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Court of Appeals
Division III
State of Washington

No. 32723-0-III

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

STATE OF WASHINGTON,
Respondent,

v.

DENNIS GASTON,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KLICKITAT COUNTY, STATE OF WASHINGTON
Superior Court No. 13-1-00145-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court err in admitting evidence that the defendant had "urges" under ER 401 and ER 403. (Assignment of Error No. 1)
2. Should the court have conducted an ER 404(b) analysis on the record prior to admitting the statements concerning "urges"? (Assignment of Error No. 2)
3. Was defense counsel ineffective due to the fact that an ER 404(b) analysis was not requested and no limiting instruction was asked for. (Assignment of Error No. 3)
4. Was the testimony by J.W. regarding why he did not say anything during the assault considered speculation? (Assignment of Error No. 3 (2nd No. 3)).
5. Was the mother's testimony inappropriate? (Assignment of Error No. 4)
6. Did the prosecutor commit misconduct during the closing argument with inappropriate comments, bolstering the credibility of the witness, or by arguing facts not in evidence? (Assignment of Error No. 5,6,7)
7. Did the court err by imposing the community custody condition to not possess or view pornographic materials? (Assignment of Error No. 8)

B. STATEMENT OF THE CASE

The state accepts and adopts the procedural and substantive facts recited in the Brief of Appellant.

C. ARGUMENT

1. The court did not err pursuant to ER 401 and Er 403 by admitting the statemtens about the defendants "urges".

The defense states that "what the jury heard of Mr. Gaston's 'urges,' including that he, had gone to 'counseling' and it did not help, suggested that he was inclined to molest 13-year old boys. However, in context the defendant's 'urges' and counseling more likely related to homosexuality with male adults." (Appellant's Opening Brief, Page 8).

This is simply not a linear conclusion. First, the statements about urges are taken in context. The defendant did not make his statement about urges in response to being questioned about homosexual incidents with adult males. He made these statements during the point in the interview when the detectives were talking about counseling, getting help, and inner demons. Further, the defendant specifically states "I haven't acted on them like I wanted to you know, 'cause I know it's wrong;" (RP 131) then further stated that "You know I feel like if I did do something bad I'd wind up going to jail" (RP 132). Taken in the full context of the paragraph, it is unlikely that that the urges had more to do with homosexuality with male adults,

considering that if he acted on those types of urges that he wouldn't be put in jail. It is actually more likely that the urges do suggest having to do with younger, adolescent males, because of the fact that he references going to jail if he acted on the urges.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence Rule 401. Because the urges are more likely to relate to adolescent males, rather than homosexual encounters with adult males, the evidence is relevant. The next analysis required is that although the evidence is relevant, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Evidence Rule 403.

In this case a hearing was held regarding the admissibility of the statement concerning the "urges" to determine admissibility under ER 403. Decisions regarding admission of evidence are reviewed for an abuse of discretion. "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009).

The defendant argues that the trial court relied on unsupported facts

– "the defendant said he had urges to molest children" (Appellant's Opening Brief, page 12). This is a misstatement of the facts that the court relied on. The report of proceedings does not show that the trial court ever thought that the defendant actually said he had urges to molest children. During the pre-trial hearing on the admission of these statements, the trial court heard argument from each side. The state took the position that these were urges relating to pedophilia, due to the statements about going to jail. The state argued that "nobody goes to jail for consensual homosexual sex." (RP 21). It is clear that the court had the facts that could support that the "urges" were relating to pedophilia. It is not unreasonable to conclude that the "urges" were related to pedophilia, considering the related statements about going to jail. The court did not rely on unsupported facts, take a view that no reasonable person would take, apply the wrong legal standard, or have an erroneous view of the law. The trial court did not abuse its discretion.

The court conducted a balancing test. It was a close call, as the court pointed out (RP 22). The court makes the analysis about whether or not the probative value outweighs the danger of unfair prejudice. Even stating that the defendant's statements could be the "knock down blow," does not mean that they are *unfairly* prejudicial. It is clear from the colloquy that the court has with defense counsel that the court views the statements as at least a partial confession (RP 14), and a confession would be a knock down blow to any criminal cases. The trial court listened to the arguments and made

an evidentiary decision by conducting a balancing test under ER 403. The fact that it is a close call shows that a reasonable person could come to either decision. A trial court has broad discretion to weigh the probative value of evidence against its prejudicial effect *State v. Stein,* 140 Wn. App. 43, 165 P. 3d 16(2007). There was no abuse of discretion.

2. The defendants statements about "urges" should not have been excluded under ER 404(b) as prior bad acts.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evidence Rule 404(b).

A statement made by the defendant, concerning his thoughts and "urges" is not evidence of another crime, wrongs, or acts. It is a statement. In this case, the state sought to admit the statement that the defendant made. The state did not attempt to use that statement that the defendant actually had any urges, and then acted on those urges.

Conversely, any action that the defendant took in the past, such as seeking homosexual contact with adult males, would be evidence of another crime, wrong, or act. That action upon the urges would be consequence to ER 404(b). The prior bad acts of seeking homosexual male contact were excluded.

The question here is whether the statements that the defendant made are "acts" within the meaning of ER 404(b). "The rule does not define the terms 'other crimes, wrongs, or acts'. The traditional notion behind the rule is that 'prior misconduct', including 'acts that are merely unpopular or disgraceful', is inadmissible to show that the defendant is a 'criminal type'and is likely to have committed the crime for which charged." *State v. Halstien,* 122 Wn.2d 109, 126, 857 P.2d 270 (1993)(citing 5 K. Tegland, Wash.Prac., Evidence § 114, at 383-84 (3d ed. 1989). Simply stating your thoughts and "urges" are statements, not acts, and should not be considered a prior bad act. The statements are not prior misconduct. There has been absolutely no showing by the defendant how the statements that he made in a police interview could be considered prior bad acts.

The defendant raises for the first time on appeal the issue that the statements should have been excluded under 404(b), and argues that the trial court's failure to conduct an ER 404(b) analysis on the record before admitting "propensity" evidence warrants reversal. First, the court would review the admission of 404(b) evidence for an abuse of discretion. *State v. Fisher* 165 Wn. 2d 727, 745, 202 P. 3d 937(2009). In this case, there is no evidentiary ruling to review. The evidence was not offered under 404(b) as a prior bad act. Because it was not offered as 404(b) there is no requirement for the proponent of the evidence to demonstrate the proper purpose of admitting any evidence of prior bad acts. If that was the case, which it is

not, then the court would have been required to do the proper 404(b) analysis, as stated by the defendant, on the record. The four Huddleston (*Huddleston v. United States*, 485 U.S 681, 108 S.Ct.1496, 99 L.Ed.2d 771 (1988)) factors would have needed to be found in order for any evidence of prior bad acts to be admitted. *Fisher* 165 at 745.

In this case, the evidence that was admitted was not prior bad acts. The evidence of prior bad acts, the two contacts with homosexual adults, was properly excluded as inadmissible 404(b) evidence. The statements that were made by the defendant concerning "urges" was admitted. A pre-trial hearing concerning the admissibility of the statements was held, and during that hearing the defense did not raise and argue the issue that the "urges" statement was inadmissible as 404(b) evidence. During that pre-trial hearing, the defense mentions that "it's 404(b) evidence" (RP 10); however, defense counsel goes immediately into talking about how the evidence is prejudicial, and argues that the court has to determine if there is probative value and if any prejudice substantially outweighs the probative value. (RP 10). The defense further goes on to argue how the "urges" statement is not probative. This is not a 404(b) argument. When the state responds to that argument, the state references defense's motion in limine, pointing out that in that motion, the defense argues that the statement should be excluded under 402 and 403, and 404(b) was never raised. (RP 11). The defense does not rebut this statement with any type of argument that they intended to raise

any 404(b) issues. The defense does not attempt to orally raise the issue and argue on the grounds that it should be inadmissible under 404(b). The state did not argue that they were admissible as 404(b) evidence. Therefore, no analysis on the record by the judge regarding the admissibility of 404(b) evidence is necessary. The court is not required, nor should it, raise possible evidentiary issues sua sponte. The court is required to rule on the issues presented to it.

