

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIES..... iii

I. COUNTERSTATEMENT OF THE ISSUES..... 1

II. STATEMENT OF THE CASE..... 1

 A. PROCEDURAL HISTORY..... 1

 B. FACTS 1

III. ARGUMENT 11

 A. RESPONSE TO BRIEF OF APPELLANT..... 11

 The trial court properly denied Gallegos’ last-minute request for a competency evaluation where defense counsel could not point to any specific basis to question Gallegos’ competency and where the nothing in the record called his competency into question. 11

 B. RESPONSE TO PERSONAL RESTRAINT PETITION.

 1. Response..... 15

 2. Authority for petitioner’s restraint..... 16

 3. Argument: Gallegos fails to show his counsel was ineffective. 16

 a. A defendant alleging ineffectiveness of counsel bears the burden of showing both deficient performance and prejudice. 17

 b. Not introducing Lisa Gallegos’ work schedule.18

 c. Failing to impeach the “State’s only witness.” 19

 d. Failing to call expert witnesses to show that the rapes would have been impossible? 19

e.	Failing to object to circumstantial evidence.....	22
f.	Failing to call JG to testify that SW did not spend the night at the Gallegos house during the relevant time period.....	22
g.	Failing to object to the amendment of the information.	23
h.	Failing to call experts to testify regarding his back injury, erectile dysfunction and medical conditions.....	24
i.	Failing to object to the State asking leading questions of SW	24
j.	Failing to call Donald Jackomino or Nannette Lewis to testify that Gallegos was never left alone and that SW never spent the night during the relevant time period.	26
IV.	CONCLUSION.....	28

TABLE OF AUTHORITIES

CASES

<i>Drope v. Missouri</i> , 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975).....	11
<i>Dusky v. United States</i> , 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).....	12
<i>In re Fleming</i> , 142 Wn.2d 853, 16 P.3d 610 (2001).....	12
<i>In re Rice</i> , 118 Wn.2d 876, 828 P.2d 1086 (1992).....	17
<i>Pate v. Robinson</i> , 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966).....	11
<i>Seattle v. Gordon</i> , 39 Wn. App. 437, 693 P.2d 741 (1985).....	12
<i>State v. Bencivenga</i> , 137 Wn.2d 703, 974 P.2d 832 (1999).....	22
<i>State v. Canida</i> , 4 Wn. App. 275, 480 P.2d 800 (1971).....	25
<i>State v. Davis</i> , 20 Wn.2d 443, 147 P.2d 940 (1944).....	25
<i>State v. Delarosa-Flores</i> , 59 Wn. App. 514, 799 P.2d 736 (1990).....	25
<i>State v. Madison</i> , 53 Wn. App. 754, 770 P.2d 662 (1989).....	25
<i>State v. Stockman</i> , 70 Wn.2d 941, 425 P.2d 898 (1967).....	25
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	17

State v. Wicklund,
96 Wn.2d 798, 638 P.2d 1241 (1982)..... 12

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 17-18

STATUTES

RCW 10.77.090(7)..... 12

RCW ch. 10.77 12

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly denied Gallegos day-of-trial request for a competency examination where counsel failed to point to any difficulty communicating with Gallegos or to any evidence that Gallegos was not able to assist in his own defense?

2. Whether Gallegos has failed to show his counsel was ineffective?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Gallegos was charged with three counts of third-degree rape of a child and was convicted as charged. CP 85, 138.

B. FACTS

SW was 14 at the time of the offenses. RP (5/4) 71. At the time she was dating Gallegos' son, JG. RP (5/4) 71. She met JG in September 2003. RP (5/4) 72. She spent the night at the Gallegos house every two days or so. RP (5/4) 15.

Sometime in December, close to Christmas, SW spent the night at the Gallegos house. RP (5/4) 75. She believed Gallegos' wife, Lisa, was at work that night. RP (5/4) 75. SW and JG went to sleep around 3:00 or 4:00 a.m. RP (5/4) 77. Later, Gallegos came into the room, and woke her up. She told

him to leave her alone, but he pulled off her sock and threw it out into the hall. RP (5/4) 77. She went out to get it, and Gallegos backed her up into another room, and then her pants and underpants down to her ankles. RP (5/4) 78. He laid her on the bed and had sex with her. RP (5/4) 78. Gallegos was standing up at the time. RP (5/4) 79. There was vaginal penetration. RP (5/4) 79.

