

FILED  
COURT OF APPEALS  
DIVISION II

2014 NOV 20 PM 1:36

STATE OF WASHINGTON

BY: cm  
DEPUTY

**NO. 45673-7-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

---

**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**KEITH IAN DOW,**

**Appellant.**

---

**BRIEF OF RESPONDENT**

---

**AMIE MATUSKO  
W.S.B.A # 31375  
Deputy Prosecuting Attorney for  
Respondent**

**Hall of Justice  
312 SW First  
Kelso, WA 98626  
(360) 577-3080**

TABLE OF CONTENTS

	PAGE
I. STATE’S REPOSE TO ASSIGNMENT OF ERROR .....	1
II. ISSUES PERTAINING TO THE STATE’S RESPONSE TO THE ASSIGNMENT OF ERROR .....	2
III. STATEMENT OF FACTS.....	3
IV. ARGUMENT.....	20
A. THE TRIAL COURT DID NOT ERR WHEN IT UPHELD THE AFFIDAVIT OF PREJUDICE AS THE CASE WAS NEWLY FILED BASED UPON NEW INFORMATION AFTER A KNAPSTAD DISMISSAL.....	20
i. THE FILING OF A NEW CAUSE AFTER A KNAPSTAD DISMISSAL CREATES A NEW CASE BASED UPON NEW EVIDENCE AND WITHOUT A PRIOR DISCRETIONARY RULING.....	21
ii. THE DEFENDANT IS NOT ENTITLED TO REVERSAL AND REMAND BECAUSE A PARTY DOES NOT HAVE A RIGHT TO A PARTICULAR JUDGE AND THERE IS NO PREJUDICE.....	25
B. THE COURT DID NOT ABUSE ITS DISCRETION NOR VIOLATE THE DEFENDANT’S RIGHT TO PRESENT A DEFENSE WHEN IT PROHIBITED A DEFENSE EXPERT FROM TESTIFYING TO MATTERS THAT WOULD INVADE THE PROVINCE OF THE JURY.....	27

i.	THE TRIAL COURT DID NOT ABUSE IT'S DISCRETION IN EXCLUDING DR. YUILLE'S TESTIMONY UNDER EVIDENCE RULE 702. .....	27
ii.	THE COURT DID NOT VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.....	36
iii.	SHOULD THE COURT FIND ERR, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.....	38
C.	THE TRIAL COURT DID NOT ERR IN ADMITTING THE ENTIRE INCULPATORY PHONE CONVERSATION BETWEEN THE VICTIM'S MOTHER AND THE DEFENDANT .....	39
i.	THE DEFENDANT FAILED TO PRESERVE HIS OBJECTIONS FOR APPEAL AS HE DID NOT MAKE A SPECIFIC OBJECTION AND ALLOW THE COURT TO RULE. ....	39
ii.	THE EVIDENCE OF THE ENTIRE AUDIO PORTION OF THE CALL WAS ADMISSIBLE UNDER <i>RES GESTAE</i> TO GIVE CONTEXT TO THE DEFENDANT'S ADMISSIONS AND WAS NOT AN ABUSE OF DISCRETION.....	41
iii.	THE DEFENDANT CANNOT PROVE DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILURE TO OBJECT TO ADMISSIBLE NON-OPINION EVIDENCE ON THE PHONE CALL.....	44
a.	THE STATEMENTS OF CECILIA CHRISTOPHERSON WERE NOT HEARSAY, NOR IMPROPER OPINIONS ON GUILT AND CREDIBILITY.....	45

b.	THE DEFENDANT CANNOT MEET HIS BURDEN TO PROVE DEFENSE COUNSEL WAS INEFFECTIVE.....	49
D.	THERE WAS NO CUMULATIVE ERROR.....	51
E.	THE TRIAL COURT ERRED WHEN IT AUTHORIZED THE COMMUNITY CORRECTIONS OFFICER TO ORDER PLETHYSMOGRAPH TESTING.....	52
V.	CONCLUSION.....	53

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page</b>
<i>Carlton v. Vancouver Care LLC</i> , 155 Wn. App. 151, 231 P.3d 1241 (Div 2, 2010).....	33, 34
<i>City of Seattle v. Heatley</i> , 70 Wn. App. 573, 578, 9854 P.2d 658(Div 1, 1993) <i>rev denied</i> , 123 Wn.2d 111, 869 P.2d 1085 (1994).....	48
<i>In Re PRP of Morris</i> , 176 Wn.2d 157, 170, 288 P.2d 1140 (2012).....	36
<i>Marine Power &amp; Equip. Co., Inc. v. Industrial Indem. Co.</i> , 102 Wn.2d 457, 460, 687 P.2d 202 (1984).....	27
<i>Porter v. Civil Service Commission of Spokane</i> , 12 Wn. App. 767, 772, 532 P.2d 296 (Div 3, 1975).....	45
<i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664, 673, 230 P.3d 583 (2010)....	53
<i>State v. Alexander</i> , 64 Wn. App. 147, 154, 822 P.2d 1250 (1992).....	53
<i>State v. Allen</i> , 176 Wn.2d 611, 294 P.3d 679 (2013).....	36, 37
<i>State v. Belgarde</i> , 119 Wa.2d 711, 837 P.2d 599 (1992)..... .....	22, 25, 26
<i>State v. Boast</i> , 87 Wn.2d 447, 451, 553 P.2d 1322 (1976).....	42
<i>State v. Cheatam</i> , 150 Wn.2d 626, 645, 81 P.3d 830 (2003).....	29
<i>State v. Clemons</i> 56 Wn. App. 57, 59-60, 782 P.2d 219 (1989).....	25
<i>State v. Coe</i> , 101 Wn.2d 772, 789, 684 P.2d 668 (1984).....	53
<i>State v. Constance</i> , 154, Wn. App. 861, 877, 226 P.3d 231 (2010).....	42
<i>State v. Curtiss</i> , 161 Wn. App. 673, 702, 250 P.3d 496 (Div 2, 2011).....	51
<i>State v. Danielson</i> , 37 Wn. App. 469. 681 P.2d 260 (Div 1, 1984).....	47

<i>State v. Deaver</i> , 6 Wn. App. 216, 219, 491 P.2d 1363 (Div 1, 1971).....	47
<i>State v. Demery</i> , 144 Wn.2d 753, 761 fnt 5, 30 P.3d 1278 (2001)....	47,48,49
<i>State v. DeVincentis</i> , 150 Wn.2d 11, 19, 74 P.3d 119 (2003).....	45
<i>State v. Dow</i> , 168 Wn.2d 243, 227 P.3d 1278 (2010).....	23, 26
<i>State v. Ford</i> , 137 Wn.2d 472, 489, 973 P.2d 452, 460 (1999).....	42
<i>State v. Greiff</i> , 141 Wn.2d 910, 929, 10 P.3d 390 (2000).....	53
<i>State v. Grier</i> , 168 Wn. App. 635, 278 P.3d 225 (Div 2, 2012).....	44
<i>State v. Guloy</i> , 104 Wn.2d 412, 428, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)).....	28, 53, 54
<i>State v. Halstien</i> , 122 Wn.2d 109, 127, 857 P.2d 270 (1993).....	54
<i>State v. Hawkins</i> , 164 Wn. App. 705, 713, 265 P.3d 185 (Div 1, 2011)....	25
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 80, 917 P.2d 563 (1996).....	52
<i>State v. Jones</i> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	40
<i>State v. K.L.B.</i> , 180 Wn.2d 735, 739, 328 P.3d 886 (2014).....	23, 24
<i>State v. Knapstad</i> , 107 Wn. 2d 346, 357, 729 P.2d 48 (1986).....	22, 23, 26
<i>State v. Kennealy</i> , 151 Wn. App. 861, 214 P.3d 200 (Div 2, 2009).....	45
<i>State v. Krause</i> , 82 Wn. App. 688, 919 P.2d 123 (Div 1, 1996).....	45
<i>State v. Lane</i> , 125 Wn.2d 825, 831, 889 P.2d 929 (1995).....	44
<i>State v. Lawson</i> , 352 Or. 724, 756, 291 P.3d 673 (2012).....	37
<i>State v. Lord</i> , 161 Wn.2d 276, 165 P.3d 1251 (2007).....	39, 40

*State v. McFarland*, 127 Wn. 2d 322, 336 and 337 n. 4, 899 P.2d 1251 (1995).....52

*State v. Morley*, 46 Wn. App 156, 160, 730 P.3d 687 (Div 3, 1986).....38

*State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976).....51

*State v. Norman*, 24 Wn. App. 811, 814, 603 P.2d 1280 (1979).....27

*State v. Notaro*, 161 Wn. App. 654, 255 P.3d 774 (Div 2, 2011).....48,49, 50, 51

*State v. Perez-Valdez*, 172 Wn.2d 808, 815, 265 P.3d 853 (2011).....44

*State v. Phillips*, 160 Wn. App 36, 47-48, 246 P.3d 589 (Div 2, 2011).....38

*State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).....44

*State v. Rafay, et al.*, 168 Wn. App. 734, 285 P.3d 83 (Div 1, 2012)...31, 32

*State v. Riles*, 135 Wn.2d 326, 344-45, 957 P.2d 655 (1998).....55

*State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *U. S. cert. den.* 115 S.Ct. 2004, 131 L. Ed. 2d 1005).....54

*State v. Salterelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).....45

*State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122 (Div 2, 1986).....51

*State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (Div 2, 1998).....52

*State v. Scherner*, 153 Wn. App. 621, 225 P.3d 248 (Div 1, 2009).....45

*State v. Schulze*, 116 Wn.2d 154, 804 P.2d 566 (1991).....28, 29

*State v. Smith*, 67 Wn. App. 847, 852, 841 P.2d 65 (1992), *review denied*, 121 Wn.2d 1019, 854 P.2d 41 (1993).....28

