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NO. 64604-4-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

STEPHEN J. MONTGOMERY,

Appellant.

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SUPPLEMENTAL BRIEF OF RESPONDENT

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## I. ISSUES

1. 15-year-old C.H. reported an incident of child molestation to her mother, but her mother did not want to call authorities. Asked on direct examination if she believed her daughter, the mother said yes, but still hadn't wanted to call. No objection was lodged. Was eliciting the response manifest constitutional error resulting in actual prejudice, given the context in which it was presented?

Was trial counsel ineffective for failing to object, when prejudice has not been shown?

2. The complaining witness expressed anger and hostility towards the defendant. Trial counsel asked in cross-examination if this was because of past incidents, and she said yes. On re-direct, she stated that the defendant had done the same thing to her mother, her mother's friend, and her aunt. Trial counsel later explained to the court that sexual overtures by one adult to another was not a crime similar to that charged, and C.H.'s mention of them provided a motive for her to lie. Was counsel ineffective in employing this strategy?

## **II. STATEMENT OF THE CASE**

### **A. THE DEFENDANT'S MOLESTATION OF 15-YEAR-OLD C.H. AND HIS ADMISSIONS TO POLICE.**

On the afternoon of July 13, 2008, the defendant and his wife picked up 15-year-old C.H. to babysit their two children. Amended Verbatim Report of Trial Proceedings (hereafter "Amd. RP") 2-4, 6, 11, 61. The trip takes about 15-20 minutes. Amd. RP 27, 84-85. The defendant and his wife went out to dinner and got back around 11:30 p.m. The defendant offered to drive C.H. home. Amd. RP 7.

At first, in the car, the conversation was normal. C.H. told the defendant some of the boys she had dated had been jerks. Amd. RP 16. The conversation then veered to more sexual topics. The defendant started talking about areolas on a woman's breasts, and how they change. C.H. thought this conversation was a bit strange. Amd. RP 17. Meanwhile the defendant had offered her a wine cooler, which she drank. He offered her a second one and she took that too. Amd. RP 8-9, 16.

The defendant started talking about how the tip of man's penis is very sensitive. Amd. RP 20. C.H. looked over and could see the defendant had exposed himself and was masturbating. She was fairly explicit in her testimony, recalling the defendant's

penis was “kind of like standing up” and his right hand was moving up and down. Amd. RP 18-20, 33-34. She could see he was circumcised. Amd. RP 34. The defendant then grabbed her left hand and pulled it towards his groin. C.H. pulled her hand away. Amd. RP 21.

Things were quiet for a while. Amd. RP 21. They had been driving in a wooded area. Amd. P 22. The defendant then picked up the conversation as though nothing had happened. He started talking about breasts again. Amd. RP 22. He reached over and grabbed C.H.’s left breast, cupping it from the side. Amd. RP 22-23. C.H. recalled it was a light touching and had lasted maybe a second, if that, before she “kind of like brushed it.” Amd. RP 23-24. C.H. then “skooshed” over to the car door and acted like nothing had happened, not wanting things to get any more awkward than they already were. Amd. RP 24.

There was no more sexual conversation or sexual contact after that. The defendant took her home. Amd. RP 27-28. He had taken a roundabout way to get there, and it took a lot longer than the trip had that afternoon. Amd. RP 9-15, 27-28, 85-86. When C.H. got home – late – the defendant paid her the baby-sitting

money and came in briefly to say hello to her mother. Amd. RP 28-29, 61-62.

Once the defendant left, C.H. told her mother what had just happened. Amd. RP 29, 62. Her mother was upset but wanted to deal with it herself, rather than call police (although C.H. wanted them called). Amd. RP 30-31, 62-63. Her mother did say that she believed her daughter. Amd. RP 63. They did call the defendant's wife that night. Amd. RP 29-30, 62. In the end the police and CPS became involved some six weeks later anyway, when C.H. disclosed to her high school counselor. Amd. RP 31-32, 108-111.

Interviewed by police in his living room, the defendant admitted he had talked to C.H. about her sexual history, about her carrying a condom, and about the sensitive areas on a man's penis. Amd. RP 78, 122-23. He said he had been adjusting the swim trunks he was wearing as he drove, and while doing so his penis might have popped out and C.H. might have seen it. Amd. RP 80-81, 120-22. The defendant confirmed he was circumcised. Amd. RP 81. He denied touching C.H. sexually. Amd. RP 79. He admitted knowing that C.H. was 15. Amd. RP 86. At the time, the defendant was 46 years old. Amd. RP 85.

## **B. THE DEFENSE CASE.**

The defendant had told police he was only trying to be a father figure to C.H. Amd. RP 73, 125-26. Even after the incident, C.H. had baby-sat the Montgomery children two more times. Amd. RP 45, 52-53, 182. The defendant portrayed C.H. as biased against him. Amd. RP 48. Counsel questioned how C.H. could have seen the defendant's penis in the dark passenger compartment. Amd. RP 39. And he pointed out that C.H. had given inconsistent statements, in particular in initially not disclosing she had consumed alcohol. Amd. RP 36, 39, 43, 87.

The defendant's wife said her husband suffered from erectile dysfunction and low libido. Amd. RP 178-81, 184. She said he suffered from arm and leg spasms, too. Amd. RP 177-78, 185. One could notice it, she said, when he drove. Amd. RP 178. The defendant told officers that arm and hand spasms is what C.H. might have seen in the car. Amd. RP 81-83, 123-24, 173-74. The defendant did not testify. Amd. RP 186.

In closing argument defense counsel portrayed C.H. as biased and angry. Amd. RP 215, 233. Even the lead detective, he noted, had found C.H.'s statements inconsistent with her trial testimony. Amd. RP 217-18.

### **C. MEDICAL TESTIMONY.**

Doctors treating the defendant on an L & I claim involving his neck and shoulder testified they had not treated him for erectile dysfunction. Amd. RP 129, 138-39, 146, 154-55, 157-58; compare Amd. RP 79, 81 (defendant saying they had prescribed Viagra). And they were unaware of any “breakthrough spasticity” in the defendant’s arms and legs. Amd. RP 141, 146-47, 149, 154.

### **D. CHARGES, VERDICT, AND SENTENCE.**

The defendant was charged by amended information with one count of third-degree child molestation (a felony) and one count of communicating with a minor for immoral purposes (a gross misdemeanor). 2 CP 103-104. The jury convicted on both counts. 2 CP 58; 1 CP 2. The defendant was sentenced within the standard range on the felony charge, 2 CP 39-53, and to a year’s incarceration, suspended, on the misdemeanor. 2 CP 34-38. This appeal followed. This Court permitted substitution of counsel after opening briefs had been submitted. Appellant submitted a supplemental brief, to which the State responds.

### **III. SUPPLEMENTAL ARGUMENT**

#### **A. INQUIRING IF C.H.'S MOTHER HAD NOT CALLED POLICE BECAUSE SHE DIDN'T BELIEVE HER DAUGHTER WAS NOT IMPROPER. EVEN IF IT WAS, THE DEFENDANT CANNOT SHOW PREJUDICE.**

C.H. recalled that when she told her mother, T.H., what had happened in the car, her mother was "kind of like freaking out" and unwilling to call police. Amd. RP 30, 31. Her mother testified she had wanted "to work it out myself," without getting the police or the courts involved. Amd. RP 62, 63. The prosecutor explored whether her unwillingness to call authorities was because she did not believe her daughter:

Q: And, again, I ask the question, you didn't call police?

A: No.

Q: Are you likely to call the police on things like this?

A: Yes, I would have, but I just didn't want, didn't get . . .

Q: Did you believe your daughter?

A: One hundred percent.

Q: But you didn't call the police?

A: No. I would have liked to have worked it out myself, but the counselor –

Q: Oh, you wanted to deal with it without the court system getting involved?

A: Yep.

Amd. RP 63. The defendant assigns error to this exchange on appeal, complaining it improperly sought to bolster the credibility of another witness.

Generally, a witness may not testify regarding another witness's credibility. Such testimony is unfairly prejudicial because it invades the exclusive province of the jury. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). In determining whether a statement is improper opinion testimony, the reviewing court considers the totality of circumstances in the case, including (1) the type of witness, (2) the nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence. Id.

For example, evidence of police officer's comments that a defendant was not always truthful during an interview is generally improper. Demery, 144 Wn.2d at 756, 765-773; State v. Saunders, 120 Wn. App. 800, 812-13, 86 P.3d 232 (2004). This is because a police officer's testimony "may particularly influence the jury because of its special aura of reliability." Saunders, 120 Wn. App. at 812-13. But testimony from C.H.'s mother had no such "aura;" indeed, one would expect a mother to believe her daughter. Indeed, it would be significant only if T.H. did *not* believe C.H.

In Sutherby, the alleged victim's mother testified that she could tell when her five-year-old daughter was lying because she makes a half smile when she lies, but did not make a half smile when she accused Sutherby, her grandfather, of rape. State v. Sutherby, 138 Wn. App. 609, 616-17, 158 P.3d 91, aff'd, 165 Wn.2d 870, 204 P.3d 916 (2009). The testimony was offered for no purpose other than to bolster the young child's credibility through her mother's ability to read physical mannerisms. Id. The court reversed, explaining that the mother's testimony was prejudicial because it conveyed not only that her daughter told the truth when she disclosed the abuse, but that jurors could evaluate her daughter's credibility by whether or not she made a half smile while testifying. Id. at 617.

In Jerrels, the prosecutor repeatedly elicited on cross-examination that the mother of two alleged victims, 11 and 6, believed they were telling the truth, even though she had had no suspicions. State v. Jerrels, 83 Wn. App. 503, 507-08, 925 P.2d 209 (1996). As in Sutherby, the testimony appeared to have no other purpose than to bolster credibility. The court reversed, finding that credibility was central to the case and that, in the light of other

evidence, the repeated improper questioning was material to the outcome of the trial. Id.

This case is different. As for the type of witness and the nature of the testimony, at issue was the victim's mother testifying about what she did *not* do when her daughter disclosed. The prosecutor's single question was not part of a strategy to establish C.H.'s credibility generically, as was the case in Sutherby and Jerrels. Rather, the prosecutor elicited T.H.'s answer to show T.H.'s motives in not calling authorities. See Amd. RP 229 (arguing in rebuttal that C.H.'s mother made some bad choices in not calling police, despite believing her daughter). As discussed above, the defense was bias, inconsistencies, mistake, and medical impossibility, none of which was undermined by T.H.'s single statement that she didn't call police even though she believed her daughter. And while the felony charge was a sex offense, where typically a victim's credibility is concededly central, here the defendant's *own* statements to police bolstered much of what C.H. had said: The defendant admitted he had talked to C.H. about her sexual history and in particular about the sensitive areas on a man's penis. Amd. RP 78, 122-23. And he recounted he had been adjusting the swim trunks he was wearing as he drove, and while

doing so his penis might have popped out and C.H. might have seen it. Amd. RP 80-81, 120-22. And while he denied masturbating, or cupping C.H.'s breast, Amd. RP 79, 81-82, 121-22, his detailed description of penile sensitivity, Amd. RP 122-23 (telling C.H. the most sensitive area is the tip, or just under the head), said far more about C.H.'s credibility than T.H.'s single answer. Compare Amd. RP 20 (C.H. recalling the same thing).

Moreover, this claim of error is brought for the first time on appeal. Generally, a defendant waives any issues not raised in the trial court. RAP 2.5(a); see State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005). But a defendant can raise alleged "manifest" constitutional errors for the first time on appeal. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). An error is "manifest" only if it had "practical and identifiable consequences in the trial of the case." State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)); Jerrels, 83 Wn. App. at 508 (finding the error there material to outcome of trial); see also State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (for error to be "manifest," actual prejudice creating practical and identifiable consequences at trial must be demonstrated by the appellant).

