WSSC No. 90312-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

CHAD E. CHRISTENSEN,
Petitioner,

PETITION FOR DISCRETIONARY REVIEW

FROM

THE COURT OF APPEALS, DIVISION II

No. 43795-7-II

RAP 13.1 (a); 13.3; 13; 4

RAP 2.3 (b) (d) (1-4_

LEWIS COUNTY SUPERIOR COURT

CHAD E. CHRISTENSEN, DOC 358748
Stafford Creek Correction Center
191 Constantine Way
Aberdeen, Washington 98520

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Chad E. Christensen asks this Court to accept review of the opinion of the Court of Appeals in State v. Chad E. Christensen No. 43745-7-11.

B. DECISION

Petitioner seeks review of the entire decision of the Court of Appeals affirming petitioner's conviction and sentence in the Superior Court of Washington for Lewis County. A copy of the Appeals decision is attached to this Motion.

C. ISSUE PRESENTED

1. Defense counsel's representation was so deficient that the assistance fell below an objective standard of reasonableness.

2. Defense counsel's deficient performance prejudiced the appellant to the point that there is a reasonable likelihood that the results of the proceedings would have been different.

3. The appellant was prejudiced due to counsel's ineffective representation.

Both the State and Federal Constitutions require that a criminal defendant has a right to effective assistance of trial counsel. Where counsel's representation was deficient and caused prejudice, does this render ineffective assistance of counsel?

D. STATEMENT OF THE CASE

On or about September of 2010, the Appellant, Chad E. Christensen and Elan Cook developed a romantic relationship, when she and her daughters came to the Appellant's residence to stay for the weekend. That Friday evening, while the Appellant watched television, I.B. walked out of the Appellant's bedroom and laid down on his couch and watched TV with him. I.B. had trouble sleeping and her mother Elan gave her "melatonin", which is known to cause vivid, enlightening, deep, and crazy dreams. The following morning, when the Appellant arrived back from the grocery store, Elan asked the Appellant

whether I.B. had touched his genitals, and the bewildered Appellant informed Elan that this absolutely did not happen. Six - eight weeks later, Appellant married Elan, and Elan's children moved in with the Appellant soon thereafter.

Nearly a year later, the couple's argument unrelated to this incident caused them to separate, and the Appellant moved out. Elan decided that it was time to report the alleged incident, and the Appellant was charged with one count of first degree child molestation.

Defense counsel's failure to have associate expert neuropsychologist to investigate and interview I.B.'s delusional statements, prior to trial. The over the counter medication I.B. had been taken to help her sleep had a psycogenic effect.

Accordingly, the Appellant, Christensen asks this Court review the abuse of discretion by the trial Counsel, trial Court, and the Court of Appeals, Opinion of May 6, 2014. Based upon facts that I was wrongfully convicted.

E. ARGUMENT

The Appellant's conviction was a direct result of Ineffectiveness of counsel, in violation of Washington Constitution, article 1, § 22, and the Federal Constitution sixth and fourteenth Amendment.

After the trial Court had inquired as to whether defense counsel had medical testimony to effect of what "Melatonin's" [2] side-effects. RP 326. Defense counsel informed the trial court that it was without medical testimony, and the prosecution properly objected on the grounds that any questions regarding the alleged victim's use of sleep medicine would be irrelevant to a lay-person.

Without any pre-trial interviews with the State's witnesses, defense counsel interjected by claiming that the Appellant's mother would be able to testify as to the side-effects I.B. experiences after taking "Melatonin" by mouth. Defense counsel was aware of the sleep-wake cycles, disorientation, confusion, vivid dreams and nightmares that I.B. has experienced while taking "Melatonin". Id.

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2 Melatonin [N-acetyl-5-methoxytryptamine]

Defense counsel also conceded that I.B.'s mother could not be considered medical personnel, and the trial Court considered in sustaining the prosecution's objection absent medical expert testimony. RP 327.

> "Expert testimony might be a different story, but if you haven't got expert testimony, I don't see the relevance or materiality pursuing this line of questioning." Id.

In this regard, the trial Court properly concluded that it would not allow the defense to question Elan as to Melatonin's side-effects on I.B..

As an offer of proof, the defense questioned Elan if she had in the past been given I.B. Melatonin for sleep issue's and Elan testified in the affirmative. Elan testified that she didn't recognize the side-effects of Melayonin and did not recall if I.B. had been given some previous night in question. RP 328.

Consequently, the trial court sustained the prosecution's objection, correctly holding that there was no evidence that the alleged victim was administered Melatonin when she went to bed the night before. Secondly, I.B. claimed that she was "pretending" to be asleep, and thirdly, absent expert testimony as to the side-effects of Melatonin, the trial Court concluded that it would not allow a lay person to testify as to any potential side-effects the drug may cause. RP 329.

