

NO. 63014-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RYAN RICHARDSON,

Appellant.

2010 MAY 28 PM 4:46

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEBORAH FLECK

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1.a. Whether this Court should consider, for the first time on appeal, Richardson's claim that three police witnesses rendered improper opinions regarding his guilt where almost all of the testimony in question is proper because it merely describes Richardson's statements and demeanor, and where there is no showing of a manifest error affecting Richardson's constitutional rights under RAP 2.5.

b. Whether defense counsel's failure to object to this testimony constitutes ineffective assistance of counsel where the decision not to object is tactical, and where no actual prejudice has been shown.

2.a. Whether this Court should consider, for the first time on appeal, Richardson's claim that the doctor who spoke with the child sexual assault victim rendered an improper opinion on Richardson's guilt where the doctor's testimony did not express an explicit or near-explicit opinion that the defendant was guilty or that the victim was telling the truth as required under RAP 2.5 and controlling case law.

b. Whether defense counsel's failure to object to this testimony constitutes ineffective assistance of counsel where the

decision not to object is tactical, and where no actual prejudice has been shown.

3. Whether Richardson received ineffective assistance of counsel when counsel did not object to testimony describing the victim's mother's inappropriate reactions to the child victim's disclosures of sexual abuse where such testimony was admissible to explain why the victim wrote a letter recanting the allegations, and to assist the jury in assessing the victim's credibility.

4. Whether Richardson's claim of cumulative error should be rejected because the errors he alleges do not warrant reversal whether considered individually or cumulatively.

5. Whether it is necessary to remand for entry of an order striking or modifying certain conditions of community custody.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Ryan Richardson, with one count of rape of a child in the first degree and one count of child molestation in the second degree based on conduct involving his stepdaughter, A.C., occurring in the fall of 2006 and the summer of 2007, respectively. CP 64-69.

A jury trial on these charges occurred in October and November 2008 before the Honorable Deborah Fleck. At the conclusion of the trial, the jury found Richardson guilty as charged on both counts. CP 15, 90. The trial court imposed a standard-range sentence totaling 130 months to life in prison. CP 92-107. Richardson now appeals.

2. SUBSTANTIVE FACTS

On July 10, 2007, 12-year-old A.C. had spent the day with her best friend, 12-year-old T.P. They had been playing at a park and got into a "sand fight" with some other children. RP (10/28/08) 4, 6. After the sand fight, the girls went back to A.C.'s house and got into the bathtub together in their bathing suits to wash off the sand. RP (10/28/08) 6.

A.C. said she wanted to tell T.P. something. She was "very nervous[.]" RP (10/28/08) 7. A.C. then told T.P. that she had been sexually abused by her stepfather, Ryan Richardson. A.C. told T.P. not to tell anyone else; A.C. "thought that no one would believe her." RP (10/28/08) 9.

Despite A.C.'s insistence that T.P. not tell anyone, T.P. told her mother, Heidi. T.P. was "sad" and "worried" about her friend.

RP (10/28/08) 20. After T.P. told Heidi what A.C. had said, Heidi had T.P. call A.C. to tell her that they were coming over to talk to A.C. and her mother, Stephanie Richardson. RP (10/28/08) 21. When Heidi and T.P. arrived, Heidi told Stephanie what T.P. had told her, and then all of them sat in the living room and talked about it. RP (10/28/08) 21.

Stephanie was surprised and angry upon hearing A.C.'s disclosure. Instead of directing her anger at her husband, she directed her anger at A.C. RP (10/28/08) 22-23. She raised her voice and demanded that A.C. tell her what had happened. RP (10/28/08) 23. Stephanie asked A.C. if Richardson had been sleeping when the incident occurred, and at one point, insisted that he must have been sleeping. RP (10/28/08) 24. A.C. was "a wreck." RP (10/28/08) 25. Stephanie did not comfort her. RP (10/28/08) 26.

A.C. wanted to go home with Heidi and T.P., but Stephanie would not allow it. At about 1:00 a.m. the next morning, Stephanie called Heidi and told her "they were going to work it out within the family" rather than notify the authorities. RP (10/28/08) 27-28. Stephanie also did not want to notify A.C.'s biological father, who is a King County Sheriff's deputy. RP (10/28/08) 28-29.

Heidi did not agree with Stephanie's decision not to notify the police. RP (10/28/08) 28. Heidi spoke with her mother, who agreed that the police should be called. Heidi then realized she would have to report A.C.'s allegations herself, so she did.¹

RP (10/28/08) 29-30.

After Heidi reported A.C.'s disclosure to the King County Sheriff's Office, A.C.'s father was notified both by a colleague and by Heidi. RP (10/29/08) 150-52. As soon as A.C.'s father learned of the disclosure, he drove to A.C.'s grandmother's house and picked up A.C. and her younger brother. RP (10/29/08) 151. After arranging for a friend to watch A.C.'s brother, A.C.'s father sat down with her and asked her to tell him what happened. A.C. cried, but she was able to answer her father's questions. RP (10/29/08) 153-55. After speaking with A.C., A.C.'s father contacted the sexual assault unit of the King County Sheriff's Office.

RP (10/29/08) 156.

¹ Although Heidi and Stephanie had been close friends since high school, this incident caused the end of their friendship because Stephanie was upset that Heidi had reported what A.C. said, and Heidi was upset with Stephanie that she continued to support Richardson. The final straw for Heidi was when she learned that Stephanie was still visiting Richardson in the jail. RP (10/28/08) 31-32.

Detective Chris Knudsen was assigned to the case as lead detective. RP (10/28/08) 42-43. Although A.C. was 12 years old, he decided not to interview A.C. himself to avoid the appearance of a conflict of interest because A.C.'s father was a deputy. RP (10/29/08) 14-15. Instead, A.C. was interviewed by Carolyn Webster, a child interview specialist with the King County Prosecutor's Office. RP (10/28/08) 46. Detective Knudsen and a CPS case worker observed A.C.'s interview through one-way glass. RP (10/28/08) 46. At the conclusion of A.C.'s interview, Detective Knudsen decided to arrest Richardson. RP (10/28/08) 50.