The defendant argues the error here was manifest, citing State v. Kirkman, 159 Wn.2d 918, 927–28, 155 P.3d 125 (2007). Suppl. BOA 14-15. In the consolidated cases in Kirkman, a detective had testified that he followed a “competency protocol” is determining if the six- and eight-year-old alleged victims were telling the truth, eliciting promises that they would; and an examining physician testified that the child victims testified with appropriate affect for their age and subject matter. Kirkman, 159 Wn.2d at 923-25. No objection was made. Id. The Supreme Court held that the doctor’s and detective’s testimony did not bear directly on credibility, as neither witness had opined on whether the children were telling the truth. Kirkman at 929-34. And while recognizing that an explicit statement on credibility, as here, can be error, the Supreme Court held actual prejudice must also be shown for it to be “manifest.” Id. at 937.

Here, the defendant cannot establish prejudice, and thus cannot show manifest constitutional error. As defense counsel noted in closing, the only purpose of the State’s calling T.H. as a witness was to explain why police had not been called. Amd. RP 208. And, as discussed above, the State elicited the answer only to show that T.H.’s failure to call authorities was not driven by doubt

over the allegations. See Amd. RP 48 (questioning), 229 (argument).

Lastly, Sutherby, Jerrels, and Kirkman, all involved child victims ranging in age from 5 to 11. Sexual-assault cases with young victims are difficult to prosecute. E.g., State v. Batangan, 71 Haw. 552, 556-57, 799 P.2d 48, 51-52 (HI 1990). While a jury can normally rely on its common experience to assess credibility, this will often not be the case in sex cases involving young victims. Id. That being so, there can be a temptation to elicit evidence to bolster a very young child's credibility.

Such factors are absent here. The jury could assess a fifteen-year-old's credibility for itself, without special help or testimony. And the prosecutor's single question was placed in the context of explaining T.H.'s *behavior*, not C.H.'s *credibility*. The defendant has not shown manifest constitutional error. See Kirkman, 159 Wn.2d at 927–28 (defendant must show that constitutional error actually affected his rights at trial).

Alternatively, the defendant argues that trial counsel was ineffective in not objecting to the question. Suppl. BOA 12-14. To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective

standard of reasonableness and that the deficient performance prejudiced his trial. 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, 334–35, 899 P.2d 1251 (1995). Representation is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.3d 1239 (1997). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336. To show prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the outcome at trial would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If either one of the two prongs of the test is absent, the reviewing court does not inquire further. Strickland, 466 U.S. at 697.

Given the context in which the prosecutor had squarely placed the question, defense counsel could have had a tactical reason for not highlighting the response with an objection. No one had taken T.H.'s answer as an attempt to shore up C.H.'s testimony. Objecting to it, however, might have prompted the fact-finder to start to do so. “[W]hen or whether to object is a classic

example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). And a failure to object strongly suggests that the comment did not appear critically prejudicial to the defendant in the context of the trial. See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (context of closing argument).

Even if counsel's failing to object was deficient performance – a point not conceded – the defendant cannot show resulting prejudice, for the same reasons given above for why he cannot show manifest constitutional error.

Hendrickson, cited by defendant, involved the admission of testimony of a government agent that the holder of a social security card had lost his card and given no one else permission to use it. The holder himself never testified. This was testimony addressing the essential elements of a charge of identity theft, and not only comprised hearsay, but also violated the confrontation clause. The court could find no tactical reason for counsel's failing to object to such critical evidence, and indeed there is none. State v.

Hendrickson, 138 Wn. App. 827, 831-33, 158 P.3d 1257 (2007).

T.H.'s statement is not remotely comparable.

**B. COUNSEL CANNOT BE DEEMED INEFFECTIVE FOR EMPLOYING A LEGITIMATE TRIAL TACTIC.**

In limine, defense counsel sought to exclude evidence of prior bad acts: specifically, that C.H. thought the Montgomerys had been involved with CPS, due to an alleged drug problem; and that C.H. was concerned for the safety of the defendant's stepdaughter, due to these allegations. 1 CP 24-25. The trial court granted the motion. 2 CP 60.

In cross-exam of C.H., defense counsel inquired:

Q: You don't like my client, do you?

A: Not anymore.

Q: In fact, you told my investigator you were angry at my client, correct?