> "... absent medical evidence that that's a common characteristic or trait of that particular medication, because how the medication affects one person doesn't necessarily mean that's how it affects everyone else that takes it or that there's anything common across a broad spectrum of people that take the medication that they respond in the same way, so it's not something that I think a lay person ordinarily would have expertise to testify about, and it's irrelevant as to how it affects somebody else, and unless it's being given by a medical expert, who could testify that in general these are some of the side-effects that Melatonin would cause, assuming that it could be shown that the child was administered Melatonin on the night in question, which it hasn't been, ..."

RP 330.

a. Trial Counsel's Failure to Investigate and prepare Appellant's defense was not a reasonable tactical decision. To establish a claim of ineffective assistance of counsel, the defendant must show that defense counsel's representation was so deficient, that it fell below an objective standard of reasonableness, and that the deficient representation prejudiced him to the point that there is a reasonable probability that the results of the proceedings would have been different. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Grier, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011), (quoting, State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)).

In this regard, an Appellate Court should determine whether, under prevailing professional norms, trial counsel's purported failures fell enough below the standard of performance to be unreasonable. Strickland, 466 U.S. at 690.

As to the second part of the test, an Appellate Court must find that the defendant was prejudiced because trial's counsel's representation was so deficient as to "undermine confidence in the outcome." Strckland, 466 U.S. at 694.

The Appellant first contends that his trial counsel failed to interview the State's witnesses as to the sleeping medicine the alleged victim had been taking at the time of the alleged incident. Further, counsel failed to investigate be researching the evidentiary issue.

Generally, defense counsel is not required to investigate and research each evidentiary issue to exhaustion, and is not deficient if he makes strategic choice to limit investigation based on reasonable professional judgments. Strickland, 466 U.S. supra at 690-91. However, counsel must undertake sufficient investigation to subject the State's case to a meaningful adversarial test. Id. at 696. When counsel does not develop the defense theory of the case Because he fails to investigate, the omission cannot be justified as a strategic decision.

Cf. Henderson v. Sargent, 926 F.2d 706, 711, 939 F.2d 586 (8th. Cir. 1991), cert. denied, 502, U.S. 1050 (1992).

Rather, this kind of failure is evidence that defense counsel did not prepare for trial. Henderson, 926 F.2d at 711. While reviewing Courts presume that trial counsel is effective, that presumption may be overcome if counsel fails to investigate factual or legal defense or sufficiently investigate the facts to discover defense.

Here, Christensen argues that counsel failed to investigate the Melatonin pills I.B. had been taking, as well as their known side-effects. These side-effects could have been pointed out to the jury in closing argument. Coupled with this argument, counsel failed to interview Elan and I.B..

This is a highly unusual case, whereas, the mother to whom her daughter apparently made a statement and the mother looking into the situation, did not believe her daughter possible because of past accusations of similar conduct, and went on to marry the Appellant a few weeks later. Adding another twist

Elan's testimony reflects that she believed both her daughter and the Appellant -- an impossibility. The Appellant's mother was totally against their marriage and did not attend the wedding. Elan's excuse for their marriage -- in order to help the Appellant's custody case, is preposterous. What better way to get even with someone in society -- to report false accusations against them.

The record does not support a contention that defense counsel investigated the alleged victim's use of Melatonin. Counsel did not interview I.B. or her mother Elan before trial, and was only able to ask general questions about the Melatonin.[2] At no time during trial did the jury hear about the side-effects of the sleep medicine:

1. Headaches
2. Nausea
3. Next-day grogginess
4. Hormone fluctuations
5. Vivid dreams and nightmares

---

[2] Dr. Michael J. Breus, is a Clinical Psycologist, who specializes in sleep disorders, inter alia. Dr. Breus's investigation reveals that Melatonin is a hormone that regulates a person's sleep and body clock. It is produced by the pineal gland which sends a signal to the sleep center of the brain. **APPENDIX 1**

Dr. Breus specifically states that Melatonin should never be used with children younger than 18.

APPENDIX 1 [pp.2 of 2]

On average, roughly fifty-percent of adults report at least an occasional bad dream while seven- to eight percent of the population will unfortunately experience nightmares regularly. A number of factors can contribute to frightening, vivid dreams being more frequent. By, far, the most common cause is stress and anxiety over issues in our daily lives. Studies show that if a person can't sleep because of issues like stress, depression or anxiety, Melatonin may not work in those cases because the problem doesn't lie with the body's ability to make its <u>own</u> Melatonin.

