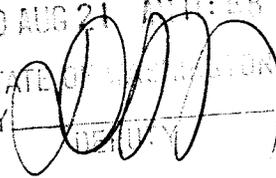


COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY: 

NO. 37309-2-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

AMBROGINO GIOVANNI FANELLI,

Appellant.

BRIEF OF RESPONDENT

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P. M. 8-19-09

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I. STATE'S RESPONSE TO ASSIGNMENTS OF ERROR

1. The Trial Court did not limit cross-examination.
 - a. There was no evidence the trial court limited cross-examination of the victim.
 - b. The trial court properly limited defense counsel from soliciting opinion evidence from the victim's father.
2. The State did not commit prosecutorial misconduct.
 - a. Detective Taylor did not give improper opinion testimony when he told the Defendant during interrogation that he had reasons to disbelieve his story, and elicitation was not prosecutorial misconduct.
 - b. Detective Taylor's testimony concerning the Defendant's physical reactions to questioning was proper and elicitation was not prosecutorial misconduct.
 - c. Detective Taylor's testimony concerning the need for a second victim interview was not improper vouching testimony, was stricken, and did not amount to prosecutorial misconduct.
 - d. Detective Taylor's statement concerning "another child" was innocuous and without context, and was not error or misconduct.
 - e. The State did not violate the Defendant's right to silence or commit prosecutorial misconduct when it impeached the Defendant with his pre-arrest silence.
 - f. The State did not chill the Defendant's right to confrontation when it stated in closing the victim's behavior in court showed she feared the Defendant.
 - g. The State reasonably argued facts already contained in the record, when it stated the victim fears of telling were valid because the Defendant's threat of her never seeing her mother again came true.
 - h. Any statements the State argued in closing which were not supported by the record did not amount to misconduct requiring reversal.

3. The Defendant failed to establish ineffective assistance of counsel with respect to trial counsel's failure to object to an alleged inference Fanelli tried to intimidate Amber Fanelli.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENTS OF ERROR

1. Whether the trial court limited cross-examination of the victim when it never ruled on the State's objection and defense counsel moved from his line of questioning?
2. Whether the trial court properly limited defense counsel's solicitation of opinion evidence from the victim's father?
3. Is an officer's testimony the officer accused the Defendant of not telling the truth during the interrogation improper opinion evidence amounting to prosecutorial misconduct?
4. Whether an officer's testimony to the Defendant's physical reaction during questioning is improper opinion testimony amounting to prosecutorial misconduct?
5. Whether an officer's testimony as to the requirements of the child interview protocol amounted to vouching testimony? Moreover, since the testimony was stricken and the jury instructed to disregard, did it amount to prosecutorial misconduct?
6. Was an officer's innocuous statement given out of context and not linked to the defendant concerning another child error amounting to misconduct?
7. Did the State's cross-examination of the Defendant concerning his pre-arrest silence violate his Fifth Amendment rights and amount to prosecutorial misconduct?
8. Did the State's argument the victim demonstrated she was fearful when the Defendant got near her in

- court, chill the Defendant's right to confrontation and constitute prosecutorial misconduct?
9. Whether the State reasonably argued facts already contained in the record, when it stated the victim fears of telling were valid because the Defendant's threat of her never seeing her mother again came true?
 10. Whether the State's argument of facts not contained in the record amounted to prosecutorial misconduct requiring reversal?
 11. Whether the State inferred the Defendant was part of the witness intimidation of Amber Fanelli when it argued Amber Fanelli's change in testimony prohibited the Defendant from arguing a previously established defense, but did not argue the Defendant knew or took part in the intimidation.
 12. If such inference was made, was the Defendant able to show that but for the lack of objection, the proceeding would have been different.

III. STATEMENT OF THE CASE

Statement of Facts

The State charged Ambrogino "Gio" Fanelli with Child Molestation in the first degree against Jane Doe, DOB 10/4/01. CP 3-4. Pal Lengyel-Leahu originally represented the defendant through the Ryan Hearing, 3.5 hearing, and initial motions in limine. Report of Proceedings (RP) (6/9/06) 3-4, RP (10/9/06 Vol. 1), (10/9/06 Vol 2), (10/10/06). Lengyel-Leahu also interviewed Jane Doe several weeks prior to the Ryan Hearing. RP (10/6/06) 52.

Jane Doe testified at the Ryan Hearing and the trial court found her to be a competent witness. RP (10/6/06 Vol. 1) 6-81, RP (10/6/06 Vol 2) 249. During cross-examination, Jane Doe told defense counsel she'd seen the movies Harry Potter, Hell Boy, and Edward Scissorhands. RP (10/6/06) 56-58. Defense counsel asked Doe about the dementors in Harry Potter. RP (10/6/06) 56. Counsel told Doe the last time they spoke Doe told him the dementors are out in the world, and asked if they bothered her now. RP (10/6/06) 57. Doe said the dementors scared her, but they stayed in the tv. RP (10/6/06) 56. Doe stated, "[t]hey can come in real, sometimes," but said she had never seen one in the real world. RP (10/6/06) 57. Counsel offered, and the court admitted, a copy of his interview with Jane Doe in both audio and transcript form. RP 10/6/06) 71, Ex. (10/6/06) 3, 3A.

Defense counsel questioned Doe about previously telling counsel Gio had a spider voice. RP (10/6/06) 59. At the hearing, Doe said Gio had a spider voice and said Gio showed her his weenie when he was a spider. RP (10/6/06) 59. Doe also told counsel Gio turned into a crab and hurt her when he chopped her with his crab claws. RP (10/6/06) 62-63. Doe elaborated that in her dream Gio turned into a crab and he made a big spider web and tried to put her in the web, until she made herself into a unicorn and got away. RP (10/6/06) 68.

Upon re-direct Doe said she dreamt Gio turned into a spider and a crab and the things in her dreams were not real, but pretend. RP (10/6/06) 73. She also said Gio was not a crab when he was in court that day, but a human. RP (10/6/06) 73. Doe clearly distinguished tv from reality by saying that Harry Potter, Edward Scissorhands, and Hellboy were tv and not real. RP (10/6/06) 75-76. She then said the touching with Gio was real and what happened in her dreams with Gio was pretend. RP (10/6/06) 76. Doe said that Gio's weenie was real. RP (10/6/06) 77.

When Defense counsel recross-examined Doe, Doe told counsel Gio was a crab in her dream and it was untrue Gio was a spider when she drank the pee. RP (10/6/06) 79-80. She also said it was untrue that Gio spoke in a spider voice. RP (10/6/06) 80.

At the end of the Ryan Hearing, the trial court addressed the question of whether Doe could distinguish between fantasy, dream, and reality. RP (10/9/06 Vol. 2) 243. The court noted some of the questions put to Doe were confusing and tended to mix up what she thought were dream and reality. RP (10/9/06 Vol. 2) 244. However, the trial court found Doe was emphatic in her answers and when Doe was asked a direct question of whether something was dream or reality, Doe was able to distinguish the two. RP (10/9/06 Vol. 2) 243-44. Addressing t issue, the Court said, “[w]hether or not that makes her believable is certainly a

question which the trier of fact can decide, but in terms of this hearing, I'm satisfied that she is able to – to sort out and respond to very specific and carefully-worded questions about is this a dream or is this reality.” RP (10/9/06 Vol. 2) 244.

The trial court ruled the statements made by Jane Doe to various people were reliable and admissible at trial. RP (10/9/06 Vol. 2) 249. On the precipice of trial, the Defendant pled guilty to an amended charge of Child Molestation in the First Degree. RP (10/10/06) 71-82, CP 32-46. The Defendant was later allowed to withdraw his guilty plea on the basis he was not entirely aware of the consequences of his plea. RP (4/19/07) 51-53.

After the withdrawal of the plea, new defense counsel was appointed by the court. RP (5/16/07) 3. The matter proceeded to trial with Mr. Bruce Hanify as defense counsel. RP (5/19/07) 3. Prior to trial, the State asked the court to limit the defense from calling Dr. Trowbridge as an expert on competency or calling Jane Doe's competency into question given the trial court's previous ruling. RP (10/12/07) 35-37. The trial court ruled the defense could not call Dr. Trowbridge to give an opinion as to Doe's competency, but said the defense could go into other matters. RP (10/12/07) 37.

Defense counsel agreed he would not call Dr. Trowbridge as a witness concerning competency, but asked the trial court for guidance as to whether it could call Dr. Trowbridge to testify as to basic child psychology, memory, recollection, and dreams. RP (10/12/07) 38. Defense counsel said he knew he could cross-examine Doe on her dreams, but was interested in offering Dr. Trowbridge's testimony so long as it was consistent with the court's ruling on competency. RP (10/12/07) 38. The trial court said it would not foreclose Dr. Trowbridge's testimony, but before the defense offered Dr. Trowbridge's testimony, the court wanted a hearing outside the presence of the jury to determine its admissibility. RP (10/12/07) 38.

The trial court said it has some familiarity with recent case law and was concerned over potential issues in expert testimony on the ability to recall memories and dream sequences. RP (10/12/07) 39. The trial court said the testimony may be admissible, but it wasn't sure. RP (10/12/07) 39. After this exchange, Defense counsel advised the court and prosecution it would not call Dr. Trowbridge. RP (10/12/07) 39.

Trial proceeded December 17 through December 20, 2007. Jane Doe, then six years old, testified at trial. RP (12/18/07) 9-55. Doe was able to distinguish a truth from a lie, promised to tell the truth, and was

competent. RP (12/18/07) 9-10.¹ Doe testified that she has two moms. RP (12/18/07) 18. Robin was her mother who lived with her father Ian and her brother Zach and sister Savannah. RP (12/18/07) 13. Amber was her other mother and the defendant Gio lived with Amber and her other brother Rosielle and sister Orie. RP (12/18/07) 18-19.

The State asked Doe if something happened between Doe and Gio. RP (12/18/07) 21. Doe responded that it was a hard question to answer and that she didn't want to tell in front of all the people in the courtroom. RP (12/18/07) 22. Doe did say that the Gio "keeps hurting" her and agreed to draw what he did to her. RP (12/18/07) 22. Doe drew a round object with a dot in the middle and wrote the word "WENY." RP (12/18/07) 24-25, Ex. (12/18/07) 1. Doe said that this object was located in the middle of a person's body, circled the genital region of an adult male, and said it was used to go pee pee. RP (12/18/07) 25, 41-42, Ex. (12/18/07) 2. She also said that girls do not have weenie's, only boys. RP (12/18/07) 27.

Doe said the weenie she saw was Gio's. RP (12/18/07) 30. Doe described that Gio's weenie touched her butt and touched inside her

¹ Doe counted to ten, correctly said her alphabet, knew her colors, and correctly spelled her name. RP (12/18/07)12-14, 17-18. Doe presented with an ability to recall past events when she told the jury what presents she received and the types of cakes she had for her 5th and 6th birthdays. RP (12/18/07) 14-17. She was also able to tell the jury what presents she received for Christmas and what their Christmas tree looked like. RP (12/18/07) 15-16.

mouth, moving up and down. RP (12/18/07) 31-3-35. Doe elaborated that when the weenie was in her mouth it went all the way in her throat and it choked her. RP (12/18/07) 43. Doe conveyed that while she didn't see anything come out of the weenie, it tasted like pee. RP (12/18/07) 42.

