

NO. 65494-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JASON KNUTH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY,

THE HONORABLE JUDGE DOUGLASS NORTH

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS--THE SECOND TRIAL	3
C. <u>ARGUMENT</u>	17
1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE DEFENDANT'S REQUEST TO RE-INTERVIEW LS	17
a. The Legal Standard.....	17
b. The Facts	19
c. A Lack Of Materiality	26
d. A Lack Of Reasonableness.....	28
e. CrR 4.7(e)(2), An Additional Reason Supporting The Court's Ruling	29
f. The Defendant Cannot Show Prejudice	31
g. Request For A Deposition	34
2. THE DEFENDANT HAS FAILED TO SHOW THAT HE IS ENTITLED TO A NEW TRIAL BASED UPON A CLAIM OF MISCONDUCT	36
3. THE DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS WITHOUT MERIT	46

a.	Standard Of Review	47
b.	A Defendant May Not Bootstrap A Waived Issue By Claiming Ineffective Assistance Of Counsel.....	48
4.	THE DEFENDANT HAS FAILED TO SUSTAIN HIS BURDEN IN SEEKING REVERSAL OF HIS CONVICTION PURSUANT TO THE "CUMULATIVE ERROR" DOCTRINE	51
D.	<u>CONCLUSION</u>	53

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Dennis v. United States, 384 U.S. 855,
86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966)..... 31, 32

Jones v. Barnes, 463 U.S. 745,
103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)..... 50

Murray v. Carrier, 447 U.S. 478,
106 S. Ct. 2639, 91 L. Ed. 2d (1986)..... 49

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)... 34, 35, 47, 48, 51

Washington State:

City of Tacoma v. Durham, 95 Wn. App. 876,
978 P.2d 514 (1999)..... 50

In re Stenson, 142 Wn.2d 710,
16 P.3d 1 (2001)..... 50

State v. Anderson, 153 Wn. App. 417,
220 P.3d 1273 (2009)..... 38, 42

State v. Badda, 63 Wn.2d 176,
385 P.2d 859 (1963)..... 52

State v. Bebb, 108 Wn.2d 515,
740 P.2d 829 (1987)..... 26

State v. Blackwell, 120 Wn.2d 822,
845 P.2d 1017 (1993)..... 18, 26

State v. Boyd, 160 Wn.2d 424,
158 P.3d 54 (2007)..... 19, 28

<u>State v. Britton</u> , 27 Wn.2d 336, 178 P.2d 341 (1947).....	33
<u>State v. Burri</u> , 87 Wn.2d 175, 550 P.2d 507 (1976).....	17, 32
<u>State v. Clark</u> , 53 Wn. App. 120, 765 P.2d 916 (1988).....	18
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	51
<u>State v. Curtiss</u> , ___ Wn. App. ___, 250 P.3d 496 (2011).....	43, 47
<u>State v. Davis</u> , 60 Wn. App. 813, 808 P.2d 167 (1991), <u>aff'd</u> , 119 Wn.2d 657 (1992).....	48, 49
<u>State v. Devin</u> , 158 Wn.2d 157, 142 P.3d 599 (2006).....	28
<u>State v. Dhaliwal</u> , 150 Wn.2d 559, 79 P.3d 432 (2003).....	44
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	26
<u>State v. Harvey</u> , 34 Wn. App. 737, 664 P.2d 1281 (1983).....	40
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	34, 48
<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991).....	18
<u>State v. Hofstetter</u> , 75 Wn. App. 390, 878 P.2d 474 (1994).....	17, 32
<u>State v. Kilgore</u> , 107 Wn. App. 160, 26 P.3d 308 (2001), <u>aff'd</u> , 147 Wn.2d 288 (2002).....	18

<u>State v. Louie</u> , 68 Wn.2d 304, 413 P.2d 7 (1966).....	33
<u>State v. Mankin</u> , 158 Wn. App. 111, 241 P.3d 421 (2010).....	34
<u>State v. McKenzie</u> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	37, 43
<u>State v. Mode</u> , 57 Wn.2d 829, 360 P.2d 159 (1961).....	50
<u>State v. Pawlyk</u> , 115 Wn.2d 457, 800 P.2d 338 (1990).....	18, 19
<u>State v. Perrett</u> , 86 Wn. App. 312, 936 P.2d 426, <u>rev. denied</u> , 133 Wn.2d 1019 (1997).....	52
<u>State v. Reed</u> , 102 Wn.2d 140, 685 P.2d 699 (1984).....	37, 40
<u>State v. Robtoy</u> , 98 Wn.2d 30, 653 P.2d 284 (1982).....	18, 30
<u>State v. Sargent</u> , 40 Wn. App. 340, 698 P.2d 598, <u>rev. denied</u> , 111 Wn.2d 641 (1985).....	40
<u>State v. Smith</u> , 72 Wn.2d 479, 434 P.2d 5 (1968).....	33
<u>State v. Stein</u> , 144 Wn.2d 236, 27 P.3d 184 (2001).....	45
<u>State v. Stover</u> , 67 Wn. App. 228, 834 P.2d 671 (1992), <u>rev. denied</u> , 120 Wn.2d 1025 (1993).....	40
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	47, 48

<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	37, 43, 44
<u>State v. Willis</u> , 151 Wn.2d 255, 87 P.3d 1164 (2004).....	18
<u>State v. Yates</u> , 111 Wn.2d 793, 765 P.2d 291 (1988).....	18

Constitutional Provisions

Washington State:

Const. art. I, § 35.....	28
--------------------------	----

Statutes

Washington State:

RCW 7.69.010.....	28
RCW 7.69A.010	28
RCW 7.69A.030	28
RCW 9.68A.001	28

Rules and Regulations

Washington State:

CrR 4.6.....	34, 35
CrR 4.7.....	1, 17, 18, 19, 26, 29, 30, 31

Other Authorities

RPC 4.4..... 28

www.kanninlaw.com..... 46

www.mywsba.org 46

A. ISSUES PRESENTED

1. The defendant asserts that his right to a fair trial was violated because his request to re-interview a seven-year-old molestation victim was denied. Has the defendant met his burden of proving that the trial court abused its discretion under CrR 4.7(e)(1) in denying the defendant's request? Has the defendant established that his right to a fair trial was prejudiced as a result of the denial of the request to re-interview the victim?

2. Did the prosecutor commit misconduct in closing argument and, if so, was the misconduct so egregious that the defendant's conviction must be reversed?

3. Should this Court reject the defendant's ineffective assistance of counsel claim because it is merely an attempt to circumvent the waiver provisions associated with his misconduct claim, i.e., his failure to object at trial?

4. Should this Court reject the defendant's ineffective assistance of counsel claim premised on his claim that his trial counsel should have moved to depose the seven-year-old victim?

5. Should this Court reject the defendant's "cumulative error" argument because he has failed to show multiple errors or substantial prejudice from the alleged errors?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On March 7, 2008, the defendant was charged with Child Molestation in the First Degree for acts he committed against then seven-year-old LS. CP 1-3. The defendant was represented by longtime defense counsel John Kannin. CP 141-45. Two trials ensued, with the first trial ending in a hung jury. The first trial occurred before the Honorable Judge Douglass North on April 15, 2009. During the first trial, LS recanted her allegations, testifying that the defendant had not molested her. 4RP¹ 708, 710-11. The jury was unable to reach a verdict, voting 11 to 1 to convict, and a mistrial was declared. CP 15; 10RP 1.

