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Division III  
State of Washington  
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No. 36610-3-III

IN THE COURT OF THE APPEALS  
OF THE STATE OF WASHINGTON

DIVISION III

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THE STATE OF WASHINGTON, Respondent

v.

ROGER W. FLOOK Jr., Appellant.

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**BRIEF OF RESPONDENT**

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CURT L. LIEDKIE  
Asotin County Chief Deputy  
Prosecuting Attorney  
WSBA #30371

P. O. Box 220  
Asotin, Washington 99402  
(509) 243-2061

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I. **SUMMARY OF ISSUES**

1. WHERE THE PROFFERED EVIDENCE WAS HIGHLY PREJUDICIAL AND IRRELEVANT TO THE ISSUES AT TRIAL, DID THE TRIAL COURT PROPERLY PRECLUDE THE APPELLANT'S INQUIRY INTO ALLEGED INCIDENTS OF SEXUAL MISCONDUCT ON THE PART OF THE VICTIM?
2. DID THE TESTIMONY OF MS MONTENEGRO AND SHERIFF MEYERS CONSTITUTE IMPROPER OPINION TESTIMONY CONCERNING CREDIBILITY?
3. WERE ANY CLAIMED ERRORS, IN ANY EVENT, HARMLESS?
4. WAS COUNSEL INEFFECTIVE FOR FAILING TO INTRODUCE CERTAIN EVIDENCE AND/OR FOR OBJECTING TO CERTAIN QUESTIONING?
5. WHERE NO ERROR OCCURED, DID CUMMULATIVE ERROR DEPRIVE THE APPELLANT OF A FAIR TRIAL?
6. WITH REGARD TO THE TERM "ROMANTIC RELATIONSHIPS," SHOULD THIS COURT DIRECT THE TRIAL COURT TO SUBSITUTE "DATING RELATIONSHIP"?

**II. SUMMARY OF ARGUMENT**

1. WHERE THE PROFFERED EVIDENCE WAS HIGHLY PREJUDICIAL AND IRRELEVANT TO THE ISSUES AT TRIAL, THE TRIAL COURT PROPERLY PRECLUDED THE APPELLANT'S INQUIRY INTO ALLEGED INCIDENTS OF SEXUAL MISCONDUCT ON THE PART OF THE VICTIM.
2. THE TESTIMONY OF MS MONTENEGRO AND SHERIFF MEYERS DID NOT CONSTITUTE IMPROPER OPINION TESTIMONY CONCERNING CREDIBILITY.
3. ANY CLAIMED ERRORS WERE HARMLESS.
4. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INTRODUCE CERTAIN EVIDENCE AND/OR FOR OBJECTING TO CERTAIN QUESTIONING.
5. CUMMULATIVE ERROR DID NOT DEPRIVE THE APPELLANT OF A FAIR TRIAL WHERE NO ERROR OCCURED.
6. WITH REGARD TO THE TERM "ROMANTIC RELATIONSHIPS," THE STATE WOULD ASK THAT THE COURT DIRECT THE TRIAL COURT TO SUBSITUTE "DATING RELATIONSHIP".

### III. STATEMENT OF THE CASE

Martha Montenegro (*formerly* Flook) and the Appellant, Roger Flook, were married July 24, 2010. Report of Proceedings (RP) at 519. The Appellant was born August 7, 1981. RP 521. Martha had two children from a previous marriage to Aaron Sheridan; a daughter, A.S.,<sup>1</sup> and a son, J.S. RP 520-1. A.S. was born in February of 2003 and she was eleven years old on June 6, 2014. RP 521. J.S., who is a year younger than A.S., suffers from a form of epilepsy and has seizures which can be triggered when he is startled. RP 523, 524. His seizures cause his arms to rise above his head and his muscles become rigid and shake or vibrate. RP 525.

In April of 2014, after his release from prison on three counts of Identity Theft, and two counts of Possessing Stolen Property. Clerks Papers (CP) 132, 138, 165; RP 814.<sup>2</sup> After his release, he returned to the family home in Endicott, Whitman County, Washington, where Martha, A.S., and J.S. lived. RP 526. On June 6, 2014, the Appellant, Martha, A.S., and J.S. traveled to Clarkston, Asotin County, Washington to attend a marriage counseling retreat

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

<sup>2</sup>The Defendant's absence from the family home and the reasons therefore, specifically, his incarceration, were issues raised prior to the first trial and addressed in the appeal which followed thereafter. State v. Flook, 199 Wn. App. 1052 (2017)(Unpublished). The State cites to the previous opinion only to establish facts, and not for its precedential value.

that was being put on by an area church. RP 521-4. Shortly after the Appellant moved back into the family home, and after the retreat, A.S. began exhibiting some significant changes in behavior, including her grades declining, her artwork becoming more dark, and sexually provocative internet use. RP 526-8.

The family stayed at the Quality Inn in Clarkston. RP 334. The room in which they stayed had only one large bed. RP 335, 473. The Appellant slept on left side of the bed and Martha on the right side. RP 522-3. A.S. and J.S. slept in the middle with A.S. next to the Appellant and J.S. between A.S. and Martha. RP 522-3. During the night, the Appellant put his hand on A.S.'s leg. RP 474. The Appellant then removed his hand and replaced it farther down inside her clothing near her pelvic area. RP 475-6. Again the Appellant removed his hand and then reached farther down into A.S.'s clothing, beneath her underwear, touching her vaginal area. RP 476-7. He touched her just inside her labia. RP 477. The Appellant withdrew his hand and A.S. quickly rolled over to face toward her brother and put her arm between her legs. RP 478. At that point the Appellant grabbed her arm and he whispered "come on." RP 476. A.S.'s account of the events was described by Martha at trial as "familiar" as she referenced the way in which the Appellant would initiate sex with her when they were married. RP 539-40. She recognized what she described as his "method" of moving and pausing. RP 540.

A.S. did not report the incident to her mother or to her father. RP 481. A few months later, A.S. confronted the Appellant and he claimed that when he grabbed her arm, he thought it was J.S. RP 481. The Appellant also told A.S. that J.S. was having a seizure and that J.S. was the one that touched her. RP 480.

A.S. told a friend she met at summer camp. RP 482. A.S. appeared upset when she told her friend. RP 626-7. This friend, C.S. in turn told her mother, who was able to contact Aaron Sheridan, A.S.'s father. RP 437.

On August 24, 2015, the Whitman County Sheriff's Office received the report and opened an investigation. RP 302. Sheriff Brett Meyers handled the investigation due to his training and experience with child sex investigations. RP 304. On August 25, 2015, Sheriff Meyers interviewed A.S. who provided her statement regarding the above events. RP 305.

A.S. related other incidents where the Appellant had her sit on his lap in his car. RP 486. During this incident, she sat down on his leg in the open door of the car and the Appellant moved her to his lap over the top of his crotch. RP 486. She then felt his penis move under her. RP 486. She became uncomfortable and told him that she needed to go to the bathroom. RP 486-7.

On another occasion, the Appellant apparently noticed a hole in her tights or jeans. RP 153, 162. The hole was really high up on the thigh and he put his finger in the hole. RP 153.

She further told Sheriff Meyers how the Appellant had showed her pornographic materials. RP 485-6. The Appellant had shown her an animated video depicting sexual acts. RP 485-6. She also related how the Appellant talked to A.S. about her mother having sex toys. RP 487. She also spoke regarding times he would spank her on the buttocks as she walked by, not in a disciplinary manner, but playfully. RP 485. This was brought to Martha's attention and she admonished him not to do it. RP 531. A.S. also reported that the Appellant offered her advice on sexual issues, and told her that he used to run a pornography site. RP 327.

As a result of her behavioral changes, which began a few months after the Appellant moved back into the family home, A.S.'s parents arranged for her to go to counseling. RP 238-9. These behaviors suggested to the counselor that A.S. had been sexually abused. RP 249.

During his investigation, Sheriff Meyers interviewed Martha Flook on August 27, 2015 at the CPS office in Colfax, Washington, and discussed with her the allegations regarding what occurred in the hotel room in Clarkston, on June 6, 2014. RP 315. She confirmed many of the details related by A.S. during her interview, including the

sleeping arrangements and the locations of persons in the bed that night. RP 312. At the conclusion of the interview Martha left and later that same day, she returned to Colfax with the Appellant and he too was interviewed by Sheriff Meyers. RP 312.

The Appellant was not under arrest, and requested that the interview not be recorded. RP 318. Although not under arrest and not otherwise being in custody, Sheriff Meyers advised him of his rights which he waived. RP 314-8. When asked about the marriage retreat in Clarkston, the Appellant claimed that he could not remember the event at all. RP 319-20. After he was reminded by Martha regarding the hotel stay and retreat, he was able to remember, not only the event itself, but the specific sleeping arrangements. RP 320. While struggling with his memory regarding the marriage retreat occurring, he was able to confirm the order in which the family slept in the bed without difficulty. RP 320-1. When confronted with the allegation by A.S., the Appellant claimed that J.S. was having seizures and he grabbed him to calm him. RP 321-2.

Sheriff Meyers asked about the incident in the doorway of the car and the Appellant initially indicated he had no recollection of the incident. RP 325. After being told what A.S. said, he remembered and confirmed that it occurred. RP 325. He claimed she asked to sit on his lap, and further claimed that this interaction ended when *he* got

up to go to the bathroom. RP 325. This notably differed from A.S.'s account where, *she* became uncomfortable and broke off contact under the auspices of needing to use the bathroom. RP 487. He outright denied showing A.S. any pornographic materials. RP 326. He also denied playfully spanking her. RP 323-4. He further denied discussing sexual matters with her. RP 324.

The Appellant was subsequently arrested in the the fall of 2015. RP 541-3. After his arrest and incarceration, Ms Montenegro decided to sell the pickup truck that the Appellant had been driving prior to his arrest. RP 542. The Appellant did not want the truck sold, begging her not to, but eventually told her to "do whatever" she needed to. RP 544. The pickup was sold to a friend named Richard Chittenden in October of 2015. RP 545. A few months after the sale, Mr. Chittenden discovered a thumb drive that fell out of the dash board area of the pickup. RP 653-4. Mr. Chittenden subsequently discovered videos while utilizing the thumb drive to play a video game. RP 659. Many of the videos found on the thumb drive were ordinary adult pornographic videos. RP 662. Mr. Chittenden quickly became concerned when he saw two videos, that were different from the others and showed a bathroom and shower area and a distinctive beach towel. RP 663. He recognized the bathroom as that of the house where Ms Montenegro, her children, and the Appellant were

living in around the time of the crimes charged herein. RP 663. Mr. Chittenden contacted Ms Montenegro and played for her, over a video chat internet application, the videos which showed a young female bathing in the tub. RP 665, 359. The young female depicted was A.S. RP 665, 362. Mr. Chittenden sent the thumb drive to Sheriff Meyers. RP 352. 666.

The video had been captured in a voyeuristic manner and was shot from over top of the tub area, most likely from the attic crawl space area. RP 363. At the time it was captured, the Appellant was living in the residence with A.S., J.S., and Ms Montenegro. RP 363. Sheriff Meyers obtained a search warrant for the residence, which had not been occupied since the Appellant's arrest and Ms Montenegro moved out. RP 364. Sheriff Meyers confirmed the bath tile, shower curtain, and even the toiletries in the bathroom were all still present from the video. RP 365. Over the tub was a ceiling fan and vent with holes allowing an view from the attic area into the tub. RP 365-6. A crawl space access was discovered in the garage area, one of which was designed as such, and the other appeared to have been improvised by partially cutting and/or punching a hole in the ceiling drywall of the garage, which gave access to the area over the bathroom. RP 366-7. Several tools and other items were photographed near the area of the bathroom in the attic space. RP 383.

Ms Montenegro confirmed that the only person with access to the attic crawl space would have been the Appellant. RP 549-50. She further confirmed that there were several times when the Appellant would go up into the crawl space. RP 550. She confirmed that she did not take the video, and that J.S., with his epilepsy, would not have been able to gain access to the ceiling location. RP 550.

The Appellant was subsequently charged with Rape of a Child in the First Degree and Child Molestation in the First Degree and preceded to jury trial commencing December 10, 2018. CP 1-2, RP 8. At trial, Ms Montenegro was cross examined by the Appellant's counsel, John Henry Browne, concerning statements she allegedly made to the Appellant's aunt, Kenda Hergert. RP 599. Trial counsel asked Ms Montenegro if she had told Kenda Hergert that she didn't believe the accusations by A.S. against the Appellant were true. RP 599. His trial counsel questioned:

Q Do you remember having two discussions with her about your belief that this was not true, these allegations? Two separate discussions?

A No.

Q Do you remember in a meeting with Ms. Hergert saying that -- regarding the hotel incident allegation -- do you remember telling Kenda that whenever J.S. would seize, Roger would reach over A.S. to comfort J.S. and keep him from falling out of bed. Do you remember telling that to her?

A No.

Q Do you remember telling her that nothing happened; you would have known?

A No.

Q Do you remember telling her, Ms. Hergert that is, that you knew Roger did nothing and A.S. was mad about the restrictions from the internet cell phone. Do you remember telling her that?

A No.

RP 599-600. On redirect, the State, responding to the Appellant's line of questioning, asked Ms Montenegro what she had actually told Kenda Hergert. RP 604.

Q What did you tell Kenda?

A I told her the exact opposite of what the questions that I was asked today. I told her that I believed that -- and I gave her my opinion about -- about what happened that night that I believed A.S.

The Appellant did not object. RP 604.

Prior to trial, the court allowed in evidence of the other situations where the Appellant behaved sexually inappropriately toward A.S. as evidence of his lustful disposition toward her. RP 161-4 The court however, ruled that the State could not introduce evidence of the incident involving the Appellant putting his finger in a hole in A.S.'s jeans, RP 162.

After hearing testimony from, *inter alia*, Sheriff Meyers, A.S., Ms. Montenegro, C.S., and the Appellant, the jury found the Appellant

guilty of Child Molestation in the First Degree but acquitted him of Rape of a Child in the First Degree. CP 127. In addition to incarceration, the Appellant was sentenced to community custody, with conditions including the requirements, in pertinent part, that he:

17. Shall report to his supervising officer prior to entering into any romantic relationship with any person who has minor aged children.

18. He shall report his criminal history to any person, with minor aged children, with whom he is going to have a romantic relationship.

CP 176. The Appellant did not object to any community custody conditions imposed by the court. RP 955-60, 964. The Appellant has now appealed. CP 185.

#### **IV. DISCUSSION**

The Appellant appeals his convictions, arguing that the trial court improperly limited his ability to introduce evidence, allowed improper opinion testimony, and that trial counsel was ineffective. Because, the evidence sought to be admitted was not relevant to the purposes for which it was offered and highly prejudicial, the court properly excluded evidence of alleged prior sexual misconduct of A.S. Further, the testimony characterized by the Appellant as “opinion” was not improper. Sheriff Meyers testified to his observations and not his opinion of the veracity of the Appellant, and Ms. Montenegro’s testimony was in direct response to claims by the Appellant of

fabrication and prior inconsistent statement. Finally, counsel was not ineffective for failing to request admission of certain evidence, or failing to raise the Appellant's criminal history during direct examination. As such, the Appellant's conviction should be affirmed.

1. WHERE THE PROFFERED EVIDENCE WAS HIGHLY PREJUDICIAL AND IRRELEVANT TO THE ISSUES AT TRIAL, THE TRIAL COURT PROPERLY PRECLUDED THE APPELLANT'S INQUIRY INTO ALLEGED INCIDENTS OF SEXUAL MISCONDUCT ON THE PART OF THE VICTIM.

The Appellant argues that the court improperly limited his ability to offer evidence that someone other than himself crawled into the attic and filmed A.S. in the bathtub. The Appellant also argues that the court limited evidence concerning his claim of inappropriate sexual interactions between her and a neighbor boy named Alex.

A criminal defendant has the right to present a defense, which is guaranteed by both the United States Constitution and the Washington Constitution, and assure as part thereof, the right to present testimony in one's defense. State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). However, the right is not without limits. "Defendants have a right to present only relevant evidence, with no constitutional right to present irrelevant evidence." State v. Burnam, 4 Wn.App.2d 368, 376, 421 P.3d 977 (Div. III, 2018), *review denied*, 192 Wn.2d 1003, 430 P.3d 257 (2018). To assess a claim that the

court improperly excluded defense evidence or testimony, this Court should review the Appellant's proffer. *Id.*

An offer of proof should (1) inform the trial court of the legal theory under which the offered evidence is admissible, (2) inform the trial court of the specific nature of the offered evidence so the court can judge its admissibility, and (3) create an adequate record for appellate review.

Burnam, at 981.

At trial, the Appellant attempted to cast aspersions on A.S. and J.S., claiming that they had, at some point, been caught in some sort of sexual misconduct. RP 219. The Appellant claimed to be offering this under auspices of proffering an "alternative perpetrator" as the creator of the video. RP 221. Alternatively, the Appellant claimed that the neighbor boy, Alex, may have been responsible. RP 586. The law on the admissibility of "alternate perpetrator" evidence is clear.

When a defendant wishes to offer evidence that a third person committed the crime charged, the defendant must offer ***more than evidence that a third person had a motive*** to commit the crime. State v. Mak, 105 Wn.2d 692, 717, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986). If motive alone were enough, "a great many trial days might be consumed in the pursuit of inquiries which could not be expected to lead to any satisfactory conclusion." Mak, 105 Wn.2d at 717, 718 P.2d 407 (*quotation omitted*). Therefore, courts require a defendant to show "***a train of facts***" that clearly suggest someone else committed the crime. Mak, 105 Wn.2d at 716, 718 P.2d 407.

State v. Kilgore, 107 Wn. App. 160, 185, 26 P.3d 308, 321 (Div. II, 2001), *aff'd*, 147 Wn.2d 288, 53 P.3d 974 (2002)(*emphasis added*).

Here, the Appellant never made any offer of proof to substantiate these claims nor did he provide the court with any reliable information upon which the court could admit such prejudicial evidence. RP, *generally*. No testimony was proffered that J.S. had ever been in the attic, or that he was even physically capable of climbing up there. Despite a glaring lack of foundation, the court did allow the Appellant to cross examine Ms Montenegro on A.S. interactions with Alex. RP 587-8. There was never any showing, nor any proffer to suggest that "Alex" had access to the attic area of the home or access the Appellant's pickup truck to stash the thumb drive. At best, the Appellant offered "mere motive" evidence to suggest that someone, other than himself, was sexually attracted to A.S. The Appellant's proffer fell substantially short of demonstrating that the evidence was relevant and admissible for the purported purpose. In reality, the Appellant merely sought to smear the victim with accusations that she abused her brother and was sexually promiscuous.

The Appellant was really attacking A.S.'s credibility with the use of such slanderous accusations. He now admits as much in his brief. See Brief of Appellant (*hereinafter Brief*), p. 34. RCW

9A.44.020(2), also known as the Rape Shield Law, specifically provides:

***Evidence of the victim's past sexual behavior*** including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards ***is inadmissible on the issue of credibility***.[.]

(*Emphasis added*). See also State v. Hudlow, 99 Wn.2d 1, 8, 659 P.2d 514, 518 (1983) (“*At the very outset, then, credibility is ruled out altogether as the basis for introducing past sexual conduct . . .*”).

Here, the Appellant admits that the primary purpose of introducing this evidence is to attack the credibility of A.S. Society is long since past the times when chastity or the lack thereof was a reliable barometer of honesty. See State v. Linton, 36 Wn.2d 67, 91-93, 216 P.2d 761, 775 (1950). The Appellant’s despicable attack on A.S.’s credibility through claims of sexual impropriety was not only inadmissible for the purposes for which it was offered, it was repugnant and reprehensible.

