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I. STATEMENT OF THE FACTS

The State accepts the Statement of the Facts as set forth by the defendant. Where additional information is needed, it will be supplied in the argument section of this brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first Assignment of Error raised by the defendant is a claim that the trial court violated the defendant's constitutional rights when it gave jury instructions that commented on the evidence.

The trial court's instructions to the jury (CP 33) contained, as instructions numbers 5 and 6, that, "In crimes of sexual offenses against a child it shall not be necessary that the testimony of the alleged victim be corroborated". The transcript does not indicate why this instruction is given twice. Even though this matter was discussed with the attorneys, there was no exception taken to the actual instructions that were ultimately given, other than the defense did object to the concept of lack of corroboration. Nevertheless, the defendant in the Appellant's Brief refers to this as a comment on the evidence by the judge.

The Appellate system review De Novo alleged errors of law in jury instructions. Del Rosario v. Del Rosario, 152 Wn.2d 375, 382, 97 P.3d 11

(2004). Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. Del Rosario, 97 P.3d at 382.

The Washington Constitution forbids a judge from conveying to a jury the court's opinion about the merits or facts of a case. Washington Constitution, Article 4, §16. But an instruction that states the law correctly and is pertinent to the issues raised in the case does not constitute a comment on the evidence. State v. Johnson, 29 Wn. App. 807, 811, 631 P.2d 413 (1981). An instruction that accurately states the applicable law is not a comment on the evidence. State v. Zimmerman, 130 Wn. App. 170, 181, 121 P.3d 1216 (2005); State v. Ciskie, 110 Wn.2d 263, 282-283, 751 P.2d 1165 (1988). RCW 9A.44.020(1) provides: "In order to convict a person of any crime defined in Chapter 9A.44 RCW, Sex Offenses, it shall not be necessary that the testimony of the alleged victim be corroborated."

An impermissible comment conveys a judge's personal attitude toward the merits of a case or permits the jury to infer from what the judge said or did not say, that the judge believed or disbelieved questioned testimony. State v. Ciskie, 110 Wn.2d at 283; Hamilton v. Department of Labor & Industries, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). However, as pointed out in the Zimmerman case and the Ciskie case (in particular), the providing of the proper jury instruction is not a comment by the judge

nor does it convey his personal attitude toward the evidence or lack of evidence. It does not suggest that the court believes more weight should be given to the alleged victim's testimony. It merely mirrors the accurate statement of the law. The giving of the instruction of the type given in our case, has been found by the Washington Supreme Court to be a correct statement of the law and that it does not constitute reversible error. State v. Malone, 20 Wn. App. 712, 582 P.2d 883 (1978); State v. Clayton, 32 Wn.2d 571, 202 P.2d 922 (1949).

The State submits that no evidence has been shown that the jury inferred from this instruction that the alleged victim's testimony required corroboration or that the alleged victim's testimony was entitled to greater weight. Further, this was not improperly argued by the State or the defense.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second Assignment of Error is a claim of ineffective assistance of counsel at the trial court level. The defense in the appellant's brief gives multiple examples of this claimed ineffective assistance and splits it into three sections.

To establish that the right to effective assistance of counsel has been violated, the defendant must make two showings: that counsel's

representation was deficient and that counsel's deficient representation caused prejudice. State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). To establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness. Trial strategy and tactics cannot form the basis of a finding of deficient performance. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

But, even deficient performance by counsel does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Strickland v. Washington, 466 US 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant must affirmatively prove prejudice, not simply show that the errors had some conceivable effect on the outcome. Strickland, 466 US at 693. In doing so, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. State v. Crawford, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006). Deciding whether and when to object to the admission of evidence is "a classic example of trial tactics." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

First Example of Ineffective Assistance: Questioning of Deputy Bull.

The first example of claimed ineffective assistance of counsel dealt with failure to object to some of the testimony of Detective Cynthia Bull. On pages 23 and 24 of Brief of Appellant, he gives an example that it is ineffective assistance because the defense attorney did not object to the term “victim” being used in some of the testimony; and, therefore, that injected the deputy’s opinion that the defendant had sexually abused the child. Defense counsel cites absolutely no case law to support this argument.

The State agrees that it would be improper during trial for the State to personally vouch for the credibility of a witness. However, the term “victim” is used throughout the Revised Code of Washington and subsequent caselaw (See especially Chapter 10.99 RCW and Chapter 9A.44 RCW). The State submits that there is nothing improper about the Court allowing the use of the term that is so often used by the parties and the witnesses to be also used in the presence of the jury. Certainly, if defense counsel referred to a witness as “the alleged victim”, the State would have no grounds to object on the basis that defense counsel was calling the victim a liar. Therefore, trial counsel was not ineffective for not objecting to the State’s use of the term “victim” before the jury.

Even if it was improper for the State to refer to the victim as “victim”, a trial counsel’s failure to object is not in and of itself ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, the defendant must prove that his counsel’s performance was deficient and that this deficient performance resulted in prejudice. (See argument above).

There is scant published caselaw in the State of Washington dealing with this. In Commonwealth v. Krepton, 590 NE.2d 1165 (1992) the trial court’s use of the term “victim” in jury instructions rather than using “alleged victim” was not prejudicial to the defendant. The Appellate Court viewed instructions in light of the entire trial, and determined that the jury would have understood that the primary issue to be decided was the defendant’s guilt. In People v. Brooks, 619 NE.2d 1271 (1993) the Court instructed the jury in an aggravated criminal sexual abuse case concerning the term “victim”. The Appellate Court held that this did not impermissibly demonstrate the Court’s belief that the complaining witness was in fact a “victim” where the pattern jury instruction defining “victim” was given to the jury. Finally, in People v. Lurcock, 631 N.Y.S.2d 959 (1995), the court did not error in the jury instruction labeling the complainant a “victim” under circumstances where there was absolutely

no question but that a robbery had occurred and the only question that the jury had to decide was the identity of the person who committed it.

In our case, and as will be described later, there was strong medical testimony that the complaining witness in our case had been sexually violated. This would constitute a criminal act and thus she would be a “victim”. This left for the jury then the question of who the perpetrator was.

On page 27 of the Brief of Appellant he makes an interesting comment, “in other words, the defendant must be guilty because in the prosecutor and Deputy Bull’s opinion, the defendant was guilty”. The State submits that there is absolutely no evidence or inference that can be raised from the evidence that would suggest opinions of the prosecutor or the detective concerning guilt or innocence of the defendant.

Second example of alleged ineffective assistance:

Testimony of Dr. Dressel, M.D.

The second area of concern about claimed ineffective assistance of counsel deals with the testimony from Dr. Amy Dressel, M.D. who examined the child. The defense, on page 34 of the Brief of Appellant, makes reference that the sole reason for the examination by the doctor of the child was for forensic purposes in court and thus was not for any type

of treatment. It's unclear exactly where the defendant gets this type of argument when the questioning at the time of trial indicates that the examination (and history) were for medical purposes:

QUESTION (by Deputy Prosecutor): And did – what was the primary reason for your examination of [the child]?

ANSWER (Dr. Dressel): She talked about that she was having memories of having a history of abuse when she was younger.

(RP 140, L8-11)

The doctor then went through the examination of the child with the jury and told the jury about the unusual amount of damage that she had found in the child's vaginal region and especially the area around the hymen (RP 153; 155-157). In regards to that, the prosecution asked the doctor the following hypothetical:

QUESTION (Deputy Prosecutor): I have a hypothetical for you. If a male penis was inserted into a 6 to 9 year old child's vagina and that caused pain enough to elicit screams from a victim, from the 6 to 9 year old girl, could that damage the hymen like we saw in [child's name]?

ANSWER (Dr. Dressel): Yes.

QUESTION: And could that leave a scar?

ANSWER: Yes, that definitely would leave a scar.

(RP 157, L3-10)

It's also of interest to note that the entire history taken from the child is extremely limited:

QUESTION (Deputy Prosecutor): And what did she tell you about the sexual abuse that she was there to be examined about?

ANSWER (Dr. Dressel): She said that when she was 6 or 7, she had been living in Oregon with her mother, and that she'd been sharing a duplex with a landlord who was managing the house, and her mother was working nights. And the man who was taking care of – the landlord that was taking care of the house at the time spent some time taking care of her, and eventually began fondling her, and eventually did penetrate her vagina with his penis.

And that it hurt a lot, and she talked a lot about that, and she spent time talking about –

QUESTION: Did she say whether or not he wore a condom?

ANSWER: She said she cannot remember that.

QUESTION: Did she say whether or not she bled afterwards?

ANSWER: She did not remember that either. She said that she remembered it hurting for a long time.

QUESTION: Was that all that you asked her about the actual incidents that occurred?

ANSWER: Yes. See, I – when I do it, I usually just ask them brief history.

(RP 140, L22 – 141, L19)

The medical diagnosis exception applies to statements that are reasonably pertinent to diagnosis or treatment. ER 803(a)(4). A party demonstrates a statement to be reasonably pertinent when (1) the declarant's motive in making the statement is to promote treatment and (2) the medical professional reasonably relied on the statement for purposes of treatment. State v. Butler, 53 Wn. App. 214, 220, 766 P.2d 505 (1989); State v. Williams, 137 Wn. App. 736, 154 P.3d 322 (2007).

Under the circumstances in our case, the doctor testified that the purpose, among other things, was to identify treatable injuries and to make sure that the child was safe. It is interesting that the history that the doctor recorded of the child's statements indicate that the sexual activity occurred in Oregon at the hands of an unknown landlord. It would be hard to see how this would factor into a reasonable possibility that the use of this evidence would be necessary to reach a guilty verdict. Obviously, the statements were consistent with the medical findings made by the doctor. As indicated, the medical findings were unusual in the amount of damage that had been done.

