

No. 35007-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Charles Wayne Sifers,

Appellant.

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STATE OF WASHINGTON
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Lewis County Superior Court

Cause No. 05-1-00274-8

The Honorable Judge Richard L. Brosey

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by overruling Mr. Sifers' hearsay objections to the testimony of Rita Trask.
2. The trial court erred by overruling Mr. Sifers' relevance objection to the testimony of Deputy Spahn.
3. The trial court erred by admitting irrelevant "demeanor" evidence.
4. Mr. Sifers was denied the effective assistance of counsel when his attorney failed to argue that the probative value of evidence offered by Rita Trask, Chrissy Stark, and Deputy Spahn was substantially outweighed by the danger of unfair prejudice.
5. Mr. Sifers was denied the effective assistance of counsel when his attorney failed to object to hearsay testimony offered through Katie Braae.
6. Mr. Sifers was denied the effective assistance of counsel when his attorney failed to object to hearsay testimony offered through Lori Davis.
7. Mr. Sifers was denied the effective assistance of counsel when his attorney failed to object to hearsay testimony offered through Amanda Olson.
8. Mr. Sifers was denied the effective assistance of counsel when his attorney failed to request an instruction cautioning the jury that repetition does not establish veracity.
9. The prosecuting attorney committed misconduct by introducing inadmissible hearsay evidence through the testimony of Rita Trask, Chrissy Stark, and Deputy Spahn.
10. The prosecuting attorney committed misconduct by referring to matters outside the record.
11. The prosecuting attorney committed misconduct by indirectly vouching for the alleged victim's credibility.

12. The prosecuting attorney committed misconduct by suggesting that an acquittal necessarily required a finding that the victim was not credible.
13. The prosecuting attorney committed misconduct by expressing a personal opinion about the credibility of the two expert witnesses.
14. The prosecuting attorney committed misconduct by disparaging the role of defense counsel.
15. Cumulative error requires reversal.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Charles Sifers was charged with Rape of a Child in the First Degree. Over defense objection, the trial court allowed three witnesses to testify about the alleged victim's accusations, indirectly revealing the content of those statements. Defense counsel did not cite ER 403 in challenging the evidence.

1. Did the trial court err by overruling Mr. Sifers' objections to the alleged victim's hearsay accusations, introduced through the testimony of Rita Trask and Deputy Spahn? Assignments of Error Nos. 1-3.
2. Was Mr. Sifers denied the effective assistance of counsel when his attorney failed to properly object to the repetition and demeanor testimony of Rita Trask, Chrissy Stark, and Deputy Spahn? Assignments of Error Nos. 1-4.

The prosecutor also elicited the alleged victim's hearsay accusations through three other witnesses, including an "advocacy-based" rape crisis counselor, a school counselor, and a nurse. The prosecutor did not establish an exception to the rules against hearsay, and there was no basis for admission of the testimony. Despite this, defense counsel did not object to the evidence.

The alleged victim's hearsay accusations were relayed to the jury a total of seven times. The jury was not cautioned that repetition is not a valid measure of credibility.

3. Was Mr. Sifers denied the effective assistance of counsel when his attorney failed to object to the admission of damaging hearsay evidence? Assignments of Error Nos. 5-7.
4. Was Mr. Sifers prejudiced by evidence that the alleged victim repeated her accusation at least six times prior to trial? Assignments of Error Nos. 1-9.
5. Was Mr. Sifers denied the effective assistance of counsel when his attorney failed to request an instruction cautioning the jury that repetition is not proof of veracity? Assignments of Error Nos. 1-9.

On direct examination of three witnesses, the prosecutor referred to hearsay statements that were not introduced into evidence. She told the jury that she was not allowed to elicit these statements, and implied that these statements bolstered the alleged victim's credibility.

6. Did the prosecuting attorney commit misconduct by repeatedly referring to hearsay statements that were outside the record? Assignments of Error Nos. 10-14.
7. Did the prosecuting attorney indirectly vouch for the credibility of the alleged victim? Assignments of Error Nos. 10-14.

In closing arguments, the prosecutor expressed her personal opinion about a piece of evidence, and about the credibility of the defense expert. She also disparaged defense counsel and his institutional role by suggesting that he was attempting to distract the jury from the evidence. She also misstated the prosecution's burden of proof, and implied that the jury could only acquit if it found that the alleged victim lied.

8. Did the prosecuting attorney commit misconduct during closing arguments? Assignments of Error Nos. 10-14.
9. Did the prosecuting attorney commit misconduct by stating her personal opinion about a piece of evidence? Assignments of Error Nos. 10-14.

10. Did the prosecuting attorney commit misconduct by stating her personal opinion about the credibility of the defense expert? Assignments of Error Nos. 10-14.
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12. Did the prosecuting attorney commit misconduct by misstating the state's burden of proof? Assignments of Error Nos. 10-14.
13. Did the prosecuting attorney commit misconduct by suggesting that the jury could only acquit Mr. Sifers by finding that the alleged victim lied? Assignments of Error Nos. 10-14.
14. Does cumulative error require reversal in this case? Assignment of Error No. 15.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In April of 2005, Charles W. Sifers was arrested for Rape of a Child in the First Degree. CP 17. A fourteen-year-old girl, S.T., accused him of raping her five years earlier, when she was nine years old. RP (1/30/06) 43-44, 81. S.T. said that she made her accusation after five years of silence because her friend Stormy (Mr. Sifers' daughter) was going to visit Mr. Sifers, and S.T. was afraid he might hurt Stormy. RP (1/30/06) 44, 89; RP (1/31/06) 20.