She went back and tried to wake up JG, but he would not wake up. RP (5/4) 80. JG had taken some medication that knocked him out. RP (5/4) 76. She cried herself to sleep and left early in the morning. RP (5/4) 80. The rape occurred in Gallegos' room. RP (5/4) 80. Gallegos was not wearing a condom, but ejaculated on the floor. RP (5/4) 80.

Gallegos gave SW a necklace, two rings and a bracelet. RP (5/4) 92. It was around Christmas, after the first incident. RP (5/4) 92. He asked her to marry him when he gave her the ring. RP (5/4) 92. She did not recall her answer, but she took the ring. RP (5/4) 92. She did not still have the ring at trial. RP (5/4) 92.

She did not recall if she ever told JG what had happened. RP (5/4) 81. She next saw JG on January 10, 2004. RP (5/4) 83. SW and JG had broken up, but she still liked him and wanted to hang out. RP (5/4) 83. She ended up spending the night. RP (5/4) 83. Gallegos woke her up and told

her to come with him, which she did because she was scared of him. RP (5/4) 84. He did it the same way, again standing up while she lay on the bed. RP (5/4) 84. She was scared because he had made threats. RP (5/4) 85. SW believed Lisa was at work again. RP (5/4) 84. This time, Gallegos fondled her breasts over her shirt before undressing her. RP (5/4) 85.

After the second incident she did not go to the house as often, but still did occasionally. RP (5/4) 86. In late January and early February JG was not there because he was in juvenile detention. RP (5/4) 86.

While JG was locked up, she went over one evening for a “girl’s night” with Lisa. RP (5/4) 87. They got drunk on vodka and orange juice. RP (5/4) 87. Gallegos drank with them. RP (5/4) 87. Lisa was drunk and “pretty out of it.” RP (5/4) 87. SW had two drinks and was pretty drunk. RP (5/4) 88. Lisa passed out on the couch, and Gallegos took her to his Suburban, where they had sex on a pull-out mattress in the back. RP (5/4) 88. They were both laying down. RP (5/4) 88. It was in February. RP (5/4) 88.

After JG got a out of detention, SW saw him only occasionally. RP (5/4) 89. She eventually stopped going to the Gallegos house some time in March. RP (5/4) 89.

On the evening of March 28, 2004, Lisa, JG, and JG’s new girlfriend

arrived at SW's house. RP (5/4) 90. JG said "Come out. I'm going to kick your ass." RP (5/4) 90. When they did not, JG said, "If you don't come out, I'm going to light your house on fire and shoot whoever comes out." RP (5/4) 90. There was no mention of wanting car keys back. RP (5/4) 90. On another occasion, when SW was not home, Lisa had come and spoken with SW's mother about the keys. RP (5/4) 90.

After JG and Lisa left on the 28th, SW told her mother about the rapes. RP (5/4) 90. They called the police and an officer came out and talked to her. RP (5/4) 91. She did not remember whether she denied the allegation to the officer at that time. RP (5/4) 91.

She did not tell the police what had happened after March 28 because she was scared of both JG and of Gallegos. RP (5/4) 94. After that she saw Gallegos and Lisa at the QFC. RP (5/4) 94. She was waiting for her friends on a bench outside when they walked by and Gallegos said jokingly, "Hey baby, did you miss me?" RP (5/4) 96. Lisa just laughed. RP (5/4) 96.

Once or twice Gallegos came to her school and left her a lunch with a note in it. RP (5/4) 98. She never saw the notes because they went to a school official, Mr. Strong, first. RP (5/4) 99.

SW's friend MR told her that Gallegos had a video of SW and Gallegos having sex. RP (5/4) 99.

SW did not particularly notice Gallegos having back problems. RP (5/4) 113. Nor did she recall any problem having an erection. RP (5/4) 113. She had never “made out” with Gallegos. RP (5/4) 114.

At some point during the spring term of 2004, Gallegos went to SW’s school and said he was SW’s father, and dropped off her lunch. RP (5/5) 191, 193. The receptionist became concerned because the name on the bag was misspelled. RP (5/5) 192. She therefore immediately took it to the administrator. RP (5/5) 192. Gallegos was the man. RP (5/5) 192. During the Spring of 2004. RP (5/5) 193.