In February of 2010, the defendant proceeded to trial again. During the second trial, LS testified that she had been truthful all along, the defendant had molested her. 16RP 188. LS said she had previously testified to the contrary in the hope that the whole thing would just go away. 17RP 15. The jury returned a verdict of guilty as charged. CP 46.

¹ The verbatim report of proceedings is cited as follows: 1RP--4/15/09, 4/16/09, 4/20/09 & 4/21/09; 2RP--4/22/09; 3RP--4/23/09; 4RP--4/30/09; 5RP--5/4/09; 6RP--5/5/09; 7RP--5/6/09 & 5/11/09; 8RP--11/6/09; 9RP--11/30/09; 10RP--12/18/09; 11RP--2/22/10; 12RP--2/24/10; 13RP--2/25/10; 14RP--2/26/10; 15RP--3/1/10; 16RP--3/2/10; 17RP--3/3/10; 18RP--4/4/10; 19RP--5/21/10.

With three prior robbery convictions, the defendant received a standard range indeterminate sentence of 108 months. CP 90-100.

2. SUBSTANTIVE FACTS--THE SECOND TRIAL

Concord Elementary School is located in the South Park industrial area along the Duwamish River in South Seattle. 12RP 158-59. At the time of this incident, the victim, seven-year-old LS, and her brother, eight-year-old LVS, were students at the school. 12RP 165; 15RP 125; 16RP 144. Prior to this incident, teachers at the school were concerned and felt that LS needed to see a school counselor, and that both children needed to be in a school aftercare program. 12RP 168, 185-86. Their father, David Windhausen (hereinafter Windhausen), did not want this to happen. 12RP 168.

During this time period, LS would come to school everyday depressed, crying and upset. 12RP 169. On one occasion, LS wrote a story about wanting to die so she could be with her mother, Dawn LaBounty (also known as Farrah Soar--hereinafter referred to as Dawn).² 12RP 170; 15RP 135. When LS's teacher recognized that LS had suicidal thoughts, she immediately tried to get

² Details about Dawn are included below.

counseling for her, but Windhausen refused. 12RP 170-71. Still, sometime later, LS was placed in an afterschool support program called Starfish. 15RP 80.

On February 28, 2008, LS was in her afterschool program when she became very upset while working on a school project. 15RP 89-90. She told the program volunteer, Hailey Birnbaum, that she was poor and that she was afraid of CPS because they take children away from their families. 15RP 90-92. LS then disclosed to Birnbaum that her babysitter, the defendant, was hurting her and touching her in places he shouldn't. 15RP 94-95. She said that he made her sit on his lap and that it happened while they were watching TV with her brother. 15RP 95.

LS also confided in Birnbaum that she had told her father about the abuse but that he did not believe her. 15RP 96-98. She added that after her disclosure, the defendant had sent her to her room and deprived her of food. 15RP 96-98. LS expressed fear about what would happen if the defendant discovered that she had disclosed the abuse to Birnbaum.³ 15RP 98.

³ Earlier that same day, LS had also disclosed the abuse to Julie Turcott, a mental health clinician who was interning at the school that day. 15RP 29-30, 34, 51-54. LS told Turcott that the defendant had lied about abusing her and that she wanted her father to know that. 15RP 54.

Shortly thereafter, the defendant arrived at the school to pick up LS. 15RP 99, 101. Believing she had no recourse, Birnbaum allowed LS to leave with the defendant. 15RP 101-02. Birnbaum then talked to her supervisor whereupon CPS was called and alerted to LS's disclosure. 15RP 101-02.

LS's short life had been anything but ideal. She had grown up in a fifth-wheel trailer in a dilapidated marina, "more of a junkyard" on the Duwamish waterway off Second Avenue South. 13RP 90; 15RP 126-29. The small trailer was surrounded by oil drums, cargo containers, broken-down old cars, dilapidated boats, a half-sunken barge, and piles of junk. 13RP 91; 15RP 130, 135. The trailer had no functioning bathroom so the children were forced to use a shared restroom facility in the marina. 13RP 98; 15RP 139.

LS's father, David Windhausen, was a semi-truck driver who worked late-afternoon to early-morning shifts four days a week. 15RP 125, 147-48. This necessitated that the children be watched by various babysitters--some good ones and "some really bad" ones. 15RP 125, 147-48. Windhausen was described as a very controlling person. 12RP 168. Much of the junk piled up on the marina property was put there intentionally by Windhausen to get

back at the management of the marina who he did not like.

12RP 134. He testified that someone once tried to kill him and that on another occasion someone had loosened the lug nuts on his truck tire. 15RP 133. As a result, Windhausen testified, he "keeps an eye out on people." 15RP 133.

LS's mother, Dawn, is part of LS's life sporadically at best, leaving the family for long periods of time. 15RP 135. Prior to this incident, Windhausen felt it appropriate to have a "tell" with LS and LVS whereupon he informed them that when LS was just a baby, he had to retrieve her from a crack house where Dawn had hidden her and that he had considered putting LS--but not LVS--up for adoption. 15RP 140-41. He told LS that in the end, he couldn't do it, that she would just have to "suffer" along with LVS and himself. 15RP 142. Windhausen also told the children that they were "drug babies," that their mother was an alcoholic and drug addict, and that they would not be able to live with her. 12RP 205-06.

Shortly before becoming LS's babysitter, the defendant became a new live-aboard on one of the boats in the marina. 15RP 145, 147. He is a convicted felon whom Windhausen had known for only eight weeks prior to being hired to babysit his children. 15RP 147, 158, 160. Dorene, the prior babysitter, had a

drinking problem and had fled when CPS got involved with the family. 15RP 149, 154. "In a jam," the defendant offered to help Windhausen out. 15RP 154. Asked the defendant's qualifications to be a babysitter for his young children, Windhausen testified that the children liked the defendant and that every time Windhausen spoke with the defendant, he believed he was telling him the truth. 15RP 157.

The defendant began babysitting the children in November of 2007. 15RP 158, 160. He babysat them regularly until January 3, 2008, when Dawn returned and moved into the trailer for a brief period of time. 15RP 168, 171.

A few weeks later, in the early morning hours of January 21, 2008, when Windhausen returned home from work, Dawn informed him that LS had disclosed to her that the defendant had touched her inappropriately. 15RP 172. Windhausen told Dawn he did not believe it. 16RP 62. When LS woke up, Windhausen made the decision not to comfort her. 15RP 178. Instead, Windhausen decided to "get to the bottom of it." 15RP 178. He implored LS to reenact what the defendant had done to her. 15RP 178.

Windhausen did not believe LS and he made that abundantly clear to everyone. 15RP 181. When asked at trial if he ever had even

the slightest thought that his daughter might be telling the truth, Windhausen responded, "never." 16RP 67.

Dawn left two days after LS's disclosure and the defendant was once again put in charge of babysitting the children. 15RP 179-80. Windhausen informed the defendant about LS's allegation that he had molested her. 15RP 182.