*State v. Strizheus*, 163 Wn. App 820, 262 P.3d 100 (Div 1, 2011)...38, 39

*State v. Sutherby*, 165 Wn.2d 870, 886, 204 P.3d 916 (2009).....45

<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990).....	34, 35, 36
<i>State v. Tharp</i> , 96 Wn.2d 591, 599, 637 P.2d 961 1981).....	54
<i>State v. Torres</i> , 85 Wn. App 231, 932 P.2d 186 (Div 3, 1997) ....	22, 24, 26
<i>State v. Visitacion</i> , 55 Wn. App. 166, 173, 776 P.2d 986, 990 (Div 1, 1989).....	51
<i>State v. Warren</i> , 134 Wn. App. 44, 62-63, 138 P.3d 1081 (Div 1, 2006) upheld 165 Wn.2d 17, 35, 195 P.3d 940 (2008).....	45
<i>State v. Whelchel</i> , 115 Wn.2d 708, 728, 801 P.2d 948 (1990).....	54
<i>State v. Willis</i> , 151 Wn.2d 255, 87 P.3d 1164 (2004).....	35, 36
<i>Tillman v. State</i> , 354 S.W.3d 425, 441 (Tex. Crim App. 2011).....	37
<i>United States v. Catano</i> , 65 F.3d 219, 225 (1st Cir.1995).....	48
<i>United States v. Flores</i> , 63 F.3d 1342, 1358-59 (5th Cir.1995).....	48
<i>United States v. Gutierrez-Chavez</i> , 842 F.2d 77, 81 (5th Cir.1988).....	48
<i>United States v. Sorrentino</i> , 72 F.3d 294, 298 (2d Cir.1995).....	48
<i>United States v. Whitman</i> , 771 F.2d 1348, 1351 (9th Cir.1985).....	48
<b>Revised Code of Washington</b>	
RCW 4.12.050 (2014).....	22, 23, 24, 25, 26, 27
RCW 10.58.035.....	15, 23
<b>Rules</b>	
WA CrR 3.3(h)(2).....	28
WA ER 702 (2014).....	29

WA ER 801 (2014).....47

WA ER 801(c) (2014).....47

**Other Sources**

5D Karl B. Tegland, *Washington Practice, Courtroom Handbook on Washington Evidence*, at 243 (2010-2011 ed. 2010).....45

5D Karl B. Tegland, *Washington Practice, Courtroom Handbook on Washington Evidence*, at 355 (214-2015 ed. 2014).....47

- I. STATE'S RESPONSE TO ASSIGNMENTS OF ERROR**
- A. THE TRIAL COURT DID NOT ERR WHEN IT UPHELD THE STATE'S AFFIDAVIT OF PREJUDICE BECAUSE A FILING AFTER A KNAPSTAD DISMISSAL IS A NEW CASE.**
  - B. BECAUSE THE DEFENDANT DOES NOT HAVE A RIGHT TO HAVE A PARTICULAR JUDGE HEAR HIS CASE, ANY ERROR IN ACCEPTING THE AFFIDAVIT IS HARMLESS.**
  - C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION NOR VIOLATE THE DEFENDANT'S RIGHT TO PRESENT A DEFENSE WHEN IT EXCLUDED PROFFERED CREDIBILITY TESTIMONY OF A DEFENSE EXPERT BECAUSE IT INVADED THE PROVINCE OF THE JURY.**
  - D. SHOULD THE COURT FIND ERR IN THE EXCLUSION OF TESTIMONY THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.**
  - E. THE DEFENDANT FAILED TO PRESERVE THE ISSUES SURROUNDING THE ADMISSION OF THE INCUPLATORY PHONE CONVERSATION AS HE DID NOT MAKE A SPECIFIC OBJECTION AND ALLOW THE TRIAL COURT TO RULE.**
  - F. THE TRIAL COURT DID NOT ERR IN ADMITTING THE ENTIRE INCUPLATORY RECORDED CONVERSATION AS THE QUESTIONS WERE ADMISSIBLE AS RES GESTAE TO GIVE CONTEXT TO THE DEFENDANT'S ADMISSION.**
  - G. THE DEFENDANT FAILS TO PROVE INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT AS ANY STATEMENTS MADE BY THE MOTHER WERE NOT IMPROPER OPINION EVIDENCE.**
  - H. THE DEFENDANT FAILS TO PROVE INEFFECTIVE ASSISTANCE OF COUNSEL AS THEY CANNOT SHOW THE LACK OF OBJECTION WAS NOT A TRIAL TACTIC NOR THE OUTCOME OF TRIAL WOULD HAVE BEEN DIFFERENT.**

**I. THERE WAS NO CUMULATIVE ERROR.**

**J. THE STATE CONCEEDS THE TRIAL COURT ERRED IN ALLOWING THE COMMUNITY CORRECTIONS OFFICER TO DETERMINE WHEN TO DIRECT PLETHYSMOGRAPH TESTS.**

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

- A. Does the filing of a new case with a new cause number based upon new evidence after a *Knapstad* dismissal prohibit a party from filing an affidavit of prejudice?
- B. If a court wrongly allows an affidavit of prejudice, is the remedy reversal if a party does not have a right to a particular judge and there is no prejudice?
- C. Does a trial court abuse its discretion when it prohibits a defense expert from proffering an opinion that because memory fades with time the victim's subsequent detailed statement is unreliable?
- D. Is the opinion that memory fades with time within the common understanding of a jury?
- E. Is the opinion that the victim's subsequently more detailed statement is opposite to how memory works within the common understanding of a jury?
- F. Did the Defendant preserve his right to object to the admission of all the evidence claimed when he made a general objection of relevance and then specifically only objected to one statement?
- G. Whether in an inculpatory conversation with the Defendant the questions are admissible under *res gestae* to give context?
- H. Whether an audio recorded conversation between a witness and the Defendant where the witness confronts the Defendant about the plausibility of his story and says the victim doesn't lie is inadmissible opinion evidence under *Notaro* and *Demery*?
- I. Was defense counsel ineffective when he did not object to the admission of the questions put to the Defendant in the recorded conversation?

- J. Whether it was a trial tactic by defense to allow the jury to hear the entire recorded conversation, including the questions and answers, to obtain the context of the conversation?
- K. Did the Defendant waive his objection to the admission of the statement the victim doesn't lie, when defense counsel asked the mother in cross-examination about the victim's past history of lying?
- L. Was there cumulative error?

### **III. STATEMENT OF FACTS**

#### **a. Statement of Facts**

Cecilia Christopherson (formerly Walde) and the Defendant were dating and Dow moved in with Cecilia and her daughter, Jane Doe, in March 2005. 5A RP 984, 987-988.<sup>1</sup> Dow and Jane had fun together at times, but he also scared her when he pretended to be a monster or got angry. 5A RP 1012-1013. Dow and Cecilia shared a room that had an adjoining Jack and Jill bathroom with Jane's room. 5A RP 989-990. Jane would often use the bathroom to get from her room to the other bedroom and she had a habit of coming in every morning to cuddle with her mother. 5A RP 989-990, 992-993.

On September 10<sup>th</sup> 2005, Cecilia was volunteer training with the Red Cross to help out the victims of hurricane Katrina. 5A RP 991. At the time she was a Certified Nursing Assistant working in the hospital. 5A RP

---

<sup>1</sup> The Verbatim Report of Proceedings consists of five consecutively numbered volumes, with Volume five having three parts, A, B, and C. The State has labeled these as 1 RP \_\_\_\_ (page number), 2 RP \_\_\_\_, 3 RP \_\_\_\_, 4 RP \_\_\_\_, and 5A RP \_\_\_\_, 5B RP \_\_\_\_, 5C RP \_\_\_\_.

991. When she left that morning, three and a half year-old Jane Doe and Dow were asleep in their respective bedrooms. 5A RP 992.

The Defendant was a highly sexualized individual, having sex three to five times a day with Cecilia and masturbating at other times. 5A RP 990. He also slept in the nude. 5A RP 991. Up to this point, Jane had never been exposed to sex, seen them nude together, nor been exposed to pornography. 5A RP 1013-1014, 1065.

That morning, Jane Doe came into the room like always. 5A RP 916. She didn't see her mother, but Dow was there under the covers. 5A RP 916. Dow told Jane to take off her clothes and get into bed. 5A RP 916. Jane removed her clothes and when Dow pulled back the covers, Jane saw his wee-wee red or purplish and sticking up. 5A RP 916, 955. Dow placed Jane on top of him and put her go-go on his wee-wee. 5A RP 916-917.<sup>2</sup> Jane described Dow as sitting and she was straddling him. 5A RP 919. His wee-wee was poking her and it felt uncomfortable. 5A RP 920.

When Cecilia arrived home, Dow went to her and said something weird happened with Jane. 5A RP 995. He told Cecilia that Jane walked in naked and jumped on the bed; he was tickling her and she was on his chest. 5A RP 995. He moved Jane down and she said, "Oh look, we're rubbing wee-wee's or go-go's." 5A RP 995. He told her that was for adults and to get dressed. 5A RP 997. When Cecilia told Dow she would talk to Jane, Dow tried to convince her he'd taken care of things. 5A RP 997. However,

---

<sup>2</sup> Jane referred to her vagina as her go-go and Dow's penis as his wee-wee. 5A RP 917.

Cecilia went to talk to Jane. 5A RP 999-1000. Jane remembered her mother came to her and asked her if she was jumping on the bed. 5A RP 922, 1000. In a very straight-forward and mature way, Jane told Cecilia she was not jumping on the bed, but that Dow put his wee-wee on her go-go and rubbed. 5A RP 922, 1001, 1061.

Cecilia tried to tell Jane this wasn't true, that Jane was jumping on the bed, but Jane was insistent and maintained he put his wee-wee on her go-go and it felt good. 5A RP 1001-1002. Cecilia was shocked and wanted to get out of the house as soon as possible. 5A RP 1002. She didn't want to believe what Jane said. 5A RP 1002, 1059. Cecilia then confronted Dow that his story was not the same as Jane's. 5A RP 1004. Dow then told Cecilia Jane walked into the bedroom and saw him masturbating and he told her get out. 5A RP 1004.

Cecilia left the house with Jane and while in the car continued to try to trip up Jane. 5A RP 1002. She tried telling Jane that it didn't happen, that she was jumping on the bed and wouldn't be in trouble for jumping on the bed. 5A RP 1002-1003. Jane added more details then saying she went into the room looking for mom, he told her to take off her clothes and told her get upon on the bed. 5A RP 1003. Cecilia didn't know what to do and called her mother-in-law – who told her not to report the matter - and stopped by the babysitter's for help. 5A RP 1008-1009, 5B RP 1155. She got a number for a sexual assault hotline from the babysitter and spoke with someone on the hotline. 5A RP 1009-1010. Not sure what to do, she went

home, watching Dow closely. 5A RP 1011. He didn't like this and offered to leave the house to take a breather. 5A RP 1011. He did ask her if she was going to call the police. 5A RP 1012. On September 12, 2005, Cecilia, she called the police. 5A RP 1010, 5B RP 1177.

Cecilia took Jane to Dr. Harnish the next day and again May 6, 2006. 5A RP 969. Dr. Harnish didn't find anything abnormal in the September exam and did not talk to Jane about any touching. 5A RP 9696. In May when Dr. Harnish did talk to Jane, Jane told Dr. Harnish that Dow touched her and pointed to her vaginal area. 5A RP 973-974.

Captain Johnson interviewed three and a half year-old Jane. 5B RP 1178. During the conversation Jane told her Dow put her on his wee-wee and rubbed his wee-wee on her go-go, demonstrating a back and forth motion. 5B RP 1184, 1188, 1190, 1192. She provided details that she took her clothes off and her clothes were at the bottom of the bed, her and Dow were on the bed when it happened, she saw his wee-wee sticking up and that it felt good. 5B RP 1184, 1186-1189, 1191.

Captain Johnson had the Defendant arrested in Multnomah county, Oregon. 5B RP 1211. Dow called Cecilia from the Multnomah county jail and the phone call was recorded. 5A RP 1015. During the call Cecilia asked Dow why he did what he did to Jane. 5A RP 1018-1019, Ex 1A at 1. Dow apologized. 5A RP 1019, Ex 1A at 2. Cecilia confronted Dow about what Jane said, telling him Jane was smart, didn't lie and the information she had couldn't be made up. 5A RP 1021, Ex 1A at 3. After this

confrontation, Dow admitted that most of it was true and asked to see Cecilia in person. 5A RP 1021, Ex 1A at 3. Cecilia told Dow she believed Jane and continued to confront Dow telling him little girls do not know what masturbation looks like, Jane doesn't know what a penis looks like. Ex 1A at 3-4. Cecilia told Dow Jane was not on a blanket like he said, but was on his bare penis. 5A RP 1021, Ex 1A at 4. Dow asked to explain it to her, admitting he was high on methamphetamine at the time. 5A RP 1021, 1034, Ex 1A at 4. Dow told Cecilia Jane walked in on him, he ordered her to go to the other bedroom and she came back and jumped up on him. 5A RP 1022, Ex 1A at 4. Cecilia didn't buy what Dow was telling her because the facts she knew were different. She continued to confront him, telling him he told her to take off her pajamas because if Jane took them off she would expect to see the pajamas on the floor and they were not. 5A RP 1022, 1062, Ex 1A at 4. Additionally Jane was wearing the same underwear from the night prior. 5A RP 1034-1035, Ex 1A at 5. Dow told Cecilia he picked them off the floor. 5A RP 1023, Ex 1A at 5. He asked her to stand by him and wanted to make it up to her. 5A RP 1023, Ex 1A at 5. Cecilia then said she spoke to Mary (his ex) and before Dow went to the war, Mary took Desi in twice to the emergency room for something pretty close. 5A RP 1024, Ex 1A at 5. Dow says that is ridiculous. 5A RP 1024, Ex 1A at 5. Cecilia then points that every person Dow has dated has had a little girl. 5A RP 1024, Ex 1A at 5. Dow said it's not true and Mary hates him. 5A RP 1025, 1027-1028, Ex 1A at , 86. Cecilia asked him if he's done this to others and

Dow denied it. 5A RP 1024-1026, Ex 1A at 6-7. He continued to apologize, say he's sorry, and said he thought about killing himself so he doesn't do this to anyone else. 5A RP 1028-1032, Ex 1A at 9-10.

Over the next five years the family didn't bring the topic up. 5A RP 929, 1039. Jane said her mother wouldn't want the topic talked about and Cecilia wanted Jane to forget. 5A RP 929, 1039, 1047. When Jane tried to talk to Cecilia about it, Cecilia would get upset, shut Jane down and tell her not to talk about it. 5A RP 1040, 1046, 5B RP 1084, 1145. Cecilia did catch Jane engaged in inappropriate sexualize play with a teddy bear when Jane was four. 5A RP 1043-1044. Jane was straddling the bear naked and moving back and forth. 5A RP 1043-1044. Cecilia became upset and yelled at Jane, telling her not to play like that. 5A RP 1046, 5B RP 1147-1148. Jane also demonstrated the same type of things with some stuffed animals in 2005 when Cecilia asked her what happened. 5A RP 1044. Cecilia took Jane to a counselor seven times back in 2005-2006, but discontinued as she didn't want to ingrain the abuse in Jane's mind. 5A RP 1040, 1058-1059. However, over the years Jane didn't forget and would continue to talk to various family members about what happened to her. 5A RP 1041.

At trial Jane testified she remembered telling a number of people what happened to her. 5A RP 923-925. Jane told her Aunt Brandy, Aunt Shayla, her grandmother Eileen, Uncle Daniel, the doctor, the prior prosecutor Toby and a couple of defense attorneys. 5A RP 923-925. She remembered that when she was four and in court to testify, she lied and said

she didn't see Keith in the courtroom and he didn't do anything to her. 5A RP 925. Crying during this part of her testimony, Jane explained Dow gave her a dirty look and she was scared he would hurt her and her mother, so she said it didn't happen. 5A RP 925-927, 1038-1039, 5B RP 1162-1163.

During the cross-examination of Jane, Jane didn't remember telling anyone she was on top of the covers when the touching happened. 5A RP 935. She believed she told back when she was four that Dow told her to take off her pajamas. 5A RP 935-936. She did not have a specific recollection of her conversation with Captain Johnson. 5A RP 937-938. She did say at the hearing in 2011, she said Dow rubbed his wee-wee on her stomach. 5A RP 940. She explained this was not accurate, but felt uncomfortable saying he rubbed his wee-wee on her go-go. 5A RP 941, 958-960.

Counsel asked Jane if she remembered giving her mother a weird look and Jane responded "I think." 5A RP 942. Counsel asked her if she knew or just thought this was the case. 5A RP 942. Jane maintained she thought it to be true and denied she heard anybody in her family say, "[she] gave me a weird look." 5A RP 942. Jane also denied seeing anyone give her a thumbs up at the prior hearing, but she heard from someone it happened and thought it was reasonable for her Aunt to have done this to let her know she was doing well in telling what happened. 5A RP 942-944, 961, 5B RP 1085.

Counsel extensively cross-examined Jane on her prior testimony and statements to prior defense counsel Baldwin. 5A RP 944-946. On several occasions, Jane admitted she did not tell what actually happened at the 2011 Ryan hearing because she was scared or uncomfortable describing the actions. 5A RP 944-946. He also asked her if she told the private detective Stan Munger that Dow was sitting up when she entered and then laid down. 5A RP 947-948. Jane denied telling Munger this and explained Dow's body position by demonstrating. 5A RP 947. Defense counsel did play the video recordings of Jane's prior 2006 and 2011 testimonies. 5B RP 1241-1251, 1268-1320. However, he did not call any witness to rebut Jane's testimony.

Brandy Ragus, Shayla Gallegos, Eileen Christensen and Gabe Walde all testified to the statements Jane made about the abuse. She reiterated over the years the same details she gave originally and what she testified to at trial. She told others that Dow told her take off her clothes and get into bed. 5B RP 1080, 1167. Then he put her on his chest and moved her down to his privates and put her go-go on his wee-wee, pointing upwards with her finger. 5B RP 1080-1081, 1157, 1159-1160.

The State called Laura Merchant, an expert who worked at Harborview Center for Sexual Assault. 5B RP 1095. Ms. Merchant testified it is important to consider the developmental level of children, their maturity, culture and background, and their feelings while they are speaking about an event. 5B RP 1101, 1105. She also indicated interviewers should ask open-ended questions and establish ground rules for a child, like

understanding the need to tell the truth, being able to correct the interviewer, and let the interviewer know if they don't understand. 5B RP 1103-04. She explained that three year-old children will not have sophisticated language skills, they will be very concrete in their meaning of things, they will not be able to relay an event from beginning to end like an adult and more likely to tell what things they remember most in the moment of the conversation. 5B RP 1106. She spoke about the need to modify the interviewer's language to something the child will understand and how when bizarre answers come from a child, it is usually because the child didn't understand the question or has a different understanding of a word. 5B RP 1108-1109. Ms. Merchant talked about the difference in maturity, intelligence, and language skills between three to four year-olds, eight year-olds, and eleven year-olds. 5B RP 1110-1111.

Additionally, Ms. Merchant testified that children will not disclose everything all at once. 5B RP 1111. Disclosure is affected by a number of factors, depending on whether a child wants to talk, who they are talking to, the language skills to express themselves and maturity of understanding, and whether they feel safe. 5B RP 1112, 1117-1119, 1121-1122.<sup>3</sup> She then testified that the interview techniques used by Captain Johnson were appropriate. 5B RP 1123. The only cross-examination by defense counsel was to point out Merchant did not actually interview Jane Doe. 5B RP 1124.

---

<sup>3</sup> Defense counsel did object to this testimony, but the court found this information was helpful to the trier of fact, overruling the objection. 5B RP 1115.

During closing argument, the State argued the facts of the case led to the common-sense conclusion Dow molested Jane Doe. 5C RP 1345. The State reviewed the evidence with the jury, from the initial admission of the Defendant, to Jane's statements to her mother, Captain Johnson, and others. 5C RP 1345-1349. The State reminded the jury of Ms. Merchant's testimony of how children disclose, and their maturity and language skills affect the disclosure. 5C RP 1350-1351, 1354-1355, 1402. After reviewing Jane's disclosures to others and the language she used in comparison to Merchant's testimony, the State encouraged the jury to use their common sense to help them understand and interpret the evidence and to use "Ms. Merchant, the expert, as your lens." 5C RP 1357. The State then spoke about Jane's answers and behavior at the first Ryan Hearing in 2006 when she denied things. 5C RP 1357. It compared Jane's testimony to the testimony of Merchant in trying to understand that children will sometimes say the easy answer to get things done and over. 5C RP 1357.

The Defendant argued during closing that Jane was suggestible, may have been coached, was inconsistent, and had an unreliable memory of the events. Specifically, counsel argued Cecilia's behavior influenced Jane to say what Dow did. 5C RP 1367, 1387. He called Cecilia's credibility into question, and argued she could've said something in the car that influenced Jane and that Jane is a people pleaser. 5C RP 1368, 1377. He also talked about Jane's inconsistent statements. 5C RP 1370-1372. He questioned how accurate Jane's memory was from when she was three and a half, and

used Merchant's testimony to indicate that a child's language at that age is unreliable because they could mean something else from what they say. 5C RP 1374-1375, 1384, 1394.

**b. Statement of the Case**

On September 28, 2005, the State filed a charge of Rape of a Child in the first degree against the Defendant in cause 05-1-01199-5. CP 136-137. The State later amended the charge to Child Molestation in the first degree. CP 138-139. In a pre-trial hearing the victim, Jane Doe was found incompetent. CP 145. The State then sought to admit the defendant's statements at trial under RCW 10.58.035. CP 146. Judge Warning dismissed the case without prejudice on May 8, 2006, finding RCW 10.58.035 was unconstitutional and the State did not have sufficient facts to proceed with the charge. CP 140-143, 148. The State appealed. On February 11, 2010, the Washington Supreme Court overturned the decision of Judge Warning, finding the statute was constitutional, but held there was insufficient evidence of the charge citing to *Knapstad* and upheld the dismissal without prejudice. CP 163-167.

The State filed a charge of Child Molestation in the first degree in a new cause number on June 28, 2010. CP 1-2. The Defendant went through three different attorneys before coming to trial on October 29, 2013. 2RP 473 (Baldwin), 3RP 540 (Wardle), 3RP 622 (Hanify), 5A RP 874. Over the three years, each attorney indicated they spoke with Dr. Yuille and intended

to offer him as an expert at trial, but each was confused as to the opinions he would testify to at trial. 2RP 473-483, 3RP 540-545, 573, 3RP 756.

When the parties came before the trial court for Motions in Limine on May 28, 2013, defense counsel told the court he would be relying on Dr. Yuille's letter provided in January 2012 and gave the court the following offer of proof for Dr. Yuille's testimony:

“[it] would be based on the premise that memory – human memory does not improve with time and Dr. Yuille, who has reviewed the *Ryan* hearings and police reports, indicated to me...that the child's subsequent recollections over that period of time taking all the factors into consideration, the child's subsequent recollections are not consistent with the way human memory functions.”

4RP 756, 759, 765. Counsel contended he should be allowed to argue there was quite a bit of reinforcement of the facts that were not present eight years earlier and Dr. Yuille permitted to opine the disclosures did not have clarity consistent with scientific knowledge of memory. 4RP 756-757. Counsel then volunteered he could obtain an additional letter from Dr. Yuille to clarify. 4RP 757, 765.

When the State attempted to find out more and refine the offer of proof, defense counsel did not answer with any more clarity, but said that memory operates in different contexts between children and adults and forensic interview techniques have a bearing on how a child recollects. 4RP 757-758. He then said Dr. Yuille's opinion may include how this child was interviewed or how this investigation was conducted and how that has a bearing on his professional conclusions. 4RP 758.

The State pointed out to the court neither defense counsel nor Dr. Yuille provided any scientific information that human memory is based upon brain function, but rather that memory fades with time, that children are susceptible to suggestion, and that children's memories are changeable. 4RP 759-761. The case was pending with the latest defense counsel for ten months and during that time, counsel and Dr. Yuille never provided any offer of proof or specific points where the interview techniques caused specific concerns. 4RP 762. The State argued this latest argument amounted to a new opinion on interview techniques and smacked of a last ditch effort not previously provided to the State and in violation of the discovery rule. 4RP 762-763, 766.<sup>4</sup> The State contended counsel was bootstrapping the interview technique theory to try to prove the victim could not have an independent memory of the event, so her recollection must come from somewhere else, and she's not credible. 4RP 766.

Defense counsel then tried to convince the court this was not a new argument and although the report was "vague," his expert should be allowed to rebut the context of the later disclosures based upon forensic interview techniques and operation of memory. 4RP 764-765.

The original report from Dr. Yuille, dated January 30, 2102, is addressed to previous counsel for Dow, Sam Wardle. Supp. Desig. CP 93 at 15. It indicated the material reviewed and gives some general considerations when interviewing children. Supp. Desig. CP 93 at 16-17.

---

<sup>4</sup> The parties agreed to and the court ordered a discovery deadline for April 19, 2013. 4RP 766.

Included in these general considerations, Dr. Yuille indicates children are susceptible to suggestion and leading questions and an interviewer must have knowledge of the memory, language, and expressive abilities of children at different ages. Supp. Desig. CP 93 at 16-17. He then writes a section entitled “Evaluating the Credibility of a Child’s Allegation.” Supp. Desig. CP 93 at 18. Dr. Yuille employs “Statement Analysis” in a two stage process. Supp. Desig. CP 93 at 19. First he evaluates credibility looking at the content of the child’s statement, then assess all other aspects of the evidence in the case. Supp. Desig. CP 93 at 19. He looks at the details of the statement to determine if the child is describing a real experience or one heard about or imagined. Supp. Desig. CP 93 at 19. He states five criteria must be present to determine if a child’s statement is credible: 1) if it is a coherent event, 2) spontaneous description, 3) quality and quantity of detail, 4) context (sense of time and space), and 5) descriptions of the interaction between the child and suspect. Supp. Desig. CP 93 at 20. Dr. Yuille then evaluates the allegations of Jane Doe. Supp. Desig. CP 93 at 22. He makes the statement that the core issue in the case is memory and questions how likely is it that a child’s memory improves with the passage of time. Supp. Desig. CP 93 at 22. He explains that episodic memory (those associated with experiencing an event) is reconstructive in nature and may change over time. Supp. Desig. CP 93 at 24. That children at the age of four have limited memories and to have more memories of an event at a later age is inconsistent with how memories work. Supp. Desig. CP 93 at 24.

Suggestion can be a reason for more memories later. Supp. Desig. CP 93 at 2425. Dr. Yuille then, despite having reviewed all the evidence, states, “I have not reviewed any evidence that bears on whether suggestion occurred in the present case.” Supp. Desig. CP 93 at 25. He concludes by saying Jane Doe’s memory pattern is very unusual but does give a reason or cause for this difference. Supp. Desig. CP 93 at 25.

Defense counsel also asked for an offer of proof from the State as to what their expert would testify. 4RP 797. The State indicated it provided this to defense counsel in compliance with the discovery deadline and again a week before the motion hearing. 4RP 797. The State intended to call their expert to speak about how the age, ability to relate, nature of the living situation, relationship with the person they talk to, and ability to communicate can affect how a child discloses abuse. 4RP 797. The State indicated Ms. Merchant would testify that disclosures to change over time because of the factors above. 4RP 797-798. Additionally, to refute Dr. Yuille if he testified, but not to discuss memory. 4RP 798-799.

The court reserved ruling to read the report by Dr. Yuille and give defense counsel an opportunity to respond to the cases cited by the State, it did not allow the defense to add any additional information to the offer of proof already provided. 4RP 767-769, 772. It also reserved as to whether the State’s expert could testify. 4RP 800.

On August 26, 2013, the parties further argued the Defendant’s ability to call Dr. Yuille as an expert. The Defendant filed an offer of proof

regarding Dr. Yuille arguing there was a possibility that repetition, suggestion, bias, or coercion accounted for the victim's improved recollection of facts. CP 250-300. He further opined there were scientifically speaking a number of factors which can influence recollection. CP 253. In his memorandum, Defendant argued Dr. Yuille should be allowed to testify that the victim's memory or ability to independently recall events was compromised because of the interview techniques used. CP 329. He then explained Dr. Yuille's testimony goes straight to the heart of the victim's credibility. CP 330. He then asked to allow Dr. Yuille to testify how interview techniques may affect "*accuracy of recollection.*" CP 330. He repeatedly linked Dr. Yuille's testimony to accuracy, that memories do not improve over time, and credibility. CP 305-307.

At the argument, the Defendant tried to distinguish how Dr. Yuille's testimony would not be a comment on credibility, but his ultimate argument was because memories cannot improve over time it is an attack of the person's ability to recall and the credibility of the testimony. 4RP 846-847. In essence he wanted to present evidence to the jury that Jane Doe's memory was inaccurate thru his expert's opinion. 4RP 852.

The court, after reviewing the letter, the various defense arguments, and case law, determined the defense was only offering the expert to testify that memories can fade and a child can have suggestions made to them. 4RP 855. Both of these things were within the common understanding of the jury. 4RP 855. The court allowed defense to cross-examine the state's

witnesses to bring out evidence for these points, but said, the only true reason for Dr. Yuille's testimony was an opinion of credibility. 4RP 855. As such, the court excluded the testimony of Dr. Yuille. 4RP 855.

The Defendant also made a motion in limine to exclude the phone call the Defendant made from the Multnomah county jail to the victim's mother on October 5, 2005. 4RP 784-785. He argued the call was "unduly prejudicial and...not authorized by law" because of a warning issue. 4RP 784, 787.<sup>5</sup> Counsel indicated the call was prejudicial because it would inform the jury the Defendant was in jail at the time of the call and argued it wasn't relevant. 4RP 788-789. He also argued it was not hearsay, because it was not an admission to the crime. 4RP 793. The court denied the motion to exclude the phone call, finding it was relevant because it was to the issue in the matter and not unduly prejudicial. 4RP 795. The Court did invite counsel he could later move to exclude any portions of the call he believed to be at issue. 4RP 795.

The State did bring to the court and counsel's attention the mother's statements were not opinion evidence under *Notero* and *Demri* when the Defendant decided to strike their motion in limine to limit any opinion evidence in citation to the officer's confrontation with the Defendant. 4RP 812-813. The Defendant did not raise this himself, nor object to the phone call on this basis.

---

<sup>5</sup> The State's transcript of the phone call indicated the defendant and the recipient of the call were both notified the call may be monitored or recorded and consented to the recording. 4RP 786, 788-89. Defense counsel later conceded the warnings were adequate but then said it was a jurisdictional issue. 4RP 789.

Just prior to trial, the Defendant objected to the jail phone call's mention of a conversation between the victim's mother and the defendant's ex, Mary Dow on the basis of relevance and foundation. 5A RP 893. He requested to exclude the reference "Dude, you know I talked to Mary about this." 5A RP 894-895. The State responded that it wasn't going to bring up the conversation otherwise and the defendant denied anything happened. 5A RP 895. The Court declined to exclude the reference, finding no prejudice and to redact it could create more speculation and emphasis for the jury. 5A RP 895.

During the cross-examination of Cecilia Christopherson, defense counsel elicited whether Jane lied to her mother in the past. 5A RP 1068. Cecilia indicated Jane did so when she was older, like nine, but Jane didn't have a problem involving lying. 5A RP 1068-1069. Cecilia indicated upon re-direct that when Jane lies her mother can tell by a change in behavior because her eyes get big and she's obvious. 5A RP 1068.

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT DID NOT ERR WHEN IT UPHELD THE AFFIDAVIT OF PREJUDICE AS THE CASE WAS NEWLY FILED BASED UPON NEW INFORMATION AFTER A KNAPSTAD DISMISSAL.**

The Defendant argues the State's affidavit of prejudice against Judge Warning was untimely filed because he made discretionary rulings in the previously filed and dismissed case. The Defendant attempts to distinguish the case of *State v. Torres*, 85 Wn. App 231, 932 P.2d 186 (Div 3, 1997)

from *State v. Belgarde*, 119 Wa.2d 711, 837 P.2d 599 (1992), but because a filing after a *Knapstad* dismissal requires new evidence, he cannot show either a distinction or a violation of RCW 4.12.050. Moreover, even if the trial court erred, the defendant cannot establish any prejudice as he does not have a right to have a particular judge hear his case. As such, this court should uphold the trial's court ruling.

**i. The filing of a new cause after a Knapstad dismissal creates a new case based upon new evidence and without a prior discretionary ruling.**

Revised Code of Washington section 4.12.050 grants any party to a case the right to file an affidavit of prejudice to prohibit a particular judge from hearing the case. (2014). The provisos of the statute require the party to file a motion and affidavit prior to the judge making any discretionary ruling in the case. RCW 4.12.050 (2014). At issue in the present matter is the definition used in the statute of "the case." The review of this matter is *de novo* as it involves statutory interpretation of RCW 4.12.050. *State v. K.L.B.*, 180 Wn.2d 735, 739, 328 P.3d 886 (2014).

On September 28, 2005, the State filed a charge of Rape of a Child in the First Degree against the Defendant in cause number 05-1-01199-5. CP 13, 136. The matter proceeded through discovery and on April 3, 2006, pursuant to Defendant's motion to suppress evidence or in the alternative dismiss pursuant to *State v. Knapstad*, Judge Stephen Warning dismissed the case. CP 13, 143. The State appealed Judge Warning's determination that RCW 10.58.035 was unconstitutional. CP 13, 141-143. The

Washington Supreme Court found RCW 10.58.035 was constitutional, but held the statute did not change the State's corpus delecti requirement to prove every element of the crime by independent evidence. *State v. Dow*, 168 Wn.2d 243, 227 P.3d 1278 (2010). The Supreme Court then dismissed the case citing to *State v. Knapstad*. *Id.*

On June 25, 2010, the State filed a charge of Child Molestation in the first degree against the Defendant in cause number 10-1-00598-3 and filed an affidavit of prejudice against Judge Warning on August 18, 2010. CP 1, 2, 5,13. The State alleged new evidence was obtained since the original dismissal. CP 14.

When looking at statutory interpretation, if the statute is unambiguous the inquiry ends. *State v. K.L.B.*, 180 Wn.2d 735, 739, 328 P.3d 886 (2014). Unfortunately, Revised Code section 4.12.050 does not define the term "case," nor does the statute give any guidance. There are only a few cases that give guidance to the term "case" and one case directly on point.

In *State v. Torres*, the State dismissed the charge of Rape of a child in the first degree because a material witness was not available for trial. *State v. Torres*, 85 Wn. App. 231, 234, 932 P.2d 186 (Div 3, 1997). After the witness was available the State filed a second information to start a new case. *Id.* Division Three specifically addressed whether the dismissal without prejudice terminated the action or the filing of the second information was a mere continuation of the original case. *Id.* at 233. The

court specifically addressed the Supreme Court decision in *Belgarde*, finding a retrial following reversal on appeal does not render the action a different case. *Id.* at 234. However, found that the filing of a second information was a new case. *Id.*

In *Belgarde*, the defendant was tried and convicted by a jury, but the matter was overturned on appeal. *State v. Belgarde*, 119 Wn.2d 711, 713, 837 P.2d 599 (1992). Before the re-trial, the defendant filed a motion and affidavit of prejudice against the judge who sat on the prior trial. *Id.* The judge denied the motion finding it was untimely filed. *Id.* at 713-14. The Supreme Court found that a trial after reversal and remand upon appeal was considered the same case for the purposes of RCW 4.12.050. *Id.* at 716-17. Because the term “case” is not defined in the statute, the Supreme Court used the general meaning of case, comparing it to the terms action or proceeding. *Id.* To determine if a matter is a new proceeding or case the court should determine if the matter “presents new issues arising out of new facts occurring since the entry of final judgment.” *Id.* at 717.

In *State v. Clemons* 56 Wn. App. 57, 59-60, 782 P.2d 219 (1989), Division One used the same line of reasoning to determine a mistrial and subsequent re-trial were of one proceeding because they arose out of the same facts and it was merely the unfinished business of trial. Division One distinguished a new proceeding from the same proceeding by asking the question, “does it present new issues arising out of new facts occurring since the entry of the [order].” *Id.* at 60. Division One maintained this line of

reasoning in *State v. Hawkins*, 164 Wn. App. 705, 713, 265 P.3d 185 (Div 1, 2011), when it found that posttrial proceedings arising out of the original judgment and sentence were the same proceedings. Again the court stated because the hearing was not based on new issues arising from new facts, but a link in the chain of posttrial proceedings, they were a part of the original action. *Id.* at 714. The court compared *Torres*, distinguishing it because in *Torres* the State filed a second proceeding. *Id.*

In the present case, the matter was dismissed for insufficient evidence by the Supreme Court citing to *State v. Knapstad*. *State v. Dow*, 168 Wn.2d 243, 255, 227 P.3d 1278 (2010). When a matter is dismissed pursuant to a *Knapstad* motion, the dismissal is without prejudice to allow the State to file the matter should new evidence come to light. *State v. Knapstad*, 107 Wn. 2d 346, 357, 729 P.2d 48 (1986). The State would only be able to file charges if new information or facts come to light, otherwise the State would suffer dismissal under the same lack of evidence as it did prior. Because new issues would likely arise from new evidence when matters are filed after a *Knapstad* dismissal, the criteria are met under *Belgarde* and *Clemons* and the second cause is a new proceeding and separate case. Lastly, under *Torres* and *Hawkins*, because the State filed a second information, a new case was started.

Thus, when the state files a new information after dismissal, the prior dismissal ended the prior case and the new information becomes a new

proceeding. Because it is a new “case,” RCW 4.12.050 allows the State to file an affidavit of prejudice.

**ii. The defendant is not entitled to reversal and remand because a party does not have a right to a particular judge and there is no prejudice.**

The defendant alleges that any error automatically ends in reversal and remand for a new trial, citing to *State v. Norman*, 24 Wn. App. 811, 814, 603 P.2d 1280 (1979). However, *Norman* is not controlling in the present situation as the error in *Norman* was for the refusal to accept the affidavit and subsequently the affidavited judge presided over trial. *Id.* It is clear when a party files an affidavit and complies with the requirements of RCW 4.12.050, that prejudice is established. *Marine Power & Equip. Co., Inc. v. Industrial Indem. Co.*, 102 Wn.2d 457, 460, 687 P.2d 202 (1984). Therefore if an affidavit is wrongly rejected and the judge hears the matter, prejudice is proven and reversal and retrial required.

Conversely, there is no case providing a remedy when an affidavit is upheld and a certain judge does not hear a case. Section 4.12.050 is a legislative rule allowing a party to disqualify a judge from hearing their case. The code section does not grant a right to a particular judge, nor does it confer an absolute right of disqualification. RCW 4.12.050 (2014). The remedy borrowed from *Norman* does not fit the situation because the Defendant cannot show what right, if any, was violated, nor any prejudice or harm in the present case because another judge presided over the matter.

The Defendant cannot show any rulings that Judge Warning would have made if he was the presiding judge.

As a guiding principal, the court can look to the remedies in other instances where violation of court rules or rights occur. The court has held in cases where discovery violations of a court rule occur, dismissal is a drastic remedy and other remedies are preferable. *See e.g., State v. Smith*, 67 Wn. App. 847, 852, 841 P.2d 65 (1992), *review denied*, 121 Wn.2d 1019, 854 P.2d 41 (1993) (quoting CrR 3.3(h)(2)); *State v. Guloy*, 104 Wn.2d 412, 428, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)).

In *State v. Schulze*, 116 Wn.2d 154, 804 P.2d 566 (1991), the Washington Supreme Court analyzed when the right to counsel under Criminal Rule 3.3 is violated. In *Schulze*, the defendant faced charges of vehicular homicide. *Id.* at 156-57. He was seen at the hospital and read his special evidence warnings. *Id.* at 157. Afterward he refused consent to take blood and requested his attorney. *Id.* The police then forcibly took his blood. *Id.* Schulze alleged his right to counsel was violated under Criminal Rule 3.3 because the police took his blood prior to allowing him to contact counsel. *Id.* at 163. He argued the appropriate remedy was either dismissal of the case or suppression of the blood evidence. *Id.*

The Court determined the appropriate remedy for a violation of the court rule right to counsel was not dismissal, but rather the suppression of

any evidence tainted by the violation. *Id.* at 163-64. In Schulze’s case he did not have a right to refuse the blood, nor could his access to counsel change the outcome the blood would be taken. *Id.* As such, the blood evidence was not tainted and not suppressed. *Id.* at 164.

In the present case the Defendant cannot show that any of the process or proceedings were tainted by having another judge hear the matter. Thus, the proposed remedy of reversal and remand is not supported by the circumstances and Dow cannot show any violation results in such a need.

**B. THE COURT DID NOT ABUSE ITS DISCRETION NOR VIOLATE THE DEFENDANT’S RIGHT TO PRESENT A DEFENSE WHEN IT PROHIBITED A DEFENSE EXPERT FROM TESTIFYING TO MATTERS THAT WOULD INVADE THE PROVINCE OF THE JURY.**

The defendant argues the trial court abused its discretion and violated the defendant’s constitutional right to present a defense when it prohibited Dr. Yuille from testifying to the memory and reliability of the victim’s testimony. The Court properly excluded this testimony as the nature of memory was well within the common understanding of the jury and any other opinions of Dr. Yuille invaded the province of the jury.

**i. The trial court did not abuse its discretion in excluding Dr. Yuille’s testimony under Evidence Rule 702.**

Evidence Rule 702 allows a person to testify to scientific, technical, or specialized knowledge if it will assist the trier of fact to understand the evidence or to determine a fact in issue.” WA ER 702 (2014). Generally, a

court's decision to allow or exclude such evidence is reviewed under an abuse of discretion standard. *State v. Cheatam*, 150 Wn.2d 626, 645, 81 P.3d 830 (2003).

In the State's Motion in Limine the State moved to exclude Dr. Yuille's testimony under both evidence rules 702 and 608 and to prohibit calling him as an expert in interview techniques as he was not disclosed as an expert in this field. Supp. Desig. CP 93 at 7. The court allowed the defendant to make an offer of proof as to what he intended to call Dr. Yuille to testify. Defense counsel offered the letter written from Dr. Yuille and stated he would testify that "human memory does not improve with time." 4RP 756, Supp. Desig. CP 93 at 15-25. He elaborated that according to Dr. Yuille, Jane's "subsequent recollections are not consistent with the way human memory functions (as to their clarity)." 4RP 756-757, 759. At the motion in limine, in violation of the discovery deadline and not in Dr. Yuille's report, counsel added it would be helpful to have testimony that specific interview techniques might compromise specific memories. 4RP 762, 764. The trial court allowed defense counsel some time to prepare a response to the State's motion and heard argument on August 26, 2013.

During this subsequent argument, defense counsel reiterated he wanted Dr. Yuille's testimony to provide the jury with the understanding that memory does not improve over time. 4RP 846-847. Defense counsel tried to distinguish the testimony as not a comment on Jane's credibility,

but the credibility of the testimony and the accuracy of her memory. 4RP 847, 852.

The court indicated it was waiting for defense counsel to provide anything about how Dr. Yuille's testimony was helpful to the trier of fact, but it did not hear such. 4RP 855. It specifically found Dr. Yuille's testimony that memory can fade, or the child can have suggestions made to them are commonly in the understanding of a jury, and the defense counsel could cross-examine the State's witnesses to bring out those issues. 4RP 855. Lastly, that Dr. Yuille's testimony was an opinion as to credibility and not admissible. 4RP 855.

The court did not abuse its discretion. In *State v. Rafay, et al.*, 168 Wn. App. 734, 285 P.3d 83 (Div 1, 2012), the appellate court upheld the exclusion of an expert who would testify the defendant's confessions were false. The State charged Rafay and Burns with three counts of first degree murder for killing Rafay's parents and sister. *Id.* at 754. The salient facts showed that after the murder, Burns fled to Canada where he gave details of the murder to undercover Royal Canadian Mounted Police Officers. The Defense proffered Dr. Richard Leo, an associate professor of criminology and psychology at the University of California, as expert to testify at trial to the "counter-intuitive phenomenon of false confessions"; the coercive interrogation techniques the police used, and the risk factors associated with false confessions. The Court of Appeals concurred with the trial court's exclusion on the basis the alleged coercive factors encompassed concepts

well within the general understanding of jurors.<sup>6</sup> *Id.* at 784. When looking at what would be helpful to a jury, the court stated Dr. Leo's opinion would not have "offered any insight into specific traits of the defendants that would have made them more susceptible to false confessions." *Id.* at 787. Moreover, his testimony would generally explain to the jury that sometimes people make false confessions even if not tortured or suffering from mental illness and that research explains how certain techniques can lead people to make false confessions. *Id.* at 788. Leo would then explain that in testing the reliability of confessions, researchers generally examine how the confession fits the fact of the crime and demonstrates that the defendant had actual knowledge. *Id.* The court particularly stated: "[a]ssessing the reliability of a confession by comparing it with the other facts alleged during the trial falls directly within the jury's obligations to determine facts and assess the credibility of witnesses." *Id.* at 789. The court held even if Leo's proposed testimony did not state the opinion the defendants gave false confessions, viewed in context the testimony clearly implied the opinion the confessions were unreliable and hence was not helpful to the jury and arguably invaded the province of the jury. *Id.* 789-90.

The expert opinion in *Rafay* and the present case were strikingly similar. Dr. Yuille's report was clear that he was hired to evaluate the credibility of the victim. Supp. Desig. CP 93 at 18-25. He entitled a section

---

<sup>6</sup> The court also noted that "Leo's testimony about the risk factors of false confessions would have been highly speculative and provided the jury with scant assistance in the evaluation of the unusual evidence of [the] case." *Rafay*, at 784.

in his report as Evaluating the Credibility of a Child's Allegation, Supp. Desig. CP 93 at 19. Additionally he put forward what he felt was the important question in the case as memory and posited the question, "How likely is it that a child's memory will improve with the passage of time?" Supp. Desig. CP 93 at 22. This question is not beyond the average intelligence of a juror. Just because an expert can give a particular name to describe a type of memory, does not mean an average juror cannot understand that memories change over time and most likely do not improve. This is actually a typical question in any trial when witnesses testify and does not need an expert to explain. Moreover, Dr. Yuille's opinion the victim's account "violates all expectations of how episodic memory operates" is an implicit opinion the victim's account is false, questions her credibility and invades the province of the jury.

In *Carlton v. Vancouver Care LLC*, 155 Wn. App. 151, 231 P.3d 1241 (Div 2, 2010), the Estate of Miriam Carlton sued the nursing facility for negligence and abuse of a vulnerable adult based on a sexual assault by another male patient. The Estate sued in-part for emotional distress based upon proffered evidence of Rape trauma syndrome and implicit memory/conditioned fear response. *Id.* The facts were Ms. Carlton suffered from dementia and had limited language skills preventing conversation and limiting her to one or two word responses. *Id.* at 155. While at the facility a male resident digitally penetrated her vagina and rectum. *Id.*

Division Two considered whether expert testimony on implicit memory would aid the jury. *Id.* 169-170. Dr. Burgess testified to the trial court that people have two kinds of memory explicit and implicit. *Id.* at 158. Explicit memory is the content of what we know and remember and is cognitively based. *Id.* Implicit memory is sensory-based and creates “conditioned responses similar to instinctual behaviors in the animal world.” *Id.* Even persons who cannot form cognitive memories retain the ability to store implicit memories. *Id.* Division Two found the particular facts of the case made the expert testimony of implicit memory helpful to the trier of fact. *Id.* at 169-170. The court stated: “[t]he scientific principles underlying this theory involve technical knowledge of several parts of the brain, their relative functions, and the effect of progressive dementia on the brain. These topics are beyond the range of the typical layperson’s knowledge and experience.” *Id.* at 170.

The Washington Supreme Court also speaks to the use of expert testimony concerning the memory of children. In *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990), husband and wife faced charges of Rape of a child in the first degree against their 3 year-old daughter and her like aged friend. The defendants proffered an expert witness to testify “about how a child’s memory capacity is affected by age and about the factors that create suggestion when and adult interviews a child...” *Id.* at 655. The trial court ruled the testimony was improper as there was no indication the results of the expert’s work was accepted in the “scientific community and because

the testimony went directly to the credibility of the victims and invaded the province of the jury.” *Id.* at 655-656. Additionally, the trial court found the idea interviews of children may be suggestive to be within the general experience of the average juror. *Id.* at 656. The Supreme Court agreed with the trial court as to the acceptance in the scientific community of the expert’s theory and the general understanding of the average juror. *Id.*

In *State v. Willis*, 151 Wn.2d 255, 87 P.3d 1164 (2004), the State charged Willis with rape of a child in the first degree against C.B. The abuse took place when C.B. was five years old and her mother and Willis were romantically involved. *Id.* at 257-58. C.B. was interviewed multiple times and gave different answers to the same questions. *Id.* at 259. The defense proffered Dr. Yuille as an expert to testify on the “potential effects of the interview techniques used on C.B.’s memory.” *Id.* The trial court prohibited the testimony on the grounds it was not helpful to the trier of fact. *Id.* at 260. The Washington Supreme kept to their original ruling in *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990), that “the general principle that younger children are more susceptible to suggestion is ‘well within the understanding of the jury.’” *Id.* at 261 citing to *Swan*, 114 Wn. 2d at 656. Additionally, it is a matter of general knowledge that children’s memories are changeable. *Id.* at 261.

However, the court made the distinction that “specialized knowledge regarding the effects of specific interview techniques and protocols is not likely within the common experience of the jury.” *Id.* Thus,

a trial court should determine whether it could be helpful to have testimony that **specific interview techniques** might compromise **specific memories**.

*Id.*; *In Re PRP of Morris*, 176 Wn.2d 157, 170, 288 P.2d 1140 (2012).

Based upon the above, the admissibility of expert testimony on memory depends on the facts of the case, type of memory involved, and whether the testimony is tied to specific memories. *Carlton* gives the court guidance that expert opinion based upon scientific knowledge outside the average understanding (implicit memories) and connected with the particular person (suffering from dementia) are helpful. However, expert opinion as to the changeable nature of children's memories is not helpful to the trier of fact. Yet, if the expert can testify to how specific interview techniques can affect specific memories, this may be allowed.

The Defendant cites to *State v. Allen*, and a number of other cases, to argue that perception and memory are topics of importance for an expert. Def. Brf. at 25-26. *State v. Allen* was a case where Allen challenged the trial court's denial of a jury instruction on cross-racial identification. *State v. Allen*, 176 Wn.2d 611, 294 P.3d 679 (2013). Allen did not call an expert witness, nor was any such evidence provided other than cross-examination of the officer that sometimes people of different races have difficulty in making such identifications. *Id.* at 614-15.

While the Supreme Court majority did acknowledge that expert testimony is allowed on eyewitness identification and Chief Justice Madsen

and Justice Wiggins indicated such expert testimony is based upon persuasive science studies, there is **nothing** in the present case, nor were any persuasive studies presented to the court, to indicate that expert testimony that memory fades with time is necessary or will help the jury. *Id.* at 624 fnnt 6, 633, 639. Appellate counsel does not provide any information to the court about how Dr. Yuille’s memory testimony is akin to eyewitness identification, comparable to the number of studies done on eyewitness identification, nor compare any information Dr. Yuille provided to the trial court, to back up the comparison. Counsel raises the concern of “suggestion,” but must concede that even Dr. Yuille indicated there was no evidence of suggestion in the evidence provided to him. Supp Desig. CP 93 at 25. As such, any opinion Yuille would give would be one of generalities, not helpful to the trier of fact, and hence inadmissible under appellate counsel’s comparable cases. *Tillman v. State*, 354 S.W.3d 425, 441 (Tex. Crim App. 2011). Moreover, even those cases cited by the Defendant indicate eyewitness identification may, when compared with other evidence, not need any expert opinion as the jury is able to compare the testimony of the witness to the facts present. *State v. Lawson*, 352 Or. 724, 756, 291 P.3d 673 (2012).

In the present case, there was no information the victim suffered from any brain malady or that Dr. Yuille’s testimony could speak directly to the victim’s specific memories, but memory in general. Moreover, there was nothing contained in the report nor the offer of proof indicating Dr.

Yuille would testify to the specific interview techniques used and how they might compromise specific memories. Given all the information provided to the court at the motion in limine, the court did not abuse its discretion.

**ii. The court did not violate the Defendant's Constitutional right to present a defense.**

A defendant does not have a right to present every fact or expert he wants to a jury. A defendant does not have a right to present irrelevant or inadmissible evidence to a jury. *See e.g., State v. Phillips*, 160 Wn. App 36, 47-48, 246 P.3d 589 (Div 2, 2011); *State v. Strizheus*, 163 Wn. App 820, 262 P.3d 100 (Div 1, 2011); *State v. Morley*, 46 Wn. App 156, 160, 730 P.3d 687 (Div 3, 1986). A reviewing court does consider the allegation of a violation of a right to present a defense *de novo*. *Id.*

Washington courts have upheld a trial court's exclusion of evidence of other suspect evidence and prior sex acts, finding that such evidence was either not relevant or inadmissible. In *State v. Strizheus*, 163 Wn. App 820, 262 P.3d 100 (Div 1, 2011), Division One considered the exclusion of other suspect evidence. Strizheus was charged with Murder in the first degree and sought to admit evidence that another person, Vladimir, committed the crime because Vladimir had a criminal history and contacts with the police, he was biased against the defendant, and allegedly made statements implicating himself in the crime. *Id.* at 826. The trial court found Vladimir's criminal history and prior police contacts were inadmissible under the rules of evidence, additionally the alleged statements were refuted

by Vladimir and Strizheus could not call a witness for the sole purpose of impeachment, lastly, any bias against Stizheus could not support the basis for other suspect evidence. *Id.* at 826-27.

Division One reviewed both Washington State and United States Supreme Court cases, determining there is no violation of the constitutional right to present a defense, even when a state rule operates to exclude favorable evidence. *Id.* at 833. The court upheld the discretionary decision of the trial court as the evidence was inadmissible and did not substantiate the defense of other suspect. *Id.* at 833-834. There was no constitutional violation.

In *State v. Lord*, 161 Wn.2d 276, 165 P.3d 1251 (2007), the Supreme Court upheld the exclusion of expert testimony and found it was not a violation of the defendant's right to present a defense. In *Lord*, the defendant sought to present dog tracking evidence that the victim of the crime was tracked from the stable to a road. *Id.* at 294. The trial court found because the expert could not narrow down the date closer than two weeks for when the person traveled the path, the evidence did prove any material fact as there was evidence the victim traveled the path multiple times during that period. *Id.* at 295.

The Supreme Court went back to the trial court's decision, finding it would not substitute their own reasoning for the trial court's reasoning, absent an abuse of discretion. *Id.* Because the trial court was well within

sound reasoning to find the evidence irrelevant, there was no violation of the constitutional right to present a defense. *Id.*

In *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010), cited by the Defendant, the Washington Supreme Court found the trial court did abuse its discretion in excluding the prior sex act information under the Rape shield law, RCW 9A.44.020. As such, the defendant's right to present a defense was violated.

In the present case, as argued above, the trial court did not abuse its discretion as the evidence proffered by the defendant was on matters within the common understanding of a jury, was not helpful to a trier of fact, and was not specific as to interview techniques enough to allow the trial court to make a decision and find it was helpful to a jury.

**iii. Should the court find error, the error was harmless beyond a reasonable doubt.**

Should the court find the trial court abused its discretion and should have admitted the evidence, the question then becomes was the error harmless? "To determine whether error is harmless, Washington uses the overwhelming untainted evidence test." *State v. Lord*, 161 Wn.2d 276, 295-296.

The defendant sought to admit evidence that the victim's later detailed statements did not comport with how memory works. The Defendant actually did present this argument through his cross-examination and closing argument. Moreover, the State's testimony of the evidence

obtained in 2005-2006 was the victim's statements to her mother and police, and the defendant's admission that what Jane said was mostly true. The defendant admitted Jane saw him masturbate (corroboration of both her initial statements and later statements his penis was sticking up), she was on top of him, he slid her down, and she believed his wee-wee touched her go-go. The only issue was not Jane's memory, but whether the touching occurred for the purposes of sexual gratification. Hence, with the admitted untainted original evidence it would lead to a finding of guilt.

**C. THE TRIAL COURT DID NOT ERR IN ADMITTING THE ENTIRE INCULPATORY PHONE CONVERSATION BETWEEN THE VICTIM'S MOTHER AND THE DEFENDANT**

The defendant alleges the trial court erred when it admitted the recorded phone call the defendant made to the victim's mother while he was in the Multnomah county jail. He argues it contained irrelevant and prejudicial accusations made by Cecilia Christopherson and was opinion evidence. The trial court did not abuse its discretion as the evidence was admissible to give context to the conversation where the defendant made admissions to the crime, additionally, the evidence did not amount to improper opinion evidence, the defendant failed to properly preserve the issue for appeal, and cannot prove ineffective assistance of counsel.

**i. The Defendant failed to preserve his objections for appeal as he did not make a specific objection and allow the court to rule.**

The Defendant argues it was an abuse of discretion for the court to admit the entire audio recording on the basis of Defendant's objection of

relevance and prejudicial. Def. Brf. at 34. In order to preserve an objection for appeal, the objection must be specific.

“[I]nsofar as possible, there shall be one trial on the merits with all issues fully and fairly presented to the trial court at that time so the court may accurately rule on all issues involved and correct errors in time to avoid unnecessary retrials.” With regard to objections to evidence, it has long been the rule in this jurisdiction that an objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review. “Objections must be accompanied by a reasonably definite statement of the grounds therefor so that the judge may understand the question raised and the adversary may be afforded an opportunity to remedy the claimed defect.”

*State v. Ford*, 137 Wn.2d 472, 489, 973 P.2d 452, 460 (1999) citing to *State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976).

The Defendant filed a motion in limine objecting to the admission of any jail phone call on the basis of “lacking foundation, and relevance and as unduly prejudicial,” citing to Evidence Rule 401, 403, and a violation of the Washington Privacy Act in RCW 9.73 and *State v. Constance*, 154, Wn. App. 861, 877, 226 P.3d 231 (2010). CP 247. At the oral argument of the motion, counsel reiterated the privacy concern, but only stated since Cecilia would be testifying to the statements, it would be overly prejudicial to also play them for the jury. 4RP 784. Counsel clarified later for the court that the prejudice would come from the jury finding out Dow was in jail. 4RP 788. Then again added Dow’s statements did not amount to admissions as an exception to hearsay. 4RP 793. The court ruled the call was not unduly prejudicial and was relevant as the statements went to the issue in the matter. 4RP 795.

The court invited the defendant to point out any specific areas of the call, but he did not until the morning of trial. 4RP 795, 5A RP 893. At that time, he argued the conversation between Mary Dow and Cecilia lacked foundation and was irrelevant. 5A RP 893. He pointed only to the portion of the call where Cecilia tells Dow that Mary took Desi in twice to the emergency room for something pretty close, citing this as overly prejudicial. 5A RP 893-895.

The Defendant now alleges all the prior accusations of other victims and any statements by Cecilia regarding guilt and credibility were inadmissible. However, arguably only the statement involving Cecilia's conversation with Mary Dow was properly preserved for appeal as the other issues were not brought to the court by specific objection, nor the court given the opportunity to rule.

- ii. **The evidence of the entire audio portion of the call was admissible under *res gestae* to give context to the Defendant's admissions and was not an abuse of discretion.**

The Defendant argues allowing the question by Cecilia to the Defendant about other victims was not relevant and overly prejudicial and an abuse of discretion. A trial court's ruling to admit evidence is reviewed for abuse of discretion, meaning, it is only an abuse if, "it is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Perez-Valdez*, 172 Wn.2d 808, 815, 265 P.3d 853 (2011) citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The Defendant cannot show

the court abused its discretion in light of the entire call and Defendant's responses.

During the call, Cecilia tells Dow that his ex-wife Mary took Desi into the emergency room for something pretty close. Ex. 1A at 5. Cecilia doesn't say what the results were of the examination, the defendant denies the allegation he did anything, and the jury has no other information than Mary has a bias against the Defendant. Ex. 1A at 5-6. Just before the mention of Mary, Cecilia confronted Dow about Jane's pajamas and underwear and he told her he is sorry and wishes he could make it up to her and asks her to stand by him because he's sick, needs drug treatment and has war issues. Ex. 1A at 5. Just after this Dow tells Cecilia that he should have come to her sooner, he's sorry for everything he put her through, can't take it back and wants forgiveness. Ex 1A at 7.

The trial court noted that to remove the portion of the call in both the audio and transcript could be prejudicial in a way that allowing the testimony may not. 5A RP 895. The court, in light of the entire call did not find the accusations prejudicial. 5A RP 895.

Evidence of other crimes may be relevant under Evidence Rule 402 to "complete the story of the crime on trial by proving its immediate context of happenings near in time and place." *State v. Grier*, 168 Wn. App. 635, 278 P.3d 225 (Div 2, 2012) citing *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). However, the *res gestae* rule is not limited to completing

the story of the crime. It is also permissible if in the presentation of evidence, statements provide explanation of someone else's direct testimony or explains how an event came to be. *State v. Warren*, 134 Wn. App. 44, 62-63, 138 P.3d 1081 (Div 1, 2006) *upheld* 165 Wn.2d 17, 35, 195 P.3d 940 (2008); *Porter v. Civil Service Commission of Spokane*, 12 Wn. App. 767, 772, 532 P.2d 296 (Div 3, 1975).

The Defendant cites to *State v. Sutherby*, 165 Wn.2d 870, 886, 204 P.3d 916 (2009) and *State v. Salterelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) for the idea that prior evidence of sex acts have the potential for prejudice. While both cases note that evidence of prior confirmed sex acts may be prejudicial, there is no evidence of proof in this case of prior sex acts. In fact, the lack of evidence of such acts is probably more telling to the jury as to the credibility of any accusation. Moreover, evidence of prior bad acts is not inadmissible in every case. *See generally: State v. DeVincentis*, 150 Wn.2d 11, 19, 74 P.3d 119 (2003); *State v. Scherner*, 153 Wn. App. 621, 225 P.3d 248 (Div 1, 2009); *State v. Kennealy*, 151 Wn. App. 861, 214 P.3d 200 (Div 2, 2009); *State v. Krause*, 82 Wn. App. 688, 919 P.2d 123 (Div 1, 1996), 5D Karl B. Tegland, *Washington Practice, Courtroom Handbook on Washington Evidence*, at 243 (2010-2011 ed. 2010). The State is not arguing the evidence was admissible to prove the prior sex acts, but rather a blanket statement that such information is not generally admissible or automatically prejudicial is an overstatement.

The audio recording and attendant transcript was not long in length. It is important when listening to evidence the jury be able to hear the tone of voice and pauses exchanged between parties. Often credibility and accuracy hinges on tone of voice and nowhere is this more key than a defendant's statement of the events. The Defendant accuses the State of being disingenuous in its statement the audio could not be redacted, but defense counsel concurred the audio could not be redacted. 4RP 893.<sup>7</sup> In light of the importance of the defendant's statement as a whole, the rule considering *res gestae*, and the lack of any proof of other occurrences, the trial court did not abuse its discretion.

**iii. The Defendant cannot prove defense counsel was ineffective for failure to object to admissible non-opinion evidence on the phone call.**

Statements made by Cecilia Christopherson in a phone call with the Defendant where she confronted him with the allegations made by Jane were not hearsay nor impermissible opinion evidence. As such, failure of counsel to object was not error and even if error, Defendant cannot show it would have changed the outcome of the case.

---

<sup>7</sup> The Defendant points out the State did not play certain portions of a Ryan hearing offered by the Defendant to show the State could redact such recordings. However, redaction and not playing certain parts are different and are dependent on technology and access. It should be noted the recording at issue was not one made for preservation of testimony in a court like a Ryan hearing. It was also not made by a local agency and was 8 years old at the time of trial. Given the **agreement** of both parties that the audio could not be redacted, the court should accept such as fact, especially in light there is no evidence to the contrary.

**a. The Statements of Cecilia Christopherson were not hearsay, nor improper opinions on guilt and credibility.**

The Defendant argues any statement made by a witness in an out-of-court conversation with the defendant is hearsay. If this were true, no audio recorded statement of a conversation between a suspect and police officer would be admissible.

Hearsay is defined as 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. WA ER 801(c) (2014). This rule is sometimes phrased in terms of relevance, such that “the statement is only relevant if true.” 5D Karl B. Tegland, *Washington Practice, Courtroom Handbook on Washington Evidence*, at 355 (214-2015 ed. 2014). Additionally, when a statement in a conversation is offered to show it was made, the statement is not hearsay. WA ER 801 (2014).

In countless cases, witnesses are entitled to recite their questions and confrontation with a defendant for the purposes of relating what a defendant said relevant to the matter charged. *See generally: State v. Danielson*, 37 Wn. App. 469, 681 P.2d 260 (Div 1, 1984); *State v. Demery*, 144 Wn.2d 753, 761 fnt 5, 30 P.3d 1278 (2001). Many federal circuit courts have recognized that statements made by a third party in a taped interview are admissible to provide context to the defendant's answers. *See United States v. Flores*, 63 F.3d 1342, 1358-59 (5th Cir.1995); *see also United States v.*

*Catano*, 65 F.3d 219, 225 (1st Cir.1995); *United States v. Sorrentino*, 72 F.3d 294, 298 (2d Cir.1995); *United States v. Gutierrez-Chavez*, 842 F.2d 77, 81 (5th Cir.1988); *United States v. Whitman*, 771 F.2d 1348, 1351 (9th Cir.1985). Moreover, telephone conversations “may be shown in the same manner and with like effect as conversations had between individuals face to face.” *State v. Deaver*, 6 Wn. App. 216, 219, 491 P.2d 1363 (Div 1, 1971). If a witness were just to state the defendant told me he was sorry, to stand by him, and that most of it was true,” without any context to the question of what the defendant was responding, the answers would not always make sense and the force of the conversation would be lost. How a question is phrased can change the answer given, moreover a question can denote suggestion, imply derision, etcetera. To say that the question has no relevance to the answer is take meaning out of every conversation. A question may have relevance without it being offered to be true.

For instance, in most child abuse cases interviewers are put to the test of what questions they asked a child witness. This is because how a question is asked can cause a child to answer in a certain way. The question is not offered for the truth, but to shed light on the answer. This is no different from an adult.

In *State v. Notaro*, 161 Wn. App. 654, 255 P.3d 774 (Div 2, 2011) and *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001), courts held that officers who told Defendants during interrogation that they didn’t believe them were not commenting on credibility nor giving opinion testimony.

In considering whether a statement constitutes improper opinion testimony, a court considers what type of witness is involved, the specific nature of the testimony, the nature of the charges, the type of defense and the other evidence before the jury. *Id.* at 661-62. “Testimony that is not a direct comment on the defendant’s guilt or on the veracity of a witness is otherwise helpful to the jury and is based on inferences from the evidence is not improper opinion testimony.” *Id.* at 662 citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 9854 P.2d 658(Div 1, 1993) *rev denied*, 123 Wn.2d 111, 869 P.2d 1085 (1994). Moreover, statements not made under live testimony are different than those made while under oath and not considered as opinion evidence. *State v. Demery*, 144 Wn. 2d at 760.

In *Notaro*, the State asked the Detective a number of questions of what he asked Notaro and what Notaro’s responses were. *Id.* at 662-68. At one point the detective told Notaro he didn’t believe Notaro and this caused Notaro to change his story. *Id.* at 665. The detective continued to use this tactic by confronting Notaro with the implausibility of what he was saying in light of common sense. *Id.*

The Appellate Court, considering *Demery*, found the interrogation consistent of a strategy to challenge the initial story and elicit responses that are capable of being refuted or corroborated by other evidence or accounts of the event discussed. *Id.* at 669. Moreover, statements made during a pretrial interview are not the types of statements that carry as special aura of reliability usurping the province of the jury at trial. *Id.* The court also

found Notaro waived his challenge because he elicited opinion testimony on cross-examination. *Id.* at 670.

The present case contains even less an opinion as to credibility than *Notaro*. It is evident from the phone call that Cecilia is confronting Dow with the facts she knows. She asks defendant if he wants to know what Jane told her, tells him Jane is smart and doesn't lie and that what she said couldn't be made up. Ev 1A at 3. This spurs defendant to admit that most of it is true. Ev 1A at 3. What is interesting is Cecilia hasn't told him everything Jane told her yet. So Cecilia tells him Jane doesn't know what masturbation looks like or a penis. Ev 1A at 3-4. This causes defendant to want to explain and admits he was high on methamphetamine at the time. Ev 1A at 4. He then goes into greater detail about what happened, blaming Jane for jumping on him. Ev 1A at 4. Then Cecilia challenges his statement this wasn't Jane's fault, by bringing up Jane's clothing. Ev 1A at 4. It is evident from the conversation Cecilia is telling him she doesn't believe him because the evidence doesn't support his story. This is not a comment on Jane's credibility and not opinion evidence under *Notaro*.

Moreover, the statement is coming from the victim's mother and not an officer. The jury would not be shocked that Cecilia would say she believed Jane, otherwise why would she call the police and continue with the case for the next eight years. This would not be any statement that would substitute the opinion of a witness over that of the jury.

Lastly, during cross-examination, defense counsel elicited from Cecilia that Jane sometimes lies to her but doesn't have a problem with lying. 5A RP 1068. This is asking a witness to comment on the credibility of another and a waiver under *Notaro*.

**b. The Defendant cannot meet his burden to prove Defense counsel was ineffective.**

The test for determining effective counsel is whether: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *Id.* citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). “This test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986, 990 (Div 1, 1989) citing *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122 (Div 2, 1986). The second prong requires the defendant to show “that there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* A court begins any ineffective analysis with the strong presumption that counsel was effective. *State v. Curtiss*, 161 Wn. App. 673, 702, 250 P.3d 496 (Div 2, 2011).

To establish ineffective assistance for failure to object, Dow must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (Div 2, 1998), citing *State v. McFarland*, 127 Wn. 2d 322, 336 and 337 n. 4, 899 P.2d 1251 (1995), and *State v. Hendrickson*, 129 Wn.2d 61, 80, 917 P.2d 563 (1996).

The Defendant begins his argument with the presumption it was error to admit the statements of Cecilia Christopherson and hence counsel was deficient by not objecting. Def. Brf at 27-28. If the appellate court disagrees, the defendant fails to meet his burden and the court need go no further in its analysis. This is the same for the second prong of the analysis, if the court would not sustain an objection because the evidence was admissible.

If the court concludes there was error, the allowance of the questions would certainly be a trial tactic to give context to the statements of the defendant. It would almost be misconduct not to allow the jury to hear the voice of Cecilia when she asked the questions and understand that when the defendant said he was sorry, what this comment was in response to. Lastly, Dow cannot show the result of the trial would have changed had the statement “Cecelia believed Jane didn’t lie” been excluded, as there was testimony she didn’t want to believe Jane, but ultimately called the police

and then followed with the case for the next eight years, bringing the child to the courthouse for approximately 10 separate instances. The fact that a mother believes their child would not have changed the outcome of the trial to any reasonable belief and not to the level the defendant can show ineffective assistance of counsel.

The defendant cites to *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010) for the position that where there is a risk of prejudice and no way to discern the value placed on the evidence a new trial is necessary. Def. Brf at 43. However, *Salas* is not a case involving ineffective assistance of counsel, but rather admission of evidence of immigration status and abuse of discretion. *Id.* The test the court used was to determine if the error was harmless, not whether the result of the trial would have been different. *Id.* As such, the “risk” cited by the Defendant is not the appropriate test.

**D. THERE WAS NO CUMULATIVE ERROR.**

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

Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence. *State v. Welchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. *Guloy* at 425. Non-constitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993); *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981), *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *U. S. cert. den.* 115 S.Ct. 2004, 131 L. Ed. 2d 1005.

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

**E. THE TRIAL COURT ERRED WHEN IT AUTHORIZED THE COMMUNITY CORRECTIONS OFFICER TO ORDER PLETHYSMOGRAPH TESTING.**

The Defendant argues and the State concedes the trial court exceeded its authority to authorize the community corrections officer to order plethysmograph testing as such testing is only reasonable when it

requested by a treatment provider. *State v. Riles*, 135 Wn.2d 326, 344-45, 957 P.2d 655 (1998). The Court should remand the matter back to the trial court to strike the condition only as it reads the Community Custody officer can authorize the testing.

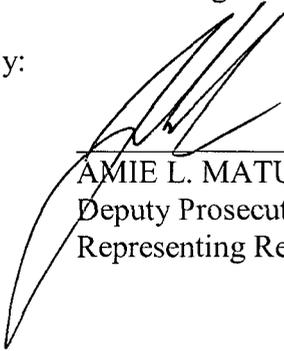
**V. CONCLUSION**

For the foregoing reasons and arguments the court should affirm the conviction. However, the court should remand the matter back to the trial court for amendment to the conditions of community custody as addressed above.

Respectfully submitted this 18th day of November, 2014.

SUSAN I. BAUR  
Prosecuting Attorney

By:



#35537  
AMIE L. MATUSKO/WSBA # 31375  
Deputy Prosecuting Attorney  
Representing Respondent

FILED  
COURT OF APPEALS  
DIVISION II

2014 NOV 20 PM 1:36

STATE OF WASHINGTON

BY: Cn  
DEPUTY

**COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION II**

STATE OF WASHINGTON,	)	NO. 45673-7-II
	)	Cowlitz County No.
Appellant,	)	10-1-00598-3
	)	
vs.	)	CERTIFICATE OF
	)	MAILING
KEITH IAN DOW,	)	
	)	
Respondent.	)	
_____	)	

I, Michelle Sasser, certify and declare:

That on the 18<sup>th</sup> day of November, 2014, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

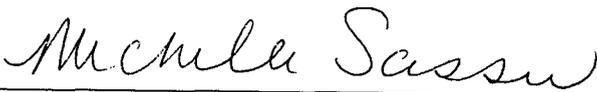
Ms. Lila J. Silverstein  
Washington Appellate Project  
Melbourne Tower, Suite 701  
1151 Third Ave.  
Seattle, WA 98101

And

Court of Appeals, Division II – Clerk  
950 Broadway, Suite 300  
Tacoma, WA 98402

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

Dated this 18<sup>th</sup> day of November, 2014.

---

Michelle Sasser