At trial, S.T. testified, again accusing Mr. Sifers' of having raped her five years previously, when he stayed at her Aunt and Uncle's home. RP (1/30/06) 18-19, 28-39. She alleged that he threatened to harm her and her family if she told anyone. RP (1/30/06) 40. She also told the jury that she made her accusation after remaining silent for so long because of her concern for her friend Stormy. RP (1/30/06) 44.

Three witnesses repeated S.T.'s accusations at trial. Katie Braae, an advocate for a sexual assault agency, testified she led a group for girls dealing with sexual assaults. She explained that the group was only open to girls who had been sexually victimized. RP (1/30/06) 102-105. She described herself as an advocacy-based counselor, rather than a mental health counselor. RP (1/30/06) 105. S.T. asked to join the group in

October of 2003, and said that something had happened to her, but did not provide any details. RP (1/30/06) 110-119. Ms. Braae described S.T. as a shy, childlike girl, who cried often. RP (1/30/06) 112. In group, S.T. once said “that’s what happened to me” after another girl had described being “groomed” by a sex offender. RP (1/30/06) 112 S.T. eventually said that her alleged abuser was a neighbor, but stated that she could not tell out of fear the person would kill her and her family. RP (1/30/06) 113, 115. Defense counsel did not object to this testimony. RP (1/30/06) 110-119.

Lori Davis, a licensed nurse practitioner at the Child Sexual Assault Center (CSAC) interviewed S.T. on March 9, 2005. RP (1/31/06) 81-82, 87. Ms. Davis testified that S.T. told her that Mr. Sifers put his penis into her privates, that it hurt, and that Mr. Sifers threatened to hurt her and her family if she told anyone. RP (1/31/06) 88-90. Ms. Davis did not testify that the interview was for diagnostic or treatment purposes. RP (1/31/06) 81-121. There was no indication that S.T. thought the interview was for diagnostic or treatment purposes. The defense did not object to this testimony. RP (1/31/06) 81-121. The trial court later noted that the examination was not done for medical purposes, and that CSAC did not treat S.T. RP (2/2/06) 107.

S.T.'s school counselor, Amanda Olson, testified that S.T. had disclosed that she'd been molested as a child. S.T. did not tell Ms. Olson the name of the person because she was afraid she would get in trouble, or that the person may kill her. Ms. Olson said that S.T. was crying and upset during the conversation. RP (2/1/06) 31-33. Ms. Olson did not claim to be a mental health counselor, and did not claim that the conversation was for diagnostic or treatment purposes. There was no evidence suggesting that S.T. viewed her conversation with Ms. Olson as relating to diagnosis or treatment of a medical or psychological problem. The defense did not object to Ms. Olson's testimony. RP (2/1/06) 30-37.

The prosecution asked three witnesses to describe S.T.'s demeanor at the time of her out-of-court disclosures. S.T.'s mother, Rita Trask, testified that her daughter was crying "very hard" and that they talked for "an hour." RP (1/30/06) 96. Based on that conversation, Ms. Trask "called the sheriff's office," went and spoke to Stormy's mother, and then talked with an officer about the case. RP (1/30/06) 97-98. The prosecutor asked Ms. Trask if she remembered "the specific date" that her daughter was talking about-- a date when Mr. Sifers was present at her sister's home while S.T. was there. RP (1/30/06) 98. Defense counsel objected when Ms. Trask began repeating S.T.'s disclosure. Rp (1/30/06) 91-94. He also pointed out that Ms. Trask's general testimony about the

disclosure revealed its substance, and argued that the testimony was prejudicial hearsay:

...And it's also troublesome that we're dancing on the head of the pin saying, "Don't tell me what he said," but this disclosure about Mr. Sifers, that in and of itself raises hearsay issues because what do you mean by disclosure? And like the state said, we all know what we're talking about, and so does the jury. They're just flatly – hoards of hearsay's coming in through nonpotential witnesses [sic] and nonappropriate [sic] witnesses under this, saying – I'm trying to characterize things as hearsay. She's trying to bring everything in, as we all know what we're talking about, wink, wink. It's clearly more prejudicial than probative....
RP (1/30/06) 93.

The trial court sustained the original hearsay objection, but allowed Ms. Trask to continue testifying about the statement and about S.T.'s demeanor at the time of the disclosure. RP (1/30/07) 94, 96-97.

S.T.'s cousin Chrissy Stark also provided "demeanor" testimony. She told the jury that S.T. became upset at the mention of Mr. Sifers, that S.T. had nightmares, and that S.T. eventually revealed why she was having nightmares. RP (1/31/06) 20-24. Ms. Stark was asked to "describe [S.T.'s] demeanor when she told you." RP (1/31/06) 24. She replied that "She was bawling. She was scared. She could barely talk... I told her that she needed to tell me what was wrong, that I knew something was wrong and she needed to tell me. And she did... [Then] I asked her if she had told anybody else." RP (1/31/06) 24. Ms. Stark reaffirmed that S.T. "had

anger whenever [Mr. Sifers] was mentioned.” RP (1/31/06) 25. The defense did not object to Ms. Stark’s testimony. RP (1/31/06) 17-25.

During her examination of Ms. Stark, the prosecutor emphasized (in the presence of the jury) that she was “not allowed to ask about the statements.” RP (1/31/07) 24. Defense counsel did not object or request a curative instruction. RP (1/31/07) 24.

The investigating officer, Deputy Spahn, was also permitted to give “demeanor” testimony. He testified that he met with Katie Braae prior to interviewing S.T. (RP (2/1/06) 55. With Ms. Braae present, Spahn took a verbal and a tape-recorded statement from S.T. He testified that S.T. was crying and trembling, and had to stop the interview three times to compose herself. RP (2/1/06) 55-57. The defense objected to this testimony but the court ruled the officer’s observations were admissible. RP (2/1/06) 42-49.

At no time did defense counsel request an instruction cautioning the jury that repetition is not proof of veracity. RP (1/30/06) 3-120; RP 1/31/06) 4-163; RP (2/1/06) 3-69; RP (2/2/06) 4-132.

Two expert witnesses testified at trial. Dr. Debra Hall (of CSAC) testified that she reviewed the examination performed on S.T., and characterized it as an “abnormal” exam because of a “notch” in S.T.’s hymen. RP (1/31/06) 135. She acknowledged that the abnormal exam

did not necessarily mean that trauma had occurred. RP (2/2/06). Dr. Joyce Adams, a Professor of Pediatrics at California San Diego School of Medicine, also reviewed the examination. She testified that the exam was performed incorrectly, that the supposed “notch” found by Dr. Hall could not be determined to be a notch, and that the exam should be categorized as a normal exam. RP (2/2/06) 40, 45.

Mr. Sifers testified that he did not have sexual contact with S.T. RP (2/12/06) 83.

During her closing argument, the prosecutor made the following statement:

...Now, let's talk about the defense witness for a minute who said she couldn't tell from the exam what it was. Was she looking at the same video we saw? I'm no doctor, but I saw it....
RP (2/2/06) 151.

During the rebuttal, she argued as follows:

...I think you're all going to need to trust yourselves, because you were in the room listening to testimony. Not the testimony that [defense counsel is] putting forth right now, but the testimony that's in the record. You all heard it. You all heard testimony that's different than he's putting forth right now...
...And I want you to remember Shannon when she testified, and I want you to remember this attorney. He's a dang good talker, isn't he? He's a dang good talker....
...And he was pretty dang good, wasn't he? Just as he's as good at talking right now....
...You can't depend on the defense attorney...
RP (2/2/06) 186-187, 194.

Defense counsel did not object to any of these statements. RP
(2/2/06) 140-155, 186-197.

Mr. Sifers was convicted as charged, and he appealed. CP 5-16, 4.

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY OVERRULED MR. SIFERS' OBJECTIONS TO THE INADMISSIBLE TESTIMONY OF RITA TRASK AND DEPUTY SPAHN.

Under ER 801(c), hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Hearsay evidence is generally inadmissible. ER 802. The interpretation of an evidence rule is a question of law, reviewed *de novo*. *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003). *See also State v. Martinez*, 105 Wn.App. 775 at 782, 20 P.3d 1062 (2001), *overruled on other grounds by State v. Rangel-Reyes*, 119 Wn.App. 494, 81 P.3d 157 (2003) (“We review *de novo*, however, whether the court's ruling rests on an erroneous understanding of the law.”)

In addition to excluding statements, the rule against hearsay excludes general testimony about a statement, if the content of the statement can be inferred from the testimony. *See State v. Johnson*, 61 Wn. App. 539 at 546-547, 811 P.2d 687 (1991) (if “the inescapable

inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay... notwithstanding that the actual statements made by the non-testifying witness are not repeated"); *United States v. Sanchez*, 176 F.3d 1214 (9th Cir. 1999) ("It is improper under the guise of artful cross-examination, to tell the jury the substance of inadmissible evidence." *Sanchez* at 1222, *internal quotations and citations omitted*.)

An evidentiary error requires reversal if there is a reasonable probability that the error materially affected the outcome of the trial. *State v. Everybodytalksabout*, 145 Wn.2d 456 at 468-469, 39 P.3d 294 (2002). The error is harmless only if the improperly admitted evidence is of minor significance compared to the overall evidence as a whole. *Everybodytalksabout*, at 468-469.

In this case, Mr. Sifers objected to testimony that conveyed S.T.'s hearsay disclosures to her mother (Rita Trask) and to Deputy Spahn. RP (1/30/06) 91-92; RP (1/31/06) 15-18; RP (2/1/06) 42-48. The trial court allowed the testimony, so long as the details of the disclosures were not provided. RP (1/30/06) 91-93, 96-99; RP (1/31/06) 17-25; RP (2/1/06) 41-61. These rulings were improper.

