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**State of Washington**  
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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JERREMY JOE GMEINER, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The trial court's declaration of a mistrial in Jeremy Joe Gmeiner's first trial was premature and resulted in a violation of his right not to be placed in double jeopardy.

2. A. The trial court's failure to examine the child at a child hearsay hearing, in either the first or second trial, contravenes the statutory requirements of RCW 9A.44.120 and existing case law.

B. The trial court's Findings of Fact 37, 38, 39, 40 and Conclusions of Law 1, 2, 3 and 4 were entered without having the child appear in court and are speculative at best. CP 103-104; Appendix "A."

3. Defense counsel was ineffective when he agreed to not have the child appear at the child hearsay hearing.

4. A. The prosecuting attorney committed misconduct during cross-examination of Mr. Gmeiner when he questioned him about whether or not his sister was lying when she testified.

B. The prosecutor elicited improper opinion testimony from Detective Satake.

5. Cumulative error deprived Mr. Gmeiner of a fair and impartial trial under Const. art. I, §§ 3 and 22, as well as the Fourteenth Amendment to the United States Constitution.

## **II. ISSUES PRESENTED**

1. Did the trial court properly declare a mistrial, at request of defense counsel, after the jury announced it was deadlocked at defendant's first trial?
2. Did the parties agreement to not call the three-year old child in the child hearsay hearing, when there was corroborative, eyewitness testimony to what the single statement described, result in manifest error, invited error, or harmless error?
3. Were the trial court's Findings of Fact 37, 38, 39, 40 and Conclusions of Law 1, 2, 3, and 4 based upon testimony from the child hearsay hearing?
4. Was there little possibility that the result of the trial would have been different, undermining any ineffective assistance of counsel claim, where defense counsel agreed to not have a three-year old child testify at a child hearsay hearing when there was corroborative, eyewitness testimony to what the single statement described?
5. Did the prosecutor commit misconduct when cross-examining defendant?
6. Did the prosecutor elicit improper opinion testimony from Detective Satake?
7. Was there cumulative error requiring remand for a new trial?

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

Sarah Gmeiner, age 28, was living at her father's house at 1320 South Skipworth Road in Spokane Valley, Washington, in September of 2016. Cochran RP 751. Also living there were her two children and her father's wife. Cochran RP 752. Her youngest child, A.B.G., was three years old with a date of birth of May 31, 2013. Cochran RP 752. Ms. Gmeiner worked as a licensed massage therapist. Cochran RP 752.

Her oldest sibling, defendant Jerremy Gmeiner, was forty years old. Cochran RP 753. Ms. Gmeiner felt she had a good relationship with defendant and that he got along great with her kids. Cochran RP 754.

Defendant had been messaging her for a couple days to see if she would work on his injured shoulder. Cochran RP 757-58. He came over to her house on September 21, 2016. Cochran RP 756. It was about 3:30 p.m. Cochran RP 759. Ms. Gmeiner had previously picked up both of her children and no one else was home when defendant came over. Cochran RP 759.

Ms. Gmeiner gave the defendant a massage in the upstairs living room. Cochran RP 761. Her daughter, A.B.G., was running all over the place. Cochran RP 761. Ms. Gmeiner's step-mother, Patti Gmeiner, came home around 4:30 p.m. and went straight to her room and never came back out. Cochran RP 763-64. After the massage, A.B.G., who was still excited to see her uncle, came into the living room and ended up playing with her dump truck in defendant's lap. Cochran RP 764.

Ms. Gmeiner then heard the defendant asking A.B.G. to stop playing with the truck in his lap so she asked A.B.G. to stop as well. Cochran RP 765. A.B.G. was still in defendant's lap when Ms. Gmeiner heard the defendant say "Huh?," as if he was no longer listening to Ms. Gmeiner. Cochran RP 766. She saw defendant just staring into his lap, no longer

listening to her, gazing at her daughter. Cochran RP 766. He was looking at A.B.G. lustfully, as if he was sexually aroused by her. Cochran RP 767. Ms. Gmeiner knew she had to do something, so she stood up, which caused A.B.G. to stand up as well. Cochran RP 766.

Right after Ms. Gmeiner stood up, her son, who was downstairs, started screaming hysterically. Cochran RP 768. She thought he might be frustrated playing a game on her phone, but could not be sure, so she ran downstairs to check on him. Cochran RP 768-69. It was the phone that caused his frustration, so she immediately took it from him and went back upstairs. Cochran RP 770.

Ms. Gmeiner rounded the corner of the kitchen and went to the living room. Cochran RP 772. She saw defendant on his knees, her daughter between his legs, with their foreheads touching. Cochran RP 772. He had his hands in his shorts and was masturbating on her daughter's abdomen, on her vagina, while humping and gyrating back and forth. Cochran RP 773. Ms. Gmeiner continued to walk up on defendant without him seeing her. Cochran RP 773. She could see his pelvis touching her daughter's entire abdomen and vagina. Cochran RP 773.