On March 28, SW’s mother observed that SW had been talking to JG on the phone and then came out of her room crying. RP (5/5) 166. Then JG and Lisa arrived and pounded on the door and demanded that SW come out. RP (5/5) 166. They accused her of initiating sex with Gallegos. RP (5/5) 166. JG said, “Come out. I’m going to kick your ass. This is your fault my dad is sick.” RP (5/5) 166. It was between 10 and 11 p.m. RP (5/5) 168. Afterwards, she asked SW if it was true, and SW admitted it was, but that she had been forced. RP (5/5) 169. She eventually called the police and told them what SW had told her. RP (5/5) 169. She delayed calling the police because she was scared of Gallegos. RP (5/5) 170. SW had told her that Gallegos had threatened both of them if she told anyone. RP (5/5) 170.

Bremerton police officer Mike Davis visited SW's home on October 17, 2004. RP (5/5) 186. SW stated that she had been raped and that Gallegos was circulating pictures of her. RP (5/5) 187. SW stated CR had the pictures. RP (5/5) 187. Davis contacted CR, and retrieved the photos from her. RP (5/5) 187. CR had gotten the photos from an unnamed juvenile. RP (5/5) 190. The pictures showed SW in her bra and panties, both standing and on all fours. Exh. 1 & 2.

Bremerton police detective Sue Shultz was assigned follow-up on the case on September 23, 2004. RP (5/5) 124. There had been an initial report in March. RP (5/5) 126. SW was interviewed at the prosecutor's Special Assault Unit on October 12. RP (5/5) 126. Shultz spoke with Gallegos on October 18, 2004. RP (5/5) 127. He denied having any photos, and agreed to go back to his house to look for them. RP (5/5) 128.

Gallegos asked her if it was about SW. RP (5/5) 128. Shultz had not mentioned SW's name. RP (5/5) 128.

At the house, Gallegos said the video was probably filmed and shown by JG to his friends. RP (5/5) 130. Gallegos said he did not have a video camera. RP (5/5) 130. She then took Gallegos to the police station for questioning. RP (5/5) 131. Gallegos denied having had any inappropriate contact with SW or having taken and photos or videos of her. RP (5/5) 134.

After a break, Gallegos told Shultz that he had made out with SW on at least three occasions. RP (5/5) 136. Gallegos said he did it to make JG jealous. RP (5/5) 137. Gallegos also admitted that he had passed photos of SW around “to fuck with her.” RP (5/5) 139. He stated he wanted to get back at her for telling people that he had raped her. RP (5/5) 140. He admitted talking about a video, but denied that it actually existed. RP (5/5) 140. He again said he did it to “fuck with” SW. RP (5/5) 140. Gallegos was unable to explain why SW would believe that there was a video of them having sexual intercourse if no such intercourse had happened. RP (5/5) 141. At the time he made the statement about making out, Gallegos also stated that on at least one occasion, he had taken SW into his bedroom and locked the door. RP (5/5) 141. Gallegos was then placed under arrest. RP (5/5) 141.

Lisa Gallegos testified on her husband’s behalf. She had an obstruction conviction from around 2000 or 2002. RP (5/5) 204. RP (5/5) 230. She denied that she would have lied to protect her husband from the police; rather it was a misunderstanding. RP (5/5) 231. Contrary to Lisa’s testimony, however, the arresting officer, Robert Davis, explained that Lisa apologized to him for lying about where her husband was. RP (5/9) 365. Davis could clearly see Gallegos standing in the front room of the house when Lisa told Davis that Gallegos was not home. RP (5/9) 367.

She asserted that she worked Monday through Thursday from 7:30 a.m. to 7:30 p.m. RP (5/5) 209. She never worked over night. RP (5/5) 210. She stated that she always slept with Gallegos in their bedroom. RP (5/5) 210. On December 20, 2003, they went to Christmas gathering at her father's in Federal Way. RP (5/5) 212. They took SW home afterwards. RP (5/5) 212. They did not see SW again during the holidays. RP (5/5) 212. She denied ever having had a girls' night with SW. RP (5/5) 213. She might have had a rum and Coke, but not with SW. RP (5/5) 214. She did not drink screwdrivers. RP (5/5) 214. She related Gallegos' back injury that happened in 1997, and his subsequent back surgery in August 2003. RP (5/5) 216. The injury limited his mobility. RP (5/5) 216. Thus, she noted, Gallegos uses cane. RP (5/5) 236. She conceded that he had left the cane at home every day of trial, however. RP (5/5) 236.