As in *Johnson* and *Sanchez*, the substance of each hearsay statement was evident from the testimony: Rita Trask testified that her

daughter was crying “very hard” and that they talked for “an hour.” RP (1/30/06) 96. Based on that conversation, she “called the sheriff’s office,” went and spoke to Stormy’s mom, and then talked with an officer about the case. RP (1/30/06) 97-98. She was then asked if she remembered “the specific date” that her daughter was talking about-- a date when Mr. Sifers was present at her sister’s home while her daughter was there. RP (1/30/06) 98. The clear implication of this testimony was that S.T. had made a disclosure consistent with her testimony, in which she accused Mr. Sifers and expressed fear that he would abuse his daughter. Mr. Sifers objected to the testimony, arguing that it was hearsay and that it was “clearly more prejudicial than probative,” a reference to ER 403. Despite this, the court allowed the testimony.

Similarly, Deputy Spahn testified that he met with Katie Braae prior to interviewing S.T.. Ms. Braae had already testified, and had relayed the content of S.T.’s hearsay disclosures to the jury. In the presence of Ms. Braae, Spahn took a verbal and a tape-recorded statement from S.T., who cried, trembled, and had to stop three times during the interview to compose herself. RP (2/1/06) 55-57. Spahn’s testimony suggests that S.T. disclosed information consistent with her earlier statements to Ms. Braae. Mr. Sifers objected that Deputy Spahn’s

testimony was irrelevant, but the court overruled the objection and allowed the testimony. RP (2/1/06) 41-52.

The only conceivable purpose of the testimony was to bolster S.T.'s credibility by emphasizing that she'd repeated her disclosure to more than one person, and that each person clearly believed her. But repetition "is not a valid test of veracity." *State v. Purdom*, 106 Wn.2d 745 at 750, 725 P.2d 622 (1986). Furthermore, a witness' belief in the accuser's credibility is inadmissible. ER 608; *State v. Kirkman*, 126 Wn. App. 97, 107 P.3d 133 (2005).

Because the testimony revealed the substance of the inadmissible hearsay, and because it was introduced for its truth, the trial court should have sustained Mr. Sifers' hearsay and relevance objections and excluded the evidence. The erroneous admission of the evidence prejudiced Mr. Sifers because there is a reasonable probability that the error materially affected the outcome of the trial. *Everybodytalksabout, supra*. The improperly admitted evidence is not minor compared to the evidence as a whole; instead, the trial court's error allowed the jury to infer that S.T. made consistent disclosures to her mother and to Deputy Spahn. The error also allowed the jury to infer that these witnesses believed S.T.'s allegations. Because there is a reasonable probability that the error

affected the verdict, the conviction must be reversed and the case remanded for a new trial. *Everybodytalksabout, supra*.

II. MR. SIFERS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO PROPERLY OBJECT TO INADMISSIBLE EVIDENCE OR REQUEST A CAUTIONARY INSTRUCTION.

The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759 at 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ “such skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Lopez*, 107 Wn.App. 270 at 275, 27 P.3d 237 (2001). The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel’s performance was deficient, and (2) whether this deficiency

prejudiced the defendant. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), citing *Strickland, supra*.

To establish deficient performance, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

An appellant claiming ineffective assistance based on the failure to challenge the admission of evidence must show (1) an absence of legitimate strategic or tactical reasons; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *Saunders, supra*, at 578. There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome

when there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126 at 130, 101 P.3d 80 (2004). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61 at 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

A. Defense counsel's performance was deficient when he failed to object to the testimony of Rita Trask, Chrissy Stark, and Deputy Spahn.

In this case, defense counsel was ineffective when he failed to object to the repetition and demeanor testimony of Chrissy Stark, and when he failed to specifically argue ER 403 in his objection to the testimony introduced through Rita Trask, Chrissy Stark, and Deputy Spahn. First, as outlined above, defense counsel's strategy was to challenge admission of the evidence. RP (1/31/06) 25-28, 49-53, 91-95. Counsel argued that the evidence should have been excluded on hearsay grounds and (in the case of Rita Trask's testimony) on the grounds that it was "clearly more prejudicial than probative." RP (1/30/06) 94. No legitimate trial strategy would account for a failure to argue the correct grounds when seeking to exclude the evidence.

Second, an objection under ER 403 would likely have been sustained. Under ER 403, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Here, the evidence provided by Rita Trask, Chrissy Stark, and Deputy Spahn was of minimal relevance. S.T.’s disclosures to each of these people did not increase the likelihood that her accusation was true, since she had already testified about the allegation in full, and since repetition is not probative of veracity as a matter of law. *Purdum, supra*. Her demeanor at the time of the disclosures was also of minimal probative value; the fact that a person cries while speaking does not necessarily make their statement trustworthy.

On the other hand, the danger of unfair prejudice, of confusion, and of misleading the jury was high. The jury was likely to misuse the repetition evidence as proof of veracity, while the testimony about S.T.’s demeanor was calculated to appeal to the jury’s passions and prejudices. Because of this, the probative value was substantially outweighed by the danger of unfair prejudice, confusion, and misleading the jury under ER 403. Defense counsel’s performance was deficient for failing to properly invoke the rule when he objected to the testimony of these three witnesses.

