

65622-8

65622-8

NO. 65622-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CORDARREL HAYES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	9
1. HAYES'S CLAIM THAT THE VICTIM'S STATEMENTS TO MEDICAL PROVIDERS SHOULD HAVE BEEN EXCLUDED FAILS BECAUSE THE CLAIM WAS WAIVED, THE CLAIM IS WITHOUT MERIT, AND ANY ERROR IS HARMLESS.....	9
a. Hayes's Confrontation Claim Is Waived	10
b. Hayes's Confrontation Claim Fails On The Merits	15
i. The claim fails under a federal constitutional analysis	15
ii. The claim fails under a state constitutional analysis	19
c. Any Error In Admitting The Statements Is Harmless.....	30
2. THE TRIAL COURT'S DECISION NOT TO ADMIT THE VICTIM'S LETTERS SHOULD BE AFFIRMED BECAUSE THEY WERE INADMISSIBLE AND HAYES WAS PERMITTED TO INTRODUCE RELEVANT EVIDENCE IN ANY EVENT	34

3.	CUMULATIVE ERROR DOES NOT PROVIDE GROUNDS FOR REVERSAL.....	40
4.	HAYES'S OHIO CONVICTION WAS PROPERLY INCLUDED IN HIS OFFENDER SCORE	41
D.	<u>CONCLUSION</u>	44

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Chambers v. Mississippi, 410 U.S. 284,
93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)..... 35

Crawford v. Washington, 541 U.S. 36,
124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)..... 15, 18

Davis v. Washington, 547 U.S. 813,
126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)..... 18, 22

Delaware v. Van Arsdall, 475 U.S. 673,
106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)..... 30

Giles v. California, 554 U.S. 353,
1285 S. Ct. 2678, 171 L. Ed. 2d 488 (2008)..... 16

Melendez-Diaz v. Massachusetts, ___ U.S. ___,
129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009)..... 15, 16

Moses v. Payne, 555 F.3d 742 (2009) 17

United States v. Peneaux, 432 F.3d 882
(8th Cir. 2005) 18

United States v. Santos, 589 F.3d 759
(5th Cir. 2009) 18

White v. Illinois, 502 U.S. 346,
112 S. Ct. 736, 116 L. Ed. 2d 848 (1992)..... 24

Washington State:

Estes v. Babcock, 119 Wn. 270,
205 P. 12 (1922)..... 27

Kraettli v. North Coast Trans. Co., 166 Wn. 186,
6 P.2d 609 (1932)..... 26, 27

<u>Madison v. State</u> , 161 Wn.2d 85, 163 P.3d 757 (2007).....	21
<u>Peterson v. Dept. of Labor & Industries</u> , 36 Wn.2d 266, 217 P.2d 607 (1950).....	28
<u>State v. Aguirre</u> , 168 Wn.2d 350, 229 P.3d 669 (2010).....	35
<u>State v. Atsbeha</u> , 142 Wn.2d 904, 16 P.3d 626 (2001).....	35
<u>State v. Burke</u> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	10
<u>State v. Enstone</u> , 137 Wn.2d 675, 974 P.2d 828 (1999).....	35
<u>State v. Fisher</u> , 130 Wn. App. 1, 108 P.3d 1262 (2005).....	16
<u>State v. Foster</u> , 135 Wn.2d 441, 957 P.2d 712 (1998).....	21, 23, 24, 25, 29
<u>State v. Greiff</u> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	40
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	19, 21, 25
<u>State v. Hodges</u> , 118 Wn. App. 668, 77 P.3d 375 (2003).....	41
<u>State v. Jones</u> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	35
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	10
<u>State v. Knighten</u> , 109 Wn.2d 896, 748 P.2d 1118 (1998).....	36

<u>State v. Lynn</u> , 67 Wn. App. 339, 835 P.2d 251 (1992).....	10
<u>State v. Madison</u> , 53 Wn. App. 754, 770 P.2d 662, <u>rev. denied</u> , 113 Wn.2d 1002 (1989).....	13
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	10
<u>State v. McNeal</u> , 145 Wn.2d 352, 37 P.3d 280 (2002).....	13
<u>State v. Mendoza</u> , 165 Wn.2d 913, 205 P.3d 113 (2009).....	41, 42
<u>State v. Moses</u> , 129 Wn. App. 718, 119 P.3d 906 (2005).....	16, 17
<u>State v. Naillieux</u> , ____ Wn. App. ____, 241 P.3d 1280 (2010).....	14
<u>State v. Neal</u> , 144 Wn.2d 600, 30 P.3d 1255 (2001).....	40
<u>State v. Norlin</u> , 134 Wn.2d 570, 951 P.2d 1131 (1998).....	36, 38
<u>State v. Ortega</u> , 22 Wn.2d 552, 157 P.3d 320 (1945).....	24
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	31
<u>State v. Pugh</u> , 167 Wn.2d 825, 225 P.3d 892 (2009).....	20, 21
<u>State v. Ross</u> , 152 Wn.2d 220, 95 P.3d 1225 (2004).....	42
<u>State v. Sandoval</u> , 137 Wn. App. 532, 154 P.3d 271 (2007).....	17

<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	10
<u>State v. Shafer</u> , 156 Wn.2d 381, 128 P.3d 87 (2006).....	20
<u>State v. Smith</u> , 148 Wn.2d 122, 59 P.3d 74 (2002).....	30
<u>State v. Walsh</u> , 143 Wn.2d 1, 17 P.3d 591 (2001).....	10
<u>State v. Williams</u> , 137 Wn. App. 736, 154 P.3d 322 (2007).....	30
 <u>Other Jurisdictions:</u>	
<u>Barber v. Merriam</u> , 11 Allen 322, 93 Mass. 322 (1865).....	28
<u>Commonwealth v. Edwards</u> , 444 Mass. 526, 830 N.E.2d 158 (2005).....	23
<u>Foulkrod v. Standard Accident Ins. Co.</u> , 343 Pa. 505, 23 A.2d 430 (1942)	28
<u>People v. Spicer</u> , 379 Ill. App. 3d 441, 884 N.E.2d 675 (2008)	19
<u>Reid v. Yellow Cab Co.</u> , 131 Or. 27, 279 P. 635 (1929).....	28
<u>Skultety v. Humphreys</u> , 247 Or. 450, 431 P.2d 278 (1967).....	28
<u>State v. Glass</u> , 5 Or. 73 (1873).....	24

Constitutional Provisions

Federal:

U.S. Const. amend. VI 15, 18, 21

Washington State:

Const. art I, § 22..... 19, 21

Statutes

Washington State:

RCW 9.94A.500 43

RCW 9.94A.530 42

Rules and Regulations

Washington State:

ER 401 38

ER 402 38

ER 403 37

ER 404 3, 32

ER 803 4, 9, 25, 30

ER 806 36, 37

RAP 2.5..... 9, 10, 11, 13, 14

Other Authorities

5 K. Tegland, Wash. Prac.,
Evidence § 101.7 (5th ed. 2007) 37

Sentencing Reform Act 41, 42, 43

T. Harbinson, Crawford v. Washington and Davis v. Washington's Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians Are Nontestimonial and Admissible as an Exception to the Confrontation Clause,
58 Mercer L. Rev. 569 (2007)..... 18

A. ISSUES PRESENTED

1. Whether this Court should reject the defendant's claim on grounds of a violation of the right of confrontation because the claim was waived, the claim is without merit, and any error is harmless.