Ms. Gmeiner got right next to defendant and could hear he was breathing heavily and was starting to moan. Cochran RP 774. She stepped in between defendant and her daughter, he turned ghost white, and

immediately stood up. Cochran RP 776. He tried to rotate his hips away from Ms. Gmeiner and pulled his hand out of his pants. Cochran RP 776.

Defendant immediately asked, “What do you think you saw?” Cochran RP 776. Ms. Gmeiner did not reply and defendant asked the same question again. She eventually just said, “Get out of my home, get out of my home, get out of my home.” Cochran RP 777. Defendant just stood there so she went to the front door and opened it. Cochran RP 777. Defendant asked again what she thought she saw and Ms. Gmeiner, with phone in hand, said, “Jeremy, if you leave my house right now I will not report this. You have to get off my property. But if you don’t leave, I’m going to be calling 911 right now.” Cochran RP 777. Defendant left and she shut the door. Cochran RP 777.

Ms. Gmeiner then went to make sure the back door was locked. Cochran RP 778. She could see defendant on the front porch about twenty feet away, his hand in his pants adjusting himself, still with an erection. Cochran RP 778. Defendant saw her and asked again what she thought she saw. Cochran RP 779. Ms. Gmeiner responded, “I saw you masturbating with my 3-year-old daughter in between your legs. You need to get off my property. You need to leave.” Cochran RP 779. Defendant then turned and walked off, never denying the accusation. Cochran RP 779.

Ms. Gmeiner then called her mom and said, “Mom, I just caught Jeremy masturbating with [A.B.G.]” Cochran RP 780-81. Her mom told her to call 911. Her mom, Joanne Gmeiner, who did not testify in the first trial, but did in the second, said Ms. Gmeiner was hysterical and crying. Cochran RP 203, 830, 1008. She confirmed that Ms. Gmeiner told her that defendant was masturbating on A.B.G. Cochran RP 831.

Ms. Gmeiner called 911 and when deputies arrived, she told them what had happened. Cochran RP 781, 786. Her mother arrived from Montana sometime between 7 or 8 that night. Cochran RP 787. While Ms. Gmeiner was talking downstairs to her mother, A.B.G. said to them, “You’re mad at Jeremy Mom?” Ms. Gmeiner replied, “Yes, [A.B.G.], I am very mad at Jeremy. Do you know why?” A.B.G. said, “Yes, because Jeremy touched my butt.” Cochran RP 788. Ms. Gmeiner explained that A.B.G. uses that term to describe her entire genital area. Cochran RP 789.

Deputy Veronica Van Patten of the Spokane County Sheriff’s Department responded to Ms. Gmeiner’s 911 call on September 21, 2016. Cochran RP 880-81. Deputy Van Patten arrived at 6:06 p.m. and contacted an emotionally upset Ms. Gmeiner outside her home. Cochran RP 882. Ms. Gmeiner told the deputy that she gave defendant a massage and her daughter, A.B.G., was playing with a truck in his lap. Cochran RP 884. Defendant then got a lustful look gazing at A.B.G. Ms. Gmeiner’s son then

threw a fit downstairs, she went down to deal with it, then came right back up and saw defendant kneeling in front of A.B.G., their foreheads touching and his hand down his pants masturbating, thrusting his hips back and forth. Cochran RP 884.

Deputy Matthew Ennis of the Spokane County Sheriff's Department contacted the defendant on September 22, 2016. Cochran RP 860, 862. Defendant told him that he had gone to Ms. Gmeiner's house for a massage and they ended up in the basement. Cochran RP 866. As they were going back upstairs, Ms. Gmeiner's son acted up and she handed off her daughter, A.B.G., to him. Cochran RP 866. A.B.G. kicked him in the groin, causing him pain, and his boxers had gotten bunched up so he reached inside his shorts to unbunch them. Cochran RP 866-67. Just then Ms. Gmeiner came up the stairs and must have thought he was exposing himself, ordering him out of her house. Cochran RP 870.

Detective Robert Satake of the Spokane County Sheriff's Department Sexual Assault Unit was assigned to investigate this case on September 26, 2016. Cochran RP 836, 838. He interviewed Ms. Gmeiner by phone on that date. Cochran RP 842. Ms. Gmeiner described to him how defendant had his hands down his pants with an erect penis and that he was pressing against A.B.G.'s belly and vaginal area. Cochran RP 845.

Detective Satake also said that during the course of his investigation he found no motive for Ms. Gmeiner to fabricate or exaggerate what she saw. Cochran RP 848.