- B. Defense counsel's performance was deficient when he failed to object to inadmissible hearsay introduced through the testimony of Katie Braae, Amanda Olson, and Lori Davis.

Under 803(a)(4), statements made for purposes of medical diagnosis or treatment are admissible "insofar as reasonably pertinent to diagnosis or treatment." The rationale for the exception is that statements made for purposes of diagnosis or treatment are presumptively trustworthy, since a rational patient would give truthful information in order to receive proper treatment from their doctor. In order to lay the foundation for admission under ER 803(a)(4), the proponent of the evidence must establish that the statements were made for purposes of medical diagnosis or treatment, which includes a showing that the declarant's motive was consistent with receiving treatment. ER 803(a)(4); *State v. Moses*, 129 Wn. App. 718 at 728, 119 P.3d 906 (2005). The proponent must also show that the statements were reasonably pertinent to diagnosis or treatment, which includes a showing that the medical provider must reasonably rely on the information for diagnosis or treatment. ER 803(a)(4); *Moses*, at 728.

In this case, S.T.'s hearsay statements accusing Mr. Sifers of rape were admitted (without objection) through three witnesses: Katie Braae, Lori Davis, and Amanda Olson. RP (1/30/06) 102-120; RP (1/31/) 81-121; RP (2/1/06) 28-41. None of the hearsay statements qualified as

statements for purpose of medical diagnosis or treatment under ER 803(a)(4). Furthermore, they were all subject to exclusion under ER 403, because their probative value was substantially outweighed by the danger of unfair prejudice.

1. Defense counsel should have moved to exclude S.T.'s statements to Katie Braae, which did not qualify under the medical diagnosis or treatment exception in ER 803(a)(4).

Ms. Braae was not a medical practitioner or a mental health counselor. Instead, she described herself as an "advocacy based counselor." RP (1/30/06) 105. Thus, any statements to her were not for the purpose of diagnosis or treatment. There was no evidence that S.T.'s statements to Ms. Braae were of a type reasonably relied upon for diagnosis or treatment. Nor was there any indication that S.T. viewed Ms. Braae as a medical provider or mental health counselor, or that S.T.'s motive was consistent with receiving treatment, especially in light of the amount of time elapsed since the alleged incident. The record suggests that S.T.'s motives in joining the group were at least in part to fit in with her peers and to get attention. RP (1/30/06) 102-120.

The statements to Ms. Braae did not qualify under the medical exception, and should have been excluded under ER 802. ER 803(a)(4); *Moses, supra*. Furthermore, their limited probative value (repetition of S.T.'s in-court testimony) was substantially outweighed by the danger that

the jury would improperly use them as proof of veracity. ER 403; *Purdum, supra*. Counsel was ineffective by failing to move *in limine* to exclude the statements, and by failing to object when they were introduced at trial. There is no conceivable strategy that would require admission of S.T.'s hearsay accusations; nor does the record include any indication that counsel was pursuing a legitimate strategy by failing to object.¹ Counsel's performance was therefore deficient under *Strickland*.

2. Defense counsel should have moved to exclude S.T.'s statements to Lori Davis, which did not qualify under the medical diagnosis or treatment exception in ER 803(a)(4).

Although Lori Davis was a nurse at the Child Sexual Assault Center, she did not testify that she interviewed and examined S.T. for medical (as opposed to forensic) purposes. RP (1/31/06) 81-121. Nor is there any indication that S.T. understood the interview to be for the purpose of diagnosis and treatment, rather than for the purpose of prosecution of Mr. Sifers. Accordingly, there is no indication that S.T.'s statements were made with a motive consistent with receiving treatment.

¹ The one exception relates to S.T.'s statement implying that she'd been "groomed" by Mr. Sifers, RP (1/30/06) 112, which was clearly inconsistent with her testimony at trial, and which counsel highlighted in closing argument. RP (1/30/06) 13-79; RP (2/2/06) 140-197. However, counsel could have cross-examined S.T. and Ms. Braae about this prior inconsistent statement without eliciting S.T.'s other inadmissible statements implicating Mr. Sifers.

RP (1/31/06) 81-121. This is especially true in light of the amount of time elapsed between the alleged incident and the date of the interview.

Because of this, the statements to Ms. Davis did not qualify under the medical exception to the rule against hearsay, and should have been excluded under ER 802. ER 803(a)(4); *Moses, supra*. In fact, the trial judge later noted the absence of a foundation for the medical exception.

RP (1/31/06) 106-107. Furthermore, the limited probative value of S.T.'s hearsay statements (repeating her in-court testimony) was substantially outweighed by the danger that the jury would improperly use them as proof of veracity. *Purdom, supra*; ER 403.

Counsel was ineffective by failing to move *in limine* to exclude S.T.'s statements to CSAC, and by failing to object when the statements were introduced at trial. There is no conceivable strategy that would require admission of these statements; nor does the record suggest that counsel's failure to object was part of a legitimate trial strategy.

