

NO. 33171-3

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL GLAVE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 04-1-00795-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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9. Has defendant met his burden of showing cumulative error requiring reversal where no error occurred below? (Appellant's Assignment of Error No. 9).

B. STATEMENT OF THE CASE.

1. Procedure

On February 20, 2004, MICHAEL GLAVE, hereinafter referred to as defendant, was charged with two counts of child rape in the first degree, contrary to RCW 9A.44.073. CP 1-3.

On October 25, 2003, the State filed a Corrected Information enlarging the incident time from August 2003, to June 1, through August 31, 2003. CP 18-19.

On January 19, 2005, the matter came before the Honorable Bryan Tollefson for pretrial rulings. RP 4. The State made a motion to either exclude witnesses or testimony surrounding pretrial contacts between the defendant and the victim's family. RP 6. After hearing argument from both parties, the court concluded that testimony would be limited to the day in question unless the door was opened. RP 15-16, CP 75-76.

On January 21, 2005, the matter resumed before Judge Tollefson on the issues of whether victim B.B. was competent, admission of child hearsay statements, and the admissibility of child hearsay in light of Crawford v. Washington.¹ RP 338.

The court concluded that B.B. was competent to testify. RP 378. The court also concluded that B.B.'s statements to her mother, father, and sister, were admissible under the child hearsay statute, RCW 9A.44.120. CP 77-80. However, the court concluded that B.B.'s statements to neighbor Mr. Anders were inadmissible. RP 878, CP 77-80. The court further concluded that B.B.'s statements to Joanne Mettler were admissible under ER 803(a)(4) as statements made for medical diagnosis. RP 879-80. CP 79. As to hearsay issues under Crawford, supra, the court determined

¹ 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177(2004).

that B.B.'s statements to her parents, sister, and Ms. Mettler, were nontestimonial in nature, but her statements to Ms. Arnold-Harms were testimonial in nature and inadmissible unless B.B. testified and was subject to cross-examination. CP 79-80. Findings of fact and conclusions of law were entered. CP 77-80.

The court conducted a 3.5 hearing and ruled that the defendant's statements to police were admissible. RP 323-328. Findings of fact and conclusions of law were entered. CP 220-222.

A sentencing hearing was held on April 22, 2005. RP 2952. Defendant received a standard range sentence of 140 months to life on Count I and 105 months to life on Count II to run concurrent. CP 181-193, RP 3008.

2. Hearsay Hearing - Facts.²

Joanne Mettler is an advanced registered nurse practitioner (ANRP) at Mary Bridge Child Abuse Department. RP 493. Her job is to perform medical exams on kids where there is a concern of sexual abuse. RP 494. She generally has the children come in accompanied by a parent, she speaks with the parent first to see why they came and then speaks with the child. RP 501. After she performs a head to toe physical, Ms. Mettler will talk with the parent about what the child said and how the exam

² The State is including a statement of the facts for witness Ms. Mettler only, as these are the only statements challenged on appeal based on Crawford.

looks. RP 502. Ms. Mettler will prescribe medication for children with a medical condition as well as prescribe treatment. RP 519-20.

On October 3, 2003, Ms. Mettler performed a medical exam on B.B. RP 506. B.B. was referred to Mary Bridge Hospital by a social worker. RP 519. Prior to examining B.B., mother Michele Basich informed Ms. Mettler outside the presence of B.B., that B.B. disclosed that "Mike had touched her private parts." RP 506, 509. Michele Basich reported that her daughter was having nightmares, a regression in wetting her bed since August, anger outbursts, and a decrease in appetite. RP 507. These behaviors, according to Ms. Mettler, may be indicative of something traumatic that happened to the child. RP 508.

Prior to interviewing B.B., Ms. Mettler explained to her that she was going to write things down so she could remember what they talked about. RP 510. When Ms. Mettler asked B.B. why she was there, B.B. said because Ms. Mettler works with kids and she is very, very nice. RP 510. B.B. agreed that she knew she was going to have a check-up but did not know why she was going to have the exam. RP 510. Ms. Mettler mentioned to B.B. that "her mom and dad told me about some things that happened and that she had talked to a lady about the things that happened, could she tell me about that?" RP 510. B.B. agreed and said, "I was in the spa and his name is Mike and he take me out and followed me into the bathroom and then pulled my pants down. Then I sat on the toilet and I said I didn't have to go. And then I pulled them up and then he—." RP

510-511. B.B. hesitated for a moment and then said, "Then he pulled them back down, and then he kissed it, and then he pulled his pants down and pulled his private out." RP 511. She hesitated again, "Pushed my head and told me to kiss it, and I said no, and then he told me don't tell the cops or the police or don't tell mom or dad." Then I told my sister and she told me to tell my mom and dad, but I was scared to tell my mom and dad but did." RP 511. Ms. Mettler asked what the defendant kissed and B.B. said, "Mine, private. And he told me to kiss his." RP 511.

At the conclusion of the interview Ms. Mettler informed B.B. that her report would go to the police. RP 511-512.

The results of the physical exam of B.B. were considered normal. RP 512. It is not unusual for a sexually abused child to have a normal physical exam and 98 percent of the children she sees have no physical findings. RP 504.

Following the exam, Ms. Mettler wrote an assessment which included observations about B.B.'s current living environment and parental supervision, and a recommendation for no unsupervised contact with the defendant. RP 513. The parents were also provided with discharge instructions and a recommendation for counseling for B.B. RP 513, 516.

3. Trial Facts

a. State's case.

Seven year old B.B. (dob 8/3/96) was sexually abused by her next door neighbor Mike Glave. RP 1156, 1075. The defendant lived across the street from B.B. in Graham, with his wife and two sons, Brandon and Justin. RP 1334. B.B. admired defendant. RP 1160. According to B.B.'s mother, defendant made sure to pay extra attention to B.B. and he treated her like the daughter he never had. RP 1161.

B.B. looked to defendant as a friend until he did a "bad thing." RP 1336. B.B. was over at his hot tub and had to use the bathroom. RP 1337. She called to the defendant who was standing near the hot tub and he helped her out while sons Justin and Brandon stayed in the hot tub. RP 1368. The defendant took B.B. into the house to use the bathroom. RP 1337. B.B. closed the door after she entered the bathroom but defendant pushed the door back open. RP 1371. As B.B. pulled her pants back up after using the bathroom, defendant pulled them down and laid on the floor and kissed her privates. RP 1337. B.B. then pulled her pants back up and defendant pulled his pants down and pulled out his private and told her to lick it. RP 1337. When B.B. said no the defendant forced her head into his private. RP 1337. B.B. described privates as "you go to the bathroom with them." RP 1358. Defendant told her not to tell the police, her parents, or sister because he wanted to be her friend and didn't want to go to jail. RP 1337.

B.B. recalled that she first went and told her parents right away and then told her sister. RP 1337-38. After the incident, B.B. had to sleep with her sister. RP 1349-50. When B.B. told her parents they were all in the living room and she told her mom first in a whisper and then her father. RP 1339, 1340.³

During the Summer of 2003 Michael and Michelle Basich noticed some changes in their daughter, B.B.'s behavior. RP 1075, 1163. She began having nightmares, had troubles sleeping alone, became more quiet, ate less and had less patience. RP 1075, 1088, 1163, 1164, 1200. She also began wetting the bed, despite the fact that she was to turn seven that August and had not wet her bed since she was approximately five and a half or six. RP 1076, 1164.

On September 8, 2003, the Basich family was home watching a football game. RP 1165. B.B. came into the room and sat to the left of her mother on the couch. RP 1166. Ms. Basich could tell something was not right with her. RP 1166. When she asked if her daughter was okay, B.B. became upset. RP 1166. B.B. then crawled up into her lap and whispered in her mother's ear that Mike had "touched me in places that I'm not supposed to be touched." RP 1308. Ms. Basich asked her daughter "Mike who," and B.B. said "Mike Glave." RP 1309. When her

³ During her pretrial defense interview B.B. was generally uncooperative and forgetful. RP 1397-1405. B.B. explained to the jury that she did not discuss all the things with the defense "Cuz I didn't want to talk about it." RP 1412.

mother asked, "when did this happen," her child could not state a correct time frame but thought it was a week to a week and half prior to when she told her mother. RP 1309.

She told her mother that she was at defendant's home using the hot tub when she needed to use the restroom. RP 1167, 1309. Defendant took her out of the hot tub and followed her into his home. RP 1167. She said she closed the door behind her but he pushed the door open and she told him no. RP 1167. As she is trying to go potty he walked in the door and closed the door behind him. RP 1167. B.B. reported to her mother, "Momma, I was so scared, I didn't know what he was going to do." RP 1309. She asked him to get out but he would not. RP 1309. Defendant removed her from the toilet and laid her on the floor. RP 1309. As she tried to pull her pants up the defendant pulled her pants down again. RP 1167. When B.B. said, "No, Mike, what are you doing? He said, "It's okay, [B.B]." RP 1167. B.B. told her mother that he then proceeded to lay her down on the floor, got down next to her, pulled her pants down again, bent over, kissed her private area. RP 1167, 1318. Defendant then proceeded to pull his pants down and pulled out his private area and told her to put her mouth on it. RP 1167. B.B. told him no. Defendant then forced her head into him and put her mouth on his penis and he forced her head into him so she could not pull back. RP 1167, 1318. B.B. said she complied because he said you cannot tell your mom, sister or anybody

because “I still want to be your friend and I don’t want to go to jail.” RP 1168.

By the end of the disclosure Ms. Basich and her daughter were both crying. RP 1168. At this point, Mr. Basich was sitting to the right and did not notice anything. RP 1168. Ms. Basich asked her daughter if she felt comfortable enough to tell her dad what she just told her. RP 1168. B.B. waited for a second and then walked over and sat on her dad’s lap. RP 1168. Later Ms. Basich would learn from her older daughter that B.B. had told her before she told her parents about the rape and her older daughter told B.B. to tell her mom and dad. RP 1176-77, 1242.

Michael Basich was in his home watching TV when his daughter came up on his wife’s lap and whispered something into her ear. RP 1077. Ms. Basich audibly gasped and asked B.B. to repeat to her husband what she had told her. RP 1078. At first B.B. was hesitant to tell her father. RP 1078-79. Ultimately she revealed the details of the rape. RP 1079. She explained to her dad that it happened when she asked to use the bathroom while she was at the Glave’s spa. RP 1079. Defendant got her out of the spa and took her to the bathroom. RP 1079. When she tried to shut the door to the bathroom the defendant pushed it open and came into the bathroom, sat down to go to the bathroom, and then got back up. RP 1079. Defendant then pulled out his private area and told her to kiss it. RP 1079. She did not disclose to her dad whether she said yes or no. RP 1079. Before leaving the bathroom defendant told her, “Don’t tell your

mom, don't tell your dad, don't tell the police, I don't want to be thrown in jail, I'm your friend." RP 1079. Mr. Basich asked his daughter if anything like this had ever happened to her before and she said "no." RP 1094. Mr. Basich could not recall if he asked his daughter whether anything else happened, but it was reflected in his statement to police. RP 1093-94.

