31896-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RYAN A. REID, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I.

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 of 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.

II.

ISSUES

A. Did Detective Estes offer any opinions as to the veracity of the witnesses he interviewed?

B. Was Tina Woodraska's single comment on her belief in the defendant's guilt a harmless error?

C. Has the defendant shown that he received ineffective assistance of counsel?

D. Has the defendant shown "cumulative error" to the extent that justifies ordering a new trial?

III.

STATEMENT OF THE CASE

The defendant was charged in Spokane County Superior Court with three counts of First Degree Child Molestation. CP 60.

"A.L.R."

The State began its case with testimony from one of the victim's in this case who will be designated "A.L.R." A.L.R. testified that she was seven years old and had finished second grade. RP 135. The prosecutor then asked the witness the typical questions to test her awareness and memory. RP 136-40. The victim knew in what city she lived, but could not remember speaking with Karen Winston. RP 139. There was no cross examination. RP 141.

KAREN WINSTON

The State next called Karen Winston who stated that she was a forensic child interviewer. RP 143. Ms. Winston described her training and education. RP 144-145. Ms. Winston recalled that on November 30, 2010, she did a child interview with the victim A.L.R. A video recording was made of the interview and this recording was played back for the jury. A.L.R. was supplied with drawings upon which she drew locations on her body where she had been touched. RP 151- 52. These were admitted as State's exhibits three, four, and five. RP 152. At one point in the interview process, A.L.R. stated that the defendant had touched her "pee pee" and her "butt" with his finger. RP 150.

Ms. Winston testified, "there was no follow up with [A.L.R.] following the interview." RP 155. Ms. Winston had a follow-up with A.L.R.'s mother to discuss "how to keep her child safe" when the suspect had access to the child. RP 155. Ms. Winston "want[ed] to make sure that the child had had a recent

medical exam and that the mother had access to that information." RP 155. Ms. Winston also wanted to make sure that, if the victim named her father as the perpetrator, the mother could ensure that contact with the child was either supervised or that there was no contact.

MELLY WOODRUFF

Melly Woodruff testified that she works for Child Protective Services as an intake supervisor. RP 171. She supplied the court with Tina Woodraska's family constellation, which consisted of two boys and two girls. RP 174.

A.E.

The State presented testimony from A.E (14-year-old brother of A.L.R). RP 184. A.E. testified that the defendant was his former stepfather. RP 185. A.E. stated that he did not get along with the defendant. RP 185. When asked why he did not get along with the defendant, A.E. said that the defendant would sometimes choke him against a wall and be violent. RP 185. A.E. recalled taking a shower one day when the defendant made A.E. touch him. RP 186. A.E. also recalled a time when he was on "the mattress" and the defendant came in. RP 186. The defendant grabbed A.E.'s hand, placed it on his penis and had Mr. A.E. masturbate him. RP 186. A.E.thought that he was eight or nine years of age when the use of event occurred. RP 189. A.E. did not tell anyone about the incident because the defendant told him, "not to tell anyone." RP 190.

TINA WOODRASKA

Ms. Tina Woodraska testified that both A.E. and A.L.R. are her children. RP 199. Ms. Woodraska recalled that at one point after the defendant had stopped living at her address, the defendant physically hurt A.E. February 2008. RP 201. Ms. Woodraska saw that as an opportunity to remove the defendant from her home. RP 201. Ms. Woodraska had been trying for "a while" to remove the defendant but had not been successful.

Ms. Woodraska testified that in 2007 and 2008, A.L.R. would have been two to three years old. Ms. Woodraska related that upon returning home one day she heard noises coming from A.L.R.'s bedroom. RP 202. Ms. Woodraska did not want anyone to know she was home, so she tiptoed down the hallway. RP 202. The door to the bedroom was slightly ajar and Ms. Woodraska pushed it open. RP 202. Ms. Woodraska saw the defendant bounce up, and A.L.R.'s bottom half was completely naked. RP 202. Ms. Woodraska screamed, "What are you doing?" Ms. Woodraska indicated that the reason for her question was that when she first saw the defendant he was down in her "private parts." RP 203. Ms. Woodraska indicated that the defendant's face was probably within a foot to 10-inches away from the space between A.L.R.'s legs. The defendant also had his hand in the same area. RP 203. The defendant said he was "checking an owie." RP 204. He then stormed out of the bedroom RP 204. Ms. Woodraska dressed A.L.R., noting that the child did not appear to be soiled in any way, that she did not see dirty

clothes, nor any powder or cream. RP 205. A.L.R. wore diapers only at night. RP 204.