Even under ER 403 and ER404(b), evidence of A.S. allegedly abusing her brother or having sexual contact with Alex was not admissible. This was not evidence that someone else had molested A.S., but rather that she was molesting J.S. and engaging in sexually promiscuous behavior with Alex. The State recognizes that application of the Rape Shield Law to situations where the a child victim had

been previously victimized by other perpetrators has been rejected, and for good reason. See State v. Carver, 37 Wn.App. 122, 124, 678 P.2d 842 (Div. II, 1984). It is clearly probative to the question of sexualized behavior in young children. See *id.* However, the evidence offered herein was not that some other adult had previously sexually abused A.S., but rather, that she was abusing her little brother and behaving promiscuously with the neighbor boy. Regardless, this evidence was clearly proffered for its inflammatory purposes to prejudice the jury against A.S. This becomes readily apparent by the social media photos that the Appellant sought to admit of A.S. in, what he characterized as, sexually suggestive poses which were attached to his sentencing memorandum. CP 140, 157. These were photos of the, now 15 year old child, not the 11 year old child he molested in the hotel four years earlier. Under ER 403, this evidence of alleged sexual misconduct by A.S. was horribly prejudicial and had utterly no relevance to the issues in the case. The only purpose was to stain her credibility in the manner that the Rape Shield Law strictly forbids. Because the evidence proffered was not admissible under ERs 403 404(b), the court's exclusion under the Rape Shield Law, even if technically erroneous, was harmless error.

As a last gasp, the Appellant intimates that such testimony was admissible to impeach Ms Montenegro's testimony denying any such

incident between A.S. and J.S. However, this would constitute impeachment on a collateral matter which does not allow for extrinsic evidence for such purpose. See ER 608(b), State v. Lubers, 81 Wn. App. 614, 623, 915 P.2d 1157 (Div. II, 1996)(“*However, extrinsic evidence cannot be used to impeach a witness on a collateral issue.*”). The trial court correctly precluded the Appellant from pursuing this unsubstantiated, irrelevant, extraneous, and highly prejudicial evidence line of questioning. The Appellant proffer fails on all counts.

2. THE TESTIMONY OF MS MONTENEGRO AND SHERIFF MEYERS DID NOT CONSTITUTE IMPROPER OPINION TESTIMONY CONCERNING CREDIBILITY.

The Appellant next complains concerning improper opinion testimony, asserting that Ms Montenegro improperly testified concerning her belief of A.S.'s accusations. The Appellant complains that Ms Montenegro testified that she believed A.S. However, the Appellant completely ignores the fact that it was on cross examination, by his attorney, that the subject of her belief as to the veracity of A.S.'s accusations, was raised. RP 580-1, 597-8. Any claim of error was therefore invited and is now precluded. See State v. Huckins, 66 Wn. App. 213, 218, 836 P.2d 230 (Div.I, 1992)(“*Invited error results when a party's own action during trial creates the error.*”)See also State v. Studd, 137 Wn.2d 533, 546–47, 973 P.2d

1049 (1999); State v. Henderson, 114 Wn.2d 867, 870–71, 792 P.2d 514 (1990)(*The invited error doctrine precludes a criminal defendant from seeking appellate review, even when the alleged error involves constitutional rights*).

With regard to Ms Montenegro's statements to Kenda Hergert, which were addressed on redirect by State's counsel, the Appellant opened the door by insinuating during cross examination that Ms Montenegro had told Ms Hergert that she didn't believe A.S. RP 599-600.

It is well settled in Washington that a party that introduces evidence of questionable admissibility runs the risk of opening the door to the admission of otherwise inadmissible evidence by an opposing party.

State v. Wafford, 199 Wn. App. 32, 33, 397 P.3d 926 (2017), *review denied*, 189 Wn.2d 1014, 402 P.3d 822 (2017). Here, the Appellant elicited testimony from Ms Montenegro on cross examination that she didn't believe A.S. at certain points during the investigation process. The Appellant opened the door to this area of inquiry and cannot be now heard to complain.

Trial counsel pounded Ms Montenegro with questions claiming she had told Kenda Hergert that she didn't believe A.S. In response on redirect, the State **did not** ask Ms Montenegro whether she actually believes A.S. Rather, the State asked Ms Montenegro what she **actually said** to Kenda Hergert. RP 604. This was an

appropriate and proportional response to the Appellant's opening of the door to such statements. Again, the Appellant cannot open the door and intimate that a witness made certain statements and preclude the State from clarifying what was actually said.

Finally, it should be noted that the Appellant didn't not object below to the State's responsive questions or the witnesses answers. Failure to object usually results in precluding review of the issue. RAP 2.5. In Kirkman, the Supreme Court determined that improper opinion testimony was not automatically reviewable without preservation by objection. State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). Therein the Court stated:

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

*Id.* (*Emphasis added*). The Appellant's reliance on State v. Johnson, 152 Wn.App. 924, 219 P.3d 958 (Div. II, 2009) is misplaced. There, the State broached the topic of the discussion between certain persons regarding statements of their respective belief in the accusation. Johnson, at 962. Here, the Appellant himself raised the issue of Ms Montenegro's belief in the veracity of A.S.'s claims.