2. Whether this Court should reject the defendant's claim of evidentiary error because the trial court excluded evidence that was inadmissible, and the defendant was allowed to present substantial evidence in his defense in any event.

3. Whether this Court should reject the defendant's claim of sentencing error because the error alleged was waived by the defendant's failure to object to his criminal history at sentencing.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Cordarrel Hayes, with two counts of assault in the second degree,¹ one count of tampering with a witness, and two counts of violation of a no-contact order (all

¹ Although they were charged separately, the two counts of second-degree assault were based on the two alternative means by which the State alleged that Hayes had committed one assault, i.e., by strangulation and by reckless infliction of substantial bodily injury. CP 75-76.

with domestic violence designations) for his conduct involving the mother of his child, Shanay Shaw, on February 21, 2010 and in the three weeks thereafter. CP 1-5, 75-77.

Hayes pled guilty to the two gross misdemeanor no-contact order violations prior to trial. CP 47-54; RP (5/5/10) 44-51. A jury trial on the remaining felony counts took place in May 2010 before the Honorable Michael Heavey. At the conclusion of the trial, the jury found Hayes guilty of one count of second-degree assault and also found him guilty of witness tampering. The jury could not agree on the other count of second-degree assault.² CP 16-19; RP (5/13/10) 2-5.

At sentencing, Hayes did not object to his criminal history as set forth in the State's presentence report. CP 59; RP (6/11/10). The trial court imposed standard-range concurrent sentences on the felony counts in accordance with the criminal history and offender scores that Hayes did not object to. CP 62-70; RP (6/11/10) 15-17. The court also imposed 12 months on one gross misdemeanor and a suspended sentence on the other. CP 71-73. Hayes now appeals. CP 81-94.

² The jury convicted Hayes of recklessly inflicting substantial bodily injury, but could not agree on the strangulation alternative means.

2. SUBSTANTIVE FACTS

Hayes and Shanay Shaw were in a dating relationship and they have a young child in common. RP (5/11/10) 41-42. For approximately a year, from early 2009 until February 2010, Hayes, Shaw, and their child lived with Shaw's mother, Ellecia Johnson. RP (5/11/09) 42-43. Although Hayes and Shaw argued on a regular basis, their relationship became especially "bad" during January and February 2010. RP (5/11/10) 44. During this time period, Johnson saw Hayes physically assault Shaw on at least three occasions. Hayes "grabbed [Shaw] by the arm," "shoved her upside the wall," "shook her," "slapped her," and "closed hand fist punched her" in view of her mother.³ RP (5/11/10) 45.

In the early morning hours on February 21, 2010, Hayes was at a Seattle dance club, Club Diamond, with a group of friends that included Nicole O'Donnell. Shanay Shaw was there as well. RP (5/11/10) 61. At approximately 1:30 a.m., Seattle Police officers responded to the area on an unrelated incident. Officer John Schweiger was one of those responding officers, and he parked his

³ These incidents were admitted under ER 404(b), and Hayes does not contest their admissibility on appeal.

marked patrol car in the Club Diamond parking lot. Sub #33A.⁴ After Schweiger parked his car, Shanay Shaw approached the driver's side window "and asked for help." She was "shook up," "scared," and bleeding from a freshly split lip.⁵ Sub #33A.

Officer Schweiger placed Shaw in the back seat of his patrol car and called for aid. Shaw sat in the back seat and cried. Shaw told Schweiger that her boyfriend, Cordarrel Hayes, had beaten her. She said that Hayes had punched her, knocked her down, and kicked her in the head and neck. Sub #33A. After a few minutes, Shaw saw Hayes walking nearby. She pointed at him and said, "There he is." Sub #33A. Officer Schweiger got out of his patrol car and made eye contact with Hayes, who then walked away. Sub #33A.

Seattle Firefighter Thomas Burke was with the aid crew that responded to Officer Schweiger's call. RP (5/11/10) 82-83. He

⁴ As noted in Hayes's brief, Officer Schweiger testified at trial via deposition rather than live testimony because of a vacation that conflicted with Hayes's trial date. The deposition was converted from a court filing to a trial exhibit by the clerk's office, and is designated as "Sub #33A."

⁵ As will be discussed in the first argument section below, Hayes argued that Schweiger's testimony regarding Shaw's out-of-court statements should be excluded on confrontation grounds. RP (5/5/10) 11, 22-26, 39-42; RP (5/10/10) 4-5, 11-12, 30; RP (5/11/10) 3-4. The trial court ruled that Shaw's statements to Officer Schweiger were excited utterances under ER 803(a)(2), and also ruled that the statements were admissible under the Confrontation Clause. RP (5/11/10) 4-8.

noted that Shaw was "visibly shaken up, upset," and crying. She was also complaining of pain in her face and neck. RP (5/11/10) 86. Shaw told Burke that her boyfriend beat her up. RP (5/11/10) 87. She indicated that she had been punched in the face and neck, but that she did not lose consciousness.⁶ RP (5/11/10) 91.

After Shaw was transported to Harborview Medical Center, she met with social worker Alice Walters. Walters provides resources and support to domestic violence victims in conjunction with medical treatment. RP (5/10/10) 16-17. Walters noted that Shaw was very fearful and crying, and was afraid to leave the secure area of the emergency room. RP (5/10/10) 18-19. Shaw told Walters that her boyfriend had grabbed her and threw her down. She said there had been about four prior incidents of domestic violence, "but never this bad." RP (5/10/10) 19. Shaw said she needed help finding a safe place to stay, so Walters referred her to a women's shelter.⁷ RP (5/10/10) 20, 22.

⁶ As will be discussed in the first argument section below, Hayes did not object to the admission of Shaw's out-of-court statements to Burke. In fact, Hayes endorsed Burke as a witness jointly with the State prior to trial. CP 6; RP (5/11/10) 81-82.

⁷ Again, Hayes did not object to any of Walters's testimony regarding Shaw's out-of-court statements.