Child hearsay hearing.

On December 5, 2016, a child hearsay hearing was held before the Honorable Judge Maryann Moreno. Cochran RP 42. All parties agreed the child would not be called, which the court noted. Cochran RP 8-9, 78. Ms. Gmeiner was the only witness called. Cochran RP 42-70. She testified A.B.G. had said “‘Mom, you’re mad at Jerremy?’ And I said, ‘Yes, Ava, I’m very mad at Jerremy. Do you know why?’ And she knew. She said, ‘Yeah, I’m – because Jerremy touched my butt.’” Cochran RP 61. The defense objected to the admission of the statement saying they felt the test for admission had not been met. Cochran RP 76. The court ruled the statement admissible. Cochran RP 78-81. Findings of Fact and Conclusions of Law were entered on May 23, 2017. CP 100-04.

A second trial started on April 10, 2017. Cochran RP 522. The court adopted its prior ruling on child hearsay, and the defense renewed its prior objection to the admission of the child hearsay statement. Cochran RP 523.

#### IV. ARGUMENT

##### A. THE TRIAL COURT PROPERLY DECLARED A MISTRIAL AS REQUESTED BY DEFENSE COUNSEL AFTER THE JURY ANNOUNCED IT WAS DEADLOCKED.

“Standards governing whether retrial is barred differ dramatically depending on whether the defendant requested the mistrial or whether the State sought a mistrial over the defendant’s objection. When the defendant requests a mistrial, double jeopardy does not bar retrial. *State v. Wright*, 131 Wn. App. 474, 484, 127 P.3d 742 (2006) (citing *United States v. Scott*, 437 U.S. 82, 99, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978)); *but see State v. Martinez*, 121 Wn. App. 21, 35, 86 P.3d 1210 (2004) (holding that retrial may be barred as a violation of the right to fair trial if the defendant requested a mistrial due to outrageous government conduct).

In contrast, a mistrial without the defendant’s consent must be based on “manifest necessity” in order to circumvent the double jeopardy prohibition. *State v. Melton*, 97 Wn. App. 327, 331, 983 P.2d 699 (1999). When the State seeks a mistrial over the defendant’s objection, “‘extraordinary and striking circumstances’ must exist before the judge’s discretion can come into play.” *State v. Jones*, 97 Wn.2d 159, 164, 641 P.2d 708 (1982). The trial court must “engage in a scrupulous exercise of judicial discretion before foreclosing a defendant’s valued right to have his trial completed by a particular tribunal.” *Melton*, 97 Wn. App. at 331-32

(quoting *State v. Browning*, 38 Wn. App. 772, 775, 689 P.2d 1108 (1984)) (footnote and internal quotations omitted). ““In evaluating the manner in which the trial court exercised its discretion, the fundamental question is whether it acted in a precipitate or unreasoning fashion.”” *State v. Robinson*, 146 Wn. App. 471, 478-79, 191 P.3d 906 (2008) (quoting *Melton*, 97 Wn. App. at 333).

As stated in *State v. Burdette*, 178 Wn. App. 183, 195, 313 P.3d 1235 (2013):

A jury’s assertion that it is deadlocked may result in the trial court declaring a mistrial. *State v. Jones*, 97 Wn.2d 159, 163, 641 P.2d 708 (1982). However, to create the “extraordinary and striking” circumstances that justify a mistrial, there must be a factual basis for the trial court’s determination that the jury is hopelessly deadlocked. *Jones*, 97 Wn.2d at 164, 641 P.2d 708 (quoting *State v. Bishop*, 6 Wn. App. 146, 150, 491 P.2d 1359 (1971)). At times, the jury’s own statement that it is hopelessly deadlocked can serve as the factual basis for the trial court’s decision to grant a mistrial. *Jones*, 97 Wn.2d at 164, 641 P.2d 708.

In the case at bar, the court engaged in an extensive colloquy with the parties when the jurors told the court’s judicial assistant they were deadlocked. Cochran RP 494-500. Defense counsel finally stated:

MR. ZELLER: What makes me a little nervous is if they are deadlocked and we’re sending them home to come back tomorrow and they’ve said they’re deadlocked, then some of them might think, “Well, now I’ve got -- I’ve got to say something one way or the other just to be done with this process,” because they’ve said they can’t reach a verdict and we’re essentially not honoring that by telling them keep

going. And at some point I get nervous that people are going to start switching their mind to be done with the process.

THE COURT: So what are you asking me to do?

MR. ZELLER: Bring them in, ask the question. If they can't reach a verdict, then I think we're at a mistrial.

THE COURT: All right. Let's go ahead and bring them in. Let's just start with that.

Cochran RP 500.

