

75164-6

75164-6

No. 75164-6-I

IN THE COURT OF APPEALS OF  
THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

RONALD WAFFORD,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON  
FOR SNOHOMISH COUNTY

The Honorable Judge Appel

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APPELLANT'S SECOND CORRECTED OPENING BRIEF

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COURT OF APPEALS  
STATE OF WASHINGTON

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## I. ASSIGNMENTS OF ERROR

### Assignments of Error

1. The Court erred when it allowed the State to introduce into evidence a portion of the 2005 videotaped forensic interview of the alleged victim, TH.
2. Trial counsel was ineffective when she failed to request a limiting instruction regarding Exhibit 31.

### Issues Pertaining to Assignments of Error No. 1

1. Will the doctrine of “opening the door” which allows the admission of otherwise inadmissible evidence be triggered by statements made during opening statement?
2. If statements made during opening statement are sufficient to trigger the “opening the door” doctrine, should the state be allowed to introduce otherwise incompetent evidence as substantive evidence?

3. Did the improper admission of an exhibit that contained a portion of a videotaped forensic interview of the child witness prejudice the defendant?

Issues Pertaining to Assignment of Error No. 2

1. Did Counsel's performance fall below the standard of performance required by the State and Federal Constitutions when she failed to request an instruction that would limit the jury's consideration of Exhibit 31.

**II. STATEMENT OF THE CASE**

When Mariyah Wafford heard rumors in 2005 that her husband, Ron Wafford, had touched her eight-year-old daughter, TH, she took steps to protect her and her older daughter, HF. **RP 1264-68, 482** Mrs. Wafford briefly discussed the rumor with her daughters, primarily HF, and the matter was reported to the police. A child forensic interview specialist, Nova Robinson, interviewed TH at Dawson Place, the Snohomish County Center for Child Advocacy. TH, during this videotaped interview with Ms. Robinson, did not make a disclosure deemed sufficient to

either charge Mr. Wafford with a crime or to continue the investigation. Mr. Wafford, who had moved out of the home during the initial investigation, moved back into the home.

Seven years later, in 2012, another allegation against Mr. Wafford was reported, again allegedly involving TH. Once again TH was interviewed at Dawson Place. Again she denied that her stepfather had ever touched her inappropriately. **RP 665-6** And again, no charges were filed.

In 2014, TH, now 17 years old, made an accusation against her stepfather claiming that Mr. Wafford had been sexually abusing her from the time she was six until the present. Again she was interviewed at Dawson Place and by the police. This time the authorities determined that TH's accusations were sufficiently credible to justify the filing of charges against Mr. Wafford. The Snohomish County Prosecutor's Office filed a two count Information on March 11, 2015. **CP 250-51** The Information charged Mr. Wafford with Rape of a Child in the First Degree and Child Molestation in the First Degree. The

named victim was TH. During the 2014 investigation TH's half sister, HF, came forward and stated that she also had been sexually abused by her stepfather, Ron Wafford. **RP 814 Prior to trial the** State filed an Amended Information. In the first three counts: Rape of a Child in the First Degree, Child Molestation in the First Degree, and Incest in the First Degree, TH was the named victim<sup>1</sup>. In counts four through six: Rape of a Child in the First Degree, Child Molestation in the First Degree, and Child Molestation in the Third Degree, HF was the named victim. SUPP CP \_\_\_\_ (Sub CP 17) Mr. Wafford entered pleas of not guilty and the matter proceeded to a jury trial.

At the conclusion of the State's case in chief Judge Appel dismissed counts Five and Six finding that the State had failed to introduce sufficient evidence to justify submitting those counts to the jury. **RP 1390** The jury deliberated on the remaining

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<sup>1</sup> TH in 2014 claimed that Mr. Wafford had penetrated her vagina with his penis shortly before she was removed from the home in 2014. RP 658

counts and returned a guilty verdict on Count II. **RP 1685** After the Court concluded that the jury was deadlocked on counts I, III, and IV, it declared a mistrial as to those counts. **RP 1696** The State subsequently dismissed the remaining counts. The Court sentenced Mr. Wafford to 68 months in prison **CP 20-37** and Mr. Wafford filed a timely Notice of Appeal. **CP 1-19**

### **III. ARGUMENT**

1. *The Court erred when it allowed the State to introduce into evidence a portion of the 2005 videotaped forensic interview of the alleged victim, TH.*

#### *Supplemental Facts pertinent to Assignment of Error 1:*

Prior to the commencement of trial, the Court conducted a child hearsay hearing pursuant to RCW 9A.44.120.<sup>2</sup> When Ms.

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<sup>2</sup> The relevant portion of RCW 9A.44.120 reads as follows:

- A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in

Robinson interviewed TH in 2005, TH was 8 years old. The State sought to introduce the videotaped interview as substantive evidence under the child hearsay statute. If admitted as child hearsay it would be admitted to prove the truth of the matters asserted and would be used by the jury as substantive evidence. After listening to the testimony of the witnesses called at the child hearsay hearing and viewing the videotape the Court concluded that TH had not made any statements that fell within the child hearsay statute and denied the State's motion to admit the videotape. **RP 82.** When asked by the prosecutor to reconsider Judge Appel stated:

Now, I won't add very much to my remarks of yesterday, perhaps just a little bit. I don't think it is at all clear that the legislature was attempting to make a vehicle by which another person's description, if that's what this was, could be attributed to a child witness. But even if that is so, even if the purpose of this statute was so as to permit the mere assent of a child to another person's description of sexual contact, I don't think that would make a difference in this case, because there

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evidence in dependency proceedings under Title 13 RCW and criminal proceedings

simply isn't really a description of sexual contact contained within the statement.

**RP 200**

A jury was selected and sworn in. Prior to Opening statements Judge Appel read preliminary instructions to the jury. Those instructions advised the jury, among other legal principles, that: The lawyers' remarks, statements, and arguments during this trial are intended to help you understand the evidence and apply the law. **They are not evidence, however, and you should disregard any statements or arguments by the lawyers which are not supported by the evidence or by the law as I give it to you. RP 421** (emphasis added).

The State began its Opening by telling the jury:

It was a close call, but he got away with it the first time. At age eight<sup>3</sup>, TH was confused, anxious, uncertain, and either unable or unwilling to articulate what it was that her stepfather had been doing to her. **RP 426**

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<sup>3</sup> TH was 8 when she first was interviewed at Dawson Place by Nova Robinson.

Next defense counsel opened. She took the jury through the various investigations and told them that TH did not accuse Ron of anything until 2014. With regard to the interview when she was 8, counsel, consistent with Judge Appel's holding that TH had not disclosed any sexual misconduct, stated:

And she brought both HK and TH to Dawson Place in 2005. Nova Robinson interviewed on video TH and built rapport and made sure she was comfortable and made sure she knew she wasn't in trouble and made all of the things that in her training she's supposed to do to create an environment where, if a crime was happening to a child, that child would feel safe to disclose. But TH denied that anything was happening to her. She knew in third grade at age eight what was bad touch, good touch, and she denied that any of those things were happening to her.

**RP 444-5.**

The State did not object during defense counsel's opening.

Following the defense opening the deputy prosecutor again asked the Court to reconsider its previous ruling and admit the video tape of the 2005 forensic interview. It based its request on its contention that defense counsel "opened the door" when

she made the remarks set out above. **RP 447** Defense counsel explained the context for her remarks telling the Court that she expected TH to testify that she had not made any disclosure of sexual abuse when questioned in 2005. **RP 449** In fact, TH, when called as a witness, did testify both on direct and cross that she had not made any specific disclosures during the 2005 interview.

Judge Appel sided with the State and held that the State would be allowed to introduce into evidence a portion of the taped forensic interview. **RP 452-3** The State did offer and the Court did admit Exhibit 31<sup>4</sup> without limitations. **RP 546**

Both TH and HF testified during the State's case in chief. TH claimed that Ron committed rape on several occasions prior to her 12<sup>th</sup> birthday by engaging in oral sex with her on multiple occasions. **RP 650, 652-3, 655** She also said that Ron penetrated

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<sup>4</sup> The Exhibit, a CD, initially was identified as Exhibit 1 from the child hearsay hearing. **RP 511** That disk contained the entire 2005 forensic interview. Because Judge Appel only admitted a portion of the interview the disk containing the interview was redacted and admitted as Exhibit 31. He specified the portion of the interview that he would allow to be played to the jury. Id. A transcript of that portion is attached hereto in the Appendix as Exhibit A and incorporated by this reference.

her vagina with his penis on one occasion when she was 17 years old. HF testified that she recalled one specific occasion when Ron sexually abused her when they were alone in the garage. In response to her allegations Ron denied ever touching either girl inappropriately. He and Mariyah provided the jurors with reasons why TH would lie about her accusations. They recounted problems with TH's behavior and how TH wanted to move from their home to her boyfriend's home. **RP 1408-10, 1549-51** The defense brought out that HF repeatedly had denied being victimized by Ron and only came forward when she was told that a disclosure by her would enhance TH's credibility. The defense also introduced testimony that HF's disclosure only came after her parents began pressuring her to make payments on money that they lent to her. **RP 1583-84**

The defense called a number of witnesses to substantiate its theory of the case. Witnesses testified about problems in the relationship of the alleged victims and the defendant. The defense brought out the denials of abuse by both step daughters

to the investigators, and discussed the motives of the girls to explain their false accusations.

- a. Is the doctrine of “opening the door” which allows the admission of otherwise inadmissible evidence triggered by statements made during opening statement?

What is meant when the Court admits otherwise inadmissible evidence in response to the opponent having “opened the door?” In State v. Jones, 144 Wash.App. 284, 297-98, 183 P.3d 307, 315 (2008) the Court described the doctrine as follows:

The “opening the door” doctrine is an evidence doctrine that pertains to whether certain subject matter is admissible at trial. The term is used in two contexts:

- (1) a party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and (2) a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence. 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 103.14, at 66-67 (5th ed. 2007). Because this “opening the door” doctrine pertains to the

admissibility of evidence, it must give way to constitutional concerns such as the right to a fair trial. See State v. Frawley, 140 Wn.App. 713, 720, 167 P.3d 593 (2007)

The theory advanced to justify the admission of that which otherwise would be inadmissible is based in equity and fairness. “It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.” State v. Gefeller, 76 Wash. 2d 449, 455, 458 P.2d 17 (1969). In Gefeller the State was allowed to elicit testimony from a police officer explaining an inconclusive polygraph examination (a topic traditionally inadmissible) following cross examination by the defense in which defense counsel elicited that the defendant had taken a polygraph and the results were inconclusive. There the Supreme Court held:

Thus, it is a sound **general** rule that when a party opens up a subject of inquiry on **direct or cross-examination**, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the

examination in which the subject matter was first introduced. State v. Stevens, 69 Wn.2d 906, 421 P.2d 360 (1966); State v. Hunter, 183 Wash. 143, 48 P.2d 262 (1935); State v. Ward, 144 Wash. 337, 258 P. 22 (1927); State v. Hempke, 121 Wash. 226, 209 P. 10 (1922); State v. Anderson, 20 Wash. 193, 55 P. 39 (1898).

State v. Gefeller, 76 Wash. 2d at 455 (emphasis added).

Washington cases that allow otherwise inadmissible evidence to be admitted under the “opening the door doctrine” limit its application to situations in which the opponent needs to respond, clarify or explain **evidence** admitted by his or her adversary. Here the Court ruled that it would allow the State to introduce a portion of the 2005 videotaped interview as an exhibit not based on any evidence introduced by the defense, but on defense counsel’s Opening Statement.