Shaw was also treated by attending plastic surgeon Dr. Matthew Klein. RP (5/11/10) 16. Shaw told Dr. Klein that she had been punched by her boyfriend, and she complained of pain in her face and neck. RP (5/11/10) 18. She also said that her boyfriend had choked her, and that she had lost consciousness.⁸ RP (5/11/10) 20, 22. Dr. Klein ordered a CT scan, which revealed that Shaw's nose was broken. Dr. Klein also observed that Shaw's face and neck were swollen. RP (5/11/10) 19. Dr. Klein diagnosed a neck sprain in addition to the nasal fracture. RP (5/11/10) 20.

Shaw's mother, Ellecia Johnson, described the appearance of Shaw's injuries two days after the assault. Shaw had two black eyes, her nose was "five times the size it normally is," she had scratches on her neck and chest, and she had bruises on her arm and on the back of her neck. RP (5/11/10) 46, 49-53. Shaw stayed in her room and cried all night. RP (5/11/10) 56. On cross, Hayes elicited the fact that Shaw was still staying at Johnson's home at the time of trial. RP (5/11/10) 57. On redirect, Johnson stated that

⁸ Hayes did not object to Dr. Klein's testimony regarding Shaw's out-of-court statements. Also, Hayes stipulated that Dr. Klein was a custodian of records and agreed that Shaw's medical records (which also contained Shaw's statements) were admissible. RP (5/11/10) 15.

Shaw would not appear in court because she was afraid.

RP (5/11/10) 58.

After Hayes was arrested and advised of his rights, he told Officer George Derezes that he and Shaw got into an argument, that another male got involved, and that Shaw "got in the middle." RP (5/10/10) 28. Hayes claimed that he pushed Shaw accidentally and "she hit her head on a wall." RP (5/10/10) 28.

Shortly after Hayes was booked into jail, he called Nicole O'Donnell and told her to call Shaw. RP (5/11/10) 65, 69. Hayes told O'Donnell to keep Shaw away from the court and the "motherfucking detective." RP (5/11/10) 81. Telephone records confirmed that O'Donnell called Shaw at least 16 times after Hayes told her to, although O'Donnell claimed that she had not actually spoken with Shaw on any of those occasions. RP (5/11/10) 69-70. On the other hand, O'Donnell also testified that Shaw had told her that she had lied to the police about Hayes assaulting her because Hayes had cheated on her and she thought he should sit in jail and "think about what he did[.]" RP (5/11/10) 80.

Shaw appeared at Hayes's arraignment on March 9, 2010 and told the victim's advocate from the prosecutor's office that there had been "a misunderstanding." Shaw told the advocate that she

had been injured because she got in the middle of a fight between Hayes and another individual, not because Hayes had assaulted her.⁹ RP (5/12/10) 30-31.

Hayes testified in his defense. He said that Shaw had been drinking on the night of the incident, and she became angry with him because an unidentified "tall dude" accused Hayes of having sex with his girlfriend. RP (5/12/10) 41-42. Hayes said that he and the tall man got into a fistfight, and that Shaw was struck accidentally by both men when she tried to get in the middle. RP (5/12/10) 43. Hayes also testified that Shaw had visited him in the jail shortly after his arrest, that she came to his arraignment, and that she had been writing him letters regularly. RP (5/12/10) 47. During his testimony, Hayes identified a letter that Shaw had written to him within the past week, although the trial court did not allow the letter itself to be admitted as evidence.¹⁰ RP (5/12/10) 47-48.

⁹ This evidence was introduced in the form of a stipulation. RP (5/12/10) 30-31.

¹⁰ As will be discussed in the second argument section below, the trial court did not allow two of Shaw's letters to Hayes to be admitted because the court determined that they were irrelevant. RP (5/11/10) 104-08; RP (5/12/10) 32-33.

Additional facts will be discussed further below as necessary for argument.

C. ARGUMENT

- 1. HAYES'S CLAIM THAT THE VICTIM'S STATEMENTS TO MEDICAL PROVIDERS SHOULD HAVE BEEN EXCLUDED FAILS BECAUSE THE CLAIM WAS WAIVED, THE CLAIM IS WITHOUT MERIT, AND ANY ERROR IS HARMLESS.**

Hayes claims that his right of confrontation under the state and federal constitutions was violated by the admission of Shanay Shaw's statements to medical providers in accordance with ER 803(a)(4). Appellant's Opening Brief, at 12-27. This claim should be rejected. Hayes did not raise this claim at trial. To the contrary, Hayes agreed to the admission of Shaw's statements to medical providers as part of a legitimate trial strategy. On appeal, Hayes has not provided an analysis under RAP 2.5, and he has not raised this issue as a claim of ineffective assistance of counsel. Accordingly, this issue is waived. However, even if this Court looks past RAP 2.5, Hayes's claim fails on the merits because the statements at issue are not testimonial. Finally, any error is harmless.

a. Hayes's Confrontation Claim Is Waived.

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

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

Kirkman, 159 Wn.2d at 926-27. Put another way, a manifest error is "unmistakable, evident or indisputable" in light of the record as a whole. State v. Burke, 163 Wn.2d 204, 224, 181 P.3d 1 (2008) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

In this appeal, Hayes does not provide an analysis under RAP 2.5. Indeed, Hayes's brief is completely silent regarding the fact that he did not object to the admission of Shaw's statements to medical providers at trial (although he *did* object to the admission of Shaw's statements to Officer Schweiger on confrontation grounds). Rather, Hayes appears to assume that because confrontation claims are constitutional in nature, they may always be raised and considered for the first time on appeal without any further analysis.

In this case, there were obvious tactical reasons that Hayes's trial counsel did not object to the admission of Shanay Shaw's statements to medical providers and agreed to the admission of her medical records from Harborview. Counsel's strategy was to use these statements to the defendant's advantage.

For example, when questioning firefighter Thomas Burke,¹¹ Hayes's counsel elicited that Shaw had been consuming alcohol, and that she had denied losing consciousness during the assault. RP (5/11/09) 89-91. When cross-examining Dr. Klein, counsel elicited the fact that Shaw did not have a nosebleed, which is a common symptom if a nose has been broken recently.

¹¹ As noted previously, Hayes endorsed Burke as a defense witness. CP 6; RP (5/11/10) 81-82.

RP (5/11/09) 29. Counsel also elicited this admission from the radiologist, Yoshimi Anzai, who also testified that the age of Shaw's nasal fractures could not be determined from the CT scan.

RP (5/11/10) 33, 36-37.

Counsel then used the contradictions in Shaw's statements to medical providers to attack her credibility. In his closing, Hayes's counsel argued that the State had not proved that the nasal fracture was recent, and he noted that Shaw did not say anything about being strangled until after she arrived at Harborview, thus calling into question the veracity of that allegation. RP (5/12/10) 84-87. Accordingly, counsel argued that Hayes was not guilty of either count of second-degree assault because the State failed to prove that the fracture occurred during a recent assault or that strangulation had occurred.¹² RP (5/12/10) 87.