The court then brought the jury in and the following exchange took place:

THE COURT: All right, good afternoon. You've been called back into the courtroom to discuss the subject of the reasonable probability of reaching a verdict. I want to caution you that because you have begun the deliberation process, it's important that you don't make any remarks which might adversely affect the rights of either party or which may disclose the opinions of the jury. I'm going to ask the presiding juror if there is a reasonable probability of the jury reaching agreement within a reasonable time. The presiding juror will simply answer yes or no and not say anything else or disclose any other information or indicate the status of your deliberations. Okay? So who is our presiding juror?

JUROR NO. 12: (Hand raised.)

THE COURT: Okay. So my question is directed to you. Is there a reasonable probability of the jury reaching agreement within a reasonable time?

JUROR NO. 12: No. No.

THE COURT: Okay. All right, head on back to the jury room.

Cochran RP 500-01.

After the jury declared it was deadlocked, the court inquired of defense counsel as follows:

THE COURT: Okay. What does defense counsel want?

MR. ZELLER: And I just get nervous, again, kind of as Mr. Martin was saying there, that if the jury comes back tomorrow with a verdict, that the appeal issue is that, you know, they essentially felt like they had to do something different than what they told us they've done. So I think at this point if they can't reach a verdict, I would just ask for a mistrial.

Cochran RP 502.

The court then made the following ruling while declaring a mistrial:

THE COURT: All right. All right. So we've had at least a full day and a half of testimony. And quite frankly, though, it's not really a complex case. There were not a lot of jury instructions. They're all pretty -- sometimes jury instructions are convoluted, you've got lesser included's. These instructions appeared to be pretty straightforward. I don't know that the length of time really makes too much difference, and that's what the case law says. And they've been out since 11:30 and they've had lunch. And I don't -- again, it seems -- it appears in the manner in which the presiding juror answered that she was pretty certain that they were not going to be able to reach a verdict. So I am going to go ahead and declare a mistrial. Okay?

Cochran RP 503.

The defendant cites *Jones*, 97 Wn.2d 159, for the proposition that the court abused its discretion in declaring a mistrial because the jury did not deliberate a reasonable amount of time. However, the critical difference is in *Jones* the parties did not ask for a mistrial, thus the "extraordinary and

striking circumstances” standard applied. Here, the defendant requested a mistrial, so the extraordinary and striking circumstance standard does not apply and therefore double jeopardy does not attach.

Even under an “extraordinary and striking circumstance” analysis, not only does the jury’s own assertion of being deadlocked qualify as such a circumstance, but the court made the appropriate findings that the jury deliberated an adequate amount of time given the nature of the case.

**B. A CRIMINAL DEFENDANT WHO ALLEGES FOR THE FIRST TIME ON APPEAL THAT HIS CONSTITUTIONAL RIGHT OF CONFRONTATION WAS VIOLATED MUST DEMONSTRATE THE EXISTENCE OF MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT PURSUANT TO RAP 2.5(A)(3).**

1. The defendant cannot show manifest error.

It is a fundamental principle of appellate jurisprudence in Washington and in the federal system 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 principle is embodied federally in Fed. R. Crim. P. 51 and 52, and in Washington under RAP 2.5. RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed by this court in *Strine*, where the 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.

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

*Strine*, 176 Wn.2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. Specifically regarding RAP 2.5(a)(3), the Court has 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) (quoting *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982), *aff’d in part, rev’d in part*, 99 Wn.2d 663, 664 P.2d 508 (1983)).

An error is considered manifest when there is actual prejudice. The focus of this analysis is on whether the error is so obvious on the record as to warrant appellate review. *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). An appellant can demonstrate actual prejudice by making a plausible showing that the asserted error had practical and identifiable consequences in the trial. *State v. Irby*, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015) (citing *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011)).

“[T]o 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.” *O'Hara*, 167 Wn.2d at 100. Importantly, “[i]t 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.” *Id.*

The complained of error in this case is not practical or identifiable. The child hearsay statement would have been admissible whether the child was found competent or incompetent. The reliability of a child hearsay statement “does not depend on whether the child is competent to take the witness stand, but on whether the comments and circumstances surrounding

the statement indicate it to be reliable.” *State v. Swan*, 114 Wn.2d 613, 648, 790 P.2d 610 (1990). If the child had been called at the child hearsay hearing and deemed incompetent, she would have been declared unavailable and her statement would have been admitted because they were found to be spontaneous, reliable and corroborated. *See* CP 51. If she were found to be competent, the statements would have been admitted through her mother as they were found to be spontaneous, reliable and corroborated. CP 51.

2. The invited error doctrine precludes the defendant from setting up this alleged error and then complaining of it on appeal.

The invited error doctrine precludes a criminal defendant from seeking appellate review of an error he helped create. *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999). 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 considers whether the petitioner 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 Pers. Restraint of Copland*, 176 Wn. App. 432, 442, 309 P.3d 626 (2013).

