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OCTOBER 5, 2016  
Court of Appeals  
Division III  
State of Washington

No. 34220-4-III

IN THE COURT OF THE APPEALS  
OF THE STATE OF WASHINGTON

DIVISION III

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THE STATE OF WASHINGTON, Respondent

v.

ROGER WILLIAM FLOOK Jr., Appellant.

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**BRIEF OF RESPONDENT**

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**I. SUMMARY OF ISSUES**

1. DID THE COURT TRIAL COURT ERR IN DENYING THE APPELLANT'S MOTION FOR MISTRIAL?
2. IS REVERSAL REQUIRED WHERE THE SHERIFF TESTIFIED CONCERNING HIS OBSERVATIONS DURING THE INTERVIEWS OF THE APPELLANT AND VICTIM AND WHERE THE APPELLANT FAILED TO OBJECT?
3. DID THE TRIAL COURT'S WRITTEN RULING CONCERNING ADEQUATELY DEMONSTRATE THAT THE COURT WEIGHED THE RELEVANCE AND DOES ANY DEFICIENCY REQUIRE REVERSAL?
4. WAS TRIAL COUNSEL INEFFECTIVE AND THEREBY PREJUDICE THE APPELLANT?
5. DID CUMMULATIVE ERROR DEPRIVE THE APPELLANT OF A FAIR TRIAL WHERE NO ERROR OCCURED?
6. SHOULD THE COURT PRECLUDE THE STATE FROM SEEKING A COST AWARD SHOULD IT PREVAIL ON APPEAL?

II. **SUMMARY OF ARGUMENT**

1. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE APPELLANT'S MOTION FOR MISTRIAL.
2. THE TESTIMONY OF THE SHERIFF WAS PROPERLY BASED UPON HIS OBSERVATIONS AND NOT IMPROPER OPINION TESTIMONY CONCERNING THE GUILT OF THE APPELLANT AND WAS NO OBJECTION WAS MADE.
3. IT IS CLEAR FROM THE COURT'S ORDER ON THE MOTIONS IN LIMINE THAT THE COURT DID WEIGH THE PROBATIVE VALUE AGAINST UNFAIR PREJUDICE AND IN ANY EVENT SUCH EVIDENCE WAS CLEARLY ADMISSIBLE.
4. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST A LIMITING INSTRUCTION AS THE TESTIMONY WAS PROPER AND IT IS A QUESTION OF TRIAL STRATEGY.
5. CUMMULATIVE ERROR DID NOT DEPRIVE THE APPELLANT OF A FAIR TRIAL WHERE NO ERROR OCCURED.
6. APPELLATE COSTS SHOULD NOT BE FORECLOSED.

### **III. STATEMENT OF THE CASE**

Martha Flook and the Appellant, Roger Flook, were married July 24, 2010 and remained so at all times relevant hereto. Report of Proceedings (RP) at 163. The Appellant was born August 7, 1981. RP 164. Martha had two children from a previous marriage to Aaron Sheridan; a daughter, A.S.,<sup>1</sup> and a son, J.S. RP 80-81, 164. A.S. was born in February of 2003 and she was eleven years old on June 6, 2014. RP 80, 164. J.S. suffers from a form of epilepsy has seizures which can be triggered when he is startled. RP 86-87.

In April of 2014, the Appellant was released from prison after serving a sentence for three counts of Identity Theft, and two counts of Possessing Stolen Property. Clerks Papers (CP) 10-13, 82-94, 75-81, 104-116. After his release, he returned to the family home in Endicott, Whitman County, Washington, where Martha, A.S. and J.S. lived. RP 34, 164. On June 6, 2014, the Appellant, Martha, A.S. and J.S. traveled to Clarkston, Asotin County, Washington to attend a marriage counselling retreat that was being put on by an area church. RP 52-53, 165-166. The family stayed at the Quality Inn in Clarkston. RP 165. The room in which they stayed had only one large bed. RP 42-43, 108. The Appellant slept on left side of the bed and Martha on the rights side. RP 110. A.S. and J.S. slept in the middle with A.S.

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<sup>1</sup>For the protection of the child victim and in accordance with court rule, the victim will be referred to throughout by her initials.

next to the Appellant and J.S. between A.S. and Martha. RP 110. During the night, the Appellant lifted up A.S.'s clothes and put his hand on her hip. RP 112. The Appellant then removed his hand and replaced it farther down inside her clothing near her pelvic area. RP 113. Again the Appellant removed his hand and then reached farther down into A.S.'s clothing, beneath her underwear, touching her vaginal area. RP 114-116. He inserted a fingertip into her labia. RP 117. The Appellant withdrew his hand and A.S. quickly rolled over to face toward her brother and put her arm between her legs. RP 116. At that point the Appellant grabbed her arm and he whispered "come on." RP 116. A.S. started softly crying and he let go. RP 120. A.S.'s account of the events was described by Martha at trial as "familiar" as she referenced the way in which the Appellant would initiate sex with her when they were married. RP 177. She recognized what she described as his "method" of moving and pausing. RP 177-178.

A.S. did not tell anyone about this incident for some time. RP 120. A few months later, she confronted the Appellant and he claimed that when he grabbed her arm, he thought it was J.S. RP 120. The Appellant also told A.S. that J.S. was having a seizure and that J.S. was the one that touched her. RP 120-121. This explanation was inconsistent with J.S.'s seizures which cause his arms to go upward and his muscles to become rigid. RP 87. A.S.

stated she was scared and embarrassed and didn't want to tell anyone about the incident. RP 121.