Lisa averred that Gallegos was barely able to do anything sexually. RP (5/5) 217. He could only lie on his back, and would have trouble getting an erection most of the time. RP (5/5) 217.

Lisa went to SW's house in March to retrieve her keys that SW had taken. RP (5/5) 218. Nobody answered the door, but there were no threats or yelling. RP (5/5) 219.

At the QFC, SW told her that she would accuse Gallegos of rape if he

did not give her money. RP (5/5) 223. Gallegos professed not to know what it was about, and said SW was trying to get money from him. RP (5/5) 223.

Lisa asserted that SW was spending the night only in September and October. By December Lisa had stopped it. RP (5/5) 244.

Tasha Adderly was called by the defense also. She asserted that the kids visiting the house would “rough house” with Gallegos. RP (5/5) 268. They would all tackle him and try to wrestle him to the ground. RP (5/5) 270.

James Lester, Gallegos’ friend of many years, testified that he spent a week at Gallegos house over Christmas 2003. RP (5/5) 274. SW was not there. RP (5/5) 274.

Gallegos himself was the last defense witness. He stated that he was not home a lot, but was instead busy shopping for his truck, going to Seattle with friends, going to the Burlington Coat Factory mall. RP (5/9) 285. He usually tried to be home by 7:30 when Lisa got home from work. RP (5/9) 285. He contended that SW never spent the night when Lisa was not there. RP (5/9) 286.

Gallegos hugged SW once when she was upset about her father. RP (5/9) 287. He never kissed her romantically. RP (5/9) 289. He hugged her two more times when she was upset. RP (5/9) 289. He did confirm that he

and SW locked themselves in the bedroom to tease JG. RP (5/9) 290.

Gallegos Denied ever having sex with SW. RP (5/9) 292.

On January 26, Lisa stayed at work because she was snowed in. RP (5/9) 292. Lisa always slept at the house until the end of March when they briefly separated. RP (5/9) 293.

JG went into detention on January 9 through February 13, 2004. RP (5/9) 294-95.

Gallegos hurt his back in August 1997. RP (5/9) 297. He was a bit better in December 2003. RP (5/9) 297. The shed fell on him in December 2003, resulting in a head injury. RP (5/9) 305. Because of the injuries he could only have sex on his back. RP (5/9) 298. He was also having difficulty getting an erection because of his medications. RP (5/9) 299. The erectile dysfunction was caused by an antidepressant. RP (5/9) 355. He could not say whether it was all the time because he was not trying to have sex often because his back was bothering him. RP (5/9) 299.

According to Gallegos, they just said "hi" when he saw her at the QFC. RP (5/9) 312. Then SW started yelling when Lisa came out. RP (5/9) 312.

Gallegos admitted to circulating the photos, but asserted that JG had taken them. RP (5/9) 314. He denied that there was ever a video, or that he

started the rumor. RP (5/9) 316-17. He denied that he told the police he had made out with SW. RP (5/9) 328.

Wife also runs the janitorial business. RP (5/9) 352. They had three business clients in 2004. RP (5/9) 353. According to Gallegos, she was not doing the work in December and January because she had hurt herself. RP (5/9) 354.

III. ARGUMENT

A. RESPONSE TO BRIEF OF APPELLANT

The trial court properly denied Gallegos' last-minute request for a competency evaluation where defense counsel could not point to any specific basis to question Gallegos' competency and where the nothing in the record called his competency into question.

Gallegos argues that the trial court erred in failing to order a competency evaluation. This claim is without merit because defense counsel never actually informed the court that he had any difficulty communicating with his client or that Gallegos was in any way unable to assist in his own defense.

The Fourteenth Amendment's due process clause prohibits the conviction of a person who is not competent to stand trial. *Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). The

constitutional standard for competency to stand trial is whether the accused has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and to assist in his defense with “a rational as well as factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).