At the sound of the news, Michael Basich felt shock and could not believe this was happening to him. RP 1079. He also felt angry and emotionally upset. RP 1080. Within ten minutes of the disclosure Mrs. Basich called their neighbors the Anders over to discuss what happened. RP 1080-81.

Neighbors Steve and Jeanne Anders received a phone call in the early part of September 2003, from Michele Basich asking them to come over right away. RP 1450. Michele sounded upset. RP 1451. They went to the home and found the whole family upset and crying. RP 1452, 1464. Mike was pacing back and forth and appeared angry. RP 1452. Mike told Mr. Anders that something happened to his daughter B.B. RP 1453-54. Mrs. Anders learned that B.B. had a sexual encounter with the defendant. RP 1465. Mr. Anders told Mike to calm down and let the proper authorities take care of it. RP 1454. It was obvious the family was in shock and needed some advice. RP 1466. The Anders stayed at the Basich home for approximately two hours, trying to help them through the ordeal. RP 1455.

B.B.'s sister recalled that B.B. told her about the rape on Wednesday, garbage day. RP 1002. The way her sister related the news she believed the rape occurred sometime in July. RP 1010-1011. She recalled her sister on that day returning from the Glave's and looking scared. RP 1011-12.

B.B. told her sister that the defendant had taken her to the bathroom when she asked to go. RP 1002. Defendant followed her in the bathroom and would not leave. RP 1002. He then had her lay on the floor and he "kissed her private, and then he made her do the same to him." RP 1002. Defendant also warned her not to tell anyone. RP 1003. B.B. was very emotional when she relayed this to her sister. RP 1003. B.B.'s sister recalled that B.B. waited a day to tell her parents and that they were all watching a football game when it occurred. RP 1005. B.B. told her mom first and then her dad. RP 1006. Her mother began crying at the sound of the news. RP 1007. B.B.'s sister also noticed that B.B. wanted to stay away from Mike. RP 1014.

The Basich's explored their options. RP 1085. They were not sure who to contact, whether their daughter needed to get information to the police, or whether they should just get her counseling. RP 1085.

Following the disclosure Mr. Basich noticed that his daughter exhibited a lot of stress when she saw the Glave family, went to court, or went to school. RP 1089. Her temperament also remained the same as the

summer and she continued to have nightmares including dream that involved the defendant getting her. RP 1089, 1199.

Within days of the disclosure defendant's family telephoned to bring a gift over for the oldest Basich daughter. RP 1123. Mr. Basich was not eager to have defendant come over to his home and give his oldest daughter a birthday gift, but he was also a little nervous for retaliation and so he did not cut off the friendship entirely. RP 1123. When the defendant came over to the house with his family bearing a gift, Ms. Basich was not happy about it. RP 1195. She noticed that B.B. immediately had a very scared look on her face. RP 1196. Ms. Basich pulled her aside, assured her that it would be okay, and kept her by her side the entire time of the visit. RP 1196.

After B.B. disclosed to her parents, Michael and Michelle Basich were uncertain what to do. RP 1181. Michelle Basich made up her mind to go to the authorities without informing her husband who was still contemplating counseling. RP 1180, 1181. Michelle Basich went to the Sheriff's Department on September 10, 2003, two days after the disclosure to report the sexual assault. RP 916-917, 1180-81. According to Deputy Baker, at the time of the report Ms. Basich was crying and asking for help. RP 917. At the request of Deputy Baker, Michael Basich also filed a report documenting the disclosure. RP 918.

On October 3, 2003, pediatric nurse practitioner Joanne Mettler examined B.B. at the Mary Bridge Hospital Sexual Assault Center. RP

1587, 1599. The clinic operates based on referrals from medical providers, Child Protective Services, or the police due to concerns of sexual or physical abuse. RP 1590. Ms. Mettler first consults the parents, without the child, and then speaks with the child separately in a typical exam room “as in any physician’s office.” RP 1590, 1592. Ms. Mettler conducts a head-to-toe physical exam, including of the genital and anal area using a coloscope. RP 1590, 1594.

When Ms. Mettler inquired of B.B. why she had come to visit, B.B. responded she was there for a checkup and also because Ms. Mettler works with kids and is nice. RP 1599. Ms. Mettler asked B.B. if she knew she was going to have a checkup and B.B. said, “yes,” but she did not know why she was going to have the checkup. RP 1600. Ms. Mettler explained that B.B.’s mom and dad had told me about something that happened, and that she talked to a lady about things that happened, so could B.B. tell her about that. RP 1600. During the interview with Ms. Mettler, B.B. disclosed that “Mike kissed it and made her kiss his.” RP 1599. Ms. Mettler documented B.B.’s statement to her as:

I was in the spa and his name is Mike, and he take me out and followed me into the bathroom and then pulled my pants down. And I sat on the toilet. And I said I didn’t have to go and then pulled them up, and then he, and she hesitated for a second again, and said, and then he pulled them back down and then he kissed it. And he pulled his pants down and pulled his private out, and then, and she

hesitated again, pushed my head and told me to kiss it. And I said no. And then he told me don't tell the cops or the police, don't tell mom or dad. And then I told my sister and she told me to tell my mom and dad, but I was scared to tell my mom and dad, but did.

RP 1600-01. When asked to clarify what Mike kissed, B.B. said "mine, private. And he told me to kiss his." RP 1601. B.B. reported she felt mad. RP 1601.

There were no physical findings of abuse, but it is estimated that in 98 percent of the kids Ms. Mettler sees there are no physical findings of abuse. RP 1595. A sudden change in a child's behavior can be evidence of a traumatic event in the child's life according to scientific literature. RP 1597. Ms. Mettler opined that if nightmares, bed-wetting, changes in appetite, temperament, occurred in the same time window with a child then she may suspect sexual abuse. RP 1603.

At trial, B.B. could not recall meeting with Ms. Mettler, nor could she recall talking to her, but she did remember having a physical examination done by a lady and it was "unpleasant stuff." RP 1348, 1397, 1425.

On October 26, 2005, at the Child Advocacy Center, Pierce County Prosecutor's forensic child interviewer Keri Arnold-Harms interviewed B.B. regarding the incident. RP 1470, 1471-72, 1492. For children under 10, Ms. Arnold-Harms begins the interview by establishing that the child knows the concepts of under, over, on top of, as well as the

difference between truth and lies. RP 1476-77. The questions are done in the “funnel technique” where the interviewer begins with very broad questions and then moves to more focused or direct questions to clarify the child’s answers. RP 1477. Leading questions are not used. RP 1478. It is not uncommon to see delayed disclosure in abuse cases. RP 1482-84. Children under the age of 10 may also have problems with spatial and time concepts, for example how big a particular room is or how many days are in a month may be difficult for them to articulate. RP 1485-86.

B.B. was a fairly easy child to engage in the interview. RP 1480. There were some demeanor changes in her interview when they discussed the actual abuse, B.B. became more closed off and reluctant, focusing on coloring and not making as much eye contact. RP 1487. During the interview she disclosed that in the bathroom the defendant exposed his genitals, removed B.B.’s clothes and exposed her genitals, and that defendant told her not to tell her parents or the police. RP 1566. B.B. did not disclose actual sexual contact between herself and defendant. RP 1566. Her interview was played for the jury. Plaintiff’s Ex. 5, CP 93-95. While B.B. recalled meeting with a woman named “Keri” near a fish tank, she could not recall what she told Keri. RP 1348, 1385.

On October 25, 2005, Detectives Harai and Dogeagle with the Pierce County Sheriff’s Department had defendant meet them at the South Hill precinct to interview him. RP 1648-50. Detective Harai confronted defendant with the details of the sex abuse allegations and defendant

became upset, said that he did not do it, and that it didn't happen. RP 1653. Defendant reported that when B.B. used the hot tub she wears a life jacket and so he helps her take the life jacket off and get out of the hot tub. RP 1653. He also places a towel down so she can go into the bathroom. RP 1653. Defendant also stated, that "if he wanted to prey on a young child, it sure wouldn't be B.B. because she's such a story teller and tattletale." RP 1655., 1827.

During the taped interview with defendant the following exchange took place between the detective (questions) and defendant (answers):

Q: But I got to ask you, you know, anything like this happen, I mean, Brittany's disclosed to her mother that . . ."

A: Uh-Hmm.

Q: You know, that you brought her into the bathroom, locked the door, laid her down . . ."

A: Uh-Hmm. Uh-Hmm.

Q: And you started kissing, you know, her in her vaginal area."

A: Uh-hmm."

Q: And at one point, you exposed yourself and made her put her mouth over your penis."

A: That's wrong. That's false. I never done that."

RP 1658. Defendant went on to explain that he is never in that bathroom alone with the kids, even his own kids and that they always lock the door because kids are shy. RP 1658. Defendant then stated that the only thing he did was put the towel on the floor. RP 1659. Later, defendant admits that he has helped B.B. use the bathroom a "few times," but that he just places a towel down and she always shuts the door. RP 1660-61.

b. Defense case and rebuttal.

Neighbor James George was friends with defendant. RP 1974-1975, 1976. After the summer of 2003 Mr. George attended a homeowners association meeting at the Basich's. RP 1980. When he arrived Basich pulled him off to the side and said, "Come here." RP 1981. He asked Mr. George, "Did you hear what happened?" RP 1981. He said, "Mike molested my daughter." RP 1981. George responded that it did not sound like defendant. RP 1981. When George asked what he was going to do now he said, "Well, he's going to lose his house." RP 1981. "I'm going to take it from him." RP 1981. From what George observed the defendant and Basich looked to have "probably the best friendship you could probably ever have." RP 1984. "They did everything together." RP 1984.

According to B.B.'s teacher, Ms. Mulkins, BB is a very sweet little girl, who is quiet, shy, and not very assertive. RP 2048. Academically, B.B. struggled in all areas. RP 2049. She started to bloom a little towards the end of the year but had a difficult time maintaining focus. RP 2049. BB's behavior appeared to be about the same, even following her disclosure to Ms. Mulkins. RP 2054, 2067.

In the Glave family, Dana was in charge of the spa. RP 2100, 2168. During the summer of 2003 the family did car races almost every Saturday. RP 2176.

There was a time when the Glaves were not on speaking terms with the Basich's for several years but then that changed and they began doing things together in 2002 and 2003. RP 2192.

