

NO. 34721-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ROBERT HEAGY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 04-1-01712-1

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED March 23, 2007, Port Orchard, WA

R. Sutton
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether trial counsel was ineffective for not attempting to relitigate every evidentiary ruling from the first trial during the second trial, where the issues were preserved for appeal, there is no evidence the second trial judge would have changed the first judge's rulings, and where Heagy fails to show that the initial rulings were incorrect.?

2. Whether trial counsel was ineffective for not objecting to hearsay evidence of statements made by the victim where the defense strategy was to cast doubt upon the victim's story by showing that every time she related it, the details changed?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Robert Heagy was charged by information filed in Kitsap County Superior Court with first-degree child molestation. CP 176.

He was brought to trial on August 31, 2005. 1RP(05) 3.¹ That trial ended in a hung jury. 6RP(05) 323. Before that trial commenced, a CrR 3.5 hearing and numerous motions in limine were litigated. 1RP(05) 12-57.

¹ This case involved two trials, the first in August and September 2005, which ended in a mistrial, and the second in February 2006, which resulted in Heagy's conviction. In referring to the reports of proceedings, the State will refer to the numbered set from the first trial as [volume]RP(05), that from the second trial as [volume]RP(06), and the remaining unnumbered volumes by date: RP ([date]).

Before Heagy testified, the parties also litigated whether Heagy could testify that the victim's parents, the Hendersons were angry because Heagy had refused to give them any more of his methadone pills. 4RP(05) 250. The trial court excluded the testimony, finding there was no connection between the parents' alleged anger at Heagy and any motive on the victim's part to fabricate the charges. 4RP(05) 251.

At the commencement of the second trial, in January 2006,² both parties agreed to proceed under the evidentiary rulings made in the second trial. 1RP(06) 2. The stipulation did not waive any objections previously made. 1RP(06) 2.

The second jury found Heagy guilty as charged. RP (2/15/06) 3-4.

B. FACTS

Kitsap County Sheriff's Deputy Matthew Hill was working patrol on the 10:00 p.m. to 6 a.m. shift in November 2004. 1RP(06) 18. On November 3, 2004, he responded to a 911 call at the Henderson residence in Bremerton. 1RP(06) 18-19. The dispatcher told him that there was a physical dispute at the residence after an 11 year-old-girl had woken up screaming and told the caller that someone had touched her. 1RP(06) 19. He was dispatched at 4:27 a.m. 1RP(06) 20. Hill was the first to arrive, followed soon after by Deputy

² Much of the delay between the two trials was apparently due to Heagy being referred for a competency evaluation. RP (12/6/05) 2.

Herrin. 1RP(06) 20.

When Hill arrived Heagy was standing in the front yard. 1RP(06) 20. There were some suitcases and clothing was scattered all over the yard. 1RP(06) 20. Heagy was just standing there. 1RP(06) 44. Hill detained Heagy to control the scene. 1RP(06) 21. Hill did not say anything to Heagy, who announced that he had not done anything wrong. 1RP(06) 22. He cuffed Heagy and placed him in the car for officer safety; Heagy was not yet a suspect. 1RP(06) 22.

As Hill was doing this, a second person came out of the house, yelling at Hill and Heagy. 1RP(06) 22. He was very angry. 1RP(06) 22. He was screaming loud enough to be heard a block away. 1RP(06) 23. Herrin arrived, and they both told the man to go back into the house, which he did. 1RP(06) 23. Hill secured Heagy in the back of the car and went inside to assist Herrin. 1RP(06) 23. Herrin was talking to the man and a women in the kitchen. 1RP(06) 24.

There was a mattress in the living room. 1RP(06) 25. TD was sitting on the mattress. 1RP(06) 26-27. She was upset and scared – she was crying and shaking. 1RP(06) 26. After listening to Herring speak to the parents, Hill went and spoke to TD. 1RP(06) 27.

Department procedure called for alleged child sex victims to be

referred to a specialist for interviewing. 1RP(06) 27. Hill spoke to TD briefly to determine what he should do. 1RP(06) 27. He asked her what had happened. 1RP(06) 28. TD was scared. 1RP(06) 27. She had tears running down her face and was shaking. 1RP(06) 27. She was not “bold about it,” but she did tell Hill the gist of what had happened. 1RP(06) 27-28.

TD said that she was sleeping in her bedroom and Heagy came in and put his “hands” in her pants. 1RP(06) 29. Hill did not clarify whether she meant both hands. 1RP(06) 30. She just said that it was from behind and up around toward her vagina. 1RP(06) 30. Hill did not ask her any more questions because she was crying, and based on what she had said, Hill thought it would be better to have someone with more expertise talk to her. 1RP(06) 30.

Hill then went outside and talked to Heagy. 1RP(06) 31. Hill could smell alcohol on Heagy. 1RP(06) 32. Heagy nevertheless asserted that he was not drunk. 1RP(06) 34. After giving him *Miranda* warnings, Hill asked Heagy what had happened. 1RP(06) 34. Heagy said he was sleeping in the living room, and there was a wiener dog with him. 1RP(06) 35. It was whining so he picked it up and took it to TD’s room. 1RP(06) 36. Once in the room, he fell over onto the bed. 1RP(06) 36.

Hill asked Heagy what happened next, and Heagy said, “Nothing.”

1RP(06) 36. Hill then asked him if he had touched TD, and Heagy said he might have. 1RP(06) 36. Hill asked Heagy where he touched TD, and Heagy responded that he could not remember. 1RP(06) 37. Hill asked him if he had put his hands into TD's pants, but Heagy said he would never do that because he was her uncle. 1RP(06) 37. When Hill asked him why TD would say that he had, Heagy reiterated that he would never do that. 1RP(06) 38.

Hill asked Heagy if he had told TD not to tell her mother. 1RP(06) 38. Heagy responded that he might have said that to her. 1RP(06) 40. Hill asked him why he would say that, and Heagy responded that he did not know, and could not remember if he had said it. 1RP(06) 40.

Hill then arrested Heagy and transported him to the jail. 1RP(06) 40. Heagy said TD's father had assaulted him. 1RP(06) 41. Heagy did not ask for any medical attention. 1RP(06) 49. Heagy never asserted that he had any health problems. 1RP(06) 41. Heagy never asserted that anyone had been stealing money from him. 1RP(06) 43. Heagy was calm. 1RP(06) 50. He did not appear angry. 1RP(06) 50. He displayed no emotion at all. 1RP(06) 51.

Before leaving, Hill told TD's parents that they should take her to the hospital to be seen by a SANE nurse. 1RP(06) 42.

Herrin arrived at the house about a minute after Hill. 2RP(06) 58.

Heagy was already detained and in handcuffs. 2RP(06) 58. Dispatch had said that the parents had awoken to find Heagy doing something to their daughter and that a fight had ensued between Heagy and the father. 2RP(06) 58-59.

The father came out as Herrin was heading up the walk to the front door. 2RP(06) 59. He appeared to be very angry. 2RP(06) 59. He was smoking a cigarette and pointing and yelling. 2RP(06) 60. Herrin asked him to go back inside, which he did. 2RP(06) 60.

Herrin went inside and both the father and the mother starting talking very rapidly to him. 2RP(06) 60. He waited for them to calm down. 2RP(06) 60.

There were two mattresses in the living room. 2RP(06) 60. TD was on one of them. 2RP(06) 60. She was fairly quiet, but crying. 2RP(06) 61.

Herrin ushered the parents out to the kitchen with the hope that once out of view of their daughter, they would calm down. 2RP(06) 61. After they had a chance to calm down, the parents told him what had happened. 2RP(06) 61. TD was out of earshot when they spoke. 2RP(06) 62. They said that TD told them that on two separate occasions, Heagy had come into TD's room. 2RP(06) 62. The first time, she woke up to find that Heagy had his hand down her pants and was rubbing her arm. 2RP(06) 62. TD told him

he should leave because her mother would not like it. 2RP(06) 62. He said he was cold, so she gave him a blanket and he left. 2RP(06) 62.

