

FILED
JAN 13, 2014
Court of Appeals
Division III
State of Washington

NO. 313778-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON

v.

ARMANDO CORTEZ-LOPEZ

RESPONDENT'S BRIEF

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A. ISSUES PRESENTED BY APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the witness give an opinion? And if so, was the opinion one that should not have been given?
2. Assuming an improper opinion was given by the witness, was the error preserved for appeal purposes and/or was not of constitutional magnitude?
3. Assuming an improper opinion was given by the witness, and referred to by the deputy prosecutor during closing argument, was such error nevertheless harmless?
4. Was the deputy prosecutor's direct examination of the witness improper?
5. Assuming the deputy prosecutor's direct examine of witnesses was improper, was the issue preserved for appeal purposes and was it of constitutional magnitude?
6. Was defense counsel ineffective for failing to object to the use of the statement made by the witness, and its subsequent use during closing argument?
7. Assuming the errors cited by the appellant, did the cumulative effect of the such error(s) deny the appellant a fair trial?

B. ANSWERS TO ISSUES PRESENTED BY APPELLANT.

1. The statement made by the witness was not one of opinion.
2. Assuming the statement was that of an opinion, and not proper, the error was not preserved for appeal and was not of constitutional magnitude.
3. Assuming the statement was that of an improper opinion, any error in its introduction was harmless.
4. The deputy prosecutor's direct examination of witnesses was not improper.
5. Assuming that the deputy prosecutor's direct examination was improper, any error was not preserved for appeal, and was not of constitutional magnitude.
6. The defense counsel was not ineffective for not objecting to the statement since it was not improper. Assuming that it was, failure to object did not rise to the level of a constitutional violation.
7. Any possible errors did not have the cumulative effect of denying the appellant a fair trial.

C. STATEMENT OF THE CASE

The appellant was charged by amended information in a one count information, with the crime of attempted second degree, or in the alternative, attempted indecent liberties by forcible compulsion. (CP 37-38).

During the pretrial hearing held on November 12, 2012, the court discussed whether there were any motions in limine, and whether the parties were requesting a jury questionnaire be given the jury panel. (11-12-2012 RP 3-4). Discussions were also conducted regarding the admission of ER 404(b) evidence. The State argued that the prior conduct should be admissible as evidence of intent and motive. The court reserved ruling on the issue. (11-12-2012 RP 4-5). The court addressed the standard juror questionnaire, as well as proposals of counsel. (11-12-2012 RP 17-18).

Before the start of trial on November 20, 2012, the court ruled that the State would not be allowed to introduce the prior conduct in its case in chief. (11-20-2012 RP 27).

Following the selection of the jury and opening statements of counsel, the State's first witness was Cody Case. Mr. Case testified that he worked as a night shelve stocker at the Sunnyside Safeway. (11-26-

2012 RP 41-42). After his night shift, were he worked from 11:00 p.m. to 7:00 a.m., he would customarily drive around Sunnyside and listen to music before going home. (11-26-2012 RP 43-44). Before the incident in the alley, Mr. Case had never seen the defendant. (11-26-2012 RP 44).

On the date of the incident, Mr. Case was driving on Edison, and had come to the stop light at Sixth, by the gazebo. Mr. Case was familiar with Sunnyside, having lived there for 21 years. (11-26-2012 RP 44). Mr. Case observed an older lady in the alleyway. [The older woman will hereafter be referred to by her initials, M.G.M., in order to protect her identity]. Mr. Case also observed a young man, later identified as the defendant, as he looked down the alley toward M.G.M. (11-26-2012 RP 45).

The defendant had been moving at a brisk walk or jog coming up to the alleyway. Mr. Case observed the defendant look down the alleyway toward M.G.M. The defendant then put his hood up and pulled it tight where you couldn't see his face. He then proceeded down the alleyway. (11-26-2012 RP 46). Mr. Case sat at the light watching M.G.M. and the defendant. Mr. Case thought it was unusual for someone to put their hood on so tight. He observed the defendant walk past M.G.M., after taking a few steps past her, he then came up behind her pushed M.G.M. up against the dumpster. (11-26-2012 RP 46-47).

The defendant had looked around before stepping back and pushing M.G.M. up against the dumpster. (11-26-2012 RP 47). M.G.M. started to fight with him as he was grabbing her pants, trying to pull them down. The defendant had placed his hands on her hip as he pushed her up against the dumpster. (11-26-2012 RP 64). Mr. Case observed M.G.M. bring up her right elbow, causing the defendant to back up. (11-26-2012 RP 47). The defendant then pushed her right back, grabbing her arm and putting his hands right back down by her waist and hip. (11-26-2012 RP 64). The defendant had been able to get M.G.M.'s pants down to where Mr. Case was able to see her skin and part of her underwear. The defendant had his body pressed right next to M.G.M.'s body. (11-26-2012 RP 48).

Upon seeing this, Mr. Case ran the red light and proceeded to drive down the alley. (11-26-2012 RP 47). When the defendant saw Mr. Case driving toward him, he took off running down the alley. (11-26-2012 RP 47-48).

Mr. Case observed the man as he was running, and he seemed to be fiddling with himself, trying to keep his pants up. He had his hands by his crotch. (11-26-2012 RP 48). When Mr. Case got to the alley, M.G.M. was pushing off the defendant, who started running down the alley. M.G.M. backed out of the way and Mr. Case drove down the alley passed

M.G.M. in order to follow the defendant. (11-26-2012 RP 50). As Mr. Case followed the defendant, the defendant would turn back yelling “no, no, no.” (11-26-2012 RP 51). The defendant then turned left and ran toward his truck. Mr. Case pulled in behind the truck, and rolled down his passenger window. (11-26-2012 RP 51). The defendant jumped out of the truck and was messing with his crotch, and appeared to be zipping his pants up. Mr. Case rolled back up his window, uncertain what the defendant would do next. (11-26-2012 RP 52).

At that point the defendant kept saying “no, no, misunderstanding, misunderstanding.” The defendant even started to cry. The defendant continued to say “misunderstanding” and “going back home.” The defendant said that he was sorry, and pleaded with Mr. Case not to call the police. (11-26-2012 RP 53-54). The defendant said that he was going on the freeway, so Mr. Case let him leave, but followed him to make sure he got on the freeway. Mr. Case followed him, but the defendant did not go toward the freeway. Mr. Case followed him past the Washington School, and after he made a turn, heard the defendant say that he was going to his brother’s bakery. (11-26-2012 RP 54-55).

Mr. Case followed him, and observed as the defendant parked his truck behind the bakery. The defendant knocked on the back door, and someone in the bakery let him in. (11-26-2012 RP 57). At that point Mr.

Case called his father and told him what he had see. His father told him to call it in so Mr. Case then called the police. (11-26-2012 RP 57). After Mr. Case called the police the defendant stepped out of the bakery and looked over towards Mr. Case's location. The defendant went back inside the bakery and Mr. Case didn't see the defendant again. (11-26-2012 RP 58).

Shortly after that two Sunnyside Police officers arrived. One of the officers came over to talk with Mr. Case. The officer asked him to identify people who had been inside the bakery at the time and see if anyone of them was the suspect. (11-26-2012 RP 58). The police brought out three guys that were in the bakery at the time they arrived, but none of them was the man Mr. Case had seen in the alley. (11-26-2012 RP 58-59). Mr. Case was shown a sweatshirt that was found in the bakery. He was able to identify it as appearing to be the one worn by the suspect. (11-26-2012 RP 59).

The police officers asked Mr. Case to go to the police department to give a statement. There, the police took a taped statement from Mr. Case and had him look at a photo montage. (11-26-2012 RP 60; Exhibit 1). Mr. Case was shown the exhibit which he identified by his signature. Mr. Case had identified the defendant from the photo montage as being in photograph number three. (11-26-2012 RP 58).

On cross examination the defense attorney repeatedly challenged Mr. Case's recall as follows:

Q: About how long did this whole altercation at the dumpster take?

A: Three minutes, long enough for me to come from a stop sign to him, if that.

Q: Three minutes?

A: I sat there and waited for a minute, hesitated. It's not often you see someone, you know, trying to molest someone.

Q: Okay. So it took you three minutes to get from the stoplight to the dumpster?

A: If that. I didn't know what to do offhand, and the first instinct didn't kick in quite as quick as it should have.

Q: Okay. So you came up behind him and you followed him through the alley, right?

A: Yes, ma'am.

(11-26-2012 RP 65).

When questioned regarding the defendant's pants, Mr. Case responded that the defendant was messing with himself, that he could have been holding up his pants. (11-26-2012 RP 66).

On redirect, the deputy prosecutor asked Mr. Case why he said “it’s not often you see someone molesting someone.” Mr. Case answered: “you just don’t. Sunday morning, any morning, see some guy grabbing an older lady and pushing up against a dumpster and trying to pull her pants down, you know. That’s not normal. That’s not correct.” (11-26-2012 RP 69).

M.G.M. testified next. She testified that she was born in 1947. (11-26-2012 RP 71). That on the morning of March 4, 2012, she was out walking for exercise. That while she walks she picks up cans to sell. (11-26-2012 RP 72). While walking she ended up in a driveway behind a park on Sixth and Edison. She had been out walking for about 40-60 minutes. (11-26-2012 RP 73). She looked for cans on the top of the dumpster when she heard footsteps and turned and saw a boy. She turned back around and continued collecting cans. She then felt him grab her from behind. (11-26-2012 RP 74). She testified that it was her coat, not her pants that were pulled. She further stated that he might have been trying to pull down her pants, but it was her coat he pulled on. (11-26-2012 RP 74).

When he grabbed her, his hands were on her buttocks over her coat. He then pulled on her. A car pulled into the alley and followed the man, she turned and yelled at them that he was going to get it. (11-26-

2012 RP 75). She then went home and told her daughter. Later, the police came by and talked with her about the incident. The police asked if she was involved in the incident in the alley. She confirmed that she was and was asked to go to the police department where she gave them a statement. (11-26-2012 RP 76).

M.G.M. was shown a photo montage and identified the suspect as number 3. She signed and dated a copy of the montage. (11-26-2012 RP 78; Exhibit 10). The first time M.G.M. saw the defendant was when he came up from behind her and pulled her coat down. (11-26-2012 RP 81).

Officer Wesley Rasmussen testified that on March 4, 2012, he was working the day shift. He was dispatched to Pepe's Bakery at 7:30 a.m. regarding a rape in progress call. The reporting party had followed the suspect to Pepe's Bakery. Officer Rasmussen arrived at the bakery hoping to find them. (11-26-2012 RP 90-91). The suspect vehicle, a Black Chevrolet, was located in the back of the bakery. (11-26-2012 RP 91). Officer Rasmussen entered the bakery and found three males inside. (11-26-2012 RP 91).

Sgt. Cunningham was speaking with the reporting party, who had said that the suspect was wearing a black, Rock Star sweatshirt. Officer Rasmussen observed a black sweatshirt hanging on a door. (11-26-2012 RP 92). The sweatshirt was later recovered and a photograph of it was

admitted into evidence. (11-26-2012 RP 92; Exhibit No. 9). Sgt. Cunningham requested that Officer Rasmussen bring the three outside. He did so, in order to conduct a showup with the reporting party. (11-26-2012 RP 92). None of the three were the suspect. The police also searched the building, but no one else was located inside. (11-26-2012 RP 93).

Sgt. Cunningham testified that he was on duty on March 4, 2012, as the patrol sergeant. He had responded to the report of the attempted rape and contact with the reporting party. (11-26-2012 RP 95-97). He directed Officer Rasmussen to bring out the three males located in the bakery. The suspect was not among the three men. (11-26-2012 RP 97-98). Sgt. Cunningham observed a black hoody while inside the bakery. He brought it out and Mr. Case identified it as the one worn by the suspect. (11-26-2012 RP 98; Exhibit 9). The suspect was not located inside the bakery. (11-26-2012 RP 98).

Sgt. Cunningham directed Officer Rivas to check the area for the other party to the incident. Sgt. Cunningham impounded the black Chevrolet truck, and later obtained a search warrant to search it. (11-26-2012 RP 99). Officer Rivas later radioed that she had located the female involved. (11-26-2012 RP 101). Sgt. Cunningham prepared a photo

montage, using a DOL photo of the defendant, and gave it to Det. Rollinger. (11-26-2012 RP 102).

Officer Melissa Rivas testified that she too was working the day shift on March 4, 2012, and that she was dispatched to assist Officer Rasmussen. While traveling to the bakery, she observed M.G.M. in her yard. Officer Rivas stopped and spoke with her. She appeared to be fine. (11-26-2012 RP 104). Officer Rivas then continued on to the bakery, where she spoke with Cody Case. Based upon information obtained from him, she returned to M.G.M.'s residence and spoke to her about the incident. M.G.M. seemed to be embarrassed about the incident. (11-26-2012 RP 109).

Detective Erica Rollinger testified that she was called out on March 4, 2012, to assist in the investigation. (11-27-2012 RP 120-122). She received a photo montage from Sgt. Cunningham to show to Cody Case and M.G.M. (11-27-2012 RP 122-123). Both identified the suspect as No. 3 in the photo montage. (11-27-2012 RP 123). Detective Rollinger interviewed M.G.M. with the assistance of Officer Rivas, who was Spanish-speaking. (11-27-2012 RP 124). In the statement, M.G.M. stated that the suspect had pulled her pants down about halfway down her derriere. (11-27-2012 RP 124). M.G.M. was transported home by Officer Rivas. (11-27-2012 RP 125).

In preparing the black Rock Star sweatshirt to be sent to the lab, Detective Rollinger located a set of keys, possibly to the black Chevrolet pickup. (11-27-2012 RP 136). The black sweatshirt was sent to the Washington State Patrol Crime Lab (WSPCL) for DNA testing. (11-27-2012 RP 136-137). On Monday, March 12, 2012, the defendant turned himself in to police. A DNA sample was taken from the defendant pursuant to a search warrant, and it was sent to the WSPCL for comparison with the sweatshirt. (11-27-2012 RP 137). DNA extracted from the cuff of the sweatshirt matched the DNA profile obtained from the DNA sample of the defendant. (11-27-2012 RP 139).

The jury was instructed as to the law. (CP 111-135). Closing arguments were heard. (11-27-2012 RP 156-172). The jury returned a verdict of not guilty as to attempted second degree rape, and guilty as to the alternative charge of attempted indecent liberties. (11-27-2012 RP 120-122). The defendant was then sentenced on January 3, 2013, to a sentence of 44 months, which was within the standard range. (CP 144-153). This appeal then followed. (CP 142-143).

D. ARGUMENT.

1. Cody Cases's statement that the appellant was "trying to molest" the victim was not an opinion, but was merely a descriptive statement of fact.

The appellant asserts that the witness's use of the phrase "trying to molest" in the context of the cross-examination, was an improper opinion that mirrored the charges, and attacked the heart of the defense, which was lack of criminal intent. [Brief of Appellant, pg. 16]. The appellant asserts that by using the phrase "trying to molest" he was offering his opinion as to the guilt of the defendant. The appellant cites the case of State v. Jones, 71 Wn. App. 798, 802, 683 P.2d 85 (1993), for his argument that the statement improperly gave his opinion on an ultimate issue of fact. In Jones, the defendant was charged with the crime of child molestation. Over defense objection, a social worker was allowed to testify she felt that the child had been sexually molested by the defendant. Jones at 812. The court held that it was apparent that the statement was an opinion as to the guilt of the defendant, which implicitly invades the province of the jury, and the objection was sufficient to preserve the alleged error. Jones at 813.

However, in this case it is not so readily apparent. The statement, "trying to molest," came up during cross examination of the witness. The counsel for the defendant was challenging the veracity and memory of the witness by repeatedly asking him how long it took him to react to the situation. (11-26-2012 RP 65). The interrogation went as follows:

Q: About how long did this whole altercation at the dumpster take?

A: Three minutes, long enough for me to come from a stop sign to him, if that.

Q: Three minutes?

A: I sat there and waited for a minute, hesitated. It's not often you see someone, you know, trying to molest someone.

Q: Okay. So it took you three minutes to get from the stoplight to the dumpster?

A: If that. I didn't know what to do offhand, and the first instinct didn't kick in quite as quick as it should have.

Q: Okay, so you came up behind him and you followed him through the alley, right?

A: Yes, ma'am.

(11-26-2012 RP 65).

Contrary to appellant's assertion to the contrary, Mr. Case's statement did not relate to the defendant's guilt, but to his own ability to recall the events and a description of what he had observed. In Jones, the social worker was giving her opinion not only as to defendant's guilt, but also to the victim's veracity in making the allegation. Here, Mr. Case was describing what he had seen. The word "molest" is a descriptive word that

means: (1): to harm (someone) through sexual contact : to touch (someone) in a sexual and improper way; (2): to bother or annoy (someone or something). [“Molest” as defined by Merriam-Webster.com, n.d. Web. 6 January 2014. <<http://Merriam-webster.com/dictionary/molest>>].

Clearly the phrase “trying to molest” described what Mr. Case had observed and was used in the context of explaining why he would be able to remember to facts as he testified, not to express his opinion regarding the appellant’s guilt. “Strictly speaking, all statements about one’s observations involve the perception process and therefore an inference process. There is no logical definition of the degree or importance of inference necessary before a statement becomes one of opinion. In ordinary life we recognize a rough, common-sense distinction between facts and the conclusions. Some decisions seem to reflect such a distinction. Where there is difficulty in making a distinction between fact and opinion, a statement of opinion, if it is such, will often be necessary or at least desirable in order for the witness to place the subject matter before the jury. Thus, it is probably true, as one Washington opinion states, that it is more important to get at the truth and permit statements involving some inference than to quibble over distinctions between fact and opinion.” 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 701.2, pg. 5 (5th ed. 2007).

The appellant cites to two cases, State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007) and State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008), in support of his argument that the opinion expressed opinions on guilt. But as conceded by the appellant, in neither case did the court hold that the statements were explicit opinions on guilt.

In State v. Blake, 172 Wn. App. 515, 298 P.3d 769 (2012), the court address a similar argument, in which appellant Blake asserted that the witness's testimony regarding identification was based on their opinions. The court stated that:

Evidence Rule (ER) 701 allows testimony as to “opinions or inferences which are (a) rationally based on the perception of the witness, [and] (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.” Similarly, ER 704 provides that “[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” Case law establishes that the limits of ER 701 and ER 704 are exceeded when a witness testifies “in the form of an opinion regarding the guilt ... of the defendant,” *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001), because such an opinion “inva[de]s the exclusive province of the [jury].” *Demery*, 144 Wn.2d at 759 (alterations in original) (internal quotation marks omitted) (quoting *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)). However, “testimony that ... is based on inferences from the evidence is not improper opinion testimony.” *Heatley*, 70 Wn. App. at 578. “The fact that an opinion supports a finding of guilt ... does not make the opinion improper.” *State v. Collins*, 152 Wn. App. 429, 436, 216 P.3d 463 (2009).

Blake, supra at 523

The Blake court further interpreted ER 701 and ER 704 to allow a witness to testify as to inferences from their observations,

“[w]e recognize that ER 701 and ER 704 do not explicitly distinguish between “opinions” and “inferences.” Nevertheless, it is clear that the Supreme Court did not consider the words to be synonyms. Indeed, there would have been no reason for the Supreme Court to have included each word in each rule if the only result was to be redundancy.

Significantly, case law does not support the contention that the challenged testimony included impermissible opinion on guilt, as opposed to allowable testimony as to inferences or fact-based observations. See, e.g., *State v. Mason*, 160 Wn.2d 910, 932, 162 P.3d 396 (2007) (death certificate from medical examiner admissible because based on specific observations and evidence referenced death rather than guilt); *Heatley*, 70 Wn. App. at 581 (testimony admissible because it was based on direct observation, was helpful to the jury, and was not framed in conclusory terms that parroted a legal standard); *State v. Sanders*, 66 Wn. App. 380, 388-89, 832 P.2d 1326 (1992) (testimony admissible because it did not prevent jury from rejecting the testimony and finding defendant not guilty).

Blake, supra at 526.

The statement made by Cody Case, was made by a lay witness with no particular expertise in the law. His use of the word “molest” would convey the ordinary meaning. The testimony was based upon his direct observation and did not parrot a legal standard. Further, he made the statement to explain why he would be able to remember the incident. The jury was free to reject the testimony and find the defendant not guilty.

2. Assuming the statement was that of an opinion and not proper, the error was not preserved for appeal and was not of constitutional magnitude.

In State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007), the court pointed out that

“[t]he general rule is that appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. Toliás, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). However, a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001); Toliás, 135 Wn.2d at 140.

Pursuant to RAP 2.5(a)(3), to raise an error for the first time on appeal, the error must be “manifest” and truly of constitutional dimension. State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999); State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). The defendant must identify a constitutional error and show how the alleged error actually affected the defendant’s rights at trial. It is this showing of actual prejudice that makes the error “manifest,” allowing appellate review. McFarland, 127 Wn.2d at 333; Scott, 110 Wn.2d at 688. If a court determines the claim raises a manifest constitutional error, it may still be subject to harmless error analysis. McFarland, 127 Wn.2d 333; State v. Lynn, 67 Wn. App. 330, 345, 835 P.2d 251 (1992).

Kirkman, supra at 926-27.

The court in Kirkman, also noted that in determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (2) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. Kirkman, supra at 928.

The defendant puts great weight on the fact that Mr. Case was a fact witness, in accessing factor number one, the type of witness involved. However, here the witness, Mr. Case, was merely a casual observer until the circumstances of the incident, caused him to react. This case is unlike the witnesses in other cases that have been doctors, nurses or police officers and detectives. Here, Mr. Case had just gotten off work, shelving stock in the local Safeway store. He has no special aura of reliability.

The second factor, the nature of the testimony, clearly did not go to show that the statements were impermissible opinion testimony. Mr. Case was merely responding to defense counsel regarding whether his memory of the event was faulty.

The third factor, the nature of the charges, does not necessary indicate that the statement was an impermissible opinion. Although the nature of the charges are of a sexual nature, the name of the crime does not mirror that of the statement as it did in State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993), nor was the statement made from the request for an opinion.

The fourth factor, the type of defense, that there was nothing sexual about the altercation, is contrary to all of the evidence presented, as well as the statement. The defense was to discredit Mr. Case's testimony

and to minimize the event as nothing more than horseplay. (11-27-2012 RP 167-170).

The Blake court addressed a similar argument regarding “manifest error affecting a constitutional right,” as well. There, the court stated:

Equally without merit is Blake’s assertion that, even if the assignment of error on appeal was not properly preserved, it is nonetheless subject to appellate review pursuant to RAP 2.5(a)(3) because it constitutes a ‘manifest error affecting a constitutional right.’ Exceptions to RAP 2.5(a) are to be narrowly construed. *Montgomery*, 1632n.2d at 593. Manifest constitutional error requires a showing of ‘actual prejudice or practical and identifiable consequences.’ *Montgomery*, 163 Wn.2d at 595. ‘Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a ‘manifest’ constitutional error.’ *Kirkman*, 159 Wn.2d at 936.

.....

Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed.” *Montgomery*, 163 Wn.2d at 595; accord *Kirkman*, 159 Wn.2d at 937. Proper instructions obviate the possibility of prejudice. Here, the jurors were instructed that they were the “sole judges of the credibility of each witness,” “the sole judges of the value or weight to be given to the testimony of each,” and were instructed to consider seven factors “[i]n considering a witness’s testimony.” “There is no evidence that the jury was unfairly influenced, and ‘we should presume the jury followed the court’s instructions absent evidence to the contrary.”” *King*, 167 Wn.2d at 340 (Alexander, C.J., dissenting) (quoting *Montgomery*, 163 Wn.2d at 596).

Blake, 172 Wn. App. at 530-531.

Since the appellant cannot establish prejudice, the appellant has failed to establish a basis under RAP 2.5(a)(3) for the court to allow appellate review.

3. Assuming the statement was that of an improper opinion, any error in its introduction was harmless.

Constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). To determine if error is harmless the court looks at the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. Id. at 426. There is no claim that Cody Cases's objective observations were improper. Thus the jury was likely to have drawn the same inferences from the direct observations Cody Case testified about.

Cody Cases's testimony was corroborated by other evidence. M.G.M. testified that when she was in the alley by the dumpster, a boy grabbed her from behind, and that he might have been trying to pull down her pants. (11-26-2012 RP 74). When he grabbed her, his hands were on her buttocks. (11-26-2012 RP 74). Officer Melissa Rivas testified that she spoke to M.G.M. about the incident. During a taped statement conducted at the police station with Detective Erica Rollinger, she stated

that the suspect had pulled her pants down, about halfway down her derriere. (11-26-2012 RP 110-113, 124).

The appellant’s argument that other alleged errors compounded the prejudice should likewise be rejected. The defense did not object to the use of the statement by either Cody Case or the deputy prosecutor in closing. The failure to object suggests that the alleged error was not so prejudicial in the context of the case. Cf. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

4. The deputy prosecutor did not engage in improper questioning of the witness.

The appellant asserts that the deputy prosecutor engaged in misconduct by using leading questions in direct examination.

A leading question is a question that suggests the desired answer. Particular forms of questions may or may not be leading. The use of the phrase “whether or not” is not decisive. Questions that can be answered “yes” or “no” may be leading, but are not necessarily leading. Form, emphasis and all surrounding circumstances must be taken into account.

Sometimes questions containing various details could be categorized as directing rather than leading. Such questions are permissible to direct the attention of the witness to the subject matter about which his testimony is sought.

.....

Practically, unless there is some unusual abuse such as the continued use of leading questions, no basis for reversal or claim of prejudicial error exists.

5A KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 611.17, pg. 547-549 (5th ed. 2007).

The appellant's claim that the deputy prosecutor used numerous leading questions is without merit. The only example given by the appellant is as follows:

Q: And was he doing anything with himself?

A: I didn't see much of it. As he was running away he was fiddling with himself right there, you know, trying to keep them up or not.

Q: Fiddling? What do you mean?

A: Touching himself up front.

Q: Up front where?

A: He had his hands by his crotch.

Q: How close were they when he grabbed her and pulled his pants down?

A: He was right up against her, body to body.

From the context of the whole direct examination, it is apparent that the deputy prosecutor used the masculine pronoun instead feminine pronoun. It was a simple slip of the tongue for which the appellant wishes to create a constitutional violation.

Restating part of the answer from the previous question does not make the question leading. Such questions are used to reinforce the answer to the jury and to direct the attention of the witness to the subject matter about which his testimony is sought.

5. Even assuming that the deputy prosecutor improperly questioned the witness, the issue was not preserved for appeal and the conduct did not prejudice the defendant.

In State v. Davis, 175 Wn.2d 287, 290 P.3d 43 (2012), the court

held that:

If the defense does not object at trial, “[r]eversal is not required if the error could have been obviated by a curative instruction which the defense did not request.” *Hoffman*, 116 Wn.2d at 93. Failure to object to an allegedly improper remark constitutes waiver unless the remark is “so flagrant and ill-intentioned that it evidences an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719 (citing *Gentry*, 125 Wn.2d at 596). If the defense does object to a prosecutor's comment, we review the trial court's ruling on the objection for abuse of discretion. *Id.* at 718. This standard of review recognizes that the trial court is in the best position to determine whether prosecutorial misconduct actually prejudiced the defendant's right to a fair trial. *Id.* at 718-19.

Davis, 175 Wn.2d at 330-331.

When a defendant claims the prosecutor's argument was improper, he bears the burden of showing the impropriety of the arguments and their resulting prejudice. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert denied, 514 U.S. 1129 (1995). “The prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury.” State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

As argued above, the remark of the witness during cross examination was not an improper opinion, but merely a description of what he observed. Thus referring to such testimony was not improper, let alone “so flagrant and ill-intentioned that it evidences an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.”

6. The defendant has not established that his counsel provided ineffective assistance of counsel.

The defendant asserts that his counsel rendered ineffective assistance of counsel by failing to object to the claimed improper opinion testimony and leading questions.

Washington has adopted the standard for reviewing claims of ineffective assistance of trial counsel as set forth in Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984); State v. Leavitt, 49 Wn. App. 348, 355-59, 743 P.2d 270 (1987), affirmed, 111 Wn.2d 66, 758 P.2d 982 (1988). That standard employs a two-part test. First, a defendant must show that counsel made errors so serious that he was not functioning as counsel. A standard of reasonableness is applied, and the defense must overcome a presumption that the attorney may be engaged in trial strategy. Strickland, 466 U.S. at 689; Leavitt, supra at 358-359. It also is clear that an attorney’s strategic choices are “virtually

unchallengeable” and thus are not a basis for finding counsel to be ineffective. Strickland, 466 U.S. at 690.

Second, counsel’s error must undermine the confidence in the fairness of the trial. Leavitt, supra at 358-359. The reviewing court must consider the entire case in making its determination of counsel’s effectiveness. Additionally, courts do invoke a presumption that counsel was competent and rendered effective assistance. State v. Serr, 35 Wn. App. 5, 12, 664 P.2d 1301 (1983); Strickland, 466 U.S. at 694. “[T]his presumption will only be overcome by a clear showing of incompetence.” State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). When one prong of the Strickland test is not met, a reviewing court need not consider the other prong. It is proper for a reviewing court to reject a claim of addressing the prejudice prong if that is dispositive. In re PRP of Riley, 122 Wn.2d 772, 780, 863, P.2d 554 (1993).

The appellant’s claim as to the “opinion” testimony, as discussed earlier, was in fact admissible and no error was made by not objecting. Even assuming that the statement was inadmissible, counsel may not have wished to draw more attention to the matter. Given the strong presumption that counsel was competent, the appellant cannot prevail on this record.

7. The appellant is not entitled to a reversal based upon the cumulative error doctrine.

“The accumulation of errors may deny the defendant a fair trial and therefore warrant reversal even where each error standing alone would not. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). Here, few errors occurred, and those that did were not so egregious or unduly prejudicial that they denied Davis a fair trial. “[A] defendant is entitled to a fair trial but not a perfect one.” *Brown v. United States*, 411 U.S. 223, 231, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (alteration in original) (quoting *Bruton v. United States*, 391 U.S. 123, 135, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)). Reversal due to the accumulation of errors discussed above is unwarranted.” *State v. Davis*, 175 Wn.2d 287, 345, 290 P.3d 43 (2012)

As argued above, there were no errors. Even assuming that there were errors, the number of purported errors did not deny the appellant a fair trial nor does it warrant reversal of the conviction.

E. CONCLUSION.

Based upon the foregoing argument, this Court should affirm the conviction.

Respectfully submitted this 10th day of January, 2014.

/s/ KENNETH L. RAMM

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Certificate of Service

I certify that on January 10, 2014, I caused to be placed in the mails of the U.S., postage pre-paid, a copy of this document to:

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I further certify that on January 10, 2014, I emailed a copy of this document to:

mitch@mitchharrisonlaw.com

/S/ KENNETH L. RAMM

Kenneth L. Ramm, WSBA #16500