

NO. 65054-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

REGINALD SPEACH,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

---

**BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

ANN SUMMERS  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. FACTS OF THE CRIME .....	3
C. <u>ARGUMENT</u> .....	8
1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN RULING THAT EVIDENCE OF THE VICTIM'S PRIOR BAD ACT WAS INADMISSIBLE .....	8
2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN RULING THAT THE DEFENDANT COULD NOT TESTIFY AS TO HIS LACK OF CRIMINAL HISTORY .....	11
3. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE BY BRIEFLY REFERRING TO THE LAKEWOOD POLICE OFFICER MURDERS, WHICH HAD HAPPENED THE PREVIOUS DAY ...	14
4. DEFENDANT HAS FAILED TO ESTABLISH THAT COUNSEL'S PERFORMANCE WAS PREJUDICIAL .....	17
D. <u>CONCLUSION</u> .....	22

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,  
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 18, 19

Washington State:

Kennewick v. Day, 142 Wn.2d 1,  
11 P.3d 304 (2000).....9, 12

State v. Bell, 60 Wn. App. 561,  
805 P.2d 815 (1991)..... 10

State v. Elmore, 139 Wn.2d 250,  
985 P.2d 289 (1999).....21

State v. Garcia, 57 Wn. App. 927,  
791 P.2d 244 (1990)..... 19

State v. Garrett, 124 Wn.2d 504,  
881 P.2d 185 (1994)..... 19

State v. Hansen, 46 Wn. App. 292,  
730 P.2d 706 (1986)..... 15

State v. Jackman, 156 Wn.2d 736,  
132 P.3d 136 (2006)..... 17

State v. Levy, 156 Wn.2d 709,  
132 P.3d 1076 (2006)..... 15

State v. Louie, 68 Wn.2d 304,  
413 P.2d 7 (1966)..... 15

State v. McFarland, 127 Wn.2d 322,  
899 P.2d 1251 (1995)..... 18

<u>State v. Mercer-Drummer</u> , 128 Wn. App. 625, 116 P.3d 454 (2005), <u>rev. denied</u> , 156 Wn.2d 1038 (2006).....	13
<u>State v. O'Neill</u> , 58 Wn. App. 367, 793 P.2d 977 (1990).....	12, 13
<u>State v. Thach</u> , 126 Wn. App. 297, 106 P.3d 782 (2005), <u>rev. denied</u> , 155 Wn.2d 1005 (2005).....	13
<u>State v. Whyde</u> , 30 Wn. App. 162, 632 P.2d 913 (1981).....	10

Constitutional Provisions

Washington State:

Const. art. IV, § 16 .....	15
----------------------------	----

Rules and Regulations

Washington State:

ER 404 .....	1, 9, 10, 12, 14
ER 405 .....	1, 12, 13, 14

Other Authorities

<u>A path to murder: The story of Maurice Clemmons</u> , The Seattle Times, April 12, 2001, p. 1 .....	16
---	----

A. ISSUES PRESENTED.

1. Pursuant to ER 404(b), prior acts of a victim are not admissible to prove her character to show action in conformity therewith. T.K.'s prior suspension from school was not admissible to show a propensity for misbehavior. Because no nexus was shown between the suspension and a motive to fabricate the allegations against the defendant, did the trial court properly exercise its discretion in excluding evidence of the suspension?

2. Pursuant to ER 404(a) and 405, pertinent character evidence must be proved by reputation evidence. The defendant did not offer reputation evidence of a pertinent trait. Did the trial court properly exercise its discretion in excluding the defendant's own testimony that he had no criminal history and thus, a law-abiding character.

3. A trial court unconstitutionally comments on the evidence when the court makes a statement that conveys its opinion about the merits of the case or instructs the jury that a disputed fact has been established. The court's brief comment about an unrelated, high profile police shooting had nothing to do with the present case, and could not be reasonably construed as a

comment on the witnesses in the present case. Was the comment an unconstitutional and prejudicial comment on the evidence?