The second time, Heagy laid down on her bed and said to himself, "Bob, don't make a move." 2RP(06) 63. TD told Heagy to go get her dog; she was scared. 2RP(06) 63. When Heagy went to go get the dog, she got up and ran into the living room and started screaming. 2RP(06) 63. Herrin pieced this information together from the two parents. 2RP(06) 63. They were still upset. 2RP(06) 63. They did not have notes or anything. 2RP(06) 63.

The mother said she heard screaming that she at first thought it was a baby crying. 2RP(06) 73. She became concerned as it continued and she and the father both came out of the bedroom and saw TD screaming and standing on the bed. 2RP(06) 73. Heagy, who was in his bed, said she was screaming because she wanted her dog. 2RP(06) 73.

TD was 11 years old at the time of the incident. 2RP(06) 86. Heagy was 54. 2RP(06) 71.

She testified that she usually slept in the downstairs bedroom, which was off the living room. 2RP(06) 88. She went bed in a jeans and shirt that night because she did not feel like changing into her pajamas. 2RP(06) 89. The dog was with her. 2RP(06) 89. Her little brother Dontre also usually

slept in the room, but they had been fooling around so her parents sent him to sleep in the living room. 2RP(06) 90.

Heagy had one hand in her pants when she woke up. 2RP(06) 90. She jumped up and told him to go get her dog, with the plan of running to her mothers room. 2RP(06) 90. Heagy just stood in the doorway, though. 2RP(06) 90. The dog was in the bed with Dontre, which was just outside the bedroom door. 2RP(06) 91. Eventually, Heagy went and got the dog. 2RP(06) 91.

Then Heagy asked if he could sleep with her because he was cold. 2RP(06) 91. She told him that her mother would not like that and she would not either. 2RP(06) 91. She gave him a blanket. 2RP(06) 92.

Heagy left, but came back a while later. 2RP(06) 92. He laid down on her bed and started petting the dog, who was lying on her chest. 2RP(06) 92. He touched her chest while he was petting the dog. 2RP(06) 92. While he was doing it, he told himself to be quiet. 2RP(06) 93.

TD got up and went into the living room. 2RP(06) 93. Heagy went out to the living room and laid on his bed. 2RP(06) 93. She told him “what you did and stuff,” and then called her mother. 2RP(06) 93. She was crying and just called out for her. 2RP(06) 93. She was upset. 2RP(06) 93. She was scared and did not want him touching her. 2RP(06) 94.

Her parents came out and she told them what had happened. 2RP(06) 95. She was upset and crying and did not tell them every detail. 2RP(06) 94. Heagy was lying on his bed when she told her parents. 2RP(06) 94. She did not remember what he was wearing. 2RP(06) 94. She did not know whether she told the police and the nurse every detail of what happened. 2RP(06) 95.

TD's mother, Ladonna Henderson, had known Heagy for about five years. 2RP(06) 109. They met through a mutual friend. 2RP(06) 110. While they were waiting for their Section 8 housing application to be processed, they stayed at the Dunes Motel. 2RP(06) 110. At one point, they ran out of money and Heagy and he let them stay in his room for three days. 2RP(06) 110.

After they got the house Heagy then came to live with them. 2RP(06) 110. The house had two bedrooms upstairs and two down. 2RP(06) 111. One of them did not have a door. 2RP(06) 111. In addition to Heagy and TD, her husband and her two other children Donovan, 15, and Dontre, 7, lived at the house. 2RP(06) 112. Donovan slept upstairs, and Dontre and TD slept down. 2RP(06) 112. She and her husband slept in the living room, because they did not have any furniture and used their bed as a couch during the day. 2RP(06) 113. Heagy also slept in the living room, on a chair that folded out into a bed. 2RP(06) 113.

On the night of the incident, Dontre and TD were messing around, so she separated them and put Dontre to sleep in the living room. 2RP(06) 114. Heagy was in his usual bed. 2RP(06) 114. She and her husband were watching a movie in their bedroom. 2RP(06) 114.

Ms. Henderson heard screaming, but was not sure if it was Dontre or TD. 2RP(06) 115. She went out and found TD in the living room, standing on the bed screaming. 2RP(06) 115. She was very surprised, because TD never screamed like that. 2RP(06) 115. Ms. Henderson asked TD what was wrong, and TD replied that Heagy had put his hand down her pants. 2RP(06) 116.

Ms. Henderson ripped the blanket off of Heagy and attacked him. 2RP(06) 116. He was wearing a T-shirt and boxers. 2RP(06) 116. His "stuff" was along the wall in Dontre's bedroom. 2RP(06) 116.

Mr. Henderson came out and assaulted Heagy as well. 2RP(06) 117. Because they did not have a phone, Ms. Henderson went to a neighbor's house and called 911. 2RP(06) 117. She returned to the house and sat with TD until the police arrived. 2RP(06) 118.

They threw all of Heagy's stuff out into the yard. 2RP(06) 118. Ms. Henderson did not talk to TD about what happened again until they went to the hospital. 2RP(06) 119. After the police came, they called a cab and they

took TD to the hospital. 2RP(06) 120.

Andre Henderson was in the bedroom when he first heard the disturbance. 2RP(06) 127. He went running out, and TD was standing on the bed and was hysterical. 2RP(06) 127. She was “out of control” crying and screaming and saying that Heagy had come into her room and touched her. 2RP(06) 127. Although she was pretty hysterical, she said he had come into the room and laid on her bed and put his hand in her pants. 2RP(06) 127.

Heagy was sitting in his fold-out bed in his boxers. 2RP(06) 127. This was unusual because he usually slept in his sweats. 2RP(06) 127. Mr. Henderson “kind of lost it for a minute” and jumped on Heagy. 2RP(06) 127. He hit him a few times and told him to get his clothes and things and to get out of the house. 2RP(06) 128. He grabbed Heagy by the neck and dragged him physically out, because Heagy did not want to leave. 2RP(06) 129. Heagy protested that it was a misunderstanding. 2RP(06) 129. He threw all of Heagy’s things out of the house, and did not let him back in. 2RP(06) 129.

Mr. Henderson was still very upset when the police arrived. 2RP(06) 130. While Ms. Henderson went to call the police, Mr. Henderson sat down and talked to TD a bit and tried to comfort her. 2RP(06) 130. She was very upset and was trying to sort out what happened in her head. 2RP(06) 130. TD also tried to explain to him what had happened. 2RP(06) 131. Mr.

Henderson told the police what TD had said to him when they arrived. 2RP(06) 131. When she told him what had happened she was upset and crying and shaking -- "She could barely get it out." 2RP(06) 131. Mr. Henderson had never seen TD like that before. 2RP(06) 131.

He was still "pretty amped up" when the police arrived. 2RP(06) 138.

He did not specifically recall where he talked to the police; he could have been in the kitchen, but he also remembered talking to them in the living room. 2RP(06) 138.

Jane Schupay was the Sexual Assault Nurse Examiner (SANE) program coordinator for Harrison Hospital. 2RP(06) 143. Before she was examined, Schupay asked TD what had happened the previous night. 2RP(06) 158. TD said that Heagy came into her room and attempted to touch her. 2RP(06) 158. TD knew that Heagy thought she was asleep, but she knew what he was trying to do so she pretended to be asleep. 2RP(06) 158. Then he touched her, and then said he was cold so she gave him her comforter and told him to get out. 2RP(06) 158. He did not leave, but came back and asked her if he could sleep with her. 2RP(06) 158. TD told him no, and to get out. 2RP(06) 159. During this she was trying to divert his attention so she could escape. 2RP(06) 159. TD said that he put his hand down her pants when he first touched her. 2RP(06) 159. He subsequently came back and felt her legs, back and chest. 2RP(06) 159.

Schupay explained that the number one reason for taking the TD's history was for Schupay to determine what areas to swab. 2RP(06) 160. The second reason is to determine if she felt safe at home, to see if referral to counseling is warranted, and to help formulate the treatment plan. 2RP(06) 160. Her purpose is not to interview the child and get every detail. 2RP(06) 161.

When Schupay spoke to TD she was very scared and tense. 2RP(06) 162. Heagy told TD not to say anything to her mother. 2RP(06) 162. TD said at one point that she tried to divert Heagy's attention by asking him to go and get her dog. 2RP(06) 162. He went and stood by the door, and TD said she was thinking that he was standing by the door and she could not get out. 2RP(06) 163. TD's genital examination did not reveal any injury. 2RP(06) 164.

III. ARGUMENT

- A. **COUNSEL WAS NOT INEFFECTIVE FOR NOT ATTEMPTING TO RELITIGATE EVERY EVIDENTIARY RULING FROM THE FIRST TRIAL DURING THE SECOND TRIAL, WHERE THE ISSUES WERE PRESERVED FOR APPEAL, THERE IS NO EVIDENCE THE SECOND TRIAL JUDGE WOULD HAVE CHANGED THE FIRST JUDGE'S RULINGS, AND WHERE HEAGY FAILS TO SHOW THAT THE INITIAL RULINGS WERE INCORRECT.**

Heagy argues that trial counsel was ineffective because he failed, at the second trial, to relitigate the evidentiary rulings made in the first trial. This claim is without merit because the issues were preserved for appeal, and Heagy fails to show that the second judge would have changed the rulings, or indeed, that they were incorrect.

1. Heagy's burden to establish ineffective assistance of counsel is high.

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. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *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; *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). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

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." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687. Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

As will be shown, Heagy has failed to carry his burden.

2. *The second judge had the discretion to reconsider the first judge's rulings.*

Heagy devotes a not-inconsiderable portion of his brief to arguing that because the rulings were not reduced to writing, the second judge could reconsider them. The State does not disagree with this contention, and indeed

is confident that the second judge would have had the discretion to have reconsidered the rulings even if they had been reduced to writing. Which is not to say that the judge would or should have done so.

3. *Heagy fails to show deficient performance.*

Heagy cannot show deficient performance for two reasons. First, he cannot demonstrate that the trial court would have reconsidered the rulings from the earlier trial. He cites no change in circumstances, additional legal authority, or new evidence that differed from that presented to the court in the first trial that would justify a change in rulings or would have persuaded the second judge to revisit the earlier ruling. Notably, when, late in the second trial, the State asked the second judge to reconsider one of the first judge's rulings due to a change in the evidence, the court declined to do so:

THE COURT: I am trying to review the court's minutes during the last trial and I am not finding his specific rulings regarding jury instructions. I am not going to change Judge Costello's ruling. The other instructions are slight modifications, but they are not adding anything, so I am not going to overrule Judge Costello's ruling.

3RP(06) 278. Plainly the second judge was not inclined to revisit the previous rulings without some cause being shown.

Secondly, because the issue was litigated in the first trial, and because counsel specifically preserved all his prior objections when he entered the stipulation, 1RP(06) 2, the issues were preserved for appeal. Since any of the

issues could thus be properly raised in this court, counsel made a reasonable tactical decision to not waste the trial court's time, and possibly patience, in re-litigating questions that had already been resolved. Heagy thus fails to show deficient performance.

4. Heagy also fails to show prejudice.

For the reasons set forth in the previous sub-point, Heagy also fails to show prejudice. Moreover, on the single issue he specifically addresses, the exclusion of the methadone testimony, he also fails to show that the second judge should have admitted the evidence.