A.S. finally did tell someone; a friend she met at summer camp. RP 121. A.S. appeared scared and upset when she told her friend. This friend, C.S. in turn told her mother, who was able to contact Aaron Sheridan, A.S.'s father. RP 83,122, 264, 275-276.

On August 24, 2015, the Whitman County Sheriff's Office received the report and opened an investigation. RP 34. Sheriff Brett Meyers handled the investigation due to his training and experience with child sex investigations. RP 32-34. On August 25, 2015, Sheriff Meyers interviewed A.S. who provided her statement regarding the above events. RP 35-39. A.S. related other incidents where the Appellant had her sit on his lap in his car. RP 49, 126. During this incident, she sat down on his leg in the open door of the car and the Appellant moved her to his lap over the top of his crotch. RP 126. She then felt his penis move under her. RP 126-127. She became uncomfortable and told him that she needed to go to the bathroom. RP 127.

On another occasion, she was riding in the car with the Appellant and he noticed a hole in her jeans. RP 123. The hole was really high up on the thigh and he put his finger in the hole. RP 124. The Appellant laughed and told her he was just "messing around." RP 124.

She further told Sheriff Meyers how the Appellant had showed her pornographic materials. RP 50. The Appellant had shown her an animated video depicting sexual acts. RP 124 - 125. At one point when her mother was not home, the Appellant offered to tell her about sex. RP 127. At times he would spank her on the buttocks as she walked by, not in a disciplinary manner, but playfully. RP 128, 173. This was brought to Martha's attention and she admonished him not to do it, commenting that, it was "weird" because he would do the same thing to Martha. RP 128.

Prior to April of 2014, A.S. was doing well in school and other than the usual childish issues, she was well adjusted. RP 88. After the Appellant moved back into the family home, she began having problems and exhibiting sexualized behaviors. RP 89-90. Her grades dropped and she began engaging in "sexting." RP 90. Her parents arranged for her to go to counseling. RP 91, 210-211. These behaviors suggested to the counselor that A.S. had been sexual abused. RP 219.

During his investigation, Sheriff Meyers interviewed Martha Flook on August 27, 2015 at the CPS office in Colfax, Washington, and discussed with her the allegations regarding what occurred in the hotel room in Clarkston, on June 6, 2014. RP 42. She confirmed many of the details related by A.S. during her interview, including the sleeping arrangements and the locations of persons in the bed that

night. RP 42-43. At the conclusion of the interview Martha left and later that same day, she returned to Colfax with the Appellant and he too was interviewed by Sheriff Meyers. RP 43, 46, 47-48.

The Appellant was not under arrest, and requested that the interview not be recorded. RP 43-47. Although not under arrest and not otherwise being in custody, Sheriff Meyers advised him of his rights which he waived. RP 45-46. When asked about the marriage retreat in Clarkston, the Appellant claimed that he could not remember the event at all. RP 47. After he was reminded by Martha regarding the hotel stay and retreat, he was able to remember, not only the event itself, but the specific sleeping arrangements. RP 47-48. In fact, without hesitation he was able to confirm the order in which the family slept in the bed. RP48. When confronted with the allegation by A.S., the Appellant claimed that J.S. was having seizures and he grabbed him to calm him. RP 48.

Sheriff Meyers asked about the incident in the doorway of the car and the Appellant initially indicated he had no recollection of the incident. RP 49. After being told what A.S. said, he remembered and confirmed that it occurred. RP 50. He also then remembered that this interaction ended when *he* got up to go to the bathroom. RP 50. This notably differed from A.S.'s account where, *she* became uncomfortable and broke off contact under the auspices of needing to use the bathroom. RP 50. He outright denied showing A.S. any

pornographic materials. RP 50-51. He also denied playfully spanking her. RP 51.

At trial, Sheriff Meyers testified that the Appellant appeared lethargic and sleepy, despite the interview occurring at three in the afternoon. RP 51. Without objection, Sheriff Meyers indicated that he appeared to be under the influence of a **substance**.<sup>2</sup> RP 51. The Appellant appeared to have trouble keeping his eyes open and the sheriff had to repeat questions at times to elicit an answer. RP 51.

During cross examination, defense counsel probed Sheriff Meyers concerning the interview with A.S. RP 59-60. Counsel intimated that there were inconsistencies in the events she related to Sheriff Meyers. RP 59-60. Counsel further intimated that girls often make up these stories and attempted to confirm this with Sheriff Meyers through his training and experience. RP 60-61. The Appellant's trial counsel then attempted to explain his client's lack of memory regarding the trip to Clarkston, highlighting the Appellant's groggy appearance, and intimating that he could, in fact, have just been woken up. RP 67 Counsel intimated that once he was "steered towards this event," this jogged his memory and he was able to recall specifics. RP 67.

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<sup>2</sup>The Appellant argues that this was testimony regarding drug use, but the sheriff did not state "controlled substances" or illegal drugs. Brief of Appellant, p. 39

On redirect and in response to defense counsel's questions, concerning his training and experience, the State's attorney inquired of his training and his observations of both A.S. during her interview. RP 70. The State did not ask the witness whether he believed A.S., but whether he observed any possible signs of deception during her interview. RP 71. Counsel objected that the question was asked and answered. RP 71. The State clarified that the question went to his observations, during the interview and not his opinion on credibility. RP 71. The witness was allowed to answer that he did not observe any signs of deception during A.S.'s interview. RP 72.