Accordingly, counsel's performance was deficient under *Strickland*.

3. Defense counsel should have moved to exclude S.T.'s statements to Amanda Olson, which did not qualify under the medical diagnosis or treatment exception in ER 803(a)(4).

Amanda Olson was the school counselor at S.T.'s school.

Although she had a bachelor's degree in psychology, there is no indication in the record that she was a licensed mental health counselor, or that she

functioned in that role at the school. Nor is there any indication in the record that she interviewed S.T. for the purpose of diagnosis or treatment of a medical or psychological condition. No evidence was presented that S.T.'s statements to Ms. Olson were of a type reasonably relied upon for diagnosis or treatment. Nor was there any indication that S.T. viewed Ms. Olson as a medical provider or mental health counselor, or that S.T.'s motive was consistent with receiving treatment, especially in light of the time elapsed since the alleged incident. RP (2/1/06) 28-41. Indeed, the trial court indicated that Ms. Olson was not part of a medical team providing treatment (in sustaining an objection to a portion of her testimony). RP (2/1/06) 40.

The statements to Ms. Olson did not qualify under the medical exception, and should have been excluded under ER 802. ER 803(a)(4); *Moses, supra*. Furthermore, their limited probative value (repetition of S.T.'s in-court testimony) was substantially outweighed by the danger that the jury would improperly use them as proof of veracity. *Purdom, supra*; ER 403. Mr. Sifers was denied the effective assistance of counsel when his attorney failed to move *in limine* to exclude the statements and failed to object when the statements were introduced at trial. No legitimate strategy would justify admission of the statements; nor does the record suggest that counsel was pursuing a legitimate strategy involving

admission of the statements. Counsel's performance was therefore deficient under *Strickland*.

C. Defense counsel's performance was deficient when he failed to request a cautionary instruction.

Despite the number of times S.T.'s hearsay statements were repeated for the jury, defense counsel did not seek to mitigate the damage by requesting a cautionary instruction. Because of this, the jury was permitted to conclude that the repetition of the statement was evidence of veracity, contrary to *Purdum, supra*. This strengthened the state's case, and was deficient under *Strickland*.

D. Counsel's deficient performance prejudiced Mr. Sifers.

Instead of hearing S.T.'s accusation once (through her testimony), the jury heard it four times, and was able to infer that she made consistent disclosures to three additional people. This evidence improperly bolstered S.T.'s credibility in two ways. First, the state was able to imply that the accusation was credible and reliable simply because it was repeated more than once. RP (2/2/06) 189, 195. But repetition "is not a valid test of veracity." *Purdum, supra, at 750*. Second, the jury was able to infer that the six witnesses who heard S.T.'s disclosures believed her. RP (1/30/06) 88-99, 110-118; RP (1/31/06) 20-22, 87-101; RP (2/1/06) 30-41, 55-57. This invaded the province of the jury and violated ER 608. *See State v.*

Kirkman, supra, at 105. In addition, the testimony regarding S.T.'s demeanor was likely to evoke sympathy and to improperly appeal to the passions and prejudices of the jury. *See, e.g., State v. Gregory*, 158 Wn.2d 759 at 808, 147 P.3d 1201 (2006).

Without the repetition and the implied opinion testimony improperly bolstering S.T.'s credibility, the direct evidence against Mr. Sifers would have consisted of S.T.'s in-court testimony and the testimony of the state's expert that her exam was "abnormal." This testimony was controverted, and might not have been sufficient to persuade all twelve jurors of Mr. Sifers' guilt beyond a reasonable doubt. First, Mr. Sifers testified and denied S.T.'s accusation. RP (2/2/06) 83. Second, Dr. Hall conceded that the abnormal exam was not even diagnostic of trauma, much less of sexual trauma. RP (1/31/06) 135. Third, Dr. Hall's expert opinion was contradicted by the testimony of Dr. Adams, who told the jury that the exam was done improperly and that the video and photographs did not show any abnormality. RP (2/2/06) 40, 42, 43-45.

Defense counsel should have raised proper objections to the hearsay, the repetition evidence, and the "demeanor" testimony. There is a reasonable probability that at least one juror would have voted not guilty if the evidence had been excluded. *Saunders*, at 578. Accordingly,

counsel's ineffectiveness undermines confidence in the outcome, and Mr. Sifers' conviction must be reversed. *In re Fleming, supra*.

III. THE PROSECUTOR COMMITTED MISCONDUCT REQUIRING REVERSAL.

A. The prosecutor improperly referred to matters outside the record and indirectly vouched for the credibility of the alleged victim.

A prosecutor has a duty to act impartially and in the interest of justice. *State v. Rivers*, 96 Wn.App. 672 at 675, 981 P.2d 16 (1999). Comments that encourage a jury to render a verdict on facts not in evidence are improper. *State v. Stith*, 71 Wn.App. 14, 856 P.2d 415 (1993). "A prosecutor may not suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty." *State v. Russell, supra*, at 87. See also *State v. Martin*, 69 Wn.App. 686, 849 P.2d 1289 (1993).