Although a defendant has a constitutional right to obtain witnesses and present a defense, a defendant has no right to the admission of irrelevant evidence. There is no constitutional error if the trial court properly finds that the evidence is irrelevant. *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). ER 401 governs whether evidence is relevant, and this Court will reverse a trial court's evaluation of relevance under ER 401 and its balancing of probative value against prejudicial effect under ER 403 only for manifest abuse of discretion. *State v. Russell*, 125 Wn.2d 24, 78, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Heagy bears the burden of proving abuse of discretion. *State v. Lord*, 128 Wn. App. 216, ¶ 106, 114 P.3d 1241 (2005).

Relevance means that a logical nexus exists between the evidence and

the fact to be established. *State v. Peterson*, 35 Wn. App. 481, 484, 667 P.2d 645, *review denied*, 100 Wn.2d 1028 (1983). Thus, the evidence must tend to prove, qualify or disprove an issue for it to be relevant. *Peterson*, 35 Wn. App. at 484.

In *Peterson*, the defense sought to introduce evidence of prior sexual abuse suffered by the child victim in support of the theory that she fabricated or fantasized the incident with which the defendant was charged. Because the defense failed to produce any evidence tending to show that the present allegations were connected to the past abuse, the evidence was properly excluded as irrelevant and speculative. *Peterson*, 35 Wn. App. at 484-85.

Similarly, in *State v. Woodward*, 32 Wn. App. 204, 208-209, 646 P.2d 135, *review denied*, 97 Wn.2d 1034 (1982), the trial court properly excluded defense evidence that two weeks before the complaint was lodged, a dog was seen “molesting” the child. The defense could not show that prior physical contact with the dog caused redness or that the child complained of redness following the earlier contacts and could not show that the dog had any contact with the child less than two weeks before the complaint was lodged. The evidence was properly excluded even though evidence tending to establish that defendant did not cause the redness would have been relevant, this evidence was irrelevant because it amounted to nothing more than conjecture absent evidence connecting the dog and the reported abuse. *Woodward*, 32

Wn. App. at 208-209.

The ruling below is consonant with these principles. First, however, it must be noted that Heagy misstates the basis of the first trial judge's ruling. The court did not rule that the evidence was inadmissible because the State failed to present any evidence that the Hendersons used drugs. Brief at 9, 10. The trial court ruled that the evidence was irrelevant because even accepting, *arguendo*, as true Heagy's contention that the Hendersons were disgruntled because Heagy had cut off their methadone supply, Heagy failed to produce a scintilla of evidence that showing that eleven-year-old TD had manufactured her story as a result of her parents' anger at Heagy. Therefore the evidence of the Henderson's alleged drug use resulted in TD's story was utterly speculative:

THE COURT: There's no testimony of the daughter, and there is no connection that I can see, between what the daughter testified to and what may have been, assuming for the sake of argument, the understanding between the adults.

MR. MURPHY: The connection is Mr. Heagy agreed and was giving methadone for a time. He needed, told them he would be, he would cut them off. He needed it for himself. The Hendersons became upset and got [TD] to make up false accusations.

THE COURT: There is nothing in the record to indicate that. That's pure speculation and irrelevant, Mr. Murphy.

4RP(05) 251.

As in *Peterson* and *Woodward*, the evidence the defense proffered lacked any

evidentiary nexus with the theory it sought to prove. While a motive to fabricate charges would be relevant, Heagy offered no evidence tending to connect the motive (that Heagy refused drugs to the Hendersons) in any way with TD or her alleged fabrication of the charges against Heagy. as such, this evidence was speculative at best. The trial court did not abuse its discretion in refusing to admit it.

Even if the trial court erred, Heagy fails to show that the outcome of the trial would have been different. The State first notes that Heagy misconceives the burden on appeal in this regard. Because he is claiming ineffective assistance of counsel, it is not the State's burden to show that any alleged error in the court's ruling would be harmless. Instead, he bears the burden of showing prejudice, as outlined above.

Here, the only substantive evidence of the crime was TD's statements. The Hendersons offered no first-hand account of Heagy's assault. As noted, Heagy offered not even a suggestion that the eleven-year-old victim fabricated her story at her parents' behest. The officers who arrived on the scene moments after the assault found her distraught, shaking and tearful, just as one would expect a child who had been violated by a fifty-year-old man to react.

Further, when he spoke to the police at the scene, Heagy admitted that

he had touched TD, albeit accidentally. He further admitted that he “might have” told TD not to tell her mother. He never claimed that the Hendersons were extorting drugs from him. He did not display any outrage at the charges leveled at him or at the Hendersons’ physical abuse of him.

In light of this evidence, it is highly improbable that a jury would have found Heagy’s drug-extortion theory plausible. For it to have been accepted, the jury would have had to have believed that the Hendersons and TD had hatched their plan and waited until Heagy just happened to have stumbled into TD’s bedroom in the night so she could then make a huge scene and accuse of him of molesting her. Alternatively, the Hendersons would have to have come up with the entire story in the few minutes between the time he “accidentally” touched TD and the police arrived. Neither is particularly believable.

In addition, Heagy brought out for the jury numerous instances where the TD’s statements to various witnesses were allegedly inconsistent, both with each other and with her testimony, and also that the Henderson’s pretrial statements differed from their testimony and with their prior testimony and with each others’. Given this significant impeachment, when combined with the implausibility of the revenge conspiracy, it is unlikely that the outcome of the trial would have been different had this evidence been permitted. Heagy thus fails to meet his burden of showing prejudice.

B. COUNSEL WAS NOT INEFFECTIVE FOR NOT OBJECTING TO HEARSAY EVIDENCE OF STATEMENTS MADE BY THE VICTIM WHERE THE DEFENSE STRATEGY WAS TO CAST DOUBT UPON THE VICTIM'S STORY BY SHOWING THAT EVERY TIME SHE RELATED IT, THE DETAILS CHANGED.

Heagy next claims that counsel was ineffective for not objecting to, and in some instances, eliciting himself, hearsay statements made by the victim. This claim is without merit because it is abundantly clear that the defense strategy was to cast doubt on the victim's credibility by highlighting the inconsistencies in the various statements she made.

The standard of review is set forth above. That admission of these statements was an integral part of the defense strategy is revealed by the most cursory examination of counsel's closing argument:

This is where the entire case of the prosecution is based on [TD]'s statements. Sometimes the statements come directly from her, sometimes it's something she told someone else, and you have to consider, are these really consistent. There is a difference between omitting something because you forgot, being excited and traumatized, admitting something and actually changing something significant in a short period of time between one version and another version.

3RP(06) 313.

What she told her parents before the officers even arrived was that Mr. Heagy came into her room twice. The first time he came in he touched her arms and legs, had a hand down her pants, said he was cold, got a blanket from [TD], and was told to leave. On the second trip in, at that point, Deputy Herrin said there was no touching, [TD] told him to

get the dog, again to leave, and that's how he left. Deputy Hill didn't go into an in-depth interrogation of [TD], but he also said he didn't try to lead her. He asked questions what happened, and she said a much different version, a much shorter version, but again, significant alterations half an hour apart at best, as to one time, one time only. Everything happened that one time.

3RP(06) 314.

Now I would like to get into [TD] herself. Again, she was up there, she admitted to remembering what she said to some people, not necessarily remembering everything she said to every person. There are a few things that she said that are very distinct. Again, she says on the stand this time, two trips. He came in there two times. That's all. Not the one, not three, just two. Also, there was clarification as to did he ever leave the room. Ms. Montgomery asked what happened the first time he came back, and I questioned her, "Did he actually leave?" and she said, "Well, he was in the doorway blocking it," then she said, "Well, he got outside of the room, but was still in the door," but it's fairly clear from her recollection, from what she thought, he never got out of eyesight in order to be able to bring back the dog or anything else, or come back for the blanket.

She also indicated that when she came out, she stood on the bed, Mr. Heagy came out to his futon, and that she had a conversation with him. That was not what she told the SANE nurse, who said when she came out, she ran to the bed, laid down, and jumped up and screamed. There was no conversation. It's not an omission. This is not, "Oh, I forgot something." This is a very distinct and different fact that doesn't track to anything she had told anyone else.

She also says that when she saw her mom come out, and Andre come out, she saw them begin to assault Mr. Heagy. She also said that no point did she ever hear or see Andre Henderson offer a chance to Mr. Heagy to clothe himself. [TD] said he was in boxers and a T-shirt. Andre said that. Ladonna said that. That's bad for Mr. Heagy to be there. He would be less culpable if he were clothed. What they said he was doing and how he was dressed doesn't track

with his arrest when he was clothed and he had no opportunity to dress himself. He got that from [TD] herself.

I will talk about this in a moment as well. We will get into what Ladonna said. We have already covered what she told the officers occurred. Again, different from what [TD] says to other people, what [TD] said on the stand, different from what she told the SANE nurse.

3RP(06) 315-16.

You get to Nurse Schupay. Again, she mostly had information she was told by [TD]. She didn't actually witness it. We have already talked about how it was told to her. It's significantly different, not in minor details, not in omissions, not in something that could be forgotten, but significant and important ways, altered from what she had told to other people.

3RP(06) 319.

You have to look at all of it. You have to see if A matches with B. Does A, B, C match together. If there's some confusion about that, is there something else that will make those resolve that confusion, resolve that discrepancy.

3RP(06) 322. Counsel also pointed out during trial that the hearsay statements were just that: "Exactly. This is not first-hand knowledge."

2RP(06) 73.

Without the hearsay statements the evidence would have consisted of the parents being roused by TD's wailing, the police arriving and finding a distraught, crying eleven-year-old girl, TD's testimony that Heagy molested her, and Heagy's quasi-incriminating statements to the police at the time of his arrest. It cannot be said that counsel's tactical decision to try to portray

TD as unreliable because she could not keep her story straight was unreasonable.

Moreover, Heagy utterly fails to specify the precise items of hearsay that were inadmissible. This is his burden as the appellant. *See, generally, Kane v. Smith*, 56 Wn.2d 799, 806, 355 P.2d 827 (1960); *Almagamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 203, 12 P.3d 603 (2000); *State v. Neely*, 113 Wn. App. 100, 108, 52 P.3d 539 (2002); *State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000). The State declines to that for him.

It does note, however, that many of the statements presumably alleged to be hearsay may well have been nevertheless admissible. For example, from the descriptions TD's demeanor, it is highly likely that her statements to her parents and the police on the night of the crime were properly admitted as excited utterances. *See, e.g., State v. Flett*, 40 Wn. App. 277, 287, 699 P.2d 774 (1985) (victim's statement made seven hours after rape properly admitted as excited utterance because there was "continuing stress experienced and exhibited by the victim" between time of rape and statement). It is equally likely that the Hendersons' statements to the police were also excited utterances.

Likewise, TD's statements to the SANE nurse were properly

admissible as statements for medical diagnosis. *See, e.g., State v. Hopkins*, 134 Wn. App. 780, ¶ 23, 142 P.3d 1104 (2006). (where the declarant is a child, statements regarding the identity of the abuser are reasonably necessary to the child's medical treatment).

Because he fails to show that any specific statement was improperly admitted, that counsel's choices were not valid tactical ones, or that the outcome would have been different if counsel had objected, Heagy fails to show either deficient performance or prejudice. This claim should also be rejected.

IV. CONCLUSION

For the foregoing reasons, Heagy's conviction and sentence should be affirmed.

DATED March 23, 2007.

Respectfully submitted,

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