Counsel further argued that because of the inconsistencies in Shaw's statements to the medical providers, inconsistencies between these statements and the evidence, and her later recantation, Shaw was not credible. Counsel argued that the jury should acquit Hayes of the assault counts, or, in the alternative, find

¹² Counsel's strategy was apparently partially successful, since the jury did not convict Hayes of the strangulation alternative means. CP 16.

Hayes guilty of fourth-degree assault due to the State's failure to prove strangulation or an acute nasal fracture. RP (5/12/10) 88-90. Thus, counsel's failure to object to Shaw's medical statements was not an oversight, but a reasonable tactical decision.

Matters of trial strategy or tactics cannot support a claim of ineffective assistance of counsel. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Trial counsel's decisions about whether to object to the admission of evidence are quintessentially tactical decisions, and only in egregious circumstances will the failure to object constitute incompetent representation. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, rev. denied, 113 Wn.2d 1002 (1989). If Hayes had raised this claim under the rubric of ineffective assistance of counsel, it would have failed. Accordingly, it makes no sense to allow Hayes to raise this claim as a "manifest" constitutional error under RAP 2.5 when the failure to raise the issue at trial was clearly the result of deliberate, tactical decision-making by competent counsel.

For obvious and rational tactical reasons, Hayes agreed to the admission of Shanay Shaw's medical records and did not object to the admission of her statements to the medical providers, yet he

raises this claim for the first time on appeal. As Division III of this Court recently observed,

We sit as a court of review, which, of course, means that we do not preside over trial proceedings de novo. Our function is to review the validity of claimed errors by a trial judge who presided over a trial. That function assumes that counsel preserve the error by objecting to something the trial judge did or did not do. We do not, and should not, be in the business of retrying these cases. It is a wasteful use of judicial resources. And it encourages skilled counsel to save claims of constitutional error for appeal so a defendant can get a new trial and second chance at a not guilty verdict if the first trial does not end in his favor.

State v. Naillieux, ___ Wn. App. ___, 241 P.3d 1280, 1283 (2010).

In light of these considerations, this Court should hold that a reasonable tactical decision by trial counsel regarding an evidentiary matter cannot be raised for the first time on appeal under RAP 2.5 because it is not "manifest" error. Hayes has provided no analysis under RAP 2.5; indeed, his brief does not mention that this claim has been raised for the first time on appeal. The evidence Hayes challenges on appeal was not admitted at trial due to counsel's oversight, but as the result of a deliberate tactical choice. Accordingly, this Court should hold that Hayes's confrontation claim is waived because he has not demonstrated a constitutional error that is "manifest."

b. Hayes's Confrontation Claim Fails On The Merits.

If this Court rejects the State's position that Hayes waived this claim, the claim also fails on the merits under both the federal and state constitutions.

i. The claim fails under a federal constitutional analysis.

The Confrontation Clause of the Sixth Amendment bars the admission of "testimonial" out-of-court statements in the absence of cross examination. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The United States Supreme Court has not yet decided whether statements made for the purpose of medical diagnosis are "testimonial" such that their admission in the absence of cross examination violates the Confrontation Clause. However, in a recent decision, the Court indicated that it will not view such statements as being testimonial. In Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), in a footnote distinguishing cases cited by the dissent, the majority of the Court stated, "Others are simply irrelevant, since they involved medical reports created for treatment purposes, which would not be testimonial under our decision

today." Melendez-Diaz, 129 S. Ct. at 2533 n.2. In another recent decision, the Court observed that "only *testimonial* statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules[.]" Giles v. California, 554 U.S. 353, 376, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) (emphasis in original). Although this statement is dicta as well, it further signals that the Court does not view statements to treatment providers as being testimonial.

Washington cases that have squarely addressed this issue have concluded that statements made for purposes of medical treatment are not testimonial for purposes of the federal Confrontation Clause. In State v. Fisher, 130 Wn. App. 1, 13, 108 P.3d 1262 (2005), the court held that the child victim's statements to a treating physician that the defendant struck him were not testimonial where it was clear that the doctor's questions were part of her efforts to provide proper treatment. In State v. Moses, 129 Wn. App. 718, 730, 119 P.3d 906 (2005), this Court held that the victim's statements to a treating doctor at the emergency room that the defendant had hit and kicked her in the

face were not testimonial because the purpose of the examination was for medical treatment of the victim's significant injuries. In State v. Sandoval, 137 Wn. App. 532, 538, 154 P.3d 271 (2007), the court held that the victim's statements to emergency room staff that the defendant assaulted her were not testimonial. The court explained that statements are not testimonial when they are made for diagnosis and treatment purposes, when there is no indication that the witness expected the statements to be used at trial, and when the doctor is not an agent of the State. Id. at 537.

Significantly, the Ninth Circuit recently upheld this Court's conclusion in Moses that statements for purposes of medical diagnosis are not testimonial. Moses v. Payne, 555 F.3d 742 (2009). On habeas review, the Ninth Circuit held that this Court's conclusion -- that statements made by the victim to her doctor following an incident of domestic violence were not testimonial -- was a reasonable application of established federal law. Id. at 755. At least two other federal courts that have addressed this issue are in agreement that statements made for the purpose of medical

diagnosis are not testimonial. U.S. v. Santos, 589 F.3d 759, 763 (5th Cir. 2009); U.S. v. Peneaux, 432 F.3d 882 (8th Cir. 2005).¹³

In sum, Washington appellate decisions have uniformly held that statements to medical providers for the purposes of diagnosis and treatment are not testimonial, and thus, their admission does not violate the Confrontation Clause of the Sixth Amendment. Moreover, the Ninth Circuit and other federal circuit courts have reached the same conclusion, and the United States Supreme Court has signaled its agreement with this conclusion as well. Accordingly, Hayes's claim under the federal constitution fails.

Nonetheless, Hayes argues that Shaw's statements to medical treatment providers were testimonial in light of the so-called "Davis factors," citing Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Appellant's Opening Brief, at 23-25. However, the test set forth in Davis is a test that applies to statements made in response to *interrogation* by a *government agent*. Davis, 547 U.S. at 826. The treatment providers in this case were not acting as government agents, nor

¹³ See also T. Harbinson, Crawford v. Washington and Davis v. Washington's Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians Are Nontestimonial and Admissible as an Exception to the Confrontation Clause, 58 Mercer L. Rev. 569, 632 (2007).

did they perform interrogations. The test set forth in Davis for police interrogations is inapplicable. In addition, the only case Hayes cites for the application of "Davis factors" to medical providers is grounded in the notion that the sexual assault examination at issue in that case was performed for the purpose of collecting evidence, not just the treatment of injuries. People v. Spicer, 379 Ill. App. 3d 441, 687-89, 884 N.E.2d 675 (2008). Such is not the case here; Shaw was treated for her injuries by the aid personnel and the medical staff at Harborview, and evidence collection did not occur.¹⁴ Hayes's claim fails under a federal constitutional analysis.