According to Ms. Glave, during the month of July she had a discussion with her kids and the Basich kids regarding good and bad touches. RP 2277. They had been watching America's Most Wanted and there was a feature on a missing child abduction. RP 2278. They try to keep their own kids apprised of these things so they had a talk about good touch and bad touch. RP 2278. During this her older 11 year old son got smart and said, "do you mean kissing your penises and your vaginas?" RP 2278-79. She explained that that is what it is. RP 2279. All four kids started laughing. RP 2279. During cross-examination the prosecutor pointed out that she had been asked in another hearing about the TV show, and yet today was the first time she ever told us that her son explicitly talked about kissing genitalia. RP 2287. She was asked if the show made any mention of men kissing women's genitalia or vice versa and the show had nothing to do with it. RP 2288. B.B.'s sister also denied on the stand that they had watched that show at the Glave's or that they had a discussion about kissing people's privates. RP 1031.

Defendant took the stand in his own defense.

Defendant admitted that he helped B.B. out of the hot tub once while his wife was home. RP 2447.

During the testimony it appeared that defendant was getting upset and the prosecutor asked, "Are you upset this morning, Mr. Glave?" RP 2471. Defendant answered, "You are my enemy. I'm not going to sit here like a whipped dog like I did yesterday in front of these people, okay. I had a lot of time to think when I left. I was tired, had a good night's sleep. You are my enemy. I'm here to say that I did not touch B.B., and I'm going to fight you all the way." RP 2472.

The prosecutor responded, "However, we have rules that we have to follow in the courtroom," but defendant interrupted and said "I'll fight you tooth to nail, so whatever you say I'm here to fight you. I did not touch that girl. I never have. I've never been in trouble in my life." RP 2472. The prosecutor tried to explain but again defendant interrupted and said "I'm going to sit here and talk just like I am now to all these people - -." RP 2472. At that point the court interrupted but the defendant continued on, "—because these are the people that are going to convict me for something I did not do." RP 2472. Finally, the court said, "Mr. Glave. Mr. Glave, how it works here —" but defendant replied, "I know how it works." RP 2472. When the court said, "Okay. I'm going to tell you how it works . . .," the defendant retorted, "Okay. You get down there and get out of my face." RP 2473. The prosecutor had to caution the defendant and the defendant replied, "I don't want that man standing next to me. I'm going to fight tooth and nail with you, Buddy." RP 2473. "You're not going to confuse me. I know --." RP 2473.

Defendant repeated his outbursts throughout his testimony. RP 2485, 2521, 2539-42.

In response to defendant's claim during cross-examination that he was an "A1 person" and employee with Bethel School District, and in his invitation to the State to "got get [his] file," if they did not believe him, the State contacted the human resource director for Bethel School District, where defendant worked. RP 2566, 2701. According to records, in 2002-2003 school year defendant's performance evaluation showed that his behavior was less than desirable and he put himself in "perilous situations where suspension and possible termination was discussed." RP 2707-2708.

According to human resource manager, Ms. Barckley, the defendant tends to be confrontative when there are allegations about him and attacks those who have made an accusation against him. RP 2707-08. Defendant also speaks highly of his own abilities when he's confronted with an allegation. RP 2708. Defendant also accused Ms. Barckley of not informing him of his right to representation by a union representative when she had. RP 2718. Defendant's reputation with his colleagues and co-workers was that they do not have faith in him and do not trust his level of honesty. RP 2718.

C. ARGUMENT.

1. DEFENDANT’S RIGHT TO CONFRONTATION
WAS PROTECTED WHERE THE VICTIM
TESTIFIED, WAS AVAILABLE FOR CROSS-
EXAMINATION AND THE STATEMENTS
ADMITTED WERE NONTESTIMONIAL.

Defendant asks this court to apply the ruling in Crawford⁴ to this case. However, because the victim (a) testified at trial and was available for cross-examination, and (b) all but one of her statements were nontestimonial, Crawford does not apply.

a. Victim testified and was available for cross-examination.

“In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI. The Confrontation Clause prohibits admission of testimonial statements made out of court by a witness who is *unavailable* for trial unless there has been a prior opportunity for cross-examination. Crawford, 541 U.S. 68. Whether a trial court has violated an accused's confrontation rights is an issue reviewed de novo. State v. Medina, 112 Wn. App. 40, 48, 48 P.3d 1005 (2002).

“The Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’” United

States v. Owens, 484 U.S. 554, 559, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988)(quoting Kentucky v. Stincer, 482 U.S. 730, 739, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987)). “It is sufficient that the defendant has the opportunity to bring out such matters as the witness’ bias, [her] lack of care and attentiveness . . . and even . . . the very fact that [she] has a bad memory.” Id.

But Crawford has no relevance in this case where the victim testified at trial and was available for cross-examination. Defendant’s attempt to extend Crawford’s holding to cases where the victim testifies at trial but cannot remember making the out of court statements is contrary to the development of case law in this area. See, State v. Price, 127 Wn. App. 193, 198, 201, 110 P.3d 1171 (2005), review granted, 156 Wn.2d 1005 (2006)(holding there is no confrontation clause violation where victim testifies but could not remember abuse or what her out of court statements were because “Crawford has no bearing . . . as the *confrontation clause* is not implicated by the use of out-of-court statements when the declarant appears for cross examination at trial.”); In re Grasso, 151 Wn.2d 1, 84 P.3d 859 (2004)(plurality decision) (child testifies for purpose of the confrontation clause where child does not describe the alleged acts or acknowledge some of the hearsay statements on the stand); State v. Mobley, 129 Wn. App. 378, 415, 418-19, 118 P.3d

⁴ Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

413 (2005) (holding no *Confrontation Clause* violation where child testified that defendant had “hurt her” in her “privates” and he had done “bad thing” but was unable to answer questions about statements she made to others because although she was not an expansive witness she was “under oath, was asked about critical events by the State, was able to project her demeanor to the jury, and was subject to cross-examination).

The above development of caselaw in this area is based on the long held ruling in United States v. Owens, *supra*, which gives a clear answer for the question before the court. In Owens, an assault victim was able to identify his attacker to law enforcement. 484 U.S. 554, 559. However, because of his injuries, at trial he was unable to recall seeing Owens at the time of the assault, although he recalled later identifying Owens as the assailant. Owens, 484 U.S. at 556.

On appeal, the Supreme Court considered whether the victim’s lapse of memory at trial precluded an opportunity for effective cross-examination as to his out-of-court identification of Owens, and whether therefore the admission of that prior identification was a violation of the Confrontation Clause. The Court noted that this case squarely presented the question that had been lurking in California v. Green, 399 U.S. 149, 162, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970), but left unanswered in the opinion of the Court. In answering that question, the Court adopted the

approach that Justice Harlan had suggested in his concurrence in California v. Green, 399 U.S. at 188:

...we agree with the answer suggested 18 years ago by Justice Harlan. “[T]he Confrontation Clause guarantees only ‘an *opportunity* for effective cross-examination, not cross examination that is effective in whatever way, and to whatever extent, the defense might wish.’” (Citations omitted)...It is sufficient that the defendant has the opportunity to bring out such matters as the witness’ bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination (citation omitted)) the very fact that he has a bad memory.

Owens, 484 U.S. at 559.

The Confrontation Clause did not preclude admission of the out-of-court statement because of the witness’ lapse of memory. Owens, 484 U.S. at 564. As the court in Owens reasoned:

If the ability to inquire into these matters suffices to establish the constitutionally requisite opportunity for cross-examination when a witness testifies as to his current belief, the basis for which he cannot recall, we see no reason why it should not suffice when the witness’ past belief is introduced and he is unable to recollect the reason for that past belief.

Owens, at 559. The Court added that “the weapons available to impugn the witness’ statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee. They are, however, realistic weapons” Id., at 560.

Owens has spurred many other jurisdiction, post Crawford, to reach the same conclusion.⁵

Defendant fails to articulate where in Crawford Justice Scalia overrules his own opinion or legal premise as he authored in Owens. Defendant asks this court to ignore the great weight of authority and analysis in this area of jurisprudence.

In this case B.B. took the stand, and unlike many other cases in this area, was able to answer questions regarding the actual incident. The only fault of her memory was whether she was present for and made prior statements to Ms. Mettler. However, B.B. was able to recall having a physical examination done and that it was “unpleasant stuff.” RP 1425. As noted in Owens, supra, defendant cannot ask for anymore in a cross-

⁵ See, e.g. United States v. Kappell, 418 F.3d 550, 555 (6th Cir. Mich. 2005), United States Cert. Den., 2006 U.S. Lexis 2732 (2006) (in child sex abuse case court rejects defendant’s claim that children were unavailable for purposes of Crawford where they were at times unresponsive or inarticulate); People v. Candelaria, 107 P.3d 1080 (Colo. App. 2004) (holding that the “fact that A.V. no longer recalled making statements or events does not alter the conclusion that there is no confrontation clause violation); State v. Miller, 918 So.2d 350, 351 (Fla. Dist. Ct. App. 1st Dist. 2005) (where victim could not remember basis for out of court statement due to head injury, no violation of confrontation clause or Crawford); People v. Miller, 842 N.E.2d 290, 297 (Ill. App. Ct. 1st Dist. 2005) (No Crawford violation where witness denied making previous out of court statement); United States v. Rhodes, 61 M.J. 445, 450 (C.A.A.F. 2005) (holding courts ruling in Crawford is consistent with ruling in Owens and only requires that a declarant *appear* for cross-examination); State v. Pierre, 277 Conn. 42, 890 A.2d 474 (2006) (A witness’ claimed inability to remember earlier statements or the events surrounding those statements does not implicate Crawford, so long as the witness appears at trial, takes an oath, and answers questions on cross-examination); Johnson v. Delaware, 878 A.2d 422, 428-29 (Del. 2005) (confrontation clause is protected where witness takes stand and is subject to cross-examination even if she does not remember events); People v. Sharp, 355 Ill. App. 3d 786, 795-96, 825 N.E.2d 706 (2005) (confrontation clause is satisfied where child rape victim appeared and testified but was nonresponsive to questions regarding rape).

examination context. He is able to show that this witness has no memory of making these statements and therefore the weight of this evidence is suspect. Indeed defendant was able to make this very argument during closing. 2898-2899. Defendant was afforded every protection and guarantee that the confrontation clause affords and fails to make any valid claim.

- b. Crawford does not apply to statements to Mettler because they are non-testimonial.

Crawford distinguishes between testimonial and nontestimonial out-of-court statements. “When testimonial hearsay is at issue, the Sixth Amendment demands unavailability and a prior opportunity for cross-examination.” State v. Fisher, 130 Wn. App. 1, 11, 108 P.3d 1262 (2005) (citing Crawford, 124 S. Ct. at 1374). “But when the admissibility of nontestimonial hearsay is at issue, the individual states are entitled to determine what statements should be admitted and what statements should be excluded.” Crawford, 124 S. Ct. at 1374.