Sheriff Meyers was then asked concerning discrepancies in the Appellant's account. RP 73. The State's attorney clarified that he was not being asked about his opinion, but his observations. RP 73. Sheriff Meyers pointed out the Appellant's lack of memory about an entire memorable event, contrasted this with the Appellant being able to recall specific details regarding this event. RP 73-74. Specifically, Meyers noted that, while the Appellant initially was slow to recall the marriage retreat, he quickly responded to questions about the sleeping arrangements, correctly identifying the locations of everyone in the bed. RP 74. He further quickly recalled J.S. having seizures and reaching across to stop his arms from flailing. RP 74. He also initially failed to recall the situation in the car where A.S. sat on his lap, but then quickly recalled that he broke contact to use the

bathroom. RP 75. It was further clarified that the Appellant would most certainly have known why he was coming in for a police interview. RP 75. These events had already been discuss with his wife, who brought him to the interview and who had been interviewed just hours before about the hotel and the events that occurred there. RP 75. There was no objection to this inquiry or the witness's responses. RP 73-75.

At the pretrial conference, the court considered the motions in limine filed by the Appellant. RP 4, CP 10-13. Specifically, the Appellant sought to preclude the State from offering his 2002 convictions for Rape of Child Third Degree and Indecent Liberties and the State conceded this motion with the exception of rebuttal of possible character evidence. CP 10-13, 39-40. The Appellant further sought limitation on prior sexually inappropriate conduct by the Appellant directed toward A.S. CP 10-13. The Court found this evidence highly probative to his lustful disposition toward A.S. and denied the motion. CP 39-40. The Appellant also sought to preclude testimony concerning the fact that he had been released from prison shortly before these events occurred. CP 10-13. The State expressed concern that, since this was a major time marking event in her life, too strict a ruling would chill the child victim's ability to testify. RP 10. The court instructed the State to caution the witnesses from

referring to his release from prison, but recognized that, due to the child's age, this will be difficult. RP 12. CP 39-40.

During the trial testimony of Nicole Konen, A.S.'s counselor, she was asked about A.S.'s report to her about the events in the hotel room. RP 216. She had previously been cautioned by the State's attorney not to talk about the Appellant being in prison. RP 234. The State's attorney asked the counselor if A.S. indicated the time frame when this happened. RP 216. Answering as A.S. reported the events to her, Konen stated, "Right after he got out of jail." A defense objection was sustained. RP 216.

During cross examination by defense counsel, Konen was again asked about the time frame. RP 224. Counsel asked if the date of the hotel incident was in June of 2014. RP 224. Konen testified that she didn't know the date, further clarifying: "I just knew it was sometime after and I didn't know when Roger was even in jail so I---." Counsel objected to the response and the witness which was stricken.

At the close of the State's case, the defense moved for a mistrial based upon Konen's testimony. The State noted that her response was based upon A.S.'s reporting and the manner that she described it to Konen. RP 234. The court denied the motion for mistrial, noting that the use of the term "jail" was not nearly so prejudicial as the term "prison," and further, the witness was not

reporting personal knowledge, but rather what she was told. RP 235. Ultimately, the court concluded that, having stricken the reference, and given the overall context in the trial, the witness's inadvertent violations of the court's order were neither overt nor sufficiently prejudicial to warrant a new trial.

The Appellant was charged with Rape of a Child in the First Degree and Child Molestation in the First Degree and was convicted as charged following the jury trial for sexually abusing A.S. CP 1-2, RP 331. The Defendant filed notice of appeal RP 120-136.

#### **IV. DISCUSSION**

1. **THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE APPELLANT'S MOTION FOR MISTRIAL .**

The Appellant first contends that the trial court erred in failing to grant the defense motion for mistrial. A denial of a motion for a mistrial is reviewed under the deferential standard of abuse of discretion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A "court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or for untenable reasons." State v. Hummel, 165 Wn.App. 749, 777, 266 P.3d 269 (Div. I, 2012). A "trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). In determining whether a

defendant has been denied a fair trial, the courts consider (1) the seriousness of the claimed trial irregularity; (2) whether it was cumulative of other properly admitted evidence, and (3) whether it could be cured by an instruction to disregard. See State v. Escalona, 49 Wn.App. 251, 255, 742 P.2d 190 (Div. I, 1987). The trial court has broad discretion in determining whether an instruction can cure an error. State v. Ecklund, 30 Wn.App. 313, 316, 633 P.2d 933 (Div. II, 1981).

While Konen's testimony concerning the date of the allegation in relation to the Appellant being in jail is problematic, as noted by the trial court, there is a difference in common understanding of jail and prison. Second, while the reference to jail was repeated twice, it should be noted that the second reference was in response to pointed questioning by defense counsel concerning precise dates, after it had already been established that the witness did not have exact dates, but instead was provided time frames by A.S., which included the Appellant's release from custody. So it was only at the pressuring of defense counsel that the second utterance occurred.

The comment concerning jail was admittedly not cumulative of other evidence. The Appellant argues that other evidence was elicited concerning his absence from the home for two years. However, it should be noted that, it was in response to counsel's

questioning of Sheriff Meyers, that the Appellant's period of absence from the home was first mentioned. During cross examination of the Sheriff and in an effort to discredit A.S., counsel asked whether she had revealed any acts that had occurred before June of 2014. RP 62. On redirect, and without identifying where the Appellant was during that time, the State elicited from the Sheriff that, the Appellant had only been back in the family home about two months and had not been in the marital home for about two years. RP 72. This was done to explain that the victim was not fabricating, but rather, prior to June of 2014, there hadn't been an opportunity to abuse A.S. The Appellant can hardly be heard to complain about evidence that was elicited in response to his claim of fabrication by the victim.

