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NO. 35261-7-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARCO A. ESPINOZA,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ASSIGNMENTS OF ERROR**

Mr. Espinoza did not receive effective assistance of counsel.

### **A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.**

Appellant makes numerous assignments of error. These can be summarized as follows;

1. Counsel was ineffective for failing to challenge competency of the child witnesses.
2. Counsel failed to present a defense when he failed to call witnesses to challenge the credibility of the child witnesses and their statements.
3. Cumulative error of trial counsel's performance denied Appellant a fair trial.

### **B. ANSWERS TO ASSIGNMENTS OF ERROR.**

1- 3. Trial counsels conduct was neither ineffective nor deficient, when viewed in part or cumulatively.

## **II. STATEMENT OF THE CASE**

Because this is not a claim regarding the sufficiency of the evidence, the substantive and procedural facts have been adequately set forth in appellant's brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section.

The State shall refer to the record as needed and has included portions of trial counsel's cross-examination of the victims and other State's witnesses as well as portions of Espinoza's trial counsel's closing

argument which sets out his theory of the case and the defense he put before the jury.

### **III. ARGUMENT.**

#### **RESPONSE TO ALLEGATIONS 1-3 INEFFECTIVE ASSISTANCE OF COUNSEL.**

##### **1. Failure to challenge child competency**

You folks saw it. I'm glad they filmed it. I'm glad we have it. RP 446. This single quote from Espinoza's trial attorney disproves his argument in this appeal. His counsel had a strategy, he knew what he wanted and needed to be able to use and reference in this trial. This was purely and simply a trial tactic. Without the ability to have these child witnesses sit on the stand and endure cross-examination this defendant had no defense at all.

From the beginning of this case trial counsel was focusing in on the fact that this was a group of young girls who had gotten together and concocted a story. This line of inquiry and cross examination started at the initial hearings and included examination of most of the witness with this line of inquiry being apparent as evidenced by this set of questions asked of one of the officers who responded to the report of this criminal act while many of the witnesses and victims were together:

Q. Okay. Now, in describing the scene as you were there, you said there was, I think I wrote down, maybe at least

seven people there in the apartment. All seven people were on that first floor living space, living area; is that correct?

A. All the people were on the first floor when I entered with the exception of the second Maria who came in. I remember there being four of them when they came in the door.

Q. And then when both family units arrived everybody stayed on the first floor?

A. I remember everybody staying on the first floor.

Q. This first floor, it's a pretty open space area. It isn't compartmentalized by closed-off rooms, correct?

A. No, it's not closed off. You can see each little alcove in the apartment just by standing in one spot. RP 50<sup>1</sup>

...

Q. ...If you were to conduct some sort of interview, you knew that it was not a good idea to interview all the kids there together that night?

A. That's correct.

Q. That wouldn't be the protocol, as you understood it, to interview the children together?

A. That's correct. RP 54-55.

Carolyn Webster forensic interview expert cross by defense, he continues to push the idea that these three girls were in a group and not only together but with adults when the initial contact and questioning was done and the children were with their parents throughout. Starting at RP 92 pretrial trial.

Q. So you've done a lot of these interviews. You've had a lot of training on child interviews. I noticed something here. You are interviewing each of these children separately.

A. Yes.

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<sup>1</sup> Several volumes of VRP have been filed with this court. The State will set out the date of occurrence before the RP on all references except the volumes of the pretrial and trial which are numerically sequential. Those references will simply be referred to with an RP designation before the page number.

Q. You're interviewing outside the presence of their parents.

A. Yes.

Q. Outside the presence. It's just you and the child, correct?

A. That's correct.

Q. You do that for a number of reasons. One of the reasons would be so -- these children are witnesses, correct?

A. Potential witnesses, yes.

Q. One of the reasons you would do that is to make sure witnesses aren't hearing from each other and getting cues from each other what to say, correct?

A. Yes.

Q. You're aware that witnesses like this, their memories might be -- I'm going to use the word tainted. That might be too strong. They might be tainted by what somebody else or adopt what somebody else says?

A. It's possible.

Cross examination of Christian Madrid, father of victim Liliana, here still defense counsel is working on a very specific defense, that these children were in the middle of a mob protesting about this alleged abuse.

RP 111-18

While cross examining LM trial counsel uses the previous statements and the testimony of the adult witnesses in an attempt to show the inconsistency of LM's statements. In her statements to the child interview specialist, Ms. Webster, LM had stated that all of the touching had occurred outside of her clothing and yet in her direct testimony she states that the touching was under her clothes. Counsel uses this and the past admonishments "to tell the truth" as a method to show the jury that

the State, through these witnesses, has not proven its case beyond a reasonable doubt. RP 146-65. For nearly twenty pages trial counsel for Espinoza took the previous statements made by LM and wove them into what he wanted, a confusing story that sounded like a young child making up the entire affair. For example:

Q. And when we talked at that time, one of the things we asked you to do was to tell us the truth.

A. Yup.

Q. Just like today, right?

A. Yup.

Q. Just like Ms. Webster asked you to tell the truth, right?

A. Yeah.

Q. And we also asked you, hey, if there's anything you can remember make sure and tell us, right?

A. Yeah.

Q. And we gave you an opportunity at the end of that interview, if there's something we haven't asked, make sure and let us know. We gave you an opportunity to tell us stuff, right?

A. Yeah.

Q. You talked about a lot of things that happened with Marco last year when you came to this building to speak with us.

A. Yeah.

Q. At that time you never once said that Marco had touched you under your clothing, did you?

A. No.

Q. So this is really the first time you've ever told anybody that Marco touched you under your clothing, right?

A. Yeah.

Q. Because you remembered it now?

A. Yeah.

Q. You didn't remember it last year?

A. Nu-huh.

If this attorney had moved to exclude the victims or the statements that they had made in the past, he would not have had these “inconsistent”

statements to compare and contrast. This was not error on the part of this attorney, it is clearly a very specific and thought out trial tactic. RP 146-65

This trail tactic, this defense, continues and can be seen during the discussion regarding some recent information that LM has a medical condition that no one had prior knowledge of that might make her more susceptible to bleeding from her genital regions. This was very upsetting to defense counsel because it struck at the defense that he was presenting. This is Mr. Swan's statement:

MR. SWAN: Your Honor, I'm still now, twelve hours later, trying to wrap my head around what to make of this. Quite frankly, the defense's position was it would be absolutely preposterous to believe that child was going to begin bleeding after being touched over the top of her pants and underwear. That just wasn't going to happen ever. The reason why I did the cross-examination I did with Lily yesterday and focused on some of that was for that reason. I expect to do that with Sadie today as well. We heard about it during the video. Now I'm kind of being caught. I can't necessarily point fingers other than it would have been great to have this explanation two years ago when Ms. Webster heard this or for somebody along the way to ask. I guess my concern, as I analyze this, I guess the explanation the state wants to bring out now essentially is a way to tear at one of the defenses we have. Well, gosh; no wonder the child -- you're right. It wouldn't have made sense for the child to be bleeding from the incident the child is describing. Now we have this excuse why the child is bleeding. Therefore, now it sounds more credible. What am I supposed to do with that now? That's what we're hearing now. I don't know. I guess I'm putting on the record I'm trying my best to contemplate what to do with

the new information. I'm not sure any learned or experienced counsel would know. I'll make my best effort and leave it at that. RP 203-4.

This continues throughout the trial and can be seen when trial counsel for Appellant cross-examined all the victims.

With victim SO counsel was able to get her to admit that a portion of her original statement to the forensic interviewer, that she bled after one of the times that Appellant touched her, was actually not from any act of the Appellant but from a preexisting medical condition that SO has. RP 234-40 He was also able to get SO to admit that other statements such as Appellant had kissed her were never stated before. RP 241.

While it is counter-intuitive for the State to compliment a trial attorney, the cross-examination done by Espinoza's counsel was done in a way that made the statement of the victims seem confused, at times contradictory and he ably got SO to testify about innocent acts such as tickling and piggy back rides that took place immediately before the touching on the outside of her clothing. This was clearly an attempt to show the jury that the allegation could or were just exaggerations by this child witness of innocence acts. RP 245-47. And, trial counsel was able to get SO to state that an earlier accusation by another victim that all three girls were touched at the same time did not occur, once again clearly putting forward his defense of his client. RP 248-9

Counsel was allowed to question Margarito Camacho about the fact that Carmen, his fiancé had questioned her daughter and the other girls at once about touching, that initially the children denied touching but after questions were asked they changed their story to be that they had in fact been touched. RP 275-67.

Once again this is clearly a trial tactic to show that what had occurred here was that the girls had been influenced by the one mother, that they had been questioned as a group and that tainted their individual statements.

This strategy continued through to the last victim DO. Counsel hit hard on the fact that when the disclosure had been made and the mother of two of the victims began to confront them about these allegations that she did it with all of these child victims present at the same time and that all of them could over hear what allegations were made by each and the forceful nature of this mother's inquiry. RP 305-12. He was able to get DO to say that yes, all of these young girls were together and participated in this round of questioning and that she was able to overhear all that was said and asked. RP 305-12.

And the final portion of this strategy was when trial counsel got testimony from Maria Olea, the mother of two of the victims, to admit in her testimony that she had in fact questioned the girls as a group about the

allegations that the defendant had touched them inappropriately. RP 337-39

This type of cross-examination was used throughout the pretrial child hearsay hearing as well as the trial itself.

The “success or failure” of this tactic is not at issue. This attorney mounted a defense that was based on his background, his training, experience and most importantly his lengthy, hands-on familiarity with this case. This makes second guessing by the Appellant or this court a risky matter. "Judicial scrutiny of counsel's performance must be highly deferential" and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, *infra*, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). Tactical decisions cannot form the basis for a claim of ineffective assistance of counsel. McFarland, 127 Wn.2d at 336 (citing State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994)).

Espinoza claims that his trial counsel was ineffective for not challenging the competency of the three child victims/witnesses who testified. Trial counsel had interviewed all three of these children and he

observed them and cross-examined them during the hearing conducted regarding child hearsay. This contact clearly was such that he knew through his background, training and experience that these witnesses were competent, and any such challenge was futile. Further, as stated above he wanted these witnesses in front of the jury.

An appellate, court will not disturb a trial court's conclusion as to the competency of a witness to testify except for abuse of discretion. State v. S.J.W., 170 Wn.2d 92, 97, 239 P.3d 568 (2010) (citing Faust v. Albertson, 167 Wn.2d 531, 545-46, 222 P, 3d 1208 (2009)). A trial court abuses its discretion if its decision is "manifestly unreasonable," based on "untenable grounds," or made for "untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12,26,482 P.2d 775 (1971) This court will defer to the trial court's assessment of witness credibility and evidence weight. In re Welfare of Sego, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973).

This standard of review is especially applicable to child witnesses because "[t]he competency of a youthful witness is not easily reflected in a written record, and [an appellate court] must rely on the trial judge who sees the witness, notices the witness's manner, and considers his or her capacity and intelligence." State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005) (citing State v. Przybylski, 48 Wn.App. 661, 665, 739 P.2d

1203 (1987)). As our Supreme Court has noted, "There is probably no area of law where it is more necessary to place great reliance on the trial court's judgment than in assessing the competency of a child witness." Woods, 154 Wn.2d at 617 (quoting State v. Borland, 57 Wn.App. 7, 11, 786 P.2d 810, review denied, 114 Wn.2d 1026 (1990)).

Furthermore, every person is presumed competent to testify, including children. S.J. W, 170 Wn.2d at 100. A child's competency is now determined by the trial judge within the framework of RCW 5.60.050. State v. Ryan, 103 Wn.2d 165,172, 691 P.2d 197 (1984).

Those "who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly" are not competent to testify. RCW 5.60.050(2). The determination of whether a child witness is competent is within the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. State v. Smith, 97 Wash.2d 801, 803, 650 P.2d 201 (1982); State v. Wyse, 71 Wash.2d 434, 437, 429 P.2d 121 (1967).

State v. Brousseau, 172 Wn.2d 331, 259 P.3d 209 (2011) discusses much of this rather specialized area of the law. It addresses competency stating "...the bar for competency is low; with few exceptions, all witnesses are presumed competent, including children. RCW 5.60.020, .050; CrR 6.12. Indeed, absent a challenge to competency, the trial court

need not conduct a competency hearing at all. State v. C.M.B., 130 Wn.App. 841, 843, 125 P.3d 211 (2005).”

While the *Allen* factors serve to inform the judge's determination. S.J. W., 170 Wn.2d at 100. The factors set forth in State v. Allen, 70 Wn.2d 690, 424 P.2d 1021 (1967) include:

(1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence; (3) the capacity to receive, an accurate impression of [his testimony]; (4) a memory sufficient to retain an independent recollection of the occurrence; (5) the capacity to express in words his memory of the occurrence; and (6) the capacity to understand simple questions about [the occurrence].

Accordingly, a party challenging the competency of a child witness has the burden of rebutting that presumption with evidence indicating that the child is of unsound mind, intoxicated at the time of his production for examination, incapable of receiving just impressions of the facts, or incapable of relating facts truly. RCW 5.60.050. Moreover, inconsistencies in a child's testimony do not necessarily call into question witness competency. State v. Carlson, 61 Wn.App. 865, 874, 812 P.2d 536 (1991), review denied, 120 Wn.2d 1022 (1993). Instead, such inconsistencies generally relate to the witness's credibility and the weight to give his or her testimony. Carlson, 61 Wn.App. at 874 (citing State v. Stange, 53 Wn.App. 638, 642, 769 P.2d 873, review denied, 113 Wn.2d

1007 (1989)). Inconsistencies in a child's testimony go to weight and credibility, however, not to competency. State v. Kennealy, 151 Wn. App. 861, 878, 214 P.3d 200(2009). This court will place particular reliance on the trial court's judgment in assessing a child witness's competency. *Id.* Further, the age of the child is not determinative of his or her capacity as a witness. State v. Ridley, 61 Wash.2d 457, 378 P.2d 700 (1963). "Intelligence, not age, is the proper criterion to be used...." Allen, at 692, 424 P.2d 1021.

Upon review of the record this court can clearly see that there was no issue of competency with these three witnesses and that this was readily apparent to trial counsel. Raising a specious and futile argument that these witnesses were not competent is not required by any court.

State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982) "While it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error." As was stated in State v. Colbert, 17 Wn. App. 658, 664, 564 P.2d 1182 (1977):

The defendant is entitled to a fair and unbiased trial. State v. Beard, 74 Wn.2d 335, 444 P.2d 651 (1968). He is not entitled to a perfect trial. A perfect trial is always sought but seldom, if ever, attained. To suggest that a perfect trial is a normal expectation is to suggest that a

judge, two attorneys, 12 jurors and innumerable witnesses, all of various ages and talents are omnipotent, not subject to human error and apparently possessing iron stomachs unaffected by repulsive testimony.

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1182 (1977):

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And as was so pointedly stated by this court in State v. Sorenson, 6 Wn.App. 269, 272, 492 P.2d 233 (1972) “We have examined the entire record and find the claimed error to be without merit. As the court observed in State v. Thomas, Supra, 71 Wn.2d at 472, 429 P.2d at 233, '(s)ome defendants are, in fact, guilty and no amount of forensic skill is going to bring about an acquittal.”

The general law regarding claims of ineffective assistance of counsel is a mixed question of law and fact that this court will review de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To establish a claim of ineffective assistance of counsel Espinoza must show that (1) defense counsel’s performance was deficient and (2) the deficient

performance prejudiced the defense. State v. Grier, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011). A failure to satisfy either prong is fatal to an ineffective assistance of counsel claim. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 784 (1984).

Espinoza's claim fails both. His trial counsel's actions were tactical, they addressed the need to discredit these witnesses, to demonstrate what he stressed which was that this was some sort of group hysteria, a simple statement, Marco is my boyfriend, turned into claims of improper touching so that these children could satisfy the probing inquiry of their respective angry and worried parents.

As this court is well aware, the Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 & n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)

Espinoza bears the burden of establishing ineffective assistance of counsel. Grier, 171 Wn.2d at 33. This court will presume that defense counsel's performance was reasonable. Grier, 171 Wn.2d at 33. Performance is deficient if it falls below an objective standard of reasonableness. Grier, 171 Wn.2d at 33. Counsel's conduct is not deficient when it can be characterized as legitimate trial strategy or tactics. Grier, 171 Wn.2d at 33. Deficient performance occurs if "counsel's

representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 784 (1984). This standard requires "reasonableness under prevailing professional norms" and "in light of all the circumstances." Id. at 688, 690. Espinoza must overcome a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. To do so, the defendant must show counsel's performance cannot be explained as a sound defense strategy. Id.

Prejudice occurs if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability of a different result exists where counsel's deficient performance "undermine[s] confidence in the outcome." Id. The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. at 693. Instead, the defendant "has ... the burden of showing that the decision reached would reasonably likely have been different absent the errors." Id. at 696. This standard requires evaluating the totality of the record. Id. at 695.

The appellant claims that his counsel should have challenged the child hearsay testimony and the factual nature of that testimony. The hearings which were held did just that. Trial counsel actively participated

in those hearings and pre-trial interviews of the victims. Through those contacts he clearly established the trial strategy which he followed throughout the trial.

This issue was not preserved at the trial court level and it should not be considered by this court. It is clear from a reading of the transcript that one of the main trial strategies by Appellant was to convince the jury that this was a group of young girls who through contact with their parents, the internet, online television and other sources of information made up this story about the alleged actions of the defendant. That when initially and specifically challenged by the adults in this case they denied anything happened and it was only after anger and sadness and other adult emotional reaction to an initial statement that they all changed their story to yes, this happened. Trial counsel argued that they then amplified and embellished this “story” until trial where it was still continuing to evolve.

As trial counsel stated at the time of the child hearsay hearing “Mr. Camacho asked, and how that then, from the defense's position, mushrooms out of control for the rest of the evening. That's sort of our theory, from our perspective. I think that needs to come in.” (8.5.16 hearing RP 17)

The defense attorney wanted to be able to cross-examine all of the witnesses. Contained in Appendix ‘A’ are several pages of the verbatim report of proceedings from the cross-examination conducted by

Espinoza's trial attorney as well as portions of his closing argument appended in Appendix B where this strategy becomes obvious.

Courts of review in this state have ruled that it is not an appealable error if this type of hearing is not even conducted. In State v. Leavitt, 111 Wash.2d 66, 71-2, 758 P.2d 982 (1988) the court failed to even conduct a child hearsay hearing and at trial that hearsay was admitted. State v. Warren, 55 Wn.App. 645, 649-50, 779 P.2d 1159 (1989), "However, counsel for Warren failed to object to the absence of a hearing and failed to object to the testimony during trial. A party's failure to object at trial precludes appellate review unless the alleged error is "truly of constitutional magnitude." State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988); see also RAP 2.5(a)(3)." The Warren court goes on to state, "Our supreme court held that because both the child declarant and the hearsay recipients had testified at trial and were available for cross examination, no constitutional confrontation or due process concerns were implicated by the omission of the hearing. Consequently, defendant's failure to raise a timely objection precluded appellate review." Id at 650.

This court should not even review this allegation, there was nothing raised in the trial court, once again purposefully, and there is no exception to RAP 2.5 which would allow this to be raised for the first time on appeal.

State v. Rock, 65 Wn. App. 654, 658-60, 829 P.2d 232 (1992):

It is well established that, other than in a few narrow exceptions, a defendant may not appeal issues or assert arguments that were not raised in the court below.

...

The whole purpose of requiring all arguments to be addressed to the trial judge before a ruling is to give him the opportunity to correct or avoid any potential error. This case illustrates dramatically the importance of the rule.

See also, State v. Applegate, 39 Or. App. 17, 21, 591 P.2d 371, 373

(1979);

There are many rationales for the raise-or-waive rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to the court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right.

Appellant has not indicated to this court a valid basis to allow this issue to be raised for the first time on appeal under RAP 2.5. The general rule is that an appellate court will not review issues raised for the first time on appeal. That rule is set forth in State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995):

As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a "manifest error affecting a constitutional right". RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). As we recognized in Scott, constitutional errors are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. Scott, 110 Wn.2d at 686-87. On the other hand, "permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts". Lynn, 67 Wn. App. at 344.

The finding of the court in State v. Trout, 125 Wn. App. 313, 317, 103 P.3d 1278 (2005) are applicable herein, "This exception is not intended to swallow the rule, so that all asserted constitutional errors may be raised for the first time on appeal. Indeed, criminal law has become so largely constitutionalized that any error can easily be phrased in constitutional terms."

The State fully believes that trial counsel planned his strategy and conducted this trial in as effective a manner as was possible given the facts. However, a defendant such as Espinoza can't sit on an issue or a perceived issue then attempt to use it to his advantage if he loses in the trial court and files a direct appeal. The claim now that this alleged failure

to call witnesses or some imagined expert falls squarely in invited error.

State v. Barnett, 104 Wn.App. 191, 200, 16 P.3d 74 (Div. 3 2001)

“The doctrine of invited error precludes review of Mr. Barnett's assigned error. The doctrine of invited error prevents a party from setting up an error at trial and then complaining of it on appeal. A potential error is deemed waived "if the party asserting such error materially contributed thereto.” (Citations omitted.)

The alleged “failures” of trial counsel are clearly such that Espinoza clearly and materially contributed to their occurrence, that he, the defendant, brought these alleged errors upon himself; In re Personal Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000) “In these invited error doctrine cases, the defendant took knowing and voluntary actions to set up the error; where the defendant's actions were not voluntary, the court did not apply the doctrine.”

The record makes it clear that Espinoza wanted this testimony, that he wanted his chance to examine both the hearsay witnesses and the victims so that he would have them in their own words poke holes in what he was arguing was a story.

This court has ruled that counsel can even agree to stipulate to facts and information essential to the jury’s determination of guilt. As was stated in State v. Craig, 82 Wn.2d 777, 786, 514 P.2d 151 (Wash. 1973)

“It is not claimed that the stipulation was coerced. Where a party participates in the introduction of evidence and does not object, he cannot complain later of its admission. State v. Benson, 58 Wash.2d 490, 364 P.2d 220 (1961).”

As can be seen from the discussion amongst the parties and the court there was briefing supplied to the court and to trial counsel covering the requirements of State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984). Defense counsel stated that he had not responded because the briefing was so complete. It can also be seen from the extremely vigorous cross-examination of the child witnesses and the questions asked that counsel indeed wanted these witnesses to testify so that he could elicit testimony that he believed would demonstrate that his client was not guilty.

**2. Response - failure to present argument against hearsay.**

This claim is not supported by the record. Trial counsel specifically stated that he was not going to respond to the briefing that was filed by the State regarding child hearsay because the State’s document was informational not argumentative RP 6-13-16

THE COURT: ...Mr. Jackson and Mr. Swan. Mr. Jackson, this is your motion regarding child hearsay. I received your brief and I’ve read it and, Mr. Swan, you didn’t have one. I don’t know if there was one necessary at least at this juncture.  
MR. SWAN: Correct. I didn’t think there was one necessary in response. There was nothing, I mean,

it's a nice brief, but there was nothing in the State's brief that required me to disagree or respond.

THE COURT: It wasn't argumentative. It was more of a guideline.

MR. SWAN: Exactly.

Espinoza also states that his trial attorney did not challenge the admission of the hearsay statements. This is patently incorrect.

His trial attorney was very active in his examination of all the witnesses who testified at the child hearsay hearing. He did not sit idly by and then state he had no objection. This trial attorney reviewed the testimony of the hearing and correlates the testimony and the facts to the "Ryan" factors. The review that covers several pages of the verbatim report of proceedings. RP 15-18, 25-31. He sums up his argument as follows:

...so, I'm asking for the court to not allow the statements made to Officer McCall or other officers, or to the parents the evening of June 14, because this was a group interview and there is not, therefore, a – any indicia -- or strong indicia of reliability when the statements were made that night. So that's my argument there.

### **3. Cumulative error – failure to present a defense.**

Appellant states "Each claim for ineffective assistance must be analyzed separately to determine whether counsel was deficient, but prejudice may result from the cumulative impact of multiple deficiencies."

(Brief at 23) He then recites the exact allegation listed up to that point in his brief. The court stated in State v. Grieff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000):

We do not believe the cumulative error doctrine warrants reversal in this case. The application of that doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)

...

Here, we are not dealing with the accumulation of several errors. Rather, we are confronted with two errors that had little or no effect on the outcome at trial. We are satisfied, therefore, that the cumulative effect of these insignificant errors did not deprive Greiff of a fair trial.

As addressed above, trial counsel for this defendant was not ineffective. Therefore, there was no cumulative error.

He now alleges that because he convinced the court to appoint secondary counsel to review the possibility of a motion for a new trial that this issue was preserved. That too, is incorrect. The record contains literally nothing to support this claim and Espinoza does not even cite to the record in his own brief to support his claim. The rule addressed by counsel who was appointed was CrR 7.5 – New Trial, there are eight basis listed in that rule which may be a basis for a motion for a new trial none of those listed are “ineffective assistance of counsel” in any of the forms listed by this Appellant

Further, the portion of the VRP that addresses this alleged preservation does not address any basis or reason for this side appointment of Mr. Bruns, it does however indicate that this attorney did not believe that any of the reasons listed in CrR 7.5 were applicable and Espinoza agreed with Mr. Bruns' analysis:

MR. BRUNS: This is the State of Washington v. Marco Antonio Espinoza, Cause No. 14-1-01066-0. We are on before the court this morning on first the defendant's motion under CrR 7.5 for a new trial. I was appointed previously, through the Department of Assigned Counsel, to represent Mr. Espinoza for the limited purpose of advising him on the potentials of whether or not his motion for a new trial under CrR 7.5 would be valid and should go forward. I met with Mr. Espinoza, discussed it extensively with him. I also - - his concerns as what you can actually bring up in a motion for a new trial versus an appeal. I also discussed this issue with his wife, and her concerns regarding what evidence that she might have or wish to present at the time of trial and did not get presented.

And I concluded, and I advised Mr. Espinoza of this, that his concerns were the kinds of concerns that are raised in an appeal and are not the sorts of things that are to be raised under the limited circumstances outlined in CrR 7.5. And I believe he understood that and understands that he needs to proceed with his concerns in an appeal.

Accordingly, Your Honor, based upon that limited assignment of defense responsibilities in this matter, **I do not believe there is grounds for a motion for a new trial in this case, and I cannot proceed with bringing such a motion at this time.**

Now, under my assignment, it's my belief that once that is done, I'm allowed to withdraw. I presented an order to the court previously, when the record was frozen, and I was approved by both the state and by

Your Honor and was signed off on. That still leaves Mr. Swan in place as defense counsel for purposes of the sentencing and for filing an appeal.

THE COURT: All right.

MR. BRUNS: And so, with the court's permission, I'll withdraw.

THE COURT: Thank you, Mr. Bruns. I've signed that order of withdrawal. And Mr. Espinoza, do you understand what Mr. Bruns was just saying about your concerns about the procedures during the trial?

THE DEFENDANT: Yes.

THE COURT: And you agree that the motion is withdrawn?

THE DEFENDANT: Yes.

THE COURT: Thank you. (Emphasis added.)

Appellant wanted the child hearsay admitted in his trial, there is no error in this action, it was a trial tactic, he did object to the use and admission of the child hearsay statements, contrary to Appellant's claim and this attorney did raise a defense, it was not successful but that is not the measure that this court uses when analyzing this type of claim.

Appellant states in his brief that there were matters that were not addressed by counsel and references matters that are outside the record as evidenced by the complete lack of citation to the record. This court should not consider or should strike this portion of this brief, this is a direct appeal not a personal restraint petition and such reference not supported by the record should not be included or considered. State v. Perez-Cervantes, 141 Wn.2d 468, 483, 6 P.3d 1160 (2000) "Perez-Cervantes' claim that the trial court was biased against him deserves no discussion

because it is totally unsupported by any citation to the record.” This court does not review errors alleged but not argued, briefed, or supported with citation to authority. RAP 10.3; Valente v. Bailey, 74 Wn.2d 857,858,447 P.2d 589 (1968); Avellaneda v. State, 167 Wn. App. 474, 485 n.5, 273 P.3d 477 (2012). Appellate courts are precluded from considering such alleged errors. Hollis v. Garwall, Inc., 137 Wn.2d 683, 689 n.4, 974 P.2d 836 (1999). State v. Koivu, 68 Wn. App. 869, 847 P.2d 13 (1993) “These issues are outside the record on appeal and, therefore, will not be addressed.” Moreover, RAP 10.3(a)(6) directs each party to supply, in his brief, "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." (Emphasis added). State v. Benn, 120 Wn.2d 631, 660-1, 845 P.2d 289 (1993). For the reasons we stated in Lord, we decline to address this contention. An appellate court need not decide a contention that is not supported by citation to authority. Lord, at 853.”

#### **IV. CONCLUSION**

For the reasons set forth above this court should deny allegation. The actions of Appellant’s trial attorney were not ineffective. Clearly the outcome of the trial was not what this Appellant wanted but the fact remains that his attorney did a capable job in this trial and used that which he had, inconsistencies, group “hysteria,” improbably that alleged

incidents could occur as stated by the victims and presented all of that to the jury. The jury just did not agree with that theory of the case.

The actions of the trial court and the verdict of the jury should be upheld, the verdict should stand and this appeal should be dismissed.

Respectfully submitted this 11<sup>th</sup> day of June 2018,

s/ David B. Trefry  
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# **APPENDIX A**

**Cross examination of Officer Grant McCall.**

Q. Okay. Now, in describing the scene as you were there, you said there was, I think I wrote down, maybe at least seven people there in the apartment. All seven people were on that first floor living space, living area; is that correct?

A. All the people were on the first floor when I entered with the exception of the second Maria who came in. I remember there being four of them when they came in the door.

Q. And then when both family units arrived everybody stayed on the first floor?

A. I remember everybody staying on the first floor.

Q. This first floor, it's a pretty open space area. It isn't compartmentalized by closed-off rooms, correct?

A. No, it's not closed off. You can see each little alcove in the apartment just by standing in one spot.

Q. I had my head down when you were describing. If you could help me out. You said the space of the first floor would be about how big?

A. It's probably a little smaller than this section right up here, so the front of the jury box to that door.

Q. Through the bar here?

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A. That would be a stop and then probably part of the way down this way.

Q. How far? Tell me when to stop.

A. I would keep going a little bit. It's probably right about there.

Q. Okay. So almost to the south wall but not quite?

A. Pretty close to the south wall, yeah.

Q. And that's the size of the first floor?

A. Yes.

Q. Okay. Thank you.

While you were talking to different folks and trying to investigate, I think you were describing that the children were sitting quietly on the couch; is that right?

A. That's what I remember, yes.

Q. So there were -- once both family units were there there were four children?

You know what? Let me retract that. Some of the children were more infant size, babies as well?

A. I remember a baby being held by the Maria that came in the door.

Q. So how many girls are sitting on the couch?

A. I remember two girls on the couch.

Q. Were there two other girls perhaps in the area?

A. I don't remember two other girls, no.

Q. Okay. You had mentioned to us that three girls were

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interviewed by the child forensic interviewer later on.

A. I said that?

Q. I thought there was a question about that?

A. No, I didn't say three girls. There was two girls interviewed as far as I know.

Q. All right. Both of those girls were on the couch?

A. I believe they were both on the couch, yes.

Q. Was one of them Liliana or Lily?

A. I learned that later, yes.

Q. And the other one was?

A. The other one was Sadie.

Q. Sadie. Did you have a chance to know whether there was a young lady there by the name of Dulce?

A. No, I don't remember.

Q. How about a young lady named Malina?

A. No, I don't remember her.

Q. You said that when you arrived on scene the mood of the room, the adults were upset. Is that accurate?

A. Yes, that's correct.

Q. And when the second family unit came or second unit family, those adults were upset as well when they learned the news upon their arrival?

A. Well, I remember the second Maria coming in seeming shocked to see me. As I spoke to the first Maria, the father kind of got upset.

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Q. Right. Okay.

The father turned -- Christian turned to his daughter Lily and asked, why didn't you tell? That's what you testified to?

A. He turned and looked at both the girls on the couch and said that. I didn't know which one was Lily until she spoke.

Q. Fair enough. So at this point, what was going on there, is it safe to say that the two girls sitting on the couch knew what each other had been telling the parents, what the allegations were?

MR. JACKSON: Objection, speculation.

MR. SWAN: Let me rephrase.

THE COURT: Rephrase.

Q. (By Mr. Swan) While you were present, did you witness either child telling their parents what had happened?

A. I only witnessed the two phrases that each girl said that I put in my police report.

Q. If you know, would Lily have been able to overhear anything that Sadie had been -- any allegation Sadie had been making about sexual assault?

A. I don't know.

Q. Somehow, though, when Christian turns to the children and says why didn't you tell, we have Lily, who's just arrived, saying that she was afraid or she'd get in trouble?

A. No. Lily had not just arrived. She was sitting on the

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couch when I got there. He had just arrived and turned to the girls and said that and she responded to him.

Q. My mistake. The two adults arrived but Lily was already there?

A. Lily was already there on the couch with Sadie.

Q. So she'd been there the whole time while you'd been there?

A. As far as I remember, she'd been there the whole time.

Q. What was the mood -- there were other children there besides the two girls on the couch?

A. I just remember the two girls on the couch and then the three -- I think there was three that came in with the second Maria. There could have been other children there, but I don't remember them.

Q. We had a chance to speak with you back in July of this year.

Do you recall that you may have described that there were other kids who were around in the room talking, playing, moving about besides just these two on the couch?

A. I don't remember. There could have been. I just don't remember.

Q. Okay. You don't recall having made that statement?

A. I don't even recall the question.

Q. The question I just asked or the question from back in July?

A. July.

Q. Okay. Had it been your impression -- when you were there

were the parents, besides just Christian asking the

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children, were the parents or any of the adults asking the children about what had happened while you were there?

A. No. I don't remember Maria ever speaking to either of the children or the children in the room. She just spoke to me.

Q. But from your investigation and reporting, it was pretty clear that the parents had or the children -- excuse me, a long day. The adults had been asking the children if there had been a sexual assault or asking the details of that?

A. I'm not sure how to answer that.

Q. Okay. I'll rephrase it.

It would be apparent to you -- you had been called out on an allegation of a sexual assault on a child. It was apparent to you that the adults had been questioning the children prior to you getting there? That's how they were getting the information?

A. No, that's not what was relayed to me.

Q. Okay. You knew that the children had been questioned somehow because the parents knew the information?

A. No, I can't say that for sure.

Q. But the parents did have information they were relaying to you about what the children had said at some point?

A. Maria relayed information to me.

Q. So you've been on the job in Enumclaw for 21 years. If you

were to conduct some sort of interview, you knew that it was not a good idea to interview all the kids there together

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that night?

A. That's correct.

Q. That wouldn't be the protocol, as you understood it, to interview the children together?

A. That's correct.

Q. Based on your training and experience, why would it be a bad idea to interview the children together?

A. Typically when you sit in an interview with anyone, if there's more than one person in the room, there are occasions when the second person who's not speaking will answer for the first. You can have two adults, a mom and a dad, brothers and sisters sitting in a room. You'll say, for example, John, did you steal the car? Sally, his sister, will go, no, he didn't steal the car.

From just strictly a law enforcement perspective, if I was going to do an interview like that on minor children, it would be in a room where it was just me and the child by ourselves so that they would answer the questions that were posed to them or that the conversation could be answered by them freely.

Q. Let me refine that slightly. I appreciate that answer. Let me refine it slightly.

If you have witnesses, let's say, to an event, you would want to interview those witnesses separate from each other, correct?

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A. Yes. I would talk to the witnesses one at a time. Of course, when you're in the field you don't always have that privilege. If it was a serious enough case we would try to bring them into the police department where our interview room is and talk to them there in private.

Q. Even on scene, you would want to talk to witnesses separately so one witness wouldn't be relying on what another witness said in giving a statement?

A. Sometimes that's a good idea if you can do that, yes.

MR. SWAN: Let me double check my notes.

Thank you.

THE WITNESS: You're welcome

THE COURT: Mr. Jackson.

MR. JACKSON: Thank you.

REDIRECT EXAMINATION

....

**Carolyn Webster forensic interview expert cross by defense**

Q. So you've done a lot of these interviews. You've had a lot of training on child interviews. I noticed something here. You are interviewing each of these children separately.

A. Yes.

Q. You're interviewing outside the presence of their parents.

A. Yes.

Q. Outside the presence. It's just you and the child, correct?

A. That's correct.

Q. You do that for a number of reasons. One of the reasons would be so -- these children are witnesses, correct?

A. Potential witnesses, yes.

Q. One of the reasons you would do that is to make sure witnesses aren't hearing from each other and getting cues from each other what to say, correct?

A. Yes.

Q. You're aware that witnesses like this, their memories might be -- I'm going to use the word tainted. That might be too strong. They might be tainted by what somebody else or adopt what somebody else says?

A. It's possible.

Q. When you're finished with an interview or interviews of children, do you give any instructions to parents or caregivers at all about what they should or shouldn't say or

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should or shouldn't do with the children?

A. I don't, no.

Q. You don't caution them not to discuss it with the children or anything else?

A. I don't. It's not my role.

Q. That's not your role. Okay.

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**Cross examination of Christian Madrid, father of victim LM**

BY MR. SWAN:

Q. Mr. Madrid, good afternoon.

A. Good afternoon.

Q. Thank you for coming.

A. Thank you.

Q. So a few things I want to speak with you about.

A. Yes, sir. Go ahead.

Q. I want to focus generally on the night that Lupita brought you home at Carmen's graduation.

A. Very well.

Q. When Lupita picked you up at the dairy.

A. Yes, sir.

Q. Lily was not with Lupita, correct?

A. That's correct.

Q. Lily was already at the home when you arrived?

A. Yes, sir.

Q. You were describing it for us, and I want to try to confirm, that at some point you talked to Lily.

A. Mm-hmm.

Q. I want to find out. You said that she was kneeling on the

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floor when you spoke with her?

A. Yes. She was kneeling right to my left.

Q. Okay. Is that in the living room or in a different part of the home?

A. Everyone was in the living room.

Q. Let's talk -- you're very familiar with Carmen's family?

A. Yes, sir.

Q. So let's talk for a moment. We know that Carmen has four children.

A. Correct.

Q. So the youngest that she has now is John Carlos?

A. Yes, sir.

Q. Had he been born yet back in June of 2014?

A. Yes. He's a little older than my son.

Q. Thank you. The next youngest child is Malina?

A. Yes, sir.

Q. And the next youngest child is Dulce?

A. Dulce.

Q. And the next child, her oldest is Sadie?

MS. CASTRO: For the interpreter?

Q. (Mr. Swan) The next oldest child is Sadie?

A. Yes.

Q. When you said your daughter was kneeling on the floor and everyone was there, where was Dulce and Sadie?

A. A little further to the left and a little more in front.

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Q. So when you say -- help us understand something for a moment. This home where you were all in, can you give us maybe an estimate of the size of the living room? If you were at one corner of the living room and I was in an opposite corner, where should I be to help demonstrate the size of the room?

A. Further back, around there. Because it's the living room and kitchen together.

Q. The first floor, is it a square? Is it a rectangle?

A. It's a square.

Q. Okay. So it would be one like might be here about where Marcos is at?

A. About where Marcos is at.

Q. Okay. That's the area we're talking about?

A. Yes, sir.

Q. In this area we have four adults including yourself?

A. Yes, and the officers.

Q. And the officers. Thank you. I was thinking of family but you have the officers. How many officers were there?

A. I believe there were two.

Q. And then the children that we've already mentioned?

A. Yes.

Q. When you say that Sadie and Dulce were just a little bit away, they were probably within just a meter or so of

Lupita, excuse me, of Lily?

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A. Yes, right around a meter, maybe a little more but about a meter.

Q. Thank you.

When you arrived, you were being asked questions about how people were -- what their mood was or what their emotions were. You had a chance to see what emotion Carmen was having, correct?

A. Yes.

Q. Carmen was upset?

A. Yes, she was. She was mad.

Q. She was visibly angry?

A. Yes.

Q. She was talking about what Marco had done to her children?

A. Yes.

Q. She was describing to you and anybody else in the room what Marco had supposedly done to all these children?

A. Not describing what he did but talking about what had happened, what he did.

Q. Thank you.

This was your sort of brother-in-law, Margarito?

A. Yes.

Q. Carmen's husband or partner?

A. Partner.

Q. He was also there?

A. Yes, he was also there.

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Q. Was Margarito participating by talking in any way?

A. No. Margarito was silent.

Q. How about Lupita? How was she responding to this news?

A. No. She was also -- she was also silent.

Q. Okay. Could you see that she was upset by what she had been hearing?

A. After Carmen said that, after she said that Liliana, too, Lupita knew that I was going to be upset. So she didn't say anything.

Q. Could you tell perhaps from her facial expression or whatnot that Lupita was upset about what she was hearing?

A. I didn't even turn to look at Lupita. Once Carmen said my daughter had also been touched, I couldn't look at everyone, and I couldn't think about anything.

Q. So it was pretty clear to everyone that you were upset?

MR. JACKSON: Objection, calls for speculation

what other females felt.

THE COURT: Overruled. He can answer.

A. I think so. I don't know what other people thought or saw in me, but I think that the officer did become aware and noticed that I was either sad or angry because he came up to me. He took me by the arm. He said, dad, stay calm. I

know what you're feeling. I would also like to go, but there is a process. We're going to take care of this according to the law.

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Q. (By Mr. Swan) Okay. Good. That describes what I needed. Thank you.

You asked Lily if these things were true, and she said yes.

A. Yes, sir.

Q. You also had a chance to hear the other children say these things had happened?

A. I didn't ask the other children. I only asked my daughter, and she said it did.

Q. I understand you asked just Lily. While you were there that evening, you were able to hear the other children also say that something happened to them, correct?

A. Yes.

Q. Just to refresh your recollection, you came here to Yakima in this building this last July to give some statements about what you could recall about this case?

A. Mm-hmm, yes.

Q. When you were speaking about those things, you recall that Sadie had spoken about what had happened to her, yes?

A. I don't understand what you're trying to say or of what time you're speaking about.

Q. Let me refine my question. So when you were there in the apartment with the other adults and the children and the police, you overheard Sadie say that Marcos touched her when she was in the kitchen?

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A. I believe so.

Q. And did Dulce speak and say what happened or when it happened to her or can you recall?

A. No.

Q. So to be clear, Sadie is Carmen's oldest daughter?

A. Yes.

Q. And Dulce is the next oldest daughter?

A. Yes, sir.

Q. And so you know it was Sadie who was saying Marcos had touched her in the kitchen?

MR. JACKSON: Objection. I think the answer was I believe so. It's asked and answered.

THE COURT: Say it again.

MR. JACKSON: He asked that question and he said I believe so. So it's asked and answered.

THE COURT: Overruled. Go ahead.

Q. (By Mr. Swan) Is that true? Is that what you best recollect, that it was Sadie that said she had been touched in the kitchen?

A. I don't know if it was in the kitchen. I really don't

remember if it was the kitchen.

Q. When you were here this last July to talk to the attorneys in this case, at that time you said it was Sadie who said she had been touched by Marcos in the kitchen. That's what you said in July, correct?

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A. I'm trying to remember.

Q. Okay. I'll ask it a different way. Is there any reason why that could not be true?

A. I don't believe so. If the children said that, it's because that's what happened.

Q. Okay. Thank you. I think I understand.

Your son, Michelangelo, was born July 13th of 2014?

A. Yes.

Q. Here in Yakima?

A. Yes.

Q. I'm not sure. I got confused on some other dates. You moved -- when did you move to Enumclaw or when were you staying with Carmen in Enumclaw?

A. I'm really bad at remembering dates.

Q. Let me ask you this question.

A. I don't know. June or July. I just don't remember exact dates, but I know it was in 2014. It was after Michelangelo was born. He was just a tiny baby then.

Q. That's what I was trying to find out. Thank you.

So you had been living in Sunnyside when your baby was born in January of 2014?

A. Yes.

MR. SWAN: Let me check my notes. We're almost done.

I think I am. Thank you.

PR 111-118

Defense counsel cross LM's mother.

Q. Is there any chance that Lily may have gone with other family members off to Carmen's house while you went to go pick up Christian on your own?

A. No. RP 192.

This defense discussion regarding some recent information that LM has a medical condition. Mr. Swan's statement:

MR. SWAN: Your Honor, I'm still now, twelve hours later, trying to wrap my head around what to make of this. Quite frankly, the defense's position was it would be absolutely preposterous to believe that child was going to begin bleeding after being touched over the top of her pants and underwear. That just wasn't going to happen ever.

The reason why I did the cross-examination I did with Lily yesterday and focused on some of that was for that reason. I expect to do that with Sadie today as well. We heard about it during the video. Now I'm kind of being caught. I can't necessarily point fingers other than it would have been great to have this explanation two years ago when Ms. Webster heard this or for somebody along the way to ask.

I guess my concern, as I analyze this, I guess the explanation the state wants to bring out now essentially is

a way to tear at one of the defenses we have. Well, gosh; no wonder the child -- you're right. It wouldn't have made sense for the child to be bleeding from the incident the child is describing.

Now we have this excuse why the child is bleeding. Therefore, now it sounds more credible. What am I supposed to do with that now? That's what we're hearing now.

I don't know. I guess I'm putting on the record I'm trying my best to contemplate what to do with the new information. I'm not sure any learned or experienced counsel would know. I'll make my best effort and leave it at that. RP 203-4.

# APPENDIX B

What we've

RP 442

tried to show you through cross-examination and presentation is these kids are inconsistent and everything they had to say isn't necessarily because they had an experience that they make an accusation out of. This is knowledge they can get independent, outside of the accusation that's been presented to you.

RP 443

You folks saw it. I'm glad they filmed it. I'm glad we have it. You had one child say, well, the other cousin was with me. When she takes the stand, oh, my little sister was, too. The other little sister was, too.

PR 446

...

I think it was Dulce who said that she was being touched like she sees mommy and daddy do. We hear Dulce talk about a show Marco was watching. It's two people under the covers.

I mean, I can think back to 1979, you know, my babysitter watching Days of Our Lives. You saw people who looked like they were unclothed underneath covers. That was 1979. That was not 2016 when I feel uncomfortable watching Sunday afternoon football with my kid and thinking, wow, that was certainly inappropriate and that's a commercial.

What must the show be like?

We know the kids were looking up things on the internet. We know mom was showing a movie. You know, I'm not here to berate the parents. They aren't trained in this. They aren't like Ms. Webster who knows why you shouldn't interview kids at the same time, why you shouldn't be showing them things about the courtroom and things like that. They don't know that. The important part is that influences kids. We know how easily kids are influenced.

RP 449

...

...One of the children says, Marco is my boyfriend.

This is how it starts. This is the spark that sets off the wildfire. Marco checks it out. It's Lily who says, well, you say he's your boyfriend because he touches you.

I don't know what the explanation here is. Is it simply that it's kind of fun to say tabu things? You know, you're talking. You're emulating grownups. You're talking grownup, talking about boyfriends and touching and kissing. That was a new one. You heard about kissing on the cheek. It's fun and exciting. It's things that maybe we're not supposed to talk about. Our parents won't know. They can't hear us two feet away. Kids don't realize.

Margarito says he walked over. Sadie, said it's not true to Lily. I don't think Dulce spoke up at all. If she did she said it wasn't true. Lily said it was true. Lily

RP 453

said that Marco was touching Malina. How would she know?

So Margarito does what all concerned parents do when they hear something like that. You don't let that go. You ask questions. Unfortunately it goes off, like I said, like a wildfire hours later asking the kids.

...

I'm thinking about a young man I know. For years he used to sit around the dinner table and listen to the rest of the family talk about Bailey the cat and all the fun we used to have with Bailey the cat. The older sister would talk about remembering when they went and got Bailey and how much fun it was to play with Bailey.

To this day you can ask that 15-year old -- he knows better now. You can ask him about his memories with playing with Bailey. The problem is Bailey died two months before he was born, but he has distinct recollections of Bailey.

The children may actually believe that these things happened. They're impressionable. You learned that last week right here before your eyes. You saw it happen. Sadie

RP 455

was telling us about the colostomy bag that she remembered being taped to the side of her stomach. At six months old when it was removed, she remembered a colostomy bag being taped to the side of her stomach.

She didn't know that. That's what she's heard over the years. It's as true to her telling you as if she -- well, it really happened. She doesn't know that.

...

You know, the lack of the correct details here, think about it. These children have said nothing that they couldn't have found out independently. In fact, their lack of details or their inconsistencies or conflicts and all these other things I've talked about is just as consistent, in fact, probably more consistent with children making up stories than it is with a person having done it.

What tells you about the evidence that you saw says that's the only thing that could have happened, that Mr. Espinoza touched these children and molested them? Is that the only thing that happened? There's reasonable doubt, reason to believe.

I would suggest to you it's credible, reasonable, not unreasonable, reasonable to believe that this started off as a spark and then a wildfire. It started with kids teasing each other. Because the kids took the cues from the adults it spread. If that's just as reasonable, then you have to maintain Mr. Espinoza's presumption of innocence.

You would want them, as the quality control inspector, to say the state has not been able to prove this beyond a reasonable doubt. We're going to fill out the form the

judge will provide not guilty on all three counts.

RP 459

DECLARATION OF SERVICE

I, David B. Trefry, state that on this date I emailed a copy of the Respondent's Brief to: Mr. Eric J. Nielsen, at [Sloanej@nwattorney.net](mailto:Sloanej@nwattorney.net)

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

DATED this 11<sup>th</sup> day of June, 2018 at Spokane, Washington,

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# YAKIMA COUNTY PROSECUTORS OFFICE

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