Although the Crawford court declined to provide a comprehensive definition of testimonial statements, it did describe three “formulations of [the] core class” of such statements. 124 S. Ct. at 1364. This description is as follows:

In the first, testimonial statements consist of “ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, [***13]

prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” The second formulation described testimonial statements as consisting of “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” Finally, the third explained that testimonial statements are those “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”

Horton v. Allen, 370 F.3d 75, 84 (1st. Cir. 2004) (quoting Crawford, 124 S. Ct. at 1364) (citations omitted). The Court declined to settle on a single formulation but noted that whatever else the term “testimonial” covers, it applies to “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.” Crawford, 124 S. Ct. at 1374.

In examining whether something is “testimonial” it is important to first acknowledge the factual circumstances of Crawford under which the court embarked on a radical departure from hearsay jurisprudence. In Crawford, the defendant and his wife were both given *Miranda* warnings and separately interrogated by police officers after Crawford had stabbed a man who had allegedly raped his wife. Crawford, at 38. Crawford’s wife observed the stabbing and her statements describing the incident to the police officers were introduced in her husband’s trial under the statements-against penal-interest exception to the hearsay rule, since her statements

tended to show that she had a role in facilitating the assault. Id. at 38-40. It was this “recorded statement, knowingly given in response to structured police questioning” that the court found to be testimonial.

It is against this backdrop that courts should consider whether a child, who is unaware of any possible criminal ramifications for statements given to a doctor, should be considered testimonial. Statements of a child victim to a physician are non-testimonial. State v. Fisher, 130 Wn. App. 1, 108 P.3d 1262, 1269 (2005). Courts thus far have looked to the “purpose of the declarant’s encounter with the health care provider.” In Fisher, the victim made the statement to the physician the morning after the assault. In concluding that the victim’s statement was nontestimonial, the court noted that the doctor was not a government employee and there was no indication of a purpose to prepare testimony for trial. Fisher, 108 P.3d at 1269.

In the instant case B.B. went to Mary Bridge Hospital for a medical exam at the Mary Bridge Child Abuse Department, at the request of a social worker. RP 493, 506, 519. Conducting the exam was advanced registered nurse practitioner Joanne Mettler who is employed by the hospital, and not a state agency or law enforcement. The exam involves a full physical exam, interview, and diagnosis. RP 502, 503. Ms. Mettler explained to B.B. that she was going to write things down so that she could remember what they talked about and it was not until after the exam was over that Ms. Mettler informed B.B. that she would be turning

the information over to the police. RP 510-512. B.B. was clear that she knew she was going to have a “check-up” but did not know why she was going to have the exam. RP 510. At the conclusion of the exam, Ms. Mettler wrote an assessment, which included observations about B.B.’s current living environment, parental supervision, and a recommendation for no unsupervised contact with the defendant. RP 513. The parents were also provided with discharge instructions and a recommendation for counseling for B.B. RP 513, 516.

Like Fisher, the examination here was not performed by a government employee. While the child knew that she was there for a medical exam, she did not understand the potential for use in a criminal prosecution. Indeed, the main outcome of the examination was to provide recommendations for counseling and supervision of the child. This is consistent with the purpose a social worker would have in making such a referral. See, State v. Bobadilla, 709 N.W.2d 243, 256 (Minn. 2006) (concluding the admission at trial of statement by a young child in a risk-assessment interview conducted by a child-protection worker did not violate the *Confrontation Clause*).

Also like Fisher, the defendant in this case was not formally charged and there was “no indication of a purpose to prepare testimony for trial.” 130 Wn. App. at 14. This case is distinguishable from People v. Sisavath, 118 Cal.App. 4th 1396, 13 Cal.Rptr 3d 753 (Cal.App. 2004), where the videotaped interview was attended by the prosecuting attorney,

post filing of information, in a setting designed for interviewing child suspected of abuse. Here, the focus was on diagnosis and treatment for the health and welfare of the child like in Bobdilla, supra, and not for building a state's case.

In summary, because B.B. statements to Ms. Mettler were nontestimonial and because she was available for cross-examination, the defendant was afforded every protection under the *Confrontation Clause*.

2. B.B.'S STATEMENTS TO A NURSE PRACTITIONER WERE PROPERLY ADMITTED UNDER MEDICAL DIAGNOSIS AND TREATMENT EXCEPTION, ER 803(a)(4).

A trial court's determination that a statement is admissible pursuant to a hearsay exception is reviewed under an abuse of discretion standard. See State v. Gribble, 60 Wn. App. 374, 381, 804 P.2d 634, review denied, 116 Wn.2d 1022, 811 P.2d 220 (1991).

Under ER 803(a)(4), "statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are admissible. A declarant's motive must be consistent with receiving treatment, and the statements must be information on which the medical provider reasonably relies to make a

diagnosis. State v. Fisher, 130 Wn. App. at 14, (citing, State v. Lopez, 95 Wn. App. 842, 849, 980 P.2d 224 (1999)).

“Washington courts admit child hearsay statements under ER 803(a)(4) even if the child declarant does not understand that the statements were necessary for medical diagnosis or treatment.” State v. Florczak, Wn. App. 55, 65, 882 P.2d 1999 (1994) (upholding statements of a three year old victim to a doctor where emotional state and behavior at the time of the statements added indicia of reliability). The courts do so only if corroborating evidence supports the child's statements and it appears unlikely that the child would have fabricated the cause of injury. Id., citing, In re S.S., 61 Wn. App. 488, 503, 814 P.2d 204, review denied, 117 Wn.2d 1011 (1991); State v. Butler, 53 Wn. App. 214, 222-23, 766 P.2d 505, review denied, 112 Wn.2d 1014 (1989); cf. 5B Karl B. Teglund, Wash. Prac., Evidence § 367(4), at 183 (3d ed. 1989). Thus, in Washington, “it is not per se a requirement that the child victim understand that his or her statement was needed for treatment if the statement has other indicia of reliability.” State v. Ashcraft, 71 Wn. App. 444, 457, 859 P.2d 60 (1993). Such indicia of reliability also satisfies the test for admitting hearsay testimony when no cross examination is allowed. Ashcraft, 71 Wn. App. at 457 n.4 (citing Idaho v. Wright, 497 U.S. 805, 817, 110 S. Ct. 3139, 3148, 111 L. Ed. 2d 638 (1990)).

However, where the age of the child supports that the victim had a treatment motive, there is no need to establish the additional Florczak

requirements prior to admission of the statements and a traditional ER 803(a)(4) analysis is appropriate. State v. Kilgore, 107 Wn. App. 160, 320, 26 P.3d 308 (2001).

Here, there is no need to show corroborating evidence because the victim was seven years old at the time of the statement and understood she was there for a medical exam. RP 1075, 510. B.B. agreed with Ms. Mettler that she was at the hospital to have an exam, or “checkup” and Ms. Mettler explained to her that she would write things down so she could remember what they talked about. RP 510, 1559. The doctor performed a head-to-toe examination that followed with recommendation for care. RP 512, 513, 516.

Nor is there any merit to defendant’s argument that this testimony was cumulative or prejudicial under ER 403. First, defendant has failed to preserve error where he fails to cite where in the record such an objection was made. A party cannot appeal absent a timely and specific objection to the admission of that evidence. ER 103; State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995), review denied, 129 Wn.2d 1007, 917 P.2d 129 (1996). This court will not review a claim of error that was not raised before the trial court. RAP 2.5(a); Avendano-Lopez, 79 Wn. App. at 710.

While ER 403 permits exclusion of evidence if the probative value is substantially outweighed by the danger of prejudice from needless presentation of cumulative evidence, the rule does not necessarily prevent

the admission of merely cumulative evidence. State v. Dunn, 125 Wn. App. 582, 589, 105 P.3d 1022 (2005), *citations omitted* (holding testimony of mother, father, physician's assistant, and police was not impermissibly cumulative where disclosures gave a logical sequence even if testimony overlapped).

Here, there was a logical sequence to the State's presentation of evidence. This was a delayed disclosure case where B.B. went to her sister, and then her mother and father, giving the most details to her parents. She then was logically referred to a nurse practitioner for a physical examination and finally to a child interviewer. The only statement defendant complains of as cumulative is the statement to Ms. Mettler. See Opening Brief of Appellant at 45-46. This was a critical statement for the State's case because it was done in the context of a medical examination and it was important for Ms. Mettler to relate the full details of that examination, which would necessarily include an interview.

3. ROHRICH DOES NOT DICTATE THAT THE VICTIM TESTIFY FIRST BEFORE CHILD HEARSAY STATEMENTS ARE ADMITTED IF PRETRIAL THE ADMISSIBILITY IS ESTABLISHED AND THE VICTIM TESTIFIES AT TRIAL.

The defendant asks this court to rule that a victim must always testify first, prior to the admission of any child hearsay statements. Such a

requirement is a novel interpretation of the rule announced in State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997) and should be rejected.

The Washington Legislature enacted a statute commonly referred to as the “Child Hearsay Statute.” RCW 9A.44.120.⁶ This statute provides for the admission of out-of-court statements of a child victim of sexual abuse under certain circumstances.

In this case the court admitted child hearsay statements through B.B’S mother and father and the child interviewer. Defendant contends that the court erred in admitting these statements on the ground that B.B. did not testify first and thus the requirements in Rohrich were not met.

In Rohrich, the prosecutor called the victim to the stand and asked her questions only of a general nature; no questions were asked about the defendant abusing her. The trial court admitted several hearsay

⁶ 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 . . . is admissible in evidence in . . . criminal proceedings . . . in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120.

statements, pursuant to RCW 9A.44.120, implicating Mr. Rohrich. The Supreme Court reversed the conviction holding, that “testifies,” as used in RCW 9A.44.120(2)(a), means the child takes the stand and describes the acts of sexual contact alleged in the hearsay. Rohrich, 132 Wn.2d at 474,477-478.

The court later clarified and limited its holding in Rohrich. State v. Clark, 139 Wn.2d 152, 159-161, 985 P.2d 377 (1999). The court clarified that the Rohrich court’s interpretation of the statutory language “testifies” was done in light of confrontation clause requirements. In re PRP of Grasso, 151 Wn.2d 1, 11-13, 84 P.3d 859 (2004). If the child “testifies” in a manner that satisfies the constitution, then the statutory requirement has been met. Grasso, 151 Wn.2d at 13, n.5. The confrontation clause is satisfied by the declarant of the hearsay statement being called to the stand at trial, asked about the event and the hearsay statement, and made available for cross-examination. State v. Clark, 139 Wn.2d 152, 159-161, 985 P.2d 377 (1999).

Here, B.B. took the stand and was subject to cross-examination regarding her statements, thus there was no error in admitting her statements to her parents under the RCW 9A.44.120 and Rohrich. But defendant argues this is not enough. Instead, defendant takes a single line from Rohrich throws it out of context, and then heralds it as a holding and absolute prerequisite to child hearsay admission: “Accordingly, the Confrontation Clause requires the testimony to be presented in court by

the witness *first* unless the witness is unavailable, in which case the “weaker substitute” alone may be admitted if reliable.” (Opening Brief of Appellant at 48, citing Rohrich, at 479-481).

In other words, under defendant’s construction, the State must always have the child testify first in the presentation of its case or the confrontation clause is violated. But the confrontation clause does not turn on the order of evidence, but the reliability and availability of cross-examination of that evidence. As long as the State presents the testimony of the child regarding the nature of the sexual acts in question then it has satisfied the requirements of Rohrich and the confrontation clause.

Even assuming a child must testify first, under Crawford testimony in a pretrial hearing would be sufficient for *Confrontation Clause* purposes. See, State v. Muhomed, 132 Wn. App. 58, 130 P.3d 401(2006) (testimony at a preliminary hearing satisfies the right to confrontation if the circumstances are those of a typical trial, including cross-examination regarding the statements). Here B.B. was subject to cross examination regarding her statements during the competency and child hearsay hearing. RP 361-364.

Defendant also waived this argument via invited error. A court will not entertain a challenge to the presentation of evidence where a party agrees to it below. See State v. Craig, 82 Wn.2d 777, 514 P.2d 151 (1973). Below, defendant agreed that there was no requirement that the child testified first before her statements were admitted. RP 862.

Finally, even if error occurred, what was the prejudice where the victim ultimately testified? It is not the case that the parents testified and then the State decided not to call the victim. Defendant cannot point to any resulting prejudice from this alleged error, as any such error was harmless even under the stringent “beyond a reasonable doubt” standard State v. Lougin, 50 Wn. App. 376, 382, 749 P.2d 173 (1988).

Defendant further outlines in his assignment of error that the testimony of the parents was cumulative. Defendant makes no attempt to brief this and the court should not consider this issue on appeal. See Opening Brief of Appellant at 49; State v. Hoffman, 116 Wn.2d 51, 71, 804 P.2d 577 (1991)(“Arguments not supported by relevant citation of authority need not be considered by this court.”)

4. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF HARAI’S ADMINISTRATIVE LEAVE, AND ADMITTING ANY EVIDENCE BEYOND THAT WAS WITHIN THE TRIAL COURT’S DISCRETION.

The defendant claims on appeal that the court violated his constitutional right to confront witnesses and ER 608(b) when it limited the cross-examination of Detective Harai regarding his administrative leave. A careful review of the record shows that the court did in fact allow both parties to elicit that Detective Harai was on administrative leave. The record also shows that defendant (a) failed to preserve error for review, (b) that the court properly exercised its discretion in limiting the scope of

cross-examination, and (c) even if there were any error, such error is harmless where a second detective was present for the defendant's interview and provided cumulative testimony in this area.

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal. Thomas, 150 Wn.2d at 856. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

Evidence of a witness's character, trait of character, or other wrongs or acts are "not admissible for the purpose of proving action in conformity therewith on a particular occasion" except as provided in ER 607, 608, and 609. ER 404(a)(3). ER 608 provides that specific instances of a witness's conduct, introduced for the purpose of attacking his or her credibility, *may not be proved by extrinsic evidence*, but may "in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness . . . concerning the witness' character for truthfulness or untruthfulness." ER 608(b)

(emphasis added). In exercising its discretion, the trial court may consider whether the instance of misconduct is relevant to the witness's veracity on the stand and whether it is germane or relevant to the issues presented at trial. State v. Griswold, 98 Wn. App. 817, 830-31, 991 P.2d 657 (2000) (the witness's prior false statement was "clearly collateral" and "not germane to the guilt issues here").

"The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions." State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing U.S. CONST. amend VI; CONST. art. I, § 22; Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). The purpose of cross-examination is to test the perception, memory, and credibility of witnesses. Darden, at 621, *citations omitted*. The right to cross-examine adverse witnesses is not absolute and courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative. Id. The confrontation right and associated cross-examination are limited by general considerations of relevance. Id.

a. Failure to preserve error.

While defendant's claim on appeal is that the court improperly limited the scope of his cross-examination, he simply failed to preserve

such error under the *Confrontation Clause* or under an evidentiary objection. Defendant concedes the failure to preserve evidentiary error in his briefing. See Opening Brief of Appellant at 59 (“the trial court never reached the question of whether Harai could be questioned about the administrative leave allegations of misconduct under ER 608, however, had the question been reached . . .”).

As a general rule, the appellate court will not consider issues raised for the first time on appeal. RAP 2.5. An exception to this rule exists where the error alleged is “a manifest error affecting a constitutional right.” RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citing, State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988)). It is well established that the appellant bears the burden to demonstrate actual prejudice, and that this prejudice must be apparent from the record, before the alleged error will be considered “manifest.” McFarland, 333-34. “RAP 2.5(a)(3) was not designed to allow parties ‘a means for obtaining new trials whenever they can identify’ a constitutional issues not litigated below.” State v. WWJ Corp., et. Al., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999) (quoting State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 491 (1988)). If the record lacks the necessary facts, then the alleged error is not manifest and the court will not consider it on appeal. Id.; State v. McNeal,

98 Wn. App. 585, 594, 991 P.2d 649 (1999), review on other grounds, 140 Wn.2d 1013 (2000). Also essential to a showing of manifest error is a ‘plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.’ WWW Corp., at 603 (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

The record is terribly confusing regarding what defense counsel wanted to pursue with regards to Detective Harai on cross-examination. On appeal, defendant argues that defense should have been allowed to examine whether Harai had “falsified a police report, or was being investigated for the same, the timing of the allegation, the circumstances of the allegation, the investigation and employment files and the like . . .” RP 55. But defendant failed to preserve this error for appeal. The only question defendant was precluded from asking, that he complained of error below, was whether the deputy invoked the Fifth Amendment during the preliminary hearing when asked if “he had ever previously falsified a police report.” RP 1684. Defense counsel made a large issue below that he wanted to “impeach” the detective with his “prior inconsistent” testimony from the 3.5 hearing where he refused to answer why he was on paid administrative leave but instead invoked the Fifth. RP 1686, 1698. The State correctly pointed out to the court that his previous testimony was not inconsistent at all, but instead was an invocation of his Fifth Amendment right. RP 1686-87. The parties broke to reinterview Deputy

Harai, where defense counsel asked him when he went on paid leave and which case it was on, at which point he became uncomfortable and upon advice of his counsel declined to answer further questions. RP 1712-1713. Defendant made no further record as to what questions he wanted to pose to the witness regarding his administrative leave. RP 1713.⁷

Therefore, based on the record below, defendant cannot meet even his constitutional burden of showing that the “asserted error had practical and identifiable consequences in the trial of the case.” WWW Corp, at 603 (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). It is speculation for this court to guess what other evidence Detective Harai could have given regarding his administrative leave and what impact that would have had on the outcome of the trial. Instead, defense counsel only made a record that he wanted to pursue that Harai had raised a Fifth Amendment objection to answering questions at the pretrial hearing. He did not state he was entitled to explore the nature of the administrative suspension in front of the jury. Failure to make such a record precludes review in this court.

⁷ Also, prior to testifying the court had a discussion with defense counsel, the State and Detective Harai’s attorney. At that time the parties agreed on the scope of the questions because Mr. Harai’s attorney was going to be out of town. RP 1223-1225.

b. Scope properly limited.

Even if the error was preserved, cross-examination was properly limited. Here the court properly allowed evidence that Deputy Harai was on paid administrative leave at the time of the hearing.⁸ RP 1663-64, 1683. The court also allowed evidence of the reason he was placed on administrative leave – an allegation by the prosecutor’s office that he had falsified a police report in another case. RP 1663-64, 1683. During trial the defense explored the manner in which the deputy generated reports in this case which was the crux of impeachability for the issue at hand. See, RP 1682-1683 (On cross-examination Deputy Harai admitted that he generated the report from memory and he did not have any notes); RP 1683 (His report also was not logged in the computer until November 6, 2003, even though his interview with the Basich’s was done September 16, 2003).

In sum, the defendant was allowed to put before the jury Deputy Harai’s possible misconduct. Admitting any evidence *beyond* this was well within the trial court’s discretion. Specifically, ER 608 prohibits proof of the prior misconduct through extrinsic evidence. Therefore defendant’s argument that personnel records are appropriate is without merit because this would qualify as extrinsic evidence. Essentially

⁸ Even this was a discretionary determination, as there had been no proof of misconduct, just an allegation that was pending investigation. RP 203, 1695.

defendant was asking the court to have a trial within a trial, of Deputy Harai, and the alleged misconduct. This is the very thing that the history of ER 608 tries to prevent. “The rule is designed to prevent time-consuming litigation over issues that are only collateral to the merits of the case.” See, 5A Karl B. Tegland, Washington Practice: Evidence Law and Practice § 608.11 at 370 (4th ed. 1999) (*citing* United States v. Adams, 799 F.2d 665 (11th Cir. 1986)).

c. Harmless Error.

A nonconstitutional error “is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). The standard of review for a claim of constitutional error is whether the court can conclude that the error was harmless beyond a reasonable doubt. State v. Lougin, 50 Wn. App. 376, 382, 749 P.2d 173 (1988).

Even if it were error to exclude, this error was not prejudicial where Deputy Dogeagle testified to the very thing defendant complains of on appeal. Both Deputy Harai and Dogeagle were present for the interview of defendant and at no time was defendant left alone with Harai. RP 1648-50, 1825, 1828-29. Deputy Harai testified in court regarding defendant’s tape recorded statements and Detective Dogeagle confirmed that the transcript of the interview was an accurate transcript of the taped interview. RP 1650, 1661, 1829-30. Both witnesses remembered

defendant making an off-handed remark while the non-tape-recorded version of the interview was conducted to the effect of “if he wanted to prey on a young child, it sure wouldn’t be B.B. because she’s such a story teller and tattletale.” RP 1655 (Harai) and “if I was going to prey on a child I wouldn’t pick [B.B] because she’s kind of a tattletale and a, I don’t know, just a little chatterbox something.” RP 1827 (Dogeagle). Detective Dogeagle had an independent recollection of the statement and it “stuck out” to him as an “unsolicited extra thing that kind of came out.” RP 1828. He had to refresh his recollection with the general report for the use of the words “prey” and “tattletale” but he recalled the “gist” of the statement without refreshing his memory. RP 1836-1837.

Because Detective Dogeagle’s testimony corroborated Detective Harai’s testimony, any err in the limitation of cross-examination is harmless under either a constitutional or non-constitutional standard.

5. THE TRIAL COURT DID NOT LIMIT THE ADMISSION OF EVIDENCE AS CLAIMED ON APPEAL; ALTERNATIVELY ANY LIMITATION WAS WITHIN THE TRIAL COURT’S DISCRETION.

Defendant makes several *Confrontation Clause* claims based on the court limiting cross-examination. He alleges that the trial court erred in limiting or excluding evidence of (a) B.B.’s school records, (b) B.B.’s medical records, and (c) preincident and pretrial contact between victim and defendant families and evidence attacking credibility. These alleged

errors are either unsupported by the record or not preserved for review. For purposes of this section, the State incorporates its confrontation clause, relevancy and admission of evidence law as outlined in section 4 of this brief.

The Sixth Amendment’s confrontation clause requires that an accused be permitted to cross-examine a witness for bias and the rules of evidence do also. Bias can arise from a variety of circumstances, including civil proceedings between the victim and the defendant. State v. Dolan, 118 Wn. App. 323, 327, 73 P.3d 1011 (2003). Bias includes that which exists at the time of *trial*, for the very purpose of impeachment is to provide information that the jury can use, during deliberations, to test the witness's accuracy while the witness was testifying. Id.

a. School Records

The court did not rule against the defense on the issue of school records. Pretrial defense counsel stated that he may want Ms. Mulkins to “refer to those records” RP 49. During trial, defense counsel agreed that he would not ask Ms. Mulkins questions regarding test scores or the fact that the victim was in special reading or math programs. RP 2004. Instead counsel wished to explore more general questions regarding victim’s aptitude. RP 2023. The court agreed that Ms. Mulkins could testify based on her personal observations of the victim but not based on

school records. RP 2027. The court also ruled counsel could explore academic performance. RP 2030.

During the discussion of the parameters of Ms. Mulkin's testimony defense counsel never made a record of what was in the school records that he wanted in evidence and what Ms. Mulkins would not be able to testify to. RP 2003-2030. Contrary to defendant's assertion on appeal, defense counsel never asked to elicit testimony regarding "special education needs" but instead agreed not to go into these. RP 2004. Defense counsel also did not ask to go into school records "regarding B.B.'s performance." RP 2023. Defendant's assignment of error and argument to this court is misleading.

A review of the court testimony shows that defense counsel was able to elicit all of the desired information from Ms. Mulkins. Ms. Mulkins testified that BB was a quiet, shy girl who struggled in all areas academically. RP 2048, 2049. She was a child who had difficulty maintaining focus and her behavior appeared to be the same post-disclosure. RP 2054, 2067. At no time during questioning did Ms. Mulkins state that she could not recall/remember victim's performance and at no time did she testify that examination of school records would help her in her testimony.

Defendant also complains that the court did not allow defense to "highlight the discrepancies in B.B's statements to Ms. Mulkins vis-à-vis her statements to other testifying witnesses." (Opening Brief of Appellant

at 63). Without citation to the record, this court should decline to address this issue on appeal. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument not supported by specific citation to record is deemed waived).

b. Medical Records.

Again defendant's claimed error on appeal does not bear out in the record below. Defendant argues that the medical records would have established that "B.B. was a chronic bed wetter and . . . would have addressed pre-existing behavioral concerns parents had reported to the child's pediatrician." (Opening Brief of Defendant at 62). There is no citation to the record for this claim. Below the only record made from defense counsel was that the medical records included that she had prior bed wetting problems, and was on medications for ADD. RP 50. After the State pointed out that the parents agreed that there was some bed-wetting two years prior, the court reserved ruling to see if the parents' testimony contradicts records and that at that time defense may have a basis to get the records in. RP 54. At trial the parent's testimony was consistent with the defendant's theory, e.g. that she had previously wet the bed up to the age of five or five and a half. RP 1076, 1164.

Defense counsel never renewed his motion to admit the medical records following the testimony of the Basich's. The issue of medical records is therefore waived on appeal. See, State v. Carlson, 61 Wn. App.

865, 875, 812 P.2d 536 (1991) (A defendant who does not seek a final ruling on a motion in limine after a court issues a tentative ruling waives any objection to the exclusion of the evidence).

c. Pretrial and pre-incident contact between families and evidence attacking credibility.

Defendant claims that he was prejudiced by the court's ruling limiting evidence of pretrial and pre-incident contact between the victim and defendant families. (Opening Brief of Appellant at 67-68). What defendant overlooks is that the court was trying to prevent a mudslinging contest, where neither side would win, and in the process the jury would be derailed from the issues before them. To put it simply, granting defendant's request would have opened a Pandora's box. An examination of the material before the court shows the documentation of the incidents between the families. See CP 232, (Declaration of Patrick Hammond); CP 233-34 (Declaration of Ehrenheims with attached Glave letter); CP 56-70 (State's Trial Brief).

The claimed evidentiary error on appeal is that the court improperly limited evidence of (i) "B.B.'s father's scams against his employers or insurance company, (ii) CPS report, (iii) defense witnesses, of special education for B.B., and police report regarding Glave boys on motor scooter. The State will address issues (i) and (ii) as arguably being

preserved in the record, while the subissues in (iii) are lumped together because of total failure to preserve.

This court must also consider the context of the motion and ruling. It was the State's motion to exclude testimony. RP 6. In response to this motion defense counsel articulated that the testimony and witnesses were to rebut allegations by the Basich's that the defendant intimidated the child at school or that B.B. was scared of him every time she saw him. RP 8. In the ruling the court left open the question of whether the evidence would be admitted and cautioned the parties about flooding the jury with irrelevant evidence:

I don't want either side talking about any of these alleged contacts, other than the day in question. If one side opens the door, the other side gets to explore . . . But I don't see any reason why I want the jury to get confused of what this trial [sic] is about. It's not about if one group of people hates another group of people. It's about whether or not the allegations are set forth in the information can be proven beyond a reasonable doubt.

RP 16. Following this ruling, defense counsel agreed that his case "will depend then upon what the Basiches and these other people testify to." RP 16.

i. Employer or insurance scam.

During pretrial motions defense counsel argued that Dana Umfleet talked with Michael Basich regarding a false L & I claim. RP 16. In response the State informed the judge that this issue came up post-disclosure with the defendant's family. RP 37. The court ruled that

Umfleet could not talk about the L & I claim, adopting the State's argument that the rules of evidence do not permit impeachment with extrinsic evidence. RP 38-39. After the court issued its ruling stating that she could not testify regarding the L & I issues, defense counsel stated, "I don't think she knows anything about that." RP 40.

First, from the record it would appear that defendant has waived this issue on appeal, given counsel's concession that the witness had no information about the L & I claim. Second, the court was correct in its ruling that ER 608 does not allow impeachment with extrinsic evidence. See (ER 608 law and argument at section 4 of opening respondent's brief).

ii. C.P.S. allegation.

There is little evidence below regarding what the "C.P.S. incident" entailed. Michael Basich testified during pretrial hearings regarding his wife contacting C.P.S. over an incident between their oldest daughter and the Glave's oldest son. RP 667-668. The allegation involved the oldest son pulling down the girls pants and kissing her on the bottom. RP 667. Mr. Basich was unaware of the outcome of the investigation. RP 668-69.

Defense counsel gave very little support for the admissibility of this evidence. The attempt to introduce the evidence came during the cross-examination of Ms. Basich, where counsel attempted to ask a question regarding whether Ms. Basich informed nurse practitioner Mettler about any incident with CPS. RP 1271. Defense counsel

explained that the CPS incident was relevant because it went to her faulty recollection. RP 1274. Mr. Meikle explained that there was an inconsistency between her October 2004 and pretrial testimony regarding the ages of the children at the time of the CPS incident.⁹ RP 1274. Mr. Meikle also stated that this evidence, “may be argumentative for an underlying reason to file another subsequent police report regarding some contact between these people.” RP 1274. Based on this argument the court sustained the objection as the incident being just too remote. RP 1275.

Later, during the presentation of Ms. Glave’s testimony, counsel again revisited the tumultuous relationship amongst the parties. At that point counsel agreed that he was not going to go into the “CPS incident,” but asked the court for leave to ask the witnesses whether there was a period of time when the parties did not get along. RP 2183. The court agreed and permitted this inquiry. RP 2186.

Based on these facts it is understandable why the court sustained the objection during Ms. Basich’s testimony. The C.P.S. incident occurred some seven years prior to the current allegations, and involved the children of the respective households, but did not involve the current

⁹ Apparently during the pretrial hearings she testified that the incident occurred in 1996, which according to defense counsel made the children three and four years old; whereas at her October 2004 testimony she stated that the kids were seven and eight years old. RP 1274.

victim. The impeachment value was very low since it involved a collateral matter. As to establishing turmoil between the families, this information would have been cumulative. The on again, off again, friendship of the families was made very clear to the jury. RP 2192 (testimony of Dana Glave that they were not on speaking terms with the Basich's for several years but that changed in 2002-2003). Thus, even assuming there was any error, such error was harmless where the information was cumulative and arguably prejudicial to defendant as well, if his child has precocious sexual knowledge.

iii. Witnesses, special education, motor scooters.

In its opening brief defendant throws out that the court impermissibly "exclude[d] defense witnesses." Defendant makes this blanket statement without pointing to which defense witnesses the court erroneously excluded. The record shows that the court's ruling was preliminary, subject to reconsideration as the case progressed. RP 15-16; CP 75-76. As to Mr. Arger, the only witness defendant singles out on appeal as error to exclude, the court again reserved ruling. RP 15.

Defendant further claims on appeal that the court erred in not allowing information regarding the Basichs contacting the police

regarding the Glave boys riding motor scooters, citing to RP 1431-32.¹⁰ There is no reference to this ruling or this incident at this point in the record and the argument is unsupported. RAP 2.5.

Finally, defendant argues that the trial court erred when it prevented defense from exploring that the victim was in special education. However, during trial, defense counsel agreed that he would not ask B.B.'s teacher, Ms. Mulkins, questions regarding test scores or the fact that victim was in special reading or math programs. RP 2004. Instead counsel wished to explore more general questions regarding victim's aptitude and was able to do so. RP 2023. Again, a reference to the record shows either invited error or failure to preserve the issue. See, Thomas, 150 Wn.2d at 856; City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (the invited error doctrine prevents parties from benefiting from an error they caused at trial regardless of whether it was done intentionally or unintentionally).

6. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Defendant claims counsel was ineffective where counsel failed to object below to (a) improper opinion testimony where the witnesses referred to Mr. Glave as the defendant and B.B. as the victim, (b)

¹⁰ Instead, this citation in the record is the cross of B.B. where the prosecutor asks B.B. about the speed bikes in the neighborhood. RP 1431.

testimony of the parents and nurse practitioner regarding general symptoms of B.B., (c) Ms. Mettler's testimony that B.B. identified defendant contrary to ER 803(a)(4), (d) a stipulation to testimony, and (e) offender score calculation. A review of each claim shows that counsel's performance was reasonable and that defendant cannot show that the outcome would have been different if these objections were made.

The test for ineffective assistance of counsel is twofold: first, counsel's performance must be so deficient that it falls below an objective standard of reasonableness; and, second, the deficient performance must so prejudice the defendant that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. State v. Day, 51 Wn. App. 544, 553, 754 P.2d 1021, review denied, 111 Wn.2d 1046 (1988) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). With respect to the first prong of the test: scrutiny of counsel's performance is highly deferential, and there is a strong presumption of reasonableness. Strickland, 466 U.S. at 689; Thomas, at 226. If counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim of ineffective assistance. Day, at 553, 754 P.2d at 1025-26 (citing State v. Mak, 105 Wn.2d 692, 731, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986)). As for the second prong, a reasonable probability of a different outcome is a probability sufficient to undermine confidence in the outcome of the original

proceeding. State v. Gonzalez, 51 Wn. App. 242, 247, 752 P.2d 939 (1988) (citing State v. Sardinia, 42 Wn. App. 533, 539, 713 P.2d 122, review denied, 105 Wn.2d 1013 (1986)).

If the defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot provide a basis for a claim of ineffective assistance of counsel. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). In discussing the contention that a social worker improperly commented on a child's credibility in a statutory rape case, the court noted that “[t]he decision to object is a classic example of trial tactics.” State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) The court then indicated that “[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.” Madison, 53 Wn. App at 763.

a. Opinion evidence.

Defendant poses the question whether it is error to allow a witness to refer to the defendant as the “defendant” and the victim as the “victim.” The answer is: where the context of the questioning and evidence is not calling for an opinion, but is merely using the words as labels, then there is no impermissible opinion evidence.

“Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant “because it ‘inva[de]s the exclusive

province of the [jury].” State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001), writ of habeas corpus denied, 141 Fed Appx 642 (2005), (quoting City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987))). Courts will generally look to several factors to consider whether something amounts to opinion testimony, including: (1) “the type of witness involved,”(2) “the specific nature of the testimony,”(3) “the nature of the charges,”(4) “the type of defense, and”(5) “the other evidence before the trier of fact.” Demery, at 759, quoting, Heatley, at 579.

In Demery, the court examined at length what constitutes “opinion” testimony and warned that the court has ““expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt.”” 144 Wn.2d at 760, quoting, Heatley, at 579. The court noted that “opinion testimony” can be defined as “[t]estimony based on one’s belief or idea rather than on direct knowledge of the facts at issue.” Id. at 760, quoting BLACK’S LAW DICTIONARY 1486 (7th ed. 1999).

Here, references to the victim as the “victim” by detectives and the defendant as the “suspect” cannot be characterized as opinion testimony and defense counsel was not ineffective for failing to object. While the State agrees that it would be error for the State to question a witness as to whether they believe Mr. Glave is “guilty” it would not be error to ask if the officer considered Mr. Glave a “suspect” or a “defendant.” Nor does the fact that a law enforcement witness refers to the victim as the “victim,”

offer an opinion as to guilt. Looking at the “specific nature of the testimony,” as required under Demery, these are merely useful labels when proceeding with an investigation and prosecution. A criminal case will naturally fall into two parties: a defendant/suspect and a victim. To force the unnatural label of “alleged defendant” and “alleged victim” to the prosecution and law enforcement witnesses is to simply force the State to subscribe to defendant’s theory of the case.

This issue presents one of frustration for the State, routinely surfacing in pretrial motions, with no resolution and courts and State’s split on the issue. For example in Jackson v. State, 600 A.2d 21 (Del. 1991), the court concluded it was inappropriate for the prosecutor to use the “victim” label in a prosecution for unlawful sexual intercourse, where the issue was whether there had been consent. On rehearing, the court clarified its ruling was not intended to apply to references to the “victim” by witnesses. The court explained: “Jackson's claim of error was directed to permitting the prosecutor to refer to the complaining witness as ‘the victim.’ The opinion does not state, nor does it imply, that the use of the term ‘victim’ by witnesses, as a term of art or in common parlance, is a basis for objection.” (Id. at 25). In the main opinion, the court had explained: “the term ‘victim,’ to law enforcement officers, is a term of art synonymous with ‘complaining witness.’ Moreover, the term ‘victim’ is also used in the indictment in this case as it is routinely in criminal charges which are read to the jury.” (Id. at pp. 24-25). However, in State v. Wigg,

the court reached the opposite conclusion, finding harmless error for the detective to refer to the victim as the victim. 2005 VT 91, 889 A.2d 233, 237 (2005).

The merit of allowing the State to proceed with its case as the victim known as “the victim” was recently examined in a law review journal:

Reference to the victim as the victim by the government at trial is not a knowing mischaracterization of evidence and is not an assertion that defendant is guilty. The use of the term victim is akin to the use of the term defendant. Neither term implies the accused believes he is guilty. Rather, when the government or its witnesses refer to the victim as the victim, or the defendant as the defendant, it simply denotes their status at that point in the trial.

NOTE: When a Victim's a Victim: Making Reference to Victims and Sex-Crime Prosecution, 6 Nev. L.J. 248 (2005).

This court should conclude that from time of the filing of a declaration of probable cause, the State in presentment of its case may use the label “victim,” if the context does not express an opinion. This holds true for the use of the phrase defendant as well. To conclude otherwise creates a universe where a prosecutor and its government witnesses must say, “the alleged defendant in this case is guilty of committing an alleged rape against the alleged victim because . . .” The preposterousness of this statement is self-evident; this is not the language used in charging documents, instructions to the jury, police reports, or the every day practicing prosecuting attorney.

Even if the reference to the word “victim” and “defendant” was error, such error does not require reversal. It was clear from the context of the statements that the detective was using a term of art and not an opinion. Detective Harai used the term victim once during examination, explaining that he contacted the “victim’s parents”. RP 1638. Detective Harai did not refer to Mr. Glave as “the suspect” as defendant suggests but instead used the term suspect when he was explaining his general interview procedure for all suspects. RP 1649-50. Ms. Basich testified once that B.B. had “bad dreams about the suspect.” RP 1199. Examining this testimony shows that the witnesses did not even refer to defendant as a “defendant” but rather a “suspect” which is synonymous with someone accused of a crime. The court should find no error at all with this term. The only claim left is a single reference to the victim as a victim. This could not have affected the outcome of trial, even under defendant’s argued constitutional standard. See, Lougin, 50 Wn. App. at 382 (the standard of review for a claim of constitutional error is whether the court can conclude that the error was harmless beyond a reasonable doubt).

Here, the evidence of guilt was overwhelming and a reference to the phrase “victim” would not change the outcome. The State established that the defendant had an opportunity to commit the act: (a) he had a close, personal relationship with B.B. and treated her like his own daughter, and (b) he had access to the victim in a vulnerable situation (spa and bathroom). RP 1161, 1336-37. The State also established the

victim's ability to articulate sexual acts outside the realm of a six-year-olds' knowledge (cunnilingus and fellatio). RP 1337. Her description further lent the ring of truth with the assertion that the defendant forced her head into his penis so that she could not pull back. This was something B.B. testified to at trial, and disclosed to her mother and Ms. Mettler. RP 1337, 1167, 1600-01. Defendant also gave cautionary instructions to the victim post act that are consistent in sex cases, and again knowledge a six year old would not have. He told her not to tell anyone and that he still wanted to be her friend. RP 1337, 1168. See, State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003) (telling a victim "not to tell" supports finding of sexual gratification). The victim showed the effects of abuse, e.g. she was scared when defendant came to her home (RP 1196), she wet her bed, lost her appetite, and was scared to sleep alone. RP 1075, 1088, 1163, 1164, 1200. The victim also remained consistent with the main points of her disclosure: the location, the sexual act involved, and the defendant's warning to her.

b. Testimony of Basichs and Mettler regarding symptoms.

Defendant failed to object below to this testimony, therefore it may only be analyzed as an ineffective assistance of counsel claim.¹¹ RAP 2.5 (a).

Defendant complains on appeal that the Basichs and Ms. Mettler testified regarding changes in behavior in B.B. Because there was no testimony linking the change in behavior to the abuse, and because this conclusion was properly left for the jury, there was no error.¹²

‘The State may not introduce expert testimony which purports to scientifically prove that an alleged rape victim is suffering from rape trauma syndrome.’ State v. Black, 109 Wn.2d 336, 349, 745 P.2d 12 (1987). And, ‘expert testimony regarding a profile or syndrome of child sexual abuse victims is not admissible to prove the existence of abuse or that the defendant is guilty.’ State v. Jones, 71 Wn. App. 798, 819, 863 P.2d 85 (1993). Profile or syndrome evidence consists of generalized testimony ‘regarding the behavior of sexually abused children as a class.’

¹¹ Instead, defendant moved below to not allow Ms. Mettler to opine that in B.B.’s case there was “probable sexual abuse.” RP 1568. The court granted this motion, relying on what he refers to as Judge/Professor Morgan’s opinion in State v. Carlson. RP 1578-79, 1583.

¹² Contrary to appellant’s assertion at page 75 in the Opening Brief, the Basich’s did not express an opinion that the change in behavior was the result of being sexually abused by defendant. (Citing RP 1165). Instead Ms. Basich testified that she was unaware of what was causing the changes in behavior and that she later learned of something that helped her “make sense of what had been going on.” RP 1165.

Jones, 71 Wn. App. at 818. But lay testimony as to the ‘emotional or psychological trauma suffered by a complainant after an alleged rape’ is admissible in a rape prosecution ‘and the jury is free to evaluate it as it would any other evidence.’ Black, 109 Wn.2d at 349. Experts may also offer such testimony if it relates only to the practitioners own clinical experience working in the field and does not offer a direct assessment of the credibility of the victim in the case. See State v. Stevens, 58 Wn. App. 478, 794 P.2d 38 (1990) (allowing doctor in child sexual abuse case to testify about common symptoms associated with sexual abuse such as bed wetting, tantrums, nightmares etc.).

i. Basichs.

The Basichs testified that in the summer of 2003 they noticed a change in their daughter’s behavior, including nightmares, troubles sleeping, becoming more quiet, and bed wetting. RP 1075-76, 1088, 1163, 1164, 1200. This is the type of lay testimony as to the ‘emotional or psychological trauma suffered by a complainant’ that Black held is admissible in a rape prosecution because it leaves the jury free to evaluate it as it would any other evidence. Black, 109 Wn.2d at 349. Whether under a parent’s watchful eye a child showed any change in behavior after a traumatic event is tremendously useful for the trier of fact when assessing the facts.

ii. Ms. Mettler

The nurse practitioner testified in general terms about her observations with children and changes in temperament, including nightmares, bed wetting, and changes in appetite. RP 1602, 1603. She did not link these changes to the victim in this case, or draw any inferences. Instead she stated in general that if changes in a behavior occurred in the same time frame as when abuse occurred or a report of abuse was made, then she “might wonder if that is in relation to sexual abuse.” RP 1603. Ms. Mettler was careful to note that a sudden change in a child’s behavior can be evidence of a traumatic event in the child’s life, but did not attribute it specifically to sexual abuse. RP 1597.