In February, the day after LS's disclosure at school, CPS and the police became involved. 13RP 144-45. On February 29, 2008, Detective Keith Savas and CPS Investigator Cynthia Martin went out to Concord Elementary School. 13RP 145, 147. LS was taken into protective custody, placed in a temporary foster home for two or three days, and then placed with Windhausen's sister, Robin Windhausen (hereinafter referred to as Robin). 13RP 147-49, 168. A dependency action was initiated against Windhausen because it was determined that he was aware of the allegations of sexual abuse and continued to place his children in the defendant's care.⁴ 13RP 147-48. During this time period, Windhausen had full

⁴ This was not the first time CPS had issues with Windhausen's care of the children. In 2007, CPS had previously cautioned Windhausen about him leaving his children in the care of persons that he did not have a good awareness about. 13RP 148. There had also been a prior referral after LVS was injured by a drunken man in the trailer. 13RP 164-65.

visitation rights to the children. 13RP 168. LS was returned to Windhausen's care in June of 2008. 13RP 178.

Shortly after LS's disclosure at school, she was brought in to be interviewed by a child interview specialist. 13RP 7, 27. The interview was recorded on a DVD and was played for the jury. 13RP 29-32; Exhibit 5 (the DVD); Exhibit 6 (a transcript of the interview). In the interview, LS described how the defendant was fine when he wasn't drinking, but that when he drank, he yelled, cussed and was mean and disgusting. 13RP 47, 60. LS recounted how hurt she was when the defendant told her that her mother was a drunk and a drug addict. 13RP 70-71. She then described how on one occasion, while she and her brother were watching TV, she was sitting on the defendant's lap when he stuck his hand up her shorts and smeared his hand on her private parts. 13RP 60, 77-78. She added that the defendant lied about it so he would not get in trouble. 13RP 60.

From the day of LS's disclosure, throughout the course of both trials, Windhausen fully supported the defendant and was steadfast in his belief that his daughter was lying. 15RP 181, 187. He put money on the defendant's books, he regularly visited the defendant in jail, and he showed up for his court appearances to

show his support for him. 15RP 188, 193, 196. In a recorded jail phone call, Windhausen reassured the defendant that he would "do everything I can to stop this." 15RP 196, 198.

Windhausen also contacted certain individuals he believed could be witnesses for the defense and had them write statements for the defendant's trial counsel. 15RP 197. He provided a copy of the confidential CPS dependency file to the defendant's trial counsel and talked with counsel about getting witnesses and information that could help the defendant's case. 16RP 11, 14. In another recorded jail phone call, Windhausen talked with the defendant about threatening his sister, Robin, because she was going "to come down [to court] and shoot her mouth off about stuff she has no idea." 15RP 202-04. Windhausen would later tell the defendant that he had Robin "in his pocket," that due to his threats, she would not testify.⁵ 16RP 92.

When Windhausen first learned that LS had disclosed the sexual abuse to school personnel, he asked LS if she was prepared

⁵ At trial, Windhausen claimed his threats only referred to the dependency action while admitting that his threats worked, Robin did not testify at the dependency hearing--a case he also admitted was tied to the criminal trial. 16RP 92. Robin was a very reluctant witness at best. She testified contrary to a statement she provided to detectives--wherein she expressed fear of Windhausen and said that he had threatened her--that no threat was made. 13RP 173; 17RP 36-39. Robin also professed that she did not even remember if she had testified at the dependency hearing. 15RP 20.

for what was going to happen now, the police involvement and her likely removal from their home. 16RP 10-11. Then, once LS was removed from the home and placed temporarily with Robin, Windhausen decided to "punish" LS, what he called "mild social disapproval," because she had made the disclosure and he did not believe her. 15RP 199-201; 16RP 4, 6. Windhausen refused to contact LS for a number of weeks and refused to show her any affection. 15RP 199-201; 16RP 4, 6.

In June of 2008, LS was returned to the custody of Windhausen. 13RP 178. At one point prior to trial, Windhausen was ordered by the court not to discuss the abuse with LS. 16RP 12. Vanessa Allen was appointed as a CASA (Court Appointed Special Advocate) for LS and LVS. 13RP 81. In August of 2008, after LS had been back in Windhausen's custody for a few months, Allen went to the Marina--which she described as more of a junkyard--to meet LS. 13RP 88, 90-91. Allen spoke with LS alone in her car, although Windhausen remained standing in front of his trailer during Allen's contact with LS. 13RP 103, 133. Allen started to ask LS about her living situation when LS interrupted her and said that she had fibbed about the defendant. 13RP 104-06.

While discussing this, LS would not make eye contact with Allen.

13RP 106.

Despite the court order prohibiting him from discussing the abuse with LS, on August 21, 2008, Windhausen took LS and LVS to the office of the defendant's trial attorney and had them subjected to a recorded interview wherein LS recanted the allegations she had made against the defendant. 16RP 15-16, 19; see also Exhibit 25 (the CD); Exhibit 27 (a transcript of the interview).

LS was described as being very emotional, near tears during the interview. 16RP 24. During the interview, defense counsel asked LS about the abuse whereupon Windhausen told LS "I know this is really hard and I know but I think you are going to say it here or are you going to say it in court, and that is what I'm trying to stop." 16RP 27. LS then is heard to say that she had not told the truth when she said the defendant had touched her. 16RP 27-28. LVS chimed in and said that the defendant would never do anything like that because he's been a good friend of our dad's for years. 16RP 36-37. LVS said during the interview that while he did see LS sitting on the defendant's lap, and he did see the defendant put

his hands down on LS, it was just because the defendant was tired.
16RP 41-42.

When asked at trial about the interview, and if he had pressured LS at all, Windhausen responded that he merely "prompted her." 16RP 24. Around this same time period, Windhausen prepared an affidavit swearing that LS was lying about being molested. Exhibit 28. Windhausen was convinced that Dawn was behind LS's accusation against the defendant. He believed Dawn coached LS into making the allegations so that the defendant would be removed as the children's babysitter. 16RP 60.

LS continued with this recantation when she testified in the first trial. The jury in the second trial was informed that LS had been in court on a prior "occasion"⁶ and that on that prior occasion she had testified that the abuse had not occurred, that she had fibbed. 16RP 191-98.

In the fall 2008, when LS was back in the care of Windhausen, LS talked to her teacher, Gaye Myles, about the abuse. 12RP 182-83. LS told Myles that she still did not think anyone believed her. 12RP 183. LS told Myles that her dad had

⁶ The jury was not told that the prior court appearance was a "trial" or that there had been a hung jury.

instructed her that "[i]f you say this happened to you then Jason's going to go to jail and so you cannot say this happened to you." 12RP 183.

In July of 2009, Vanessa Allen met with LS at school. 13RP 113. Allen was there to check on LS and see how her counseling was going. 13RP 116. As the two were walking, LS started crying and she told Allen that she was having trouble opening up to her counselor. 13RP 116. When Allen asked what was wrong, LS said that the defendant really did molester her, but that she didn't want to get him in trouble and that it wasn't his fault, that he had had four or five beers. 13RP 117-18.

LVS testified at trial and said that the abuse did not occur. He claimed that he actually saw the defendant "lay his hand down on her lap, just so he could lay it down instead of holding it up in the air." 16RP 160. LS, LVS proclaimed, "mistook" this for something else. Id. He added that his father really supported the defendant as their babysitter and that he, LVS, was really upset at LS for breaking up the family. 16RP 178, 181. LVS also recounted an incident wherein he claimed that he had previously accused a prior babysitter--Tammy Powelson (Windhausen's ex-wife) with touching him so that their mother would come back to take care of them.

16RP 173-74. LVS swore that LS knew about this incident.

16RP 175.

LS testified that she was abused, that she was watching television, that the defendant had been drinking "and then it happened." 16RP 187. When asked to describe the incident further, LS responded, "[d]o I have to?" 16RP 187. She then described sitting on the defendant's lap while he squinted his eyes and touched her private parts. 16RP 188-89. She said it made her feel bad. 16RP 189.