4. In order to establish ineffective assistance of counsel, a defendant must establish that counsel's oversight resulted in prejudice. Here, counsel's oversight was not prejudicial because the question that counsel failed to ask was asked by the prosecutor in cross-examination. Moreover, the defendant has failed to show that further testimony on that point would probably have changed the outcome of the trial. Has the defendant failed to establish ineffective assistance of counsel?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Reginald Speach was charged by amended information with four counts of rape of a child in the third degree and one count of communicating with a minor for immoral purposes. CP 18-20. A jury acquitted Speach of the four counts of rape of a child in the third degree and convicted him of communicating with a minor for immoral purposes. CP 97-101. The court imposed a twelve-month suspended sentence with 30 days of confinement. CP 126-30.

## 2. FACTS OF THE CRIME.

S.M. and T.K. were both foster children who were placed in the home of Madelynn and Reginald Speach. RP (11/24/09 a.m.) 42-43; RP (11/30/09) 18-19. S.M. started living with the Speaches when she was 13 years old. RP (11/24/09 a.m.) 55. Her biological sister, Rebecca, was living in the home before S.M. moved there. RP (11/24/09 a.m.) 53. Once she moved in, S.M. liked living in the Speach home, and began calling them "Mom" and "Dad." RP (11/24/09 a.m.) 55-57. However, she testified that Reginald began slapping her on the butt and making inappropriate comments to her, which made her uncomfortable. RP (11/24/09 a.m.) 59. He asked her questions about her sexual history, which also made her uncomfortable. RP (11/24/09 a.m.) 61. She testified that in September or October of 2006, when she was 14 years old, Reginald came into her bedroom and had sex with her. RP (11/24/09 a.m.) 78-93. She testified that she remembered Reginald having sex with her on other dates in his bedroom, on the couch in the living room and in the hallway. RP (11/24/09 p.m.) 8-13, 15-19, 21-22. She did not protest or tell anyone about these incidents at the time they happened. RP (11/24/09 a.m.) 88, 92; (11/24/09 p.m.) 14.

S.M. testified that one day in January of 2007 she was cleaning the upstairs bathroom when she heard T.K., who was also living in the home, talking to Reginald in his bedroom. RP (11/24/09 p.m.) 24-25. She heard Reginald tell T.K. that Madelynn was going out of town and that he could teach her about "the birds and the bees." RP (11/24/09 p.m.) 25. After overhearing that conversation, S.M. confronted T.K. about what she heard. RP (11/24/09 p.m.) 26. The two girls conferred with each other, and with S.M.'s sister, Rebecca, about what to do. RP (11/24/09 p.m.) 28-29. The next day, on January 26, 2007, S.M. told the assistant principal at her school that she had been propositioned by her foster father. RP (11/23/09) 39, 63, 74; (11/24/09 p.m.) 29, 33. The assistant principal contacted Child Protective Services. RP (11/23/09) 40. Police officers were dispatched to the home and the girls were removed from the home that day. RP (11/23/09) 74, 80. Although S.M. testified in court to only four instances of sexual intercourse that she could remember, she thought it had happened ten times. RP (11/24/09 p.m. 38). However, she told a police detective that it had happened 20 to 25 times. RP (11/24/09) 52-53.

T.K. also lived in the Speach home. She lived there in 2003 and 2004 before leaving to live with some of her relatives. RP (11/30/09) 16-24. She asked to return to the Speach home in 2006 because she felt comfortable there. RP (11/30/09) 24-26, 53. When she returned, S.M. was also living in the home. RP (11/30/09) 26. In January of 2007, when she was 15 years old, T.K. went to Reginald and told him that she needed to talk about "the birds and the bees." RP (11/30/09) 36. He told her to come into his bedroom and instructed her to close the door. RP (11/30/09) 36. He asked her questions about her sexual past, and then stated, "I want to ask you something." RP (11/30/09) 36. He hesitated, saying "No, you are going to tell." RP (11/30/09) 36. When she assured him she would not "tell," he asked her "Can I hit it?", which is slang for "Can we have sex?" RP (11/30/09) 36, 40; (12/1/09) 119. He explained that "we will try it" when Madelynn, who was planning a trip to Atlanta, was out of town. RP (11/30/09) 36, 41; RP (12/1/09) 105. T.K. was shocked and did not respond, but simply left the room. RP (11/30/09) 36. She did not believe that he was joking. RP (11/30/09) 49.

T.K. testified that S.M. was home at the time and T.K. told her what Reginald had said to her. RP (11/30/09) 36. When the

girls were contacted by the police the next day, T.K. had not told anyone but S.M. and another good friend about what Reginald had said to her. RP (11/30/09) 43-44.

Officers Chris Martin and Brian Walsh contacted S.M. and T.K. on January 26, 2007. RP (11/23/09 a.m.) 74-76. The girls were walking together down the road from the Speach home. RP (11/23/09 a.m.) 76. After the officers talked with the girls, Officer Martin advised other officers that there was probable cause to arrest Reginald. RP (11/23/09 a.m.) 79.

Officer Oscar Villanueva went to the Speach home and spoke to Madelynn. RP (11/24/09 a.m.) 5-9. He advised her that they were looking for her husband. RP (11/24/09 a.m.) 9. While he was there, Reginald called on the telephone. RP (11/24/09 a.m.) 9-11. Madelynn handed Officer Villanueva the telephone, and the officer asked Reginald how he was doing. RP (11/24/09 a.m.) 10. Reginald responded, "not so good," and Officer Villanueva asked him why. RP (11/24/09 a.m.) 10. Reginald stated, "Because I think it's about saying something inappropriate to [T.K.]." RP (11/23/09 a.m.) 11. Reginald returned to the home ten minutes later and was placed in custody. RP (11/23/09 a.m.) 11.

Madelynn Speach testified for the defense. RP (12/1/09) 59. She testified that she is a certified addictions counselor and has been a foster parent to more than 10 children. RP (12/1/09) 64. She was a foster parent to T.K. before she married Reginald in 2006. RP (12/1/09) 62, 67. She testified that when the police came to her home on January 26, 2007, they were looking for S.M. and T.K. RP (12/1/09) 79, 88. She told them the girls had just left for the library. RP (12/1/09) 88. They did not tell her why they were looking for the girls. RP (12/1/09) 88. The police came back later. RP (12/1/09) 88. She confirmed that she had a trip to Atlanta planned in January, 2007. RP (12/1/09) 105.

Reginald Speach testified in his own defense. RP (12/1/09) 133. He testified that he was retired from the United States Army, and testified about his military career. RP (12/1/09) 134. He was medically discharged from the army due to knee injuries. RP (12/1/09) 135. He testified about the other jobs he held, with a medical supply company and the post office, after his discharge from the army. RP (12/1/09) 137-38. He retired due to continued problems with his knees. RP (12/1/09) 138. He testified that he never had sex with S.M. and never sexually propositioned the children. RP (12/1/09) 147-48. On cross-examination, he testified

that on the day of his arrest he called home and briefly spoke to his wife before speaking to a police officer on the telephone. RP (12/1/09) 176. She told him the police were there and wanted to speak to him. RP (12/1/09) 176.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN RULING THAT EVIDENCE OF THE VICTIM'S PRIOR BAD ACT WAS INADMISSIBLE.

The defendant contends that the trial court abused its discretion in excluding evidence of T.K.'s prior suspension from school. This claim should be rejected. The trial court reasonably concluded that this evidence was inadmissible propensity evidence.

Prior to trial, the State moved to exclude what it termed "behavioral issues" of T.K. RP (11/17/09) 111. In response, defense counsel stated that "we don't know what the testimony is going to be." RP (11/17/09) 111. The parties then discussed the fact that T.K. had been suspended from school, although the basis for the suspension and the date of the suspension are unclear from the record. RP (11/17/09) 112-16. The court concluded that T.K.'s suspension from school was a prior bad act, and would be excluded. RP (11/17/09) 116.

A trial court's decision to admit or to exclude evidence is reviewed for abuse of discretion. Kennewick v. Day, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). The trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. Id.

ER 404(b) provides that "evidence of other crimes, wrong, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence is admissible for other purposes, such as proof of motive, intent or plan.

ER 404(b). T.K.'s suspension from school is a prior bad act. It was inadmissible pursuant to ER 404(b), unless the defendant could show it was relevant to some purpose other than a propensity to misbehave.

The defense argued below that the suspension was relevant to T.K.'s willingness to manipulate the foster care system.

However, it was unclear how this related to the present charges against the defendant. For example, no evidence was presented that T.K. wished to leave the Speech home. Without some clear nexus between the suspension from school for unstated reasons,

and a motive to fabricate an allegation against the defendant, the evidence was mere propensity evidence. See State v. Bell, 60 Wn. App. 561, 564, 805 P.2d 815 (1991) (victim's past instances of homosexual behavior inadmissible pursuant to ER 404(b)). The trial court's decision to exclude the evidence was not manifestly unreasonable or based on untenable grounds.

The defendant's reliance on State v. Whyde, 30 Wn. App. 162, 632 P.2d 913 (1981), is misplaced. In that case, the court held that the victim's threat to sue the owner of the apartment building where she was allegedly raped was relevant to show bias. Id. at 166. The court followed other jurisdictions in holding that whether a victim intends to commence a lawsuit for money damages is a proper subject for impeachment. Id. Whyde is inapposite. There is no evidence that T.K. intended to sue anyone. There is no argument that T.K. stood to financially benefit from her allegation against the defendant. The trial court's exclusion of evidence of T.K.'s suspension from school was not an abuse of discretion.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN RULING THAT THE DEFENDANT COULD NOT TESTIFY AS TO HIS LACK OF CRIMINAL HISTORY.

The defendant contends that the trial court abused its discretion in excluding his own testimony that he had no arrest record or criminal history. This claim should be rejected. The trial court correctly ruled that the defendant's own testimony was not admissible to prove his character as a law-abiding citizen.

Assuming such character evidence was pertinent, it needed to be proved by reputation evidence, which the defense did not offer.

In pretrial motions, the State moved to exclude evidence that the defendant had no criminal history. RP (11/17/09) 101. In response, the defense clarified that it was not intending to offer reputation evidence, and the court reserved its ruling. RP (11/17/09) 102-05. The next day, the issue was discussed again. The defense argued that it wanted Madelynn Speach to testify as to her husband's reputation, but also wanted the defendant to tell the jury himself about his "faultless reputation" and that he had no prior arrests or criminal history. RP (11/18/09) 56-57. The defense argued that the evidence was relevant to the defendant's morality. RP (11/18/09) 58-59. The court ruled that if the State offered

evidence of the defendant's nervousness while under arrest to imply guilt, the defendant could rebut this testimony with evidence that he had never before been under arrest. RP (11/8/09) 59-60. The State indicated it would not offer evidence of the defendant's demeanor while under arrest. RP (11/18/09) 60. The court therefore ruled that the defendant's testimony about his lack of criminal history was inadmissible. RP (11/18/09) 60. In the middle of trial, the court requested briefing on the admissibility of reputation evidence. RP (11/30/09) 5. In response, defense counsel stated that the defense had decided not to offer any reputation evidence. RP (11/30/09) 7.

Character evidence is governed by ER 404. ER 404(a)(1) provides that "evidence of a pertinent trait of character offered by an accused," is admissible. ER 405 provides that "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation." Character evidence is pertinent when offered to support the existence of an affirmative defense. Kennewick, 142 Wn.2d at 10. However, such evidence can only be offered in the form of evidence of reputation. State v. O'Neill, 58 Wn. App. 367, 370, 793 P.2d 977 (1990). A defendant may not attempt to prove his

law-abiding character by testifying to the absence of an arrest record. Id. In State v. Mercer-Drummer, 128 Wn. App. 625, 632, 116 P.3d 454 (2005), rev. denied, 156 Wn.2d 1038 (2006), the court held that a character trait of being a law-abiding citizen was not pertinent to the charge of assault. The court also held that ER 405 does not allow proof of the defendant's character to be made in the form of the defendant's own testimony. Id. Thus, as in O'Neill, the Mercer-Drummer court held that the defendant's testimony that she had no arrest record was not admissible. Id.

In the present case, the trial court properly exercised its discretion in ruling that the defendant would not be allowed to testify as to his lack of an arrest record in order to prove his character as a law-abiding citizen. Even assuming his law-abiding character was pertinent to the charges, it could only be proved in the form of reputation evidence pursuant to ER 405. The defense declined to offer reputation evidence on this point. Indeed, there is no showing that the defense had any proper reputation witness available. In order to offer reputation evidence, a foundation must be laid that the witness and defendant are part of a neutral and generalized community. State v. Thach, 126 Wn. App. 297, 315, 106 P.3d 782 (2005), rev. denied, 155 Wn.2d 1005 (2005). A

family does not constitute a neutral and generalized community for purposes of reputation evidence. Id.

In sum, the defense offered no witness who could testify as to the defendant's reputation as a law-abiding citizen within a neutral and generalized community. The trial court correctly ruled pursuant to ER 404(a)(1) and ER 405 that the defendant could not testify to his own character by means of testifying that he had no arrest record or criminal history. The trial court did not abuse its discretion.

3. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE BY BRIEFLY REFERRING TO THE LAKEWOOD POLICE OFFICER MURDERS, WHICH HAD HAPPENED THE PREVIOUS DAY.

Speech contends that the trial court issued an unconstitutional comment on the evidence when the court made a brief statement referring to the shooting of four Lakewood police officers, which happened on the day before the judge's comment. Speech's claim should be rejected. The court's statement could not be construed as conveying his attitude toward the merits of the evidence or the issues presented in Speech's case. As such, it was not a comment on the evidence.

Under article IV, section 16 of the state constitution, a judge is prohibited from conveying her personal opinion about the merits of the case to the jury or from instructing the jury that a fact at issue has been established. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Any remark “that has the potential effect of suggesting that the jury need not consider an element of an offense” is a judicial comment on the evidence. Id.

The purpose of the prohibition against judicial comments on the evidence is to prevent the jury from being influenced by the trial judge's opinion of the evidence. State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 706 (1986). A statement by the court is a comment on the evidence only if the court's attitude toward the merits of the case or the court's evaluation of a disputed issue can be inferred from the statement. Id. A comment as to an admitted or undisputed fact is not a comment on the evidence. State v. Louie, 68 Wn.2d 304, 314, 413 P.2d 7 (1966). In State v. Hansen, 46 Wn. App. at 301, this Court found a challenged comment by the trial court was not a comment on the evidence because it related to a peripheral and unimportant issue and was ambiguous.

In the present case, on the sixth day of trial, the trial court made the following statement to the jury at the beginning of the proceedings:

Welcome back. I hope you all had a nice Thanksgiving. We had real bad news for the State, four officers being killed yesterday, and the Defense and the Prosecution wanted me to let you know that they all share in your mourning.

RP (11/30/09) 8. This was a reference to the four Lakewood police officers who were killed by Maurice Clemmons on November 29, 2009.<sup>1</sup> Neither party had requested the court to make this statement. Later the same day, the defense objected to the court's statement as a comment on the evidence. RP (11/30/09) 94. The court explained that it made the statement because it was concerned about racial prejudice that might be engendered by the Lakewood shooting. RP (12/1/09) 4; (2/4/10) 9.

The court's statement about the Lakewood shooting was not a comment on the evidence. It had nothing whatsoever to do with the case at hand. The comment in no way suggested that the jury need not consider an element of the offenses. It could in no way be construed as reflecting the court's attitude toward the evidence in

---

<sup>1</sup> See A path to murder: The story of Maurice Clemmons, The Seattle Times, April 12, 2001, p. 1.

this case or the court's evaluation of a disputed issue in this case. The trial court's comment cannot be reasonably construed as either a comment on the credibility of police officers in general, or a comment on the credibility of the officers involved in this case, as the defendant claims. The court's statement was not a comment on the evidence.