A.C. described two incidents of sexual abuse. The most recent incident, which formed the basis for count II, had occurred only a week or so before she told T.P. about it, and occurred when A.C. and Richardson were watching a movie on the hide-a-bed in the living room after everyone else had gone to bed. RP (10/30/08) 22-23, 50. A.C. was having trouble falling asleep, so Richardson gave her three pills of melatonin² to help her fall asleep. RP (10/30/08) 27-30; RP (11/4/08) 49-50.

² Melatonin is a hormone produced by the pineal gland, but synthetic melatonin is widely available commercially as a sleep aid. See http://www.mayoclinic.com/health/melatonin/ns_patient-melatonin.

A.C. fell asleep on her side. When she woke up, Richardson was behind her, pulling her towards him with his arms. RP (10/30/08) 31. Her skirt was pulled up around her stomach, and Richardson reached between her legs to move her underwear to the side. Richardson was keeping A.C.'s legs parted with one of his legs. RP (10/30/08) 32-34. A.C. could feel Richardson's penis between her legs. Richardson's penis touched the inside of her leg and the outside of her vagina, but it did not go inside of her vagina. RP (10/30/08) 35. At that point, A.C. broke free from Richardson's grasp, got up, and went to the bathroom. RP (10/30/08) 37. She felt scared. RP (10/30/08) 38.

The other incident, which formed the basis for count I, occurred in 2006 when A.C. was 11 years old. RP (10/30/08) 47. A.C. had very dry skin, particularly on her back, and Richardson sometimes helped her put lotion on her back to ease the dryness. RP (10/29/08) 74-75. On one occasion when Richardson was helping A.C. with the lotion, he applied it not only on her back, but also on her stomach, legs, chest, and "in [her] pants." RP (10/30/08) 41-43. Richardson put his hand inside her underwear from the front and inserted a finger into her vagina. RP (10/30/08)

44-46, 60-61, 66. A.C. did not tell anyone about this incident until her interview with Carolyn Webster. RP (10/30/08) 46-47.

A.C. was also seen by Dr. Rebecca Wiester at a sexual assault clinic. RP (11/3/08) 37, 43. Although A.C. declined a physical examination, Dr. Wiester interviewed both Stephanie and A.C. RP (11/3/08) 43, 56. Stephanie told Dr. Wiester that Richardson was asleep during the hide-a-bed incident, and that the lotion incident was an accident. RP (11/3/08) 46. After A.C. described both incidents to Dr. Wiester in detail, Dr. Wiester told Stephanie that she "felt differently" about A.C.'s account of events than Stephanie did, and shared her concerns that Richardson's conduct was not accidental and that A.C. had been abused. RP (11/3/08) 51-55, 63. Dr. Wiester also noted that children are capable of putting lotion on their own legs, stomachs and chests at only 4 or 5 years of age. RP (11/3/08) 61.

Detective Knudsen arrested Richardson and interviewed him. RP (10/28/08) 51-52. Knudsen told Richardson what A.C. had said, and told him he wanted to hear his "side of the story." RP (10/28/08) 51, 54. Richardson claimed that he did not remember the hide-a-bed incident, but that he would sometimes "hump" Stephanie while he was asleep. Richardson also said that

A.C. was "a good honest kid," and if she said that something had happened on the hide-a-bed he had no reason not to believe her. RP (10/28/08) 55. As to the other incident, Richardson admitted that he had put lotion on A.C.'s thighs and hips, but he adamantly denied that he had ever touched her vagina. RP (12/28/08) 55.

Upon arrival at the King County Sheriff's Office, Richardson was placed in an interview room, where he spoke with Detective Wendy Billingsley. RP (10/29/09) 31. When Billingsley came into the room, Richardson was crying with his face in his hands. He said "that he was not a rapist." RP (10/29/08) 35. Richardson reiterated that he had no memory of the hide-a-bed incident, and again denied touching A.C.'s vagina during the lotion incident. RP (10/29/08) 36-38. Billingsley asked whether it was possible that Richardson had touched A.C.'s vagina accidentally, and he denied it. But after a while, Richardson admitted that this was possible. RP (10/29/08) 40-42.

Knudsen asked if Richardson was willing to speak with polygraph examiner³ Jason Brunson, and Richardson agreed. RP (10/28/08) 56. During his interview with Brunson, Richardson

³ As would be expected, all references to the polygraph were suppressed, so Brunson was referred to as an "interview specialist" by agreement of the parties. RP (10/28/08) 56; RP (11/3/08) 82.

again initially denied touching A.C.'s vagina during the lotion incident, although he did admit to putting lotion on her thighs up to the "bikini area." RP (11/3/08) 92-93. Richardson then conceded that "he might have brushed her vagina with his hand." RP (11/3/08) 93. Eventually, when Brunson asked Richardson point-blank whether he had put his finger in A.C.'s vagina during the lotion incident, Richardson "kinda slumped forward and said, yeah, I did, but it was accidental." RP (11/3/08) 94. When Brunson told Richardson that he did not think that was likely, Richardson continued to insist that it was an accident. RP (11/3/08) 97. He also insisted that he must have been asleep during the hide-a-bed incident. RP (11/3/08) 98-100.

After Richardson was taken into custody, Stephanie still wanted to have a relationship with him. RP (10/29/08) 179; RP (11/4/08) 23-24. Accordingly, CPS remained involved in the case and at one point a dependency action was filed (although it was later dismissed) "because there was a question as to whether or not [A.C.]'s mother could protect her." RP (10/29/08) 177. Also, while the case against Richardson was pending, A.C. wrote a letter recanting significant details of her initial disclosures. Specifically, A.C. wrote that Richardson was asleep during the hide-a-bed

incident, and that he did not penetrate her vagina with his finger during the lotion incident. RP (10/30/08) 63-65. A.C. also wrote that she liked "having [her] mom to [herself]" with Richardson gone, and she apologized for "lying." RP (10/30/08) 65. At trial, A.C. explained that she wrote the letter because she just "wanted it to be over[.]" RP (10/30/08) 66. A.C. testified that Richardson did put his finger in her vagina during the lotion incident, and that she did not think Richardson was asleep during the hide-a-bed incident. RP (10/30/08) 55, 66.

