



**TABLE OF CONTENTS**

A. Appellant’s Assignment of Error.....1

B. Issue Pertaining to Assignment of Error.....1

C. Evidence Relied Upon.....2

D. Statement of the Case.....2

E. Argument.....2-9

F. Conclusion.....9

**TABLE OF AUTHORITIES**

**1. Table of Cases**

*State v. Baxter*, 134 Wash.App. 587, 141 P.3d 92 (2006).....6

*State v. Browder*, 61 Wash.2d 300, 378 P.2d 295 (1963).....7

*State v. Cameron*, 100 Wash.2d 520, 674 P.2d 295 (1980).....3

*State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969).....5

*State v. Johnson*, 90 Wn.App. 54, 950 P.2d 981 (1998).....8

*State v. Levy*, 156 Wash.2d 709, 132 P.3d 1076 (2000).....6,7

*State v. McFarland*, 127 Wash.2d 322, 899 P.2d 1251 (1995).....5

*State v. Parr*, 93 Wash.2d 95, 606 P.2d 263 (1980).....3,4

*State v. Rodriguez*, 121 Wash.App. 180, 87 P.3d 1201 (2004).....5

*State v. Walker*, 143 Wash.App. 880, 181 P.3d 31 (2008).....4

*State v. White*, 81 Wn.2d 223, 500 P.2d 1242 (1972).....5

*State v. Terrovona*, 105 Wash.2d 632, 716 P.2d 295 (1980).....3

**2. Other Jurisdiction**

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674  
(1984).....4

*United Brotherhood v. United States*, 330 U.S. 395, 91 L.Ed. 973, 67 S.Ct.  
775 (1947).....7

**3. Constitutional Authority**

Wash. Const. art. IV § 16.....6

**4. Other**

RAP 10.3.....2

ER 803.....3

WPIC 5.30.....6

A. ASSIGNMENTS OF ERROR

1. The trial court erred in permitting Manuel to be represented by counsel who provided ineffective assistance by failing to properly present evidence that the alleged victim had threatened her mother that if she were forced to return to Washington from Massachusetts to attend junior high school she would claim Manuel had raped her.
2. The trial court erred in giving Court's Instruction 7 that commented on the evidence and constituted a directed verdict.
3. The trial court erred in permitting Manuel to be represented by counsel who provided ineffective assistance by failing to properly object to Court's Instruction 7, the court's purported limiting instruction.
4. The trial court erred in failing to dismiss Manuel's conviction where the combination of trial errors denied him a fair trial.
5. The trial court erred in imposing a community custody condition prohibiting Manuel from purchasing, possessing or viewing any pornographic materials.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the proffered testimony admissible under 803(a)(3) when the victim's state of mind is irrelevant to the issue of whether Manuel committed the acts charged?
2. Was Counsel ineffective when he failed to properly argue for admission of the victim's alleged threats to her mother when they were not relevant and her state of mind was not at issue?
3. Did the court comment on the evidence that resulted in a directed verdict when it supplied the jury with a limiting instruction?
4. Did cumulative errors deny Manuel a fair trial, when errors did not occur?
5. Was the community custody provision prohibiting the purchase, possession, or viewing of pornographic materials unconstitutionally vague?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as “RP.” The Clerk’s Papers shall be referred to as “CP.”

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Manuel’s recitation of the procedural history and facts.

E. ARGUMENT

**1. THE PROFFERED TESTIMONY WAS INADMISSIBLE UNDER ER 803(a)(3).**

Manuel moved to admit testimony at trial that while H.M.C. was out of the state, she called her mother, and threatened she would claim that Manuel had raped her if she were forced to return to Washington to attend school. RP 397. Manuel argued this testimony was not hearsay and was admissible to show H.M.C.’s mother’s state of mind. The court correctly sustained the State’s objection, finding that the testimony was hearsay and not admissible as a state of mind exception: The witness’s (H.M.C.’s

mother) state of mind is not relevant as to whether or not this act occurred or didn't occur. RP 400.