The defendant also argues that none of the ER 404(b) exemptions apply; however, the court did not admit propensity evidence. There is no evidence of prior bad acts that are being used to show that the defendant acted in conformity with. At trial, the state did not attempt to show any prior bad acts. The state did not introduce evidence of any acts that occurred due to any urges that the defendant had or anything that the defendant did to act upon any urges in the past. Rather, the state admitted statements that the defendant made. Those are not prior bad acts. There are no 404(b) exceptions to apply because there is no 404(b) evidence in this case, other than the prior contacts with homosexual males, which was properly excluded.

The defendant also argues that the admission of ER 404(b) propensity evidence was not harmless. There is no error, harmless or not, because no 404(b) evidence was admitted.

3. Defense counsel was not ineffective for failing to object to and ask for a limiting instruction.

In order to prove that there is an ineffective assistance of counsel, the defendant must must show by a preponderance of the evidence that his counsel's performance fell below an objective standard of reasonableness AND that without the deficiency there is a reasonable chance that the results would be different. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In this case, there simply is no evidence of deficient performance. Defense counsel was very active in the trial, and made strong arguments for the exclusion of the statements made by the defendant. Looking at the entire record, it is clear that defense counsel was well prepared and took an active role in defending his client. Defense counsel had complete knowledge of the evidence, which was clear from the pre-trial hearing.

The defendant wants to now argue that his counsel was ineffective based on the fact that a 404(b) argument was not raised, when it was not necessary. It is clear that statements are not prior bad acts. There was no 404(b) evidence admitted, therefore no request for a limiting instruction should have been requested.

Further, even if a limiting instruction had been asked for, and was refused, the failure to give an ER 404(b) limiting instruction may be harmless. *State v. Mason* 160 Wn.2d. 910, 935, 163 P. 3d. 396 (2007). The

error is harmless "unless, with reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected" *Id* (Quoting *State v. Smith,* 106. Wash. 2d 772, 780, 725 P. 2d 951 (1986)). There was no reason to ask for a limiting instruction because there was no 404(b) evidence to give an explanation on, but even in the event that one was necessary and not given, it should be considered harmless error. There is no showing that the trial was materially affected by the lack of a limiting instruction.

The defendant has made no showing of deficient performance by counsel. Without deficient performance, it is impossible to say that the deficient performance prejudiced his defense. The defendant made statements, which were admitted, over the proper objections of counsel.

4. The trial court did not abuse its discretion in allowing J.W. to testify about why he did not say anything to the defendant during the assault.

Rule 701 allows a lay witness to testify to their opinions. J.W. testified that he did not want the defendant to feel uncomfortable during the incident. When the State asked "What do you mean you didn't want him to feel uncomfortable." (RP 88). J. W. responded with "Well, he was enjoying what he was doing, but –"; and at that point defense counsel objected on grounds of speculation. At that time, the Court asked that the question be rephrased. When the State attempted to rephrase, defense counsel objected, now on the grounds that the question was "coaching" (RP 89). The trial

court overruled the objection as to the form of the question. When J.W. answered that question, he again stated that "he was enjoying what he was doing . . . "(RP 89). At this point, defense counsel did not renew his objection for speculation. There was no objection in front of the court. It appears from the record that defense counsel seemed to be satisfied about the rephrase.

While J.W. may not give the foundation for why he thought that the defendant was enjoying himself; Defense counsel did not object after the question was rephrased. Further, this was not opinion on the guilt of the defendant. This was testimony of the victim relaying what was going on for him during the incident and giving his reasons why he didn't say anything during the assault.

A lay witness may give opinion testimony if the witness has the personal knowledge to form the opinion, the opinion is rationally based upon the perception of the witness, and the opinion is helpful to the jury. *State v. Russell,* 125 Wn.2d 24, 882 P.2d 747 (1994) (citations omitted). In this case, it is clear that J.W. had personal knowledge, the assault happened to him. It is not clear what his perception is based on. At that point, counsel should have renewed his objection, and the trial court would have needed to make a ruling. That didn't happen; therefore, there is no evidentiary ruling to review for abuse of discretion.