LS testified that she did not like having to go live with Robin and that she really wanted to live with her father. 16RP 191. She admitted that she told Vanessa Allen, TG, defense counsel and the court at a prior hearing that she had fibbed about the defendant molesting her. 16RP 191, 195, 197; 17RP 3, 7, 15. When asked why she told people the defendant had not touched her, LS responded that she felt she had to say it, and, that she thought if she said she had not been molested, it all would be over with. 16RP 192; 17RP 15.

LS also testified that back when the abuse happened she told her friend TG about it and wrote about it in TG's personal notebook. 16RP 192. TG is a friend and classmate of LS. 16RP 122.

On October 24, 2008, LS told TG that she had a secret to tell her about her babysitter. 16RP 125, 130. LS told TG, and wrote in TG's journal, that the defendant had touched her private area. 16RP 126, 130, 133. A few days later, LS told TG that the defendant was drunk, that it wasn't his fault. 16RP 130-31. At trial, TG testified that LS would later tell her that the allegations were not really true, but she added that LS also told her the allegations really were true but that LS did not want "you guys" to know they were really true--apparently referring to the attorneys. 16RP 134. Detective Savas retrieved the journal from TG's home--a page of the journal being admitted into evidence--confirming that LS had disclosed the abuse to TG in 2008. 17RP 34-35.

The defendant did not testify. Additional facts are included in the sections below where they pertain.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE DEFENDANT'S REQUEST TO RE-INTERVIEW LS.

The defendant asserts that his right to a fair trial was violated because the trial court denied his request to re-interview LS. This argument should be rejected. The defendant has failed in his burden of proving that the re-interview of LS was both material and reasonable under CrR 4.7(e)(1). In addition, the defendant cannot establish any specific prejudice stemming from the denial of his request to re-interview LS.

a. The Legal Standard.

A criminal defendant's right to compulsory process includes the right to interview a witness in advance of trial. State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). However, this right is not "absolute." State v. Hofstetter, 75 Wn. App. 390, 397, 878 P.2d 474 (1994). Rather, the right coexists equally with a witness's right to refuse to be interviewed. Id. In addition, the right to interview a witness does not mean a defendant has a right to have a

successful interview. State v. Clark, 53 Wn. App. 120, 124-25, 765 P.2d 916 (1988).

CrR 4.7 governs discovery in a criminal case. State v. Pawlyk, 115 Wn.2d 457, 471, 800 P.2d 338 (1990). The scope of discovery, including the determination whether to allow a second or subsequent interview of a witness, rests within the sound discretion of the trial court. State v. Kilgore, 107 Wn. App. 160, 176, 26 P.3d 308 (2001) (citing State v. Hoffman, 116 Wn.2d 51, 80, 804 P.2d 577 (1991)), aff'd., 147 Wn.2d 288 (2002). A trial court's discovery decision will not be disturbed absent a manifest abuse of that discretion. State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988); State v. Blackwell, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993). While reasonable minds might differ about the propriety of a trial court's ruling, that is not the standard of review on appeal. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail on appeal, a defendant must prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

CrR 4.7(a) and (c) set forth the prosecutor's discovery obligations. There is no dispute that the State fully complied with

these provisions.⁷ Instead, the defendant asserts that the trial court improperly denied his request to re-interview LS under CrR 4.7(e)(1), which states:

Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the relevant material and information not specified by sections (a), (c) and (d).

CrR 4.7(e)(1). As this rule makes clear, the decision to allow additional discovery remains within the sound discretion of the trial court. CrR 4.7(e) places the burden of showing (1) reasonableness and (2) materiality on the defendant. State v. Boyd, 160 Wn.2d 424, 432, 158 P.3d 54 (2007). A reviewing court will not disturb the trial court's ruling under this rule absent a manifest abuse of discretion. Pawlyk, 115 Wn.2d at 470-71.

b. The Facts.

At the time LS was molested she was just seven years old. 15RP 125; CP 1-3. She made disclosures about the abuse to her father--David Windhausen, Julie Turcott (school counselor), Hailey

⁷ CrR 4.7(a) and (c) do not require that the prosecutor produce witnesses for interviews, only that the prosecutor provide notice of the identity of these individuals, addresses, their statements or reports and summary of expected testimony.

Birnbaum (Americorp volunteer), Gale Myles (teacher), and TG (friend).⁸ 1RP 6. All of the disclosures were documented, reduced to writing, and provided to counsel in discovery. 1RP 14, 16. The defense was aware of all of the disclosures and agreed that they were admissible at trial. 1RP 11. Prior to the defendant's first trial, the defendant's trial counsel took taped statements from each of these witnesses. 1RP 41. All of these witnesses testified at the defendant's first trial. 1RP 135; 2RP 227, 265; 3RP 523.

Also prior to the defendant's first trial, LS was interviewed by child interview specialist Carolyn Webster, with the interview being recorded on a DVD and provided as part of discovery. 4RP 611, 645-48. Webster testified at the defendant's first trial. 4RP 611. In all of the disclosures/statements, LS talked about being molested by the defendant.

After the disclosures, LS was removed from the home by CPS and a dependency action was instigated against Windhausen due to him allowing the defendant to have continued contact with LS after she disclosed to him that she had been abused. Vanessa Allen was appointed as a CASA advocate for LS and LVS. 1RP 14,

⁸ LS also made a disclosure to her mother, Dawn, but her whereabouts were unknown. She was not called as a witness by either party.

168. Windhausen made it abundantly clear that he never believed that the defendant molested his daughter. 1RP 168; 2RP 244.

Subsequent to her disclosures, but prior to the defendant's first trial, LS recanted. 1RP 168. To this end, defense counsel interviewed both LS and LVS at his office and recorded the interview. 1RP 22, 115. This occurred without a CASA advocate, prosecutor or any other state agent or victim representative being present because defense counsel had somewhat unique access to LS and LVS through their father, Windhausen. In fact, defense counsel was provided a copy of the entire confidential dependency file--courtesy of Windhausen. 1RP 29, 67.

During this time period and even before the molestation, LS was described by school officials as being depressed and in need of counseling services. 2RP 234, 257. LS would come to school every day exhausted, emotional and crying. 2RP 275. LS appeared as if she was being neglected. 2RP 332. She would show up at school dirty and disheveled, she did not fit-in with her classmates, and she possessed very little self-esteem. 2RP 332. At one point, this little girl was described as suicidal, with dreams of being with her drug-addicted mother when she died. 2RP 276.

Windhausen claimed that LS suffered from fetal alcohol syndrome. 2RP 318. Windhausen recounted that when LS was just a baby, her mother took LS into hiding, with Windhausen finding her in a crack house--a story he later told LS. 5RP 935-36. At one point, her mother told LS that she should be dead. 5RP 946. Prior to the molestation, Windhausen told LS all about her mother's problems and that he considered putting LS up for adoption. 5RP 953-56.

During this time period, LS expressed fear of CPS and was concerned that she would be taken away from the only parent she had left--Windhausen. 3RP 571-72. But Windhausen was adamant that LS was lying about the defendant, he was forceful in his opinions, and he punished LS for claiming she had been abused. 3RP 350, 354, 36-63. It was after LS was returned to Windhausen's custody that LS recanted and she was taken by Windhausen to the defendant's attorney to be interviewed.⁹ 3RP 472.

