

No. 45673-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KEITH DOW,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Dow's motion to vacate the State's affidavit of prejudice against Judge Warning, who had previously issued discretionary rulings including suppressing Mr. Dow's statement to police over the State's objection.

2. The trial court erred under ER 702 and violated Mr. Dow's rights under the Sixth and Fourteenth Amendments and article I, section 22, by prohibiting him from presenting expert testimony on the fallibility and malleability of memory, while allowing the State to present expert testimony to support its theory that the child complainant accurately remembered the alleged events.

3. The admission of Cecilia Walde's out-of-court statements violated ER 402, 403, and 802.

4. Mr. Dow was deprived of his right to the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments and article I, section 22.

5. Cumulative error deprived Mr. Dow of a fair trial.

6. The sentencing court erred and violated Mr. Dow's Fourteenth Amendment right to due process by imposing a condition of community custody ordering Mr. Dow to "submit to ... a plethysmograph as directed by Corrections Officer"

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A party may disqualify a judge from a case without cause, but only if it does so before the judge has “made any ruling whatsoever in the case, ... and before the judge presiding has made any order or ruling involving discretion” RCW 4.12.050. Because the purpose of the timeliness requirement is to prevent judge-shopping, “the case” is broadly construed and a party may not disqualify a judge following a mistrial or appellate reversal simply because there will be a new trial. Did the trial court err in permitting the State to disqualify Judge Warning from this case, where Judge Warning had previously dismissed the charge over the State’s objections, the State appealed and the Supreme Court affirmed the trial court, and the State then re-filed the charge?

2. Under ER 702, “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” The only fact in issue in this case was the accuracy of the complaining witness’s memory regarding a 15-30 second event that occurred eight years prior to trial when she was three years old. Did the trial court err under ER 702 by prohibiting Mr. Dow from presenting expert testimony on the fallibility of memory, while permitting

the State to present its own expert supporting its theory that the complainant's memory was reliable?

3. The Sixth and Fourteenth Amendments and article I, section 22 guarantee the accused the right to present witnesses in his own defense. Mr. Dow's defense in this case was that the complaining witness's memory was inaccurate, and he sought to introduce as an expert a professor with forty years of experience in memory research to explain the factors that can contribute to false memories. Did the trial court violate Mr. Dow's constitutional right to present a defense by excluding his expert witness, while permitting the State to call an expert witness supporting its theory that the complainant's memory was accurate notwithstanding the contradictory stories she related over the years?

4. Under the Rules of Evidence, irrelevant evidence is inadmissible, hearsay is inadmissible, and evidence that is substantially more prejudicial than probative is inadmissible. Over Mr. Dow's objections, the trial court admitted a recording of the complainant's mother repeatedly telling Mr. Dow that she heard Mr. Dow had molested children other than the one at issue in this case. The prosecutor agreed that there was "no indication" these accusations were true, and the trial court acknowledged the accusations were irrelevant to this case. The court nevertheless admitted the statements because the State claimed they could

not be redacted and because any prejudice was “minor.” Did the trial court abuse its discretion in admitting this undisputedly irrelevant evidence, which was also highly prejudicial hearsay?

5. The Sixth and Fourteenth Amendments and article I, section 22 guarantee the right to the effective assistance of counsel. Hearsay is inadmissible, as are statements of opinion on guilt and credibility. Was Mr. Dow deprived of his constitutional right to the effective assistance of counsel when his attorney failed to object on these grounds to the admission of Cecilia Walde’s statements that the complainant “did not lie,” that Mr. Dow “told her to take her clothes off,” and that the complainant was on Mr. Dow’s bare penis?

6. The Due Process Clause of the Fourteenth Amendment guarantees freedom from unwanted bodily intrusions. Accordingly, this Court has held that although a sentencing court may order penile plethysmograph testing incident to crime-related treatment, it may not impose it as a monitoring tool subject to the discretion of a community corrections officer. Should the community custody condition ordering Mr. Dow to “submit to ... a plethysmograph as directed by Corrections Officer” be stricken as unconstitutional?

C. STATEMENT OF THE CASE

Keith Dow is a family man and a veteran who has served two tours of duty in Iraq. RP (5C) at 1441-47. In September of 2005, a few months after he returned from his first tour of duty, his girlfriend's three-year-old daughter, K.W., walked in on him while he was naked in his bedroom. According to Mr. Dow, he had been masturbating when K.W. walked in on him and jumped on the bed. Ex. 1A at 3-4; RP (5A) at 995. According to the child's mother, K.W. said that during the 15-30 seconds she was in the bedroom, Mr. Dow put his "wee-wee" on her "go-go."¹ RP (1A) at 66; RP (5A) at 1001.

Later that month, K.W. met with a detective. RP (2) at 369; RP (5B) at 1178. At one point in the interview, K.W. said that Mr. Dow "rubbed his wee-wee on me," but twice during the interview she said that Mr. Dow's "wee-wee" did not touch her at all. RP (2) at 376, 378; RP (5B) at 1184, 1222.

The State nevertheless charged Mr. Dow with one count of first-degree child molestation. CP 138. In March 2006 at a child competency hearing, K.W. testified that Mr. Dow did not touch her "go-go" and that a "wee-wee" had not touched any part of her body. RP (5B) at 1248-49.

¹ K.W. used the term "wee-wee" for penis and "go-go" for vagina. RP (5A) at 917.

The State conceded that K.W. was incompetent to testify and that her statements to others were inadmissible. CP 140-41.

Over the State's objection, Judge Stephen Warning then ruled that Mr. Dow's statements to the detective were inadmissible because they were exculpatory and because their admission would violate the corpus delicti rule. CP 141-42. The trial court dismissed the charge without prejudice. CP 143. The State appealed, and the Supreme Court ultimately affirmed the trial court. CP 144-66.

The State re-filed the charge in 2010. CP 1. At the first hearing, the State filed an affidavit of prejudice against Judge Warning and told him that he could not hear the case. RP (1A) at 1; CP 5. As soon as counsel was appointed for Mr. Dow, he moved to vacate the affidavit of prejudice as untimely given that Judge Warning had already issued discretionary rulings. CP 10-12. The trial court denied the motion on the basis that the dismissal and re-filing of the charge created a new "case" for which no discretionary rulings had been issued. RP (1A) at 28-37.

The court held another child competency hearing. This time, K.W. said that Mr. Dow was lying down in bed holding his "wee-wee," and that he touched it to her stomach. RP (1A) at 63-66. K.W. was adamant that Mr. Dow's "wee-wee" never touched her "go-go," and that she had never told anyone that it had. RP (1A) at 72, 91. The court ruled that K.W. was

competent to testify and that her statements to others were admissible. RP (2) at 425-32, 456-64.