Further, it is not clear that this statement was "especially

prejudicial" as the defendant argues in his opening brief on page 33. The victim of the assault recounted the assault on the stand in terms of testimony. J.W. did not make a determination of guilt. Further, it was not improper for the State to reference that testimony in closing, as it had not been objected to. The evidence was admissible. It appeared by not objecting a second time that defense counsel was satisfied, and waived the objection.

5. The mother's testimony did not include hearsay, improper vouching or irrelevant evidence.

Appellant claims ineffective assistant of counsel, asserting his attorney failed to object to Ms. Woolery's (J.W.'s mother) testimony based on relevancy grounds, for failing to renew his hearsay objection to Ms. Woolery's testimony and for failing to argue improper bolstering of J.W.'s testimony. Defense counsel was not ineffective for failing to object to Ms. Woolery's testimony on relevance grounds, failing to renew his hearsay objection and failure to argue improper bolstering of victim's testimony.

The Sixth Amendment and article 1, section 22 of the Washington State Constitution guarantees the right to counsel, but more than the mere presence of an attorney is required. *State v. Hawkins*, 157 Wn.App. 739, 238 P.3d 1226 (2010). A claim for ineffective assistance presents questions of law and fact which courts review de novo. *State v. Cross*, 156 Wn.2d 580,132 P.3d 80 (2006).

To establish a claim for ineffective assistance of counsel, the defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2025, 80 L.Ed.2d 674 (1984). Deficient performance is that which falls "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995). Prejudice exists if the defendant can show that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.

In evaluating claims for ineffectiveness, courts are highly deferential to counsel's decisions and there is a strong presumption that counsel performed adequately *Strickland*, 466 *U.S.* at 689. Strategic and tactical decisions are not grounds for error. Where it is a failure to challenge the admission of evidence that is alleged to constitute ineffective assistance, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would have been likely 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, 958 P.2d 364 (1998).

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence." Evidence Rule 401.

Turning to the facts presented in this case, it very well could have been defendant's strategic objective to allow the testimony of Ms. Woolery that her son told others about the molestation to provide defendant the opportunity to impeach the victim with potential prior inconsistencies in relating his story. Moreover, Ms. Woolery testified at trial that her son had informed her of what the defendant had done to him. Ms. Woolery, without providing factual detail of what her son told her, merely testified to what her own actions were after she became aware of the molestation. Ms. Woolery testified that she contacted a mental health counselor and law enforcement in response to her son's revelation. Additionally, the fact that Ms. Woolery testified during trial that her son told others what occurred had no bearing on the outcome of the trial. Other evidence, much more persuasive, determined the outcome of the trial. The fact that the victim testified in great detail regarding the acts perpetrated upon him by the defendant combined with the fact that the defendant confessed to having urges and knowing these urges, if acted upon would land him in jail, and the victim's detailed description of the defendant appearing to enjoy himself while in the process of molesting the victim resulted in the defendant's conviction. In light of the overwhelming direct evidence presented at trial establishing defendant's guilt, it is unlikely that the fact that defendant told

others the about the molestation played a significant role in the fact finders determination.

Defendant additionally claims that counsel's failure to re-new an objection to Ms. Woolery's hearsay statement was ineffective assistance of counsel. Hearsay is defined as a statement made outside the courtroom, offered in court, to prove the matter asserted by the declarant. Evidence Rule 801. An out of court statement is not hearsay unless it is a statement of fact, offered to prove that same fact at trial. A statement that is not a statement of fact, or is offered for some other purpose other than to prove the same fact, is not hearsay. In *State v. Moses*, 129 Wn.App. 718, 119 P.3d 906(2005), a case involving the prosecution of a murder, the victim had earlier spoken to a social worker about defendant's tendency towards violence in the home. The court held that the statements were not barred as hearsay statements because the statements were not offered to prove the truth of the matter asserted. The statements were offered for the non-hearsay purpose to show why the social worker contacted Child Protective Services.

With the case presented, Ms. Woolery's testimony that her son told others what occurred is not a factual statement offered to prove that the molestation actually occurred, but rather a non-hearsay statement. No details of the molestation related to Ms. Woolery by her son were proffered by Ms. Woolery during trial and she did not offer her opinion as to defendant's guilt or credibility.

Finally, and for the first time on appeal, defendant seeks to assert that counsel's performance was deficient because of his failure to object to Ms. Woolery's testimony on the grounds that one witness may not bolster another witness's testimony with improper opinion or inference testimony.

Under Evidence Rule 701, opinion testimony is not required to be excluded merely because it encompasses an ultimate issue of fact. *State v. Fisher*, 74 Wn.App. 804, 874 P.2d 1381 (1994). The State concedes no witness, lay or expert is allowed to testify to his opinion of the guilt of the defendant, whether by direct statement or by reference. *State v. Heatley,* 70 Wn.App. 573, 854 P.2d 658 (1993). However, courts have consistently held that when the testimony is not a direct comment on defendant's guilt or credibility, and which made an inference that would have been drawn by any reasonable person, that evidence does not constitute improper opinion testimony.

In this case, although Ms. Woolery's testimony encompassed the ultimate factual issue as to whether defendant molested her son, Ms. Woolery did not express a direct opinion as to defendant's guilt or his credibility. The fact that Ms. Woolery testified that her son spoke to others about the incident is an inference that would be drawn by any reasonable person especially in light of the type of crime alleged to have occurred. In cases involving an allegation of sexual molestation it is reasonable to infer that law enforcement personnel, medical staff, social services and mental

health workers would be involved with the victim and that this would necessitate victim re-telling details of the crime.

6. No objection was raised during the Prosecutor's closing argument; if there was misconduct it did not rise to the level that they are flagrant and ill-intentioned to the point that it could not have been cured.

In the context of closing arguments, the prosecutor attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Fisher,* 165 Wn.2d 727, 202 P.3d 937 (2009) (quoting *State v. Gregory,* 158 Wn. 2d 759, 147 P. 3d 1201, (2006)).

"Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as the prejudicial effect. Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. The failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error unless the remark is deemed to be so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonishment to the jury." *State v. Gentry,* 125 Wn.2d 570, 640, 888 P.2d 1105 (1995) (citing *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991).

In the case at hand, it is questionable if the prosecutor rose to the level of misconduct. On the issue of the statement regarding the

commentary of child molestation can be difficult things that "our children go through." As the defendant pointed out – "reference to the heinous nature of a crime and its effect on the victim can be proper argument." *State v. Claflin*, 38 Wn.App. 847, 849-50, 690 P.2d 1186 (1984) (citing *State v. Huson*, 73 Wn.2d 660, 662, 440 P.2d 192 (1968)). It was not wrongfully sympathizing with the jury to state that child molestation is an extremely difficult thing, and difficult on the victim and the parents of the victim – child molestation is a heinous crime that has a substantial effect on children and their families. Furthermore, the defense did not object to this statement, therefore waiving any objection.

As far as arguing facts not in evidence, J.W. did testify at trial that that the defendant enjoyed the incident. The prosecutor could have been drawing a conclusion based on that testimony, and might have made an erroneous conclusion. Even if this was an erroneous conclusion, the defense did not raise any objection to this statement; therefore waiving the objection.

Lastly, as far as improperly bolstering J.W.'s testimony by referring to his testimony as candid, the prosecution has a wide latitude in drawing reasonable inferences from the evidence, as cited above. Candid has a wide range of meanings, it doesn't explicitly mean "honestly" as the defendant would like to conclude. The prosecution was making an inference of the evidence, that J.W. testified, and answered the questions unwaveringly,

facing the facts that his story was not always consistent on small details and he did not avoid answering those types of questions. Again, the defense did not object to this inference, therefore waiving any objection.

Finally, the court should not consider reversal on this issues. The statements that were made in closing are not clearly misconduct. Even in the event that the comments were improper, had defense objected, a curative instruction could have solved this issue. Nothing that was said rises to the level of flagrant and ill-intention to the point that a curative instruction could not solve the issue. There is nothing that shows that a curative instruction could not properly solved the issue with the jury. Even if there was misconduct, this error would not warrant reversal. Further, "Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial." *State v. Lopez,* 95 Wn.App 842, 857, 980 P.2d 224 (1999) (citing *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). Even if there was prosecutorial misconduct on the issue of stating to facts not in evidence, it does not rise to the level that it materially affected the outcome of the trial.