⁹ Windhausen was listed as a defense witness who would testify regarding LS's recantation. CP ____, sub # 46. He also signed a sworn declaration that he provided to defense counsel wherein he claimed LS's allegations were false. CP 146-48.

At the defendant's first trial, LS testified twice. She first testified at a child competency hearing. 4RP 684-89. She then testified before the jury and recanted the allegations she had made about the defendant having molested her. 4RP 694-726. When LS first recanted--a time she was with her father--she was described as having appeared to have been pressured. 5RP 874. The defendant's first trial ended in a hung jury--with a mistrial being declared on May 11, 2009. 7RP 1305-06.

On November 6, 2009, the court was informed that in May of 2009, the children's new babysitter caught LVS engaging in some sort of inappropriate sexual contact with her own daughter, with LS being present. 8RP 2. Defense counsel informed the court he wanted to re-interview LVS. LVS had both an attorney and guardian ad litem appointed for him in juvenile court. 8RP 4-5. Defense counsel also said he wanted to re-interview LS because she may now be representing that the defendant really did molest her. 8RP 8. At the time defense counsel sought to re-interview LS, she was just nine-years-old. 15RP 125; CP 139-40.

Defense counsel told the court that Windhausen was fully cooperative and willing to produce LS for yet another interview. 8RP 7. However, the court expressed grave concerns because

nobody in the courtroom was there to represent LS's interests, and Windhausen certainly had "other issues." 8RP 28. The court stated that before any request to re-interview LS would be addressed, the request must be preceded by notice to CASA Vanessa Allen, any attorney who may represent LS--if there was one--and whomever LS was currently residing--and that these persons could then provide their insight. 8RP 31-33; CP 101-02; CP 162. Once these tasks were accomplished, the court would "then consider the request for second interviews." CP 101-02; CP 162.

This did not happen. Instead, defense counsel scheduled an interview with LS in his office for November 11, 2009. CP 118-19, 121. The first the prosecutor was informed of this attempt to interview LS was via e-mail from Vanessa Allen, who indicated that "[t]he children are both continuing in mental health counseling and somewhat fragile and it is not in their best interests to have to attend yet another interview with defense counsel." CP 118-19. The prosecutor then alerted the court, believing that counsel was circumventing the court's order. CP 118. A hearing was then held on November 30, 2009. 9RP.

At the hearing, defense counsel told the court that the reason he wanted to re-interview LS was, "[w]ell I would like to know what she is going to say at trial." 9RP¹⁰ 5. As the court noted, whatever LS were to say in an interview--as is true with any witness--doesn't mean that is what the testimony will be at trial. 9RP 5-6. In response to the court's inquiry, defense counsel admitted that all the witnesses he wanted to interview had previously been interviewed and had previously testified at trial. 9RP 4. When asked what new potential evidence the defense had, counsel responded as follows:

I know this through conducting other interviews and through discovery, and since I have even filed this motion, I have conducted two more interviews. I interviewed the girl, TG, on Wednesday, 25, November. She told me that after the trial the little girl who the State says was molested told TG that Mr. Knuth did nothing to her.

On Friday, 27, November, I interviewed Robin Windhausen; she told me that over the summer months, after the trial, since LS was living with her, she told her -- LS told Robin that Mr. Knuth had done nothing to her; that he hadn't molested her. She also told me that the State's witness, Ms. Allen, has been having contact over the summer with LS, and is telling LS that Mr. Knuth did molest her. And so these are the witnesses.

¹⁰ This hearing was not transcribed by the defendant. The State had it transcribed and designated to this Court after receiving the Brief of Appellant. The court did not simply sign off on an order denying the motion as indicated by the defendant.

9RP 5-6. After hearing the defense request, the court granted the defense motion to re-interview Vanessa Allen but denied the defense motion to re-interview LS. CP 139-40; CP 183.

c. A Lack Of Materiality.

CrR 4.7 requires as a prerequisite to obtaining additional discovery, a showing that the new information sought is “material.” Evidence is material if there is a reasonable probability that it would impact the outcome of the trial. State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006). A defendant must advance some factual predicate, and file supporting affidavits, which make it reasonably likely the request will bear information material to the defense. Blackwell, 120 Wn.2d at 828. A bare assertion that additional investigation “might” bear such fruit is insufficient. The mere *possibility* that an item of undisclosed evidence *might* have helped the defense or *might* have affected the outcome of the trial does not establish “materiality.” State v. Bebb, 108 Wn.2d 515, 523, 740 P.2d 829 (1987).

The defendant fails to meet his burden here. The defense already had full discovery about the alleged molestation and had

interviewed LS about the allegations. While she recanted at trial--of which defense counsel could obtain a transcript--this did not change the allegation or facts to be presented by the State. The State would be presenting the same evidence in a second trial regardless of whether LS recanted yet again or whether she retracted her recantation. Further, the defendant did not provide any evidence or affidavit from a person with personal knowledge from LS that she was retracting her recantation. The only "evidence" was secondhand, that Windhausen claimed Vanessa Allen told him that LS was retracting her recantation.¹¹ The trial court was correct, LS was either going to recant again or retract her recantation--but a re-interview would not establish this--nor would it provide impeachment evidence because defense counsel already had a recorded interview of LS, her recantation, and admission that she had fibbed.¹²

¹¹ The court granted the defense motion to re-interview Allen. If that interview proved fruitful in providing greater information, counsel was free to raise his motion to re-interview LS anew.

¹² Defense counsel also briefly discussed allegations regarding sexual misconduct involving LVS that occurred post-trial, and possible sexual misconduct that may have occurred between LVS and LV. This "evidence" has no relevance to the allegations against the defendant. Further, at the defendant's second trial, the court ruled that these allegations were inadmissible. 11RP 19.

d. A Lack Of Reasonableness.

The defendant also fails to meet his burden of proving the second requirement for obtaining a re-interview of LS--a showing of reasonableness. Boyd, 160 Wn.2d at 432. This State takes victim's rights seriously, with a constitutional provision specifically dealing with the rights of crime victims,¹³ a statute mandating that victims of violent and sex crimes be allowed an advocate at any prosecutor or defense interview,¹⁴ and a mandate requiring attorneys to respect the rights of victims.¹⁵

Defense counsel here had full discovery, the confidential dependency case file, a DVD of the interview of LS by a child interview specialist, his own recorded interview with LS, testimony from her competency hearing and testimony from trial--along with discovery and testimony regarding all of LS's disclosures and recantations. LS was clearly a very, very troubled little girl, a depressed little girl, potentially suicidal, and she was undergoing mental health treatment at the time of the request.

¹³ See CONST. art. I, § 35; State v. Devin, 158 Wn.2d 157, 171, 142 P.3d 599 (2006).

¹⁴ See RCW 7.69.010; RCW 7.69A.010; RCW 7.69A.030; RCW 9.68A.001.

¹⁵ See RPC 4.4.

The CASA advocate informed the parties that she considered LS to be currently "fragile" and that it was not in her best interest to be interviewed yet again. CP 118. At the same time, counsel was given access to Vanessa Allen, the person whom allegedly heard LS retract her recantation. In this way, counsel could certainly determine whether LS was likely to recant or not. But subjecting LS to yet another interview in her situation was not reasonable.

e. CrR 4.7(e)(2), An Additional Reason Supporting The Court's Ruling.