The following discussion took place between the court and the parties prior to the child hearsay hearing:

THE COURT: All right. I've got witnesses listed out in the joint trial management report. And they are -- now, my understanding is you're not having -- you're not bringing the minor in to testify, right?

MR. MARTIN: Well, Judge, I didn't know what your Honor's preference was going to be. I fully expect her not to be -- not to have the capacity to testify. She's -- we've met her. During our meet-and-greet she was barely able to let go of her mother the entire time that we were doing it. She cried when I tried to talk directly to her. So I'm not sure if she's going to be open to that kind of testimony. And I can elicit a little testimony from her mom, but I don't know that she's going to be sufficiently verbal. I didn't know if your Honor wanted a chance to see the child in court to make that ruling yourself or you'll just accept my representation of it.

THE COURT: I don't know. What does the defense think? Were you expecting the child to be here?

MR. ZELLER: No, your Honor.

MR. CHARBONNEAU: (Moved head from side to side.)

Cochran RP 8-9.

By agreeing to not having the child present for the child hearsay hearing, the defendant affirmatively assented to it and cannot now complain that it is error.

3. Any error was harmless.

If the record supports a finding that the jury verdict would be the same absent the error, harmless error may be found. *State v. Berube*,

150 Wn.2d 498, 506, 79 P.3d 1144 (2003). A constitutional error is harmless if the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the error. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). This court employs the “overwhelming untainted evidence” test and looks to the untainted evidence to determine if it so overwhelming that it necessarily leads to a finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

In *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011), the erroneous admission of testimonial hearsay from a sexual assault clinic nurse was subject to harmless error analysis. In the case at bar, there is overwhelming untainted evidence without the single statement of A.B.G. Ms. Gmeiner, was an eyewitness to the molestation. She is corroborated by her immediate reporting to her mother, Joanne Gmeiner, and law enforcement.

Joanne Gmeiner testified that Ms. Gmeiner was hysterical when she called her and said defendant was masturbating on A.B.G. Cochran RP 830-31. Deputy Van Patten testified she responded to Ms. Gmeiner’s 911 call and Ms. Gmeiner met her outside her house, crying, shaking and visibly upset. Cochran RP 882.

Deputy Van Patten said Ms. Gmeiner told her:

that she is a massage therapist and that her brother stopped by; she was doing some work on his back and they were hanging out and he was visiting with her children. And in -- during the course of that [A.B.G.] was standing near Jeremy's lap, and he -- she was playing with a toy truck on his lap. And she observed him making kind of like a lustful look down toward her -- her daughter. And she said she -- that's how she could describe it was that it just made her feel uncomfortable and -- but she ignored it and just moved [A.B.G.] from the area that he -- she was standing, because she didn't want to feel like she was overreacting. And shortly after that her son was downstairs in the house; and she could hear him kind of, you know, just being a normal kid and kind of throwing a fit over a video game. So she went down the stairs to discipline him. And she said she was down there for maybe one minute, and when she returned back upstairs she observed Jeremy was kneeling in front of [A.B.G.] and he had his hand down his pants and it appeared that he was masturbating. And she said that their foreheads were pressed together and he was looking into her eyes or looking into her face area and he was thrusting his hips back and forth toward her.

Q. Did she express to you any doubt about what her brother was doing, whether it was masturbation or some other type of an act?

A. No. She said that -- she said it was clear that he was masturbating.

Cochran RP 883-84.

The prosecutor then asked Deputy Van Patten:

Q. Did she tell you whether she confronted her brother when she saw him doing this?

A. She did. She said that -- she said, "What are you doing?" or "What do you think that you're doing?" And he said, "What did you think I was doing?" She said immediately

after that he had pulled his hand out of his pants. And -- and she said "Well, it was pretty clear what you were doing," and that he said, "Well, what did you see?" a few different times. And then she said, "You need to leave," and she -- and then he left the residence at that point.

Cochran RP 885.

The defendant also corroborated Ms. Gmeiner's statement by his own call to 911 as follows:

Deputy Ennis testified he listened to the 911 call made by the defendant and the defendant said "My sister had called in saying that I was doing something to her daughter." Dispatch asked him what his sister had said he was doing, and he replied, "She said I was playing with myself."

Cochran RP 870.

The jury verdict would have been the same for the above reasons, and also because the statement would have been admitted whether A.B.G. was properly found incompetent or competent. Any error was harmless.

**C. THE TRIAL COURT'S FINDINGS OF FACT 37, 38, 39, 40 AND CONCLUSIONS OF LAW 1, 2, 3 AND 4 WERE BASED UPON TESTIMONY FROM THE CHILD HEARSAY HEARING.**

After hearing testimony from Ms. Gmeiner in the child hearsay hearing, the court made findings of fact and conclusions of law. The court analyzed the testimony under RCW 9A.44.120, recognizing the court must find the statement both reliable under its time, content and circumstances, and corroborated before it could be admitted. Cochran RP 78. The court found A.B.G. had no motive to lie, Cochran RP 79; that A.B.G. accurately

reports her perceptions and has the general character of a three-year-old, Cochran RP 79; that more than one person heard the statement, Cochran RP 61; that A.B.G. made the statement spontaneously, Cochran RP 80; and that the timing of the statement, to her mom and grandmother, was right before bedtime several hours after the event happened, Cochran RP 80-81.

The court then reviewed the *Dutton*<sup>1</sup> factors, finding the statement contained no express assertion of past fact, cross-examination could not show the declarant's lack of knowledge, the possibility of the declarant's faulty memory is remote, and the circumstances are such that there's no reason to suppose the declarant misrepresented the defendant's involvement. Cochran RP 81.

The court concluded that the statement had all the indicia of reliability, especially given the state had an eyewitness to the event, and ruled it admissible. Cochran RP 81. The court based its findings on testimony adduced at the child hearsay hearing, and not on speculation.

**D. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR WAIVING THE CHILD'S PRESENCE AT THE CHILD HEARSAY HEARING BECAUSE THE RESULT WOULD HAVE BEEN THE SAME.**

To show ineffective assistance of counsel, a defendant must show (1) that defense counsel's conduct was deficient and (2) that the deficient

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<sup>1</sup> *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct 210, 27 L.Ed.2d 213 (1970).

performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *see also Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show deficient performance, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness. *Reichenbach*, 153 Wn.2d at 130. To show prejudice, a defendant must show a reasonable probability that, but for counsel's purportedly deficient conduct, the outcome of the trial would have differed. *Id.* If a defendant fails to establish either prong of the ineffective assistance of counsel test, the court need not inquire further. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

The defendant carries the burden to show deficient performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). A court gives great deference to trial counsel's performance and begins the analysis with a strong presumption counsel performed effectively. *State v. West*, 185 Wn. App. 625, 638, 344 P.3d 1233 (2015). Because ineffective assistance of counsel claims present mixed questions of law and fact, a court reviews them de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To demonstrate ineffective assistance of counsel based on the failure to object to the child not testifying in the child hearsay hearing, the claim

here, the defendant must show (1) that the trial court would have sustained the objection if raised, (2) an absence of legitimate strategic or tactical reasons for failing to object, and (3) that the result of the trial would have been different. *See State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). The defendant cannot sustain his burden on either (2) or (3).

Trial strategy is a proper reason for defense counsel to agree to not have a three-year-old testify at a child hearsay hearing.

The Fourth Edition of the ABA Criminal Justice Standards for the Defense Function states:

**Standard 4-5.2 Control and Direction of the Case**

(a) Certain decisions relating to the conduct of the case are for the accused; others are for defense counsel. Determining whether a decision is ultimately to be made by the client or by counsel is highly contextual, and counsel should give great weight to strongly held views of a competent client regarding decisions of all kinds.

...

(d) Strategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate. Such decisions include how to pursue plea negotiations, how to craft and respond to motions and, at hearing or trial, what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what motions and objections should be made, *what stipulations if any to agree to*, and what and how evidence should be introduced.

(Emphasis added.)

The decision whether to call or interview a witness is presumed to be a matter of legitimate trial strategy or tactics that generally will not support an ineffective assistance claim. See *In Re Pers. Restraint Petition of Stenson*, 142 Wn.2d 710, 735-36, 16 P.3d 1 (2001); *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). In *State v. Warren*, 55 Wn. App. 645, 652-53, 779 P.2d 1159 (1989), the court stated it could not perceive a legitimate trial strategy in counsel's decision to waive a reliability hearing for child hearsay. Unlike *Warren*, in this case, the parties did not waive the reliability hearing. The legitimate trial strategy here, by agreeing to waive the presence of the child, is avoiding the risk that the three-year-old child be found competent and testify in front of the jury, especially when there is already corroborative, eyewitness testimony. This takes on greater importance at the time of the second trial, as the child was now almost four-years old and more likely to be found competent.

Further, in *Warren*, the court found there was no reasonable probability that the outcome would have been different but for the alleged error because the hearsay statement would have been found reliable and admissible under RCW 9A.44.120. *Warren*, 55 Wn. App. at 653. In *State v. Leavitt*, 107 Wn. App. 361, 27 P.2d 662 (2001), the court found the failure to hold the reliability hearing was harmless error because the statement met the factors laid out in *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984),

known as the *Parris*<sup>2</sup>/*Dutton* factors. *Leavitt*, 107 Wn. App. at 357-58. Because the court found harmless error, the court determined the second part of the *Strickland* test was not met by counsel's failure to object because there was not a reasonable probability the outcome would have been different. *Id.* at 359.

In the case at bar, the court also found that the statement met the admissibility standards laid out in *State v. Ryan*. See CP 100-04. The outcome would have been the same if the child would have testified at the child hearsay hearing. Either she would have been found incompetent, and therefore unavailable, and the statements would have been properly admitted, or she would have been found competent, and testified to the statements at trial herself. Even if she froze on the stand, the statements still would have been properly admitted through her mother. *Swan*, 114 Wn.2d at 628.

Additionally, in *Warren*, the court noted that “an explicit account of sexual contact that essentially ‘mirrored’ the challenged hearsay statements” was given at trial by the victim and therefore the result would most likely not have been different. *Warren*, 55 Wn. App. at 653. Here, an explicit account of the sexual contact between defendant and A.B.G. was

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<sup>2</sup> *State v. Parris*, 98 Wn.2d 140, 654 P.2d 77 (1982).

given by an eyewitness, Ms. Gmeiner, and therefore the result here would most likely also not have been different. Therefore, for the reasons above, defendant's ineffective assistance of counsel claim must fail.

**E. THE PROSECUTOR DID NOT COMMIT MISCONDUCT WHEN CROSS-EXAMINING DEFENDANT.**

Cross-examination “designed to compel a witness to express an opinion as to whether other witnesses were lying” constitutes improper conduct. *State v. Padilla*, 69 Wn. App. 295, 299, 846 P.2d 564 (1993). However, to succeed on a prosecutorial misconduct claim, “a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor’s conduct was both improper and prejudicial.” *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (plurality opinion). In order to show prejudice, a defendant must show there is a substantial likelihood the misconduct affected the jury’s verdict. *State v. Vassar*, 188 Wn. App. 251, 256, 352 P.3d 856 (2015). If the misconduct did not result in prejudice that had a substantial likelihood of affecting the verdict, the inquiry ends.

“Absent a proper objection, a request for a curative instruction, or a motion for a mistrial, the issue of a prosecutor’s misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill intentioned

that no curative instructions could have obviated the prejudice engendered by the misconduct.” *Padilla*, 69 Wn. App. at 300.

Here, objections were made by defense counsel, which were overruled by the court. The first was:

MR. MARTIN: So the testimony coming from [Ms. Gmeiner], then is in your view what she believes to be the truth/

MR. CHARBONNEAU: Objection, Judge. Commenting on the testimony. Is there—could we rephrase?

THE COURT: Yeah, I – I have a –

MR. GMEINER: I’m not sure what—

THE COURT: Let’s have –

MR. GMEINER: --what you’re asking.

THE COURT: --you rephrase that, please.

MR. MARTIN: Okay.

MR. MARTIN: Well, do you believe that Sarah’s lying about you?

MR. GMEINER: Do I believe she’s lying about me?

MR. CHARBONNEAU: Objection, Judge.

THE COURT: Overruled.

Cochran RP 954.

An objection must be sufficiently specific to inform the trial court and opposing counsel the basis of the objection and an opportunity to correct the alleged error. *Padilla*, 69 Wn. App. at 300. The objections are

similar to the ones in *State v. Casteneda-Perez*, 61 Wn. App. 354, 363-64, 810 P.2d 74 (1991). In *Casteneda-Perez*, the court found that an objection stating “calls for a comment on the evidence” was too general to preserve error. 61 Wn. App., at 363. The court stated “[d]efense counsel, in his objections, never did apprise the trial court of the prejudicial aspect of the line of questioning, which is that it equates an acquittal with false testimony.” *Id.* at 364. Here, there was no request for a mistrial, no request for a curative instruction and no proper objections made to preserve alleged error. The only objections were “commenting on the testimony,” almost verbatim to the objection in *Casteneda-Perez* that was found to be too general. Additionally, the question whether Ms. Gmeiner testified to was what she believed to be true, not whether she was lying. The question did not ask for the defendant’s opinion on Ms. Gmeiner’s veracity but her state of mind. Furthermore, the second objection was just a simple “objection.” There was insufficient specificity to allow the trial court and prosecutor an opportunity to correct the alleged error.

Additionally, error may not be based on an overruled objection when the objection is indefinite so as to not call the court’s attention to the real reason for the testimony’s inadmissibility. *State v. Boast*, 87 Wn.2d 447, 553 P.2d 1322 (1976).

