May, 2014, I served a copy of the foregoing APPELLANT'S BRIEF to the Prosecuting Attorney for Spokane County by personally delivering a copy to the office of the Spokane County Prosecuting Attorney at 1100 W. Mallon Avenue, in Spokane, Washington;

Further, on the 2nd day of May, 2014, I served a copy of APPELLANT'S BRIEF on the Appellant, Ryan Reid by depositing the same in the U. S. Mails, First Class Priority Mail, postage pre-paid, addressed as follows:

Mr. Ryan Reid
Inmate # 988671
NB 44 L
Airway Heights Corrections Center
P. O. Box 2049
Airway Heights, WA 99001

Dated this 2nd day of May, 2014.

DAN B. JOHNSON - Attorney for Appellant
WSBA # 11257