A: Yes.

Q: And you were angry at my client not only based on the allegations in this situation but for other allegations; isn't that correct?

A: Yes, in the past.

Amd. RP 48. On re-direct, the prosecutor inquired:

Q: So what were you upset about in the past?

A: That I found out that he's done this to my mom, my mom's friend, and my aunt.

Q: And that makes you angry?

A: Yes.

Q: And you're angry with what he did to you?

A: Yes.

Id. After testimony had concluded, the prosecutor recalled the exchange to the trial court, and that he understood defense counsel was not seeking a limiting instruction, but, rather, using C.H.'s anger over alleged or perceived past incidents as a basis for motive. Amd. RP 187-89. Defense counsel confirmed that his questioning was contemplated; that he needed a motive for why C.H. would come up with this story, and her anger over perceived past incidents supplied one; and that it was clear, especially given the mother having testified, that what was involved was an individual "making a pass at another adult" or adults, and not other instances involving sexual offenses on minors. Amd. RP 189-90. Given that distinction, counsel did not see the need for a limiting instruction. Id. On appeal the defendant claims this tactic comprised ineffective assistance. Suppl. BOA 7-12.

As set forth above, to prevail in a claim of ineffective assistance of counsel, the defendant must demonstrate that (1) defense counsel's representation was *deficient*, i.e., it fell below an

objective standard of reasonableness based on consideration of all the circumstances; and (2) this deficient performance resulted in *actual prejudice*. Strickland v. Washington, 466 U.S. at 687.

Here, defense counsel explained on the record that he sought to establish a basis for C.H.'s bias and anger.<sup>1</sup> As he explained, he needed a motive for her story, and anger at the defendant having allegedly made sexual overtures to C.H.'s mother, aunt, and a mutual friend supplied it. Amd. RP at 189-90. This was not, as he stressed, evidence of other sex crimes against children; indeed, it was not evidence of other crimes at all. Id. The trial judge acknowledged that "we couldn't even necessarily consider them prior bad acts." Amd. RP 190.

Deficient performance is not shown by matters that go to trial strategy or tactics. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). A court may not sustain a claim of ineffective assistance if there was a legitimate tactical reason for the allegedly incompetent act. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). "[S]trategic choices made after thorough investigation

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<sup>1</sup> While not obvious from the bare written record, C.H. apparently became angry on the witness stand, for defense counsel referenced her doing so in his closing argument. Amd. RP at 215.

of law and facts relevant to plausible options are virtually unchallengeable . . ." Strickland, 466 U.S. at 690.

The defendant disagrees, arguing that eliciting prior bad act evidence is *always* a bad idea in a sex case. He cites Sutherby for this proposition. The Supreme Court in Sutherby addressed counsel's failure to move to sever child pornography counts from child rape and child molestation charges, and could conceive of no legitimate tactical reason for declining to do so. Sutherby, 165 Wn.2d at 883-87. But trial counsel there did not set forth his or her tactical reasons; instead, respondent surmised what they might be. Here, however, we know why counsel chose to do as he did. And Sutherby addressed the effect of multiple *child sex offenses*, whereas, as the trial court stated, what was involved here was not necessarily even prior *bad acts* at all. See Amd. RP 190.

Counsel on appeal argues for a per se rule, but that is a disfavored approach that ignores the presumption of trial counsel's effectiveness. See State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011) (argument based on failure to request a lesser included offense instruction as per se ineffective "without merit"), rev'g State v. Grier, 150 Wn. App. 619, 643, 645, 208 P.3d 1221

(2009). And second-guessing counsel's choices with the luxury of hindsight is not the correct inquiry either:

It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland, 466 U.S. at 689. Trial counsel had an angry complaining witness, and he employed what appeared to be a reasonable strategy to explain her hostile attitude and bias. See Amd. RP 189-90; see n.1. One may or may not agree with that strategy, but a court may not sustain a claim of ineffective assistance if there was a legitimate tactical reason for the allegedly incompetent act. State v. Garrett, 124 Wn.2d at 520. Here, there was.

#### IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on August 4, 2011.

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