Our Supreme Court was presented with the opportunity to hold that remarks made during Opening Statement could “open the door” to otherwise inadmissible evidence. In State v. Whelchel, 115 Wn.2d 708, 801 P.2d 948 (1990) the Court

refused to do so. At trial the Court allowed the State to introduce the testimony the tape recorded interviews of putative co-defendants who refused to testify for the State at Mr. Whelchel's trial. When the Supreme Court indicated during argument that the trial court erred when it held the tape recordings to be admissible as statements against penal interests, the State next argued for the tapes admissibility on the basis that the defense during its opening statement had mentioned the statements numerous times. It argued that by doing so it invited error that "opened the door" for the admission of the statements. Rejecting the State's argument, the Supreme Court stated:

It is well settled that any party may, in opening statement, refer to admissible evidence expected to be presented at trial. More specifically, defense opening statements will generally cover what the defense expects to be able to prove, an outline of the expected weaknesses in the State's anticipated proof, or may simply remind the jurors to reserve judgment until all the evidence is in. Defense counsel may also use the opening statement to emphasize the concept of reasonable doubt. This means, in part, telling the jury the ways that defense counsel claims that he

or she will be able to demonstrate uncertainties in the State's case.

Defense counsel's opening references to the tape-recorded statements focused on their internal contradictions and on how they would conflict with other testimony that the State was expected to present. . . . The defense both defused and used the incriminating evidence as best it could, and we do not regard those efforts as constituting invited error.

State v. Weichel, 115 Wash. 2d at 727-28

The door is opened only by the introduction of evidence. It is not opened by counsel's opening statements to the jury. Tegland, Washington Practice, 5D, Courtroom Evidence, section 103:6 (2015-2016 edition). See also, Corson v. Corson, 46 Wn.2d 611, 283 P.2d 673 (1955). West Virginia v. Richards, 190 W.Va. 299, 438 S.E.2d 331 (1993); United States v. Tomaiolo, 249 F.2d 683 (2<sup>nd</sup> Cir.1957); State v. Bronner, 2002 Ohio 4248 (2002); State v. Anastasia, 356 N.J. Super. 534 , 813 A.2d 601 , 606 (N.J. Sup. Ct. App. Div. 2003) (stating that opening arguments are not evidence and cannot be met with rebuttal evidence).

In this case defense counsel said no more than what she believed the evidence would show through the cross-examination of TH and Nova Robinson. She said that when questioned in 2005 TH did not make a disclosure. When questioned, Ms. Robinson, a person specially trained to conduct forensic interviews of children, agreed that TH did not claim during the interview that Mr. Wafford touched her body where it's not okay to be touched. **RP 561** She also testified that TH answered "no" when asked if anyone had asked her to touch their bodies or had ever shown parts of their bodies that it is not okay for kids to see. *Id.* TH, during her testimony, she also agreed she had not made any disclosures during the 2005 interview. **RP 628, 648, 699.** The lead detective, Daniel Pitocco, was present and observed the 2005 interview. **RP 472** He also noted in his report that TH made no disclosure during the forensic interview. **RP 489.** He must not have perceived anything to indicate that a crime had been committed as the investigation ended soon after the interview with no charges being filed. **RP 491**

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It was error for the Court to hold that defense counsel's remarks during her opening statement opened the door for the admission of a portion of the 2005 interview. Her remarks did no more than preview the evidence she anticipated would be admitted at trial and which was admitted at trial.

- b. If statements made during opening are sufficient to trigger the "opening the door" doctrine, should the state be allowed to introduce otherwise incompetent evidence as substantive evidence?

Appellant contends that Judge Appel was correct when he concluded that TH made no statement to Nova Robinson in 2005 that described an act or attempted act of sexual contact. For that reason, the interview was not admissible as substantive evidence under the Child Hearsay statute. However, when it was admitted without limitation, even though it was hearsay and not admissible as an exception to the rule against hearsay, the jury could consider it for the truth of the matters asserted. See State v. Mohamed, *infra*.

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ER 801 states that a hearsay statement is an out of court statement offered to prove the truth of the matter asserted. A statement can be either a written or verbal assertion, or the "nonverbal conduct of a person, if it is intended by the person as an assertion." Evidence Rules (ER) 801-806 govern the admissibility of hearsay statements. ER 801 defines the basic terms as follows:

(a) Statement. A "statement" is (1) an oral or written assertion or

(2) **nonverbal conduct** of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) **Hearsay**. "**Hearsay**" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

The portion of the videotaped interview admitted as Exhibit 31 contained the out of court statements by TH and Ms. Robinson. TH, on the videotape, made oral assertions as well as nonverbal conduct intended as assertions. Once admitted the jury was free to

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consider these assertions for the truth of the matters asserted by both TH and Ms. Robinson.