- ii. The claim fails under a state constitutional analysis.

Hayes also argues that the admission of Shanay Shaw's statements to medical providers violated article I, section 22 of the Washington constitution. This is a question of first impression. This claim should be rejected as well. Analysis of the Gunwall¹⁵

¹⁴ In addition, Spicer appears to be an outlier and its reasoning is questionable.

¹⁵ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

factors does not support an independent state constitutional analysis in these circumstances.

Hayes's argument that the state constitution should be interpreted differently than the federal constitution in this context does not withstand scrutiny. Although two recent state supreme court cases have *suggested* that the state constitution could be interpreted independently in some circumstances, both cases ultimately held that the state constitution was, under the facts of those cases, no broader.

In State v. Shafer, 156 Wn.2d 381, 392, 128 P.3d 87 (2006), the court held that the child victim's statements to her mother and a family friend were not testimonial, and that their admission did not violate the state constitution. In State v. Pugh, 167 Wn.2d 825, 845, 225 P.3d 892 (2009), the court held that the victim's statements to the 911 operator were not testimonial and that their admission did not violate the state constitution. Thus, while both of these cases suggest that an independent analysis of the state constitution may be warranted, neither of them actually interpreted the state constitution to provide broader protection than the federal constitution.

Even where an independent analysis of the state constitution has previously been employed, consideration of the Gunwall factors helps guide the court's inquiry under the facts presented in a particular case. Madison v. State, 161 Wn.2d 85, 93 n.5, 163 P.3d 757 (2007); Pugh, 167 Wn.2d at 846-47 (Chambers, J., concurring). The Gunwall factors are (1) the textual language, (2) differences in the texts, (3) constitutional and common law history, (4) preexisting state law, (5) structural differences and (6) matters of particular state and local concern. State v. Foster, 135 Wn.2d 441, 458, 957 P.2d 712 (1998).

Turning to the first two factors, which focus on the text of the federal and state constitutions, independent state constitutional analysis is not warranted because the critical term is the same in both constitutions. Article I, section 22 of the state constitution provides that "[i]n criminal prosecutions, the accused shall have the right . . . to meet the witnesses against him face to face." It is similar, but not identical, to the Confrontation Clause of the Sixth Amendment, which reads, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI . While the state provision guarantees the accused the right to "meet face to face"

and the federal provision guarantees the accused the right to "confront," both constitutional provisions apply to "witnesses" against the accused. Because the drafters of the state constitution adopted the term "witnesses" from the federal constitution, it should be presumed that the drafters intended the term to have the same meaning.

As the United States Supreme Court has reasoned, only testimonial statements cause the declarant to be a "witness" within the meaning of the Confrontation Clause. Davis, 547 U.S. at 821. If a statement is not testimonial, it is not subject to the Confrontation Clause because the declarant is not "bearing witness" by making the statement. Id. The result should be the same under the state constitution, because the critical term, "witness," is the same. The fact that the state constitution requires a "face to face" confrontation with "witnesses" does not alter the definition of "witness" itself. Accordingly, Shaw's statements to the medical providers would not violate either the federal or state constitution because the statements were not testimonial and admission of the statements did not make Shaw a "witness against the accused." Therefore, factors one and two do not favor a broader interpretation of the state constitution in this case.

Turning to the third factor, a plurality of the state supreme court has previously noted that constitutional history is not helpful in determining whether the drafters intended the state constitution to be broader than the federal Confrontation Clause. Foster, 135 Wn.2d at 460. In his dissent in Foster, Justice Johnson looked to Massachusetts, after determining that the "face to face" language in the Washington constitution was indirectly derived from that state's 1780 constitution, which was one of the original state declarations of rights. Foster, 135 Wn.2d at 490 (Johnson, J., dissenting). Recently, the Massachusetts Supreme Court held that its constitution is not broader than the federal right to confrontation in cases involving the hearsay rule and its exceptions. Commonwealth v. Edwards, 444 Mass. 526, 830 N.E.2d 158 (2005). Therefore, constitutional history also does not favor a broader interpretation of the state constitution in this case.

The fourth factor is preexisting state law. Hayes argues that the question of whether out-of-court statements violate the state constitution must be determined by examining Washington law at the time that the state constitution was adopted. The state constitution was adopted in 1889. As of that time, there were only nine years of reported decisions by the Supreme Court of the

Washington Territory. Obviously, the court did not address all possible constitutional issues in those nine years.

Hayes has cited to no pre-1889 Washington case in which statements for the purpose of medical treatment were held to violate the right to confront witnesses. However, in State v. Glass, 5 Or. 73, 79 (1873), the Oregon Supreme Court recognized that statements made by a sick person to a medical attendant as to the nature of her malady were admissible.¹⁶ Also, in White v. Illinois, the United States Supreme Court referred to the hearsay exception for statements made for the purpose of medical treatment as a "firmly-rooted" exception. White v. Illinois, 502 U.S. 346, 355 n.8, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992). Moreover, in State v. Ortega, 22 Wn.2d 552, 563, 157 P.3d 320 (1945), the state supreme court noted that the law can evolve, stating "the privilege of confrontation has at all times had its recognized exceptions, and these exceptions are not static, but may be enlarged from time to time if there is no material departure from the reason underlying the

¹⁶ In his opinion in Foster, Justice Alexander noted that Washington's confrontation clause is identical to Oregon's. Foster, 135 Wn.2d at 474 (Alexander, J., concurring in part and dissenting in part). Therefore, Oregon's case law is instructive as to this issue.

constitutional mandate guaranteeing to the accused the right to confront the witnesses against him."

The fifth factor supports an independent constitutional analysis in every case. Foster, 135 Wn.2d at 458. In regard to the sixth factor, the concerns underlying the right to confrontation are not unique to Washington; rather, they are national concerns. Id. at 465.

In sum, only the fifth Gunwall factor supports an independent analysis of the state constitution in regard to the question presented here. Therefore, as it regards statements for the purpose of medical treatment, the state constitution does not provide broader protection than the federal Confrontation Clause. Because Shaw's statements to the medical providers were not testimonial, their admission did not violate either the federal or the state right to confront witnesses.

Nonetheless, Hayes cites several cases and claims that they stand for the proposition that statements for the purpose of medical diagnosis or treatment were not admissible prior to the adoption of ER 803(a)(4) in 1976. Appellant's Opening Brief, at 14-15. A closer examination of these cases demonstrates that Hayes has misconstrued them. Rather than exclude medical hearsay

statements, as Hayes claims, these cases draw a distinction between statements made by a patient to a treating physician, which were admissible as substantive evidence, and statements made to a physician solely for the purpose of qualifying the physician as an expert witness who would render an opinion at trial, which were not admissible as substantive evidence.

For example, in Kraettli v. North Coast Trans. Co., 166 Wn. 186, 6 P.2d 609 (1932), the injured plaintiff called several doctors to testify in her favor at trial. At least one of the plaintiff's treating physicians, Dr. Dickerson, testified about the plaintiff's statements regarding her injuries without objection. One of the other doctors, Dr. Stewart, testified as both an expert witness and a treatment provider. In addressing the defendant's claim on appeal that Dr. Stewart's testimony regarding the plaintiff's hearsay statements should not have been admitted, the court held:

The objection to the testimony of Dr. Stewart is easily determined. He did not make his examination for the purpose solely of testifying as a witness. He was called by Dr. Dickerson, her attending physician in Seattle, to examine respondent and make suggestions as to what to do for her, purely from the mental side. He was therefore called as a consultant with Dr. Dickerson, and appellant makes no objection to the testimony of Dr. Dickerson as to her statements to him concerning past pain and the condition of respondent after the accident, nor any pretense that

his testimony was inadmissible. The testimony of Dr. Stewart stands upon the same ground.

In no decision or text that we have been able to find, after reading most of the many cases cited by appellant, has it ever been held that physicians called for the purpose of effecting a cure of a patient are not permitted to testify as to statements of the patient's past pain and suffering made to them by the patient, which are, of course, statements of subjective symptoms.

Kraettli, 166 Wn. at 189-90. Further, although the trial court had instructed the jury that it could not consider the plaintiff's hearsay statements to the two doctors who testified as *experts* for the truth of the matters asserted, no such instruction was necessary regarding the plaintiff's statements to her *treating physicians*. Id. at 190-01.

The other cases cited by Hayes (and the cases cited by those cases) stand for the same proposition: statements made to doctors for the purpose of qualifying them as expert witnesses for trial were not admissible as substantive evidence, whereas statements made to treating physicians for the purposes of diagnosis or treatment *were* admissible as substantive evidence. See Estes v. Babcock, 119 Wn. 270, 274, 205 P. 12 (1922)

(statements made to a doctor called as an expert witness were admissible for the purpose of allowing jurors to determine the weight to be given to the expert's opinion, not as substantive evidence); Peterson v. Dept. of Labor & Industries, 36 Wn.2d 266, 268, 217 P.2d 607 (1950) (noting that "one rule applies when the medical testimony is given by a doctor who examines a patient for the purpose of treating him, while a different rule applies when the testimony is given by a doctor who examines an individual for the sole purpose of qualifying himself to be a witness"); Foulkrod v. Standard Accident Ins. Co., 343 Pa. 505, 509, 23 A.2d 430 (1942) (statements by patients to doctors regarding symptoms for purposes of treatment are admissible); Reid v. Yellow Cab Co., 131 Or. 27, 32-33, 279 P. 635 (1929), *overruled on other grounds*, Skultety v. Humphreys, 247 Or. 450, 431 P.2d 278 (1967) (doctors may testify to statements connected to diagnosis or treatment, not for the purpose of qualifying them as a witness); Barber v. Merriam, 11 Allen 322, 93 Mass. 322, 325 (1865) (statements to treating physicians are made with "a strong and direct interest to adhere to the truth," and "[t]here can be no doubt that testimony of this

character has always been received in the courts of this commonwealth without any serious doubt or question").¹⁷

In sum, these cases held uniformly that statements for the purposes of medical diagnosis or treatment were admissible as substantive evidence. On the other hand, statements made to medical experts for the purpose of rendering an expert opinion at trial did not carry the same guarantees of trustworthiness, and thus, they were admitted only for the limited purpose of allowing the jury to decide what weight the expert's opinion deserved. This analysis, which Washington cases adopted, closely resembles the federal analysis as to whether a statement is "testimonial," i.e., whether it has been made in anticipation of testimony at trial. Accordingly, Hayes's claim under the state constitution fails.

Finally, Hayes argues that even if some medical statements are admissible, statements of causation and attribution are not. See Appellant's Opening Brief, at 15 ("a patient's statement that he was struck by an automobile would qualify but not his statement

¹⁷ Again, the fact that courts in both Oregon and Massachusetts historically admitted statements to treating physicians is significant, given that those states have the same confrontation clause language as Washington. See Foster, 135 Wn.2d at 474-76 (Alexander, J., concurring in part and dissenting in part), and at 490 (Johnson, J., dissenting).

that the car was driven through a red light") (citation omitted).

Although this is true as a general rule, Washington case law is clear on this point: "In domestic violence and sexual abuse situations, a declarant's statement disclosing the identity of a closely-related perpetrator is admissible under ER 803(a)(4) because part of reasonable treatment and therapy is to prevent recurrence and future injury." State v. Williams, 137 Wn. App. 736, 746, 154 P.3d 322 (2007). Hayes's claim is without merit.

c. Any Error In Admitting The Statements Is Harmless.

But even if the admission of Shanay Shaw's statements to medical providers violated Hayes's right to confrontation, the error was harmless beyond a reasonable doubt.

If statements are admitted in violation of the Confrontation Clause, a conviction should be affirmed if the error was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); State v. Smith, 148 Wn.2d 122, 138-39, 59 P.3d 74 (2002). An error is harmless beyond a reasonable doubt if the untainted evidence overwhelmingly proves the defendant's guilt. Smith, 148 Wn.2d at

139. Stated another way, an error is harmless if there is no "reasonable probability that the outcome of the trial would have been different had the error not occurred." State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995).

In this case, as discussed at length above, Shanay Shaw's statements to the medical treatment providers were admitted without objection in accordance with Hayes's trial strategy. That strategy was to show that Shaw was not strangled, that her nasal fracture was not recent, that Shaw was not credible, and that no assault had occurred. In addition to the medical statements, the trial court also admitted the deposition testimony of Officer Schweiger over Hayes's objection. During this testimony, which Hayes does not challenge on appeal, Officer Schweiger stated that Shaw approached his police car, asked for help, and told him that Hayes had punched her, knocked her down, and kicked her in the head and neck. Schweiger observed that Shaw was fearful, crying, and bleeding from a fresh injury to her lip. Sub #33A. While Shaw was sitting in Schweiger's patrol car, she pointed to Hayes as he was walking nearby and said "there he is." Schweiger got out of the car and made eye contact with Hayes, who then left the area. Sub #33A.

Shaw's mother, Ellecia Johnson, testified to prior incidents of domestic violence that she had witnessed in accordance with ER 404(b). Hayes also does not challenge this evidence on appeal. Johnson told the jury that she had seen Hayes assault Shaw at least three times between December 2009 and February 2010. Johnson described how Hayes "grabbed her by the arm," "shoved her upside the wall," "shook her," "slapped her," and "closed hand fist punched her." RP (5/11/10) 45. Johnson also described the appearance of Shaw's injuries two days after the assault at issue in this case. Shaw had two black eyes, her nose was "five times the size it normally is," she had scratches on her neck and chest, and she had bruises on her arm and on the back of her neck. RP (5/11/10) 46-53. Dr. Klein observed that Shaw's face and neck were swollen and her lip was cut. RP (5/11/10) 19. Photographs of Shaw's injuries were introduced as well. RP (5/11/10) 13-21. The CT scan confirmed that her nose was broken. RP (5/11/10) 32.

Hayes told the police that he had pushed Shaw by accident and that she hit her head on a wall. RP (5/10/10) 28. During his trial testimony, Hayes admitted that he punched Shaw, but claimed that he punched her by accident when she tried to break up a fight

between him and an unknown male. RP (5/12/10) 43. Hayes also had little choice but to admit that he had called Nicole O'Donnell from the jail after his arrest and told her to prevent Shaw from coming to court or talking to the "motherfucking detective."

RP (5/12/10) 50.

The case focused on the credibility of Hayes's claim that he punched Shaw by accident during a fistfight with someone else. Clearly, the jury did not believe Hayes's version of events, which was not surprising given the implausibility of Hayes's testimony in light of the other evidence. Instead, the jury believed that Hayes intentionally assaulted Shaw, as she told Officer Schweiger immediately after the incident, and that Hayes broke Shaw's nose, as confirmed by the CT scan. Shaw's injuries as observed by her doctor at the time of treatment and by her mother two days after the incident were not consistent with being punched by accident a couple of times while trying to break up a fight. The prior incidents of violence as witnessed by Shaw's mother further rebutted Hayes's claim that he struck Shaw by accident. Also, Hayes's telephone call to Nicole O'Donnell provided powerful evidence of guilt, as there would be no reason to keep Shaw away from court or the "motherfucking detective" if Hayes was not guilty of assaulting her.

In sum, this Court can conclude that any error in admitting Shaw's statements to the medical providers was harmless beyond a reasonable doubt in light of the overwhelming untainted evidence that Hayes committed the crime of second-degree assault. Hayes's conviction for that crime should be affirmed.

2. THE TRIAL COURT'S DECISION NOT TO ADMIT THE VICTIM'S LETTERS SHOULD BE AFFIRMED BECAUSE THEY WERE INADMISSIBLE AND HAYES WAS PERMITTED TO INTRODUCE RELEVANT EVIDENCE IN ANY EVENT.

Hayes next claims that he was denied the right to present his defense because the trial court refused to admit two letters that Shanay Shaw wrote to him during his incarceration pending trial. More specifically, Hayes claims that by not allowing the introduction of the letters, the trial court denied him the constitutional right to present a defense by impeaching Shaw's admissible hearsay statements. Appellant's Opening Brief, at 28-35. This claim should be rejected because the letters themselves were not admissible, and Hayes was allowed to introduce substantial evidence that impeached Shaw's credibility in any event. Accordingly, this Court should affirm.

A defendant has a constitutional right to present a defense; however, a defendant has no right to present irrelevant or inadmissible evidence. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); State v. Aguirre, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010). "In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

Evidentiary rulings are matters addressed to the sound discretion of the trial court. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). A trial court abuses its discretion in deciding whether evidence is admissible only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court will find an abuse of discretion only if it finds that no reasonable person would have ruled as the trial judge did. Atsbeha, 142 Wn.2d at 914. In addition, even if the trial court's stated basis for an evidentiary ruling is incorrect, the ruling may still

be affirmed on any other proper basis supported by the record.

State v. Norlin, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998).

In this case, Hayes offered the two letters under the theory that they showed Shaw was not afraid of Hayes, thus impeaching her hearsay statements, and he cited ER 806 as authority for their admission.¹⁸ RP (5/6/10) 6-7; RP (5/11/10) 8-12. This rule provides in relevant part:

When a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence *which would be admissible for those purposes* if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.

ER 806 (emphasis supplied). Moreover, as the former comment to this rule explained, "Evidence offered to impeach or rehabilitate a declarant must, of course, *be relevant to the declarant's credibility*."

The trial court has a measure of discretion in determining

¹⁸ The State acknowledges that its position on this issue was inconsistent at trial. The prosecutor initially agreed that Shaw's letters were admissible, and later argued that they were not admissible. RP (5/6/10) 7; RP (5/11/10) 10-11. But a court is not bound by an erroneous concession of law; thus, the prosecutor's inconsistent positions are of no moment in deciding this issue. See State v. Knighten, 109 Wn.2d 896, 901-02, 748 P.2d 1118 (1998).

relevance, just as it does when evidence is offered to impeach or rehabilitate a witness who is present in the courtroom." Former ER 806 cmt. (2006) (emphasis supplied).¹⁹

In this case, the letters that Hayes sought to introduce contain a few isolated statements that could have been admitted under ER 806, i.e., that Shaw still wanted to be in a relationship with Hayes, which could imply that she was not afraid of him. Ex. 3, 27; Appellant's Opening Brief, at 33. On the other hand, both letters are full of completely irrelevant and inflammatory personal information, such as Shaw's descriptions of drinking, dancing, socializing with other men, toilet training her child, and many passages consisting of sexually explicit remarks. Ex. 3, 27. One of the letters contains a picture of Shaw wearing nothing but underwear displayed prominently on the front page. Ex. 3. Accordingly, whatever minimal probative value these letters may have had as impeachment under ER 806, the vast bulk of their contents was far more prejudicial than probative under ER 403 and wholly irrelevant to Shaw's credibility (or any other material issue)

¹⁹ Though deleted in 2006, the comments to the evidence rules remain a "reliable guide to the drafters' original intent." 5 K. Tegland, Wash. Prac., Evidence § 101.7, at 16 (5th ed. 2007).

under ER 401 and ER 402. Accordingly, the trial court exercised sound discretion in excluding them.

Moreover, although the trial court's ruling on this issue was partially incorrect, this does not negate the conclusion that the ruling was proper. Specifically, the trial court stated that the letters were irrelevant in part because no one had testified that Shaw was afraid of Hayes. RP (5/11/10) 108. In fact, Shaw's mother testified that Shaw was afraid. RP (5/11/10) 58. Nonetheless, the letters were properly excluded because they consist mainly of irrelevant, unfairly prejudicial material. As noted above, the trial court should be affirmed if its ruling is proper on any basis supported by the record. Norlin, 134 Wn.2d at 582. Such is the case here.

Furthermore, Hayes's starting premise that he was denied the right to present a defense is not supported by the record. To the contrary, Hayes was allowed to introduce significant evidence in support of his theory that Shaw was not afraid of him and had fabricated her allegations because she was jealous. For example, although Hayes was not allowed to introduce the letters themselves, Hayes identified Exhibit 3 in open court during his testimony as a letter that Shaw had written to him within the past week. RP (5/12/10) 47-48. Shaw's mother, Ellecia Johnson, also

identified Exhibit 3 during cross examination. RP (5/11/10) 57, 59.

In addition, Hayes testified that Shaw had visited him in the jail soon after his arrest, that she had been writing him letters while he was incarcerated, and that she came to his arraignment.

RP (5/12/10) 47.

In addition, Hayes's friend Nicole O'Donnell testified that Shaw told her that she had lied to the police about Hayes assaulting her because she was angry with Hayes for cheating on her and she wanted him to sit in jail and "think about what he did[.]" RP (5/11/10) 80. The trial court also read a stipulation to the jury that Shaw had appeared at Hayes's arraignment on March 9, 2010, that she told the victim's advocate that the incident was "a misunderstanding" and that she had been injured when she tried to stop a fight between Hayes and another individual. RP (5/12/10) 30-31.

In sum, Hayes was allowed to present significant evidence in his defense to support his theory that Shaw was not afraid of him, and that she had fabricated her allegations due to jealousy. Accordingly, the jury had ample evidence from which to determine whether Hayes's theory of the case was sound, and Hayes was not deprived of the right to present a defense. Therefore, even if this

Court were to conclude that the trial court's ruling excluding the letters cannot be sustained on any evidentiary basis, any error is harmless because there is no reasonable probability that the outcome of the trial would have been different given the evidence that Hayes was allowed to introduce. See State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (evidentiary errors are harmless if there is no reasonable probability that the outcome of the trial was affected). Hayes's claim fails for this reason as well.

3. CUMULATIVE ERROR DOES NOT PROVIDE GROUNDS FOR REVERSAL.

Hayes also argues that if the errors he alleges to not warrant reversal individually, that their cumulative effect deprived him of a fair trial. Appellant's Opening Brief, at 35-37. This claim should be rejected, because the errors Hayes alleges do not warrant reversal either individually or cumulatively.

The cumulative error doctrine is limited to cases where there have been several trial errors that, standing alone, may not justify reversal; when combined, however, they may deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). As argued above, Hayes's claims on appeal are without merit.

Accordingly, there is no trial error to cumulate in this case. See State v. Hodges, 118 Wn. App. 668, 674, 77 P.3d 375 (2003) (where defendant has identified no errors, cumulative error doctrine does not apply). Hayes's cumulative error claim is without merit.

4. HAYES'S OHIO CONVICTION WAS PROPERLY INCLUDED IN HIS OFFENDER SCORE.

Lastly, Hayes argues that he should be resentenced because the State did not prove that one of his prior convictions was comparable to a Washington felony. More specifically, Hayes argues that the State did not prove that his Ohio conviction for trafficking in marijuana is legally or factually comparable to a Washington felony drug crime. Appellant's Opening Brief, at 37-43. This claim should be rejected. Recent amendments to the Sentencing Reform Act provide unequivocally that Hayes acknowledged that the Ohio conviction should be included in his offender score by not objecting to it at sentencing.

Hayes is correct that generally speaking, the State bears the burden of proving a defendant's criminal history, including the comparability of out-of-state prior convictions, for purposes of determining the defendant's offender score. State v. Mendoza,

165 Wn.2d 913, 920, 205 P.3d 113 (2009); State v. Ross, 152 Wn.2d 220, 229-30, 95 P.3d 1225 (2004). But if the defendant acknowledges his criminal history at sentencing, the trial court may rely on that acknowledgment and no further proof of the defendant's criminal history or the comparability of out-of-state prior convictions is necessary. Ross, 152 Wn.2d at 232-33.

Before June 12, 2008, an *affirmative* acknowledgment by the defendant was required to relieve the State of its burden of proof regarding criminal history; a failure to object did not suffice.

Mendoza, 165 Wn.2d at 924-29. But as of June 12, 2008, the SRA now provides in relevant part as follows:

In determining any sentence . . . the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing[.] *Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing.* Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence[.]

RCW 9.94A.530(2) (emphasis supplied). The current version of the SRA further provides:

A criminal history summary relating to the defendant from the prosecuting authority or from a state, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein.

RCW 9.94A.500.

In accordance with the plain language of these statutes, Hayes acknowledged his criminal history as contained in the State's presentence materials, including his prior Ohio conviction, when he did not object to his criminal history at sentencing. CP 59; RP (6/11/10). Therefore, Hayes has waived any challenge to the inclusion of the Ohio conviction in his offender score by virtue of that acknowledgment.

Nonetheless, Hayes argues that the Ohio drug trafficking statute is broader than the comparable Washington statute, and that the record does not establish factual comparability. But Hayes's brief fails to mention the recent amendments to the SRA that conclusively establish that he acknowledged his Ohio conviction at sentencing and that this claim has been waived. Hayes's claim is contrary to controlling statutory authority.

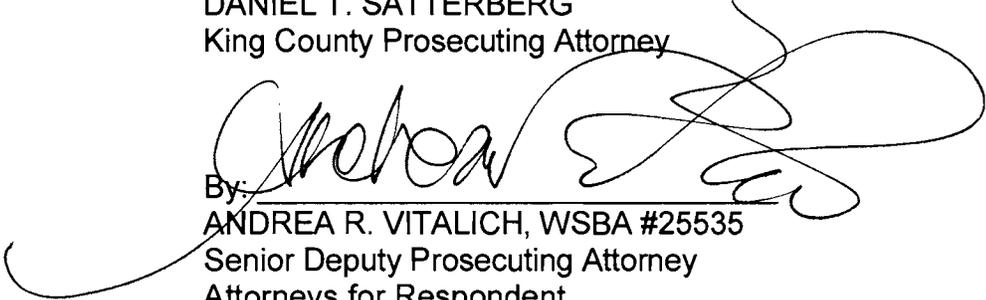
D. CONCLUSION

For the foregoing reasons, this Court should reject Hayes's appellate claims and affirm.

DATED this 7th day of February, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
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By: 

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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 Maureen Cyr, 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. CORDARREL HAYES, Cause No. 65622-8-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

2/7/11
Date