This example of ineffective assistance of counsel:

Failing to object to the examination of the child

The final area of concern of the defendant dealt with the lack of objections made to the direct examination of the child by the Deputy Prosecutor. Yet, the defendant, on page 6 of the Brief of Appellant, clearly shows that there was effective cross-examination of the child by the defense attorney concerning statements that the child had previously given in Alaska and statements that she was now making. The other example cited by the defendant, for example, page 36 of Brief of Appellant, discusses an improbable fact that the child claimed occurred and yet the defense attorney at trial was able to show that it bordered on the absurd. As previously indicated, whether to object or not object is a classic example of trial tactics and will not justify an ineffective assistance of counsel claim.

All of this comes together, then, in the closing argument by the defense attorney.

The defense attorney begins the closing argument reminding the jury that the allegations came to light approximately 7 years after the child had moved up to the state of Alaska. (RP 274-275). The defense attorney discussed with the jury the fact that the child had a troubled past and that she had been in a locked down detention facility and how her family life was less than ideal. (RP 275-276). He then began pointing out to the jury the inconsistencies between what she had told investigators in Alaska and

what she had been discussing when she arrived in Washington. (RP 278-280). It is obvious that the direct examination of the child would be needed to further substantiate these areas of concern. He also centered in on the inconsistency of the testimony of a “hole in the bathroom”, which at least three witnesses had said was one complete enclosure. Again, showing the lack of credibility and absurdity of the complaining witness’s story (RP 281-282).

The defense attorney then started to use the history that was taken from the doctor concerning the landlord watching the child. The defense attorney probably twisted this as follows:

... arrangement that Mr. Johnson could look in on the child, and that he was some ways – I think Corina described him as an acquaintance, Corina Comstock.

But she said that somehow they had this arrangement. She’s not quite sure how that happened, but there was an arrangement for him to look in on the kid.

Was he paid? No. Did he do it? Well, a couple of times. I think those were her words, a couple times. You – you, you know, certainly look at your own notes, what you can remember of the testimony, but there was a couple of times that he – that he may have gone in there.

There was no testimony from any defense witnesses knowing of any such arrangement, any such arrangement to take care of this child in any way, shape, or form.

The testimony we got was that – and I asked Ms. Comstock on the stand about this, you know. She said – and after prompting and by the state’s counsel about that, you know, did she have any other things? Well, she couldn’t use daycare, and there just wasn’t any other resources available to her.

Well, the truth was that – that there could have been other people she could have used, and she even admitted that she did have some friends over at the house from time to time. There were – there were certainly other people. It wasn’t like Mr. Johnson was the only living male that could have performed this function or done this thing, and yet she wants you to believe that he was gonna – you know, out of the kindness of his heart or whatever, do free babysitting chores for this gal.

(RP 283, L13 – 284, L21)

The defense attorney then approached the testimony of the doctor and indicated that, because of the length of time between the alleged occurrences and the examination, and the fact that the complaining witness was a troubled teenager, that there could have been a lot of other explanations as to hymeneal damage to the child, including some type of teen sexual escapades (RP 290-292). The defense attorney was not doubting that there was some type of injury or damage to the child, but whether or not it occurred at the hands of Mr. Johnson. He raised grave doubts with the jury about the credibility of the entire case (RP 292-293). The defense attorney then sums up his argument as follows:

...And I think that when you examine this evidence carefully, all the stuff, how the disclosures happened, the inconsistencies in the testimony, the fact that there was never a hole in the wall that could have amounted to anything but a – possibility a pencil, if not a toothpick going through it.

The fact that she had certain things happening to her, Ajax in one interview and not in another interview, something happening on his stomach in one interview and not on another.

The fact that there were descriptions of – of Mr. Johnson with gray hair and a hairy chest, then he morphed into a light haired individual.

Then she picks out of a picture that he's got dark brown hair.

It – it's a grasping of straws. Never identified at the witness table. To put Mr. Johnson in a hot seat to clear a girl's fractured and fractious relationship with her mother.

And that's what this case is about. It's not about anything else.

(RP 295, L1 – 22)

The State submits that the defense attorney at trial has shown that he had a strategy and tactics put in place and that he implemented these. The tactics were so successful that only verdicts were found on Counts 3 and 4. The jury was unable to arrive at verdicts on Counts 1 and 2 and the Court later dismissed those (CP 81). There has been no showing in this case of ineffective assistance of counsel.

IV. CONCLUSION

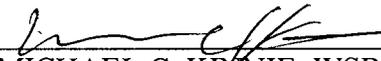
The trial court should be affirmed in all respects.

DATED this 22 day of Oct, 2008.

Respectfully submitted:

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