The defendant cites to CrR 4.7(e)(2) and argues on appeal that once a defendant makes a showing of materiality and reasonableness, a court *must* grant a discovery request--a re-interview--unless the court finds that usefulness of the disclosure is outweighed by a substantial risk of harm to any person. While the State believes the defense is misguided as to the application of this subsection of the rule, application of this subsection of the rule actually supports the trial court's position here.

Subsection (e)(2) of the rule provides as follows:

The court may condition or deny disclosure authorized ***by this rule*** if it finds that there is a

substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant.

CrR 4.7(e)(2) (emphasis added). The very language of (e)(2) denotes that it applies to the "rule," i.e., CrR 4.7, not just to subsection (e)(1) of CrR 4.7. What CrR 4.7(e)(2) provides is a mechanism by which the court may limit disclosures allowed generally by the provisions of CrR 4.7. Thus, it is not a provision that *requires* disclosure under (e)(1) unless the requirements of (e)(2) are met. If this is what the Supreme Court intended when the rule was adopted, the Court would have said so in clear language.

In any event, CrR 4.7(e)(2) provides yet another basis that supports the trial court's decision. As stated above, LS was in a fragile state and the trial court would not abuse its discretion in finding that there was a substantial risk of harm to LS from subjecting her to another interview.

In sum, the trial court did not abuse its discretion in denying the request to re-interview LS. The defendant has failed to prove that no reasonable person would have ruled as the trial court did here--the standard the defendant must meet to prevail on appeal. Robtoy, 98 Wn.2d at 42.

f. The Defendant Cannot Show Prejudice.

Although he argues that the trial court abused its discretion under CrR 4.7, the defendant attempts to transform this discovery issue into an issue of constitutional magnitude by claiming he was denied a right to a fair trial by the court's denial of his attempt to re-interview LS. But the defendant has failed to cite to any case that suggests that a denial of a second or subsequent interview of a witness constitutes a violation of a right to a fair trial. In any event, the defendant cannot show that the court's ruling, even if it is deemed error, prejudiced his right to a fair trial.

The defendant cites to two cases in claiming that his alleged CrR 4.7 violation is elevated to a constitution compulsory process issue.

First, the defendant cites to Dennis v. United States, 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966). But Dennis involved a situation where the State had unique access to discovery--grand jury minutes--and refused to turn them over to the defense. The Supreme Court stated that, "[i]n our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest

and most compelling considerations." Dennis, 384 U.S. at 873.

That is not the situation here. The State did not have access to information that the defense did not.

Second, the defendant cites to Burri, supra, another case not on point. Burri sought to present an alibi defense to a charge of theft. The prosecutor decided to hold a special inquiry hearing, calling and questioning all the defense alibi witnesses, precluding the defense from being present at the hearing, and then instructing all the alibi witnesses not to discuss their testimony with the defense. This unauthorized and illegal interference, the court held, violated the defendant's right to a fair trial and compulsory attendance of witnesses. Burri, 87 Wn.2d at 180-81. Here, the defendant was not precluded from any hearing, the State did not have access to discovery unavailable to the defense, and the defense was not precluded from interviewing any witness before trial. The defendant was simply precluded from re-interviewing a little girl he had already interviewed. The defendant's attempt to turn a discovery issue into a constitutional issue is unavailing. After all, the right to compulsory process co-exists with a witness's right to refuse such an interview. Hofstetter, 75 Wn. App. at 397. The

defendant was not denied the right to confront LS at trial or the right to interview her prior to trial.

Finally, an alleged trial error, to merit the granting of a new trial, must be so prejudicial as to have denied the accused a fair trial. State v. Louie, 68 Wn.2d 304, 413 P.2d 7 (1966). In determining whether the error is prejudicial, consideration must be given to all the facts and circumstances presented in the trial of the cause. An error, to be prejudicial error, must be one which probably would have changed the result of the trial. State v. Britton, 27 Wn.2d 336, 178 P.2d 341 (1947); State v. Smith, 72 Wn.2d 479, 484, 434 P.2d 5 (1968).

Here, the defendant cannot demonstrate that the denial of the request to re-interview LS probably changed the result of the trial. LS testified consistent with her initial disclosures and consistent with the recorded interview of her by the child interview specialist. She recanted in the first trial, and as defense counsel seemed to expect, she retracted that recantation in the second trial. Nothing occurred in the second trial that was unexpected or unknown to defense counsel. The defendant's claim of prejudice amounts to nothing more than pure speculation that yet another interview of LS would have probably changed the outcome of trial.

g. Request For A Deposition.

As a separate but related issue, the defendant claims that his trial counsel was constitutionally ineffective because he failed to request that the trial court order LS be deposed. This claim has no merit.

To establish ineffective assistance of counsel, a defendant must prove (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The first element is met by showing that counsel's conduct fell below an objective standard of reasonableness based on the entire record. The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceedings would have been different. If the defendant fails to prove either element, the inquiry must end. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

The rule governing depositions, CrR 4.6, does not authorize a court to order a witness to submit to a deposition merely because the witness refuses to give the defendant an interview. See State v. Mankin, 158 Wn. App. 111, 121-23, 241 P.3d 421 (2010). The rule authorizes court-ordered depositions in criminal cases only

when the witness refuses to speak to either counsel and when the party seeking the deposition can demonstrate that a deposition is necessary to prevent a failure of justice.

(a) When Taken. Upon a showing that a prospective witness may be unable to attend or prevented from attending a trial or hearing or ***if a witness refuses to discuss the case with either counsel*** and that his testimony is material and that it is necessary to take his deposition ***in order to prevent a failure of justice***, the court at any time after the filing of an indictment or information may upon motion of a party and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

CrR 4.6(a) (emphasis added).

Here, the defendant fails under both prongs of the Strickland test. First, the trial court had already denied a defense motion to interview LS. No reasonable attorney would expect the court to then turn around and order a much more invasive and disruptive deposition procedure of the same witness.

Second, under the prejudice prong, the defendant must prove two things. First, the defendant would have to prove that there is a reasonable probability that a motion to depose LS would have been granted--as stated above, a very unlikely event considering the motion to re-interview LS had been denied.

Second, the defendant would have to prove that there is a reasonable probability that the granting of the motion to depose LS would have resulted in the outcome of trial being different. Beyond pure speculation, the defendant cannot meet this burden.

Along with it being pure speculation what LS would have said in a deposition, LS had already asserted she was abused and then recanted. Statements from her deposition could be used only to impeach LS if she testified to something different at trial than she were to say in the deposition. But if LS continued to recant, this was in the defendant's favor. If LS asserted at trial she was abused, counsel already had prior testimony wherein she testified the defendant did not abuse her, thus a deposition statement to the same effect would be cumulative and of limited value. Finally, that LS would have disclosed some totally new set of facts is a matter of pure speculation and cannot support a claim of prejudice.

2. THE DEFENDANT HAS FAILED TO SHOW THAT HE IS ENTITLED TO A NEW TRIAL BASED UPON A CLAIM OF MISCONDUCT.

The defendant contends that the prosecutor committed such flagrant and egregious misconduct in closing argument that his conviction must be reversed, and that his failure to raise an

objection below must be excused. This claim is without merit. The defendant claims the prosecutor committed misconduct in two ways. First, he claims that the prosecutor improperly made the trial all about David Windhausen's parenting skills and attempted to garner sympathy for LS. Second, he claims that the prosecutor lessened the burden of proof by one of his comments in closing. The defendant's claim is not supported by the record and has no legal merit.