Furthermore, it is misconduct for a prosecutor to vouch for the credibility of a witness. *State v. Horton*, 116 Wn.App. 909 at 921, 68 P.3d 1145 (2003); *U.S. v. Frederick*, 78 F.3d 1370 at 1378 (9th Cir. 1996), citing *United States v. Roberts*, 618 F.2d 530 at 533 (9th Cir.1980), cert. denied, 452 U.S. 942, 101 S.Ct. 3088, 69 L.Ed.2d 957 (1981). A prosecutor indirectly vouches for a witness by indicating that information not presented to the jury supports the witness' testimony. *Frederick at*

1378. This “may occur more subtly than personal vouching, and is also more susceptible to abuse.” *Frederick* at 1378. Such prosecutorial remarks are fatal if the jury might have understood the remarks to be based on the prosecutor’s personal knowledge apart from the evidence in the case. *Frederick* at 1378, citing *Roberts* at 533-34; see also *United States v. Humphrey*, 287 F.3d 422 at 433 (6th Cir., 2002).

In this case, the prosecuting attorney committed misconduct by referring to matters outside the record and by indirectly vouching for the credibility of S.T. Throughout her examination of Rita Trask, Chrissy Stark, and Deputy Spahn the prosecutor made reference to her inability to ask about the content of S.T.’s disclosures. RP (1/30/06) 90, 96; RP (1/31/06) 24. The clear implication of these references was that additional evidence, known to the prosecutor but not provided to the jury, supported the state’s case. This improper vouching requires reversal. *Frederick, supra*.

B. The prosecutor committed misconduct during closing arguments.

Comments made during closing arguments are reviewed “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions.” *State v. Boehning* 127 Wn.App. 511 at 519, 111 P.3d 899 (2005).

1. The prosecutor improperly expressed her personal opinion as to the credibility Mr. Sifers' expert.

A prosecutor may not express a personal opinion as to the credibility of a witness. *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984). Misconduct occurs when it is clear that counsel is expressing a personal opinion rather than arguing an inference from the evidence. *State v. Price*, 126 Wn. App. 617 at 653, 109 P.3d 27 (2005); *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990); *State v. Robinson*, 44 Wn.App. 611, 722 P.2d 1379 (1986); *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983).

Here, the prosecutor expressed a clear personal opinion disparaging the defense expert's credibility (and at the same time expressing her personal agreement with the state's expert) when she made the following statement:

...Now, let's talk about the defense witness for a minute who said she couldn't tell from the exam what it was. Was she looking at the same video we saw? I'm no doctor, but I saw it....
RP (2/2/06) 151.

Since this statement is a clear and unmistakable expression of personal opinion, the prosecutor committed misconduct. Because the disagreement between the two experts was critical to the outcome of the

case, the prosecutor's comment was prejudicial, and the conviction must be reversed. *Price, supra*.

2. The prosecutor committed misconduct by disparaging the role of defense counsel.

It is misconduct for a prosecutor to disparage the role of defense counsel or to draw a "cloak of righteousness" around the state's position. *State v. Gonzales*, 111 Wn. App. 276 at 282, 45 P.3d 205 (2002), citing *United States v. Frascone*, 747 F.2d 953 (5th Cir., 1984); see also *People v. McReynolds*, 175 A.D.2d 31 (N.Y. App. Div. 1991). A prosecutor should not directly or implicitly impugn the integrity or institutional role of defense counsel. *United States v. Jamieson*, 427 F.3d 394 at 414 (6th Cir. 2005); *Lewis v. State*, 780 So. 2d 125 (Fla. 2001). It is improper for a prosecutor to accuse defense counsel of attempting to create a reasonable doubt by confusion, indecision, and misrepresentation. *People v. Abadia*, 328 Ill. App. 3d 669 at 679 (2001). Such comments are especially damaging when made during the rebuttal phase of closing argument. *United States v. Holmes*, 413 F.3d 770 at 776 (8th Cir. 2005).

In this case, the prosecutor implied that defense counsel was lying, or attempting to distract the jury from the truth. RP (2/2/06) 186-187. These comments had nothing to do with the evidence or the merits of the case; instead, they improperly focused the jury's attention on the integrity

of defense counsel, implying that Mr. Sifers' attorney was dishonest. This was misconduct. *Gonzales, supra*. The fact that it occurred during rebuttal, with no opportunity for defense counsel to respond, magnifies the problem. *Holmes, supra*. Mr. Sifers' conviction must be reversed and the case remanded for a new trial. *Holmes, supra*.

3. The prosecutor erroneously implied that acquittal required disbelieving the alleged victim.

It is misconduct for a prosecutor to argue that an acquittal requires the jury to find that the State's witnesses are either lying or mistaken. *State v. Fleming*, 83 Wn.App. 209 at 213, 921 P.2d 1076 (1996); *see also State v. Casteneda-Perez*, 61 Wn.App. 354, 362-63, 810 P.2d 74 (“[I]t is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying”), *review denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991); *State v. Wright*, 76 Wn.App. 811 at 826, 888 P.2d 1214, *review denied* 127 Wn.2d 1010, 902 P.2d 163 (1995).