Richardson also testified at trial. He continued to insist that he was asleep during the hide-a-bed incident. RP (11/4/08) 29-30. He denied that his finger penetrated A.C.'s vagina during the lotion incident, and he claimed that he must have told Brunson that he did because Brunson was "scary," and he was just agreeing with what the police officers were telling him. RP (11/4/08) 40, 44, 112-13.

Additional facts will be discussed below as necessary for argument.

C. ARGUMENT

1. RICHARDSON CANNOT SHOW MANIFEST CONSTITUTIONAL ERROR OR INEFFECTIVE ASSISTANCE OF COUNSEL STEMMING FROM THE TESTIMONY OF THREE POLICE WITNESSES DESCRIBING RICHARDSON'S STATEMENTS AND Demeanor.

Richardson first claims both manifest constitutional error under RAP 2.5 and ineffective assistance of counsel stemming from the testimony of Detective Billingsley, Detective Knudsen, and Jason Brunson. More specifically, Richardson claims that these police witnesses improperly expressed their opinions regarding Richardson's veracity and guilt, and that this is a manifest constitutional error that he may raise for the first time on appeal. In the alternative, Richardson argues that his attorney's failure to object to most of this testimony constitutes ineffective assistance of counsel. Brief of Appellant, at 13-24.

These arguments should be rejected. First, the remarks by these three witnesses were focused on their objective observations of Richardson's demeanor, not his veracity or his guilt, and to the extent that they remarked on Richardson's truthfulness, the comments were brief and insignificant in light of the whole record. Therefore, Richardson cannot meet his burden of showing manifest constitutional error. Second, Richardson's ineffective assistance

claim fails because the decision whether to object is a quintessentially tactical decision, and because Richardson cannot demonstrate prejudice.

It is well-settled that appellate courts generally will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). An exception exists for manifest errors affecting the defendant's constitutional rights. RAP 2.5(a)(3); State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). But this exception is a narrow one. State v. Kirkman, 159 Wn.2d 918, 934, 155 P.3d 125 (2007). In order to raise a claim for the first time on appeal, the defendant must show that the error alleged is both truly "manifest" and of constitutional dimension. State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). In other words,

The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review.

Kirkman, 159 Wn.2d at 926-27. Put another way, a manifest error is "unmistakable, evident or indisputable" in light of the record as a whole. State v. Burke, 163 Wn.2d 204, 224, 181 P.3d 1 (2008)

(quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

Impermissible opinion testimony regarding the defendant's guilt may constitute reversible error because it may infringe upon the defendant's right to have the jury independently determine the defendant's guilt from the facts of the case. Kirkman, 159 Wn.2d at 927. In addition, it is generally improper for a witness to offer an express opinion on the veracity of the defendant unless the defendant has affirmatively offered such evidence himself. Id. at 927-28. However, it is important to note that "[m]anifest error requires an explicit or almost explicit witness statement on an ultimate issue of fact," or else the claim is waived. Id. at 938.

On the other hand, it is proper for the jury to consider other relevant evidence tending to show a defendant's consciousness of guilt or lack of truth or honesty. State v. McGhee, 57 Wn. App. 457, 461, 788 P.2d 603, rev. denied, 115 Wn.2d 1013 (1990). Further, "[t]estimony regarding a defendant's statements and demeanor is not opinion and thus is admissible if relevant." State v. Day, 51 Wn. App. 544, 552, 754 P.2d 1021, rev. denied, 111 Wn.2d 1016 (1988). Also, even if testimony regarding the defendant's demeanor is expressed in the form of an opinion, such testimony is

admissible if a proper foundation exists, i.e., "personal observations of the defendant's conduct, factually recounted by the witness, that directly and logically support the conclusion." State v. Craven, 69 Wn. App. 581, 586, 849 P.2d 681, rev. denied, 122 Wn.2d 1019 (1993) (quoting Day, 51 Wn. App. at 552).

For example, in Day – a case in which the defendant was convicted of murdering his wife – police officers who spoke with the defendant were properly allowed to testify that the defendant's reaction to being informed of his wife's death was "inappropriate" because he was "unemotional" and "did not ask questions the officers expected." Day, 51 Wn. App. at 552. Similarly, in Craven – a child physical abuse case – a hospital social worker was properly allowed to testify that the defendant's behavior was "unusual" because she would not make eye contact and stared at the floor as they spoke about the injured child. Craven, 69 Wn. App. at 586. A similar case presents itself here.

Richardson objects to the testimony of Detectives Billingsley and Knudsen and polygraph examiner Brunson as improper opinion testimony on his guilt, but the vast majority of this testimony merely describes Richardson's statements and demeanor. Thus, with isolated exceptions, the testimony is proper.

For instance, Detective Billingsley testified about her direct observations of Richardson's changes in emotion and demeanor as she spoke with him about A.C.'s allegations:

Q: In general what was his demeanor and what were his emotions such that you could see?

A: He was nervous. He was upset, which was very understandable given the allegations; and he would -- his emotions would peak and valley. So, he would -- emotions were he was very upset and audibly crying and sniffing and he had tears on his face. Other times where he just looked very nervous or stressed out where he would be sweating. At other times I felt that he wasn't being as forthright or as honest. He wouldn't make eye contact with me. His voice would get softer. He would just keep his eyes turned away at times.

Q: What were you -- what were you discussing when you noticed that, do you recall, when he was looking away from you?

A: Most of the time he would not make eye contact with me was when we would discuss very direct questions or my very direct, probing about [the] potential of him accidentally touching his daughter's vaginal area when . . . when he talked about -- when he had initially blurted out that he may have, you know, accidentally approached his daughter or attempted to enter his penis in his daughter in his sleep, he seemed to be not as willing to make direct, full eye contact with me at those times.

RP (10/29/08) 42-43. With the exception of the isolated "forthright or honest" comment, the remainder of this testimony consisted of Billingsley's fact-based, firsthand observations of Richardson's

behavior and demeanor as they talked about A.C.'s allegations of abuse. As such, almost all of this testimony was proper. In addition, although the "forthright or honest" comment was not proper, Richardson cannot demonstrate how this isolated remark had practical and identifiable consequences at trial as required under the RAP 2.5 standard given the strength of the evidence and the record as a whole.