If error were committed, it is harmless if the questions “were not so egregious as to be incapable of cure by an objection and an appropriate instruction to the jury.” *State v. Stover*, 67 Wn. App. 228, 232, 834 P.2d 671 (1992). In deciding harmless, courts consider several factors to include “whether the prosecutor was able to provoke the defense witness to say that the State’s witnesses must be lying, whether the State’s witness’s testimony was believable and/or corroborated, and whether the defense witness’s testimony was believable and/or corroborated.” *Padilla*, 69 Wn. App. at 301. As pointed out, Ms. Gmeiner’s eyewitness testimony was more than sufficiently corroborated and believable; the defendant’s was not.

The defendant also contends, on page 28 of his brief, that the prosecutor’s closing argument undermined defense counsel’s integrity, and therefore was misconduct, citing *State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014). However, the defendant fails to cite to the record to exactly what phrase he finds offensive. Under RAP 10.3(a)(5) and 10.4(f), citation to the record is required. *See also Lawson v. Boeing Co.*, 58 Wn. App. 261, 271, 792 P.2d 545 (1990). “The failure to cite to the record is not a formality. It places an unacceptable burden on opposing counsel” and the court. *Lawson*, 58 Wn. App. at 271. The only reference to

defense counsel talking about Ms. Gmeiner's testimony is in the State's rebuttal, as follows:

The defense has to walk a really fine line in this case between saying Sarah Gmeiner is lying and Sarah Gmeiner is mistaken. Mr. Zeller very honorably does not want to simply attack this mother. He says he believes her and that she's just mistaken. But that really -- if you listen to some of the arguments, though, the only explanation for some of the things that she said is if she is actively, knowingly, purposefully lying to implicate her brother in a child molestation claim.

Cochran RP 1028.

Nothing in this undermines defense counsel's integrity. In fact, it enhances it by indicating defense counsel is conducting himself honorably.

**F. THE PROSECUTOR DID NOT ELICIT OPINION TESTIMONY FROM DETECTIVE SATAKE.**

Testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony. *State v. Notaro*, 161 Wn. App.654, 662, 255 P.3d 774 (2011). Testimony that is "based on one's belief or idea rather than on direct knowledge of facts at issue" is opinion testimony. *State v. Demery*, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001).

The questions posed to Detective Satake by the prosecutor both asked if he found any evidence of a motive to fabricate or exaggerate. *See* Cochran RP 848. It did not ask his opinion or belief about a witness's

veracity, nor comment on the defendant's guilt, but was based on his knowledge of the investigation. It was helpful to the jury. It was not improper opinion testimony.

**G. THERE IS NO CUMULATIVE ERROR REQUIRING REMAND FOR A NEW TRIAL.**

Under the cumulative error doctrine, a court may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant their right to a fair trial, even if each error standing alone would be harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). The doctrine does not apply where the errors are few and have little or no effect on the trial's outcome. *See Weber*, 159 Wn.2d at 279.

The main error that is complained of all flows from the same source, the single statement made by A.B.G. That statement implicates the claim that A.B.G. did not testify at the child hearsay hearing; that defense counsel erred when he agreed to not have her testify, and was therefore ineffective; and that the court erred in admitting A.B.G.'s statements. As argued above, any error was harmless as there was an eyewitness that described exactly what occurred in the statements and, therefore, the statement had little or no effect on the trial's outcome. Additionally, because the court found the

statement reliable, it would have been admitted through Ms. Gmeiner regardless of the outcome of the child hearsay determination of availability.

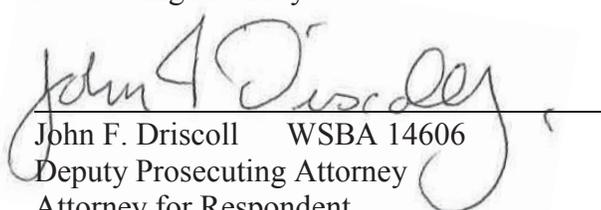
The other claimed errors, that the prosecutor committed misconduct during cross-examination of the defendant and by eliciting improper opinion testimony from Detective Satake, also fail. Defense counsel failed to properly object to the prosecutor's cross-examination, which would have allowed the court to correct any alleged error. Further, Detective Satake testified to facts from his investigation, not his opinion.

#### **V. CONCLUSION**

For the reasons stated, this Court should affirm defendant's conviction.

Dated this 26 day of February, 2018.

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Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

JERREMY JOE GMEINER,

Appellant.

NO. 35370-2-III

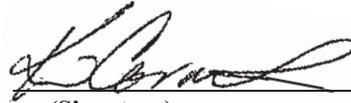
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on February 26, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Dennis Morgan  
nodblspk@rcabletv.com

2/26/2018  
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Spokane, WA  
(Place)

  
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(Signature)

# SPOKANE COUNTY PROSECUTOR

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**Appellate Court Case Title:** State of Washington v. Jeremy Joe Gmeiner  
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