7. <u>The community custody condition relating to viewing or possessing pornographic material should be stricken.</u>

The state concedes this issue.

8. The cumulative error doctrine does not apply because there is not an accumulation of several errors.

The defendant alleges that the trial was full of errors. This simply isn't true.

The trial court did not err in admitting the urges testimony under ER 401 and 403. The statements were relevant, and not out of context, given the fact that the defendant referenced the fact that he would go to jail if he acted on the urges.

There was no error by the trial court in admitting the statements absent of a 404(b) analysis on the record, because the statements are not 404(b) evidence. The statements are similar to a confession.

Counsel was not ineffective. There was no offer of a limiting instruction because there was no 404(b) evidence admitted. The only 404(b) evidence in this case was the prior homosexual contact with adult males, which was excluded.

J.W. did not improperly testify. He was testifying to the incident itself, and explaining why he didn't say anything to the defendant during the sexual assault. His opinion testimony is allowed under ER 701.

The mother's testimony did not contain hearsay. She never repeated what J.W. told her, she only testified as to what actions she took in response to what J.W. told her. Her testimony was not irrelevant, as she was the reporting witness. She didn't vouch for J.W., there is no evidence that the

mother testified that J.W. was always truthful or that she believed him. She testified to what actions she took.

The prosecutor did not commit misconduct during her closing argument.

The cumulative error doctrine does not apply here. The admissions of evidence, and the mothers testimony was not in error, and counsel was effective at trial. Assuming arguendo that there was prosecutorial misconduct and that the child did improperly speculate; the cumulative error doctrine still does not apply. "The application of that 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, 928, 10 P.3d 390 (2000). Here, like in *Greiff*, there is not an accumulation of several errors. Rather, there is only two possible errors, each of which had little effect on the outcome of the trial. With only two errors, *Greiff* held that the court was satisfied "that the cumulative effect of the insignificant errors did not deprive [the defendant] of a fair trial."

Even if there were errors, none of the errors rise to the level that would warrant reversal, and the cumulative effect of those errors were not prejudicial enough that they materially affected the outcome. "A defendant is entitled to a fair trial, but not a perfect one." *Lutwak v. United States,* 344 U.S. 604, 73 S. Ct. 481, 97 L.Ed.593 (1953).

D. CONCLUSION

Based upon the above argument the court should affirm defendant's conviction.

Respectfully submitted this 30th day of June, 2015.

KLICKITAT COUNTY
PROSECUTING ATTORNEY

ERIKA GEORGE
WSBA No. 43871
Deputy Prosecuting Attorney

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
Division III

STATE OF WASHINGTON,	)	
Respondent,	)	**No. 32723-0-III**
v.	)	
	)	**Superior Court No. 13-1-00145-6**
DENNIS N. GASTON,	)	
Appellant.	)	**DECLARATION OF SERVICE**
	)	

I, Shari Seward, certify that on June 30, 2015, I emailed, a copy of the Brief of the Respondent to:

ATTORNEY FOR APPELLANT:
KRISTINA M. NICHOLS
NICHOLS LAW FIRM, PLLC
P.O. BOX 19203
SPOKANE, WA 99219-9203
WA.APPEALS@GMAIL.COM

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

DATED this 30th day of June, 2015.

SHARI SEWARD
Senior Legal Assistant

KLICKITAT COUNTY PROSECUTOR
205 S. Columbus Avenue
MS-CH 18
Goldendale, WA 98620
(509)773-5838 • Fax (509)773-6696

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STATE OF WASHINGTON,	)	
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Appellant.	)	**DECLARATION OF SERVICE**
	)	

I, Shari Seward, certify that on June 30, 2015, I deposited in the United States mail by certified mail, proper postage affixed, a copy of the Brief of the Respondent to:

DENNIS N. GASTON
DOC #: 376379
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

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

DATED this 30th day of June, 2015.

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