Even if the instruction was a comment on the evidence, it was not prejudicial. A judicial comment on the evidence in a jury instruction is presumed prejudicial, and the burden is on the State to show that the defendant was not prejudiced. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Under the circumstances, this court can conclude that the comment was not prejudicial, since it had nothing to do with the issues or the witnesses presented at trial.

**4. DEFENDANT HAS FAILED TO ESTABLISH THAT COUNSEL'S PERFORMANCE WAS PREJUDICIAL.**

Speach alleges that he was denied effective assistance of counsel at the penalty phase of his trial. His claim of ineffective assistance of counsel should be rejected. Speach cannot show

prejudice. Thus, he has failed to establish ineffective assistance of counsel.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

The petitioner has the burden of establishing ineffective assistance of counsel. Strickland, 466 U.S. at 687. To prevail on a claim of ineffective assistance of counsel the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different (the prejudice prong). Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it

need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Strickland, 466 U.S. at 689. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Strickland, 466 U.S. at 689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

In addition to overcoming the strong presumption of competence and showing deficient performance, the petitioner must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Strickland, 466 U.S. at 693. If the standard were so low, virtually any act or omission would meet the test. Strickland, 466 U.S. at 693. Petitioner must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694.

The defendant had two attorneys that represented him at trial. In a motion for new trial, those attorneys asserted that they had

rendered ineffective assistance of counsel by failing to ask the defendant whether he had briefly spoken to his wife before talking to Officer Villanueva on the telephone. CP 104. Counsel stated they had no tactical reason for failing to elicit this testimony. CP 105. The trial court refused to consider the motion for new trial, stating that it should be left to the appellate court. RP (2/4/10) 9.

Although defense counsel did not ask the defendant about whether he spoke to his wife, the prosecutor did ask that question in cross-examination. The defendant testified that he spoke to his wife briefly before talking to Officer Villanueva on the telephone, testimony that was corroborated by Officer Villanueva's testimony that Madelynn handed the telephone to him. RP (11/24/09 p.m.) 9-10; (12/1/09) 176. Because this evidence was elicited in cross-examination, defense counsel's failure to ask the question could not have been prejudicial. The defendant has failed to establish ineffective assistance of counsel.

The defendant argues on appeal that he was prejudiced by counsel's failure to elicit testimony from the defendant as to his knowledge of the accusations against him. However, the defendant's argument that he was prejudiced by this failure assumes facts that are not in the record. Officer Villanueva did not

testify as to what information he gave Madelynn about the accusations. Likewise, Madelynn did not testify as to what information Officer Villanueva gave her, or what information she relayed to the defendant in their brief telephone conversation. It is possible that both these witnesses would have corroborated the defendant's claim that Madelynn told him he was being accused of saying something inappropriate to T.K. It is also possible they might not have. However, without some corroboration from Officer Villanueva and Madelynn, the defendant's testimony standing alone would have been self-serving and not persuasive to the jury.<sup>2</sup> Because there is no evidence in the record that Officer Villanueva and Madelynn could have corroborated the defendant's testimony on this point, the defendant cannot establish that counsel's failure to ask him would more probably than not have affected the outcome on the trial. Having failed to show prejudice, the defendant's claim of ineffective assistance of counsel should be rejected.

---

<sup>2</sup> In arguing that he was prejudiced, the defendant attempts to rely on unattributed hearsay statements made to trial counsel by the jurors about their deliberations. These statements about the jury's thought processes inhere in the verdict and may not be considered by this Court. State v. Elmore, 139 Wn.2d 250, 294 n.17, 985 P.2d 289 (1999) (jurors' individual and collective thought processes leading to a verdict inhere in the verdict and may not be considered).

D. CONCLUSION.

The defendant's misdemeanor conviction for communicating with a minor for immoral purposes should be affirmed.

DATED this 9<sup>th</sup> day of December, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: 

ANN SUMMERS, WSBA #21509  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

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 David Donnan, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. SPEACH, Cause No. 65054-8-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

12/9/10  
Date

2010 DEC -9 PM 4:20