Here, the prosecutor emphasized in closing that S.T. “had no motive to lie.” RP (2/2/06) 193. This argument was inappropriate, because it improperly focused the jury's attention on whether or not S.T. lied, rather than on whether or not the state sustained its burden of proof.

The prosecutor went on to say that S.T.'s testimony alone is sufficient if you find her credible. RP (2/2/06) 194. This argument

misstated the prosecution's burden of proof, and improperly equated S.T.'s credibility with the sufficiency of the evidence. Under this logic, an acquittal would have required the jury to find S.T. not credible. In other words, the jury could only vote "not guilty" by finding that S.T. was lying.² As in *State v. Fleming, supra*, this is misconduct.

C. The prosecutor's comments were so flagrant and ill-intentioned that no curative instruction would have neutralized them

In the absence of an objection to misconduct, reversal is required if the misconduct is so flagrant and ill-intentioned that a curative instruction would not have corrected the error. *State v. Henderson*, 100 Wn.App. 794, 998 P.2d 907 (2000); *State v. Jones* 117 Wn.App. 89 at 90-91, 68 P.3d 1153 (2003). Multiple instances of misconduct may be considered cumulatively to determine the overall effect. *State v. Henderson, supra*, at 804-805.

Here, the prosecutor repeatedly implied that matters outside the record supported the state's case, and thereby indirectly vouched for S.T.'s

² This can be seen by examining the "contrapositive" of the prosecutor's statement. In formal logic, the contrapositive of a conditional statement is formed by negating both the hypothesis and the conclusion, and then reversing their order. If a conditional statement is true, its contrapositive is also true, and the two statements are logically equivalent. In this case, the prosecutor's statement (if S.T. is credible, then the evidence is sufficient) is logically equivalent to its contrapositive (if the evidence is not sufficient, then S.T. is not credible).

credibility. During closing, the prosecutor expressed her own personal opinion about certain evidence and the credibility of the defense expert. She also disparaged defense counsel and his institutional role. Finally, she improperly told the jury that it must disbelieve S.T. in order to acquit Mr. Sifers.

These instances of misconduct violated well-established rules (of which the prosecutor should have been aware) and thus were flagrant and ill-intentioned. Furthermore, they prejudiced Mr. Sifers. Her repeated reference to matters outside the record improperly bolstered S.T.'s credibility (especially since repetition is not a valid test of veracity, *see Purdom, supra*); her statement of personal opinion tipped the balance on an issue (the interpretation of the physical evidence) that was critically important to Mr. Sifers' defense; her comments about defense counsel improperly shifted the jury's focus away from the evidence and disparaged the role of counsel; her statements about S.T.'s credibility misstated the burden of proof and improperly conveyed the idea that acquittal required the jury to find S.T. was lying. For all these reasons, Mr. Sifers' conviction must be reversed, and the case remanded for a new trial. *Reed, supra*.

- D. In the alternative, Mr. Sifers was denied the effective assistance of counsel when his attorney failed to object and request a curative

instruction to negate the prosecutor's repeated instances of misconduct.

The failure to object to prosecutorial misconduct can constitute ineffective assistance of counsel under the Sixth Amendment. U.S. Const. Amend. VI; *State v. Horton*, 116 Wn.App. 909, 68 P.3d 1145 (2003). Here, there was no strategic reason for defense counsel's failure to object to the numerous instances of prosecutorial misconduct and to request a curative instruction to counter the effect of the misconduct.

In the absence of a curative instruction, the jury was likely swayed by the prosecutor's reference to matters outside the record, by her personal opinion of the evidence and of Mr. Sifers' expert, by her inappropriate comments about defense counsel, and by her improper characterization of the burden of proof. The jurors would have understandably been reluctant to vote "not guilty," knowing that an acquittal (under the prosecutor's logic) would be equivalent to a finding that S.T. was lying.

Defense counsel's failure to object and request a curative instruction requires reversal of the conviction. *Horton, supra*.

IV. CUMULATIVE ERROR REQUIRES REVERSAL OF THE CONVICTION.

An accumulation of non-reversible errors may deny a defendant a fair trial. *State v. Perrett*, 86 Wn.App. 312, 936 P.2d 426 (1997); *State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984). In this case, even if some of

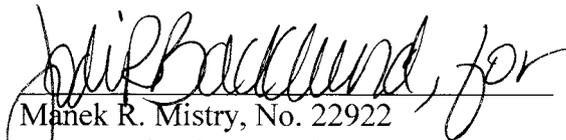
these errors, standing alone, are not of "sufficient gravity," *Coe, supra*, at 789, to require reversal, the combined effect does require a new trial. Because of the trial judges errors, defense counsel's errors, and prosecutorial misconduct, Mr. Sifers was denied a fair trial. His conviction must be reversed and the case remanded to the Superior Court. *Coe, supra*.

CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on February 15, 2007.

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CERTIFICATE OF MAILING

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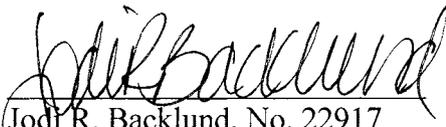
COURT OF APPEALS
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STATE OF WASHINGTON
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on February 15, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 15, 2007.


Jodi R. Backlund, No. 22917
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