Christensen contends that had defense counsel interviewed the State's witnesses as to the use of Melatonin, and investigated the side-effects, counsel would have developed the defense's theory of the case.

In this regard, a complete failure to investigate and prepare a defense to be presented at trial is not a reasonable tactical decision.

b. Trial counsel's failure to hire a medical expert to investigate the Appellant's defense, deprived the Appellant effective assistance. When counsel fails to undertake any independent investigation into the reliability of a complaining witness's statements it cannot be justified as a strategic decision. Harris v. Wood, 64 F.3d 1432, 1435-36 (9th. Cir. 1995); Henderson, 926 F.2d supra at 711.

Here, the jury could not have known of the possible side-effects associated with the alleged victim's use of Melatonin. In this regard, it is possible that the testimony of a medical expert, knowledgeable of sleep disorders, and the possible side-effects of Melatonin, may have changed the outcome. Without a medical expert's investigation, and testimony thereafter, the defense lacked the potentially persuasive argument to undermine the alleged victim's testimony as to what actually occurred on the night in question.

"But a trial attorney who fails to adequately investigate and introduce evidence that demonstrates his clients factual innocence or raises sufficient doubt that undermines confidence in the verdict, renders deficient performance" Avila v. Galaza, 297 F.3d 911, 919, (9th Cir. 2002).

We have repeatedly found that a trial attorney who fails adequately to investigate, (evidence) that demonstrate's his clients factual innocents, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance. Hart v. Gomez 174 P.3d 1067, 1070 (9th Cir. 1999).

In sum, if defense counsel had conducted an investigation, and prepared the defense theory of the case, it may have raised questions about the State's theory. In considering these errors in light of all of the State's less than circumstantial evidence, there is a significant probability that counsel's performance was deficient, and that this deficient performance prejudiced Mr. Christensen. Grier, 171 Wn.2d supra at 32-33.

Here, the alleged victim had been taking 6 milligrams of Melatonin per night. The recommended dosage of an adult is 1 milligram per night.

Dr. Breus, one of the foremost experts in the field of pharmacology, stated that children who are given Melatonin, experience "vivid dreams," "nightmares," drowsiness, and tiredness, especially in cases of high dosage. It is extremely troubling that the jury in this instant case, was totally unaware, not only of I.B.'s high dosage of this "magic bullet," but the extent to which the supplements she was given by her mother. This may have had a particular impact on I.B. at the time she made accusations against the Appellant, [and others].

Further, this failure was likely to prejudice Christensen. Counsel was unable to draw conclusions as to the cause of I.B.'s statements she made to her mother on the morning after the alleged incident. Had the jury known of I.B.'s use of the Melatonin, and its known side-effects, it may well have reached a different result. Strickland, 466 U.S. supra at 694; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 8- (2004).

F. CONCLUSION

For the reasons stated above, Mr. Christensen respectfully request that this Court reverse, and remand for new trial.

RESPECTFULLY SUBMITTED,

/S/ CHAD E. CHRISTENSEN
PRO-SE APPELLANT

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EXHIBIT A

March 4, 2013
HUFFPOST HEALTHY LIVING

Melatonin: Not a Magic Bullet for Sleep

Posted: 02/21/11 08:56 AM ET

Many of you have made a New Year's Resolution to get more and better sleep. I hope you are having great success! But I want to address a topic I am asked about repeatedly, and it may be something many of you have tried or considered in your quest for a better night's sleep: *Is Melatonin good to take to help with my sleep?*

So exactly what is melatonin?

Melatonin is a hormone. It is not an herb, a vitamin or a mineral. Hormones are naturally produced by your body as you need them. This means that it is very unlikely that someone has a melatonin deficiency. While melatonin could be considered natural, in most cases it doesn't come from the earth. There are exceptions -- foods that contain melatonin in them -- but this is a different type of melatonin than what is produced in your brain.

Your melatonin levels can be tested with a blood test, urine test or saliva test. If you are concerned that you may actually be melatonin deficient, ask your doctor about testing. Melatonin is produced by the pineal gland and sends a signal to regulate the sleep-wake cycle in the sleep center of the brain. Interestingly, melatonin is also produced in the retina, the skin and the GI tract, but this is not the melatonin what affects your biological sleep clock.

This is the really important thing you should understand about melatonin: Melatonin is a sleep and body clock regulator, *not* a sleep initiator. Melatonin works with your biological clock by telling your brain when it is time to sleep. Melatonin does not increase your sleep drive or need for sleep.

Melatonin is called the "Vampire Hormone" because it is produced primarily in darkness and inhibited by light. The levels of your melatonin increase in the middle of the night and gradually fall as the night turns to morning, so exposure to light before bed can push your biological clock in the wrong direction, making melatonin ineffective.

Melatonin treats Circadian Rhythm Disorders (where you sleep the right amount of minutes but your body clock is at the wrong time), Shift Work Sleep Disorders and early morning awakenings -- all things that deal with the timing of your need to sleep. Melatonin is not considered an effective treatment for insomnia.

Melatonin in pill form does not function like your body's naturally produced melatonin; it effects the brain in bursts and rapidly leaves the system, instead of the slow build-up and slow wash-out that your body's naturally produced melatonin experiences.

The correct dosage of melatonin can be a problem. According to research conducted at M.I.T., the correct dosage of melatonin for it to be effective is 0.3-1.0 mg. Many commercially available forms of melatonin are in three to 10 times the amount your body would need. In fact, there is some evidence that higher doses may be less effective. In Europe, melatonin at very high doses has been used as a contraceptive.

Melatonin can have side effects. Melatonin (two to three milligrams or higher) has reported side effects of:

- Headaches
- Nausea
- Next-day grogginess
- Hormone fluctuations
- Vivid dreams and nightmares

Melatonin may also have some issues with safety. While melatonin is available over-the-counter, in the U.S. and Canada, melatonin is available only by prescription -- or not at all, in some countries. In the U.S., melatonin is sold as a dietary supplement, not a medication; so until recently, melatonin has not been subject to the same purity rules and standards as prescription medications. In June 2010, new F.D.A. rules went into effect that require all dietary supplements to comply with "good manufacturing practices," which include compliance in manufacturing standards and labeling.

So what does all this mean if you want to try melatonin as a supplement? Melatonin has been shown to be safe in healthy people when used for up to three months at the correct dosage.

Over The Counter Melatonin

- When taken several hours before sleep, Melatonin can shift the biological clock earlier, making a better environment for falling asleep and waking up on time.
- When taken in the correct dose (0.3-1 mg), it can be effective for shift workers and people with circadian rhythm disorders.
- However, most Melatonin sold over the counter is packaged in doses ranging from one milligram to 10 milligrams, with most doses containing double or triple the amount that is needed to be effective for the population that will benefit from its use.

Other Possible Uses for Melatonin

- As an anti-oxidant Melatonin acts upon free radicals. It may reduce damage caused by Parkinson's disease, and can have an anti-aging effect.
- In the elderly, it has shown some promise in managing a type of insomnia called early morning awakenings ; but this area needs more study and does not take into account medications that may interact with melatonin.

Caution Should Be Taken When Using Melatonin

- It should be used under the guidance of a doctor and sleep professional.
- It should be used at the correct dosage.
- It should be taken about 90 minutes before lights out.
- It should be used for a short time (less than three months).
- It should never be used in combination with other sleep inducing medications.
- It should never be used with alcohol.
- It should never be used with children younger than 18.
- There are possible interaction effects that could change the effectiveness of your current medication regimen.

There are new and exciting experiments with patches for delivery of melatonin for use by shift workers and others who have work environments that put their regular circadian clocks to the test. Tart cherries contain a natural melatonin, and there is research to show that drinking tart cherry juice can help with insomnia. There are vitamins and minerals -- vitamin D, the B vitamins, folic acid and calcium -- that have been shown to help with both energy and relaxation.

At the end of the day (no pun intended), your first line of defense for sleep problems is good health and good sleep hygiene. Make it a habit to prepare your body and your mind at the end of every day to get the rest you need. Try that first before you start looking for something else. And when you do look, be careful.

Michael J. Breus, Ph.D.
The Sleep Doctor™

Everything you do, you do better with a good night's sleep™
www.thesleepdoctor.com
Facebook: www.facebook.com/thesleepdoctor

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent/ Cross-Appellant. v. CHAD ERNEST CHRISTENSEN, Appellant/ Cross-Respondent.	No. 43745-7-II UNPUBLISHED OPINION

LEE, J. — Chad Ernest Christensen appeals his conviction of first degree child molestation, arguing that he received ineffective assistance of counsel because his attorney failed to object when the State elicted testimony concerning the victim's truthfulness and the fact of his arrest and incarceration. In a pro se statement of additional grounds (SAG), Christensen argues that his trial attorney also was ineffective in failing to investigate the victim's use of a sleeping aid and its possible side effects. The State cross appeals, arguing that the trial court erred in concluding that one of Christensen's prior convictions "washed" and in failing to include it in his offender score. Because the State did not elicit inadmissible testimony and because any evidence concerning the victim's use of a sleeping aid was irrelevant, Christensen did not receive ineffective assistance of counsel. And, because the trial court properly concluded that the State failed to prove that Christensen committed his current offense before the washout period for the

prior conviction expired, it properly calculated his offender score. We affirm the conviction and sentence.

FACTS

During the summer and fall of 2010, Christensen began a romantic relationship with E.C., whom he had known since childhood. At the time, Christensen was living with his infant daughter in Chehalis, and E.C. and her four children were living in Vancouver. E.C. has two daughters: I.B., who was then 8 years old, and A.B., who is two years older than I.B. Christensen and E.C. married on December 11, 2010, and lived with their children in Onalaska.

Sometime before the wedding, E.C. and her children stayed with Christensen in his Chehalis apartment. One evening, I.B. and Christensen were in the living room on the couch, watching television, when Christensen took I.B.'s hand by the wrist and placed it in his pants so that she touched his penis. She took her hand out and eventually went to sleep.

The next morning, A.B. walked into the bathroom and saw I.B. washing her hands. When A.B. asked what she was doing, I.B. told her about the touching and said that she was washing her hands because she "could still feel it." Report of Proceedings (RP) (June 14, 2012) at 178. A.B. told I.B. that she needed to tell their mother, E.C., what had happened. I.B. told her mother that Christensen had taken her hand and placed it in his pants and on his penis. Christensen had left the apartment by that time, but when E.C. confronted him later with I.B.'s claims, he denied the allegations. E.C. believed Christensen.

In September 2011, Christensen and E.C. argued over an unrelated issue, and Christensen left the home. Christensen told I.B. a few days later that it was her fault that he could not return.

When I.B. repeated this to her mother, E.C. decided to report the touching incident to Child Protective Services (CPS). E.C. and Christensen eventually filed for divorce.

I.B. was reluctant to speak with the CPS investigator, Keith Sand, at school, so Sand arranged for her to speak with investigator Ronnei Jensen at the CPS office. This interview was audiotaped while Sand and Lewis County Sheriff's Detective Tom Callas watched and listened through a two-way mirror. When Jensen asked I.B. what she had told her mother, I.B. asked for a piece of paper so that she could write it down. I.B. wrote that Christensen "went in bed with me and I was pretending to fall asleep and he grabbed my hand and took out his weiner [sic] and made my hand touch it and put it down his pants." Ex. 2. She then talked about the details of the incident. I.B. gave a consistent description to her counselor, Sandra Ames. Chehalis Police Detective Rick Silva subsequently interviewed Christensen, who admitted being on the couch with I.B., but denied that anything inappropriate had occurred.

The State charged Christensen by amended information with one count of first degree child molestation and alleged that he used his position of trust to facilitate the commission of the offense. The charging document stated that the molestation took place between September 12, 2009, and October 12, 2011.

Following a pretrial hearing, the trial court concluded that Christensen's statements to Detective Silva were admissible, that I.B. was competent to testify, and that I.B.'s statements to her sister, her mother, the two CPS investigators and her mental health counselor were admissible as long as she testified.

I.B. was the State's first witness, and her testimony about the incident was consistent with what she told her sister, mother, Jensen, and Ames. During her direct testimony, the following exchange occurred:

> Q. When you talked to your sister and mom that morning, did you tell them the truth about what happened?
> A. Yes.
> . . .
> Q. The things you told your counselor Sandra, were those things you told the truth?
> A. Yes.
> Q. Were these things you told Ronnei the truth?
> A. Yes.

RP (June 14, 2012) at 180-81, 187. I.B. denied telling anyone that she had lied about Christensen, and during cross-examination, she denied telling her aunt and sister that her allegations were not true. During I.B.'s redirect examination, this exchange occurred:

> Q. Has anyone ever told you what to say about [Christensen]?
> A. No. They just say tell the truth.
> Q. Who told you that?
> A. My grandma, my mom and so—
> . . . .
> Q. So you understand when the judge had you raise your right hand, you were promising to tell the truth?
> A. Yes.
> Q. You understand that?
> A. Yes.
> Q. Is everything you told us here today the truth?
> A. Yes.

RP (June 14, 2012) at 211, 213.

The CPS investigators also testified for the State, as did A.B., E.C., Ames, and Detective Silva. After questioning Silva about his interview with Christensen, the prosecutor asked about Christensen's arrest:

> Q. Direct your attention to December 7, 2011: Did you make an arrest of the defendant on that day?
> A. Yes, I did. He was taken into custody and booked into the Lewis County jail.

RP (June 15, 2012) at 353-54. Silva's interview with Christensen was published for the jury, as was Jensen's interview with I.B.

E.C.'s sister testified for the defense that I.B., A.B., and E.C. had told her that I.B.'s allegations were false. Detective Callas testified that E.C. did not initially believe I.B.'s allegations, and Christensen's sister testified that E.C. had told her that Christensen was "going to pay" for leaving her and her children. RP (June 15, 2012) at 363. Christensen testified that E.C. confronted him about I.B.'s allegations a few weeks before the couple married. He denied any inappropriate touching.

The trial court instructed the jury that to find Christensen guilty, it had to find that he committed the offense between September 12, 2009, and October 12, 2011. The jury found Christensen guilty and also found that he had used his position of trust or confidence to facilitate the commission of the offense.

At sentencing, the State noted that there was an issue concerning Christensen's offender score. Christensen had four prior offenses. RP 505. The parties agreed that the first three convictions counted for a total of 6 points, but they disagreed about adding 1 point for the fourth conviction of second degree unlawful possession of a firearm. Christensen was released from confinement for this class C felony on July 20, 2006. The applicable washout period expired on July 20, 2011, which fell within the charging period for Christensen's current offense included in the information and the "to convict" instruction. The State argued that the evidence showed that the molestation occurred before Christensen and E.C. married in 2010 and before the firearm

conviction washed, but Christensen argued that because the jury did not find that he committed his current offense on a specific date before the washout period expired, his firearm conviction should not count. The trial court agreed that the firearm conviction washed. Based on an offender score of 6, the trial court imposed an underlying sentence of 114 months, plus 18 months for the aggravator, for a total sentence of 132 months to life.[1]

Christensen appeals his conviction, arguing that he received ineffective assistance of counsel. The State cross appeals Christensen's sentence, arguing that the trial court erred in calculating Christensen's offender score.

ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Christensen contends that he received ineffective assistance of counsel because his attorney failed to object when the State elicited testimony from I.B. about her truthfulness as well as testimony from Detective Silva about Christensen's arrest and incarceration. Christensen adds in his SAG that his attorney was ineffective because he failed to investigate I.B.'s use of melatonin and offer expert testimony about its side effects.

Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact that we review de novo. *State v. McLean*, 178 Wn. App. 236, 246, 313 P.3d 1181, 1186 (2013), *review denied*, 179 Wn.2d 1026 (2014). To prove ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient

[1] With an offender score of 6, the standard range was 98-130 months; with a score of 7, the range would be 108-144 months. RCW 9.94A.510.

performance was prejudicial to defendant's case. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). A failure to satisfy either prong is fatal to a claim of ineffective assistance of counsel. *McLean*, 178 Wn. App. at 246.

When determining whether counsel's performance was deficient, we begin with a strong presumption of counsel's effectiveness. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Counsel's performance is deficient if it falls below an objective standard of reasonableness and cannot be characterized as legitimate trial strategy or tactics. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). Prejudice occurs when there is a reasonable probability that the trial's result would have differed had the deficient performance not occurred. *Hendrickson*, 129 Wn.2d at 78.

We now apply these standards to Christensen's three claims of ineffective assistance of counsel.

1. I.B.'s Truthfulness

Christensen argues that his attorney should have objected when the State elicited I.B.'s testimony that she was telling the truth. He contends that because I.B.'s credibility was the main issue at trial, defense counsel was ineffective in failing to object to the prejudicial and inadmissible testimony that the State introduced to bolster her credibility.

To support his claim of error, Christensen cites to cases holding that it is improper for a prosecutor to ask a witness to testify about the credibility of another witness. *See, e.g, State v. Jerrels*, 83 Wn. App. 503, 507, 925 P.2d 209 (1996) (misconduct occurs when prosecutor's cross examination seeks to compel a witness's opinion as to whether another witness is telling the truth); *State v. Suarez-Bravo*, 72 Wn. App. 359, 366, 864 P.2d 426 (1994) (misconduct

occurred when prosecutor repeatedly attempted to get defendant to call the police witnesses liars). Weighing the credibility of the witnesses is the jury's province; witnesses may not express their opinions on whether another witness is telling the truth. *State v. Casteneda-Perez*, 61 Wn. App. 354, 360, 810 P.2d 74, *review denied*, 118 Wn.2d 1007 (1991).

In asserting that a witness may not testify about her own credibility, Christensen cites *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984). This case does not support Christensen's assertion. Instead, it stands for the proposition that an attorney may not assert his personal belief in the credibility of the witnesses or the accused's guilt. *Reed*, 102 Wn.2d at 145-46.

Christensen cites no authority that directly supports his claim of error, perhaps because it is unassailable that a witness may be asked and may testify as to whether her testimony is truthful. Indeed, such a statement is made every time a witness takes the stand and declares under oath or affirmation that she will testify truthfully, as required under ER 603.

Christensen is correct that this case turned on the victim's credibility. Consequently, both parties questioned I.B. about her veracity. In addition, defense counsel called witnesses who testified that I.B. had recanted her allegations, that E.C. did not initially believe her daughter's accusation, and that E.C. wanted Christensen to "pay" for leaving her. Instead of calling attention to I.B.'s assertions of truthfulness by objecting, defense counsel sought to undermine those assertions with substantive evidence. Thus, defense counsel's failure to object to the State's questioning of I.B. can be characterized as a legitimate trial strategy that defeats a claim of deficient performance.

Christensen has failed to cite any authority that establishes I.B.'s testimony about her truthfulness was inadmissible. Counsel's failure to object to evidence cannot prejudice the

defendant unless the trial court would have ruled the evidence inadmissible. *McLean*, 178 Wn. App. at 248. Here, Christensen has failed to show that I.B.'s testimony about her own veracity was inadmissible. Accordingly, Christensen's claim fails.

2. Christensen's Arrest and Incarceration

Christensen next argues that Detective Silva's testimony about arresting him and taking him to jail constituted improper opinion testimony as to Christensen's guilt. Christensen cites to no authority supporting his contention that the fact of arrest is categorically inadmissible.

We recently rejected a similar claim after observing that the defendant had cited no authority stating that the fact of an arrest is categorically inadmissible. *McLean*, 178 Wn. App. at 249. We also distinguished the same two cases on which Christensen relies to support his claim of error. *McLean*, 178 Wn. App. at 249 (citing *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967); *State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985)).

In *Carlin*, a police officer testified that a police dog followed a "fresh guilt scent" from the scene of a burglary to the defendant. 40 Wn. App. at 703. We observed in *McLean* that stating that a defendant emitted an objectively ascertainable "guilt scent" was not comparable to stating the fact of an arrest. 178 Wn. App. at 249.

In *Warren*, defense counsel argued that the jury should find that a driver was not negligent because police officers decided not to issue a traffic citation at the scene of a car accident. 71 Wn.2d at 517. As we observed in *McLean*, the *Warren* case says nothing about admitting evidence showing the fact of a criminal defendant's arrest. 178 Wn. App. at 249.

The fact that Detective Silva added that he took Christensen to jail following his arrest does not alter our conclusion that *Carlin* and *Warren* do not support a claim of deficient

performance. Nor does the timing of this testimony influence our decision. Christensen argues that the question concerning his arrest deliberately came at the culmination of the detective's testimony, but this argument overlooks the fact that the prosecutor recalled the detective for additional questions that had nothing to do with the fact of arrest or incarceration.

Here, as in *McLean*, withholding an objection can be characterized as a legitimate trial tactic that sought to avoid emphasizing the fact of Christensen's arrest and incarceration. Furthermore, having failed to establish that this evidence was inadmissible, Christensen again cannot show prejudice. Christensen's claim of ineffective assistance of counsel fails.

3. Failure to Investigate and Hire Expert

Finally, Christensen argues in his SAG that he received ineffective assistance of counsel when his attorney failed to interview the State's witnesses about the melatonin that I.B. was taking as a sleeping aid at the time of the incident and failed to hire a medical expert to testify about its side effects.

During E.C.'s cross-examination, defense counsel asked about I.B.'s sleeping habits and whether E.C. had found it necessary to give I.B. any type of pill. After the State objected, the trial court excused the jury, and defense counsel explained that he was referring to E.C. giving her daughters melatonin for sleep issues, which might have some bearing on the possibility of dreams or nightmares. Defense counsel had no medical testimony about the side effects of melatonin to offer, but he planned to have Christensen's mother testify that melatonin gives her nightmares. The trial court explained that any evidence that witnesses take melatonin and have nightmares would not be admissible absent expert testimony explaining that melatonin causes nightmares, but it permitted an offer of proof on the issue.

Defense counsel then asked E.C. about giving I.B. melatonin. She replied that she occasionally gives her children melatonin without it having any adverse effect on them. E.C. could not remember giving I.B. melatonin the night before I.B. made her allegations against Christensen. Following this offer of proof, the trial court excluded the melatonin evidence as irrelevant because there was no evidence that I.B. took melatonin the night before the alleged incident, no evidence that she was asleep at the time of the incident, and no expert testimony about melatonin's side effects. Our record does not disclose the scope of defense counsel's pretrial investigation into I.B.'s melatonin use. Because our review is limited to the appellate record, we decline to consider the issue of whether counsel was ineffective in failing to interview the State's witnesses about I.B.'s melatonin use. *State v. Crane,* 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied,* 501 U.S. 1237 (1991). Furthermore, given the lack of evidence that I.B. used melatonin the night before she made her allegations, the failure to introduce expert testimony on the side effects of melatonin was neither deficient nor prejudicial. Accordingly, Christensen's claim fails.