As noted by the Appellant, the court struck the comment both times and there is no claim that the jury was not properly instructed to disregard the jail reference. Brief of Appellant, p. 20. Further, juries are presumed to follow the trial court's instructions. State v. Hanna, 123 Wn.2d 704, 711, 871 P.2d 135 (1994).

This result is consistent with State v. Condon, 72 Wn.App. 638, 865 P.2d 521 (Div. I, 1993). In Condon, a witness twice violated the court's limine order precluding mention that the defendant had spent time in jail. *Id.* at 648. The witness testified that the defendant called her when he was getting out of jail. *Id.* There as here, counsel

objected and the remark was stricken. *Id.* Minutes later, the witness again testified that the defendant asked her to pick him up from jail.

*Id.* The trial court denied a defense motion for a mistrial and the court of appeals affirmed, stating:

In the present case, on the other hand, the reference to Condon having been in jail was much more ambiguous. The mere fact that someone has been in jail does not indicate a propensity to commit murder, and the jury just as easily could have concluded that Condon was in jail for a minor offense. Also, the fact that someone has been in jail does not necessarily mean that he or she has been convicted of a crime. Thus, although the remarks may have had the potential for prejudice, they were not so serious as to warrant a mistrial, and the court's instructions to disregard the statements were sufficient to alleviate any prejudice that may have resulted.

*Id.* at 649-650. In Condon, the court distinguished between the statement in Escalona, *supra*, where the testimony was that the stabbing victim stated that "he was nervous when he saw the defendant because the defendant already had a record and had stabbed someone." *Id.* (quoting Escalona, at 252). As in Condon, while twice violating the court's order in limine, the court found that the statement related merely to being in jail and not to propensity to commit the same crime. Further, unlike Condon, the second utterance was in response to the prying of defense counsel.

The trial court is best suited to assess the prejudice of a statement. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

The trial court herein considered the effect of the statements in the context of the trial and considered the efficacy of instruction to the jury. As in Condon, the trial court properly denied the motion for a mistrial.

2. THE TESTIMONY OF THE SHERIFF WAS PROPERLY BASED UPON HIS OBSERVATIONS AND NOT IMPROPER OPINION TESTIMONY CONCERNING THE GUILT OF THE APPELLANT AND WAS NO OBJECTION WAS MADE.

The Appellant next argues that the Sheriff Meyers' testimony concerning his observations of A.S. and the Appellant during their respective interviews constituted improper opinion testimony concerning the Appellant's guilt. A witness is generally not allowed to comment on or offer an opinion as to the veracity of another witness or the defendant. See State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). "Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." Kirkman, at 927. The State *does not* concede that the testimony of Sheriff Meyers constituted such improper comment or amounted to opinion testimony. Further, even if it were, the Appellant failed to object at trial to the question or the answer. RP 71.

RAP 2.5(a)(3) provides:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court . . . manifest error affecting a constitutional right.

Refusal to entertain issues for the first time on appeal is based upon well settled precepts of jurisprudence: "insistence on issue preservation is to encourage 'the efficient use of judicial resources.'" See State v. Robinson, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011)(quoting State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)).

Issue preservation serves this purpose by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals.

*See id.*

No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal ... cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

State v. Strine, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013) (*internal quotes omitted*). There is great potential for abuse when a party does not raise an issue below as this would be allow the party to simply lie back, not give the trial court opportunity to avoid error, gamble on the verdict, and then seek a new trial on appeal. State v. Weber, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006). The theory of preservation by timely objection also addresses several other concerns. The rule serves to further judicial economy by enabling trial courts to correct mistakes, obviating the needless expense of appellate review and subsequent trials, facilitates appellate review by ensuring that a

complete record of the issues will be available, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address. Strine, 176 Wn.2d at 749-50 (2013).

In Kirkman, the Supreme Court determined that improper opinion testimony was not automatically reviewable without preservation by objection. 159 Wn.2d at 936. Therein the Court stated:

Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a "manifest" constitutional error. "Manifest error" requires a ***nearly explicit statement by the witness that the witness believed the accusing victim.*** Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.

*Id.* (Emphasis added). Here, there was no opinion offered that A.S. was telling the truth, only the observation of the lack of any behaviors that might show deception. Meyers never testified that A.S. was credible nor that he believed her account. As to the Appellant, Meyers testified that the Appellant's claimed lack of memory at certain points, contrasted by his extraordinary memory as to other points was noteworthy. This was nowhere close to a "nearly explicit" statement concerning whether Meyers believed the Appellant.

The Appellant concedes that there was no objection to Meyers' answer that A.S.'s body language was consistent with someone who was telling the truth. Brief, p. 26. The Appellant argues that there was an objection to the question concerning whether A.S. showed any signs of deception. However, the objection lodged was that the question was asked and answered, not that it was an otherwise improper question. RP 71. "To assign error to a ruling that admits evidence, a party must raise a timely objection on specific grounds." State v. Gray, 134 Wn.App. 547, 557, 138 P.3d 1123 (Div. I, 2006). *See also* ER 103(1), State v. Wilbur-Bobb, 134 Wn.App. 627, 634, 141 P.3d 665 (Div. I, 2006). The timeliness is not at issue. Instead, the specific grounds that defense based the objection was that the question was asked and answered. While editorializing concerning the province of the jury, it is clear that the objection was that the question had already been answered by the witness, not that the answer was improper should be stricken. This is further made clear by the lack of a request to strike the answer. Defense's only request was that the previous answer stand and not be repeated.

As to his claim concerning Meyers' testimony regarding his interview with the Appellant, there was absolutely no objection. His reliance on State v. Barr, 123 Wn.App. 373, 98 P.3d.518 (Div. III, 2004) is likewise misplaced. In Barr, the officer used the "Reid

Interrogation”<sup>3</sup> method and testified that “taught him to look for verbal and nonverbal clues that someone *was being deceptive*.” *Id.* at 378 (*emphasis added*). Here, Meyers testimony concerned looking for “*possible signs of deception*.” RP 71. In Barr, the officer ultimately testified that thought that the defendant was being deceptive. *Id.* at 378-379. These were express statements of the *officer’s* opinion of the truthfulness of the defendant’s statements. In the present case in regard to the Appellant’s interview, Meyers merely testified to his observations and inconsistencies in the Appellant’s memory. He did not express any personal opinions about the Appellant’s veracity.

The Appellant asserts that this is a distinction without difference. However, this is an important distinction. In closing argument, a prosecutor may point out fact, and argue inferences therefrom that make it obvious and apparent what the prosecutor’s personal opinion is concerning witness credibility and the truthfulness of the charge. See State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). However, a prosecutor may not assert his or her personal opinion as to the defendant’s guilt or a witness’s credibility. See *id.* Meyers expressed no personal opinions as to whether the Appellant was telling the truth. He merely testified to inconsistencies

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<sup>3</sup>The Reid Interrogation training teaches officers to look for indications of deception as a tool for more effective interviews. Barr at 378.

and the jury was properly instructed to weigh the credibility of all witnesses. Under Kirkman, the Appellant has failed to properly preserve the issue, which, while arguably constitutional, is not a “manifest.” Review is therefore precluded pursuant to RAP 2.5(a)(3).

Assuming *arguendo*, that this Court should reach the issue, the testimony herein was not violative of the Appellant’s right to a fair trial.

“[T]estimony 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.”

State v. Notaro, 161 Wn.App. 654, 662, 255 P.3d 774 (Div. II, 2011)

(Quoting City of Seattle v. Heatley, 70 Wn.App. 573, 578, 854 P.2d 658 (1993)).

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,’ (3) ‘the nature of the charges,’ (4) ‘the type of defense, and’ (5) ‘the other evidence before the trier of fact.’”

State v. Kirkman, 159 Wn.2d at 928. (Internal citations omitted).

The State recognizes that the witness was a law enforcement officer which adds additional “aura” to his testimony. See State v. Rafay, 168 Wn.App. 734, 806, 285 P.3d 83 (Div. I, 2012).

But testimony that is based on inferences from the evidence, does not comment directly on the defendant’s guilt or on the veracity of a witness, and is otherwise helpful to the jury does not generally constitute an opinion on guilt.

*See id.* While the Appellant characterizes the Sheriff's testimony as an opinion on veracity, closer examination of the record reveals that the contrary is true. The testimony, while colored by the Appellant as an opinion on veracity, only related to "**possible signs of deception**" or that there "**may** be deception." RP 71, 73. As to A.S., Meyers was asked if he observed any signs of deception while speaking with her. RP 71. His short response: "No I did not." This is not an expression of his opinion on the truth of her statements to him. No opinion as to the veracity of her statements to him was offered. RP 72. Further, the jury didn't hear what she told Meyers concerning what occurred in the hotel room. RP 39. As such, there was no statement in the record for Sheriff Meyers to offer an opinion as to its truth. Instead, A.S. took the stand and gave her account to the jury who was able to independently consider her credibility.

As to testimony regarding observations of the Appellant during this interview, while inquiry was made concerning "possible signs of deception," the sum and substance of Meyer's testimony on this point was limited to pointing out inconsistencies in the Appellant's memory. This is not an overt statement that Meyers did not believe the Appellant's account. By the Appellant's measure, a mere reference to the fact that a suspect is arrested at the conclusion of an interview would be an expression of opinion of truthfulness. It would certainly

be clear at that point that the officer didn't believe the suspect's exculpatory explanation. If it were believed, the officer certainly wouldn't arrest. That a juror may surmise the personal opinion of the officer is insufficient to constitute improper opinion testimony. The law requires at least a "nearly explicit statement" of opinion by the officer. See Kirkman, *supra*.

Additionally, the line of questioning now at issue did not occur during direct examination and was only in response to accusations by defense during cross that A.S.'s story changed during the interview with Meyers. RP 60, 71.

Finally, the manner in which the jury was instructed at the conclusion of trial should quell any concern on this issue. In the very first written instruction from the court, the jury was told:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness.

CP 52-67. The court was, in effect, telling the jury to disregard any statement by any witness or anyone else and judge the credibility for themselves. "Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary." Kirkman at 928. In Kirkman, it was significant to the Court that the jury had been so instructed. *Id.* at 937. Instruction 1 further told the jury:

In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe

or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP 52-67. The testimony from Sheriff Meyers that the Appellant now complains of, was really just a restatement of the law reflected in instruction. He testified that he looks at the body language, the grandiosity of the witness's statements, inconsistency, and memory. RP 70, 73-74. The jury is instructed that only their opinion of credibility matters and they should look at the manner of the witness while testifying, quality of memory, the reasonableness of the statements, etc.

Further, any error was clearly harmless beyond a reasonable doubt. A constitutional error is harmless if the 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). Under this test, the court examines whether the untainted evidence is so overwhelming that it leads necessarily to a finding of guilt. Guloy, 104 Wn.2d at 426.