Clearly, had the defense raised the issue in Johnson, the result would have been different, both procedurally and substantively. In all likelihood, the Court would not have reviewed the issue of improper opinions, had it been the defense that introduced testimony on the subject, nor would it have found a violation for the State to respond proportionately. The Appellant herein cannot create the issue by asking questions on cross examination, create the impression that the witness had made inconsistent statements and thereby open the door to such testimony, and then claim a “manifest constitutional error” which obviates the need to object below and preserve the claim. To the extent the testimony was not proper, the Appellant invited the improper testimony and therefore the error, and opened the door to the State’s inquiry. His failure to object precludes review in any event, under these circumstances.

The Appellant also complains that Sheriff Meyers’ testimony concerning the Appellant’s demeanor during the interview constituted improper opinion testimony.

Generally, no witness may offer testimony in the form of an opinion regarding the defendant’s guilt or veracity. This testimony unfairly prejudices the defendant because it invades the exclusive province of the jury to make an independent determination of the relevant facts. To determine whether a statement constitutes improper opinion testimony, a court considers the type of witness, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. The improper

testimony of a police officer raises additional concerns because "an officer's testimony often carries a special aura of reliability." ***But testimony that is based on inferences from the evidence, does not comment directly on the defendant's guilt or on the veracity of a witness, and is otherwise helpful to the jury, does not generally constitute an opinion on guilt.***

State v. Rafay, 168 Wn. App. 734, 805–06, 285 P.3d 83 (Div. I, 2012)(*emphasis added*).

In determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: "(1) 'the type of witness involved,' (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense, and' (5) 'the other evidence before the trier of fact.'"

Kirkman, 159 Wn.2d at 928. (*Internal citations omitted*). Here, Sheriff Meyers did not testify that the Appellant was answering deceptively or otherwise indicated his personal opinion concerning the veracity of the Appellant's statements to him. He testified concerning the Appellant's behavior and the appearance that he didn't want to be there speaking with the Sheriff. Meyers testified concerning the Appellant's apparent lack of memory concerning certain events and the lack of eye contact. It is wholly appropriate for a witness to testify concerning the demeanor of the person, including while giving a statement. *Id.* See also State v. Aguirre, 168 Wn.2d 350, 360, 229 P.3d 669 (2010)(*Testimony by state's expert about demeanor of victim during interview was admissible.*) Officers are allowed to testify

to their observations regarding the defendant's demeanor during questioning. See State v. Allen, 50 Wn. App. 412, 419, 749 P.2d 702, 706 (Div. I, 1988). In State v. Craven, 69 Wn. App. 581, 849 P.2d 681 (Div. I, 1993), a social worker properly testified that the defendant was having difficulty making eye contact, was staring down at the floor, and seemed highly anxious. Craven, at 586. The complained of testimony herein is well within the ambit of appropriate demeanor testimony, and not a direct comment on the credibility of the Appellant.

3. ANY CLAIMED ERRORS WERE HARMLESS.

Any claimed errors, under the facts of this case, were harmless beyond a reasonable doubt. Under that standard, a conviction won't be reversed where it necessarily appears, beyond a reasonable doubt, that the error did not affect the verdict. State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551, 558 (2011).

The Appellant presumes that, because the jury declined to convict on the charge of Rape of a Child in the First Degree, that the errors complained of above could not have been harmless. This assumption is not supported by the record.<sup>3</sup> The Appellant

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<sup>3</sup>Subsequent discussions with jury members revealed that there was but a single hold out with the remaining jurors in favor of convicting. The single holdout juror did not see the victim demonstrate how the Appellant penetrated her labia, if only minimally. RP 477. Based upon this, the other jurors relented and all agreed to convicted as to the charge of Child Molestation in the First Degree. The State recognizes that these facts, much like the Appellant's assumptions

characterizes the children (A.S. and J.S.) as sexualized, citing to the CPS report and the referral relating to A.S.'s massage salon, but neglects to point out that the allegations concerning were determined unfounded. RP 554-6. The matter was simply a child's make believe game where she would walk on her uncle's and the Appellant's backs. RP 554. The Appellant persists on ascribing sexual overtones to this, which, quite frankly, is disturbing. The CPS referral is, in any event, hearsay and the contents would not have been admissible in any event. See ERs 801, 802.

The evidence in this case showed that, after the Appellant returned home from prison, the victim began demonstrating sexualized behaviors. A.S.'s testimony concerning the charged offense was corroborated in every detail, even by the Appellant's own statements and testimony, with the exception of his actual act of touching her vagina. A.S. recalled the trip to the hotel in Clarkston, the sleeping arrangements and other important details which were confirmed by others. The Appellant had a documented history of being sexually inappropriate with the victim, including recording her in the bathtub.

The Appellant denies his responsibility for the recording, and his attempts to place blame on others for the voyeuristic video are

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about the strength of the evidence, are matters outside the record.

simply to ridiculous to constitute a serious erosion of the State's evidence. First, it was clear from the video, A.S. did not record it herself. J.S. was not capable of doing so and wasn't even aware that the house had an attic. RP 550, 647-8. There was no evidence Alex had access to the home or the crawl space, or access to the Appellant's pickup. It is beyond comprehension that Alex would shoot a video of A.S. in the bathtub and then hide it in her step-father's pickup.

As discussed above, even if the court had not excluded evidence of A.S.'s alleged sexual improprieties under the Rape Shield Law, such evidence would have been deemed inadmissible under ERs 403 and 404(b) as simply too prejudicial and lacking any meaningfully probative value.

With regard to "opinion testimony," it was the Appellant who brought into play Ms Montenegro's opinion about the veracity of her daughter's claims against her husband. Further, Sheriff Meyers never testified that he didn't believe the Appellant's account, nor did he offer any opinion regarding the veracity of A.S.'s claims. He simply testified to the Appellant's demeanor and the appearance of his memories during the interview. He testified to eye rolling, and that, during the interview, he would look at Ms Montenegro for help with the questioning. RP 332. He didn't testify that the Appellant's responses

appeared deceptive. The jury heard only about his behavior and was able to ascribe whatever significance they thought was appropriate. Considering the nature of this testimony, even if the record were construed to reflect Sheriff Meyers' personal opinion on the veracity of the Appellant's statements, this paled in comparison to the other evidence in the case.

The fact that the jury was properly instructed at the conclusion of trial should quell any concern on this issue. In the very first written instruction from the court, the jury was told:

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

CP 106. The court was, in effect, telling the jury to disregard any statement by any witness or anyone else and judge the credibility for themselves. "Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary." Kirkman at 928. In Kirkman, it was significant to the Court that the jury had been so instructed. *Id.* at 937.

4. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INTRODUCE CERTAIN EVIDENCE AND/OR FOR OBJECTING TO CERTAIN QUESTIONING.

Next, the Appellant complains that trial counsel should have introduced the CPS report. The Appellant once again makes certain assumptions about facts not in the record. A criminal defendant has

the right to effective assistance of trial counsel under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. See, e.g., In re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). To establish that the right to effective assistance of counsel has been violated, a defendant must make two showings: that counsel's representation was deficient and that counsel's deficient representation caused prejudice. *Id.* (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). To establish deficient performance, a defendant must show that trial counsel's performance fell below an objective standard of reasonableness. *Id.* Courts engage in a strong presumption counsel's representation was effective. *Id.* at 335. Trial strategy and tactics cannot form the basis of a finding of deficient performance. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)). Prejudice can be shown only if there is a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different. Davis, 152 Wn.2d at 672-73. The reasonableness of trial counsel's performance is reviewed in light of all of the circumstances of the case at the time of counsel's conduct. See State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

First, the Appellant claims that trial counsel's failure to introduce his prior crimes of moral turpitude constituted deficient performance. The Appellant does not dispute that his convictions for Identity Theft and Possession of Stolen Property were admissible for impeachment when he testified. See ER 609. The Appellant merely assumes that it was deficient performance for trial counsel not to preemptively introduce this impeachment evidence. The Appellant offers no citation to even a single case suggesting that it is deficient performance to fail to impeach your own client with his prior convictions. This Court may assume no such authority exists. DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (*holding that where no authority is cited for a proposition, we may assume that counsel, after diligent search, has found none*). Where arguments are not supported by authority, the appellate courts do not consider them. RAP 10.3; Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In any event, where the convictions were clearly admissible and were inevitably going to be introduced into evidence, the Appellant cannot demonstrate prejudice.

Next, the Appellant accuses counsel of deficient performance by failing to introduce the CPS report into evidence. As noted above, the CPS report was hearsay and not otherwise admissible. The Appellant preemptively counters, noting the State's invitation to

stipulate to its introduction. What the Appellant fails to note is that the State's invitation was to introduce the document *in its entirety!* The document was never made part of the record, so its contents are outside the record. Suffice to say that not all portions of the CPS report would have been beneficial<sup>4</sup> to the Appellant. Regardless, this Court's review is limited to matters of record.

Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below.

State v. McFarland, 127 Wn.2d at 335. Here, the Court lacks the ability to measure the impact of the *entirety* of the CPS report, and as such, the Appellant cannot demonstrate that it was deficient performance to not offer the report. Further, without the report, the Appellant cannot show that the outcome of the trial would have been different.

Finally, the Appellant complains that his counsel was deficient because he objected to an open ended question posed to A.S. by the State's attorney regarding other incidents demonstrating the Appellant's lustful disposition. Once again, the Appellant fails to cite to a single case suggesting that objecting to an open ended narrative

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<sup>4</sup>The report determined the "massage salon" allegation to be unfounded, but included a summary of the accusations by A.S. and a notation that the Appellant was a registered sex offender.

question constitutes deficient performance. See DeHeer, 60 Wn.2d at 126. More importantly, counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (Div. I, 1989). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Id.*

Here, it is important to recognize the circumstances as they existed at the time. The trial court had previously excluded certain incidents involving the Appellant's alleged inappropriate actions with A.S. When the Appellant objected to the general question posed by the State, this was necessarily to avoid having A.S. testify about incidents not deemed admissible by the court and requiring the State to specify the incidents, one at a time. This was appropriate strategy. Further, with or without an objection, the trial court has broad discretion to allow leading questions. See State v. Scott, 20 Wn.2d 696, 699, 149 P.2d 152 (1944). Due to the court's prior ruling, the court was inclined to allow the State ask leading introductory questions which directed the witness as to each specific incident. RP 485. It should be further noted the manner of questioning utilized by the State. While the initial question specifying the particular incident was phrased as "do you recall" or words to that effect, the State's follow-up question was very open ended. RP 484-7. A.S. provided

details concerning each event, without prompting or leading questions. The Appellant can therefore show neither deficient performance, nor prejudice resulting therefrom. Trial counsel appropriately objected in order to limit the scope of the answers that would be elicited.

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

Finally, the Appellant claims that cumulative error deprived him of a fair trial. Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair. See In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). This doctrine provides that where several errors standing alone do not warrant reversal, the cumulative error requires reversal when the combined effect of the errors denied the defendant a fair trial. See State v. Garcia, 177 Wn. App. 769, 786, 313 P.3d 422 (Div. II, 2013). However, where as here, no error occurred, the doctrine is inapplicable. See State v. Warren, 134 Wn.App. 44, 69, 138 P.3d 1081(Div. I, 2006). Further several of the errors complained of herein were either invited (e.g. eliciting opinion testimony from Ms Montenegro by the defense) or not preserved by proper objection which precludes application of the doctrine. See State v. Embry, 171 Wn.App. 714, 766, 287 P.3d 648 (Div. II, 2012).

6. WITH REGARD TO THE TERM "ROMANTIC RELATIONSHIPS," THE STATE WOULD ASK THAT THE COURT DIRECT THE TRIAL COURT TO SUBSTITUTE "DATING RELATIONSHIP".

Finally, the Appellant argues that conditions 17 and 18 in Appendix H of the Judgement and Sentence are unconstitutionally vague and should be stricken. Considering that the Appellant did not object at sentencing to the condition or the language, the State would request that, rather than striking the conditions, In accord with this Court's recent decision in State v. Peters, \_\_\_ Wn.App.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2019 WL 4419800 at \*6 (Div. III, Sept. 17, 2019), this Court direct the trial court to substitute "dating relationship." As this Court noted in Peters, the Supreme Court has previously determined that "dating relationship" is not unconstitutionally vague and has been defined in the law. See Hai Minh Nguyen, 191 Wn.2d 671, 683, 425 P.3d 847 (2018).

**V. CONCLUSION**

The issues raised by the Appellant are without merit. The Appellant's attempt to besmirch the victim with tales of sexual impropriety under the thin disguise of an "alternate perpetrator" theory was properly rejected as was his attempt to use this slanderous evidence to attack her credibility. No opinion testimony was introduced by anyone other than the Appellant and the State properly and proportionately responded to the Appellant's attempt to introduce

such personal opinion of Ms Montenegro. Any claimed errors which can be characterized as constitutional, were clearly harmless beyond a reasonable doubt. Likewise, the Appellant's claims that counsel was ineffective are without merit. The Appellant's arguments bizarrely turn the issues on there head. Counsel was not deficient for failing to introduce his criminal history, objecting to questioning of the victim that protected the record, and not introducing an extraneous and potentially harmful information from a CPS report. The Appellant has failed to demonstrate either deficient performance or prejudice therefrom. This Court should affirm the Appellant's conviction for Child Molestation in the First Degree and remand for entry of an order amending the community custody conditions to clarify "dating relationship" instead of "romantic relationship." The State respectfully requests this Court enter a decision affirming the Appellant's conviction and sentence in all other respects.

Dated this 4<sup>th</sup> day of October, 2019.

Respectfully submitted,



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CURT L. LIEDKIE, WSBA #30371  
Attorney for Respondent  
Deputy Prosecuting Attorney for Asotin County  
P.O. Box 220  
Asotin, Washington 99402  
(509) 243-2061

COURT OF APPEALS OF THE STATE OF  
WASHINGTON - DIVISION III

THE STATE OF WASHINGTON,  
Respondent,

v.

ROGER W. FLOOK JR.,  
Appellant.

Court of Appeals No: 36610-3-III

**DECLARATION OF SERVICE**

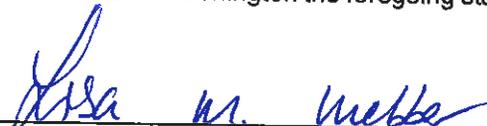
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On October 7, 2019 I electronically mailed, with prior approval from Ms. Marushige, a copy of the BRIEF OF RESPONDENT in this matter to:

VALERIE MARUSHIGE  
ddvburns@aol.com

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

Signed at Asotin, Washington on October 7, 2019.

  
LISA M. WEBBER  
Office Manager

DECLARATION  
OF SERVICE

**ASOTIN COUNTY PROSECUTOR'S OFFICE**

**October 07, 2019 - 9:04 AM**

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