But the statements were hearsay. They did not fall within any of the recognized exceptions to the hearsay rule. While the doctrine of “opening the door” does allow otherwise inadmissible evidence to be received into evidence, it does not justify the admission of incompetent evidence. Ignoring for the moment appellant’s contention that Judge Appel improperly admitted Exhibit 31 to “correct” defense counsel’s argument rather than **evidence** offered by defense counsel, how was the jury to use this evidence?<sup>5</sup> If the exhibit was admitted to allow the jurors to consider whether defense counsel had attempted to mislead them, a limitation should have been placed on the jury’s consideration of the hearsay contained in the exhibit. Simply allowing the jury to do with exhibit 31 as they wished was error.

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<sup>5</sup> Ms. Robinson and Det. Pitocco testified to their observations during the 2005 interview. There was no necessity to introduce the actual videotape.

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- c. Did the improper admission of an exhibit that contained a portion of a videotaped forensic interview of the child witness prejudice the defendant?

Having rejected the 2005 interview at the conclusion of the child hearsay hearing, the Court decided to admit the statements on the basis that defense counsel “opened the door” when she told the jury that “TH denied that anything was happening to her.” But, should counsel’s remarks during her opening justify the admission of the exhibit containing a portion of the 2005 interview as substantive evidence? That is exactly how the State urged the Jurors to use Exhibit 31. He made the following argument during his closing:

Also, when considering Count 1 and frankly, Count 2, take a look at the forensic interview, the interview of TH from 2005. And you saw this a long time ago, so it might not be fresh in your mind, but you're going to have the disc, and you're going to have access to it, and I would encourage you to go back and review that disc.

A quick comment on that. Throughout the proceeding and, I anticipate, any closing argument, the defense essentially treats that as a non-issue, essentially claiming, well, she didn't disclose anything in 2005.

She was interviewed. She didn't say anything. So we really couldn't do anything about it, and that was the end of that.

Well, take a closer look at that interview. Remember exactly how the exchange between Nova and TH transpired.

It's not nothing. In fact, it's far from nothing. On the heels of a discussion about what parts of the body are okay to touch and what parts aren't, Nova starts asking TH a very specific series of questions about sexual contact. "Has anyone ever touched any part of your body they're not supposed to touch?" And on and on and on. And you can see and hear eight-year-old TH's response to those questions. "No, not that I can think of," or some other comments like that.

Then we get to a very specific question Nova asks. "Has anyone ever asked you to do anything to any parts of their body that it's not okay to do something to?"

And there's a pause. And she's looking down with her hair over her face. And she nods. Clearly she

nods affirmatively.<sup>6</sup>

**RP 1613-14**

The Deputy prosecutor returns to urge the jurors to rely on exhibit 31 again in his rebuttal closing when he says:

But that line of reasoning doesn't extend back to 2005 when she was eight, when she said the things that she said in the video.

**RP 1666**

In State v. Gonzalez-Gonzalez, 193 Wash. App. 683, 689, 370 P.3d 989, 993 (2016) the Court held that for evidentiary errors not implicating a constitutional mandate, the appellate court will reverse only if, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” Id. (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). “The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence

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<sup>6</sup> Appellant submits that her lowering of her head and nodding is nonverbal conduct intended as an assertion that brings it within ER 801’s definition of “hearsay.”

as a whole.” Id. (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). Here the State relied on the video tape to corroborate TH’s trial testimony that she had been sexually abused by her stepfather.

Its prejudice to Mr. Wafford was substantial. This exhibit, allowed into the jury room during deliberations, was argued by the State as evidence that something sexually inappropriate occurred between TH and the defendant. The jury accepted the prosecutor’s contention that Exhibit 31 showed something had happened and it used the exhibit as the basis to convict on the charge of Child Molestation in the First Degree. That it prejudiced Mr. Wafford is evident from the jury’s failure to convict him on Counts I and III (the remaining counts in which the State identified TH as the victim). While the jurors used the tape as evidence that inappropriate touching occurred, as argued by the Deputy Prosecutor, they could not unanimously accept TH’s testimony that Mr. Wafford engaged in intercourse with her, essential elements of Counts I and III.

2. Trial counsel was ineffective when she failed to request a limiting instruction regarding Exhibit 31.

A defendant has the burden of establishing ineffective assistance of counsel. To prevail, the defendant must show that (1) counsel's representation is deficient, that is, it falls below an objective standard of reasonableness and (2) there is prejudice, measured as a reasonable probability that a result of a proceeding will be different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Judicial review of an attorney's performance is highly deferential, and such performance is not deficient if it can be considered a legitimate trial tactic. State v. Johnston, 143 Wash. App. 1, 177 P.3d 1127 (2007)

Here defense counsel had argued successfully during the Child Hearsay hearing that the taped interview was inadmissible. When Judge Appel later decided to admit a portion of the interview, Defense counsel first had to determine why it was being admitted. It was hearsay that didn't fall within the child

hearsay statute or any other exception to the hearsay rule. From Judge Appel's statement it was being admitted to allow the jury to reject defense counsel's remark that TH denied that anything bad was happening to her. From Judge Appel's comments it appears as if he admitted Exhibit 31 to impeach defense counsel's statement despite his having just told the jury that the statements made by counsel in opening statement are not evidence.<sup>7</sup> If that is why Judge Appel admitted Exhibit 31, though as argued previously evidence does not become admissible based on what an attorney says during opening statement, defense counsel should have requested a limiting instruction. That instruction should have told the jury that the exhibit was being admitted insofar as it may contradict defense counsel's opening statement, not for the truth of its contents and should be used for no other purpose.

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<sup>7</sup> Maintaining that he was not admitting Exhibit 31 under the child hearsay statute it is unclear for what purpose, other than allowing the jurors to determine the validity of defense counsel's remarks, he admitted the exhibit.

By not requesting a limiting instruction the jury was free to use Exhibit 31 as substantive evidence. In the recent case of State v. Mohamed, No. 92261-6, 2016 Wash. LEXIS 832, at 12-13 (July 21, 2016) our Supreme Court addressed the use of hearsay evidence admitted without limitation stating:

We presume that a jury will follow the instructions provided to it. State v. Kalebaugh, 183 Wn.2d 578, 586, 355 P.3d 253 (2015) (citing State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982)). The corollary to this presumption is that where evidence could be relevant for multiple purposes, a jury cannot be expected to limit its consideration of that evidence to a proper purpose without an appropriate instruction to that effect. Moreover, in the absence of a limiting instruction, the jury is permitted to consider the evidence for any purpose, including its truth. See State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997) (“[A]bsent a request for a limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for others.”); State v. Konrath, 61 Wn.2d 588, 591, 379 P.2d 359 (1963) (“The court's refusal to give appellant's requested instruction allowed the jury to give unlimited consideration to the evidence.”).

Having argued successfully to keep the substance of the 2005 interview from the jury there is not strategic reason why

counsel would have wanted it admitted or admitted without limitation on how it could be used by the jury. Her failure to request a limiting instruction fell below the standard of performance required under the United States Constitution, Amendments 6 and 14 and the Washington Constitution, Article I, section 22, Amendment 10. Had Judge Appel given a limiting instruction, the deputy prosecutor would not have been allowed to argue to the jury that the exhibit clearly showed that TH had been abused. The prejudice of allowing the jurors to use the interview as substantive evidence is apparent. It is fair to assume, in light of the jury's deadlock on the other counts involving TH, that it was the videotaped interview that convinced all of the jurors that something had happened between TH and Mr. Wafford which caused them to convict him of Child Molestation in the First Degree.

#### **IV. CONCLUSION**

The trial court denied Mr. Wafford a fair trial when it allowed hearsay testimony to be introduced based on remarks

made by defense counsel in her Opening Statement. Admitting this hearsay without limitation prejudiced Mr. Wafford, preventing him from receiving a fair trial. Defense counsel's failure to request a limiting instruction regarding Exhibit 31 constituted ineffective assistance of counsel. Accordingly, this Court should vacate the Judgment and Sentence and remand the matter for a new trial.

DATED THIS 15 DAY OF SEPT., 2016.