Doe also described when the weenie touched her butt and drew where it touched her. RP (12/18/07) 31, Ex. (12/18/07) 3. She said it was inside her butt and it hurt. RP (12/18/07) 34, 36. She then explained how Gio and she were the only ones awake and that Gio would stick his weenie in her butt and would move it side to side. RP (12/18/07) 37-38. Jane Doe said he put his weenie in her butt a lot. RP (12/18/07) 39-40. She told the jury Gio would give her something when she would cry after he put his weenie in her. RP (12/18/07) 39.

Doe related she told her dad Ian and her mom Robin what Gio did. RP (12/18/07) 40-41. She said the touching happened when she was four and five years old. When the State asked Doe if she had any dreams about Gio, defense counsel objected as to relevance. RP (12/18/07) 50. An unreported sidebar occurred and the court sustained the objection. RP (12/18/07) 51.

Defense counsel's cross-examination occurred shortly after the dream objection. RP (12/18/07) 51-53. Defense counsel said, "I know we've never talked before,...but were there times when Gio turned in to or

talked like a spider; do you remember that?” RP (12/18/07) 53. The State objected, without stating the grounds for the objection, and requested a side-bar. RP (12/18/07) 53. The trial court said, “Counsel, we need to talk.” RP (12/18/07) 53. An unreported sidebar occurred. RP (12/18/07) 53. At the end of the sidebar, the trial court never ruled on the objection. RP (12/18/07) 53. Rather, defense counsel told Doe they were almost done and then asked her about talking with Detective Pat Schallert. RP (12/18/07) 53-54. Counsel then asked if she remembered talking with the other defense counsel. RP (12/18/07) 54. Doe remembered talking with the prior defense counsel, but couldn’t remember telling him about pizza or fingernails. RP (12/18/07) 54. Defense counsel ended his cross-examination shortly thereafter. RP (12/18/07) 55.

Ian, Jane Doe’s father, testified at trial. RP (12/18/07) 64-104.² He and Jane Doe’s mother, Amber were together about two and half years, but were separated approximately 14 months after Jane Doe’s birth. RP (12/18/07) 64, 67, 90. According to Ian, it was a hairy separation and divorce, with custody as the biggest battle. RP (12/18/07) 68. At first Amber had custody of Doe, but around April 2004, Amber voluntarily signed over custody to Ian. RP (12/18/07) 68-69. After that Amber had visitation Monday through Friday every other week. RP (12/18/07) 69.

² The State is refraining from using last names in an effort not to reveal Jane Doe’s identity and means no disrespect.

Sometime later, Amber married the defendant, a long-time friend of Ian's. RP (12/18/07) 70-71. At first Ian was upset by the relationship, but he quickly got over it, and there were no hard feelings as of the date of trial. RP (12/18/07) 71-72.

In late-march/early-April 2006, Jane Doe came up to her father and asked if she could tell him a story. RP (12/18/07) 72-73. Doe was playing with her hands and in a shaky and fearful voice told Ian that "Gio like to choke her, or has choked her." RP (12/18/07) 73-74. Ian asked how Gio choked Doe, asking her if it was with his hands. RP (12/18/07) 74. Doe said he choked her with his weenie. RP (12/18/07) 74. She said if she's not a good girl at her mother's and Gio's, then Doe and Gio will go have private talks in the bedroom. RP (12/18/07) 74. Doe said if anyone knew, Gio told her that she would never get to see her mother again. RP (12/18/07) 74.

Ian didn't report the matter to the police until April 22, 2006. RP (12/18/07) 83. The State asked Ian if after he spoke to Doe he thought to call the police and make a report. RP (12/18/07) 75. Ian said his initial thoughts had nothing to do with calling the police or making a report. RP (12/18/07) 75-76. After Doe told him, he immediately grabbed his wife Robin. RP (12/18/07) 76. Ian said he was about to lose it and wanted to talk to somebody else before he did something he was going to regret. RP

(12/18/07) 76. He told Robin everything Doe said. RP (12/18/07) 76. Not wanting to jump to conclusions, together they decided Ian needed to talk to a psychologist to get a neutral third party involved. RP (12/18/07) 76-77. Afterward, he and Robin went to Doe and told Doe that if she wanted to talk with them about anything they were open and available. RP (12/18/07) 78-79. A couple of days later, Doe came to her father asking him if she could tell him a secret. RP (12/18/07) 79-80. Again Doe said that Gio likes to choke her and that he has touched her. RP (12/18/07) 79. Doe said Gio touched her in the mouth and pointed to her genitals, clarifying he touched her privates. RP (12/18/07) 79. She told her father “that when Gio touches her in the privates, it makes her feel like she’s gotta go potty.” RP (12/18/07) 81.

After Doe’s second statement, Ian called the police. RP (12/18/07) 83. He said he waited so long because “[w]e wanted to get as close to the truth as we could. I mean, there’s a lot of children involved, and we didn’t want to accuse an innocent person of something they – they didn’t do.” RP (12/18/07) 84. Defense counsel did not object. RP (12/18/07) 84.

In late August 2006, Doe again came to her father and asked him if she could tell him about Gio again. RP (12/18/07) 86-87. Doe said that sometimes when she’s laying in bed, he will come get her out of bed, take

her to the living room and pull her underwear down, stick his weenie on or in, her butt. RP (12/18/07) 87.

Ian testified he never discussed good touch/bad touch with Doe, anatomy, or about where strangers may not put hands on Doe's body. RP (12/18/07) 88. He also said as far as he knew Doe never helped in changing the other children's diapers or ever saw him and his wife having sex. RP (12/18/07) 88. Ian stated that when Doe was approximately three years old she expressed reluctance in staying with her mother.

During cross-examination, Defense counsel asked Ian why he didn't report the matter to the police after Doe came to him and said these things. RP (12/18/07) 94. Ian responded that they wanted to make sure they were as close to the truth as possible. RP (12/18/07) 94. Ian went on to say that since there were so many children involved and so many mental states, they wanted to make sure she was telling the truth before they went forward. RP (12/18/07) 94. Counsel then asked why Ian was being so careful. RP (12/18/07) 95. Ian responded because rape of a child is a very huge accusation to just throw out at the word of a three or four year old at the time. RP (12/18/07) 95. Ian said they wanted to make sure they were being given accurate information. RP (12/18/07) 95. Defense counsel asked if there was a reason in Ian's mind to wonder if Holly was being truthful. RP (12/18/07) 95. The State objected and the court

sustained the objection. RP (12/18/07) 95. Defense counsel then stated, “You testified prior that Holly does, in fact, lie sometimes; correct?” RP (12/18/07) 95. The State’s objection was again sustained. RP (12/18/07) 95.

Robin, the step-mother of Jane Doe, testified. RP (12/18/07) 104-114. Robin testified she and Ian discussed what to do after Doe told him about Gio. RP (12/18/07) 107. They were worried about the allegations and thought they should take her to see a psychologist, however were worried if they took Doe to the psychologist and the allegations were true, it could appear Doe was coerced. RP (12/18/07) 108. Thus, they decided Ian would see the psychologist. RP (12/18/07) 108. Robin said they discussed calling the police right then. RP (12/18/07) 108. However, they decided against calling given how serious such accusations could be and wanted to investigate it themselves a bit more. RP (12/18/07) 108. Upon cross-examination, defense counsel asked Robin if she and Ian had actual concerns about whether or not the things Doe said were correct and that this is why they took time to develop the matter. RP (12/18/07) 113. Robin indicated this was true. RP (12/18/07) 113.

After Doe disclosed, Robin met with Amber, informed her Gio had been inappropriate with Doe and there would be no more visitations. RP (12/18/07) 111. Amber corroborated she was not allowed to see Doe

afterward and the defendant encouraged her not to see Doe. RP (12/19/07 Vol. 1) 18, 30.

The State presented testimony that Amber, Doe's mother, brought Doe to the Emergency Department on September 17, 2004 based upon her suspicion Doe was being molested. RP (12/18/07) 135, 137, RP (12/19/07 Vol. 1) 11-12. Dr. Brian Hoyt spoke with Amber and examined Doe. RP (12/18/07) 137. Amber told Hoyt she noticed Doe didn't like playing with other boys and didn't like it when her male friend tried to change Doe's diaper during Doe's last visitation. RP (12/18/07) 137. Amber also told Hoyt she noticed some vaginal redness about two weeks ago after she picked Doe up from her father's, and again that day. RP (12/18/07) 137. Amber also saw vaginal swelling. RP (12/19/07 Vol. 1) 13. Hoyt visually examined Doe and found the same vaginal redness Amber described. RP (12/18/07) 138. Hoyt stated he viewed the outside of Doe's vagina and anus and described what he saw as a bright redness on the labia, to the sides of the vagina. RP (12/18/07) 139, 149. Hoyt stated he did not perform a colposcope examination as the emergency room did not have a colposcope and Doe was so young as the exam would be painful without sedation. RP (12/18/07) 142. Hoyt did not note any injuries based upon his visual examination of Doe's anus. RP (12/18/07) 139. However, Hoyt indicated that the lack of any injury was not

definitive of sexual assault. RP (12/18/07) 144. Hoyt said that there could be penetration of the anus without creating any injuries. RP (12/18/07) 144.

The State also presented testimony from multiple sources that witnesses saw the Defendant babysitting Doe. RP (12/18/07) 118-120, 122-124. Additionally, Doe's grandmother and Great Aunt noticed Doe would shy away from the Defendant and kept at least ten feet from him. RP (12/18/07) 125, 130.

Amber Fanelli, Jane Doe's mother, testified at trial. RP (12/18/07) 151-171, RP (12/19/07 Vol. 1) 11-35. She stated currently she and the Defendant were in the middle of a divorce that she filed November 30, 2007. RP (12/18/07) 153. Amber corroborated the details of her and Ian's divorce. RP (12/18/07) 160. She agreed the divorce was less than civil and while she had custody of Doe originally, she voluntarily gave Ian custody in April of 2004. RP (12/18/07) 160. She was together with the Defendant at this time, and they both agreed that a change in custody was appropriate. RP (12/18/07) 161. Amber testified that when she and the Defendant spoke about the parenting plan with Ian, the Defendant said "he didn't want to get caught in the middle of it because he didn't want anything bad happening to him." RP (12/18/07) 169. Specifically in September 2004, he was worried about being accused of doing anything

harmful or hurtful or being accused of molesting her. RP (12/18/07) 169. However, Gio babysat Doe after the custody change when Amber was at work. RP (12/18/07) 165-68.

Amber testified she noticed behavior changes in Doe. RP (12/18/07) 168. She said Doe did not want to be around the Defendant or left alone with him. RP (12/18/07) 168. She noticed Doe having bed wetting accidents and remembered her having one night terror. RP (12/18/07) 170. She also said Doe didn't like to be around most men and didn't like to be touched by them. RP (12/18/07) 170. Furthermore, when Doe was two or three she didn't like her to have Amber or the Defendant change her diaper and would cry and scream, telling them no. RP (12/19/07 Vol. 1) 11, 28. Amber testified that to her knowledge Doe had never seen her and the Defendant having sex. RP (12/19/07 Vol. 1) 15.

Amber admitted she testified falsely in the Ryan Hearing in October 2006, when she and the Defendant were still together. RP (12/18/07) 154. Amber told the jury she lied in the Ryan hearing when she testified the Defendant never had access to Jane Doe. RP (12/18/07) 155-56. Amber acknowledged by testifying differently at trial she was placing herself in jeopardy of criminal charges of perjury and had not received immunity from those charges. RP (12/18/07) 155. She also

knew that she could be sent to jail, lose her career and her son. RP (12/18/07) 155.