Here, the compelling testimony of A.S. primarily carried the weight at trial. However, her testimony was substantially supported by other witnesses and not merely by the alleged improper bolstering of Meyers' testimony. Her accounts, first to C.S., then to her counselor, her father, her mother, the sheriff, and finally the jury were remarkably consistent. Details concerning the trip to Clarkston, including the precise arrangement of her family in the bed, were confirmed by both her mother and the Appellant. C.S. testified to her demeanor (scared and upset) when A.S. related these events to her corroborate that she is reporting, not a fictional story, but an actual account of a personal experience. The issues she was having that resulted in her going to see a counselor were significant. Nicole Konen testified that her behaviors were strongly indicative of a child who had been abused. Finally, the fact that she didn't dramatize or exaggerate the Appellant's conduct lends substantial credence to her credibility and severely hampered his suggestions that she was making up these accusations to settle a score. Under the great weight of evidence that corroborated her account, and in light of the actual testimony, which did not directly reveal Sheriff Meyers' opinion of the victim's veracity or the credibility of the Appellant, any possible error would be clearly harmless beyond a reasonable doubt in this case.

The testimony was not an opinion of the witness as to the guilt of the Appellant nor of the veracity of the victim. It was based upon observations and merely pointed out inconsistencies or the lack thereof. Further, the Appellant failed to preserve this issue through timely and specific objection. This issue is therefore not reviewable and without merit under the specific facts of this case.

3. IT IS CLEAR FROM THE COURT'S ORDER ON THE MOTIONS IN LIMINE THAT THE COURT DID WEIGH THE PROBATIVE VALUE AGAINST UNFAIR PREJUDICE AND IN ANY EVENT SUCH EVIDENCE WAS CLEARLY ADMISSIBLE.

The Appellant next contends that the court erred in admitting evidence of prior incidents by the Appellant of sexually inappropriate actions or statements directed toward A.S. A.S. testified that the Appellant had engaged in several episodes of inappropriate sexual behavior, like sticking his finger in a hole in the upper thigh of her jeans and wiggling it around, showing her sexually explicit videos, offering to teach her about sex, seating her on his lap and becoming aroused, and playfully spanking her on the buttocks.<sup>4</sup> Specifically, the Appellant complains that the court failed to conduct, on the record, a balancing of the probative value against the risk of unfair prejudice.

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<sup>4</sup>It should be noted that A.S. was eleven and twelve when this started and the Appellant was a convicted sex offender who had only recently been back in the home for a short period of time after an extended absence. He certainly should have been aware that these behaviors crossed clear boundaries.

ER 404(b) states that evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show that he acted in conformity therewith. Such evidence is admissible, however, to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. If the evidence is admissible for one of these purposes, a trial judge must determine whether the danger of undue prejudice from its admission outweighs the probative value of the evidence.

State v. Jackson, 102 Wn.2d 689, 693, 689 P.2d 76 (1984). The court is required to conduct this balancing analysis on the record. *Id.* The purpose of this requirement is to allow for meaningful appellate review. *Id.*

Here, the trial court took the Appellant's motion under advisement and issued a written ruling. RP 12-13. In its written ruling, the Court found that the evidence was highly probative of a lustful disposition toward the victim. CP 39-40. The Appellant complains that this finding is insufficient to constitute balancing. The Appellant's argument is hypertechnical and ignores a common sense reading of the court's ruling. Clearly the court found a strong probative value to this evidence under the circumstances. It goes without saying the concern regarding possible prejudice of such evidence, but the court's order makes clear the balancing of interests and the need for such evidence. The court's ruling is clearly in line with the state of the law. In State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991), the Court stated:

This court has consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the offended female.

116 Wn.2d at 547. Ray recognized that, in cases such as this one, this evidence is admitted to show "the lustful inclination" of this particular defendant toward the victim, "which in turn makes it more probable that the defendant committed the offense charged." *Id.* In State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012), the Court stated:

In that circumstance, the purpose of the evidence is not to demonstrate the defendant's character but to demonstrate the nature of the defendant's relationship with and feelings toward the victim.

Gresham, at 429, fn.4. The evidence herein was properly admitted for a proper purpose. The court adequately, if implicitly, weighed the competing factors and arrived at the proper conclusion: that evidence of the Appellant's sexual desires toward A.S. was admissible as it tends to make it more likely that he committed the acts alleged in the hotel on June 6, 2014.

Even assuming that the court's written ruling is insufficient to meet the requirements of an on-the-record balancing, this does not necessarily result in reversal of the conviction. See State v. McGhee, 57 Wn.App. 457, 788 P.2d 603 (Div. I, 1990). In McGhee, the court stated:

When the trial court fails to conduct the on-the-record balancing process required by ER 404(b), a reviewing court should decide issues of admissibility if it appears possible after reviewing the record as a whole.

57 Wn.App. at 460. Review of the record reveals that the parties clearly articulated their respective positions and provided the court with legal authority in support thereof. RP 4-12, CP 14-19, 20-23. These concerns were considered and addressed. Under the circumstances of this case and in light of the vast authority supporting admissibility, it is highly unlikely that the court could have ruled otherwise. As has been astutely noted:

[W]hat purpose is served by reversing a conviction where the questioned evidence is relevant and admissible? The trial court's failure to articulate its balancing process does not make admissible evidence inadmissible.

State v. Gogolin, 45 Wn.App. 640, 645, 727 P.2d 683 (Div. I, 1986).