This examination starts with an analysis of the relevant evidence rule. ER 803(a)(3) states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Hearsay evidence is admissible if it bears on the declarant's state of mind and if that state of mind is an issue in the case. *State v. Terrovona*, 105 Wash.2d 632, 716 P.2d 295 (1986). To be admissible, hearsay testimony of the victim's state of mind must be relevant to a material issue before the jury. *State v. Cameron*, 100 Wash.2d 520, 674 P.2d 650 (1986). In the present case H.M.C.'s state of mind is not a material issue in the case. Her state of mind is not relevant as to whether or not the charged acts had occurred or did not occur.

To be admissible under this hearsay exception, testimony must be relevant and meet the test of trustworthiness. *State v. Parr*, 93 Wash.2d 95, 606 P.2d 263 (1980). In that case the defendant was convicted of second-degree murder. At trial he claimed the shooting of his girlfriend

was accidental. He claimed that the he and the victim had reached for a gun at the same time and it accidentally discharged shooting the victim in the head. The defendant's contention in that case concerned the admission of certain rebuttal evidence offered to prove that the victim did not reach for the gun or threaten the petitioner; in other words, to rebut the claim that the shooting was accidental, occurring while the petitioner was attempting to defend himself. *Id* at 98. The court went on to say:

“if there is no defense which brings into issue the state of mind of the deceased, evidence of fears or other emotions is ordinarily not relevant. But where a defense such as that of accident or self-defense is interposed, as is the case here, courts have generally allowed the admission of evidence of the victim's fears, as probative of the question whether that person would have been likely to do the acts claimed by the defendant.” *Id* at 103.

In the present case, there is no defense that brings into issue the state of mind of H.M.C. The victim's state of mind is irrelevant to the issue of whether Manuel committed the acts charged and her alleged hearsay statements do not fall under any exception to the rule.

## **2. COUNSEL WAS NOT INEFFECTIVE.**

To establish ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient; and (2) the deficient performance resulted in prejudice. *State v. Walker*, 143 Wash.App. 880, 890, 181 P.3d 31 (2008); see: *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Deficient performance is performance below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Rodriguez*, 121 Wash.App. 180, 184, 87 P.3d 1201 (2004). Prejudice means that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wash.2d 322, 334-335, 899 P.2d 1251 (1995). Effective assistance of counsel does not mean successful assistance of counsel. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Competency of counsel will be determined upon the entire record. *State v. Gilmore*, 76 Wn.2d 293, 297, 456 P.2d 344 (1969).

Counsel was not ineffective because the alleged threats made by H.M.C. to her mother were not relevant and her state of mind was not at issue. The court properly ruled that:

“the witness’s state of mind is not relevant as to whether or not this act occurred or didn’t occur. The statements you’ve indicated is not offered for truth of the matter asserted. But the statement itself is not relevant---is only relevant if it in fact is true. So it is essentially hearsay. RP 400-401.

For the reasons stated above the alleged statements were not admissible hearsay and Manuel was not afforded ineffective assistance of counsel.

**3. THE COURT’S LIMITING INSTRUCTION DID NOT COMMENT ON THE EVIDENCE AND DID NOT AMOUNT TO A DIRECTED VERDICT.**

At trial there was evidence introduced that while living in Oregon Manuel had sexual intercourse or sexual contact with H.M.C. RP 264, 267. The trial court gave the following limiting instruction:

Evidence has been introduced in this case that the defendant engaged in sexual intercourse and/or sexual contact with (H.M.C.) in the State of Oregon. This evidence has been admitted for the limited purpose of presenting evidence relating to the defendant's lustful disposition or common scheme or plan. You must not consider this evidence for any other purpose. RP 470.

This instruction is based on WPIC 5.30 which reads:

Certain evidence has been admitted in this case for a limited purpose. This [*evidence consists of* \_\_\_\_\_ *and*] may be considered by you only for the purpose of \_\_\_\_\_. You may not consider it for any other purpose. Any discussion of the evidence during your deliberation must be consistent with this limitation.

The trial court judge did not err and improperly comment on the evidence before the jury when it issued this limiting instruction. Article IV, section 16 states that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." *State v. Levy*, 156 Wash.2d 709, 723, 132 P.3d 1076 (2006); see *State v. Baxter*, 134 Wash.App. 587, 592-593; 141 P.3d 92 (2006).