She explained that she lied because she was trying to protect her son and didn't want her son taken from her. RP (12/18/07) 156, RP (12/19/07 Vol. 1) 30. Amber testified the Defendant's mother told her if she didn't try to protect the Defendant, the mother would take away her child. RP (12/18/07) 156. Amber said the Defendant's mother told her what to say for the Ryan Hearing. RP (12/18/07) 156-57.

Lastly, Amber testified that in July 2007, the Defendant had his penis pierced. RP (12/19/07 Vol. 1) 17. The Defendant told Amber he was specifically getting the piercing so there would be something Doe didn't know was there and he could try to win the case. RP (12/19/07 Vol. 1) 17.

The State presented testimony from Detective Pat Schallert concerning her two interviews with Jane Doe. Detective Schallert explained the Cowlitz County Child Sexual Abuse Investigation protocol states when a child is interviewed, another detective, prosecuting attorney and sometimes a CPS worker will sit in the adjacent room watching and listening to the interview. RP (12/19/07 Vol. 1) 48-49.

Detective Schallert first interviewed Jane Doe on May 4, 2006. RP (12/19/07 Vol. 1) 51. Doe told her that Gio hurts her with his weenie. RP

(12/19/07 Vol. 1) 59-60. She was able to tell Schallert that a weenie is what boys use when they go potty. RP (12/19/07 Vol. 1) 60. She also told Schallert that Gio makes her drink his pee, he had her lick it and it tasted yucky. RP (12/19/07 Vol. 1) 60, 65. Doe then drew a picture of Gio's weenie for Schallert. RP (12/19/07 Vol. 1) 61, Ex. (12/19/07 Vol. 1) 4. Doe said there was hair on weenie and drew lines on the weenie. RP (12/19/07 Vol. 1) 62-63. She also said he puts his weenie in her mouth and the pee looked like the color of plastic or the color of fingernails. RP (12/19/07 Vol. 1) 63, 65. Doe drew a second picture for Schallert of Gio's weenie. RP (12/19/07 Vol. 1) 67. She moved her open fist back and forth over the drawing and said "that's what he does, he squeezes it and pee comes out." RP (12/19/07 Vol. 1) 67-68, Ex. (12/19/07 Vol. 1) 5.

Detective Schallert interviewed Doe again on May 11, 2006. RP (12/19/07 Vol. 1) 71. Schallert explained the only reason for the second interview was because the prosecutor assigned to sit in on the first interview was unable to attend the first interview. RP (12/19/07 Vol. 1) 72. She said according to the protocol, a Prosecuting Attorney needs to be able to view what the child is disclosing and what the child is capable of, her age level, et cetera, whether she's capable of proceeding with whatever, and if it's necessary. RP (12/19/07 Vol. 1) 72. The second interview was not set up like the first. RP (12/19/07 Vol. 1) 73. It was

mostly for the prosecuting attorney to understand the level of where the child was at and get a grasp of what the child was saying about the allegation. RP (12/19/07 Vol. 1) 73.

During the second interview, Doe told the prosecutor and Detective Schallert that Gio hurts her by putting stuff in her mouth and hurts her under her butt. RP (12/19/07 Vol. 1) 74. She again reiterated that Gio squeezes his weenie and pee comes out and it makes her sick. RP (12/19/07 Vol. 1) 75. She said she was four years old when it happened. RP (12/19/07 Vol. 1) 83. She made another drawing, including the hair, saying she put her mouth on it and it chokes her. RP (12/19/07 Vol. 1) 75,79, Ex. (12/19/07 Vol. 1) 9. Doe said she sucked Gio's weenie and licked his pee. RP (12/19/07 Vol. 1) 81. He then rubs it up and down and his potty comes out. RP (12/19/07 Vol. 1) 81-82. Doe said that Gio puts his weenie in her butt and it hurts her. RP (12/19/07 Vol. 1) 76. Doe also said that he put it everywhere, also on her front. RP (12/19/07 Vol. 1) 77. She said the front hurt and he did it hard, but he hurt her carefully. RP (12/19/07 Vol. 1) 77.

During cross-examination defense counsel said, "And, then, when you asked what should happened to Gio, her response was, "He should go down"? Do you think that's kind of an unusual thing for a four-year old to say? RP (12/19/07 Vol. 1) 100. The State objected as to opinion and the

court sustained the objection. RP (12/19/07 Vol. 1) 100. Defense counsel moved onto another question and Detective Schallert never corroborated defense counsel's recitation that Doe said "He should go down." RP (12/19/07 Vol. 1) 100.

The State next called Detective Fred Taylor. Detective Taylor described the Child interview protocol usually requires there be two detectives, one who interviews, the other takes notes, and also that a prosecutor and sometimes a CPS worker observe the interview. RP (12/19/07 Vol. 1) 114. Taylor explained that in the protocol and his training, child interviews are usually limited to one to avoid the risk of tainting children and because they know the children will likely also be interviewed by a number of individuals later. RP (12/19/07 Vol. 1) 115. Detective Taylor explained the reason why Doe was interviewed a second time was because the prosecutor assigned to the original interview had to leave in the middle of the interview. RP (12/19/07 Vol. 1) 120. He then went on to say, without being questioned, that one of the reasons a prosecutor is present is to help determine the child's credibility. RP (12/19/07 Vol. 1) 121. Defense counsel did not object, but the trial court called a break. RP (12/19/07 Vol. 1) 121.

Outside the hearing of the jury, the trial court raised concern over Taylor's testifying as to the reason the prosecutor is present. RP (12/19/07

Vol. 1) 121-122. The State said it was open to suggestions from the court and counsel as to how they wished to proceed, and proposed a jury instruction or moving on as to not create any undo emphasis on the matter. RP (12/19/07 Vol. 1) 121-122. Defense counsel asked the court to instruct the jury or have them disregard the last answer. RP (12/19/07 Vol. 1) 122. The trial court agreed and instructed the jury that the last question and answer were stricken and to disregard the last answer. RP (12/19/07 Vol. 1) 123.

In addition to sitting in the second interview of Doe, Taylor interviewed the Defendant. Taylor interviewed the Defendant on May 24, 2006. RP (12/19/07 Vol. 1) 125. Prior to the interview Taylor read the Defendant his Miranda rights and the Defendant waived those rights and agreed to speak with Taylor. RP (12/19/07 Vol. 1) 126-127, RP (12/19/07 Vol. 2) 199. Soon into the interview Taylor asked Fanelli if he knew what the interview was about. RP (12/19/07 Vol. 1) 127. Fanelli told Taylor he knew it was about inappropriate touching and contact. RP (12/19/07 Vol. 1) 127.

Taylor testified how the interview progressed with the Defendant. Fanelli first spoke with Taylor about his family, the living and custody arrangements, and whether he saw any inappropriate touching between Doe and the roommate Pete Coughlan. RP (12/19/07 Vol. 1) 128. Fanelli

gave Taylor his opinion that Doe was slow and difficult to understand and that her behavior changed toward men in May 2005. RP (12/19/07 Vol. 1) 128-29. Fanelli told Taylor he did not have any opportunity to be alone with Doe as he was in the military and out of town a lot. RP (12/19/07 Vol. 1) 129-30. Additionally, Fanelli told Taylor he never bathed Doe or put her to bed. RP (12/19/07 Vol. 1) 130. Taylor asked Fanelli why he thought Doe might make such accusations and Fanelli opined that someone might have put her up to it. RP (12/19/07 Vol. 1) 131.

At this point, Taylor confronted Fanelli with the specific allegations. RP (12/19/07 Vol. 1) 131. When Fanelli told him it wasn't true and had a flat affect, Taylor went back and discussed Fanelli's opportunities to be around Doe and if Doe had ever seen Fanelli and Amber having sex. RP (12/19/07 Vol. 1) 131-32. Taylor then spoke with Fanelli if Doe could have misconstrued any innocent touching on Fanelli's part. RP (12/19/07 Vol. 1) 132. After Fanelli denied this, Taylor asked him how he felt about the accusations. RP (12/19/07 Vol. 1) 133. Receiving another denial with a flat affect, Taylor said near the end of the interview he became pointed with Fanelli. RP (12/19/07 Vol. 1) 134. He confronted him with the specific allegations and gave Fanelli several reasons why Taylor thought Fanelli wasn't being truthful with Detective Taylor. RP (12/19/07 Vol. 1) 133. It was made clear on the record that it

was during the interview that Detective Taylor told Fanelli that he thought he wasn't being truthful. RP (12/19/07 Vol. 1) 133. Taylor said near the end of the interview Fanelli accused Taylor of being aggressive. RP (12/19/07 Vol. 1) 133. The Defendant said to Taylor that the tone of the interview had changed. RP (12/19/07 Vol. 1) 134.

The State asked Taylor what was Fanelli's tone and temperament when he said the allegations weren't true. RP (12/19/07 Vol. 1) 131. Taylor said Fanelli "wasn't very confrontational about it, he just kind of flatly said it wasn't true, and he didn't do it." RP (12/19/07 Vol. 1) 131. Taylor said Fanelli didn't appear to be upset and had a flat facial expression. RP (12/19/07 Vol. 1) 131. The State asked what Taylor meant by "flat?" RP (12/19/07 Vol. 1) 131. Taylor explained, "[j]ust a flat affect. I mean, he didn't pound the table; he didn't come across the table at me, he didn't stand up and yell; he just was kind of a flat affect, sat there and said he didn't do it." RP (12/19/07 Vol. 1) 131-132.

Later during direct examination the State asked Taylor if he received any information from Ian Wood about an additional disclosure of possible anal penetration in August 2007. RP (12/19/07 Vol. 1) 136. Taylor responded, "I don't remember if it was – there was something with another child this summer." RP (12/19/07 Vol. 1) 136. The State said "[n]ot that." RP (12/19/07 Vol. 1) 136. Defense counsel objected as to

relevance and asked that it be stricken. RP (12/19/07 Vol. 1) 137. The trial court sustained the objection and instructed the jury to disregard the last answer. RP (12/19/07 Vol. 1) 137.

Defense counsel asked for a mistrial saying that the non-responsive answer could be interpreted in two different ways. RP (12/19/07 Vol. 1) 140. The court denied the mistrial saying he already instructed the jury to disregard the answer. RP (12/19/07 Vol. 1) 141. The trial court did advise defense counsel that it would give an additional curative instruction should counsel wish. RP (12/19/07 Vol. 1) 141. Counsel did not propose an instruction. RP (12/19/07 Vol. 1) 141-155.

The Defendant testified in his defense. During direct examination, Fanelli said Detective Taylor called him to talk and he went down to talk with him. RP (12/19/07 Vol. 2) 198. Fanelli explained the reason his affect was flat during his interview with Taylor was that he had nothing to hide and there was no point in him jumping up and down and screaming. RP (12/19/07 Vol. 2) 199. Fanelli said when Taylor became aggressive in the conversation he decided to end the talk because he no longer felt comfortable. RP (12/19/07 Vol. 2) 200. The Defendant said he wasn't bothered that a law enforcement officer was talking to him about the allegations, but rather that the allegations were made in the first place. RP (12/19/07 Vol. 2) 200.

The Defendant also testified to the close relationship he had with his parents and how involved his mother was in the allegations. RP (12/19/07 Vol. 2) 201-205. On a number of occasions Fanelli expressed concern that he would be accused of some sort of abuse. RP (12/19/07 Vol. 2) 185, 204, 205, 214, 221. His mother was particularly worried about where the allegations were coming from and disliked Amber immensely. RP (12/19/07 Vol. 2) 200, 205-06. Defense counsel asked Fanelli if he knew anything about the allegations that his mother tried to influence Amber's testimony. RP (12/19/07 Vol. 2) 205. Rather than answering the question directly, Fanelli said Amber and his mother never got along and expressed such many times. RP (12/19/07 Vol. 2) 205. Fanelli indicated that his mother would speak her mind and she and Amber clashed on a regular basis. RP (12/19/07 Vol. 2) 205. He then said he never heard his mother tell Amber she had to testify in a certain way. RP (12/19/07 Vol. 2) 206.

During cross-examination Fanelli admitted he knew about the allegations of inappropriate touching at least several days if not a week in advance of speaking with Taylor. RP (12/19/07 Vol. 2) 208. He said the reason he never sought out Taylor to speak about the allegations was that Taylor spoke to his wife and asked Amber if Fanelli would be willing to meet with him. RP (12/19/07 Vol. 2) 208-09. Fanelli admitted that over

the years he was concerned that something like this might happened and did his best to protect himself. RP (12/19/07 Vol. 2) 209. Thus, when asked if he was prepared when he went into the interview with Taylor, Fanelli admitted he was. RP (12/19/07 Vol. 2) 210.

Prior to closing arguments, the trial court read the jury instructions to the jury. RP (12/20/07) 5-15. In one of the instructions, the court told the jury “the evidence that you are to consider...consists of the testimony that you heard from the witnesses and from the exhibits that [are] admitted during the trial. If the evidence was not admitted, or was stricken from the record, then you are not to consider it in reaching your verdict.” RP (12/20/07) 6, CP 189. Additionally, the court told the jury if it ruled evidence was inadmissible, or if the court asked the jury or directed the jury to disregard any evidence, then the jury was not to discuss that evidence or consider it in reaching their verdict. RP (12/20/07) 7, CP 189. The court also instructed the jury that they were the sole judges of the credibility of each witness. RP (12/20/07) 7 CP 190. Finally, the court instructed the jury:

The lawyers’ remarks, statements and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers’ statements are not evidence. The evidence is the testimony and the exhibits, the law as contained in my instruction to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

RP (12/20/07) 8, CP 190.

In the State's closing, the State reminded the jury that Doe told her father she and Gio had private talks and Gio told her if she told she would never see her mother again. RP (12/20/07) 19. The State argued the Defendant's threat came true, because Doe did not see her mother afterward. RP (12/20/07) 19.

The State also argued the Defendant's behavior toward Doe and statements he made to various people afterward indicated he set up multiple defenses in advance of trial. RP (12/20/07) 26-28. The State argued those defenses changed throughout the years. RP (12/20/07) 26-28. One such changed defense was the argument the Defendant couldn't have touched Doe because he didn't have the opportunity. In the interview with Taylor, the Defendant told Taylor he never had the opportunity to touch Doe because he was always out of town. RP (12/20/07) 27. The State argued this defense withered when Amber changed her Ryan Hearing testimony and testified at trial that he did babysit. RP (12/20/07) 28. In arguing Amber's credibility the State declared the change in Amber's testimony was reasonable given the threats by the defendant's mother. RP (12/20/07) 28. The state never said the Defendant was aware of his mother's threat or played a part in that

threat, but that he was aware he could no longer rely on Amber's former testimony as a defense. RP (12/20/07) 28-29.

During the Defense closing argument, counsel argued it was unusual for a child to say that their abuser "should go down." RP (12/20/07) 36. Counsel also argued the "elephant in the room" was that things were not going well at Ian and Robin's house. RP (12/20/07) 39-42. Counsel argued Ian and Robin may have something to hide, citing that the redness viewed by Amber and Doe's behavior changes coincided with visitation with Ian. RP (12/20/07) 44-45.

During the State's rebuttal, the State countered there was no testimony from Doe that she didn't like Ian or Robin or that anything untoward was happening at her father's home. RP (12/20/07) 45. The prosecutor pointed out that contrary to defense counsel's argument the only testimony concerning bruising came from the defendant and not the doctor or Amber. RP (12/20/07) 45. The State reminded the jury that counsels' remarks were not evidence. RP (12/20/07) 46.

The State then asked the jury to remember Doe's demeanor on the stand. RP (12/20/07) 46. It asked them to recollect how many times Doe waived to Robin and her behavior when the Defendant came closer to her when she was drawing during her testimony. RP (12/20/07) 46. The State argued Doe was obviously scared because she paused and looked during

her testimony. RP (12/20/07) 46. The State then said it was the first time the Defendant had been that close to Doe in years. RP (12/20/07) 46. Defense counsel objected to facts not in evidence and the trial court sustained the objection and instructed the jury to disregard the last comment. RP (12/20/07) 46.

The Defendant was found guilty. RP (12/20/07) 57-58, CP 205.

IV. ARGUMENT

1. THE TRIAL COURT DID NOT IMPROPERLY LIMIT CROSS-EXAMINATION.

A defendant has a Sixth Amendment right to confront and cross-examine adverse witnesses. *See State v. Hudlow*, 99 Wa.2d 1, 15, 659 P.2d 514 (1983) *citing Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974). An appellate court reviews a trial court's limitation of the scope of cross-examination under a manifest abuse of discretion standard. *See State v. Darden*, 145 Wa.2d 612, 619, 41 P.3d 1189 (2002). Additionally, any error is also subject to review under a harmless beyond a reasonable doubt standard. *See State v. R.H.S.*, 94 Wn.App. 844, 849, 974 P.2d 1253 (1999).

The right to cross-examination has its limitations and can be waived by a defendant. *See id., In re Sauve*, 103 Wn.2d 322, 330, 692

P.2d 818 (1985). For instance, a defendant does not have a right to present irrelevant or prejudicial evidence. *See Hudlow*, 99 Wa.2d at 15. A court looks to see how essential the witness is to the prosecution's case. *See State v. Darden*, 145 Wa.2d 612, 619. The more essential the witness, the more latitude defense counsel is given to explore motive, bias, credibility, or foundational matters. *See id.*

A. THERE WAS NO EVIDENCE THE TRIAL COURT LIMITED CROSS-EXAMINATION OF THE VICTIM.

The Defendant argues the trial court improperly limited defense counsel's cross-examination of Jane Doe, however, the evidence he uses is conjecture and not supported by the transcript.

The Defendant states the trial court restricted defense counsel's cross-examination of Jane Doe by preventing counsel from asking Doe about her pre-trial statements that Gio turned into a spider. Def. Brf at 15-16. However, the record does not support the Defendant's assumption the court limited defense counsel in any way. The record actually supports a finding the trial court would have allowed questioning into this topic, but defense counsel voluntarily abandoned this line of questioning. To examine this issue, one must look to the prior defense counsel's interview

with Jane Doe, the Ryan Hearing, and the motions in limine before examining the trial record.

During prior defense counsel's interview with Doe, Doe said Gio had a spider voice and Gio showed her his weenie when he was a spider. RP (10/6/06) 59, Ex. (10/6/06) 3, 3A. Defense Counsel questioned Doe at the Ryan Hearing about these prior statements. RP (10/6/06) 59. Doe again told counsel that Gio had a spider voice, turned into a spider, and hurt her when he chopped her with his crab claws. RP (10/6/06) 62. Upon re-direct Doe clearly established what she told counsel was a dream and not reality and that Gio never was a spider or crab in real life. RP (10/6/06) 73-80.

At the Ryan Hearing, the trial court found Doe was able to distinguish when something was real and what was a dream. RP (10/9/06 Vol. 2) 243. The trial court found the testimony concerning dreams and reality helpful in determining Jane Doe's competency and her credibility. RP (10/9/06 Vol. 2) 243-244. The Court actually foretold its potential ruling at trial when it said, "[w]hether or not [she can distinguish between the two] makes her believable is certainly a question which the trier of fact can decide...." RP (10/9/06 Vol. 2) 244.

The trial court's position on this matter did not change during the motions in limine. During the motions the State asked the court to limit

the defense from calling Dr. Trowbridge as an expert on competency or calling Jane Doe's competency into question. RP (10/12/07) 35-37. The trial court ruled the defense could not call Dr. Trowbridge to give an opinion as to Doe's competency, but said the defense could go into other matters. RP (10/12/07) 37.

Defense counsel asked the trial court for guidance as to whether it could call Dr. Trowbridge to testify as to basic child psychology, memory, recollection, and dreams. RP (10/12/07) 38. The trial court said it would not foreclose Dr. Trowbridge's testimony, but had some concerns given recent case law about potential issues of expert testimony about the ability to recall memories and dream sequences. RP (10/12/07) 39. The trial court stated the testimony may be admissible, but it wasn't sure. RP (10/12/07) 39. Defense counsel demonstrated his understanding of the court's position when he said he knew he could cross-examine Doe on her dreams, however advised the court and prosecution it would not call Dr. Trowbridge. RP (10/12/07) 38-39.

Based upon his representation that counsel knew he could question Doe about the dreams, the State sought to introduce the matter of dreams in direct examination and asked Doe if she had any dreams about Gio. RP (12/18/07) 50. Surprisingly, the defense counsel objected as to relevance. RP (12/18/07) 50. An unreported sidebar occurred, resulting in the court

sustaining the objection and the State asked no further questions about dreams. RP (12/18/07) 51.

Defense counsel's cross-examination occurred shortly after the dream objection. RP (12/18/07) 51-53. Defense counsel said to Doe, "I know we've never talked before,...but were there times when Gio turned in to or talked like a spider; do you remember that?" RP (12/18/07) 53. The State objected, without stating the grounds for the objection, and requested a side-bar. RP (12/18/07) 53. The trial court said, "Counsel, we need to talk." RP (12/18/07) 53. An unreported sidebar occurred. RP (12/18/07) 53. At the end of the sidebar, the trial court never ruled on the objection. RP (12/18/07) 53.

Defendant cites this portion of the transcript in his statement of facts. Def. Brf at 6. However, he then comes to the baseless assumption the objection was sustained "because defense counsel moved on to a new topic." Def. Brf. At 6. Defendant uses this assumption as the basis for his argument the trial court limited cross-examination. The Defendant's assumption is counter-intuitive to the entire record before the court.

The trial court found the information concerning Doe's ability to distinguish between dream and reality helpful during the Ryan Hearing. RP (10/9/06 Vol. 2) 243-244. Additionally, the court stated this evidence would be helpful to the trier of fact at trial, i.e. the jury. RP (10/9/06 Vol.

2) 243. Moreover, the trial court told defense counsel it could go into other matters than competency, and left it open to defense whether it wanted to call an expert on dream recollection. RP (10/12/07) 37-39. It was only as to the admissibility of expert testimony about dream recollection and dream sequences the court said it was unsure. RP (10/12/07) 38-39.

Given the record, it is more logical that defense counsel decided not to question Doe about this topic. Defense counsel was aware it could question Doe about the dreams concerning Gio. RP (10/12/07) 38-39. Counsel was also aware of Doe's answers at the Ryan Hearing and her ability to distinguish between dreams and reality. RP (10/6/06) 73-80, RP (10/12/07) 37-39. Counsel also knew the trial court's finding that Doe could distinguish between dreams and reality when given clear questions. RP (10/12/07) 37-39. Lastly, Counsel objected during the State's direct examination concerning dreams and successfully kept this testimony from the jury. RP (12/18/07) 50-51.

It is reasonable to believe counsel changed his mind and abandoned this line of questioning after the State objected to the very type of questioning to which the defense earlier excluded. Defense counsel was not shut down by this objection as demonstrated by his continuing to question Doe about what she told Detective Schallert and if she

remembered talking to the prior defense counsel. RP (12/18/07) 53-54. Moreover, he asked Doe if she remembered talking to defense counsel about pizza and fingernails. RP (12/18/07) 54. It is reasonable to conclude counsel decided not to question Doe about dreams as to not make her a more credible witness to the jury. In accordance with *In re Sauve*, 103, Wn.2d 322, 330, 692 P.2d 818 (1985), defense counsel waived the right to confrontation with he made no attempt to exercise that right at trial.

B. THE TRIAL COURT PROPERLY LIMITED DEFENSE COUNSEL'S SOLICITATION OF OPINION EVIDENCE FROM THE VICTIM'S FATHER.

The Defendant briefly argues the trial court improperly limited defense counsel's cross-examination of Doe's father Ian because the State opened the door to allow Ian to give an opinion on his daughter's credibility. Def. Brf. at 18. The Defendant does not appeal the testimony of Ian as improper evidence of opinion, but rather argues the admission of such evidence opened the door to allow the defense to elicit opinion testimony.

When reviewing an allegation of limitation of cross-examination, the reviewing court must first determine whether the proposed evidence was admissible in the first place. *See State v. Darden*, 145 Wa.2d 612,

619-21, 41 P.3d 1189 (2002). The Defendant's right to cross-examination is limited in two ways. *See id.* at 621. First, the evidence sought must be relevant; second, relevant evidence "must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial." *Id.* A trial court's decision to admit evidence is reviewed for abuse of discretion. *See State v. Darden*, 145 Wa.2d 612, 619, 41 P.3d 1189 (2002).

In general, opinion evidence on the victim's credibility is prohibited as it invades the province of the jury. *See State v. Kirkman*, 159 Wa.2d 918, 928, 155 P.3d 125 (2007), *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987), *State v. Suarez-Bravo*, 72 Wa. App. 359, 366, 864 P.2d 426 (1994). To determine whether statements are impermissible opinion testimony, the court will consider (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *See State v. Demery*, 144 Wa.2d 753, 759, 30 P.3d 1278 (2001).

During direct examination, the State elicited a lengthy explanation of what Ian did immediately after Doe disclosed the unlawful touching. RP (12/18/07) 76-77. Before calling the police Doe made additional statements about the touching to Ian. RP (12/18/07) 76-80. When the State asked Ian why he didn't call the police immediately after Doe told

him of the unlawful touching, he said he waited so long because “[w]e wanted to get as close to the truth as we could. I mean, there’s a lot of children involved, and we didn’t want to accuse an innocent person of something they – they didn’t do.” RP (12/18/07) 84. Defense counsel did not object. RP (12/18/07) 84. Contrary to Defendant’s rendition, Ian did not say that he did not believe Doe, but rather that the accusations were so serious and so many lives were involved that he was being careful. RP (12/18/07) 84, Def. Brf at 18.

During cross-examination, Defense counsel asked Ian why he didn’t report the matter to the police after Doe came to him and said these things. RP (12/18/07) 94. Ian responded that they wanted to make sure they were as close to the truth as possible. RP (12/18/07) 94. Ian went on to say that since there were so many children involved and so many mental states, they wanted to make sure that she was telling the truth before they went forward. RP (12/18/07) 94. Counsel then asked why Ian was being so careful. RP (12/18/07) 95. Ian responded because rape of a child is a very huge accusation to just throw out at the word of a three or four year old at the time. RP (12/18/07) 95. Ian said they wanted to make sure that they were being given accurate information. RP (12/18/07) 95. Defense counsel then asked if there was a reason in Ian’s mind to wonder if Holly was being truthful. RP (12/18/07) 95. The State objected and the

court sustained the objection. RP (12/18/07) 95. Defense counsel then stated, “You testified prior that Holly does, in fact, lie sometimes; correct?” RP (12/18/07) 95. The State’s objection was again sustained. RP (12/18/07) 95.

Using the five factors under *State v. Demery*, 144 Wa.2d 753, 759, 30 P.3d 1278 (2001), the defense counsel asked the victim’s father and reporter of the crime to testify whether he felt his daughter lied about the sexual accusations and if she was known to lie in the past. The defense raised by the Defendant was that Doe either lied about the accusations and/or that her parents had coached her to make up the accusations. The trial court already had the testimony of Doe about the accusations, her statements to her father about the sexual touching, and why her father waited to report the matter to the police. Under *State v. Demery*, 144 Wa.2d 753, 759, it appears defense counsel attempted to elicit opinion testimony from Ian. There does not appear to be any legitimate basis for this opinion testimony other than to invade the province of the jury. Thus, it was not an abuse of discretion by the trial court to prevent the testimony. Furthermore under *State v. Darden*, 145 Wa.2d 612, 619-21, 41 P.3d 1189 (2002), cross-examination was properly limited to prevent opinion evidence that was so prejudicial as to disrupt the fairness of the trial.

The Defendant argues Ian was in a unique position to know whether Doe had a propensity to lie. Def. Brf at 18. This testimony may have been allowed under Evidence Rule 608. *See* WA ER 608 (2009).

Evidence Rule 608 states:

The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

However, defense counsel did not phrase his question in the appropriate form to establish whether Doe had a character for truthfulness or untruthfulness. Instead he asked if Doe had ever lied in the past. RP (12/18/07) 95. This borders on a instance of specific conduct prohibited under Evidence Rule 608(b). Thus the trial court's limitation as to this question was appropriate and not an abuse of discretion. Moreover it was not a violation of the defendant's right to cross-examination, as the Defendant must comply with the rules of evidence under *State v. Darden*, 145 Wa.2d 612, 619-21, 41 P.3d 1189 (2002).

2. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT.

The Defendant accuses the State of multiple incidents of prosecutorial misconduct. In order to establish prosecutorial misconduct the Defendant "must show that the prosecutor's conduct was improper and

prejudiced his right to a fair trial.” *State v. Boehning*, 127 Wa.App. 511, 518, 111 P.3d 899 (2005) *citing State v. Dhaliwal*, 150 Wa.2d 559, 578, 79 P.3d 432 (2003). Prejudice is shown where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” *Id.* When a defendant fails to object to alleged misconduct at trial he waives the right to assert misconduct on appeal, unless the Defendant shows the “remark was so flagrant and ill intentioned that it causes enduring and resulting prejudice that a curative instruction could not have remedied.” *Id.* If the Appellate court finds the remark to be misconduct, it will review it for its prejudicial nature and cumulative effect to determine if reversal is necessary. *See id.*

A. DETECTIVE TAYLOR’S TESTIMONY.

1. Detective Taylor did not give improper opinion testimony when he told the defendant during interrogation that he had reasons to disbelieve his story, and elicitation was not prosecutorial misconduct.

The Defendant alleges the State committed prosecutorial misconduct when it elicited testimony from Detective Taylor that during his interrogation of the Defendant, Taylor told the Defendant he thought he was lying. Def. Brf at 19-20.

As already stated above, opinion evidence on the victim’s or defendant’s credibility is prohibited as it invades the province of the jury.

See State v. Kirkman, 159 Wa.2d 918, 928, 155 P.3d 125 (2007), *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987), *State v. Suarez-Bravo*, 72 Wa. App. 359, 366, 864 P.2d 426 (1994). To determine whether statements are impermissible opinion testimony, the court will consider (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *See State v. Demery*, 144 Wa.2d 753, 759, 30 P.3d 1278 (2001).

It is well accepted that an officer may testify that during their interview of the defendant, they told the defendant they believed the defendant was lying to the officer. *See id.*, at 765. In *State v. Demery*, the trial court admitted a taped interview between Demery and the police. *See id.* at 757. During that interview the police tell Demery he needs to start telling the truth and question his story as truthful. *See id.* The Court of Appeals upheld the admission, finding the statements were not impermissible opinion testimony because the officer's statements were not testimony given at trial under oath. *See id.* 759-60. The court found the statements were part of a police interview technique commonly used to determine whether a suspect will change their story during the interview, and not an opinion given on the day of trial about the defendant's veracity. *See id.* Moreover, the court found the jury does not give these kind of

statements additional reliability because they do not expect the officer to believe the defendant during an interview. *See id.*

In the present case, the Defendant argues Taylor's testimony was not an interrogation tactic, but constituted Detective Taylor's opinion on the day of trial that the Defendant was untruthful. Def. Brf. at 21. At trial Taylor testified how the interview progressed with the Defendant. He said after reading Fanelli his Miranda rights and the defendant agreeing to testify, that Fanelli told him he knew the interview was about inappropriate touching with Doe. RP (12/19/07 Vol. 1) 127. Fanelli then spoke with Taylor about his family, the living and custody arrangements, and whether he say an inappropriate touching between Doe and the roommate Pete Coughlan. RP (12/19/07 Vol. 1) 128. Fanelli then gave Taylor his opinion that Doe was slow and difficult to understand and that her behavior changed toward men in May 2005. RP (12/19/07 Vol. 1) 128-29. Fanelli told Taylor he did not have any opportunity to be alone with Doe as he was in the military and out of town a lot. RP (12/19/07 Vol. 1) 129-30. Additionally, Fanelli told Taylor he never bathed Doe or put her to bed. RP (12/19/07 Vol. 1) 130. Taylor asked Fanelli why he thought Doe might make such accusations and Fanelli opined that someone might have put her up to it. RP (12/19/07 Vol. 1) 131.

After the above exchange, Taylor confronted Fanelli with the specific allegations. RP (12/19/07 Vol. 1) 131. When Fanelli told him it wasn't true and had a flat affect, Taylor went back and again discussed Fanelli's opportunities to be around Doe and if Doe had ever seen Fanelli and Amber having sex. RP (12/19/07 Vol. 1) 131-32. Taylor then spoke with Fanelli if Doe could have misconstrued any innocent touching on Fanelli's part. RP (12/19/07 Vol. 1) 132. After Fanelli denied this, Taylor asked him how he felt about the accusations. RP (12/19/07 Vol. 1) 133. Receiving another denial with a flat affect, Taylor became pointed with Fanelli. RP (12/19/07 Vol. 1) 134.

It was only after all the above conversation took place, that Taylor again confronted him with the specific allegations and gave Fanelli several reasons why Taylor thought Fanelli wasn't being truthful with Detective Taylor. RP (12/19/07 Vol. 1) 133. It was made clear on the record that it was during the interview that Detective Taylor told Fanelli that he thought he wasn't being truthful. RP (12/19/07 Vol. 1) 133. After this confrontation the Defendant accused Taylor of being aggressive. RP (12/19/07 Vol. 1) 133-34.

It is clear from the transcript that Detective Taylor's testimony in which he told Fanelli he was being untruthful is exactly the kind of testimony considered appropriate in *State v. Demery*, 133 Wa.2d 753, 30

P.3d 1278 (2001). Taylor's statements during the interview were not testimony as they were not made under oath. Additionally, it was clear to the jury that only after Defendant made many denials and gave reasons why he couldn't have done the touching, that Taylor confronted him and told him he was lying. Just like Demery, the jury would not expect Taylor to believe the defendant and the statements were not opinion. Moreover, the statement gave context to the Defendant's next statement that Taylor was being aggressive.

The Defendant cites *State v. Jones*, 117 Wa.App. 89, 68 P.3d 1153 (2003), to distinguish Taylor's statements from those in *Demery*. In *Jones*, Officer Wilken stopped a car where the defendant was a front seat passenger. See *State v. Jones*, 117 Wa.App. 89, 90. While Wilken was checking for criminal history on the occupants, he observed Jones make furtive movements. See *id.* Officer Wilken discovered Jones was a convicted felon and based upon his furtive movements, and finding a gun handgrip on Jones' person, Wilken searched the vehicle and found a firearm. See *id.* At trial, Wilken testified to his post-arrest interview with Jones. See *id.* 91. During the interview Wilken insisted that Jones must have known about the gun. See *id.* At trial, Wilken stated that he addressed the issue that he didn't believe him. See *id.* He then testified

that “[t]here was no way that someone was sitting in that car, and everything that had transpired from my eyes.” *Id.*

It is unclear from the opinion if Wilken’s testimony was to his interrogation technique or his opinion during trial that the defendant’s story was unbelievable. A three judge panel from Division Two stated that in their opinion there was “no meaningful difference between allowing an officer to testify directly that he does not believe the defendant and allowing the officer to testify that he told the defendant during questioning that he did not believe him.” *Id.* However, the Washington Supreme Court in *State v. Demery* did declare a difference. The Court in *Demery* made clear that if an officer’s statement about the defendant’s veracity is made in the course of the interrogation, it is not opinion. *See State v. Demery*, 133 Wa.2d 753, 759.

With the Supreme Court’s recent decision in *State v. Kirkman*, 159 Wa.2d 918, 155 P.3d 125 (2007), it appears the Supreme Court is moving away from such a black and white picture of what constitutes impermissible opinion testimony. In *State v. Kirkman*, the court chose to limit a defendant’s ability to appeal based on opinion to when a defendant can demonstrate the error was of a manifest constitutional magnitude. *See State v. Kirkman*, 159 Wa.2d 918, 934-38, 155 P.3d 125 (2007). The defendant must show the testimony amounted to a nearly explicit

statement by the witness that they believed/did not believe the witness; second, the defendant must show actual prejudice from the opinion testimony. *See id.* at 936.

In *Kirkman*, two different detectives testified to the child abuse protocol and how it is used to test the victim's competency and truthfulness. *See id.* at 930-31, 933-34. The Washington Supreme Court disagreed with the courts of appeals that testing for truthfulness constituted opinion evidence. *See id.* at at 931, 934, 937-38. The Supreme Court stated that detectives often use a similar protocol in all child witness interviews, whether they believe the child witness or not. *See id.* at 931. It held this was not opinion testimony and pointed out the jury was still instructed they were the sole judge's of credibility. *See id.* at 931, 934, 937-38. The Court reminded all:

Juries embody 'the commonsense judgment of the community.' Only with the greatest reluctance and with clearest cause should judges-particularly those on appellate courts-consider second-guessing jury determinations or jury competence. As Judge Learned Hand wrote, 'Juries are not leaves swayed by every breath.'

Id. at 937, *citations omitted.*

Looking at both *Demery* and *Kirkman*, the Washington Supreme Court seems to say if the police use regular tactics in their interviews with witnesses and suspects, there is not an additional aura of reliability created

and the jury is still able to make their own decisions concerning credibility. Clearly, Taylor's testimony fits this criteria and his testimony was not opinion. Finding the statements were not improper opinion testimony, the Defendant's allegation of prosecutorial misconduct fails.

Should the court disagree and feel the testimony amounts to improper opinion testimony, the Defendant fails to show the elicitation of such testimony amounted to remarks so flagrant and ill-intentioned that it caused enduring and resulting prejudice that a curative instruction could not have remedied.

There is no evidence to support the accusation the prosecutor's conduct was flagrant and ill-intentioned. Given the split between the courts of appeals and the Washington Supreme Court the prosecutor's question is a reasonable interpretation of the state of the law. Secondly, the Defendant has not proven there was an enduring and resulting prejudice that a curative instruction could not have remedied. The trial court could have given an instruction to the jury to disregard Taylor's statement to Fanelli about truthfulness and had the remark stricken. It is a general precept that jurors are presumed to follow the court's instructions. *See Kirkman*, 159 Wa.2d at 937. Had the court given the above instruction, combined with the court's closing instruction that the Juror's

were the sole judges of credibility, there is no reason to believe there would be enduring prejudice. RP (12/20/07) 7.

2. Taylor's testimony concerning the Defendant's physical reactions during interrogation was proper and elicitation by the State was not prosecutorial misconduct.

The Defendant argues Taylor's testimony to the Defendant's physical reactions during interrogation was improper, but cites no authority for this position. Generally, courts of appeal will not consider claims not supported by any authority. Rule of Appellate Procedure 10.3(a)(5) requires parties to provide 'argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.' WA RAP 10.3(a)(5) (2009), *see State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (appellate court need not consider claims that are insufficiently argued).

Perhaps, the Defendant argues Taylor's testimony to the behavior he witnessed is opinion evidence commenting on the Defendant's truthfulness. The State asked Taylor what was Fanelli's tone and temperament when he said the allegations weren't true. RP (12/19/07 Vol. 1) 131. Taylor said Fanelli "wasn't very confrontational about it, he just kind of flatly said it wasn't true, and he didn't do it." RP (12/19/07 Vol.

1) 131. Taylor said Fanelli didn't appear to be upset and had a flat facial expression. RP (12/19/07 Vol. 1) 131. The State asked what Taylor meant by "flat?" RP (12/19/07 Vol. 1) 131. Taylor explained, "[j]ust a flat affect. I mean, he didn't pound the table; he didn't come across the table at me, he didn't stand up and yell; he just was kind of a flat affect, sat there and said he didn't do it." RP (12/19/07 Vol. 1) 131-132.

In *State v. Day*, 51 Wa.app. 544, 754 P.2d 1021, 1025 (Div 3, 1988) *rev denied* 111 Wash.2d 1016 (1988), several officers testified that when Day was told of his wife's death he had shown "very little emotion," had been unemotional, and asked the officers no questions. The Court of Appeals found this evidence was properly admitted and not opinion testimony. *See id.* Moreover, opinion testimony regarding a defendant's reaction is admissible so long as the conclusions are based upon actual observation of the defendant's conduct. *See id.*

In the present case, Detective Taylor directly observed the defendant's reaction and demeanor. RP (12/19/07 Vol. 1) 131. He testified the defendant had a flat affect and used the defendant's lack of emotions to support this conclusion. RP (12/19/07 Vol. 1) 131. Under *State v. Day* this was appropriate testimony and it was not prosecutorial misconduct to elicit such testimony.

3. Detective Taylor's testimony concerning the need for a second interview was not improper vouching testimony, was stricken, and was not prosecutorial misconduct to elicit.

The Defendant argues prosecutorial misconduct when Detective Taylor testified that a second interview was necessary because the first interview did not follow the child abuse protocol.

At trial, the State elicited testimony from Detective Schallert that two interviews of Jane Doe were done because the prosecutor assigned to view the first interview was not present. RP (12/19/07 Vol 1) 72. She explained that according to the protocol, the attorney needs to be able to view what the child is disclosing and what the child is capable of and the second interview was not set up like the first. RP (12/19/07 Vol. 1) 72-73. During Detective Taylor's testimony, he explained to the jury that the protocol and his interview training state that child interviews are to be limited in number. RP (12/19/07 Vol. 1) 115. Detective Taylor explained the reason why the prosecutor was not available was because he had to leave in the middle of the first interview. RP (12/19/07 Vol. 1) 120. Then without being asked a question, Taylor went on to say that one of the reasons a prosecutor is present is to help determine the child's credibility. RP (12/19/07 Vol. 1) 121. Defense counsel did not object, but the court took a break and addressed the matter outside the hearing of the jury. RP

(12/19/07 Vol. 1) 121-22. The court, at defense counsel's request, instructed the jury to disregard the last answer and both the question and answer were stricken from the record. RP (12/19/07 Vol. 1) 123.

In *State v. Kirkman*, 159 Wa.2d 918, 155 P.3d 125 (2007), the Washington Supreme Court determined officer testimony concerning the child abuse protocol's testing a child witness' competency and truthfulness is not opinion testimony. The Supreme Court considered two separate cases in *Kirkman*. *See id.* In the first instance, a detective testified about the competency protocol he gave to the child. *See id.* at 930. Specifically, the detective said the reason why the protocol tests the child's competency is because the officer is interested in the child's ability to distinguish between truth and lies. *See id.* The detective then went on to say the child was able to distinguish between truth and lies and promised to tell the truth. *See id.* In the second instance, the detective testified she tested the child's ability to distinguish between a truth and a lie and asked the child to promise to tell the truth.

In both instances, the Court of Appeals' found testing a child's ability to distinguish truth and lie and eliciting a promise to tell the truth, amounted to an officer giving their opinion the child was truthful. *See id.* at 930-31, 934. The Supreme Court disagreed and found this testimony was simply an account of the protocol and the detective never said they

believed the child or that child was telling the truth. *See id.* The Court held the interview protocol did not carry a special aura of reliability beyond that conferred upon a witness when the judge swears them in at trial. *See id.* By testifying to the protocol, the detective “merely provided the necessary context that enabled the jury to assess the reasonableness of the...responses” *Id.* at 931. Additionally, it noted detectives often use a similar protocol in all child interviews and the use of the protocol does not mean the detective believed the child witness. *See id.* The Court held that the interview protocol did not infringe on the jury’s province. *See id.* at 934.

In the present case, the jury heard from both Detective Schallert and Detective Taylor that the protocol required a prosecutor be present. RP (12/19/07 Vol. 1) 72, 115. The jury heard from Schallert the attorney needs to be present to see the child and assess the child’s capabilities. Because the trial court struck Taylor’s testimony as to the reason for the prosecutor’s presence, this is the only information the jury had.

Since defense counsel did not object, the Defendant must show that the State’s elicitation of the remark was both flagrant and ill intentioned and there was an enduring prejudice not resolved with a curative instruction. However, should the court find the Defendant’s request for an instruction amount to an objection, the Defendant must

show the prosecutorial misconduct was improper and prejudiced the defendant's right to a fair trial.

In the present case, the State never asked a question of Detective Taylor as to why a prosecutor is present, but rather why there was a second interview. RP (12/17/07 Vol. 1) 120. The question was not improper, flagrant, or ill intentioned, in light of Taylor's response that the prosecutor was unavailable. It was only when Taylor voluntarily went on to explain the reason for a prosecutor that any issue arose.

When looking at the prejudice burden under prosecutorial misconduct *Kirkman* is again instructive. The court in *Kirkman* analyzed when the giving of opinion testimony amounts to manifest error. *See id.* at 926-27. To show an error is manifest a defendant must show actual prejudice. *See id.* "Essential to this determination is a plausible showing...that the asserted error had practical and identifiable consequences in the trial..." *Id.* at 935. To show actual prejudice when opinion evidence is admitted at trial, a defendant must show there was a nearly explicit statement by the witness that the witness believed the victim.

To show prosecutorial misconduct a defendant must show an enduring prejudice. This burden is akin to actual prejudice. In the present case, the offending language was not an explicit or nearly explicit

statement by the witness as to credibility and it was stricken. Without a nearly explicit statement there would not be actual prejudice. Since actual prejudice is akin to enduring prejudice, it stands to reason the defendant fails in his burden to show enduring prejudice, and there was no prosecutorial misconduct.

Moreover, juries are presumed to follow the instructions of the court, absent evidence proving the contrary. *See id.* at 928, 937. The court instructed the jury not to consider the testimony of Taylor both at the time of testimony and again in the court's final instructions to the jury. RP (12/19/07 Vol. 1) 123, CP 189. The court also instructed the jury that they were the sole judges of the credibility of the witnesses. RP (12/20/07) 6, CP 190. As such, the Defendant cannot show the jury even considered the statement or there was enduring prejudice.

4. Detective Taylor's statement concerning "another child" was innocuous and without context and there was no error or misconduct.

The Defendant argues the State recklessly elicited a statement from Taylor concerning another child and this plus the other errors alleged had a cumulative effect of prejudice. Def. Brf at 24. Once again the Defendant cites no authority for the position of recklessness or how this was error, nor does he even cite to the Report of Proceedings. Def. Brf at

24. Generally, courts of appeal will not consider claims not supported by any authority. Rule of Appellate Procedure 10.3(a)(5) requires parties to provide ‘argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.’ WA RAP 10.3(a)(5) (2009), *see* State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) (appellate court need not consider claims that are insufficiently argued).

Should the court consider this argument, what happened was in early October 2007 in a defense interview, Doe made additional statements to the Defendant’s private investigator that she saw the Defendant inappropriately touch his other daughter. RP (10/12/07) 19. The State and defense counsel addressed this with the court during the motions in limine. RP (10/12/07) 19. It was decided the issue was premature and would be addressed later if needed. RP (10/12/07) 19.

At trial, the State asked Detective Taylor a pointed question if he received “information from Ian...about an additional disclosure of possible anal penetration in August of ’07.” RP (12/19/07 Vol. 1) 136. Ian had already testified Jane Doe made an additional disclosure to him in August concerning anal penetration. RP (12/18/07) 86-87. Detective Taylor, obviously misunderstanding the question, said “I don’t remember

if it was – there was something with another child this summer.” RP (12/19/07 Vol. 1) 136. The State said “not that.” RP (12/19/07 Vol. 1) 136. The defense counsel objected as to relevance and the objection was sustained. RP (12/19/07 Vol. 1) 137. This entire conversation was clearly not prejudicial and had no context for the jury. Taylor in no way connected the other child with the Defendant, but as far as the jury knew he was referencing another case completely. Lastly, the answer was stricken and the jury was not to consider the information.

B. The State did not violate the Defendant’s right to silence or commit prosecutorial misconduct when it impeached the Defendant with his pre-arrest silence.

The Defendant argues the State’s cross-examination and impeachment of the Defendant concerning his pre-arrest silence was prosecutorial misconduct.

Since 1980, the United States Supreme Court has held that should a Defendant decide to testify in his behalf, the State may cross-examine a defendant with their pre-arrest silence. *See Jenkins v. Anderson*, 447 U.S. 231, 238, 100 S.Ct. 2124 (1980). The Court found this use neither implicated the Defendant’s Fifth Amendment right to silence, nor the Fourteenth Amendment’s fundamental fairness. *See id.* at 238-40. The Supreme Court did however leave up to each jurisdiction to formulate

their own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference is probative. See *id.* at 239.

In 1996, the Washington Supreme Court ruled a defendant's pre-arrest silence could not be used by the State in its case in chief or as substantive evidence, but left open the issue of use in impeachment of the defendant. See *State v. Lewis*, 130 Wa.2d 700, 927 P.2d 235, *State v. Easter*, 130 Wa.2d 228, 922 P.2d 1285 (1996). In March 2008, three months after Fanelli's trial, the Supreme Court held when a defendant testifies at trial, "use of pre-arrest silence is limited to impeachment and may not be used as substantive evidence." *State v. Burke*, 163 Wa.2d 204, 217, 181 P.3d 1 (2008). The *Burke* court did explain in circumstances where silence is protected, a mere reference to the defendant's silence by the government is not necessarily a violation...; however, when the State invites the jury to infer guilt from the invocation of the right of silence, the Fifth Amendment and article 1, section 9 of the Washington Constitution are violated." *Id.* at 217.

In *Burke*, the defendant faced charges of third degree rape a child. See *id.* at 206. At trial, Burke argued the statutory defense the victim misrepresented her age to him as the legal age of consent. See *id.* The State presented in its case in chief that Burke did not tell his defense to the

police when they interviewed him. *See id.* The State sought to undermine this defense and argued such in both their opening and closing. *See id.* at 208. The Court found that since Burke testified, his omissions were admissible as impeachment. *See id.* at 219.

In the present case, the Defendant testified in his defense when Detective Taylor called him to talk, he went to talk with him. RP (12/19/07 Vol. 2) 198. He raised his own right to silence when he testified that he ended the interview with Taylor because he no longer felt comfortable due to Taylor's aggressiveness. RP (12/19/07 Vol. 2) 200. Moreover, he said he was never bothered by talking to an officer about the allegations, but rather bothered that the allegations were made in the first place. RP (12/19/07 Vol. 2) 200. He stated on a number of occasions that he was worried he would be accused of abuse by Ian and Robin. RP (12/19/07 Vol. 2) 185, 204, 205, 214, 221.

The State's cross-examination of Fanelli was obviously impeachment concerning when and what he knew prior to the interview with Taylor. The State elicited from the Defendant that he had at least a week to prepare for the interview with Detective Taylor. RP (12/19/07 Vol. 2) 208-210. He was also well aware Taylor wished to speak with him about inappropriate touching against Doe, something he was worried about for a long time. RP (12/19/07 Vol. 2) 208-210. Additionally, much

like *Burke*, his decision not to seek out Taylor calls into question his testimony that he had repeated concerns he would be falsely accused, and that he was comfortable discussing the accusations with the police. When the State asked if Fanelli sought out Taylor to speak with him, the Defendant said he didn't have to because his wife told him that Taylor would call for him at a specific time. RP (12/19/07 Vol. 2) 209.³ Given the court's stance that pre-arrest silence is proper for impeachment, there was no prosecutorial misconduct.

Should the court find the cross-examination was improper, the remark was one of passing reference and not a comment on the Defendant's right to remain silent. "A remark that does not amount to a comment is considered a 'mere reference' to silence and is not reversible error absent a showing of prejudice." *State v. Burke*, 163 Wa.2d 204, 216. In *State v. Lewis*, 130 Wa.2d, 700, 703, 927 P.2d 235 (1996), the courts found an officer's testimony he told the defendant that if he was innocent he should just come in and talk was found to be a reference, and not a comment. Given the nature of the cross-examination in the present case and that the State never mentioned the defendant's failure to contact the police in closing argument, any remark was one of reference.

³ Defense counsel did not object at any time during the portion of cross-examination.

Once again, it is the Defendant's burden to prove that the elicitation was flagrant and ill intentioned and had enduring prejudice. The Defendant has failed to show ill intention and flagrancy given the status of the law at the time of trial. Additionally, he has failed to show prejudice or endurance that a curative instruction would not have cured.

C. Closing Argument

1. The State did not chill the Defendant's right to confrontation when it stated in closing the victim's behavior in court showed she feared the Defendant.

The Defendant argues the State suggested in closing argument that the Defendant deliberately tried to intimidate Doe by coming closer to her when she testified and thus violated the Defendant's Sixth Amendment right to be present at trial. Def. Brf at 27.

In the State's rebuttal closing, the State disputed the Defendant's claim Doe was a victim of her father and Robin, and not the Defendant. RP (12/20/07) 39-44, 45-47. The State told the jury it heard no testimony Doe didn't like Ian or Robin or that things were bad for Doe at Ian's house. RP (12/20/07) 45. It reminded the jury that the defense never asked Ian, Robin, or Doe if anything else untoward was going on at their house. RP (12/20/07) 45. Moreover, other witnesses refuted the Defendant's testimony Doe was hurt at Ian's house. RP (12/20/07) 45.

The State encouraged the jury to use their memory and notes to remember Doe's behavior on the stand. RP (12/20/07) 46. The State argued if bad things were happening at Ian's house, it made no sense Doe would waive to her step-mother while she testified. RP (12/20/07) 46. The State reasoned Doe was scared of the Defendant, arguing Doe demonstrated this fear when she looked at Fanelli several times and paused in her testimony, when the Defendant moved around the courtroom. RP (12/20/07) 46.

A Defendant does have a Sixth Amendment right to confront witnesses against him face-to-face. *See State v. Jones*, 71 Wa.App. 798, 810, 863 P.2d 85 (Div 1., 1993). Additionally, "the State may not act in a manner that would unnecessarily chill the exercise of a constitutional right, nor may the State draw unfavorable inferences from the exercise of a constitutional right." *Id.* "However, both the United States Supreme Court and Washington courts have recognized that not all arguments touching upon a defendant's constitutional rights are impermissible comments on the exercise of those rights." *State v. Gregory*, 158 Wn.2d 759, 806-07, 147 P.3d 1201 (2006), *see Portuondo v. Agard*, 529 U.S. 61, 69, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000); *State v. Miller*, 110 Wash.App. 283, 284, 40 P.3d 692, *review denied*, 147 Wash.2d 1011, 56 P.3d 565 (2002). The question comes down to "whether the prosecutor manifestly intended the remarks to be a comment on that right." *State v.*

Gregory, 158 Wn.2d 759, 807, *citing State v. Crane*, 116 Wash.2d 315, 331, 804 P.2d 10 (1991). “So long as the focus of the questioning or argument ‘is not upon the exercise of the constitutional right itself,’ the inquiry or argument does not infringe upon a constitutional right.” *Id.*, *citing Miller*, 110 Wash.App. at 384.

In *State v. Jones*, the prosecutor inadvertently blocked the defendant’s view of the child victim. *See id.* at 805. When the State cross-examined the defendant, the prosecutor asked if the defendant was frustrated because his view was blocked and couldn’t stare at the victim. *See id.* In closing argument, the prosecutor argued how difficult it is for a child to testify in front of strangers with the defendant staring at them. *See id.* at 805-06. The defense did not object to the question or argument. *See id.* Division One found this to be an impermissible use of constitutionally protected behavior, but that it was harmless beyond a reasonable doubt. *See id.* at 811.

In *State v. Gregory*, 158 Wn.2d 759, 805, the prosecutor asked the victim how she felt about testifying to rebut the defendant’s claim she made up the accusation. The victim told the jury that she hated testifying and being cross-examined because it made her remember the events and she was now having nightmares. *See id.* The court in *Gregory* upheld the questioning, and distinguished *State v. Jones* on the basis the question did

not focus on the Defendant's right to cross-examine the victim, but rather on the victim's credibility. *See id.* at 806-07.

The present case is more like *Gregory* and distinguishable from *Jones*. Instead of focusing on Fanelli's right to confront Doe, the State focused on Doe's reaction to his presence. One of the purposes of the right to confrontation is to allow the fact finder to observe the witness's response. *See Coy v. Iowa*, 487 U.S. 1012, 1019-20, 108 S.Ct. 2798 (1988). While face-to-face confrontation may 'upset the truthful rape victim or abused child,' this reaction actually serves to aid the jury in assessing the credibility of the witness. *Coy*, 487 U.S. at 1020, *see Maryland v. Craig*, 497 U.S. 836, 845-46, 110 S.Ct. 3157 (1990). It is this reaction the State argued. Because the State's focus was on the victim's credibility, the State did not infringe on the Defendant's right to confront witnesses.

The Defendant again argues the State committed prosecutorial misconduct through this argument. According to *State v. Gregory*, 158 Wn.2d 759, 808 fn 24, there is a disagreement as to the impact a failure to object at trial has upon a claim that a prosecutor's argument amounted to an improper comment on a constitutional right. *Compare, e.g., State v. Belgarde*, 110 Wash.2d 504, 510-12, 755 P.2d 174 (1988) (analyzing comment on constitutional right independently from claims of

nonconstitutional prosecutorial misconduct) *and Jones*, 71 Wash.App. at 809-10, 863 P.2d 85 (analyzing comment on constitutional right under RAP 2.5(a) for manifest error) *with State v. Jordan*, 106 Wash.App. 291, 296-97, 23 P.3d 1100 (2001) (analyzing alleged comment on Sixth Amendment right during closing argument under a prosecutorial misconduct standard of review, asking whether a curative instruction would have cured the defect) *and State v. Klok*, 99 Wash.App. 81, 83-84, 992 P.2d 1039 (2000) (same). *See also State v. Holmes*, 122 Wash.App. 438, 93 P.3d 212 (2004) (providing yet another analysis where a comment on the Fifth Amendment right to silence arises during testimony). It is wholly unclear to the State which level of review the Defendant seeks.

However, given that defense counsel failed to object and has alleged prosecutorial misconduct, it appears the Defendant must either show the State's remark was flagrant, ill-intentioned, and caused enduring prejudice that couldn't be cured with an instruction, or the State must show any error was harmless beyond a reasonable doubt. *See State v. Belgarde*, 110 Wash.2d 504, 510-12, 755 P.2d 174 (1988), *State v. Jones*, 71 Wa. App. 798, 812, 863 P.2d 85 (1993). In the first instance, since the State's argument was couched in terms of the victim's credibility, there is no evidence the remark was ill-intentioned and the State never referenced

it at any other time in trial. Moreover, there is no reason to believe an instruction couldn't have cured any wrongdoing.

In the second instance, the untainted evidence is so overwhelming that it would necessarily lead to a finding of guilt. The Defendant repeatedly insists there was no corroborating evidence of Doe's testimony. This is simply untrue. The State presented testimony from Doe that the defendant had Doe put her mouth on his penis and placed his penis in her anus. RP (12/18/07) 31-35, 43. It also presented the consistent statements Doe made to her father and the police. The State presented testimony that Doe's behavior changed towards men, she was having nightmares, wetting incidents, was reluctant to visit the Defendant's home, and would shy away from the Defendant. RP (12/08/07) 88-89, 125, 137, 168-170 (12/19/07 Vol 1.) 11, 13, 28. Additionally, there was testimony from both Amber and Dr. Hoyt that Doe had vaginal redness. RP (12/18/07) 138-39, 149. Lastly, there was evidence of the Defendant's guilt when he obtained a penis piercing to try to win the case. RP (12/19/07 Vol 1.) 17.

If the court finds any error by the State, the untainted evidence presented shows a little girl demonstrating a distinct fear of the defendant, she went through a behavior change including bed wetting and nightmares, and she was able to testify to sexual knowledge beyond her years and experience.

2. The State reasonably argued facts already contained in the record, when it stated the victim fears of telling were valid because the Defendant's threat of her never seeing her mother again came true.

The Defendant states the prosecutor committed misconduct by arguing in closing facts not contained in evidence. Def. Brf. at 28. The Defendant alleges the State's argument that Doe never saw her mother Amber after Doe disclosed was unsupported in the record. Def. Brf. at 28. This is untrue.

During Ian's testimony, he said Doe told him Gio choked her with his weenie. RP (12/18/07) 73-74. She said if she wasn't a good girl, then she and Gio would have private talks in the bedroom. RP (12/18/07) 74. Lastly, Doe told Ian if anyone knew, Gio told her that she would never get to see her mother again. RP (12/18/07) 74. Robin and Amber both testified that Robin told Amber she was not allowed to see Doe anymore. RP (12/18/07) 111, RP (12/19/07 Vol. 1) 18, 30. Additionally, Amber testified she was not allowed to see Doe afterward and the Defendant encouraged her not to see Doe. RP (12/19/07 Vol. 1) 18, 30.

A court reviews a prosecutor's comments during closing argument in the context of the whole argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *See State v.*

Boehning, 127 Wa.App. 511, 519, 111 P.3d 899 (Div 2, 2005). Additionally, a prosecutor is given wide latitude in closing to draw reasonable inferences from the evidence. *See id.*

In the present case, the State's argument to the jury that Doe didn't see her mother again after she disclosed was an appropriate argument based upon the evidence before the jury.⁴ It was not designed to inflame the passion or the prejudice of the jury, but to demonstrate the victim's fear and reluctance in telling were valid, because the negative consequences already happened.

3. Any statements the State argued in closing argument which were not supported by the record, did not amount to misconduct requiring reversal.

The State admits in its rebuttal closing argument that it included a statement attributed to the victim concerning Heaven, which is not supported by the record and to which defense counsel did not object. RP (12/20/07) 48. According to *State v. Boehning*, 127 Wa.App. 511, 518, the Defendant must show the "remark was so flagrant and ill intentioned that it causes enduring and resulting prejudice that a curative instruction could not have remedied."

⁴ It should be noted that defense counsel objected that the State's argument was not supported by the record and the trial court sustained the objection and instructed the jury to disregard. RP (12/20/07) 46. Thus, if it were an improper argument, an error was not enduring and cured by the instruction.

In *Boehning*, the defendant was charged with three counts of Rape of a Child in the First degree or in the alternative three counts of Child Molestation in the first degree. *See id.* at 515. During trial, the State was only able to elicit statements concerning the molestation and not the rape. *See id.* As such, the State elected to dismiss the rape charges, and proceed with the molestation charges. *See id.* at 517.

In closing argument, the prosecutor repeatedly argued the child was not able to talk in front of the jury as well as she'd done in the past and the charges were dismissed because she couldn't talk about it as well as before. *See id.* Additionally, the prosecutor argued that because Boehning was unable to prove the prior statements were inconsistent, the statements were obviously consistent and she was credible. *See id.* The Court of Appeals found the State committed misconduct when the prosecutor repeatedly and flagrantly referred to dismissed charges inferring that more serious charges were disclosed and the jury should use this inference to convict the defendant. *See id.* at 522.

The present case is distinguishable from *Boehning*. In this case, the State's remark was in passing and the State did not repeat it again. *See State v. Alexander*, 64 Wa.App. 147, 155, 822 P.2d 1250 (Div. 1, 1992) (a repeated pattern of inferring to inadmissible evidence constitutes misconduct). One of the main issues in *Boehning* was how many times

the prosecutor drew the jury's attention to the victim prior inadmissible statements. *See State v. Boehning*, 127 Wa.App. 511, 522.⁵ The court found the prosecutor wanted the jury infer the prosecutor had more information and essentially vouched for the victim's credibility. *See id.*

While the victim's credibility was at issue in the present case, there was no indication to the jury anything was left out of Schallert's interview with Doe, or that Doe was inconsistent. The prosecutor did not vouch for Doe's credibility, like the prosecutor in *Boehning*, but mistakenly argued a fact not in evidence.

As often repeated in this appeal, a jury is presumed to follow instructions. *See State v. Kirkman*, 159 Wa.2d 918, 928, 937, 155 P.3d 125 (2007). The court instructed the jury that the evidence consists of testimony from the witnesses and that counsel's argument is not evidence. CP 189. Additionally, the State reminded the jury of this in its closing. RP (12/20/07) 46. As such, the Defendant cannot show the jury even considered the statement or there was enduring prejudice.

3. THE DEFENDANT FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL WITH RESPECT TO TRIAL COUNSEL'S FAILURE TO OBJECT TO AN ALLEGED INFERENCE FANELLI TRIED TO INTIMIDATE AMBER FANELLI.

⁵ It does not appear any statements the victim made prior to trial were admissible under RCW 9.44.120, as the victim was 10 years old. *See State v. Boehning*, 127 Wa.App. 511, 514.

The defendant argues that his trial counsel's failure to object to an alleged inference by the State of witness intimidation was ineffective assistance of counsel. The Defendant does not cite anywhere in the Report of Proceedings that the State argued such an inference and the State urges the Court of Appeals not to consider this argument. Def. Brf. at 30-32.

Should the court decide to consider this argument, the State did not infer the Defendant's involvement in witness tampering. What actually occurred was the State argued in closing the Defendant's behavior toward Doe and statements afterward indicated he was setting up multiple defenses, and that those defenses changed throughout the years. RP (12/20/07) 26-28. As part of those defenses, the Defendant told Taylor he never had the opportunity to touch Doe. RP (12/20/07) 27. However, that defense withered when Amber changed her Ryan Hearing testimony and testified at trial that he did babysit. RP (12/20/07) 28. In arguing Amber's credibility the State declared the change in Amber's testimony was reasonable given the threats by the defendant's mother. RP (12/20/07) 28. The state never said the Defendant was aware of his mother's threat or played a part in that threat, but that he was aware he could no longer rely on Amber's former testimony as a defense. RP (12/20/07) 28-29.

It is not ineffective assistance of counsel in this instance as the State never argued or inferred the Defendant encouraged the witness intimidation.

Should the court consider the argument of ineffective assistance, the test for determining effective counsel is whether: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *Id.* citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263, 576 P.2d at 1307. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wa.App. 166, 173, 776 P.2d 986, 990 (1989) citing *State v. Sardinia*, 42 Wa.App. 533, 539, 713 P.2d 122 (1986). The second prong requires the defendant to show “that there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* citing *State v. Sardinia*, 42 Wa.App. 533, 539, 713 P.2d 122 (1986).

The defendant failed to establish ineffective assistance of counsel with respect to both prongs in failing to show another attorney would have objected and asked for an instruction. Secondly, Defendant never argued there was a reasonable probability that, but for counsel's errors the proceeding would have been different.

4. THE DEFENDANT FAILED TO ESTABLISH ANY ERRORS AND IF SUCH ERRORS WERE FOUND, THEY WERE NOT CUMULATIVE AS TO VIOLATE THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

The cumulative error doctrine is "Limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. See *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Alexander*, 64 Wn App. 147, 154, 822 P.2d 1250 (1992).

Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence. *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985),

cert. denied, 475 U.S. 1020 (1986). Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. *Guloy*, at 425. Non-constitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993); *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981), *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *U. S. cert. den.* 115 S.Ct. 2004, 131 L. Ed. 2d 1005.

The State has identified no error, harmless or prejudicial, resulting from the trial court's rulings regarding any of the foregoing issues. Given the scope of this trial, and the over-whelming evidence of guilt, the State asserts that no error had a material effect on its outcome. Nor does the State believe that a different result would have been reached in their absence.

V. CONCLUSION

The State requests the Court affirm the trial court and deny the appeal based upon the above arguments.

Respectively submitted this 19 day of August, 2009.

SUSAN I. BAUR
PROSECUTING ATTORNEY

By:



AMIE HUNT, WSBA# 31375
Representing Respondent

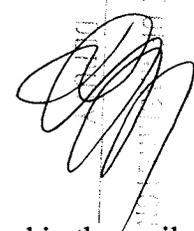
COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Appellant,)
)
 vs.)
)
 AMBROGINO GIOVANNI)
 FANELLI,)
)
 Respondent.)
 _____)

NO. 37309-2-II
Cowlitz County No.
06-1-00634-5

CERTIFICATE OF
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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II



I, Michelle Sasser, certify and declare:

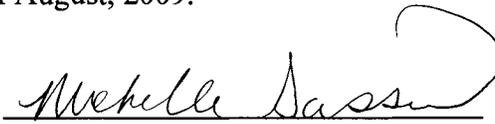
That on the 19th day of August, 2009, I deposited in the mails of
the United States Postal Service, first class mail, a properly stamped and
address envelope, containing Brief of Respondent and State's Motion to
File Over length Brief addressed to the following parties:

Anne Cruser
Attorney at Law
P.O. Box 1670
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Court of Appeals, Clerk
950 Broadway, Suite 300
Tacoma, WA 98402-4454

I certify under penalty of perjury pursuant to the laws of the State
of Washington that the foregoing is true and correct.

Dated this 19th day of August, 2009.



Michelle Sasser