For the first time on appeal, the Appellant now challenges the court's determination that the events constituting the "lustful disposition evidence" even occurred. However, there was never any challenge to these events and no evidentiary hearing was requested. Further, the trial court has discretion whether to conduct an evidentiary hearing or to rely upon the State's proffer. State v. Mee, 168 Wn.App. 144, 154, 275 P.3d 1192 (Div. II, 2012) (citing State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002)). It should be further noted that the Appellant never denied that the events complained of

didn't occur.<sup>5</sup> At trial, counsel for the Appellant questioned A.S. about the anime pornography and insinuated that she had already been watching it when he showed it to her. RP 142. He further attempted to characterize as good natured teasing the situation involving the hole in A.S. pants. RP 149. With regard to the incident where she said he became aroused after he moved her from his leg to his lap in the open car door, counsel attempted to ascribe nefarious motives to A.S. RP 150. He claimed she was merely trying to catch him smoking. RP 150. The Appellant didn't challenge that these events occurred at the limine motion hearing or at trial. Because the Appellant never challenged that these events occurred, the court properly considered the State's offer of proof and did not abuse its discretion in failing to hold an evidentiary hearing.

The court properly and sufficiently weighed the competing interests in this case, and properly ruled that the evidence was admissible. Any deficiency in the "weighing" is not fatal in light of the clear purposes and strong probative value of the evidence. No evidentiary hearing was needed because the Appellant never challenged the actual occurrence of these events, and only questioned the relevance and significance thereof. Under applicable

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<sup>5</sup> The only evidence of his denial of any of these events is his statement to Sheriff Meyers denying that he showed A.S. pornography or spanked her on the buttocks in a non-disciplinary fashion. He recalled the incident where A.S. sat on his lap in the open car door.

precedent, the evidence was clearly admissible for the purposes for which it was offered. The court did not commit reversible error in admitting the evidence.

4. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST A LIMITING INSTRUCTION AS THE TESTIMONY WAS PROPER AND IT IS A QUESTION OF TRIAL STRATEGY.

Next, the Appellant claims that trial counsel's performance was deficient in failing to object to Sheriff Meyers' testimony and was further ineffective in failing to request a limiting instruction regarding evidence of the Appellant's inappropriate sexual conduct directed toward A.S. The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation. See State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Courts engage in a strong presumption counsel's representation was effective. See *id.*

A criminal defendant has the right to effective assistance of trial counsel under the both the Washington State and United States Constitutions. See In re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). To establish that the right to effective assistance of counsel has been violated, the Appellant show: 1) that counsel's representation was deficient, and 2) that counsel's deficient representation caused prejudice. See McFarland, 127 Wn.2d at 334-35. To establish deficient performance, the defendant must show

that trial counsel's performance fell below an objective standard of reasonableness. *See id.* Prejudice is shown only where there is a reasonable probability that, absent counsel's deficient performance, the result of the proceeding would have been different. *See Davis*, at 672-3.

Here, the Appellant complains that trial counsel failed to object to Sheriff Meyers' testimony concerning inconsistencies in his statement given at the interview. Trial counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions. *See State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (Div. I, 1989).

Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.

*Id.* Here, in light of the fact that this testimony was elicited in response to his cross examination, it is likely and entirely reasonable that counsel simply wished to avoid highlighting the point for the jury. *See Davis*, 152 Wn.2d at 714.

As to Meyers' testimony concerning the interview of A.S., in light of the defense posited at trial, it was within the ambit of strategy not to object. The Appellant's theory at trial was that A.S. was mad at him for reporting her "sexting" and other inappropriate internet activities. Counsel accused her of being a "tattler," trying to make trouble for him. RP 310, 316-317. Counsel pointed out apparent

inconsistencies in her report to Sheriff Meyers. RP 60. That the Sheriff recognized inconsistency in the Appellant's version but not in A.S.'s account would play into the defense theory that she was making up the story about the hotel room and the authorities just ran with it. Counsel's use of C.S. to try and make A.S. appear to be a sensationalist highlights this strategy. RP 318. The failure to object may well have been a strategic decision. This court must presume that counsel's lack of objection was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. See Davis, 152 Wn.2d at 714. The Appellant has not done so.

With regard to requesting a limiting instruction, like the failure to object to trial testimony, the decision whether to request a limiting instruction is one of trial strategy. State v. Humphries, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014). It is presumed that counsel did not request limiting instructions to avoid reemphasizing damaging evidence. State v. Yarbrough, 151 Wn.App. 66, 90, 210 P.3d 1029 (Div. II, 2009). Against the strong presumption otherwise, the Appellant again fails to demonstrate that counsel was deficient.

Further, the Appellant fails to demonstrate prejudice. As discussed above and in light of the actual testimony given, the testimony was not objectionable as improper opinion. Meyers was properly allowed to point out the inconsistencies in the Appellant's

memory. With regard to his complaint concerning Meyers' testimony regarding A.S. and his observations there, such objection would have emphasized the testimony. Criminal defendants are not guaranteed "successful assistance of counsel." State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The Appellant "cannot argue that simply because a trial tactic may have failed and impacted the outcome of his trial, it proves prejudice and establishes ineffective assistance of counsel." State v. Dow, 162 Wn.App. 324, 336, 253 P.3d 476 (Div. II, 2011). There is no showing that the result would likely have been different had counsel objected or proposed a limiting instruction. The Appellant's convictions should not be reversed on this basis.