Mr. Dow's defense was that K.W.'s recollection was inaccurate and had been tainted by post-event influences. Accordingly, Mr. Dow sought to introduce expert testimony on the fallibility and malleability of memory. He submitted a report and C.V. for Dr. John Yuille, a professor with over 40 years of experience researching memory and developing interview protocols and standards for evaluating the accuracy of memory. CP 250-300, 323-35; RP (4) at 755-58, 764-65, 846-48, 852-53.

In response, the State hired its own expert and objected to the defense expert. The trial court excluded the defense expert on the basis that the malleability of memory was within the common understanding of jurors and that any testimony on this issue would go to the credibility of the witness and invade the province of the jury. RP (4) at 759, 761, 855. The trial court nevertheless admitted the State's expert testimony supporting its theory that the child's memories were accurate and that her inconsistent stories did not mean her memory was unreliable. RP (4) at 797-98; RP (5A) at 883-86.

Over Mr. Dow's objections, the trial court also admitted a recording of a telephone call between K.W.'s mother and Mr. Dow, during which the mother opines that Mr. Dow molested K.W. and that K.W. was

not lying. The mother also stated that she had heard from Mr. Dow's ex-wife that he had likely similarly molested his own daughter, and that he probably molested the daughters of previous girlfriends. Although the State acknowledged that these accusations were completely unfounded, it insisted it could not redact the recording and claimed the unfounded molestation allegations were not prejudicial. The trial court agreed and admitted the recording in its entirety. Exs. 1, 1A; CP 247; RP (4) at 784; RP (5A) at 891-95.

At trial, K.W. changed her story again and testified that Mr. Dow was sitting up in bed, put her on top of him, and touched his "wee-wee" to her "go-go." RP (5A) at 918-19. The State's expert testified that these types of changing stories are usually due to language development rather than any inaccuracies in memory. RP (5B) at 1108-12. In closing argument, defense counsel attempted to explain that the complainant's memory was probably inaccurate and had been tainted by inadvertent post-event suggestion. RP (5C) at 1363-1394. The jury was instructed that the arguments of counsel are not evidence. CP 344. The prosecutor in closing argument told the jury it was to view K.W.'s testimony "through the lens" of the State's expert. RP (5C) at 1357.

The jury found Mr. Dow guilty as charged. CP 357. He was sentenced to a term of 68 months to life in prison. CP 364.

D. ARGUMENT

1. The trial court erred in denying Mr. Dow's motion to vacate the State's untimely affidavit of prejudice against Judge Warning.

RCW 4.12.050 permits a party to remove a judge without cause, but only if the motion is made before the judge has issued a discretionary ruling in the case. In this case, the State was permitted to remove Judge Stephen Warning after he had already issued a ruling dismissing the charge without prejudice over the State's objection. The State's removal of Judge Warning violated the language and purpose of RCW 4.12.050, and this Court should reverse. The standard of review on this issue of statutory construction is *de novo*. *State v. K.L.B.*, ___ Wn.2d ___, ___ P.3d ___, 2014 WL 2895451 (filed 6/26/14) at ¶ 8.

- a. The State filed an affidavit of prejudice against Judge Warning, who had already made discretionary rulings including suppressing Mr. Dow's statements over the State's objection.

After presiding over a child competency hearing in this case in 2006, Judge Stephen Warning ruled that Mr. Dow's statement to the police was inadmissible at trial in light of the State's concession that the complainant was incompetent to testify and that all of her hearsay statements were inadmissible. CP 145-48. The State objected to Judge Warning's ruling and appealed. CP 144. The Supreme Court ultimately

affirmed the trial court's order dismissing the charge without prejudice. CP 149-66.

The State re-filed the information and Judge Warning presided at Mr. Dow's first appearance following the Supreme Court's decision. RP (1A) at 1-3. The State filed an affidavit of prejudice against Judge Warning, and told him that "your honor can't hear this matter." RP (1A) at 1; CP 5.

No attorney appeared on behalf of Mr. Dow. He could not afford to hire one because he had just returned from a second tour of duty in Iraq and did not yet have a job. RP (1A) at 2. The court appointed a public defender and continued the case. RP (1A) at 2-3.

At the next hearing, before Judge Stonier, Mr. Dow's appointed counsel moved to vacate the affidavit of prejudice against Judge Warning. CP 10-12. Counsel noted that RCW 4.12.050 permits a party to remove a judge without cause only if the motion is made before the judge has issued a discretionary ruling in the case. CP 10-12; RP (1A) at 28-29. The State argued that following dismissal and re-filing, the case is no longer the same "case" for purposes of the statute. CP 14-17; RP (1A) at 32-34.

Mr. Dow pointed out that the State's view of the law would permit judge-shopping because the State could simply move to dismiss and re-file charges any time it wanted a new judge. RP (1A) at 31-32. Mr. Dow

argued the case was the same “case” under the Supreme Court’s analysis in *State v. Belgarde*, 119 Wn.2d 711, 837 P.2d 599 (1992). CP 11-12; RP (1A) at 29-30. The State acknowledged the policy problem with its position but argued the issue was directly controlled by Division Three’s opinion in *State v. Torres*, 85 Wn. App. 231, 932 P.2d 186 (1997). RP (1A) at 32-24.

The trial court ruled:

[I]f *Belgarde* were the only decision before the court, I would -- would certainly be leaning towards [defense counsel’s] position. I agree it smacks of judge shopping. It doesn’t seem to promote good policy.

But *Torres* is the -- is factually very, very close to this situation.

RP (1A) at 37. The judge accordingly denied Mr. Dow’s motion to vacate the affidavit of prejudice. RP (1A) at 38. The court also denied Mr. Dow’s motion to reconsider. CP 23-24; RP (1A) 44-45.

- b. Although the information had been dismissed and re-filed, the case was the same case for purposes of the statute because it was the same charge based on the same alleged incident.

This Court should part company with Division Three’s opinion in *Torres*. Under the Supreme Court’s decision in *Belgarde*, a case is the same “case” for purposes of RCW 4.12.050 where the charge has been dismissed and re-filed, because the action is based on the same facts and

issues. The *Torres* opinion construes the phrase “the case” too narrowly, and promotes judge-shopping.

Under Washington law, a party may file an “affidavit of prejudice” to disqualify a judge from a case without cause, but only if “such motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case, ... and before the judge presiding has made any order or ruling involving discretion” RCW 4.12.050. See *State v. Clemons*, 56 Wn. App. 57, 59, 782 P.2d 219 (1989). Otherwise, the motion is untimely and must be denied. *Clemons*, 56 Wn. App. at 61. The purpose of requiring a party to file an affidavit of prejudice before any discretionary rulings are made in the case is to prevent judge-shopping. *Id.*

At issue here is the definition of the phrase “the case” in RCW 4.12.050. Division Three in *Torres* held that where an information is dismissed without prejudice and then re-filed, it becomes a new “case” and a party may remove a judge who already made discretionary rulings before the previous information was dismissed. *Torres*, 85 Wn. App. at 232. Division Three’s analysis was incorrect under the Supreme Court’s decision in *Belgarde*.

In *Belgarde*, the Court reversed the defendant’s convictions and remanded for a new trial because of prosecutorial misconduct. *Belgarde*,

119 Wn.2d at 713. At the first pre-trial appearance following remand, the defendant filed an affidavit of prejudice against the judge who had presided over the first trial. *Id.* The judge denied the motion on the basis that he had already made discretionary rulings in the first trial and therefore the affidavit of prejudice was untimely. *Id.* at 713-14.

On appeal, the defendant argued the affidavit of prejudice was timely because the second trial was a new “case” for purposes of the statute. *Id.* at 715-16. The Supreme Court disagreed, noting that “case” or “action” means “the prosecution of a legal right by one party against another.” *Id.* at 716-17 (citing Black’s Law Dictionary 26 (5th ed. 1979)). The Court set forth a rule that “a new proceeding or case is one that (1) presents new issues arising out of (2) new facts occurring since the entry of final judgment.” *Belgarde*, 119 Wn.2d at 717 (citing *State ex rel. Mauerman v. Superior Court*, 44 Wn.2d 828, 830, 271 P.2d 435 (1954)).

The Court also endorsed Division One’s opinion in *Clemons*. *Belgarde*, 119 Wn.2d at 716 (citing *Clemons*, 56 Wn. App. at 59). In *Clemons*, the court held that a retrial following a mistrial due to a hung jury was the same “case” for purposes of RCW 4.12.050, and therefore the trial court properly denied the defendant’s affidavit of prejudice against the judge who had presided over prior proceedings. *Id.* Division One noted that the word “case” is “broader and more inclusive than ‘trial,’”

and that the second trial was based on the same alleged incident (a homicide) and not on “new issues arising out of new facts.” *Clemons*, 56 Wn. App. at 59, 60. Furthermore, to allow a change of judge in such circumstances would run counter to the justification for the timeliness requirement of the statute, which is to prevent judge-shopping. *Id.* at 61-62.

Applying these principles to the situation here, it is clear that a case is not a new case for purposes of RCW 4.12.050 where a charge is dismissed and re-filed. The case is not one that presents new issues arising out of new facts; it is the same charge based on the same alleged incident. Thus, under the rule set forth in *Belgarde*, it is the same “case,” and an affidavit of prejudice may not be filed against a judge who issued discretionary rulings before the prior information was dismissed. *See Belgarde*, 119 Wn.2d at 717. This is not only the correct application of the two-part standard outlined in *Belgarde*, but also promotes the purpose of the statute as explained in *Clemons*.

Here, the State was permitted to remove the judge who had earlier issued a ruling with which the State disagreed. The disqualification was improper under the standard set forth in *Belgarde*, and violates the principles of fairness that RCW ch. 4.12 was designed to protect. This Court should reverse and remand for a new trial. *State v. Norman*, 24 Wn.

App. 811, 814, 603 P.2d 1280 (1979) (remedy for incorrect ruling on affidavit of prejudice is reversal and remand for new trial).

2. The trial court erred under ER 702 and violated Mr. Dow's constitutional right to present a defense by prohibiting him from calling an expert witness to explain the fallibility and malleability of memory.

The State's theory of the case was that during the "15 to 30 seconds" the complainant said she was in Mr. Dow's bedroom, he picked her up and put her on his lap such that their genitals were touching and rubbing against each other. The defense theory of the case was that the child walked in on Mr. Dow while he was masturbating and jumped on the bed, and that her drastically inconsistent stories about the incident showed that her memory was unreliable and had likely been tainted by inadvertent post-event suggestion.

The trial court prohibited Mr. Dow from calling a highly experienced expert on memory and child interview techniques to support his defense, but permitted the State to call an expert witness supporting its theory that the memories were accurate. The trial court's ruling was improper under ER 702, and violated Mr. Dow's rights to due process and to present a defense under the Sixth and Fourteenth Amendments and article I, section 22.

This Court reviews *de novo* whether a defendant's constitutional right to present a defense was violated. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). A ruling under ER 702 is reviewed for abuse of discretion. *State v. Green*, ___ Wn. App. ___, ___ P.3d ___, 2014 WL 2866555 (filed 6/24/14) at ¶ 31.

a. The contested issue in the case was the accuracy of the complainant's memory, but the defense was prohibited from presenting expert testimony on the fallibility of memory, while the State was permitted to present its own expert supporting its theory that the complainant's memory was reliable.

i. The complainant's inconsistent and contradictory stories.

At various points throughout the years, K.W. said the following:

- September 2005: Mr. Dow "rubbed his wee-wee on my go-go." RP (5A) at 1001.
- September 2005: "It didn't touch me." (stated twice in response to repeated question about where on her body Mr. Dow's "wee-wee" touched her). RP (2) at 378.
- December 2005: "Keith rubbed his wee-wee on my go-go." RP (5B) at 1159.
- March 2006: "No" (In response to "Do you recall an incident in your mom's and Keith's bed?"); "No" (in response to "has anything ever touched your go-go?"); "No" (in response to "Have you ever seen Keith's wee-wee?"); "No" (in response to "Has a wee-wee ever been touched with your body?"). RP (5B) at 1248-49.

- 2007: “My daddy Keith hurt me.” “It just makes me sad because it hurt me and it hurts my mom and it makes me sad and it makes my mom sad.” RP (5B) at 1143.
 - 2011: “Yes” (in response to “so you were facing each other on your side?” and “he was never sitting, he was always lying?”). RP (1A) at 65, 89.
 - 2011: “No” (in response to “was there any touching involving a go-go?”). “No” (in response to “Have you ever told somebody that he did rub your go-go or your private area?”). RP (1A) 72, 91.
 - 2013: “then my go-go is touching his wee-wee.” “He was sitting.” RP (5A) at 918-19.
- ii. The trial court excludes defense expert testimony regarding the factors that can cause inconsistent stories.

Because “the core issue in this case is memory,” CP 262, the defense planned to call an expert witness, Dr. John Yuille, to explain the fallibility and malleability of memory. RP (4) at 755-58, 764-65, 846-48, 852-53. The expert would have described the factors which can influence recollection, which was necessary because such factors are not within the ordinary experience of jurors. CP 253. Defense counsel argued the expert testimony would be helpful to the jury under ER 702, and that it was critical to his constitutional rights to due process and to present a defense. RP (4) at 764, 848. He said:

Dr. Yuille is an expert in child forensic interviews and in human memory and I believe my client is entitled to provide evidence that additional memories or new memories can be accounted for from other sources than historic fact. And, if I am required to make that argument without the benefit of expert testimony, it's kind of a reversal of the burden of proof

RP (5A) at 853.

Mr. Dow submitted Dr. Yuille's report and CV to the court as an offer of proof. CP 250-300, 323-35. Dr. Yuille is an expert in human memory and child interview techniques. CP 252. He is a Professor Emeritus in the Department of Psychology at the University of British Columbia, and has conducted research in the area of human memory for over 40 years. CP 261. Dr. Yuille's CV notes that he has published more than 125 articles, presented at more than 240 conferences, and conducted over 175 workshops for police, CPS workers, prosecutors, and judges. He has also interviewed and/or assessed children's evidence in more than 1000 cases of alleged sexual or physical abuse. CP 261.

Dr. Yuille's report discussed what must be considered when interviewing children, noting that children "are particularly susceptible to the effects of leading questions and to suggestion." CP 256-57. "In addition, the interviewer must have knowledge of the memory, language and expressive abilities of children of all ages." CP 257. Dr. Yuille stated, "As a researcher and practitioner in the area of victim and witness

interviews, I have been involved in the development of interview standards. The procedure I have developed, called the Step-Wise Interview, attempts to maximize the information obtained from the child while minimizing the contamination of the child's memory." CP 257. This method "employs open-ended questions, avoids leading the child, allows the child to set the pace of the interview and to describe events in his or her own words, and attempts to obtain as much information as possible to evaluate alternative hypotheses about the child's allegations." CP 258.

Dr. Yuille's report also describes a method using 24 criteria which he and other researchers developed for evaluating the reliability or accuracy of a child's statements. CP 258-61. Dr. Yuille notes that when using the term "credibility" in this context, it "is not synonymous with truth telling." CP 258. Rather, the procedures "are intended to determine, with varying degrees of certainty, if the child's disclosure has the features of a real memory, that is, a memory of a personally experienced event." CP 260. Furthermore, "it is possible that some parts of an allegation are assessed as credible and other parts are not. For example, a child who has been abused may exaggerate the extent of the abuse." CP 261.

Dr. Yuille explained that, unlike what jurors commonly understand, episodic memory "is reconstructive in nature." CP 264. In

other words, “an episode is not stored in memory in the fashion that a video or computer would store information.” CP 264. Because of this:

[T]he reconstructive process can make errors. The content of a reconstructed episode can be influenced by current information (i.e., at the time of recall) as well as by the original experience. Thus, an episodic memory may change over time as a result of re-interpretation of an event or as a result of suggestion. The change in memory over time can happen without the awareness of the rememberer.

CP 264.

Humans do not even develop the capacity for episodic memory until the third year of life. CP 264. Furthermore, “episodic memories decline in accuracy and detail with the passage of time.” CP 264.

An individual could come to hold a memory for an event that is not true: that is, the memory is a narrative truth but not an historic truth. The reconstructive nature of Episodic Memory makes it possible for this to occur. Typically, false memories of this sort are a result of suggestion.

CP 264.

Dr. Yuille was not permitted to explain any of this to the jury, because the trial court excluded his testimony altogether. The trial court adopted the State’s position that the expert should be excluded because “testimony as to children’s memory is within the common understanding of the jury,” and because it was a question of credibility that was within the province of the jury. RP (4) at 759, 761, 855.

iii. The trial court admits the State's expert testimony regarding the factors that can cause inconsistent stories.

In contrast, the expert the *State* hired to rebut Dr. Yuille was permitted to testify notwithstanding the fact that Dr. Yuille was excluded. RP (5A) at 883-86. The State offered Laura Merchant as an expert to explain “how children disclose, meaning the way in which they disclose is based upon their age, their ability to talk about it and that children disclose differently depending on their ages and how it comes out and that those disclosures change over time.” RP (4) at 797. The prosecutor said, “It can be how the other parties who they are talking to affect those disclosures. For instance, if a child sees their disclosure as having [an effect] on their mother, that might change how they disclose and the way in which they disclose over time.” RP (4) at 798.

Defense counsel pointed out that the State's offer of proof for its expert “repeated what I said about [defense expert] Dr. Yuille.” RP (4) at 798. He said, “if we're actually going to talk about how do children disclose under a variety of stressful circumstances like relatives asking questions, I think if we're going to have those discussions, let's have those discussions. Let's have both [expert] witnesses talk about how children disclose.” RP (4) at 799. “Both sides want experts ... and I think it is important in this case. ... However, if we're not allowed to have John

Yuille, I don't think they should be allowed to have Laura Merchant." RP (4) at 800. Without explanation, the court permitted the State to present expert testimony notwithstanding the fact that it had excluded the defense expert. RP (5A) at 883-86.

At trial, the State's expert told the jury that she has a master's degree in sociology with a minor in psychology, and that she trains child interview specialists. RP (5B) at 1096-97. She said, "research has shown that children as young as two really get it that it is not okay to lie and it is a really good idea to tell the truth." RP (5B) at 1105. The State's expert explained why, in her opinion, a child's inconsistent stories do not necessarily mean her memory is inaccurate. RP (5B) at 1108-09. She said, children "are likely to tell different things to different people depending on what comes to their mind at the moment or what they're interested in talking about or how the person responds to them." RP (5B) at 1112. She said an apparent change in story is likely due to language development rather than inaccurate memory. RP (5B) at 1112. Mr. Dow noted his continuing objection to this testimony, which was overruled. RP (5B) at 1112-15.

In closing argument, the State invoked its expert testimony many times, telling the jury that Laura Merchant explained why it did not matter that the child said at multiple points that Mr. Dow did not touch her. RP

(5C) at 1347-49, 1354. The prosecutor continued, “So let’s look at the evidence just beyond 2005-2006 and common sense will help you understand and interpret those things and use Ms. Merchant, the expert as your lens.” RP (5C) at 1357. The prosecutor implied that to doubt the child’s memory would be to punish her, rather than to hold the State to its burden to prove the accuracy of the memory beyond a reasonable doubt: “How much are you asking from an 11-year-old? ... who are you judging here? Are you judging [K.W.] because she remembers him putting her on his wee-wee?” RP (5C) at 1359.

In his closing argument, defense counsel tried to explain that no one was accusing the child of “making anything up,” but that the evidence showed her memory was inaccurate and there was no way to determine what actually happened. He tried to explain that “adults’ behavior can influence how a child processes information,” and that this post-event suggestion likely caused the multiple changes in K.W.’s story. RP (5C) at 1363-1394. However, unlike the State, Mr. Dow could not say “our expert explained all of this” and you must “consider K.W.’s testimony through the lens of our expert.” The jury was instructed that the lawyers’ arguments were not evidence. CP 344.

The State again emphasized its expert’s testimony in rebuttal. RP (5C) 1401-02.

b. The exclusion of the defense expert was improper under ER 702.

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” ER 702. Expert testimony is admissible under this rule if it will be “helpful to the jury in understanding matters outside the competence of ordinary lay persons.” *State v. Green*, ___ Wn. App. ___, ___ P.3d ___, 2014 WL 2866555 (filed 6/24/14) at ¶ 31.

The trial court erred under ER 702 in concluding that Dr. Yuille’s expert testimony on memory fell within the understanding of the average juror and would invade the province of the jury. Numerous studies show that certain subjects like memory and perception, which were previously thought to be commonly understood, “are actually not as straightforward as thought.” *State v. Cheatam*, 150 Wn.2d 626, 646, 81 P.3d 830 (2003). Researchers have found that “while certain tendencies of memory may be matters of ordinary sensibility, human memory is far more fallible, and indeed malleable, than most recognize.” Justin S. Teff, *Human Memory is Far More Fallible and Malleable than Most Recognize*, 76-Jun N.Y. St. B.J. 38 (June, 2004).

Thus, while decades ago courts generally excluded expert testimony regarding the ability of eyewitnesses to perceive and remember events accurately, “at this point the significant majority of federal and state courts addressing the question have held that such evidence is admissible.” *Cheatam*, 150 Wn.2d at 645. “Today, there is no question that many aspects of perception and memory are not within the common experience of most jurors, and in fact, many factors that affect memory are counter-intuitive.” *United States v. Smithers*, 212 F.3d 306, 316 (6th Cir. 2000).

The Supreme Court in *State v. Allen* recently emphasized the importance of expert testimony in cases where the accuracy of perception and memory is at issue. *State v. Allen*, 176 Wn.2d 611, 294 P.3d 679 (2013). In that case, the issue was whether and when trial courts must instruct juries on the difficulties of accurately perceiving and remembering faces of those who are of a different race than the observer. *Id.* at 613. The Court held that it was not error to refuse to instruct the jury in that case. *Id.* However, the four-justice lead opinion noted that it *would have* been appropriate for the defendant to present expert testimony on the issue. *Id.* at 624 n.6. Justices Chambers and Fairhurst wrote a special concurrence to underscore this point: “The recognition that expert

testimony is admissible is very important to our justice system” *Id.* at 634 (Chambers, J., concurring).

The two dissenting justices explained why the issue is not one of credibility that invades the province of the jury, and not one that can be addressed through cross-examination. As defense counsel stated in Mr. Dow’s case, the problem is not that the witness is lying; the problem is that the witness genuinely believes the “facts” in his or her memory, but that memory may be inaccurate. *Allen*, 176 Wn.2d at 640 (Wiggins, J., dissenting). Chief Justice Madsen agreed that “the very nature of the problem is that witnesses believe their [testimony] is accurate.” *Id.* at 633 (Madsen, C.J., concurring). Because the issue is one of reliability rather than credibility, all nine justices in *Allen* rejected the State’s argument that a jury instruction on the fallibility of memory with respect to eyewitness identifications would constitute an unconstitutional comment on the evidence. *Id.* at 624 n.7.

Other courts have recognized the same principles. For example, the Texas Court of Criminal Appeals recently stated:

[A] vast body of scientific research about human memory has emerged. That body of work casts doubt on some commonly held views relating to memory.

Tillman v. State, 354 S.W.3d 425, 441 (Tex.Crim.App. 2011) (quoted in *State v. Lawson*, 352 Or. 724, 760 n.10, 291 P.3d 673 (2012)). The

Oregon Supreme Court similarly acknowledged the research mirroring that of Mr. Dow’s proffered expert, including “the alterations to memory that suggestiveness can cause,” and “the difficulty of attempting to distinguish between the original memory and the new memory corrupted by later suggestiveness.” *Lawson*, 352 Or. at 749. “Witness memory can become contaminated by external information or assumptions embedded in questions or otherwise communicated to the witness.” *Id.* at 743. Furthermore, as Dr. Yuille stated, “[s]cientists generally agree that memory never improves.” *Id.* at 779.

In response to the reams of research demonstrating the unreliability of eyewitness memories, the Oregon Supreme Court drastically changed its standards for the admissibility of eyewitness identifications, and also discussed the importance of expert testimony:

As a result of the substantial degree of acceptance within the scientific community concerning data on the reliability of eyewitness identifications, federal and state courts around the country have recognized that traditional methods of informing factfinders of the pitfalls of eyewitness identification – cross-examination, closing argument, and generalized jury instructions – frequently are not adequate to inform the factfinders of the factors affecting the reliability of such identifications. *See State v. Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012) (finding that research on the reliability of eyewitness identifications enjoys strong consensus in the scientific community, that many factors affecting eyewitness identifications are unknown to average jurors or are contrary to common assumptions, and that cross-examination, closing argument,

and generalized jury instructions are not effective in helping jurors spot mistaken identifications).

Lawson, 352 Or. at 759-60. The court listed numerous other state and federal cases affirming the validity of the scientific research on perception and memory and the admissibility of expert testimony based on that research. *Id.* at 760 n.10.

The memoranda and offers of proof Mr. Dow presented in the trial court are consistent with the above authority. Dr. Yuille's scientific explanations would have been helpful to the jury on the critical issue in the case, and should have been admitted under ER 702. The trial court erred in concluding to the contrary.

c. The exclusion of the defense expert violated Mr. Dow's constitutional right to present a defense.

Not only was the trial court's ruling incorrect under the Rules of Evidence, it also violated Mr. Dow's constitutional right to present a defense.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *State v. Franklin*, ___ Wn.2d ___, 325 P.3d 159, 162 (2014) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). This right is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution. U.S. Const.

amends. VI, XIV; Const. art. I, § 22; *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *Cheatam*, 150 Wn.2d at 648 (citing *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)).

This constitutional right may not be abrogated by statute or court rule. *See Jones, supra*. In *Jones*, the defendant was accused of rape, and his defense was that the complainant consented to intercourse during a drug-fueled sex party, where she also had sex with two other men. *Id.* at 717. The trial court found that the defendant's evidence was offered for the purpose of attacking the alleged victim's credibility, and was barred by the rape shield statute. *Id.* at 717-18. The Supreme Court reversed. *Jones*, 168 Wn.2d at 725. It held the statute did not bar the evidence, but that even if it did, Jones's constitutional right to present a defense would trump the statute. *Id.* at 719-24.

The Court emphasized that “[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.” *Id.* at 720 (quoting *Chambers*, 410 U.S. at 294). Thus, so long as a defendant's proffered evidence is minimally relevant, the trial court may not exclude it unless the State proves “the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Jones*, 168 Wn.2d at 720. For evidence of high probative value, “no state interest can be compelling enough to preclude

its introduction consistent with the Sixth Amendment and Const. art. I, § 22.” *Id.* Following these rules, the Court held that because the proffered evidence regarding a consensual all-night sex party was “Jones’s entire defense,” the trial court violated the defendant’s constitutional rights by excluding such evidence. *Id.* at 721.

The same is true here. The inaccuracy of K.W.’s memory was Mr. Dow’s entire defense, yet he was not permitted to introduce his proffered evidence supporting that defense. It is especially egregious that the trial court permitted the State to present an expert witness supporting its theory that the child’s memories were accurate, while defense counsel was left to argue the contrary with his hands tied behind his back. The trial court’s ruling violated Mr. Dow’s right to a fair trial under the Sixth and Fourteenth Amendments and article I, section 22.

d. The remedy is reversal and remand for a new trial.

Evidentiary errors require reversal if, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Thomas*, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). But because the exclusion of Mr. Dow’s expert also violated his Sixth Amendment right to present a defense, the constitutional harmless error standard applies. *Jones*, 168 Wn.2d at 724. That is, a new trial is required unless the State proves beyond a reasonable doubt that the

error was harmless. *Id.*; *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Reversal is required here under either standard.

The only question in the case was whether in 2013 K.W. accurately remembered and related what happened in a bedroom for 15-30 seconds in 2005 when she was three years old. Her stories throughout the years kept changing, and the State was permitted to present expert testimony supporting its theory that none of that mattered and that what K.W. said to the jury reflected an accurate memory. Mr. Dow was not permitted to present his own expert testimony supporting his defense that the contradictory stories showed that K.W.'s memory was inaccurate and likely contaminated by post-event influences. The State relied heavily on its expert during closing argument, even telling the jury that they were to consider the testimony through the lens of the State's expert. Mr. Dow's attorney was left to argue that the complainant's memory was unreliable without being able to support the argument with his own expert testimony. The jury was instructed that the arguments of counsel were not evidence. Thus, they viewed the testimony through the lens of the State's expert in reaching their verdict, and did not have a competing lens through which to view the evidence. Had the trial court properly permitted defense expert

testimony, the outcome may well have been different. This Court should reverse and remand for a fair trial.

3. The trial court improperly admitted a recording of Cecilia Walde’s out-of-court statements that her daughter did not lie, that Mr. Dow molested her child, and that Mr. Dow likely molested other children as well – a claim the State acknowledged was completely unfounded.

- a. The trial court admitted a recording of a telephone conversation between Mr. Dow and Cecilia Walde in its entirety, notwithstanding the fact that it included hearsay, statements of opinion on guilt and credibility, and unfounded accusations that Mr. Dow molested other children.

Pre-trial, the State sought to admit a recording of a telephone conversation between Mr. Dow and K.W.’s mother, Cecilia Walde. During the conversation, Ms. Walde stated that Mr. Dow molested K.W., expressed her opinion that K.W. did not lie, and accused Mr. Dow of molesting his own daughter and the daughters of previous girlfriends. Exs. 1, 1A.

Specific statements Ms. Walde made during the recorded telephone call include the following:

- “You messed with my daughter, dude.” Ex. 1A at 2.
- “You know what that little girl told me? You don’t want to know what that little girl told me. And you know how smart she is and she did not lie. There is

so much she said that cannot be made up.” Ex.1A at 3.

- “You know, I believe her 100%.” Ex. 1A at 3.
- “She was not on a blanket. She was on your fuckin’ bare ass penis.” Ex. 1A at 4.
- “you told her to take off her clothes.” Ex. 1A at 4.
- “Dude, you know I talked to Mary^[2] about this?”
“She told me that before you went to the war that she had taken Dezi in twice to the emergency room for something pretty close.” Ex. 1A at 5.
- “She’s got it on record, and I’m like, what the hell? And then um, I didn’t know that almost every girl you’ve dated since Mary has had a little girl.” Ex. 1A at 5.
- “Well, it’s documented. There’s no reason for [Mary] to make it up.” (In response to Mr. Dow’s protestations that “it’s not true.”) Ex. 1A at 6.
- “Did you do anything to Jackie?” “Did you do anything to Summer?” Ex. 1A at 6.³
- Mary “has no reason to make it up. ... She has absolutely no reason to make it up....She did mention something like that before. ... While you were in Iraq. But it was put on Linda instead.” Ex. 1A at 8.

² Mary is Mr. Dow’s ex-wife and the mother of his daughter.

³ The precise identities of Summer and Jackie are not explained in the call; the context implies they are daughters of Mr. Dow’s previous girlfriends. Mr. Dow’s response to these questions was “No. No. God, no, CeCe.” Ex. 1A at 6.

Mr. Dow moved to exclude the recording. CP 247; RP (4) at 784. Mr. Dow argued the entire conversation was irrelevant and unduly prejudicial and should be excluded under ER 401 and ER 403. *Id.* Mr. Dow also argued that even if a portion of the call was admitted, all of the accusations from his previous wife, Mary, should be excluded as hearsay and because they were irrelevant and unduly prejudicial. RP (5A) at 891-95.

The State argued that the entire recording should be played because “it cannot be redacted.” RP (5A) at 893. With respect to the numerous accusations in the phone call that Mr. Dow molested children other than K.W., the State said:

I would just point out the Defendant’s response is, “It didn’t happen. It’s not true.” And, there’s no indication elsewhere that it would be. The State is not bringing in that evidence. We’re not asking any questions about it.

RP (5A) at 895. Immediately following this statement from the prosecutor, the judge said:

I’m not going to exclude it. I don’t see any prejudice by it being in there that, you know, the idea being that the jury is going to speculate. If, in fact, it could be redacted, when [there are] blanks in a consistent flow of a conversation [it] in many ways creates more speculation than something that seems so minor – appears so minor and it doesn’t go to any of the issues before the Court. So, it’s going to be left in.

RP (5A) at 895.

- b. The trial court abused its discretion by admitting, over Mr. Dow's objections, extraordinarily prejudicial hearsay evidence which the trial court itself acknowledged was irrelevant.

The admission of the above statements was shockingly improper. Mr. Dow correctly objected to the admission of all accusations regarding Mary's daughter and other children, because they were hearsay, were irrelevant, and were unduly prejudicial. *See* ER 401, 402, 403, 801, 802. Both the State and the trial court *agreed* that the accusations were irrelevant. The prosecutor said there was "no indication" that the accusations were true, and the court said "it doesn't go to any of the issues before the Court." RP (5A) at 895. The court nevertheless admitted the evidence because it "appears so minor" and "I don't see any prejudice." RP (5A) at 895.

It is incomprehensible that one could conclude that unfounded accusations of prior molestations are "minor" and "not prejudicial" in a case in which the defendant has been charged with child molestation. Indeed, courts have recognized that the potential for prejudice is at its highest where evidence of alleged prior sex acts is admitted. *State v. Sutherby*, 165 Wn.2d 870, 886, 204 P.3d 916 (2009); *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). Thus, the trial court clearly erred under ER 403.

The more fundamental problem, however, is that the statements were not even relevant, because neither party believed there was any evidence that these prior alleged acts in fact occurred. RP (5A) at 895. The trial court *acknowledged* that the evidence was not relevant. RP (5A) at 895. At that point, even if it were not extraordinarily prejudicial – which it was – it would be inadmissible under ER 402 (“Evidence which is not relevant is not admissible”). Once evidence is deemed irrelevant, the inquiry is over. ER 402. The prejudice inquiry occurs if and only if the evidence has at least some minimal probative value. ER 403. Having found that the evidence was irrelevant, the court was obliged to exclude it. ER 402.

Mr. Dow also correctly noted that the statements were inadmissible under the Rule Against Hearsay. ER 802. “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). The statements were obviously made out of court, and were offered for their truth notwithstanding the fact that – outside the presence of the jury – the State admitted there was no evidence that they were true. In addition to failing to explain why these statements were admissible despite their irrelevance, the State never explained why they were admissible despite

being hearsay. In other words, the State never presented a non-hearsay purpose for the evidence.

The State's claim that the recording could not be redacted is false, and, even if it were true, it would not mean that irrelevant hearsay evidence was admissible. The State never pointed to an exception to ER 402 or ER 802 which states "evidence which cannot be redacted is admissible regardless of whether it violates these rules." Furthermore, the claim that the recording could not be redacted was disingenuous. Recordings are redacted as a matter of course in trials because they are not usually admissible in their entirety. The State demonstrated its ability to redact when it played the recordings of the *Ryan* hearings for the jury. *See* RP (5C) at 1414 (prosecutor explains how she redacted exhibits 18 and 19). If for some reason the recording of this jail call was different from all other recordings and was impossible to redact, then the State could have moved to admit a redacted transcript in lieu of a recording. In any event, the difficulties of redaction do not create an exception to the rules of evidence. The trial court erred in admitting this irrelevant and extraordinarily prejudicial hearsay.

- c. Mr. Dow was deprived of his constitutional right to the effective assistance of counsel when his attorney failed to object to other statements as improper hearsay and improper statements of opinion on guilt and credibility.

Cecilia Walde's other statements opining that Mr. Dow molested her daughter and that K.W. did not lie were also inadmissible because they were hearsay and were improper opinions on guilt and credibility. To the extent these particular objections were waived, Mr. Dow was deprived of his constitutional right to the effective assistance of counsel.

- i. The statements were inadmissible because they were hearsay and were improper opinions on guilt and credibility.

Again, "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Cecilia Walde's statements that K.W. "does not lie," that K.W. "was on [Mr. Dow's] penis," and that Mr. Dow "told her to take her clothes off," were made out-of-court and were offered for their truth.⁴ Thus, they were inadmissible hearsay statements.

The statements were inadmissible hearsay regardless of the fact that Cecilia Walde testified and was subject to cross-examination. *See*

⁴ If they were not offered for their truth, they would not have been relevant, and Mr. Dow's relevance objection should have been sustained.

Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (explaining that testimony can violate the prohibition against hearsay without violating the confrontation clause, and vice versa). “An out-of-court-statement is hearsay when offered to prove the truth of the matter asserted, *even if the statement was made and acknowledged by someone who is an in-court witness at trial.*” *State v. Clinkenbeard*, 130 Wn. App. 552, 569, 123 P.3d 872 (2005) (emphasis added).

Another independent reason the statements were inadmissible is that they were statements of opinion on guilt and credibility. The state and federal constitutions guarantee the right to trial by jury. U.S. Const. amend. VI; Const. art. I, §§ 21, 22. “The right to have factual questions decided by the jury is crucial to the right to trial by jury.” *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008).

Because it is the jury’s role to decide factual questions, witnesses may not express opinions as to the guilt of the defendant in criminal trials. *Id.* at 591. Witnesses “may not testify as to the guilt of defendants, either directly or by inference.” *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002). Additionally, “[a] witness’s expression of personal belief about the veracity of another witness is inappropriate opinion testimony in criminal trials.” *State v. Perez-Valdez*, 172 Wn.2d 808, 817, 265 P.3d 853 (2011). Such testimony invades the province of the jury and

violates the defendant's constitutional right to a trial by jury. *Olmedo*, 112 Wn. App. at 533. Statements of opinion as to guilt or credibility are inadmissible whether presented through live testimony or in recordings. *State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001) (Alexander, C.J., concurring); *id.* at 767 (Sanders, J., dissenting).⁵

In sum, Cecilia Walde's statements that Mr. Dow molested her daughter and that her daughter did not lie were inadmissible because they were hearsay and were statements of opinion on the credibility of the complaining witness and the guilt of the accused. As explained below, Mr. Dow was deprived of his constitutional right to the effective assistance of counsel when his attorney failed to lodge these objections.

ii. *Mr. Dow had a constitutional right to the effective assistance of counsel.*

A person accused of a crime has a constitutional right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22; *United States v. Cronin*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996).

⁵ *Demery* was a plurality opinion in which four justices would have drawn a distinction between live opinion testimony and recorded opinion testimony, but five justices held that statements of opinion on guilt or credibility are inadmissible whether through live testimony or recordings. See *Demery*, 144 Wn.2d at 760 (four-justice lead opinion); *id.* at 767 (four-justice dissent); *id.* at 765 (concurring justice agrees with dissent except as to harmless error analysis).

“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled.” *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A new trial should be granted if (1) counsel’s performance at trial was deficient, and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel’s inadequate performance, the result would have been different, prejudice is established and reversal is required. *Strickland*, 466 U.S. at 694; *Hendrickson*, 129 Wn.2d at 78. A reasonable probability “is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *State v. Thomas*, 109 Wn.2d 222,

226, 743 P.2d 816 (1987). It is a lower standard than the “more likely than not” standard. *Thomas*, 109 Wn.2d at 226.

iii. *Mr. Dow was deprived of his constitutional right to the effective assistance of counsel when his attorney failed to object to improper hearsay and opinion statements.*

Mr. Dow’s attorney’s performance was deficient when he failed to object to Cecilia Walde’s recorded statements on hearsay grounds, and when he affirmatively agreed that they were admissible notwithstanding that she stated her opinion as to the ultimate issue. *See* RP (4) at 813. The decision was not tactical; counsel had objected to the statements on other grounds and wanted them excluded. CP 247; RP (4) at 784. Nor was it reasonable. “Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Had counsel researched the law discussed above, he would have objected on the grounds that the statements were hearsay and improper opinions on guilt and credibility.

The deficiency prejudiced Mr. Dow because there is a reasonable probability that the trial court would have excluded the statements had the proper objection been lodged. *See State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (explaining this portion of the prejudice inquiry). The State could not have proposed a non-hearsay purpose for

introducing the statements, because if not offered for their truth, they would not have been relevant. Furthermore, it is well-settled that witnesses may not offer opinions on the credibility of other witnesses or on the ultimate issue of guilt or innocence. Had counsel objected, the evidence would have been excluded. The failure to object deprived Mr. Dow of his constitutional right to the effective assistance of counsel.

d. The remedy is reversal and remand for a new trial.

The improper admission of Cecilia Walde's recorded statements constitutes an independent basis for reversal, because there is a reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. *Thomas*, 35 Wn. App. at 609. "[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." *Salas v. Hi-Tech Erectors*, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010). The issue in this case was whether K.W. accurately remembered and related that Mr. Dow molested her, or whether instead she walked in on him while he was masturbating and jumped on the bed and her memory of the event was compromised. A rationale jury would have difficulty making that determination – until they heard that Mr. Dow was accused of molesting several other children, and heard K.W.'s mother say that K.W. did not lie and that Mr. Dow molested K.W. The improper

admission of this highly prejudicial evidence materially affected the outcome, requiring reversal and remand for a new trial. *Salas*, 168 Wn.2d at 673; *Thomas*, 35 Wn. App. at 609.

4. Cumulative error deprived Mr. Dow of a fair trial.

Even if each of the above errors individually does not warrant a new trial, they do in the aggregate. “Under the cumulative error doctrine, we may reverse a defendant’s conviction when the combined effect of errors during trial effectively denied the defendant [his] right to a fair trial, even if each error standing alone would be harmless.” *State v. Venegas*, 155 Wn. App. 507, 522, 228 P.3d 813 (2010). Here, the combination of improper evidentiary rulings, ineffective assistance of counsel, and the violation of the constitutional right to present a defense denied Mr. Dow his right to a fair trial. This Court should reverse and remand for a new trial.

5. The condition of community custody requiring Mr. Dow to submit to penile plethysmograph testing as directed by his community corrections officer violates Mr. Dow’s constitutional right to be free from bodily intrusions.

The judgment and sentence provides that Mr. Dow must “[s]ubmit to, and at your expense, a polygraph examination and a plethysmograph [sic] as directed by Corrections Officer or treatment provider.” CP 366.

The portion requiring Mr. Dow to undergo plethysmograph testing at the pleasure of his corrections officer should be stricken as unconstitutional.

Freedom from bodily intrusion is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV; *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997). The Fourteenth Amendment does not permit any infringement upon fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest. *Glucksberg*, 521 U.S. at 721.

Courts have noted that penile plethysmograph testing implicates this liberty interest and that the reliability of this testing is questionable. *In re Marriage of Ricketts*, 111 Wn. App. 168, 43 P.3d 1258 (2002) (recognizing liberty interest); *In re Marriage of Parker*, 91 Wn. App. 219, 226, 957 P.3d 256 (1998) (test violated father's constitutional interests in privacy, noting no showing of reliability of penile plethysmograph testing or absence of less intrusive measures).

Plethysmograph testing may be useful in the diagnosis and treatment of sex offenses, and therefore may be required as part of court-ordered sexual deviancy therapy, but it may not be imposed to monitor a defendant while on community custody. *State v. Riles*, 135 Wn.2d 326, 343-46, 957 P.2d 655 (1998). “[P]lethysmograph testing does not serve a

monitoring purpose . . . It is instead a treatment device that can be imposed as part of crime-related treatment or counseling.” *Id.* at 345.

This Court recently reaffirmed this principle:

Plethysmograph testing is extremely intrusive. The testing can properly be ordered incident to crime-related treatment by a qualified provider. But it may not be viewed as a routine monitoring tool subject only to the discretion of a community corrections officer.

State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782 (2013) (striking community custody condition similar to one at issue in Mr. Dow’s case).

Here, the court required Mr. Dow to submit to such testing as directed by his community corrections officer rather than only at the direction of his treatment provider. CP 366. The testing was ordered in the same sentence as the requirement that Mr. Dow comply with polygraph testing, which is utilized by DOC to monitor compliance. *Riles*, 135 Wn.2d at 342-43.

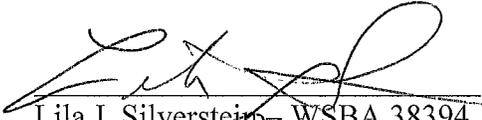
The danger is that the testing is not connected to Mr. Dow’s diagnosis or treatment, but can be ordered by the CCO for any reason, including monitoring Mr. Dow’s compliance with community custody conditions. The community custody condition thus violates Mr. Dow’s constitutional right to be free from bodily intrusions. This Court should strike the requirement that Mr. Dow submit to plethysmograph testing as required by his CCO. *Land*, 172 Wn. App. at 605-06.

E. CONCLUSION

Mr. Dow asks this Court reverse his conviction and remand for a new trial. In the alternative, the condition of community custody ordering Mr. Dow to submit to a plethysmograph as directed by a corrections officer should be stricken.

DATED this 21st day of July, 2014.

Respectfully submitted,



Lila J. Silverstein - WSBA 38394
Washington Appellate Project
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

| | | |
|----------------------|---|----------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| RESPONDENT, |) | |
| |) | |
| v. |) | NO. 45673-7-II |
| |) | |
| KEITH DOW, |) | |
| |) | |
| APPELLANT. |) | |

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