The law governing claims of misconduct is well-settled. When a defendant alleges that the prosecutor's arguments prejudiced his right to a fair trial, he bears the heavy burden of establishing both (1) the impropriety of the prosecutor's arguments and (2) that there was a "substantial likelihood" that the challenged comments affected the verdict. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); State v. Reed, 102 Wn.2d 140, 145, 685 P.2d 699 (1984). The prejudicial effect of the prosecutor's alleged improper comments is not determined by looking at the comments in isolation but by placing the remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Absent a proper objection

and a request for a curative instruction, the defense waives the issue of misconduct unless the comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice. State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009).

The evidence introduced at trial by both parties showed that LS was a troubled child who lived a life under difficult circumstances. She had lived nearly all of her then seven years of life in a very small trailer located in the industrial area along the Duwamish waterway in a marina piled high with junk and dilapidated cars and boats. Her father was a very opinionated man whom LS loved dearly as he was the only constant in her life. Still, her father and the defendant told LS that her mother was a drug addict, alcoholic and prostitute. She was also told by her father that he had considered putting her up for adoption. And CPS had been involved with the family on more than one occasion.

When LS told her father about being sexually abused, he not only refused to believe her, he punished her in a very controlling cruel manner--he refused to show her any affection and he refused to contact her when she was taken away by CPS. One can only imagine the emotional impact on a seven-year-old child, taken

away from the only parent they have, and then having that parent punish you and refuse to contact you.

At the same time, Windhausen made it abundantly clear that he would do anything--including threatening witnesses--to help the defendant fight the charges against him--and the evidence shows that he went to great efforts to do so. Importantly, LS's recantation occurred only after she was returned to Windhausen's custody and control. Prior to this time, and subsequently, when LS retracted her recantation, one of LS's great concerns was that her father did not believe her. Windhausen's behavior and manipulation of LS was very much a part of trial. Similarly, LS's living situation and her emotional/mental state were very much a part of trial--for both the defense and the prosecution theories of the case.

The defendant's argument on appeal that it was improper for the prosecutor to focus on these issues misses the point. LS's situation and circumstances, along with Windhausen's absolute inability to consider even for a moment that his daughter might be telling the truth, and his controlling behavior and desire to help the defendant, were central facts supporting the State's theory of the case--that LS was pressured into recanting. Similarly, LS's dismal situation and her desire to have her mother back in her life were

central facts supporting the defense theory of the case--that LS lied because of the circumstances of her life, that she wanted her troubled mother back in her life and was willing to lie about it.

When a defendant alleges that a prosecutor's argument prejudiced his right to a fair trial, he first bears the heavy burden of establishing the impropriety of the comments. Reed, 102 Wn.2d at 145. Prejudicial error does not occur until such time as it is clear and unmistakable that counsel has committed misconduct. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598, rev. denied, 111 Wn.2d 641 (1985). Generally, greater latitude is given in closing argument than elsewhere during trial. State v. Stover, 67 Wn. App. 228, 232, 834 P.2d 671 (1992), rev. denied, 120 Wn.2d 1025 (1993). In closing, counsel may argue all reasonable inferences from the evidence. State v. Harvey, 34 Wn. App. 737, 664 P.2d 1281 (1983).

This case was about Windhausen, the situation he placed LS, LS's emotional/mental state and how Windhausen possessed the ability to manipulate her. To argue these points--all arguments supported by the evidence, was not misconduct. The propriety of the argument is illustrated in a passage from the State's closing argument.

After discussing the fact that LS was clear in her description of being sexually abused when interviewed by a child interview specialist, the prosecutor discussed her recantation:

...LS is clear and you can review that on her interview, the DVD there. LS is clear about what happened to her. Now Mr. Kannin [defense counsel] points to her prior hearing, guess who she was living with at that prior hearing? David Windhausen. Guess who was out in the hall with her? Brought her to court, David Windhausen. Guess who really wanted this to go away, David Windhausen. You cannot ignore that. You cannot ignore that fact in terms of what it did to motivate this girl to come out and say that it didn't happen. You cannot ignore that. She didn't stand a chance against Mr. Windhausen...

18RP 43.

Additionally, in making his argument on appeal, the defendant fails to prove the nexus here that he claims. Essentially, the defendant wants this Court to believe that the prosecutor intended to disparage Windhausen and garner sympathy for LS and therefore the jury would convict a third party, the defendant, based on less than the evidence presented at trial and in contrast to the jury instructions. This theory simply is not logical and is not supported by the evidence or a full reading of closing argument.

Next, the defendant claims that the prosecutor misstated the law and diminished the burden of proof by the following passage:

I will again ask you to keep in mind a couple things. You are not sitting in judgment of Jason Knuth. You are not deciding whether he is a good person or a bad person. Your job, your job is to decide what happened. This is your job. And he made a choice whether he had beers or not, he made a choice when he put his hand in her pants. Does he think consequences flow from that choice? Your job is decide what happened and what happened here is that Jason Knuth committed the crime of child molestation in the first degree and I will ask that you find him guilty.

18RP 43-44. He asserts that by telling the jury that it was their job to decide what happened, the prosecutor so trivialized and misstated the burden of proof that his conviction must be reversed. This assertion is not supportable.

First, this case is not like Anderson, supra, the case the defendant relies. In Anderson, the prosecutor made repeated requests for the jury to "declare the truth," to return "not just a verdict, but a just verdict." Anderson, 153 Wn. App. at 423-24. The prosecutor then told the jury that people apply the beyond a reasonable doubt standard every day when they make simple decisions like whether to change lanes on the freeway or whether to leave a child with a babysitter. Id. at 425. Division Two found these comments amounted to misconduct--although harmless--because they minimized the importance of the beyond a reasonable doubt standard by comparing the standard to "relatively

minor" real-life decisions. Id. at 431-32. No such thing happened here.¹⁶

Here, the prosecutor stated no more than the obvious; LS was either sexually molested as she first disclosed and later testified, or she was lying as the defense claimed. It was the jury's job to determine whether the defendant was guilty or not, whether LS was telling the truth. The prosecutor did not trivialize the burden of proof and did not commit misconduct.

In any event, the issue of misconduct has been waived. The defendant did not object to any of the claimed misconduct. "Where the defense fails to object to an improper comment, the error is considered waived unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." McKenzie, 157 Wn.2d at 52. Here, as the Supreme Court indicated in State v. Warren,¹⁷ an objection and curative instruction

¹⁶ See also State v. Curtiss, ___ Wn. App. ___, 250 P.3d 496 (2011). In Curtiss, the Court rejected the notion that telling the jury that their job was to "search for and speak the truth" was misconduct. As the court noted, "trial judges frequently state that a criminal trial's purpose is to search for truth and justice." Curtiss, 250 P.3d at 510.

¹⁷ 165 Wn.2d 17, 27, 195 P.3d 940 (2008).

would have obviated any potential prejudice emanating from the prosecutor's alleged misconduct.

In Warren, in a clear misstatement of the law, the prosecutor repeatedly told jurors that the defendant was not entitled to "the benefit of the doubt." Warren, 165 Wn.2d at 24. Warren objected and the trial court gave an "appropriate and effective curative instruction" that obviated any potential prejudice. Id. at 28. Under Warren, if the prosecutor here was indeed misstating the law, it is clear that a proper objection and curative instruction would have been sufficient to cure any potential prejudice. The failure to object and request such an instruction constitutes waiver of the misconduct claim.

This is also true in regards to the defendant's claim the prosecutor intended to obtain a verdict based on sympathy for LS. There is no reason that a simple objection would not have stopped the prosecutor's argument if it indeed was improper.

Finally, the defendant can prove no prejudice. Prejudice is established only where the defendant proves that "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Jurors are presumed to follow the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). The court instructed the jury that "[t]he lawyers' remarks, statements, and argument are intended to help you understand the evidence and apply the law...however...the lawyers' statements are not evidence...The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 34. The jury was further instructed that "[y]ou must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference." CP 35. And in no uncertain terms, the jury was instructed on the burden of proof.

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 37.

The defendant has failed to demonstrate that the comments he contends constitute misconduct could have had such a dramatic impact that the jury ignored the instructions of the court. Even if misconduct, the comments would have been of little moment. The defendant cannot show that there is a substantial likelihood the jury's verdict would have been different but for the alleged misconduct.

3. THE DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS WITHOUT MERIT.

The defendant claims that his trial counsel, longtime criminal defense attorney John Kannin,¹⁸ was constitutionally ineffective. This claim is without merit. Besides his claim that trial counsel should have moved to depose LS (discussed above), the

¹⁸ Kannin has over ten years of criminal trial defense work. See www.mywsba.org; www.kanninlaw.com.

defendant's ineffective assistance of counsel claim is simply a thinly veiled attempt to avoid the waiver provisions associated with his prosecutorial misconduct claim and the requirement that he object to alleged misconduct.¹⁹ However, even if he could demonstrate that no reasonably competent attorney would have failed to object to the alleged misconduct, just as with his misconduct claim, the defendant cannot show prejudice.

a. Standard Of Review.

For the defendant to prevail in his ineffective assistance of counsel claim, he must prove by a preponderance (1) that his trial counsel's performance was so deficient that it fell outside the wide range of objectively reasonable behavior based on a consideration of all the circumstances of the case; and (2) that this deficient performance prejudiced him, i.e., that there is a reasonable probability that but for counsel's objectively unreasonable representation, the results of trial would have been different. Strickland, supra; State v. Thomas, 109 Wn.2d 222, 225-26,

¹⁹ See, e.g., Curtiss, supra ("Curtiss attempts to circumvent preservation requirements to some of her challenges in this appeal by claiming that her trial counsel was ineffective for failing to object to the errors she now raises").

743 P.2d 816 (1987). If the defendant fails to prove either prong of the test, the inquiry must end. Hendrickson, 129 Wn.2d at 78.

A reviewing court will presume that counsel's performance was reasonable. Strickland, 466 U.S. at 688-89. This presumption eliminates "the distorting effects of hindsight" and recognizes that "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." Id.

b. A Defendant May Not Bootstrap A Waived Issue By Claiming Ineffective Assistance Of Counsel.

An error that does not directly implicate a constitutional right shall not be transformed into an error of constitutional magnitude simply by claiming ineffective assistance of counsel. State v. Davis, 60 Wn. App. 813, 823, 808 P.2d 167 (1991), aff'd, 119 Wn.2d 657 (1992);

So long as a defendant is represented by counsel whose performance is not constitutionally ineffective...we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default...[to hold otherwise would] undercut the State's ability to enforce its procedural rules.

Murray v. Carrier, 447 U.S. 478, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d (1986) (where counsel failed to recognize a factual or legal basis for an alleged error at trial, or failed to raise the claim despite recognizing it, and where counsel is otherwise competent, review will be denied).

In State v. Davis, supra, the defendant argued that an instructional error, which was not objected to by his trial counsel and therefore could not be raised for the first time on appeal, could be raised under an ineffective assistance of counsel claim. This Court rejected Davis's argument, stating:

We note that Davis raises ineffective assistance of counsel only in support of his claim that the trial court erred in giving an aggressor instruction. Independent claims of ineffective assistance of counsel are of constitutional magnitude and, by their nature, many be reviewed for the first time on appeal. However, instructional errors that do not directly implicate a constitutional right may not be transformed into error of constitutional magnitude by claiming that they resulted from ineffective assistance of counsel.

Davis, 60 Wn. App. at 822-23.

In the case at bar, the defendant claims that trial counsel was ineffective for failing to object to the alleged misconduct discussed above. This is simply an attempt to avoid the waiver issues associated with his misconduct claim. But the defendant

should not be able to raise a waived issue merely by recasting the issue under the rubric of an ineffective assistance of counsel claim.

In addition, in making a determination of whether trial counsel was constitutionally ineffective, a reviewing court will not "second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim." In re Stenson, 142 Wn.2d 710, 733-34, 16 P.3d 1 (2001) (citing Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)). Nothing in the Constitution requires such a rigorous standard. Id.; see also, City of Tacoma v. Durham, 95 Wn. App. 876, 882, 978 P.2d 514 (1999) ("Just as an appellate lawyer is not considered ineffective for failing to raise every conceivable non-frivolous claim of error, a trial lawyer cannot be faulted for failing to make a record of every such allegation").

There is nothing in the record here that suggests such egregious error by trial counsel that the waiver provisions of his misconduct claim should be ignored. An attorney cannot be said to be incompetent if, in the exercise of his professional talents and knowledge, he fails to object to every item of evidence to which an objection might successfully be interposed. State v. Mode, 57 Wn.2d 829, 360 P.2d 159 (1961).

An examination of the record shows that the defendant's trial counsel performed commendably, interviewed witnesses, did an extensive investigation, raised a multitude of pretrial and trial issues, fought through two trials and made ample and successful objections where deemed appropriate. The defendant's claim that trial counsel was constitutionally ineffective for failing to raise certain objections during closing argument does not show that counsel acted outside an objective standard of reasonableness.²⁰

4. THE DEFENDANT HAS FAILED TO SUSTAIN HIS BURDEN IN SEEKING REVERSAL OF HIS CONVICTION PURSUANT TO THE "CUMULATIVE ERROR" DOCTRINE.

The defendant alleges that the cumulative effect of numerous errors deprived him of his right to a fair trial. It is true that an accumulation of otherwise non-reversible errors may deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). However, it is axiomatic that to seek reversal pursuant to the "accumulated error" doctrine, the defendant must establish

²⁰ And just as with his claim of misconduct, the defendant must prove prejudice, that there is a reasonable probability that but for counsel's failure to object, the outcome of trial would have been different. Strickland, 446 U.S. at 694. The State will not repeat the prejudice argument here. See misconduct section above.

the presence of multiple trial errors. Reversal due to cumulative error is justified only in rather extraordinary circumstances. See State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997) (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).

As addressed above, the defendant has failed to show that any errors occurred in his trial. Further, the defendant essentially alleges but two errors--a discovery issue related to re-interviewing a witness or seeking a deposition of that witness and a prosecutorial misconduct/ineffective assistance of counsel claim. The defendant fails to show how these two very different alleged errors could culminate in such substantial prejudice that he is entitled to a new trial when standing alone, even if proven, would not. The defendant has failed to meet his burden under the cumulative error doctrine.

D. **CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 15 day of June, 2011.

Respectfully submitted,

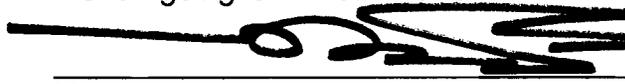
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Sweigert, 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. KNUTH, Cause No. 65494-2-1, 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.



Name
Done in Seattle, Washington

06/15/11
Date

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