Like the doctor in Stevens, supra, Ms. Mettler did not testify that B.B. fit a “sexual abuse profile” or that such a profile even exists. Instead, without objection, she gave very general testimony regarding traumatic events and symptoms she has observed children may exhibit.

Even assuming this testimony was technically error, defendant has failed to establish that this was not a trial tactic. Defense counsel could very well have wanted this general testimony before the jury. With this, he could argue that any number of events in the child’s life could have brought on this change of behavior.

Nor has defendant met his burden of establishing that such error affected the outcome of the trial. See harmless error supra, at 60.

c. Testimony as to identity of perpetrator.

Defendant complains that under ER 803(a)(4) the identity of an accuser via nurse practitioner Mettler is not admissible. The State hereby incorporates by reference ER 803(a)(4), outlined in section 2.

Contrary to defendant's assertion, identity was important for diagnosis and treatment. The defendant was the victim's next door neighbor. The parents were directed to allow the child to have "no unsupervised contact with the defendant." RP 513. Like instances where victim's abuser is a family member, the identity of the abuser as a close family friend and neighbor is pertinent for doctor recommendations. See, Fisher, at 15 (citing, United States v. Renville, 779 F.2d 430, 436 (8th Cir. 1985)) ("statements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household are reasonably pertinent to treatment.")

This may also be characterized as tactical. Identity was not at issue in the case. B.B. only pointed to defendant as her abuser. Even if it were error, because identity was also elicited through her parents and B.B. on the stand, any error was harmless.

d. Stipulation.

It was not error for defense counsel to stipulate to the history of the family. As argued in section 5(c), the history between the families cut both ways. A simple statement to the jury that, "In the interest of justice,

time management, and presentation of this case, the parties have refrained from discussing in detail specific instances of contact between the Basich and Glave families from before June 1, 2003, and after September 13, 2003,” made tactical sense. CP 92.

Because the other history evidence was prejudicial to the defendant, a brief explanation of the limitation was helpful to both parties. Defendant cannot show that the outcome would have been different if the jury learned of CPS reports, pretrial contact violations of the defendant, and police referrals by both parties unrelated to the incident.

e. Sentencing/same criminal conduct.

Under the Sentencing Reform Act, multiple current offenses are presumptively counted separately in determining a defendant's offender score unless the trial court finds that current offenses encompass the “same criminal conduct” and the crimes are then counted as one crime in determining the offender score. RCW 9.94A.589(1)(a). For multiple counts to be treated as the “same criminal conduct,” the crimes must have been committed at the same time and place against the same victim, and must also involve the same objective criminal intent. RCW 9.94A.589(1)(a); State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). The absence of any one of these elements prevents finding “same criminal conduct.” State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

A trial court's determination of what constitutes the “same criminal conduct” will not be disturbed absent an abuse of discretion or a misapplication of the law. Tili, 139 Wn.2d at 122-23. The appellate court must narrowly construe the language of RCW 9.94A.589(1)(a) to disallow most assertions of same criminal conduct. State v. Price, 103 Wn. App. 845, 855, 14 P.3d 841 (2000).

When considering whether the repeated commission of the same crime against the same victim involves the same objective criminal intent, courts have considered whether the crimes are “merely sequential, or whether they form a continuous, uninterrupted sequence of conduct.” Price, 103 Wn. App. at 858.

Defendant argues that this case is similar to Tili, in which the Washington Supreme Court concluded that Tili’s commission of three counts of rape involved the same objective criminal intent. Tili’s three penetrations of the victim were nearly simultaneous, all occurring within two minutes. The Court focused on the “extremely short time frame coupled with Tili’s unchanging pattern of conduct” and found it “unlikely that Tili formed an independent criminal intent between each separate penetration.” Tili, 139 Wn.2d at 124.

The Court in Tili contrasted the facts in that case with those in State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997). There, the defendant anally raped a woman and forced her to perform oral sex on him. In between the two acts, the defendant beat and threatened the

woman and refused her requests to let her go. On appeal, the defendant argued that the sentencing court erred in not treating his two rape convictions as the same criminal conduct. The court disagreed:

[T]he trial court could find that Grantham, upon completing the act of forced anal intercourse, had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act. He chose the latter, forming a new intent to commit the second act. The crimes were sequential, not simultaneous or continuous. The evidence also supports the trial court's conclusion that each act of sexual intercourse was complete in itself; one did not depend upon the other or further the other.

Grantham, 84 Wn. App. at 859.

Similarly here, the sexual acts were not simultaneous. Once defendant finished performing oral sex on the victim he made a conscious decision to have the victim perform the same act on him; like Grantham, “each act of sexual intercourse was complete in itself.” Id. There was no need for defense counsel to make this argument before the trial court when the criminal intent for these separate acts is so clearly separate and this court should deny the request for resentencing.

7. THE JUDGE DID NOT IMPERMISSIBLY COMMENT ON THE EVIDENCE DURING AN EVIDENTIARY RULING.

Defendant complains on appeal that the court commented on the evidence by a statement made during an evidentiary ruling. Because the

remark was in response to an objection made, and because it did not give an opinion as to the weight or credibility of evidence, there was no error.

Article 4, section 16 of the Washington Constitution provides: “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986). “The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury.” State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929, 1995 Wash. LEXIS 129 (1995), citing State v. Trickel, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), review denied, 88 Wn.2d 1004 (1977). “The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury.” Id.

A court's statements giving reasons for its rulings, without indication that the court believes or disbelieves the testimony, do not constitute a comment on the evidence. State v. Studebaker, 67 Wn.2d 980, 983, 410 P.2d 913 (1966); State v. Renfro, 96 Wn.2d 902, 909-10, 639 P.2d 737, cert. denied, 459 U.S. 842, 103 S. Ct. 94, 74 L. Ed. 2d 86 (1982).

Here, the complained of statement was hardly a comment on the evidence. The ruling came during the testimony of witness neighbor Jeanne Anders as she was describing the upset/frantic disclosure of the Basichs regarding the report of the rape:

Q: And did you know which neighbor the allegations were against at that time?

MR. MEIKLE: Objection, Your Honor. Has to come from hearsay, from somebody else telling her.

THE COURT: It's a matter of identity, correct?

MR. MEIKLE: Yes, Your Honor.

THE COURT : Objection's overruled.

RP 1465.

In making its ruling, the court was not commenting on the evidence or the case, but simply engaging with counsel as to admissibility. Nothing in the remark commented on the judge's opinion as to the weight of evidence.

Even assuming any error, such error was harmless. Once its has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial and the burden “rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment.” Lane, at 838, quoting, State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262

(1972), aff'd in part, rev'd in part, 83 Wn.2d 485, 519 P.2d 249 (1974).

Here, the jurors were cautioned in the written instructions to disregard any apparent comment on the evidence, and that it was the judge's duty to rule on admissibility of evidence. CP 103. They are presumed to have followed these instructions. State v. Ingle, 64 Wn.2d 491, 499, 392 P.2d 442 (1964). Also, as argued supra, identity was never an issue in this case. Whether or not the rape occurred was the only issue, but the identity of the perpetrator remained constant. Thus an isolated reference to "identity" did not affect the outcome of the trial. See also, Harmless Error Analysis at 60.

8. THE STATE PROVED BEYOND A
REASONABLE DOUBT ALL OF THE
ESSENTIAL ELEMENTS OF THE CRIME OF
CHILD RAPE.

The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)). All reasonable inferences from the evidence must be

drawn in favor of the State and interpreted most strongly against defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

Generally, where time is not a material element of the charged crime, the language “on or about” is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi. State v. Hayes, 81 Wn. App. 425, 435, 438, 914 P.2d 788, review denied, 130 Wn.2d 1013, 928 P.2d 41 (1996). Id. Time is not an element of the charge of child rape. Id., citing RCW 9A.44.073; State v. Cozza, 71 Wn. App. 252, 258-59, 858 P.2d 270 (1993).

Here, the State proved that the rape occurred between the charged period of “between the 1st day of June, 2003, and the 31st day of August 2003.” CP 18-19. The testimony showed that it was during the summer of 2003 that B.B.’s behavior began to change. RP 1075, 1163. B.B. disclosed to her parents the abuse on September 8, 2003. RP 1165. At the time of disclosure B.B. told her mother she believed the rape happened a week to a week and a half prior to when she told her mother. RP 1309. B.B.’s testimony at trial was that she told her parents “right away” and

then told her sister. RP 1337-38. B.B.'s sister also recalled that B.B. told her about the rape on Wednesday, garbage day and that the way her sister related the news she believed the rape occurred sometime in July. RP 1002,1010-1011.

Defendant did not present an alibi defense, nor does he claim so on appeal. Instead his defense was one of general denial where he was alleging a defense of impossibility because he did not allow the kids to use the spa when he was home alone. Defendant's main argument on appeal is that the evidence supports a conviction for September 8, 2003 (date of disclosure) and not the charging dates. This argument is without merit. See, State v. Osborne, 39 Wn. 548, 81 P. 1096 (1905) (prosecution for rape where evidence at trial established that the rape occurred a week or two weeks prior to the date alleged in the information); State v. Oberg, 187 Wn. 429, 432, 60 P.2d 66 (1936) (prosecution for sodomy where the State alleged that the act occurred "on or about April 3," but the victim testified that the act occurred on June 20, over two months later); State v. Thomas, 8 Wn.2d 573, 586, 113 P.2d 73 (1941). See also RCW 10.37.050(5), (7) (an information is sufficient if it indicates that the crime was committed before the information was filed and within the statute of limitation, and the crime is stated with enough certainty for the court to pronounce judgment upon conviction.)

9. DEFENDANT HAS FAILED TO MEET HIS
BURDEN OF SHOWING CUMULATIVE ERROR
WHERE NO ERROR OCCURRED BELOW.

A defendant may be entitled to a new trial when errors cumulatively produced a trial that was fundamentally unfair. In re Personal Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, clarified, 123 Wn.2d 737, 870 P.2d 964, cert. denied, 513 U.S. 849, 115 S. Ct. 146, 130 L. Ed. 2d 86 (1994). The defendant bears the burden of proving an accumulation of error of sufficient magnitude to require a retrial. Lord, 123 Wn.2d at 332. Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 128 (1990). Here, the State submits that no error occurred below and thus this argument must fail as well.

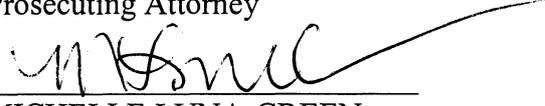
D. CONCLUSION.

The claims defendant brings before this court are largely unsupported by the record. A careful review of the record will lead this court to a conclusion that defendant received a fair trial without

constitutional, evidentiary, or sentencing error. This court should affirm defendant's conviction and sentence.

DATED: May 26, 2006.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/26/06 
Date Signature

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