Ms. Woodraska remembered that there was a time when she saw her daughter sitting up in bed late at night. RP 207. She asked the child what was wrong, and the child stated "Ryan hurt me." When Ms. Woodraska asked how she had been hurt, the child said "a finger", and pointed down to her private parts. RP 208.

The prosecutor asked Ms. Woodraska if there was any reason why she would want to put these sorts of thoughts in A.L.R.'s head and Ms. Woodraska replied "no." RP 209. The prosecutor then questioned Ms. Woodraska regarding an inference that maybe she did not want the defendant to have visitation rights with his kids. RP 209. The prosecutor asked "how would you address that?" RP 209. Ms. Woodraska stated:

> Well, I don't want 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.

ERIC O'LEARY

Mr. Eric O'Leary is Tina Woodraska's brother. RP 246. In thinking back to 2007 and 2008, Mr. O'Leary recalled an incident where he entered the family home and went looking for occupants. RP 246. Mr. O'Leary found a bedroom on

the left with its door partially open and he heard something inside the room. RP 246. When he entered the room the defendant was kneeling over the "baby" (A.L.R.). Mr. O'Leary did not really think much of the situation until he began to feel that perhaps the defendant was trying to explain the situation. RP 246. The defendant told Mr. O'Leary that he was just changing her diaper. However, as the individuals started to move into another room, Mr. O'Leary noticed that there was no diaper on the floor, either dirty or clean. Mr. O'Leary also did not see any wipes or other diaper changing paraphernalia. RP 247. Mr. O'Leary testified that A.L.R. was on the floor as though the defendant would be changing her diaper. RP 247. According to the witness, the defendant's face was perhaps two feet from the child's abdomen. RP 247. Mr. O'Leary could see the defendant's hands and described them as being "down there." RP 247. Mr. O'Leary reiterated that the only diaper he saw was the one that was on the child. RP 249.

JORDAN FERGUSON

Mr. Jordan Ferguson testified that he is a law enforcement officer with the Spokane Police Department. RP 256. Ofc. Ferguson took part in an interview with the defendant. RP 257. As the interview began, the defendant volunteered information regarding an incident with "Abdul." RP 260. According to the defendant, Tina Woodraska had called Abdul a "homo and a fag." RP 261. The defendant stated that he went to comfort Abdul who was quite upset. RP 261. According to the defendant, Abdul asked the defendant if he would spend the

night in Abdul's bed. RP 261. The defendant did spend the night in Abdul's bed and when he awoke, Abdul was playing with his penis. RP 262.

The defendant stated that he had been honest when talking to the detectives, and he had not had sexual contact with A.L.R. RP 263. The defendant blamed the allegations on Ms. Woodraska. RP 263.

PAUL LEBSOCK

Paul Lebsock is employed with the City of Spokane as a detective. RP 270. Det. Lebsock assisted Detective Estes in the investigation. RP 272. Det. Lebsock recalled two interviews with the defendant and Detective Estes. RP 272. The defendant explained that on one occasion he had been changing A.L.R.'s diaper. The defendant described the changing as being difficult because A.L.R. would wipe fecal matter on various surfaces in her bedroom. RP 274-75. The defendant went on to explain that he was being careful and meticulous to clean her private area. RP 275. According to the defendant, A.L.R. had some fecal matter at the entrance to her vagina and he wanted to be diligent about cleaning the child thoroughly. RP 275. The defendant described how he had used a baby wipe and his finger to wipe fecal matter from the child's vaginal area. RP 275.

BENJAMIN ESTES

Detective Estes began his testimony answering questions regarding his past work history and his training as a police officer. RP 284-289. Detective Estes noted that he was assigned to investigate the case at bar. The detective described a

meeting that occurred in his office with the Spokane Police Department. RP 294. The detective noted that during the initial interview with the defendant, the defendant volunteered a lot of items. RP 298. Detective Estes testified that early on in the interview with the defendant he noticed "… A lot of real inconsistencies" from what the defendant claimed and what the detective had been told by Tina Woodraska as well as Eric O'Leary. RP 298. Detective Estes noticed many inconsistencies about issues that were not central to the matter at hand. He also noted that such inconsistencies on peripheral issues were a "red flag" to the detective that "somebody" is not telling the truth. RP 298-299.

Detective Estes testified that he discussed a portion of the incidents in which Tina Woodraska alleged she came home unannounced and caught him in the room with the victim. What caught the detective's attention was that the time frame was inconsistent. The defendant said that the incident occurred at approximately 2:30 PM, while Tina Woodraska's explanation was that she had come home midmorning. RP 299. Ms. Woodraska had told the detective that her lunch time was between 1:00 and 1:30, revealing another inconsistency. RP 300. The inconsistency regarding the timing of the lunchtime incident was "… kind of a red flag, but, you know, some things— people remember things different." RP 300.

The defendant stated that he was "hurt" when he found out about the allegations against him. 358. The defendant said he felt "belittled" by Tina

Woodraska. RP 358. The defendant denied doing anything wrong. RP 359. The defendant completely reversed the situation in the incident involving A.E. RP 361. The defendant blamed the penis touching incident entirely on Abul. RP 361. The defendant claimed that he wore a boxer brief even though he did not want to. He blamed the choice on Ms. Woodraska. RP 369. The defendant claimed that his penis would inadvertently "flop out" of the underwear. RP 369. The defendant partially blamed the A.E. incident on the underwear allowing his penis to "flop out." RP 370-371. Essentially, the defendant denied each allegation of which his counsel inquired. RP 358-366.

After deliberations, the jury returned guilty verdicts of First Degree Child Molestation on Counts 1 and 3. RP 424-25. This appeal followed. CP 139-54.

IV.

ARGUMENT

A. DETECTIVE ESTES DID NOT TESTIFY IN THE FORM OF AN IMPROPER OPINION.

The single item underpinning the majority of the defendant's arguments (including later ineffective assistance of counsel arguments) is the defendant's assertions regarding what constitutes improper opinion testimony. Reduced to its essence, the defendant claims that any testimony that mentions inconsistencies between the defendant's statements and other witness' testimony is improper. The

State takes the position that mentioning inconsistencies in the context of why the witness took particular actions, without more, does not constitute improper opinion testimony. Nearly all of the instances of alleged opinion testimony involving Detective Estes are no more than the Detective reporting that the defendant's statements did not "square" with the statements of other witnesses on the same issue.

There were no objections to the sections of Det. Estes' testimony contested by the defendant. Since the defendant did not object to the issues he now attempts to raise on appeal, he has waived any arguments pertaining to Det. Estes' testimony. *State v. Sublett*, 176 Wn.2d 58, 126, 292 P.3d 715 (2012); RAP 2.5(a).

"But a party can raise an error for the first time on appeal if it is a manifest error affecting a constitutional right." *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a)(3). "The defendant must show the constitutional error actually affected [his] rights at trial, thereby demonstrating the actual prejudice that makes an error "manifest" and allows review." *Kirkman*, 159 Wn.2d at 926-27. "Actual prejudice, as it applies to opinion testimony, is only shown when the statement was an "'explicit or almost explicit' opinion on the defendant's guilt or the victim's veracity." *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009) (*quoting Kirkman*, 159 Wn.2d at 936).

The defendant cannot reasonably argue that Det. Estes gave testimony in the form of an opinion on the defendant's guilt or the victim's veracity. There is nothing in the record that approaches the level required by *King, supra*.

In determining whether witness statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008).

"Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed." *Montgomery, supra* at 595. The jury in this case was instructed that they were the sole judges of credibility. CP 71-73, RP 384. There was no written jury inquiry or other evidence that the jury was unfairly influenced, and the court should presume the jury followed the court's instructions absent evidence to the contrary. *State v. Kirkman*, 159 Wn.2d at 928.

The defendant attaches great significance to the words, "red flag." Det. Estes uses the terms "flag" or "red flag" in the same sense as would anyone else. The State maintains that Det. Estes used "flag" or "red flag" as a shorthand that would be understood by most people as: the events currently being given to the Detective were inconsistent with what he had been told by other witnesses. This

caused Detective Estes to make further inquiries in an attempt to reconcile all the data he had received. Using the term "red flag" only means that the Detective was alerted to some aspect of the versions of events that did not seem to make sense. The term does not indicate that one side or the other is more credible.

The key fact overlooked by the defendant is that none of the detective's comments made any claim as to which sets of statements were believable and which were not. Simply pointing out that witness A's statements were inconsistent with witness B's statements says nothing about which version (if either) was correct. The detective only stated that he received statements from the witnesses that were different than those given by the defendant. The testimony of Detective Estes contained no opinions, improper or otherwise. In the body of his testimony, Det. Estes never used the terms "I think" or any language approaching a personal opinion. The detective was never asked for a personal opinion. Det. Estes' testimony contained no direct opinion on the defendant's guilt or on the credibility of a witness.

The testimony of Det. Estes presented the versions of the facts as told by the witnesses. The Detective described what he did during the investigation. Mentioning that he found inconsistencies in the statements was not an opinion at all. The Detective examined all the different stories he obtained from witnesses, and mentioned the obvious: the defendant's versions of events did not always match the versions supplied by other witnesses.

The defendant's continued assertions that Det. Estes repeatedly violated hearsay rules are without merit. The section contested by the defendant as being a series of hearsay violations is actually a series of statements by the defendant to the detective. RP 298-299. The defendant's argument does not acknowledge that the statements made to the detective were not hearsay. The defendant's statements were those of a "party opponent." ER 801(d)(2). The statements of a party opponent are not classified as hearsay. ER 801(d)(2). The defendant could not object to the admission of his own statements to Det. Estes. Also, it appears from the record that the State offered the defendant's statements only to show that the defendant's version of events were quite different than those given by other witnesses. The statements do not appear to have been offered to prove the truth of the matters asserted. The defendant's statements related by Det. Estes were not hearsay and therefore not objectionable.

As a side note, the defendant's claim that the prosecutor "…felt a need to correct the officer…." is very wide of any possible "mark" and a very strained interpretation of the actual record. The prosecutor stated: "… 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?" Brf. of App. 29; RP 299. If anything, the prosecutor was alerting the detective that the questioning the prosecutor intended to pursue might cause an inadvertent improper response by

the detective. The statement was a cautionary statement by the prosecutor, nothing more.

B. MS. WOODRASKA'S COMMENT WAS HARMLESS ERROR.

The defendant claims Ms. Woodraska gave an opinion on the guilt of the defendant. The prosecutor asked Ms. Woodraska why she might not want the defendant to have visitation rights. Ms. Woodraska replied:

> Well, I don't want 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. A that's the only reason I would ask that he just not hurt them anymore.

RP 209.

There was no defense objection to this testimony at trial. The defendant now complains that his trial counsel should have objected to this testimony. What the defendant does not mention is that his defense counsel undertook a withering cross-examination of Ms. Woodraska. RP 213-241. Throughout the trial, defense counsel made numerous remarks of the sort found at RP 281-82.

At this point in the trial, much of the "lay" testimony had already been given. It should have come as no surprise to any juror that Ms. Woodraska would make the statements she did; after all, she is the mother of both victims involved in this case. The fact that she might want to protect her children, and the fact that she is sure of something should be no surprise.

What Ms. Woodraska was saying is not exactly clear. She testified that "I know for sure." RP 209. The record does not say *what* she knows for sure. Does she know "for sure" that the defendant physically abused her children, which is not part of the charges, or does she know "for sure" that the defendant sexually abused "them"? Ms. Woodraska stated that "as far as I know, he sexually abused 'them'." This is not as positive a statement as, "I know for sure."

Compared to the quantity and nature of the cross-examination of Ms. Woodraska, the jury could hardly have been influenced by the contested statements.

If a court determines the claim raises a manifest constitutional error, it may still be subject to harmless error analysis. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

The State previously outlined the test for an improper opinion from *State v. Montgomery*, *supra*. If the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis. *City of Seattle v. Heatley*, 70 Wn. App. 573, 585, 854 P.2d 658 (1993)).

Washington has adopted the "overwhelming untainted evidence" approach to the harmless error analysis. The Court in *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986) held:

> Under the 'overwhelming untainted evidence' test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Id. A finding of harmless error requires proof beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.

Id. at 425.

Ms. Woodraska's statement could arguably have been an improper opinion on the guilt of the defendant. However, her statement was apparently not egregious enough -- in the flow of testimony, that either the trial court or defense counsel raised an issue.

If this court decides that the comment was a violation of the defendant's trial rights, then this court looks to the remainder of the evidence to determine the weight of the untainted evidence and decide if the untainted evidence is so overwhelming that the jury would have reached the same result without the error.

The comment in question does not say where, when or which child Ms. Woodraska believes was sexually assaulted by the defendant. This comment, taken in the balance of the mass of other testimony is undoubtedly harmless.

C. THE DEFENDANT HAS NOT SHOWN THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The defendant argues that his counsel was ineffective for not objecting to certain parts of Detective Estes and Tina Woodraska's testimony. The net effect of this argument is to "double down" on the errors the defendant claimed in the

first section because the errors claimed in the first part of defendant's appeal were raised for the first time. The direct issues raised by the defendant on appeal were improper as the State explained earlier.

The State's response to the argument of ineffective assistance of counsel is both obvious and short: The defense counsel did not object at trial because there was nothing to which defense counsel could object. Failure to object to admissible evidence does not establish ineffective assistance of counsel. *State v. Alvarado*, 89 Wn. App. 543, 553, 949 P.2d 831 (1998).

As argued in the first section of this brief, since the defendant did not object to Det. Estes' testimony, the defendant cannot raise his initial arguments for the first time on appeal. Thus, the defendant's "fallback" position becomes the primary argument. If this court agrees with the State regarding the inability of the defendant to raise his initial issues for the first time on appeal, the case "defaults" to the question of whether the defendant received ineffective assistance of counsel. In some sense, the argument is the same as the initial defense argument: did the detective give improper opinion testimony? However, the analysis of that question is now one step removed: the defendant must show that his counsel was ineffective because defense counsel did not object to improper opinion testimony. The defendant must further show that the defense counsel would have (hypothetically) succeeded with "improper opinion" arguments before the trial court.

To establish deficient performance or prejudice, the defendant must first show that *if* his counsel had objected to the disputed testimony, the objections would likely have been successful. *State v. Gerdts*, 136 Wn. App. 720, 150 P.3d 627 (2007). When deciding whether hypothetical objections would have been successful, the following should be noted. "The admission of relevant evidence is within the sound discretion of the trial court and will not be reversed absent a manifest abuse of that discretion." *State v. Mak,* 105 Wn.2d 692, 702, 718 P.2d 407 (1986). "…[T]he trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Such determinations are left to the sound discretion of the trial court." *Id*. at 703.

The trial judge was overseeing the admission of evidence. The defendant seems to believe, and wants to convince this court, that trial judges will just sit through a trial and will do nothing without an objection. The defendant has not presented authority to support this idea. This means that the trial court had already "passed" on issues raised by the defendant on appeal. This means the likelihood of success with hypothetical objections would have been small.

Defense counsel is strongly presumed to be effective. *State v. McDonald*, 138 Wn.2d 680, 696, 981 P.2d 443 (1999). "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *State v. McFarland*, 127 Wn.2d at 335.

To establish ineffective assistance of counsel, the defendant must meet a two-pronged test. The defendant must show (1) that counsel's performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the first prong of the test, the court makes reference to "an objective standard of reasonableness based on consideration of all of the circumstances." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Appellate review of counsel's performance is highly deferential and there is a strong presumption that the performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). In order to prevail on the second prong of the test, the defendant must show that, "but for the ineffective assistance, there is a reasonable probability that the outcome would have been different." *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The two prongs are independent and a failure to show either of the two prongs terminates review of the other. *Thomas*, 109 Wn.2d at 226 (*citing Strickland*, 466 U.S. at 687). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697.

In order to prevail on grounds of ineffective assistance of counsel, the defendant must show that the detective gave improper opinions as to the versions

of events told by the defendant to the detective. No such opinions appear in the record. The defendant attempts to turn the "red flag" comments into personal opinions, but this approach has no merit.

From a practical trial standpoint, the "cat was already out of the bag" by way of Karen Winston's testimony regarding her interview with the victim. Objecting to this testimony could easily have offended the jury and made it appear to the jurors that trial defense counsel was being picayune and obstructionist. It cannot be said that trial defense counsel was not engaged in strategy when he did not object to this testimony.

If counsel is engaged in strategy, there is no error. *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (*citing Strickland*, 466 U.S. at 689), *cert. denied*, 506 U.S. 958 (1992).

The defendant claims that Karen Winston's testimony regarding a follow-up interview with the victim's mother, was lacking in relevance and prejudicial in nature. The defendant believes that trial defense counsel should have objected to this line of testimony. Brf. of App. 42-44.

The defendant argues that his trial counsel should have objected to the victim's testimony because it was a violation of ER 404(b). Brf. of App. 45. As mentioned previously, it is not enough to simply point at a failure to object. The defendant has the burden to show that the trial court would have granted the alleged failure.

D. THERE WAS NO CUMULATIVE ERROR.

The State maintains there was no error and therefore there were no errors to form a basis for "cumulative error".

V.

CONCLUSION

For the reasons stated above, the State respectfully requests that the defendant's convictions be affirmed.

Dated this 12th day of June, 2014.

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Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 31896-6-III
v.	)	
	)	CERTIFICATE OF MAILING
RYAN A. REID,	)	
	)	
Appellant,	)	

I certify under penalty of perjury under the laws of the State of Washington, that on June 16, 2014, I mailed a copy of the Respondent's Brief in this matter, addressed to:

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6/16/2014 Spokane, WA Kathleen R. Owens

(Date) **(Place)** **(Signature)**