Washington courts apply a two-step analysis when deciding whether reversal is required as a result of an impermissible judicial comment on the evidence in violation of article IV, section 16. *Levy*, 156 Wash.2d at 709. Judicial comments are presumed to be prejudicial, and

the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. The court in *Levy* States:

“The fundamental question underlying our analysis of judicial comment is whether the mere mention of a fact in an instruction conveys the idea that the fact has been accepted by the court as true. *Levy*, 156 Wash.2d.

For a court’s remark to be a comment on the evidence within constitutional proscription, the jury must be able to infer there from that the court personally believed or disbelieved the testimony in question. *State v. Browder*, 61 Wash.2d 300, 378 P.2d 295 (1963).

A jury of laymen could not infer from the limiting instruction in the present case any belief or disbelief of testimony on the part of the court. The instruction simply states that this evidence was *introduced* in the case for a limited purpose and must not be considered for any other purpose. There is no indication that the court accepted this evidence as required by *Levy* or an inference drawn that the court personally believed or disbelieved this testimony, as required by *Browder*. The court did not comment on the evidence.

A judge may not direct a verdict of guilt in a criminal case no matter how overwhelming or conclusive the evidence is. *United Brotherhood v. United States*, 330 U.S. 395, 408, 91 L.Ed. 973, 67 S. Ct. 775 (1947).

Manuel argues that by entering the language in the limiting instruction “engaged in sexual intercourse and/or sexual contact with (H.M.C.) in the State of Oregon” removed this factual issue from the jury’s consideration. However, it is clear from the instruction that the evidence was simply introduced, not acknowledged as being true or not. This limiting instruction did not eliminate an element of the crime charged that the State had to prove beyond a reasonable doubt. The court also instructed the jury with the following:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. RP 469.

The court did not comment on the evidence or direct a verdict in the present case. As outlined above, Manuel did not receive ineffective assistance of counsel, because the limiting instruction was proper.

#### **4. THERE WAS NO CUMULATIVE EFFECT OF ERRORS**

Under the cumulative error doctrine, the appellate court will reverse when it appears reasonably probable that the cumulative effect of error’s, none of which standing alone mandates reversal, materially affected the outcome. *State v. Johnson*, 90 Wn.App. 54, 74, 950 P.2d 981 (1998). In the present case, there were no errors. Therefore, the cumulative errors doctrine does not apply.

**5. THE COMMUNITY CUSTODY PROVISION PROHIBITING THE PURCHASE, POSSESSION, OR VIEWING OF PORNOGRAPHIC MATERIAL IS UNCONSTITUTIONALLY VAGUE.**

The State concedes the complained of term of community custody is error and moves the Court of Appeals to remand for correction of the judgment and sentence. The State believes that the sole issue raised by Appellant is meritorious

**F. CONCLUSION**

The State respectfully requests the Court to affirm the judgment and sentence with the exception of remanding to correct the issue of community custody.

Dated this 22 day of October, 2010

Respectfully submitted by:



Timothy W. Whitehead, WSBA #37621  
Deputy Prosecuting Attorney for Respondent  
Gary P. Burlison, Prosecuting Attorney  
Mason County, WA

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

STATE OF WASHINGTON, )  
 )  
 Respondent, ) No. 40495-8-II  
 )  
 vs. ) DECLARATION OF  
 ) FILING/MAILING  
 ) PROOF OF SERVICE  
 RENE D. MANEUL, )  
 )  
 Appellant, )  
 \_\_\_\_\_ )

I, MARGIE OLINGER, declare and state as follows:

On FRIDAY, OCTOBER 22, 2010, I deposited in the U.S. Mail  
postage properly prepaid, the documents related to the above cause number  
and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Thomas Doyle  
P.O. Box 510  
Hansville, WA 98340-0510

I, MARGIE OLINGER, declare under penalty of perjury of the laws  
of the State of Washington that the foregoing information is true and correct.

Dated this 17<sup>TH</sup> day of September, 2010, at Shelton, Washington.

  
MARGIE OLINGER

10 OCT 25 AM 10:19  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY