

FILED
Court of Appeals
Division III
State of Washington
12/2/2019 11:20 AM
35062-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM JOSEPH KRAMER, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF LINCOLN COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court committed reversible error when it allowed child hearsay testimony from a former child's grandmother, mother and forensic interviewer.
2. The child hearsay testimony amounted to bolstering of the former child's testimony and/or vouching of her credibility.
3. Lack of sidebars, speaking objections, sparring between counsel and argument in the presence of the jury denied William Joseph Kramer a fair trial.
4. The prosecuting attorney committed misconduct when questioning witnesses as to the credibility of other witnesses, disparaging defense counsel on a number of occasions, complimenting a witness and eliciting an opinion on Mr. Kramer's guilt from another witness.
5. The trial court violated Const. art IV § 16 when commenting on Mr. Kramer's testimony from his prior trial and the testimony of the complaining witness during the prosecutor's closing argument.
6. Cumulative error deprived Mr. Kramer of a fair trial under the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3.
7. The trial court erred by imposing a second set of legal financial obligations (LFOs) including the \$200.00 filing fee and \$100.00 DNA fee.

II. ISSUES PRESENTED

1. Are the defendant's claims of error to the introduction of child hearsay and to the application of the law of the case doctrine to the court's 2006 rulings preserved where any error is not manifest or constitutional in nature?
2. Even assuming the child hearsay statute does not permit introduction of child hearsay statements after the declarant has reached the age of majority, did the defendant tactically seek admission of child hearsay as an effort to highlight the inconsistencies in K.S.'s version of events when compared to her trial testimony?

3. Other than his bald assertions, has the defendant demonstrated he was prejudiced by speaking objections during his trial, and is this alleged error preserved?
4. Where no objection was made below, are the defendant's claims of improper vouching or opinion testimony preserved, and has he demonstrated that these statements prejudiced him?
5. Were the unobjected-to comments by the deputy prosecutor so flagrant and ill-intentioned that no curative instruction could have obviated any claimed prejudice to the defendant?
6. Was the single instance of alleged prosecutorial misconduct to which an objection was made but no curative instruction requested so flagrant and ill-intentioned that, had such a request been made, any prejudice could not be cured?
7. Did the trial court improperly comment on the evidence in the course of ruling on certain objections, where there is no indication the court voiced a personal opinion on the facts or merits of the case?
8. Where the errors were few or invited, does the cumulative error doctrine apply?
9. Should this Court remand to strike the DNA fee and criminal filing fee, where the defendant's case was pending and not yet final when the legislature overhauled Washington's LFO statutes?

III. STATEMENT OF THE CASE

In 2005, the defendant, William Kramer, was charged in the Lincoln County Superior Court with one count of first degree child molestation. CP 1-3. He was alleged to have molested K.S., an eight-year-old girl, when he was 39 years old. CP 3. After a trial, he was convicted by a jury, and sentenced to life in prison due to his persistent offender status.

State v. Kramer, 187 Wn. App. 1038 (2015). After staying the appeal for nine years, this Court reversed Kramer’s conviction, finding a public trial violation. *Id.* at *3. By the time the matter proceeded to a retrial in 2017, K.S. was 20 years old. RP 220.

Substantive facts.

In 2004, eight-year-old K.S., and her mother, Mary DeBoer,¹ lived with DeBoer’s mother and father, Suzanne and Robert Frank, in Lincoln County, Washington. RP 17-20. Ms. DeBoer drove a school bus in the morning and afternoon and also worked as a house cleaner during the day. RP 73-74.

On Halloween of 2004, K.S. and her mother went trick-or-treating in Reardan, stopping at the Kramer home. RP 70-71. Thereafter, Ms. DeBoer reconnected with her childhood classmate, Lisa Kramer, Mr. Kramer’s sister. RP 69-70, 72. In the winter of 2004-2005, because the Frank house was 18 miles outside of Reardan, Ms. DeBoer arranged for Connie Kramer, Lisa and William’s mother, to care for her children after school while Ms. DeBoer worked. RP 75-76. At times, during inclement weather, Ms. DeBoer and her children, including K.S., would sleep at the

¹ At the time of the first trial, Ms. DeBoer used the surname, “Snell.”

Kramer residence in the living room, rather than returning to the Frank home. RP 81, 88-89, 223, 226.

By all outward appearances, K.S. enjoyed her time at the Kramer home. Mr. Kramer gave her piggy-back rides, candy, and watched movies with her. RP 28, 95. Mr. Kramer's room "was filled with Disney princess movies," transformers, Barbie dolls, and two or three computers. RP 83-84, 86. K.S. felt as though she received special treatment from Mr. Kramer, as did her mother.² RP 95, 98. K.S. said that Mr. Kramer was more playful with her than he was with the boys. RP 227.

Mr. Kramer would pull K.S. up to sit on his lap, making Ms. DeBoer uncomfortable; despite her requests to stop, Mr. Kramer continued to do so. RP 93-94, 96-97. Connie Kramer also repeatedly told Mr. Kramer to keep his bedroom door open when the children were inside. RP 93-94. Mr. Kramer would walk in on K.S. while she was using the bathroom. RP 228. He was very "touchy" and would pat K.S. her on the behind. RP 228. Slowly, Mr. Kramer attempted to get K.S. alone in his room.

² Mr. Kramer's first molestation victim testified at trial. She was the younger sister of Mr. Kramer's friend, Gary Carvalho. RP 194. When she was eight years old, Mr. Kramer would also horsey with her and give her piggy back rides. RP 197, 201. He gave her toys and candy, and wanted her to watch movies with him. RP 198. Mr. Kramer victimized her by putting his hand down her pants and "playing" with her vagina. RP 199. The molestation occurred in both his bedroom and in the living room. RP 202.

RP 229. While Ms. DeBoer and her children stayed with the Kramers, Ms. DeBoer noticed that K.S.'s behavior changed; she became irritable, began acting out, and stated she did not like playing with the boys because "they were gross." RP 99.

On March 22, 2005, K.S. unexpectedly rode the bus home to the Frank residence, rather than going to the Kramer home. RP 24-25, 232. K.S. said that she "did not want to be at Bill's" house. RP 26. While wringing her hands, K.S. disclosed that Bill "does icky things to her," "touched her butt," locked her in his bedroom, laid on top of her and moved against her skin.³ RP 29. K.S. pointed to and placed her hand on her private parts, both on the front of her body and on the back. RP 31. She told her grandmother that Mr. Kramer's "fingers had went in one of her holes." RP 31. At the time of the disclosure, K.S. stuttered and was shaking and crying. RP 32, 45. She relayed to her grandmother that the touching, which occurred more than once, usually happened in the bedroom. RP 33. K.S. told her grandmother that Mr. Kramer said she would be in trouble if she told anyone, or that she would not be believed. RP 34-35.

Mrs. Frank called Ms. DeBoer, who returned home from work. RP 35-36, 101. K.S. told Ms. DeBoer that Mr. Kramer had put his hand

³ To this statement, defendant objected during the second trial, "[T]his has not been presented as part of the child hearsay. I think it goes to impeachment." RP 29.

down her pants and would rub her privates, both in the front and back; she said that he would “put his fingers in her holes,” and would rub his own privates while doing so. RP 104. K.S. said this had been going on for a long time and that Mr. Kramer said that “grownups wouldn’t believe a little kid over somebody who was all grown up.” RP 103, 105.

Ms. DeBoer reported her daughter’s statements to police, and later took K.S. to see forensic child interviewer, Karen Winston. RP 109. K.S. told Ms. Winston that “boys are gross” and again told Ms. Winston that Mr. Kramer had put his hand down her pants and touched her privates.⁴ When asked to demonstrate on a diagram where she had been touched, K.S. marked both the crotch and buttocks, and later the breast area. RP 136, 139. K.S. denied that Mr. Kramer’s touching hurt her, and did not recall whether Mr. Kramer had asked her not to tell anyone. RP 137. K.S. told Ms. Winston that the touching occurred less than ten times. RP 137. At the time, Ms. Winston noted that K.S. used age appropriate vocabulary.⁵ RP 142.

⁴ During the retrial, defense counsel stated he had no objection to Ms. Winston reading from her report. RP 132.

⁵ Ms. Winston noted that eight-year-olds do not “take everything that happened to them, put it neatly together, and present it...They remember certain things, other things they don’t remember and they tell later...they have good memories...but they don’t code that information as well as adults and so their recovery of those memories sometimes has to be stimulated by questions.” RP 150-51.

In the second trial, K.S. testified: “He would rub me a lot. Well, when it got much worse, he would get me to take off my clothes and he would rub up against me until he was done...[H]e would jack off or rub against my body until he came.” RP 229. “He would try to stick his fingers in my butt or my vagina,” both through and beneath her clothes. RP 230. The molestation occurred in both his bedroom and living room. RP 230. K.S. estimated that this occurred “about ten times.” RP 231. Mr. Kramer said nobody would believe K.S. if she disclosed what was happening to her. RP 231.

Procedural facts.

Prior to trial, on December 8, 2016, the State filed motions requesting the court adopt the rulings of the prior trial court, to include the previous ruling on the admissibility of child hearsay. CP 52-82. The record does not reflect that the defendant filed a written response or objection to the State’s motion regarding the child hearsay. CP at *passim*. While the defendant’s pretrial motions included objections to ER 404(b) evidence⁶ pertaining to the defendant’s prior child molestation conviction, the defendant never objected to the use of the child hearsay – specifically,

⁶ See 12/13/16 RP 4, 11-12 (Court mentions *Ryan*, but defense counsel only discusses ER 404(b)), 21, 28-29 (Court discusses *Ryan* but defense counsel focuses on admissibility of previous child victim’s ER 404(b) testimony); 12/22/16 RP 43, 55-56, 61.

K.S.'s statements to her mother, grandmother, and Karen Winston. No briefing or argument was made or objection voiced to the court that child hearsay was not admissible in a retrial where the former child victim had grown into adulthood.

In the defendant's opening statement, his counsel emphasized that the case hinged on the credibility⁷ of the witnesses – "it's her word against his word." RP 12. The defendant's theory, introduced in opening statement, was that he dated Ms. DeBoer, she had cheated on him, and when he ended their relationship, Ms. DeBoer "told him to...move out...or [she] was going to tell everybody that [he] molested her daughter." RP 14. He claimed that K.S. told her friend that she did not like Mr. Kramer around her mother, and

⁷ In his appeal, the defendant highlights differences in the testimony of K.S., Ms. DeBoer and Ms. Franks between the first and second trial and their written witness statements. Br. at 5. K.S. explained that, when she was a child, she did not possess the vocabulary "to talk in depth about what happened," and did not disclose everything that had occurred to Karen Winston because she was embarrassed and uncomfortable. RP 236, 239.

Yet, even the defense witnesses' testimony varied from one trial to the next. Gary Carvahlo, the defendant's friend and brother to his first victim, never testified during the first trial that he had a brief sexual encounter with Ms. DeBoer. RP 358-59; 1/20/06 RP at *passim*. In his first trial, Mr. Kramer did not testify, as he did in the second trial, that "when [he] and [Mary DeBoer] had broken up in March, she told [him] that if [he] didn't move out of the house she was going to falsely accuse [him] for molesting her daughter." RP 446; 1/23/19 RP at *passim*. During the first trial, however, Connie Kramer, who was deceased at the time of the second trial, testified: "when [Mary DeBoer] came over and told me and my husband that Bill was accused of this, she probably – like a week or something like that after that, then she told me that she wanted Bill to move out and she wouldn't turn him in." 1/20/06 RP 63.

as a result, fabricated the claims against him. RP 15. Defendant theorized that, knowing of Mr. Kramer’s earlier conviction, K.S. and her mother “took advantage of him” and tried to remove him from the Kramer house “so she could take over.” RP 15. The defendant also claimed, “[K.S.] will tell you that she lied to [the forensic interviewer] when she testified that she told her the truth.” RP 16.

The defendant was again found guilty as charged. CP 119. The court resentenced the defendant on February 3, 2017, to life in prison based upon his persistent offender status. RP 172-73. The court also imposed \$800 in legal financial obligations, to include the victim assessment (\$500), filing fee (\$200) and DNA fee (\$100).

IV. ARGUMENT

A. THE DEFENDANT DID NOT PRESERVE THE ALLEGED CHILD HEARSAY ERROR; THE ALLEGED LAW OF THE CASE ERROR IS NOT PRESERVED; EVEN IF ERROR OCCURRED, IT WAS HARMLESS OR INVITED.

1. Any alleged child hearsay error is not preserved.

It is a fundamental principle of appellate jurisprudence in that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This rule supports a basic sense of fairness; the *Strine* court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, 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.

Id. at 749-50.⁸

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right.⁹ Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). Here, any asserted error relating to the admissibility of child hearsay, in a retrial, where that hearsay was properly admitted in the first trial, and where the child declarant has grown

⁸ Quoting BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472-73 (2d ed. 2007).

⁹ An issue may also be raised for the first time on appeal if it involves trial court jurisdiction or failure to establish facts upon which relief can be granted. RAP 2.5(a)(1) and (2).

into adulthood by the time of the second trial and testifies at the second trial, is not manifest, as is required by RAP 2.5.

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review...It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (footnote and internal citation omitted) (emphasis added).

There is nothing in defendant's claim of error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the judge trying the case should have recognized that the use of K.S.'s childhood disclosures during the defendant's retrial when K.S. was available to testify as an adult, was in error.

Furthermore, an alleged error occurring by the admission of child hearsay is waived if it is not properly raised at trial; such an alleged error is not of constitutional magnitude. *See, e.g., State v. Quigg*, 72 Wn. App. 828, 866 P.2d 655 (1994) (if the child and the witness who recounts the child's statements are present at trial and subject to cross-examination, an error in

the application of the statute is not of constitutional magnitude and will not be considered for the first time on appeal); *State v. Warren*, 55 Wn. App. 645, 779 P.2d 1159 (1989) (failure to object to testimony during trial precluded defendant from raising lack of hearing on appeal); *State v. Leavitt*, 49 Wn. App. 348, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66 (1988) (objection one day after hearsay was admitted was too late to preserve the issue for appeal). The defendant's failure to object to the use of child hearsay in his retrial bars any consideration of that issue on appeal.

Even if any of the defendant's remarks or motions could be taken as a general objection to the admission of child hearsay without a new child hearsay hearing, they were not specific enough to preserve the currently alleged error. *See e.g., State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) ("A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial...Since the specific objection made at trial is not the basis the defendants are arguing before this court, they have lost their opportunity for review"). Although the defendant objected in a motion in limine to the admission of hearsay for which there was no exception or which would violate the Confrontation Clause, CP 25, that is not the same ground the defendant now claims. In addition, the defendant's written objection on the final order signed by the Court, adopting the 2006 rulings, further discussed below, does not preserve this

child hearsay claim either. CP 319. The defendant never objected, either orally or in writing, claiming that child hearsay is not admissible when the declarant is an adult at the time of trial.

It does not appear that any Washington court has analyzed the specific issue raised by the defendant – whether the child hearsay statute may be used to admit statements made by a child under the age of ten after the child reaches the age of majority. However, in *Slade v. Georgia*, the Georgia Court of Appeals declined to consider this claimed error for the same reason that this Court should decline review – it was not preserved by timely objection in the trial court. 287 Ga. App. 34, 651 S.E.2d 352 (2007). In so holding, the Georgia Court of Appeals found that the comments made by defense counsel regarding the admission of child hearsay were too vague and indefinite to present any question for the trial court or court of appeals. *Id.* at 35. “No reference was ever made to an objection based upon the age of [the child]” and the court did not view the defense attorney’s “generalized pre-trial objection as sufficient to notify the trial court of the legal ground at issue” “so that its applicability could be measured and error avoided.” *Id.* The same flaw exists here – the comments made by defense counsel at trial were simply too vague and indefinite to preserve the issue. This Court should decline review.

2. Defendant's law of the case doctrine argument is likewise unpreserved; a trial court has discretion to adopt its prior rulings.

The defendant claims that the law of the case doctrine was inapplicable to the child hearsay ruling made at the defendant's first trial. He is largely correct – although the defendant did not assign error to the child hearsay ruling in the first trial, that failure would not preclude appellate review of the current (and different) issue raised – whether child hearsay is admissible when the declarant has reached adulthood. Although defendant is correct in that regard, as discussed below, it was defendant's strategy at his second trial to have the child hearsay statements introduced in an effort to impeach the credibility of the State's witnesses. For that reason, the court's adoption of its prior rulings, if error, was harmless or invited. The trial court discussed, at length, whether it would adopt the previous trial court's child hearsay rulings, and the defendant never objected to the court doing so – because he desired the admission of those statements.

Our Supreme Court has interpreted RAP 2.5(c)(1) to allow trial courts, as well as appellate courts, discretion to revisit an issue on remand that was not the subject of an earlier appeal. *State v. Kilgore*, 167 Wn.2d 28, 38, 216 P.3d 393 (2009). That rule states:

If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and

determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

RAP 2.5(c)(1).

This rule does not revive automatically every issue or decision which was not raised in an earlier appeal. *Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.* The advisory committee on Rules of Appellate Procedure explained:

The trial court *may exercise independent judgment as to decisions to which error was not assigned in the prior review*, and these decisions are subject to later review by the appellate court....

2 L. Orland & K. Tegland, Wash. Prac., *Rules of Practice* at 481 (4th ed. 1991).

Clearly the rule is permissive for both the trial court and the appellate court. It is discretionary for the trial court to decide whether to revisit an issue which was not the subject of appeal. If it does so, RAP 2.5(c)(1) states that the appellate court *may* review such issue.

State v. Barberio, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993) (emphasis added).

This rule notwithstanding, the State concedes that had defendant objected to the trial court adopting its prior child hearsay ruling on the basis claimed in this appeal – that the statute does not permit the introduction of child hearsay after the declarant has reached adulthood – the trial court could not have relied upon the “law of the case” or any other rule of issue preclusion to decline review of the issue. That issue was not present or

addressed at the first trial when K.S. was still a minor. However, as above, the defendant never objected to the use of child hearsay on the current basis, thereby depriving the trial court of the opportunity to review the issue at the second trial. Further, the defendant never lodged an objection to the trial court's adoption of the prior child hearsay ruling, and never insisted a new child hearsay hearing should be held.

Prior to trial, the State moved the court to adopt its prior ruling regarding the admissibility of child hearsay, rather than holding a new child hearsay hearing. CP 52. The trial court stated:

I did review all the information so far, and I've read Judge Borst's findings on the 404(b) and child – not child hearsay – (inaudible) competency issues all were – were heard then. And – be kind of awkward for me to have any sort of *Ryan* hearing, when, now, as [she's] 20-some years old versus then...So the question is, should I have a separate hearing on this, or do I defer back to when the (inaudible) was fresh in their minds...*why would I rehear that area now unless the law's changed...*

12/13/16 RP 21 (emphasis added).

But as to the hearing (inaudible), if I rule that the testimony that was produced – in front of Judge Borst...both the same time, I understand it, the 404(b) and the hearsay, and the *Ryan* factors...if I rule that that...[has] been heard and resolved – I think I would be able to do so without having a new...hearing from someone 20 about their statements they made...But the...child hearsay statements made to others, can they testify? I'm certainly more leaning toward saying that those – that information is – much more relevant ten years ago when the parties were – fresh in their minds, and the...child was that age, now is twenty...

12/13/16 RP 29-30.

[Prosecutor] First, seemed to me from our prior hearing that your Honor was resolved that you were going to take the prior rulings and uphold those. And I – And that you were asking [defense counsel] to come up essentially with reasons why you shouldn't, based on the briefing that you'd already read.

I think your Honor's first inclination is correct...Those hearings were done closer in time to the events that we're talking about, the judge at that time had the opportunity – witness the behavior, the demeanor, the attitude of the witnesses who were in court at that time. No matter what we do we can't replicate those circumstances from back when they first occurred.

12/22/16 RP 43.

[The Court] The problem I have, I guess...is...the issues on this were not determined [on appeal]. We pretty much have a law of the case here that – that was decided.

12/22/16 RP 56.

[The Court] The sum up is the 404(b) and child hearsay and the competency all...were heard previously...with the actual witnesses here. The nine-year-old was here...there was never an issue in the Court of Appeals so...*why would we have another ruling here*, ten years later, when the evidence was more appropriate there?

So I think I need¹⁰ to defer back to the rule of the case that was – with Judge Borst and the witnesses then on that issue.

12/22/16 RP 61-62 (footnote and emphasis added).

Thus, the trial court twice invited the defendant to provide any reason it should not adopt the prior child hearsay ruling. Throughout the

¹⁰ The defendant does not claim that the trial court failed to recognize its discretion to revisit the prior rulings, despite its use of the word, "need."

December 13 and December 22 hearings, and the briefing that was filed in the case, Respondent is unable to locate any objection or argument by the defendant answering the court's question or otherwise lodging an objection to the Court adopting the earlier child hearsay ruling. Although there was certainly an objection to the ER 404(b) ruling,¹¹ the defendant failed to make any argument that the law of the case doctrine was inapplicable, that the trial court did not have discretion to adopt its prior rulings regarding the child hearsay, that the court should hold a new child hearsay hearing, or that child hearsay was statutorily inadmissible in the retrial. The trial court even prompted defense counsel:

[The Court] Oh. So you're thinking I need a new hearing to have a 20-year old testify as to the -- hearsay statements now, versus adopt the prior one --.

12/13/17 RP 28.

Defense counsel's response did not answer the court's question, only responding that "she's going to testify at trial." *Id.* at 29. The defendant's failure to answer the trial court's repeated requests for an objection to the use of the prior child hearsay ruling in the second trial waives the issue of whether the trial court could adopt those rulings. This

¹¹ CP 4-16, 24, 322. It is the State's position that the defense counsel's noted objection on the written order adopting the 2006 rulings was only as to the adoption of the ER 404(b) evidence as defense counsel never verbally, or in writing, opposed the adoption of the prior rulings regarding child hearsay.

claim is not preserved for the same reasons above; it is not manifest, or obvious, as required by RAP 2.5.

Because there was no objection by the defendant below, the trial court did not err in declining to review Judge Borst's earlier ruling admitting the child hearsay. The court had the discretion to consider and rule on the issue, but chose not to do so. It did not abuse its discretion when it was never asked to consider the current argument pertaining to the admission of child hearsay in the retrial.

3. Any error was harmless or invited by defendant's trial strategy.

Defendant asserts that RCW 9A.44.120¹² is unambiguous and does not allow for the admission of child hearsay statements made by a child victim after the victim as reached the age of majority. However, this Court need not engage in any statutory construction in this case because, even assuming the plain language of the statute requires "a child" to testify at

¹² As relevant here, RCW 9A.44.120 provides:

- (1) A statement not otherwise admissible by statute or court rule, is admissible in evidence in...criminal proceedings...if:
 - (a)(i) It is made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another...and,
 - (b) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
 - (c) The child...:
 - (i) Testifies at the proceedings...

trial, and would, therefore, preclude the introduction of hearsay statements made by a child under ten when that child has reached the age of majority by the time of trial, any error was invited by the defendant's strategy and, additionally, was harmless.

As above, an evidentiary error to hearsay is waived if it is not properly raised at trial; such an alleged error is not of constitutional magnitude. *See, e.g., Quigg*, 72 Wn. App. 828. Properly objected to, but erroneously admitted evidence that is a violation of an evidentiary rule is analyzed for harmless error – whether within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred; erroneously admitted evidence that violates a constitutional provision requires analysis for harmless error beyond a reasonable doubt. *See e.g., State v. Howard*, 127 Wn. App. 862, 871, 113 P.3d 511 (2005). Here, it is unclear whether the defendant claims the error was evidentiary or constitutional. He claims that the admission of K.S.'s hearsay statements constituted vouching or bolstering, but provides no constitutional authority for this proposition. Regardless, it is clear from the record that defense counsel desired the prior statements to be introduced at trial – for that reason, under either standard of review, this Court cannot determine that the defendant was prejudiced by the introduction of K.S.'s hearsay statements.

Furthermore, if the trial court's rulings were in error, that error was invited by this trial strategy. The invited error doctrine precludes a criminal defendant from seeking appellate review of an error he helped create, even when the alleged error involves constitutional rights. *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999), *as amended* (July 2, 1999); *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). To determine whether the invited error doctrine is applicable to a case, the court may consider whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it. *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009); *In re Copland*, 176 Wn. App. 432, 442, 309 P.3d 626 (2013).

The defendant introduced, in his opening statement, a theory that both K.S. and her mother fabricated the molestation allegations for various improper motives. As a result, it was important and tactical to the defense that counsel be permitted to inquire into the prior statements made by K.S. and her mother throughout the pendency of the case – the hearsay statements, the information in the police reports, and the prior testimony at the 2006 trial.

The allegations made by K.S. against Mr. Kramer were first made to Mrs. Frank on March 22, 2005. The defendant's sister, Shelby Kramer, who was friends with K.S., testified that sometime "at the end of March" 2005, K.S. approached her mother, Connie Kramer, Lisa Kramer and said Mr. Kramer had been touching her inappropriately. RP 427-28, 434. She could not remember the date the statement was made. RP 430. Shelby Kramer testified that K.S. first asked her whether Mr. Kramer had previously been convicted of a crime, and then "stood up and she said, well, I'm going to go tell my mom that Bill touched me and she walked in the house and she said it just like she just said." RP 436-37. Neither party established the date upon which this alleged act of fabrication occurred.¹³

The defendant testified that when he and Mary Snell (DeBoer) ended their relationship at the end of March 2005, Ms. Snell (DeBoer) told him that if he did not move out of the house, she would falsely accuse him of molesting K.S. RP 446. Mr. Kramer was also unable to establish the date

¹³ Because the defendant did not object to any of the child hearsay, the record was not sufficiently developed to establish whether the claim of fabrication, or the alleged break up would have occurred before or after the March 22, 2005 disclosure date. The timing of these events would have been important to a determination whether, in the face of allegations of recent fabrication, K.S.'s statements to her grandmother and mother would have admissible, as nonhearsay, under ER 801(d)(1)(ii). *See State v. Stark*, 48 Wn. App. 245, 249, 738 P.2d 684 (1987).

of the break up, or the date upon which Ms. Snell (DeBoer) allegedly told him she would fabricate allegations against him.

The defendant tactically sought to have K.S.'s prior statements (and her mother's) admitted at trial to demonstrate potential inconsistencies and variations. The defendant specifically stated that he did not object to Karen Winston reading, verbatim, from her report of the forensic interview. RP 132. In closing, he argued, "There is no excuse, whatsoever, even a slight deviation from the truth, no, no, it can't happen." RP 526. The defendant sought to argue that K.S. had been coached on what to say,¹⁴ RP 526, that she had been deceptive to Karen Winston during the forensic interview,¹⁵ RP 526-27, and that over time, her allegations changed,¹⁶

¹⁴ When [K.S.] was first asked where she had been touched, she replied, "Probably my privates." The defendant used this statement, as well as her mother's admission that she had gone over potential questions with her prior to the forensic interview, to argue that her allegations were coached. RP 526-27.

¹⁵ During closing argument, defense counsel argued: "[K.S.] did not tell Karen Winston the truth and that is sacred, it is a violation our [sic] swearing to tell the truth and there is no excuse for a deviation from that whatsoever." RP 529; *see also*, RP 536 ("Inconsistency in the...testimony while they were under oath during the interviews and Karen Winston, I think that is important for you take into consideration").

¹⁶ The defendant argued that K.S. had claimed that she was touched ten times, and later changed that testimony to "less than ten times." RP 527. He argued that her statements regarding whether Mr. Kramer hurt her were inconsistent: "I asked [K.S.] if her private parts were ever hurt, and she said no, and she tells you *and others* yes." RP 528-29 (emphasis added). He argued that K.S. vacillated on whether the abuse had occurred in the living room. RP 528. The defendant argued that it was not until the current trial that K.S. alleged she had been locked in Kramer's room: "[K.S.] embellished her story many times, and ten years later said she was locked up in a room for two hours. How dare her [sic] say that. Ten years

RP 527. These inconsistencies and the impeachment of the State's witnesses *were* the defendant's trial strategy - without K.S.'s previous statements and trial testimony, the defendant would have struggled to argue that her current trial testimony was embellished or varied over time.

Similarly, Mr. Kramer sought to portray Ms. Snell (DeBoer) as also having embellished her testimony from the prior trial; during closing argument, he stated: "Mary Snell embellished her testimony by saying something else if you recall. Oh, Mr. Kramer held my daughter down is what she said. They are all embellishing that. That is the first time that was said."¹⁷ Summing up the defense theory, defense counsel stated, "Ten years later, come into court where they could get into trouble...[T]he reason they were all over the place ten years later is because the old saying you always tell the truth so you can keep your stories straight...And that is what happened in this case, they couldn't keep their stories straight, because the truth was not said." RP 537.

later when she never said anything." RP 530. And, lastly, he sought to assert that K.S. had never before claimed Mr. Kramer ejaculated or that he took off her clothes - not when she was a child, and not during his pretrial interview with her. RP 531.

¹⁷ And, even with regard to Ms. Frank, defendant dismissed her as being only "a carrier of the untruth...She didn't want [K.S.] to testify, remember that? I think she kind of realized there was a problem here." RP 535.

The defendant cannot purposefully withhold an objection to hearsay statements at trial, in order to tactically argue that the older hearsay statements were inconsistent with the current trial testimony or with the statements made during pretrial interviews, and then, on appeal, claim that the use of those hearsay statements bolstered the testimony of the child victim; if error exists under these circumstances, consideration of that error is barred by the invited error rule. Based upon the absence of an objection to the child hearsay evidence (and express agreement to admit the child's hearsay statements made to Karen Winston) and the arguments he advanced at trial, it is clear that the defendant "gambled on the verdict,"¹⁸ and lost. He should not now be permitted a new trial on grounds he purposefully did not assert below.

B. THE DEFENDANT DOES NOT MAKE A REASONED ANALYSIS FOR HIS CONTENTION THAT THE USE OF SIDEBARS PREJUDICED HIM; THE ERROR IS NOT PRESERVED.

The defendant cites five exchanges between the court and counsel that he claims should have been made outside the presence of the jury or in

¹⁸ RAP 2.5's prerequisite that objections be made at trial affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. *Strine*, 176 Wn.2d at 749. Abuse could follow when a party does not raise an issue below because "a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, 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)

a sidebar. Although he claims that the lack of sidebars constituted prosecutorial misconduct, Br. at 28, he does not claim ineffective assistance for his counsel's failure to request sidebars.

Instead, he cites ER 103(c),¹⁹ and Tegland's Courtroom Handbook on Washington Evidence, which sets forth a *preference, but not a prohibition*, against speaking objections.²⁰ Br. at 18. Other than to claim that the "overall impact" of the speaking objections was to prejudice the jury against him, the defendant fails to demonstrate that the jury did not follow its instructions – namely, that (1) the lawyer's remarks, statements and arguments are not evidence, and the jury must disregard any remark, statement or argument that is not supported by the evidence or the instructions, or (2) the jury should not make any assumptions or draw any conclusions from the lawyer's objections. CP 104. Jurors are presumed to follow the court's instructions. *State v. Hopson*, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989).

Because the defendant baldly asserts that five specific instances of speaking objections prejudiced him, and cites lengthy passages without

¹⁹ "**Hearing of Jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury."

²⁰ Even Tegland's states that "speaking objections are neither authorized nor prohibited by the rules of evidence."

specific notation to the particularly offensive language, it is difficult to respond to his complaints. Regarding the first speaking objection exchanged cited by the defendant, when the State objected to the defense asking K.S. about her counselling records, RP 255-56, the fact that the State sought to limit the questions that could be asked of K.S. would appear to the jury as if the State had something to hide. The same is true of the second speaking objection, relating to Ms. DeBoer's alcohol consumption before her alleged one night stand with Mr. Carvahlo, RP 360.²¹ Neither of these speaking objections would have caused the defendant any prejudice.

The third instance, relating to the defense objection to the admission of a photograph of Mr. Kramer's first victim, at the same age as K.S., when Mr. Kramer molested her, RP 362,²² is also not prejudicial in any way. Neither is the fourth instance pertaining to the State questioning Mr. Carvahlo about his ability to perceive facts – namely, his inability to perceive that his sister had been molested by Mr. Kramer.²³ RP 365-66.²⁴ The jury heard that the defendant's prior conviction for child molestation,

²¹ The defendant cites this passage as reported at RP 358.

²² The defendant cites this passage as reported at RP 360.

²³ Of the five passages cited by the defendant, only one, the fourth, contains an objection by defense counsel, to the argument being held in the presence of the jury.

²⁴ The defendant cites this passage as reported at RP 363-64.

and the facts presented pertaining to that charge were not to be used as propensity evidence, and were only to be used as evidence of a common scheme or plan. *See*, RP 10, 91-92, 193-94, 412, 479. The third and fourth passages, if prejudicial, were remedied by the use of multiple limiting instructions.

Regarding the fifth passage, pertaining to the State asking K.S. “about the ripple effects” occurring because of the alleged molestation, RP 242-43, it is again unclear to which specific words or argument the defendant now takes exception.

Had defense counsel, the State, or the trial court perceived that these arguments presented a danger of prejudice, those arguments could have been held outside the presence of the jury. After all, both the State and the defense requested sidebars at other times, demonstrating that when the parties believed the argument could prejudice the jury in some way, they attempted to keep the argument outside of the jury’s presence. *See, e.g.*, RP 112, 169. Without reasoned argument or additional explanation, the defendant has failed to demonstrate how the speaking objections prejudiced him and, therefore, this claim fails.

C. THE DEFENDANT’S VOUCHING/IMPROPER OPINION OF GUILT CLAIM IS UNPRESERVED; THE COMMENTS ARE EITHER PROPER OR HARMLESS.

The defendant next alleges that his right to a fair trial was violated by the introduction of allegedly improper opinion testimony. However, no objection was made to *any* of the questions asked or responses given, upon which defendant now assigns error. RP 168, 299, 366, 433.²⁵ In addition to generally claiming that Ms. Winston’s testimony indicating that she did not observe K.S. manifest signs of fabrication or deception was improper, the defendant claims the following passages also constituted improper opinion testimony or vouching:

Q. (By Mr. Martin) Are you aware of any, any circumstances that would have led your daughter to want some kind of vengeance against the Kramer family, or some basis for her making this story up?

A. [By Ms. DeBoer] No.

RP 169.

Q. When Mr. Hearrean asked you if you want to get Mr. Kramer, do you want him to be convicted of this crime if he is not guilty of it?

A. [By K.S.] No, if he is not guilty of it we wouldn’t be here.

RP 299.

Q. Do you believe that your sister was telling the truth?

A. [By Gary Carvahlo] At that time, yes.

RP 366.

²⁵ Cited by defendant as RP 297, 364, 433.

Q. You believe that [K.S.] was lying in those accusations; is that true?

A. [By Shelby Kramer]²⁶ Yes.

RP 433.²⁷

1. Opinions regarding witness credibility.

It is generally improper for a witness to testify regarding the veracity of another witness because such testimony invades the province of the jury as the fact-finder in a trial and violates a defendant's right to a jury trial. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001);²⁸ *State v. Thach*, 126 Wn. App. 297, 312, 106 P.3d 782 (2005).

As above, however, under RAP 2.5, "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." *Kirkman*, 159 Wn.2d at 936. "Requiring an explicit or almost explicit statement by a witness is also consistent with...precedent that it is improper for any witness to express a personal opinion on the

²⁶ Defendant attributes this statement to Frances Machen, whose testimony is found at RP 404-15. Shelby Kramer's testimony is found at RP 415-42.

²⁷ Cited by defendant as RP 431.

²⁸ *Demery* involved tape recordings of police officers directly accusing the defendant of lying. 144 Wn.2d 757.

defendant's guilt." *Id.* (citations omitted). In this case, therefore, where no objection was made to any of the remarks now assigned as error, the remarks must be an explicit or nearly explicit personal expression in order to be reviewable.

In *Kirkman*, the defendants were convicted of child rape. A detective interviewed the child victim and testified to the "preliminary competency protocol" used to determine the victim's ability to tell the truth. *Id.* at 930. The detective used this protocol because he was interested in the victim's ability to distinguish between truth and lies. *Id.* at 922, 930. He stated that the victim distinguished truth from lies, that he asked the victim to promise to tell the truth, and that the victim explicitly promised to do so. *Id.* at 929. For the first time on appeal, the defendants argued the detective improperly testified to the victim's credibility. Our high court determined that the detective's testimony "simply" accounted for the interview protocol used to obtain the victim's statement and "merely provided the necessary context that enabled the jury to assess the reasonableness of the ... responses." *Id.* at 931. The court also concluded that the detective did not testify that he believed the victim or that she told the truth, and testifying as to the protocol used was not a comment on the truthfulness of the victim. *See also, State v. Warren*, 134 Wn. App. 44, 52, 138 P.3d 1081 (2006), *affirmed*, 165 Wn.2d 17 (2008), *cert. denied* 556 U.S. 1192 (2009) (claim that forensic

interviewer and detective commented on child's credibility was not reviewable for the first time on appeal); *State v. King*, 131 Wn. App. 789, 130 P.3d 376 (2006), *as amended* (Mar. 7, 2006), *publication ordered* (Mar. 7, 2006), *review denied*, 160 Wn.2d 1019 (2007) (testimony from child interviewers did not infringe on the jury's role of determining the victim's testimony and claimed error was not manifest).

In *State v. Madison*, an expert witness testified without objection, that a young child's conduct was "typical of a sex abuse victim." 53 Wn. App. 754, 760, 770 P.2d 662 (1989), *review denied*, 113 Wn.2d 1002 (1989). The court rejected the argument that the testimony amounted to a statement of belief in the victim's story and, consequently, an opinion on the defendant's guilt. *Id.* After acknowledging that certain statements would have been properly excluded if challenged at trial, the court indicated its general reluctance to recognize the admission of testimony without objection as manifest constitutional error.

Appellate courts are and should be reluctant to conclude that questioning, to which no objection was made at trial, gives rise to "manifest constitutional error" reviewable for the first time on appeal. The failure to object deprives the trial court of an opportunity to prevent or cure the error. The decision not to object may be a sound one on tactical grounds by competent counsel, yet if raised successfully for the first time on appeal, may require a retrial with all the attendant unfortunate consequences. Even worse,...it may permit defense counsel to deliberately let error be

created in the record, reasoning that while the harm at trial may not be too serious, the error may be very useful on appeal.

Id. at 762-63.²⁹

Nothing in Ms. Winston's testimony invaded the province of the jury or commented on K.S.'s credibility. It was the defendant's theory that K.S. had been coached by her mother as to what to say during the forensic interview. It was not improper, in response, for Ms. Winston to state that she observed no objective indicators of deception. Further, Ms. Winston was very clear that she could not opine on whether a child was truthful or a defendant guilty – those decisions were up to the jury. RP 155. No error occurred in Ms. Winston's testimony.

Similarly, Ms. DeBoer's testimony, above, did not call for testimony on whether K.S. was credible. It only called for whether Ms. DeBoer knew of any reason that K.S. would fabricate allegations against Mr. Kramer – again, a theory raised by defendant's opening

²⁹ *But see State v. Sutherby*, 138 Wn. App. 609, 158 P.3d 91 (2007), where the defendant was charged with first degree child rape and first degree child molestation, in addition to other charges. The victim was five at the time of the rape and molestation. The victim's mother testified that she could tell when her daughter was lying because she made a half smile when she lied, but did not make a half smile when she accused Sutherby of rape. The *Sutherby* court explained that her testimony was prejudicial because it conveyed not only that her daughter told the truth when she disclosed the abuse, but that jurors could evaluate her daughter's credibility by a whether or not she made a half smile while testifying. The opinion does not state whether Sutherby objected to this testimony or asked the court to strike it. That situation is clearly distinguishable from the present circumstance.

statement. It was not improper. And, even if it could be construed as an improper comment, it was not “explicit or nearly explicit” which would allow for review absent objection.

Gary Carvahlo’s testimony, that he believed his sister, Mr. Kramer’s first victim, may not have been proper, but it had no practical effect on the trial. The credibility of Mr. Kramer’s first victim was a collateral issue, as her testimony was used only for the ER 404(b) evidence; Carvahlo’s statement did not opine on K.S.’s credibility. Further, the defendant does not attempt to demonstrate how this testimony adversely affected the trial. The jury was aware the defendant pled guilty to the charge involving Carvahlo’s sister. RP 309. Mr. Carvahlo testified he believed his sister, but had forgiven Mr. Kramer. RP 367. If the jury drew *any* inference from this testimony, it would likely have inferred that the defendant pleads guilty when he is actually guilty.³⁰ If this testimony was in error, it was harmless beyond a reasonable doubt in the context of the whole trial.

The defendant also assigns error to Shelby Kramer’s comment that she believed K.S. was lying. This testimony was cumulative with other testimony that K.S. was either coached or fabricated a story. It had no practical effect on the trial, where Ms. Kramer testified:

³⁰ *See also*, RP 425 (Shelby Kramer testified that Mr. Kramer had pled guilty and “obviously he had to be [guilty of the prior offense], he was convicted of it”).

[K.S.] repeated...how she was attached to her mother and she didn't get a lot of time with her mom because she was always with Bill, and she brought it up and asked me if he was guilty of a crime that he did in the past, she asked me about if it was true and if it was possible, and I told her, well, yeah, I guess. So [K.S.], she stood up and she said well, I'm going to go tell my mom that Bill touched me, and she walked in the house and she said it just like she just said.

RP 171.

These unobjected-to statements were not “nearly explicit” comments on K.S.’s credibility, and, in any event, were harmless.

2. The defendant cannot establish prejudice from K.S.’s opinion on his guilt.

Lastly, the defendant assigns error to K.S.’s statement that “if he is not guilty of it, we wouldn’t be here.” The defendant includes this statement as an example of vouching or bolstering. It would be better addressed as a comment on the defendant’s guilt.

Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant “because it ‘invad[es] the exclusive province of the [jury].’” *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). In determining whether statements are, in fact, impermissible opinion testimony, the court will generally 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. *Id.* at 579.

Here the commenting witness was the defendant's accuser, who had been a child when she first accused the defendant of molestation. She spent two days testifying, and being questioned about "inconsistencies" in her testimony between the original allegations and trial, and the current trial. She was specifically asked by defense counsel, *immediately before the question to which the defendant now objects*, whether it was "true that you want to get Mr. Kramer," to which she answered, "that is irrelevant." On redirect examination, the prosecutor asked, in response, whether she wanted Mr. Kramer to be convicted if he is not guilty. Her response, as above, was that we would not be here if he is not guilty. Immediately following that, and not assigned as error, K.S. testified that she would not accuse the defendant of something he did not do, and would not want him to be in trouble for something he did not do. RP 299.

The State concedes that this comment was improper. However, as above, no objection was made to the comment. At trial, the defendant ostensibly did not believe the testimony was damaging to him; on recross, defense counsel asked K.S. about this specific testimony in an attempt to impeach her with other false allegations that she had allegedly made against her grandfather as well as allegations that she had made that Mr. Kramer

molested Shelby Kramer. RP 303. The defendant's failure to object to this testimony was tactical because he desired the opportunity to inquire as to the other false allegations K.S. had allegedly made. His tactical silence upon K.S.'s improper comment on his guilt should not now be rewarded by consideration for the first time on appeal. As above, he should not be permitted to gamble on the verdict, and then seek redress for unpreserved errors to which he tactically did not object.

Additionally, the defendant cannot establish any actual prejudice because the jury was properly instructed. *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008); *Kirkman*, 159 Wn.2d at 937. "Proper instructions obviate the possibility of prejudice." *State v. Blake*, 172 Wn. App. 515, 531, 298 P.3d 769 (2012), *review denied*, 177 Wn.2d 1010 (2013). In the present case, the trial court's jury instructions obviated the possibility of prejudice. The trial court properly instructed jurors that they, alone, were to decide credibility issues. For example, in *Kirkman*, the Supreme Court rejected the defendant's claims of prejudice because defense counsel had tactical reasons for not objecting and that the jury was instructed that they alone decided credibility issues. 159 Wn.2d at 937. Here too, the court instructed the jurors that they were "the sole judges of the credibility of the witnesses" and that they alone were to determine the credibility and weight of testimony. CP 104; *see also State v.*

Davenport, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984) (jurors are presumed to follow the court's instructions absent evidence proving the contrary). Because actual prejudice cannot be established, RAP 2.5(a)(3) should not allow for appellate review.

Moreover, even if this Court determines that the unobjected-to testimony discussed constitutes improper opinion testimony and is manifest constitutional error, a harmless error analysis applies. *Kirkman*, 159 Wn.2d at 927. To be harmless, the State must show beyond reasonable doubt that any reasonable jury would have still reached the same result absent the error. *State v. Quaale*, 182 Wn.2d 191, 201, 340 P.3d 213 (2014). The untainted evidence must be so overwhelming that it necessarily leads to a finding of guilt. *Thach*, 126 Wn. App. at 313.

In the defendant's first trial, there were no allegations of improper vouching or commentary on credibility. The defendant was convicted in 2006 upon the word of an eight-year-old child. Any vouching that occurred in the second trial was harmless beyond a reasonable doubt because the result would be (and was) the same without the testimony.

D. THE DEFENDANT'S PROSECUTORIAL MISCONDUCT ARGUMENT FAILS.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's conduct was both improper and prejudicial.

State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prosecutorial misconduct is prejudicial where there is a substantial likelihood the improper conduct affected the jury's verdict. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). Where a defendant does not object during trial to the alleged misconduct, the claim is considered waived unless the misconduct is "so flagrant and ill-intentioned that it cause[d] an enduring and resulting prejudice that could not have been neutralized by a curative instruction." *Matter of Phelps*, 190 Wn.2d 155, 165, 410 P.3d 1142 (2018). In *Phelps*, our high court observed it has found prosecutorial misconduct that was flagrant and ill-intentioned only "in a narrow set of cases where we were concerned about the jury drawing improper inferences from the evidence, such as those comments alluding to race or a defendant's membership in a particular group, or where the prosecutor otherwise comments on the evidence in an inflammatory manner." *Id.* at 170.

Here, the defendant alleges both objected-to and unobjected-to misconduct. Even where the conduct was objected to, the defendant did not request the court give a curative instruction. The defendant lists several examples of what he characterizes as misconduct, and claims, without any reasoned analysis, that these statements undermined his right to a fair trial.

- (1) [Pertaining to hearsay objection by defense] "Judge, I think this is all part and parcel of the *truth* that Your Honor admitted before trial." RP 28-29.

The State would surmise that this statement is simply an inarticulate use of words or an incomplete thought.³¹ The statement itself was not objected to, although the underlying evidence the State sought to admit was the subject of an objection. Without an objection, the defendant must demonstrate flagrancy and ill-intent. He cannot do so where, under the circumstances, the prosecutor's word choice was unintended and incomplete.

- (2) Claim of impropriety regarding admissibility of evidence that Ms. DeBoer and K.S. moved prior to the start of the next school year. RP 165.

The defendant makes no attempt, whatsoever, to explain his claim that this question asked or argument offered was improper. Further, while defense counsel objected to the relevancy of the underlying testimony, there was no objection to any prosecutorial misconduct. Unless flagrant and ill-intentioned, the claim is waived; where, as here, the claim of error is not even readily apparent, this Court should decline to speculate as to the basis for the defendant's current objection where no record was made below.

- (3) "Are you aware of any, any circumstances that would have led your daughter to want some kind of vengeance against the

³¹ The hearsay objection immediately preceding this statement questioned whether the proffered testimony was offered for the *truth of the matter asserted*. The prosecutor potentially intended to say, "part and parcel of the truth of the matter asserted that your Honor admitted pretrial," or, perhaps, "part and parcel of the evidence that Your Honor admitted before trial." One problem with the lack of objection is that, if an attorney is simply ineloquent, and may not realize he or she has misspoken, there is little chance of the record being corrected.

Kramer family or some basis for her making this story up?”
RP 168.

As explained above, it was the defendant who first claimed in opening argument and continued with this point during trial, that K.S. and her mother each had reasons to fabricate the allegations against him. The prosecutor did not engage in misconduct by asking K.S.’s mother, Ms. DeBoer, whether she was aware of any reason K.S. might fabricate such a story. And, even if misconduct, as above, it was not flagrant and ill-intentioned such that it was incurable by an objection and instruction to the jury.

(4) “If he is not guilty of it we wouldn’t be here.” RP 299.

The defendant next assigns as error the prosecutor inquiring whether K.S. wanted Mr. Kramer to be convicted of a crime he did not commit. While irrelevant, and certainly a question that led to an improper answer, this question, like the above, was not objected to. The defendant sought to use K.S.’s response to his advantage, by then impeaching her with false allegations she had made against others. The defendant has failed to demonstrate how, if an objection had been made, any prejudice would not have been cured.

(5) “Do you believe your sister was telling the truth?” RP 366. “Do you believe K.S. was lying in those accusations?” RP 433.

Neither of these questions, nor their responses, were objected to. RP 366, 433. As discussed above, any commentary on whether Mr. Carvahlo's sister was truthful had no bearing, whatsoever, on this trial. Similarly, it was evident from all of Mr. Kramer's witnesses that the general belief amongst the Kramers and their friends, was that K.S. was lying. Although it was improper to ask these questions, the defendant has failed to demonstrate how any potential prejudice would not have been cured by an instruction from the court, had one been requested.

The following two passages are claimed misconduct, ostensibly as disparaging remarks toward opposing counsel.

- (6) "It's not my fault if Mr. Hearrean is not forming his questions on direct." RP 358. "If he believes his client is telling the truth." RP 462.

As to the first statement, defense counsel made no objection. The comment was certainly inarticulate, but was only indicative of the prosecutor's belief that defense counsel was asking improper direct examination questions. It could have been worded more kindly, but the defendant has failed to demonstrate that the jury considered this statement, in any way, that it impacted the verdict, or that the jury disregarded its instructions that counsel's remarks were not evidence, RP 473. Defense counsel did not object to the errant comment, nor did he ask the court for a curative instruction.

The second comment *was* the subject of a defense objection. The State agrees that it is improper for a prosecutor to question, in front the jury, whether defense counsel believes his client. However, notably, the defense attorney did not request a curative instruction, or any other remedy. The court easily could have instructed the jury to disregard the comments of the prosecutor, but did not because no such instruction was requested. The defendant has failed to demonstrate how an instruction, if requested and given, would not have cured any prejudice resulting from the comment.

E. THE DEFENDANT HAS FAILED TO DEMONSTRATE HOW ANY OF THE COURT’S REMARKS WERE AN IMPERMISSIBLE COMMENT ON THE EVIDENCE.

Article 4, section 16, of the Washington Constitution provides, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Const. art. 4, § 16. This constitutional provision prohibits a judge from conveying to the jury a personal opinion regarding the merits of the case or a particular issue within the case. *State v. Theroff*, 95 Wn.2d 385, 388-89, 622 P.2d 1240 (1980). The prohibition is intended to prevent a trial judge’s opinion from influencing the jury. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

The defendant claims the following passages were an improper judicial comment on the evidence. As discussed below, none of these passages evidences that Judge Strohmeier communicated a personal opinion

regarding the merits of the case or a particular issue to the jury. The court ruled on the objections made by defendant. Any opinion that the Judge may have expressed regarded the propriety of the question posed by counsel, not the veracity of the evidence elicited from the witness.

At any point during your forensic interview with [K.S.], did you have a sense, did she give you any indication that she was fabricating a story?

MR. HEARREAN: Judge, I would object to that, that is a jury question.

JUDGE STROHMAIER: Can she testify to the veracity of a witness?

MR. MARTIN: I think what I'm looking for, Judge, is based upon her expert training, if she saw anything that children typically do to indicate deception.

JUDGE STROHMAIER: I'll allow that.

RP 141.

Taken in context, the court's ruling "allowing that" was not a ruling allowing a witness to comment on the veracity of another witness; it was a ruling allowing the witness to discuss, based upon her expert training, whether there are general indicators children demonstrate when engaging in deception. The remark was not improper.

Well, did there ever come a time when you tried to hurt yourself?

MR. HEARREAN: Objection, this is so prejudicial. It has nothing to do with the facts of the case and it is prejudicial. I object.

JUDGE STROHMAIER: Objection noted, but I think it is proper at this time.

RP 243.

Again, the court's ruling that "it is proper at this time" was as to the propriety of the question, whether K.S. ever tried to hurt herself, and did not evidence a personal opinion.

Did your mental condition at that time have anything to do with what happened to you with Mr. Kramer?

MR. HEARREAN: Objection, she's not a psychologist.

MR. MARTIN: But she knows how she feels.

MR. HEARREAN: That is out of her expertise.

JUDGE STROHMAIER: We're not talking about a clinical definition, we are talking about her personal opinion. I will allow it.

RP 244.

Here, the Court ruled on the defendant's objection to K.S.'s testimony regarding her personal emotional state. The Court properly ruled, without communicating a personal opinion from the bench, that K.S. could give a lay opinion as to why she felt a certain way.

Q. [By Mr. Martin to Mr. Kramer] You also got in trouble with Mary for giving her children too much ice cream and candy; isn't that true?

MR. HEARREAN: Objection, gets in trouble, and I don't think there has been any testimony.

JUDGE STROHMAIER: Those are the words he used back in 2006? Let him testify first, on impeachment you can go into that afterwards. You're putting the cart before the horse.

RP 463-64.³²

The State would surmise that the Court's reference to impeachment was merely inarticulate, and that the court intended to say "redirect" instead

³² Cited by the defendant as RP 462.

of “impeachment.” As above, the court ruled on the objection, stating that defense counsel could “go into that” (meaning whether the defendant “got in trouble” with Ms. Snell) on redirect.

And, during the State’s closing argument, Judge Strohmeier merely ruled upon the defendant’s objection that the State was speculating during closing argument, stating that the prosecutor was engaging in *argument*, where argument and inferences are regularly permitted.

Sexual contact is not ejaculation. [K.S.] talked here in court as a 20 year old woman who now understands what those things are, that the defendant ejaculated. She couldn’t have understood that as a child, but she can –

MR. HEARREAN: Objection, speculation that a child wouldn’t understand that.

JUDGE STROHMAIER: He’s making an argument about that, he’s not saying what she believes.

RP 498.³³

None of these passages evidences a personal opinion from Judge Strohmeier. Defendant seems to claim that the Court’s use of generalized pronouns, such as “it” and “that” (common words in all of the above rulings), somehow communicated an opinion on the merits of the case. The use of “it” and “that” would communicate, even to a juror with little legal experience, that the court was referring to the question asked, and the objection made, not to testimony expected to be elicited. And, even if one

³³ Cited by the defendant as RP 496.

of these statements could be construed as a personal opinion, the Court properly instructed the jury to disregard any personal opinion made by the bench.³⁴ RP 473-74. As above, the jury is presumed to have followed the Court's instructions. Lastly, other than baldly claiming that these combined³⁵ remarks prejudiced him, the defendant has failed to demonstrate how these remarks could have affected the jury. He has failed to establish either error or prejudice.

³⁴ See WPIC 1.02:

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

...

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. The objections should not influence you. DO not make any assumptions or draw any conclusions based upon a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

See also, RP 472-74; CP 103-04.

³⁵ Defendant concedes that the remarks, in isolation, may not be a prejudicial judicial comment. Br. at 36.

F. THE CUMULATIVE ERROR DOCTRINE IS INAPPLICABLE.

The cumulative error doctrine applies when a trial is affected by “several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). To determine whether cumulative error requires reversal of a defendant’s conviction, the court considers whether the totality of circumstances substantially prejudiced the defendant. The totality of the circumstances does not substantially prejudice the defendant where the evidence is overwhelming against the defendant. *In re Cross*, 180 Wn.2d 664, 691, 327 P.3d 660 (2014), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). Additionally, the cumulative error doctrine does not apply when there are no errors or where the errors are few and have little or no effect on the trial’s outcome. *Weber*, 159 Wn.2d at 279.

As discussed above, the errors occurring in the trial were few – and the lack of objection was, in general, tactical. The defendant has failed to demonstrate that these errors, when combined, deprived him of a fair trial.

G. THE COURT SHOULD REMAND TO STRIKE CERTAIN LEGAL FINANCIAL OBLIGATIONS.

House Bill 1783, which became effective June 7, 2018, prohibits trial courts from imposing discretionary legal financial obligations (LFOs) on defendants who are indigent at the time of sentencing. Laws of 2018,

ch. 269, § 6(3); *State v. Ramirez*, 191 Wn.2d 732, 738, 426 P.3d 714 (2018). This change to the criminal filing fee statute is now codified in RCW 36.18.020(2)(h). These changes to the criminal filing fee statute apply prospectively to cases pending direct appeal prior to June 7, 2018. *Ramirez*, 191 Wn.2d at 747.

The change in law also prohibits imposition of the DNA collection fee when the State has previously collected the offender's DNA because of a prior conviction. Laws of 2018, ch. 269, § 18. The uncontested record establishes that Mr. Kramer has two other Washington State felonies since 1992. Since that time, Washington law has required defendants with a felony conviction to provide a DNA sample. Laws of 1989, ch. 350, § 4; RCW 43.43.754. It is a reasonable conclusion that Mr. Kramer's criminal history means the State has previously collected a DNA sample from him.

The defendant's case is not final (and has never been final). The original conviction was pending appeal from 2006 to 2015. The conviction was vacated and the matter remanded for retrial. At the time the court imposed legal financial obligations (for the second time) in 2017, *Ramirez* had not yet been decided, and legislative amendments had not yet occurred. Since his conviction, his matter has been pending appeal and not yet final. The Court should remand to strike the DNA fee and criminal filing fee.

V. CONCLUSION

The State respectfully requests this Court affirm the defendant's conviction and sentence. The alleged errors are, for the most part, unpreserved, and/or were tactical decisions by counsel in an effort to develop his theory of the case. The defendant's conviction should not now be reversed because the trial court was not given the opportunity to cure any potential errors and prejudice at trial.

Dated this 2 day of December, 2019.

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM JOSEPH KRAMER,

Appellant.

NO. 35062-2-III

CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on December 2, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Dennis Morgan
nodblspk@rcabletv.com

12/2/2019
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

December 02, 2019 - 11:20 AM

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