Similarly, Detective Knudsen's testimony describing his observations of Richardson's interview with Brunson consisted mainly of describing Richardson's statements and demeanor:

Q: Can you describe how the interview progressed?

A: Mr. Richardson's demeanor was a lot different than when I talked to him. He was quieter, you know, he was kind of leaning over in his seat as he talked, I'm sorry, as they talked. He at one point actually put his face in his hands. And he initially, well, he told the same story that he had of what happened on the hide-a-bed to Jason Brunson as he had to me; that he didn't remember what happened, but didn't doubt what [A.C.] had to say about regarding the incident with the lotion. You know, he was a bit more honest than he had been earlier. And Jason Brunson asked him, you know, he was asked if he ever put his finger in [A.C.'s] vagina what would he say. And Mr. Richardson answered that he would say yes, but that he was adamant that it had been an accident[.]

RP (10/28/08) 60-61. Again, with the exception of the "a bit more

honest" remark, this testimony is proper because it consists of the detective's firsthand observations of Richardson's emotions and behavior as he began to make more incriminating admissions about what he had done to A.C. Furthermore, as was the case with Billingsley's isolated remark, Richardson has not shown that Knudsen's "more honest" remark had any identifiable impact on the outcome of the trial given the strength of the evidence and the record as a whole. This claim is waived as well.

Jason Brunson's testimony also focused on describing Richardson's statements, demeanor, and body language. First, Brunson described what occurred when Richardson admitted for the first time that he had inserted his finger in A.C.'s vagina during the lotion incident:

[Brunson:] I asked him, umm, again at that point, did you put your finger inside her vagina? He told me that during the course of applying ointment that he might have brushed her vagina with his hand.

Umm, I said, you know, this was something that we need -- I appreciate you starting to open up and tell me these details, it's very important that we, you know, he not minimize or rationalize, so that we get to the truth here. And I asked him flat out, did you put your finger inside her vagina? Uh, at that point he said -- he kinda slumped forward and said, yeah, I did, but it was accidental.

Q: You indicated that he slumped forward; how was his affect before this?

A: Generally, fairly, uh, I wouldn't say -- I guess the term is closed off, people, you know, put their arms closed kind of sitting back listening to what you're saying. And as we started talking further, then he got more opened up as his arms kind of came together, he somewhat leaned forward, had tears in his eyes, things that would indicate that he's thinking very strongly about, you know, the accusations and that he's probably about there to tell what happened.

RP (11/3/08) 93-94. Again, this testimony is proper because it consists of Brunson's firsthand observations of the changes in Richardson's demeanor as he started to make more incriminating admissions. In addition, Brunson's "get to the truth" comment is also not improper because Brunson was recounting his own statements in order to provide the necessary context for Richardson's statements, and was not expressing an opinion.

In describing what occurred after Richardson admitted to putting his finger in A.C.'s vagina, Brunson explained that he told Richardson that he did not think it was likely that such a thing would happen accidentally:

Q: Did you wind up talking with him about how likely you thought it was that he had accidentally placed his finger in his daughter's vagina?

A: Yeah, I expressed to him that I did not feel it was likely that it was an accidental slip.

Q: How did he respond to that?

A: He told me that he would never -- he would never admit that he did it intentionally or purposefully.

Q: Had you, umm -- so when you told him what you just told the jury, I don't think it was -- doesn't sound likely that you would do that, was it exactly how you said it to him or was it more involved than that?

A: Yeah, basically, I just -- it was more disbelief, you know, the way that I recall explaining this is that, you know, I have been a detective, I've investigated a lot of, you know, similar types of cases, and it didn't make sense to me that you're applying lotion to this girl's, you know, leg, she moved and your thumb slipped into her vagina. It didn't make sense to me. I thought that there was more to it than that.

RP (11/3/08) 97-98.

Although this testimony appears closer to opinion testimony, it is not improper when considered in context. Brunson was not stating his opinion as to Richardson's guilt. Rather, he was telling the jury what he said to Richardson during the interview, again to provide the necessary context for Richardson's own statements and behavior, and thus, the testimony was appropriate. Moreover, even if this testimony were improper, it is not likely to have affected the trial. Indeed, it should be apparent to any reasonable person that it is extremely unlikely that an accidental digital penetration of a young girl's vagina could occur in these circumstances. Therefore,

Brunson's statement of the obvious in this regard does not amount to manifest constitutional error in any event.⁴

Nonetheless, Richardson argues that the testimony of the three witnesses in this case is like some of the testimony at issue in State v. Saunders, 120 Wn. App. 800, 86 P.3d 1194 (2004), and that reversal is required. Brief of Appellant, at 16-18. In Saunders, similarly to this case, almost all of the challenged testimony was found to be appropriate except for one remark that the defendant's answers to questions "weren't always truthful." Saunders, 120 Wn.2d at 811-13. But as this Court should find in this case, the Saunders court found this remark to be harmless. Id. at 813. Moreover, the Saunders court initially employed the wrong standard in doing so; the court found the error "manifest" without a showing of identifiable consequences, although the court correctly agreed with the State that the error was harmless beyond a reasonable doubt in any event. Id. However, this approach (i.e., assuming that

⁴ Moreover, as Richardson notes in footnote 12 of his brief, the State's entire redirect examination of Brunson was stricken by the trial court by agreement of the parties because it contained a passing reference to "the test." RP (11/3/08) 107-08, 114-18. This portion of Brunson's testimony also contained the improper remark that Richardson was "ready to tell the truth," but this was obviously stricken as well. RP (11/3/08) 107. Jurors are presumed to follow the trial court's instructions to disregard inadmissible evidence. State v. Russell, 125 Wn.2d 24, 74, 882 P.2d 747 (1994).

a constitutional error is "manifest") was expressly rejected in Kirkman. Kirkman, 159 Wn.2d at 936 (quoting City of Seattle v. Heatley, 70 Wn. App. 573, 583, 854 P.2d 658 (1993)). For both of these reasons, Saunders does not support Richardson's position that his convictions should be reversed.

In sum, Richardson cannot meet his burden of showing manifest constitutional error as required under RAP 2.5 with respect to the testimony of these three witnesses, and this Court should not consider these claims for the first time on appeal.

As an alternative argument, however, Richardson contends that his attorney provided ineffective assistance of counsel by failing to object to the testimony in question. To prevail on a claim of ineffective assistance of counsel, the defendant must meet both prongs of a stringent two-part test by showing: 1) that counsel's performance was actually deficient (the performance prong); and 2) that the deficient performance resulted in actual prejudice (the prejudice prong). Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Counsel's performance is deficient only if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705,

940 P.2d 1239 (1997). Prejudice occurs only when, but for counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different. McFarland, 127 Wn.2d at 335.

Appellate courts must employ a strong presumption that counsel's representation was effective, and should avoid the distorting effects of hindsight in judging counsel's performance. McFarland, 127 Wn.2d at 335. Moreover, matters of trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Counsel's decisions about whether to object or not are quintessentially tactical decisions, and only in egregious circumstances relating to evidence central to the State's case will the failure to object constitute incompetent representation that justifies reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, rev. denied, 113 Wn.2d 1002 (1989).

Thus, to prevail on a claim of ineffective assistance of counsel based on a decision not to object, the defendant must show three things: 1) that there were no legitimate tactical reasons for not objecting; 2) that the trial court would have sustained an objection if one had been made; and 3) that the result of the trial

would have been different if an objection had been made and sustained. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Richardson cannot meet these standards based on the record in this case.

First, the decision not to object was part of a legitimate trial strategy. With Detective Knudsen, counsel suggested on cross examination that the entire investigation was biased against Richardson because A.C.'s father is a King County Sheriff's deputy. RP (10/29/08) 13-15. Counsel also obtained a begrudging admission from Knudsen that Richardson could have been speaking softly and putting his head in his hands because he was tired, not because of a consciousness of guilt. RP (10/29/08) 18-19. With Brunson, counsel established that Richardson had had almost no sleep in the last 24 hours prior to the interview, reinforcing that Richardson's behavior during the interview could be due to exhaustion. RP (11/3/08) 101-03. Counsel also established that Brunson was only one in a series of police officers who interrogated Richardson, suggesting that Richardson had been badgered by the police. RP (11/3/08) 104. In this same vein, counsel established during her cross examination of Detective Billingsley that Billingsley was the person who had suggested to

Richardson that any digital penetration during the lotion incident could have been an accident. RP (10/29/08) 60. Counsel then used this information in closing to argue that the police witnesses were biased, and that they badgered Richardson and planted ideas in his head when he was in a weakened state. RP (11/5/08) 50-52.

In other words, because counsel's decision not to object was part of a legitimate strategy, Richardson cannot establish a claim of deficient performance under Strickland. Moreover, because the majority of the challenged testimony is proper in any event, Richardson cannot establish that an objection would have been sustained. Finally, even with respect to the isolated improper remarks regarding Richardson's truthfulness, Richardson cannot establish a reasonable probability that the outcome of the trial would have been different if these remarks had been stricken. The evidence against Richardson was very strong and compelling, and his own explanations for his conduct were inconsistent and incredible. In addition, Richardson testified at trial and the jurors were able to judge his credibility (or lack thereof) firsthand for themselves. Therefore, any possible impact stemming from the witness's remarks would have been completely dispelled at that point.

In sum, Richardson cannot show either that counsel's performance was deficient or that he suffered actual prejudice as a result of counsel's deficient performance. This Court should reject Richardson's claims, and affirm.

2. RICHARDSON ALSO CANNOT SHOW MANIFEST CONSTITUTIONAL ERROR OR INEFFECTIVE ASSISTANCE OF COUNSEL STEMMING FROM THE TESTIMONY OF DR. WIESTER REGARDING HER INTERVIEW OF A.C.

Richardson also claims both manifest constitutional error under RAP 2.5 and ineffective assistance of counsel stemming from the testimony of Dr. Wiester regarding her interview of A.C. Specifically, Richardson claims that Dr. Wiester rendered an impermissible opinion on guilt when she stated that A.C.'s account of events was more consistent with sexual abuse than with accidental touching, and that A.C.'s statements gave her cause for concern. Brief of Appellant, at 24-30. These arguments should also be rejected. Dr. Wiester did not express an explicit or near-explicit opinion regarding Richardson's guilt or A.C.'s veracity, and thus, the RAP 2.5 standard has not been met under controlling case law. Moreover, Richardson cannot show either deficient

performance or prejudice as required for a claim of ineffective assistance of counsel.

As discussed above, a defendant cannot raise a claim for the first time on appeal unless it concerns a manifest error of constitutional magnitude. RAP 2.5. In this context, a defendant may not raise a claim of improper expert opinion testimony unless the witness in question has stated "an explicit or almost explicit" opinion that the defendant is guilty or that the victim is telling the truth. Kirkman, 159 Wn.2d at 936-37. Moreover, in sexual abuse cases where the child's credibility is always at issue, "a court has broad discretion to admit evidence corroborating the child's testimony," including the testimony of an expert. Id. at 933. The facts of Kirkman are instructive here.

In Kirkman, the physician who examined the child sexual abuse victim testified, without objection, that the child gave "'a very clear history' with 'lots of detail,' 'a clear and consistent history of sexual touching . . . with appropriate affect'," and that the normal physical examination results were not inconsistent with the "'clear and consistent'" history of sexual abuse reported by the child. Kirkman, 159 Wn.2d at 929. On appeal, the defendant argued, and Division II agreed, that the doctor's testimony constituted an

impermissible opinion on the defendant's guilt, and that this was a manifest constitutional error under RAP 2.5.

In reversing Division II, the Washington Supreme Court stated in no uncertain terms that the issue had been waived because the witness had not expressed an opinion on the defendant's guilt or the victim's veracity:

We agree with the State and the dissent below. The Court of Appeals erroneously deemed Dr. Stirling's testimony as "clearly" an improper opinion implying Kirkman's guilt. Dr. Stirling was not "clearly" commenting on A.D.'s credibility and actually testified that his findings neither corroborated nor undercut A.D.'s account. Dr. Stirling did not come close to testifying that Kirkman was guilty or that he believed A.D.'s account. Dr. Stirling's statement that A.D.'s account was "clear and consistent" does not constitute an opinion on her credibility. A witness or victim may "clearly and consistently" provide an account that is false. The jury properly was instructed to determine the facts. Thus, Dr. Stirling's testimony was not a manifest error of constitutional magnitude.

Kirkman, 159 Wn.2d at 930. The court further observed that jurors – who are specifically instructed that they are the sole finders of fact and judges of credibility – "are not leaves swayed by every breath," and should be given more credit for being able to determine the facts for themselves. Id. at 938 (quoting United States v. Garsson, 291 F. 646, 649 (D.N.Y. 1923)); see also State v. Lord, 161 Wn.2d 276, 279, 165 P.3d 1251 (2007) (noting that

"jurors are intelligent and responsible individuals" who follow the court's instructions). A similar case presents itself here.

In this case, Dr. Wiester testified that she spoke with both Stephanie and A.C. as part of her standard sexual assault examination protocol. RP (11/3/08) 43, 56. Dr. Wiester explained that when she first spoke with Stephanie, Stephanie said that Richardson may have been asleep during the hide-a-bed incident, and that the lotion incident was an accident. RP (11/3/08) 45-46. Dr. Wiester then spoke with A.C., who reported that Richardson's finger had caused her discomfort when it went inside her "private area" during the lotion incident, but that Richardson's penis did not hurt when it touched her "private" during the hide-a-bed incident because it did not go inside. RP (11/3/08) 51-55.

After obtaining a full description of the two incidents from A.C., Dr. Wiester spoke with Stephanie again, and told her that she "felt differently about the description of events than perhaps [Stephanie] did" because A.C.'s description of what had occurred was "far more concerning for child sexual abuse than accidental events." RP (11/3/08) 63. During cross examination, Dr. Wiester conceded that she had had cases in the past involving false accusations by children. RP (11/3/08) 73. When asked on cross

examination if she knew for a fact that A.C. had been abused, Dr. Wiester again stated that "the information [A.C.] gave me I would find concerning for child sexual abuse and not consistent with accidental events." RP (11/3/08) 73-74.

As in Kirkman, Dr. Wiester "did not come close to testifying that [Richardson] was guilty or that [she] believed [A.C.'s] account." Kirkman, 159 Wn.2d 930. Rather, Dr. Wiester testified that she told A.C.'s mother that A.C.'s account of what had happened gave her cause for concern, and that A.C.'s description of events was more consistent with abuse than with accidental touching.⁵ Dr. Wiester did not render an opinion that Kirkman was guilty; she merely stated that A.C.'s statements were inconsistent with an accident. Moreover, Dr. Wiester did not opine that A.C. was telling the truth. To the contrary, she merely stated that A.C.'s description of events gave her cause for concern that sexual abuse had occurred. Indeed, it is difficult to imagine a person who would *not* be

⁵ In his brief, Richardson states that "Dr. Wiester offered her opinion [that] A.C. suffered sexual abuse rather than accidental touching." Brief of Appellant, at 28. This mischaracterizes the testimony. Dr. Wiester did not render an opinion that A.C. had been abused; rather, she stated that A.C.'s *description of events* was more consistent with abuse. In other words, Dr. Wiester's testimony was that A.C.'s account, *if true*, was more consistent with abuse than with accidental touching. This Court should reject Richardson's inaccurate description of the testimony.

concerned by A.C.'s description of events. Also, as in Kirkman, the jurors in this case were properly instructed that they alone were to find the facts and determine credibility. CP 71-72. In sum, Dr. Wiester did not render an explicit or almost explicit opinion regarding Richardson's guilt or A.C.'s veracity, and thus, this issue cannot be considered for the first time on appeal.

Again, however, Richardson takes the alternative position that his attorney's decision not to object to Dr. Wiester's testimony constitutes ineffective assistance of counsel. But as the court observed in Kirkman, there are legitimate tactical reasons not to object to such testimony, including foregoing an objection in order to elicit helpful testimony from the witness on cross examination. Kirkman, 159 Wn.2d at 937. In this case, Richardson's counsel elicited a concession from Dr. Wiester that she had had cases in the past involving false accusations. And although Dr. Wiester did not directly answer counsel's question as to whether she knew for a fact that A.C. had been abused, Dr. Wiester's answer was that A.C.'s account gave her cause for concern. This answer was non-responsive, and in essence, answered the question in the negative as counsel had intended. This questioning by Richardson's counsel was part of a legitimate trial strategy, and

thus, Richardson cannot meet the two-pronged test for ineffective assistance of counsel. This Court should affirm.

3. RICHARDSON CANNOT SHOW INEFFECTIVE ASSISTANCE OF COUNSEL STEMMING FROM THE ADMISSION OF TESTIMONY REGARDING STEPHANIE'S REACTION TO A.C.'S DISCLOSURES BECAUSE THIS TESTIMONY WAS ADMISSIBLE.

Richardson next claims that he received ineffective assistance of counsel because his attorney did not object to testimony from Heidi P. and Melinda Larrison regarding Stephanie's inappropriate reactions to A.C.'s disclosures of abuse. Brief of Appellant, at 30-35. This argument is without merit because this evidence was admissible. A.C.'s credibility and the question of whether or not A.C.'s letter recanting her disclosures of abuse was truthful were central issues at trial. Therefore, the State was entitled to show that A.C. was living with a mother who was angry with her and who believed that Richardson did not knowingly abuse her, and that this was a motivating factor for A.C. to write a false recantation. Richardson's claim fails.

As noted above, a decision as to whether or not to object is a quintessentially tactical decision, and only in egregious

circumstances will the failure to object constitute incompetent representation that justifies reversal. Madison, 53 Wn. App. at 763. Thus, to prevail on a claim of ineffective assistance of counsel based on a decision not to object, the defendant must show the absence of legitimate tactical reasons, that an objection would have been sustained, and that the outcome of the trial would have been different. Saunders, 91 Wn. App. at 578. Richardson cannot meet these standards because the evidence in question was admissible.

Under ER 401 and ER 402, evidence that is relevant to proving or disproving a material fact at trial is admissible. In cases involving recanting victims and child sexual abuse victims, Washington courts have found a wide range of evidence admissible to explain a recantation, or to assist the jury in assessing the victim's credibility. See, e.g., State v. Magers, 164 Wn.2d 174, 181-86, 189 P.3d 126 (2008) (in domestic violence case where victim recanted in a letter, evidence of prior domestic violence admissible to show victim's state of mind and to assess victim's credibility); State v. Stevens, 58 Wn. App. 478, 496-98, 794 P.2d 38, rev. denied, 115 Wn.2d 1025 (1990) (in child sexual abuse case, expert testimony regarding symptoms and behaviors typically associated with abuse was admissible to rebut defense theory that

victims' behavior resulted from other traumatic events in their lives); Madison, 53 Wn. App. at 764-67 (in child sexual abuse case where victim recanted, expert testimony on "recantation phenomenon" admissible to explain possible reasons for child's recantation).

In this case, A.C. wrote a letter recanting her original disclosures of abuse by Richardson. In this letter, A.C. wrote that Richardson was asleep during the hide-a-bed incident, and that he did not penetrate her vagina with his finger during the lotion incident. A.C. also wrote that she liked "having [her] mom to [herself]" with Richardson out of the house, and she apologized for "lying." RP (10/30/08) 63-65. For fairly obvious reasons, this letter was a key issue at trial. Thus, the State was entitled to offer relevant evidence in order to show possible reasons why A.C. had written the letter, and in order to assist the jury in assessing A.C.'s credibility as a witness.

Accordingly, the prosecutor presented testimony from Stephanie's friend Heidi P. and CPS caseworker Melinda Larrison to show that Stephanie's response to A.C.'s disclosures of abuse was inappropriate and unsupportive. More specifically, Heidi testified that Stephanie was very angry and yelled at A.C. when A.C. initially told her about the hide-a-bed incident, and that

Stephanie insisted that Richardson must have been asleep when it happened. RP (10/28/08) 22-24. Heidi testified that she was the one who reported A.C.'s disclosures to the police because Stephanie did not want to, and that Stephanie was upset with Heidi for having done so. RP (10/28/08) 28-31. Heidi also explained that she stopped associating with Stephanie when she learned that Stephanie was still visiting Richardson in the jail after charges were filed. RP (10/28/08) 32.

CPS worker Larrison testified that in her experience, mothers of sexual abuse victims generally display some form of "moral outrage," but that she "got no response" like that from Stephanie. RP (10/29/08) 183. Larrison also testified that a dependency proceeding was filed, although it was later dismissed, because CPS was concerned that A.C. was not being protected, and that Stephanie's behavior "did not indicate an emotional support of her daughter." RP (10/29/08) 177. In fact, despite CPS involvement due to concerns that A.C. was not being adequately protected, Stephanie told Larrison that she was going to legally separate from Richardson rather than divorce him due to her mistaken belief that this would preclude her from testifying against him at trial. RP (10/29/08) 180.

This evidence was highly relevant and admissible to explain why A.C. would write a letter recanting her initial disclosures of abuse. After A.C. made her initial disclosures, her own mother directed her anger toward A.C. rather than the perpetrator, repeatedly made excuses for the perpetrator's behavior, continued to visit the perpetrator in jail, and was unsupportive of A.C. to the point that a dependency was filed. Under such circumstances, it does not require an expert to understand why a 12 or 13-year-old girl would write a recanting letter. Indeed, as A.C. herself explained, she wrote the letter because she just "wanted it to be over[.]" RP (10/20/08) 66.

In sum, the testimony regarding Stephanie's inappropriate response to A.C.'s disclosures was admissible to explain A.C.'s recantation and to assist the jury in assessing her credibility as a witness. As such, Richardson cannot meet his burden of showing either deficient performance or actual prejudice stemming from his attorney's decision not to object. Put another way, the decision not to object to admissible evidence does not constitute ineffective assistance of counsel. Richardson's claim fails under both prongs of Strickland, and this Court should affirm.

4. RICHARDSON'S CUMULATIVE ERROR CLAIM SHOULD BE REJECTED.

Next, Richardson argues that the cumulative effect of the errors he alleges warrants a new trial, even if they do not justify a reversal individually. Brief of Appellant, at 35-36. This claim should be rejected.

An accumulation of errors that do not individually require reversal may still deny the defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997). But reversals due to cumulative error are justified only in rather extraordinary circumstances.⁶ As addressed above, no error occurred that warrants a new trial, either individually or cumulatively. Therefore, Richardson's convictions should be affirmed.

⁶ See, e.g., Perrett, 86 Wn. App. at 323 (police officer's comment on defendant's post-arrest silence, testimony regarding prior confiscations of defendant's guns, and trial court's exclusion of key witness's conviction for crime of dishonesty cumulatively warranted a new trial); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (prosecutor's remarks regarding personal belief in defendant's guilt, coupled with two instructional errors of constitutional magnitude, warranted a new trial).

5. THE CONDITION OF COMMUNITY CUSTODY AUTHORIZING A SUBSTANCE ABUSE EVALUATION AND TREATMENT IS VALID; THE STATE AGREES THAT THE OTHER CHALLENGED CONDITIONS SHOULD BE STRICKEN OR MODIFIED.

Lastly, Richardson claims that several conditions of community custody as ordered by the trial court at sentencing should be stricken from the judgment and sentence or clarified upon remand. Specifically, Richardson makes four claims: 1) that the condition that he undergo a substance abuse evaluation and follow any treatment recommendations if so directed by his sexual deviancy treatment provider or community corrections officer ("CCO") should be stricken; 2) that the condition that he not purchase or possess alcohol should be stricken; 3) that the condition prohibiting access to the internet should be stricken; and 4) that the condition prohibiting contact with minor children should be clarified to include an exception for Richardson's own children. Brief of Appellant, at 36-41. These claims will be discussed in turn.

a. The Condition Allowing A Substance Abuse Evaluation And Treatment If Ordered By The Treatment Provider Or CCO Is Valid.

Under the relevant statutory provisions applicable in this case, the Department of Corrections ("DOC") and the Indeterminate

Sentencing Review Board ("board") are authorized to impose conditions of community custody, including participation in rehabilitative programs, whether or not such conditions are crime-related. Accordingly, the condition of community custody authorizing a substance abuse evaluation and treatment if ordered by the sexual deviancy treatment provider or CCO is valid because it merely authorizes the DOC to take future action that it is already within its power to take. Accordingly, this Court should reject Richardson's claim that this condition should be stricken.