B. OFFENDER SCORE

The State argues on cross appeal that the trial court erred in concluding that Christensen's prior conviction for unlawful possession of a firearm washed for the purpose of calculating his offender score and standard sentencing range and that resentencing is required. When a direct appeal shows that an incorrect offender score was used to calculate the standard range, resentencing is required even where the trial court imposed an exceptional sentence, unless the record clearly indicates that the sentencing court would have imposed the same sentence anyway.

State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999); *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

Christensen's prior conviction for second degree unlawful possession of a firearm is a class C felony. RCW 9.41.040(2)(b). Under the Sentencing Reform Act (SRA), this prior conviction "shall not be included in the offender score if, since the last date of release from confinement . . . the offender ha[s] spent five consecutive years in the community without committing any crime that subsequently results in a conviction." RCW 9.94A.525(2)(c). Christensen was released from confinement for the firearm conviction on July 20, 2006. Consequently, the five-year washout period expired on July 20, 2011. Christensen was charged with committing his current offense between September 12, 2009, and October 12, 2011.

The State argued below, as it does on appeal, that the testimony showed that the touching incident occurred before E.C. and Christensen married on December 11, 2010, which was before the five-year washout period expired. Defense counsel responded that the State never sought, and the jury never made, any finding that the offense occurred on a specific date before the washout period expired, and that the firearm conviction had washed. The trial court ruled without explanation that the offense washed.

In addressing the State's argument, we find guidance in *Parker*, 132 Wn.2d 182.[2] In *Parker*, the defendant was charged with committing two different crimes within a five-year

[2] Christensen asserts that the State is equitably estopped from raising this argument. We reject this assertion, particularly where the State has clearly preserved its claim of error. *See State v. Yates,* 161 Wn.2d 714, 738, 168 P.3d 359 (2007) (declining to apply equitable estoppel after observing that no Washington case has extended it to criminal prosecutions), *cert. denied*, 554 U.S. 922 (2008). Equitable estoppel requires a statement inconsistent with the claim later

period. 132 Wn.2d at 185. During the fourth year of the charging period, the legislature amended the SRA to significantly increase the standard ranges for the charged crimes. *Parker*, 132 Wn.2d at 185. At trial, evidence was presented that the defendant committed the acts throughout the charging period. *Parker*, 132 Wn.2d at 185. During closing, the prosecutor urged the jury to consider the entire charging period; the jury was not asked to specify whether the defendant committed the acts after the effective date of the penalty increase. *Parker*, 132 Wn.2d at 185. The Supreme Court agreed with the defendant that the trial court erred by using the increased penalties without requiring the State to prove that the crimes occurred after those penalties became effective. *Parker*, 132 Wn.2d at 191. "[W]hen the crime was committed is a factual question which must be put to the jury." *Parker*, 132 Wn.2d at 192, n.14.

Christensen's jury was not asked to specify whether he molested I.B. before the five-year washout period expired. Rather, the "to convict" instruction required the jury to find that he committed the offense within a timeframe that straddled the washout date. During closing, the prosecutor discussed the other elements of the crime and then urged the jury to consider the entire charging period: "that leaves element number 1, that on or about and between September 12, 2009 and October 12, 2011—big time net—basically from when she turned eight up to the time it got reported, so we know we're in that time, the defendant had sexual contact with [I.B.]." RP (June 18, 2012) at 475.

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asserted, action by the other party in reliance on that statement, and an injury to that other party resulting from allowing the first party to repudiate that statement. *Yates*, 161 Wn.2d at 737-38. The application of equitable estoppel against the government is disfavored. *Yates,* 161 Wn.2d at 738.

In determining a defendant's sentence, the trial court may consider information that has been admitted, acknowledged or proved in a trial. RCW 9.94A.530(2). The State points out that uncontroverted evidence shows that Christensen committed the molestation before the washout period for his prior firearm conviction expired. Given the absence of a jury finding on this issue, however, we see no proof that Christensen committed his current offense before his firearm conviction washed out. Consequently, we affirm the trial court's calculation of the offender score and the resulting standard range.

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:

Bjorgen, P.J.

Maxa, J.

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, Chad E. Christensen, declare and say:

That on the 29 day of May, 2014, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 43745-7-II:

Petition for review to the Washington Supreme Court;

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;

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addressed to the following:

Mr. David C. Ponzoha, Clerk
Court of Appeals, Divison II
950 Broadway, Suite 300
Tacoma, WA. 98402

Jonathan Meyer
Lewis County Prosecuting Attorney
345 West Main Street
Chehalis, Wa. 98532

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 29 day of May, 2014, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Signature

Chad Christensen
Print Name

DOC 358748 UNIT H4B-46u
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