The procedures set forth in the competency statute, RCW ch. 10.77, are mandatory and not merely directory. *State v. Wicklund*, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982). “Thus, once there is a reason to doubt a defendant’s competency, the court must follow the statute to determine his or her competency to stand trial.” *Seattle v. Gordon*, 39 Wn. App. 437, 441, 693 P.2d 741 (1985). Failure to observe procedures adequate to protect an accused’s right not to be tried while incompetent to stand trial is a denial of due process. *In re Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001).

The two-part test for legal competency for a criminal defendant in Washington is as follows: (1) whether the defendant understands the nature of the charges; and (2) whether he is capable of assisting in his defense. *Fleming*, 142 Wn.2d at 861. If the defendant is receiving medication, he may still be competent to stand trial if the medication enables him to understand the proceedings and to assist in his own defense. RCW 10.77.090(7).

Gallegos avers that the trial court should have granted his motion for

a competency evaluation. However, no irrational behavior was apparent from the record, nor was there any other indication that he did not understand the proceedings. *See Fleming*, 142 Wn.2d at 862. Nor does he presently offer any such evidence.

Moreover, counsel at no point actually suggested to the trial court that he any actual concerns about Gallegos' competency when he raised the issue on the day of trial. The motion was based solely on the fact that counsel had become aware that Gallegos had some unspecified history of mental health issues. RP (5/2 - J. Roof) 3. Counsel asked for an evaluation to "determine if, in fact, this *might* be an issue." RP (5/2 - J. Roof) 3 (emphasis supplied). The court then inquired whether the request was based on counsel's own observations. Counsel could identify no problems he had with preparing the defense or communicating with Gallegos:

I guess I would say that the conversations I've had with him in the last week would give me some pause as to whether or not he is, perhaps, competent, but initially did not have concerns about competency in this case until Mr. Gallegos revealed to me his mental health history.

RP (5/2 - J. Roof) 4.

The State noted that nothing in the medical records the defense had produced contained any discussion of mental health issues. RP (5/2 - J. Roof) 5. There were anger management issues, but nothing regarding an ability to formulate intent, or any problems with assisting counsel. RP (5/2 -

J. Roof) 6.

The State had legitimate concerns that this was yet another delay tactic. The case had been charged in October 2004, and involved incidents occurring in late 2003 and early 2004. CP 1. The defense had requested continuances on January 20, 2005, RP (1/20) 2-3. It again requested a continuance on February 14, 2006. RP (2/14) 2. It agreed to a continuance in April, alleging it was still investigating the case. RP (4/4) 3. At the time of trial, it had again been set over for a week for further defense investigation. RP (5/2 - J. Roof) 2.

The trial court noted that the case was originally set for trial in December, and that it was now May. RP (5/2 - J. Roof) 7. It further noted that there was nothing in the record since October that indicated any mental problems, despite three orders for investigation funds having been granted in the interim. RP (5/2 - J. Roof) 7.

Moreover, nothing in the trial record suggests that Gallegos was not competent. Counsel never broached the issue again. There was no suggestion during the suppression hearing or during three full days of witness testimony that counsel was unable to communicate with Gallegos or that he was not able to assist in the defense of the case. To the contrary, the defense located and called three witnesses to testify on Gallegos' behalf. Gallegos

himself testified at length. His testimony consumed eighty transcript pages. RP (5/9) 281-361. Nothing in his testimony suggests any inability to recall the relevant events, or a failure to understand the nature of the proceedings, the charges, or the roles of the participants. His clear understanding of the nature of his predicament and the factual issues surrounding it are highlighted by the lucid 21-page personal restraint petition, supported by numerous affidavits and exhibits, that he has filed and which has been consolidated with this appeal.

Given the lateness of the request, given that counsel was unable to point to any difficulty Gallegos had in communicating with him or assisting in his own defense, and given the utter lack of anything in the record that suggested up to that time, or at any time thereafter, that Gallegos was anything but competent, it cannot be said that the trial court abused its discretion in denying Gallegos' request for a competency evaluation. This claim should be rejected and his convictions affirmed.

B. RESPONSE TO PERSONAL RESTRAINT PETITION.

1. Response

The State respectfully moves this court for an order dismissing the petition with prejudice because it is without legal or factual merit.

2. Authority for petitioner's restraint

The authority for the restraint of Joe Gallegos lies within the judgment and sentence entered by the Superior Court of the State of Washington for Kitsap County, on June 17, 2005, in cause number 04-1-01620-5, upon Gallegos's conviction of three counts of third-degree rape of a child. *See* CP 154.

3. Argument: Gallegos fails to show his counsel was ineffective.

In his personal restraint petition, Gallegos raises numerous contentions, which are set forth at pages two through four of the petition, all of which are based on the alleged ineffectiveness of his counsel. Specifically he alleges that counsel was ineffective for:

1. Not introducing Lisa Gallegos' work schedule.
2. Failing to impeach the "State's only witness."
3. Failing to call expert witnesses to show that the rapes would have been impossible?
4. Failing to object to circumstantial evidence.
5. Failing to call JG to testify that SW did not spend the night at the Gallegos house during the relevant time period.
6. Failing to object to the amendment of the information.
7. Failing to call Nannette Lewis to testify that Gallegos was never left alone.
8. Failing to call experts to testify regarding his back injury, erectile dysfunction and medical conditions.
9. Failing to object to the State asking leading questions

of SW.

10. Failing to call Donald Jackomino to testify that Gallegos was never left alone and that SW never spent the night during the relevant time period.

The State will first address the standard of review, and then will address each of these contentions in turn.

- a. **A defendant alleging ineffectiveness of counsel bears the burden of showing both deficient performance and prejudice.**

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Thomas*, 109 Wn.2d at 226; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89,

828 P.2d 1086 (1992). To show prejudice, the defendant must establish that “there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” *Thomas*, 109 Wn.2d at 226; *Strickland*, 466 U.S. at 687.

b. Not introducing Lisa Gallegos’ work schedule.

Gallegos alleges counsel was ineffective for failing to introduce Lisa Gallegos’ time sheets to show that she was not working at the time the rapes occurred. While he attaches documents purporting to be her time sheets, he offers no evidence that establishes their authenticity or explains their significance. It is not clear whether they represent hours actually worked or hours scheduled. Nothing in Lisa’s affidavit, assuming, *arguendo*, she would be competent to provide the foundation for their admission, establishes such a foundation. What he affidavit does do is to reiterate her trial testimony, which the jury found unpersuasive. Moreover, even if the sheets were accepted, they do not prove she was at home, only that she was not at her Keepsake Cottage job. Notably, however, while Lisa testified that she never worked any hours beyond her 12-hour shifts, Gallegos testified that on at least one occasion she worked a double shift because she was snowed in. *Cf.* RP (5/5) 210 & 292. Notably, on that date, January 26, the purported timesheet appears to show her working her usual 7:30 a.m. to 7:30 p.m. shift. This fact alone shows makes it highly unlikely that the sheets are probative

of anything, much less that they would have caused the jury to have chosen to believe a woman who was convicted of lying to the police to protect her husband and reached a differing verdict.

Furthermore, although the defense witnesses minimized her participation in the business, Gallegos did testify that Lisa had a business cleaning business establishments. RP (5/9) 352. Such activities are generally conducted after normal business hours, *i.e.*, typically during the time frame that SW testified she believed Lisa was at work. Nothing in these purported records rules out this possibility.

Given all these uncertainties and the limited probative value of the alleged work records, it cannot be said counsel was deficient for failing to present them to the jury. Nor, for the same reason can Gallegos show prejudice.

c. Failing to impeach the “State’s only witness.”

This assignment of error appears to be redundant to the other claims, and will not be individually addressed.

d. Failing to call expert witnesses to show that the rapes would have been impossible?

Gallegos alleges that counsel should have called experts to testify regarding his back and neck injury and his consequent alleged inability to have committed the rapes. First, although he attaches exhibits purporting to

be his medical records, there is no evidence supporting their authenticity or completeness.

Further, nothing in them establishes an inability to have committed the crimes. While they discuss some issues arising from the shed collapsing incident, the only referenced pain is to Gallegos' head and neck. Nothing suggests an inability to move about or engage in sexual activity of a not particularly gymnastic variety.

In any event, the State never disputed the existence of Gallegos' injuries, which were testified to by Gallegos, his wife, and the victim. Rather, it questioned the inference that they would have prevented the crime. Thus, the prosecutor noted in closing, that based on SW's description of the rapes, he would only have had to have stood and moved his hips an inch or two. RP (5/9) 402. The record at trial affirmatively indicates that Gallegos clearly could have done this.

For example, despite his alleged need for a cane to get around, it was noted that he had not brought it with him to trial. RP (5/5) 236. Despite his present alleged inability to care for himself or to get around, he testified that he was hardly ever there when SW visited his home. Instead, according to his own testimony, he was off shopping for his truck, taking trips to Seattle with friends, and shopping at the large mall where the Burlington Coat

Factory is. RP (5/9) 285.

Likewise, despite his alleged infirmity, according to defense witness TA, he engaged in “roughhousing” with gaggles of teenaged girls, where they would all jump on him and try to tackle him. In the face of such evidence, “expert” testimony that he was too disabled to have sex in standing position with a prone and slight 14 year old girl would have rung hollow indeed.

Further, there is no documentation whatsoever in these records of Gallegos’ alleged erectile dysfunction. The only notation regarding anything close to the charges at trial is a notation in October 2004 that because of his discomfort Lisa has been sleeping on the couch. *See* Initial Office Consultation, Donna Moore, MD, 10/28/03, at 1 (attached to PRP). Moreover, Lisa’s testimony contradicted Gallegos’ own on this subject. She testified that he was almost never able to achieve erection, whereas he claimed that he never tried because he was in too much discomfort. RP (5/5) 217, 299.

Because Gallegos fails to establish that any expert would have testified as he contends, he cannot meet his burden. Moreover, counsel appears to have had the records. RP (2/14) 2; RP (5/2 - J. Roof) 5-7. Since the information contained in his medical records was already before the jury, was undisputed by the State, and given additionally that the records

contained material that contradicted some of the defense claims, it must be presumed that counsel made a tactical decision not to seek their introduction.

Gallegos in any event fails to establish that he did not, or that no competent counsel would have not. Likewise for the foregoing reasons, Gallegos also fails to show the outcome of the trial would have been different had they been introduced.

e. Failing to object to circumstantial evidence.

The State fails to understand this claim. It is unaware of any rule rendering circumstantial evidence, *per se*, inadmissible. Indeed, it is generally regarded to be just as probative and admissible as direct evidence.

State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999).

f. Failing to call JG to testify that SW did not spend the night at the Gallegos house during the relevant time period.

Given that the jury did not believe Gallegos, his wife, or family friend James Lester when they all provided the same testimony, there is no reason to suppose that the jury would have found Gallegos 15-year old son more believable. This is especially true since Gallegos and Lisa admitted to a history of Gallegos bullying JG, and SW testified that Gallegos had whipped JG with an electrical cord. RP (5/5) 158. His testimony would also have no doubt brought about evidence of the fact that he had a juvenile conviction for burglary.

Moreover, his testifying would have resulted in either his testimony that he believed there was a sexual relationship between Gallegos and SW, or the introduction of impeachment evidence in the form of his statement to Detective Shultz to that effect. *See* CP 6.

g. Failing to object to the amendment of the information.

Gallegos fails to identify any legal basis for such an objection. Moreover, it appears to be based on a factually inaccurate contention that the State kept amending the information until he no longer had an alibi. The record positively refutes this claim.

The record shows that in the original information, filed October 19, 2004, alleged one count of third-degree rape of a child, occurring between December 1 and 25, 2003. CP 1.

The first amended information was filed on May 2, 2005, and alleged three counts of third-degree rape of a child. Count I is the same as the charge in the original information. There was no change of dates. CP 77.

Counts II and III alleged rapes occurring on or about January 10 and between February 1 and 28, 2004, respectively. CP 78. Since this amendment was on the eve of trial, and since there was no change to the dates already charged, it must be presumed that the amendment was not in response to Gallegos have produced an alibi, but due to the prosecutor's

general practice of filing additional available and provable charges if the defendant fails to plead to the charges set forth in the original information. See <http://www.kitsapgov.com/pros/standardsandguidelines.pdf>, at 13, ¶10. Gallegos was on notice since at least January 20 that these charges would be forthcoming should he go to trial. RP (1/20) 4.

The second amended information expanded the date range in Count II from January 10 to January 1 through January 12. CP 86. This occurred following SW's testimony that the offense had occurred on the evening January 10, or perhaps the early morning hours of January 11, 2004. RP (5/4) 83, RP (5/5) 119. It was well before any defense evidence, alibi or otherwise, was presented. As such, Gallegos' factual allegation is without basis. It appears that the amendment was primarily done in an abundance caution, not in response to any alibi provided by Gallegos.

h. Failing to call experts to testify regarding his back injury, erectile dysfunction and medical conditions.

This contention appears to be the same as that addressed *supra*, at (d).

i. Failing to object to the State asking leading questions of SW.

Gallegos fails to identify any particular questions to SW that were improper. The State has no intention of going through her day and half of testimony line by line to show it was proper.

In any event, the decision whether to object is a classic example of a trial tactic. Absent egregious circumstances, counsel's failure to object will not constitute ineffectiveness requiring reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). An attorney has no duty to argue frivolous or groundless matters before the court. *State v. Stockman*, 70 Wn.2d 941, 946, 425 P.2d 898 (1967). ER 611(c) permits the use of leading questions during direct examination when "necessary to develop the witness' testimony." Because the trial court is in the best position to determine whether the form of questions is proper, this Court not generally reverse its ruling the use of leading questions. *State v. Delarosa-Flores*, 59 Wn. App. 514, 517 799 P.2d 736 (1990), *review denied*, 116 Wn.2d 1010 (1991). Pre-ER 611(c) cases held that the trial court has considerable discretion in permitting the use of leading questions during examination of minors, especially where the minor is unaccustomed to court proceedings or is reluctant to testify because of the nature of the offense. *See State v. Davis*, 20 Wn.2d 443, 446, 147 P.2d 940 (1944); *State v. Canida*, 4 Wn. App. 275, 279, 480 P.2d 800 (1971). The Comment to ER 611 indicates that the rule is not intended to broaden the discretion permitted under previous law. Consequently, it appears that the rule drafters intended that prerule case law continue to control implementation of the rule.

While the State undoubtedly asked some leading questions of this

young and scared witness, Gallegos has not shown that they were improper under the circumstances. This claim should be rejected.

- j. Failing to call Donald Jackomino or Nannette Lewis to testify that Gallegos was never left alone and that SW never spent the night during the relevant time period.**

Gallegos' final contention is that Jackomino and Lewis could have testified that he was never left alone at any time between December 2003 and March 2004, and that SW only visited once and never spent the night in December.¹ There is no evidence that these witnesses were available to defense counsel.

Moreover, there simply is no reason to suppose that the jury would have found these two family friends any more persuasive than they found Lisa or James Lester. Notably, their credibility is severely impaired by the fact that not one witness, not Gallegos, not his wife, not supposed frequent visitor and defense witness TA, not SW, nor James Lester, who reputedly spent a week at the Gallegos home over Christmas made a single reference to Jackomino or Lewis being around. Yet supposedly one or the other never left Gallegos' side during the relevant period.

Counsel could have several reasons for not having called these witnesses. As noted, there is no evidence that he was made aware of them

¹ The State has not had the benefit of receiving the Lewis affidavit, but assuming that it has

before trial. There is no evidence they were available. Counsel could also have determined that their testimony would be seen as utterly preposterous, since no other witness apparently observed them acting as Gallegos' keeper. Counsel could also have reasonably concluded that they were lying and chose not to present perjured testimony. Whatever the reason, Gallegos has not shown that counsel's performance was deficient.

Likewise, given the inconsistencies between the stories of these two and the testifying witnesses, and given that similar testimony has already been rejected by the jury, Gallegos cannot show prejudice either.

As a final curious note, both Lisa and Gallegos testified that the shed injury occurred in December. RP (5/5) 227, RP (5/9) 305. Yet Jackomino claimed that it happened in October. Again, these witnesses have no credibility whatsoever, and Gallegos cannot prove prejudice in counsel's failure to call them.

been filed, assumes that it is of the same tenor as Jackomino's.

IV. CONCLUSION

For the foregoing reasons, Gallegos's convictions should be affirmed.

DATED May 22, 2006.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RS' with a long horizontal stroke extending to the right.

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

C:\DOCUMENTS AND SETTINGS\RANDY\MY DOCUMENTS\MY WORK\GALLEGOS\APPEAL DOCS\GALLEGOS COA BRIEF.DOC