Richardson was sentenced for count I, first-degree rape of a child, under RCW 9.94A.712,⁷ which provides that certain sex offenders must serve at least the minimum term set by the trial court in total confinement, and, if approved for release from total confinement by the board, must serve the remainder up to the maximum term on community custody. In imposing conditions of community custody, the trial court must comply with RCW 9.94A.700(4) and (5). RCW 9.94A.712(6)(a). In this respect,

⁷ As is usually true of the Sentencing Reform Act ("SRA"), RCW 9.94A.712 has been amended multiple times in recent years, and, as of August 1, 2009, it was recodified as RCW 9.94A.507. All of the statutory citations in this brief refer to the version of the SRA in effect in 2006 and 2007 when Richardson's crimes were committed.

Richardson is correct that any treatment or counseling services ordered by the trial court must be crime-related.

But the DOC and the board are granted the authority to impose additional conditions of community custody above and beyond those ordered by the trial court at sentencing. See RCW 9.94A.713. Under this statute, the DOC is required to conduct a risk assessment and "recommend to the board any additional or modified conditions of the offender's community custody based upon the risk to community safety." RCW 9.94A.713(1). This provision specifically requires the DOC to recommend appropriate "rehabilitative programs" in which the offender may be required to participate or any other "affirmative conduct" the offender may be required to perform. *Id.* Although the DOC and the board may not impose conditions of community custody "that are contrary to those ordered by the court, and may not contravene or decrease court-imposed conditions," the DOC and the board are clearly authorized to impose conditions *in addition to* those imposed by the court. RCW 9.94A.713(2); see also RCW 9.95.420(2).

In this case, Richardson cites State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003), as controlling. In Jones, the court concluded that a sentencing court cannot require an alcohol

evaluation and treatment as a condition of community custody unless the sentencing court makes a finding that the use of alcohol contributed to the offense. The Jones court reached this conclusion in order to avoid rendering superfluous the requirement in RCW 9.94A.700(5) that such counseling and treatment be "crime-related." Jones, 118 Wn. App. at 207-08.

However, Richardson fails to recognize that additional conditions of community custody as may be deemed appropriate by the DOC and the board under RCW 9.94A.713 need not be "crime-related." Rather, they need only be "based upon the risk to community safety." RCW 9.94A.713(1). Therefore, because the condition of community custody at issue here is contingent upon a finding by the sexual deviancy treatment provider or CCO, and will only be implemented upon a risk assessment and recommendation to the board by the DOC, the trial court in this case has done no more than authorize the DOC and the board to do what they already have authority to do by statute.⁸ In short, because condition of community custody number 18 is contingent upon

⁸ In this respect, the community custody condition at issue here is arguably superfluous.

proper action by the DOC (see CP 101), Jones is not on point and Richardson's claim should be rejected.

But even if this Court finds that Richardson's claim has merit and determines that condition number 18 should be stricken, it should do so without prejudice to the DOC's authority to order an evaluation and treatment if it deems such action necessary to protect community safety if and when Richardson becomes eligible for release from total confinement.

- b. The Conditions Prohibiting The Purchase Or Possession Of Alcohol And Internet Access Should Be Stricken Without Prejudice To The DOC's Authority To Impose Such Conditions In The Future.

The State agrees that the trial court lacked statutory authority to impose the portions of condition 20 prohibiting the purchase or possession of alcohol, and that condition 27 prohibiting internet access without prior approval is not statutorily authorized as worded. CP 101. First, although the relevant statute expressly provides that the use of alcohol may be prohibited, there is no such authorization for purchase or possession. RCW 9.94A.700(5)(d). Moreover, as this Court found in State v. O'Cain, 144 Wn. App. 772, 774, 184 P.2d 1262 (2008), a prohibition on internet usage is

valid only if it is crime-related. Accordingly, Richardson is correct that condition 20 should be stricken in part, and that condition 27 should be stricken entirely.

However, as discussed in detail above, the DOC and the board have much broader authority to impose conditions of community custody than the trial court does. Therefore, the conditions at issue should be stricken without prejudice to the DOC's authority to impose such conditions if deemed necessary to protect community safety.

c. The Condition Prohibiting Contact With Minor Children Should Be Clarified.

Lastly, the State agrees that community custody condition 13 is inconsistent with the no-contact provision of the judgment itself, and that this requires clarification by the trial court. *Compare* CP 97 (prohibiting unsupervised contact with minors "except the defendant's children"), *with* CP 100 (prohibiting contact with "any minor age children" without exception). Accordingly, this Court should remand for entry of an order clarifying whether condition 13 should also contain an exception for the defendant's biological children.

D. CONCLUSION

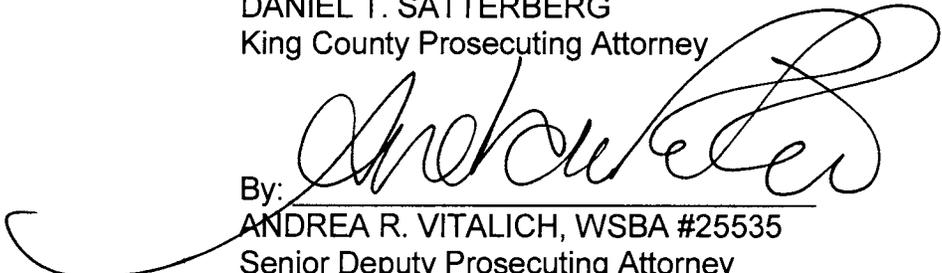
For all of the reasons stated above, this Court should affirm Richardson's convictions for rape of a child in the first degree and child molestation in the second degree. In addition, this Court should affirm the condition of community custody authorizing a substance abuse evaluation if required by Richardson's sexual deviancy treatment provider or CCO.

However, the State agrees that this Court should remand to the trial court for entry of an order striking the conditions of community custody prohibiting the purchase or possession of alcohol and internet access, and clarifying the condition of community custody prohibiting contact with minors.

DATED this 28th day of May, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. RYAN RICHARDSON, Cause No. 63014-8-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame
Name
Done in Seattle, Washington

5/28/10
Date