5. CUMMULATIVE ERROR DID NOT DEPRIVE THE APPELLANT OF A FAIR TRIAL WHERE NO ERROR OCCURED.

Finally, the Appellant claims that cumulative error deprived him of a fair trial. Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair. See In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). This doctrine provides that where several errors standing alone do not warrant reversal, the cumulative error requires reversal when the combined effect of the errors denied the defendant a fair trial. See State v. Garcia, 177 Wn. App. 769, 786, 313 P.3d 422 (Div. II, 2013). However, where as here, no error occurred, the doctrine is inapplicable. See State v. Warren, 134

Wn.App. 44, 69, 138 P.3d 1081(Div. I, 2006). Further any of the errors complained of herein were not preserved by proper objection which precludes application of the doctrine. See State v. Embry, 171 Wn.App. 714, 766, 287 P.3d 648 (2012)

The Appellant was not deprived of a fair trial. The parties were allowed to forward their respective theories of the case. Ultimately, in light of A.S.'s detailed account of the incident, the jury was convinced beyond a reasonable doubt of the guilt of the Appellant. She was consistent in her reports to various persons. Many of the details were corroborated, including the fact of the trip, and the respective positions in the bed. The Appellant's "method," as described by Martha Flook, was familiar. Counter to the Appellant's claim of vindictive fabrication, A.S. didn't exaggerate the level of touching or penetration. If she were trying to get him in trouble, she certainly wouldn't have limited the contact so severely nor would she have only created one incident where he minimally penetrated her vagina. This severely cut against the Appellant's trial claim that she was making up accusations. The jury was able to observe A.S.'s demeanor while testifying and the Appellant was able to confront her through cross examination. He received a fair trial. His convictions for Rape of a Child in the First Degree and Child Molestation in the First Degree should be affirmed.

6. APPELLATE COSTS SHOULD NOT BE FORECLOSED.

Finally, the Appellant asks this Court to rule that, should the State prevail on appeal, he should not be required to repay appellate costs on the grounds that he is currently indigent. This claim should be rejected. It is a defendant's future ability to pay costs, rather than his present ability, that is most relevant in determining whether it would be unconstitutional to require him to pay appellate costs. Because the record contains no information from which this Court could reasonably conclude that he has no likely future ability to pay, this Court should not forbid the imposition of appellate costs.

At sentencing, the trial court found, based upon his age, physical condition, and work history that the Appellant would have the ability to pay costs.<sup>6</sup> RP 358. The Appellant obtained an ex parte Order of Indigency after presenting a declaration regarding his current financial circumstances. CP 140-41. The declaration contained no information about his employment history, potential for future employment, or likely future income, nor did the trial court make any findings regarding the Appellant's likely future ability to pay financial obligations.

It is a defendant's future ability to pay, rather than simply their current ability, that is most relevant in determining whether the

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<sup>6</sup> The only cost not imposed related to a court appointed attorney fee, but this was not imposed because trial counsel was privately retained and took over the case early on. RP 356, 358.

imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (*indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments*).

In State v. Sinclair, 192 Wn.App. 380, 393, 367 P.3d 612 (Div. I, 2016) *review denied* 185 Wn.2d 1034 (2016), the court held that costs should not be awarded because the defendant was 66 years-old and was facing a 24-year sentence, meaning there was "no realistic possibility" that he could pay appellate costs in the future. The court also recognized, however, that "[t]o decide that appellate costs should never be imposed as a matter of policy no more comports with a responsible exercise of discretion than to decide that they should always be imposed as a matter of policy." Sinclair, 192 Wn. App. at 391.

The record is devoid in this case of any information that would support a finding that there is "no realistic possibility" that the Appellant will be able in the future to pay appellate costs. In such circumstances, appellate costs should be awarded. State v. Caver, No. 73761-9-1, slip op. at 10-14 (filed Sept. 6, 2016).

The Appellant here is 35 years old and has held employment as a concrete finisher. RP 358. Other than his current incarceration and the fact of his convictions, he is capable of obtaining employment

and making the payments as ordered by the court upon his release. CP 104-116. Assuming retirement at sixty-five, he still has thirty of his working years ahead of him. Because the record in this case contains no evidence from which this Court could reasonably conclude that the defendant has no future ability to pay appellate costs, any exercise of discretion by this Court to prohibit an award of appellate costs in this case would be unreasonable, premature, and arbitrary.

## V. CONCLUSION

The trial court properly denied the Appellant's motion for mistrial as the *de minimis* violation of the limine order was not so prejudicial as to deny the Appellant a new trial. The testimony of Sheriff Meyers did not constitute improper opinion on the guilt of the Appellant. The Appellant failed to preserve the issue for appeal and in any event, any such error was clearly harmless beyond a reasonable doubt. The court correctly admitted prior lustful disposition evidence in this case and conducted the proper analysis sufficient to allow appellate review. Trial counsel was not deficient in his representation of the Appellant, and cumulative error did not so permeate the process as to deprive the Appellant of a fair trial. Finally, his request to preclude the State from seeking costs on appeal, should his convictions be affirmed should likewise be denied. The State respectfully requests this Court issue a decision affirming the

Appellant's convictions for Rape of a Child in the First Degree and  
Child Molestation in the First Degree.

Dated this 5<sup>th</sup> day of October, 2016.

Respectfully submitted,



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**COURT OF APPEALS OF THE STATE OF  
WASHINGTON - DIVISION III**

THE STATE OF WASHINGTON,

Respondent,

v.

ROGER W. FLOOK JR.,

Appellant.

Court of Appeals No: 34220-4-III

**DECLARATION OF SERVICE**

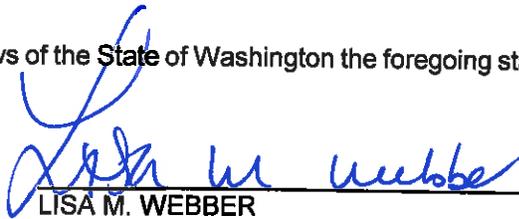
**DECLARATION**

On October 5, 2016 I electronically mailed, with prior approval from Ms. Marushige, a copy of the BRIEF OF RESPONDENT in this matter to:

VALERIE MARUSHIGE  
ddvburns@aol.com

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on October 5, 2016.



LISA M. WEBBER  
Office Manager