  
MARK D. MESTEL, WSBA# 8350  
Attorney for Appellant

# APPENDIX 'A'

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**NR:** Okay. Tyran, is there any place on your body where it is not okay to touch?

**TH:** There.

**NR:** Okay. Any place there?

**TH:** There.

**NR:** Uh huh.

**TH:** There.

**NR:** Okay. Any place else? It's not a test. Are those all the places?

**TH:** (just giggling) no audible response

**NR:** Okay. There are no right or wrong answers, it's up to you what you want to tell me about  
okay?

**TH:** Uh huh.

1 **NR:** And so you said right here where you said you don't want to say on the girl drawing and then  
2 right here where you're not really sure what it's called that's below the mouth and above the  
3 belly button. And then you said right here on the part you called the butt.  
4  
5 **TH:** Uh huh.  
6 **NR:** If you think of any place else I want you to let me know okay?  
7 **TH:** Uh huh.  
8 **NR:** Has anyone touched you someplace on your body where it's not okay?  
9 **TH:** Not that I know of.  
10 **NR:** Okay. Have you told somebody that you were touched on your body where it's not okay to be  
11 touched?  
12 **TH:** No.  
13 **NR:** Okay. Has anybody ever asked you to touch them on their body where it's not okay for you to  
14 touch them?  
15 **TH:** Huh uh.  
16 **NR:** Has anybody ever shown you any parts of their body that it's not okay for kids to see?  
17 **TH:** Not that I know of.  
18 **NR:** Okay. Has anybody ever asked you to do anything to any parts of their body where it's not  
19 okay to be doing things?  
20 **TH:** Uh...  
21 **NR:** What?  
22 **TH:** I'm not really what it, sure what it's called actually.  
23 **NR:** Just do your best. Tell me about what was going on, where you were at, who was there, what  
24 was happening, that helps me understand.  
25  
26  
27  
28

1 **TH:** Uh my daddy and I'm not sure what was happening actually cause I don't know what it's  
2 called.  
3  
4 **NR:** Okay. Alright. It was your daddy? And is that the daddy you told me about on here on this  
5 picture named Ron?  
6 **TH:** Uh huh.  
7 **NR:** Or a different daddy?  
8 **TH:** That daddy.  
9 **NR:** That daddy? Okay. And where were you at when that was happening?  
10 **TH:** My house.  
11 **NR:** Okay, where at at your house?  
12 **TH:** In the garage.  
13 **NR:** In the garage. Is that the only place something like that ever happened or any place else?  
14 **TH:** Huh uh.  
15 **NR:** Huh uh what?  
16 **TH:** There is no other place that that happened.  
17 **NR:** Okay. Just in the garage? And is that the only time something like that happened or were there  
18 more than one time?  
19 **TH:** More than one time.  
20 **NR:** Okay. And I know that you're eight years old, you're almost nine...  
21 **TH:** Yeah.  
22 **NR:** ...so I know you can probably count.  
23 **TH:** Uh huh.  
24 **NR:** Can you count to ten for me?  
25 **TH:** one, two, three, four, five, six, seven, eight, nine, ten.

1 **NR:** Okay. And did the thing that happened with your daddy happen more than ten times or less  
2 than ten times or about ten times or...  
3  
4 **TH:** About ten times, I'm not really sure.  
5 **NR:** You're not really sure?  
6 **TH:** I'm not really sure.  
7 **NR:** Okay. And have you ever seen that happen with any other kids or any other people?  
8  
9 **TH:** No.  
10 **NR:** Okay. And was anybody else ever with you when that happened?  
11 **TH:** ...no audible response.

**V. CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Appellant's Second Corrected Opening Brief was served upon the following by United States Postal Service, addressed to:

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|---|--|
| 1. Court of Appeals<br>Division One<br>600 University Street<br>One Union Square<br>Seattle, WA 98101 | 2. Snohomish County Prosecutor<br>3000 Rockefeller Ave<br>M/S 504<br>Everett, WA 98201 |
| 3. Ronald Wafford<br>Coyote Ridge Corrections Center<br>PO Box 769<br>Connell, WA 99326               |  |

DATED this 15 day of September, 2016.

  
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Brandy L. Ellis, Secretary