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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

MARK MOEN, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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

1. Was the defendant denied effective assistance of counsel where defense counsel failed to challenge M.A.'s competency?
2. Was the defendant denied effective assistance of counsel where defense counsel did not object to opinion testimony by Ms. Williams and Ms. Nesbitt?

## **II. ISSUES PRESENTED**

1. Should this Court decline to address the merits of any claim regarding M.A.'s presumed testimonial competency where such claim was waived under the invited error doctrine, which prohibits a party from setting up an error at trial and then complaining of it on appeal?
2. Did the trial court abuse its discretion when it found M.A. competent to testify?
3. Did Ms. Nesbitt or Ms. Williams improperly express an opinion as to M.A.'s credibility; if so, was any challenge waived by defendant's failure to object?
  - a. Did any failure to object rise to the level of establishing ineffective assistance of counsel such that defendant has established his attorney's performance cannot be characterized

as legitimate trial strategy, and, with respect to prejudice, “there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

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

Defendant was charged with two counts of first-degree child molestation, two counts of rape of a child in the first degree, and one count of unlawful imprisonment. The case proceeded to trial on January 22, 2019. CP 221.

The trial court held a child hearsay hearing prior to trial on January 11, 2019. The trial court found victim M.A. competent to testify. CP 160. Because the defendant’s failure to object to this competency determination is challenged on appeal, the findings and testimonial support for that hearing will be set forth under the argument in that section. The defendant does not challenge the sufficiency of the evidence at trial, so a brief summary of the evidence supporting his conviction is set forth below.

M.A.’s mother, Ms. Danielle Nesbit, testified that during the fall of 2016, starting in August, her stepfather, Mr. Moen, would babysit the children at her home. RP 430. He would babysit them from 3:30 p.m., when they got out of school, until she got home from her job around 6:00 p.m.

RP 430. On December 28, 2016, M.A. disclosed that the defendant had been abusing her. RP 438.

M.A. testified she was nine years of age at the time of trial and resided with her mother and two brothers. RP 408-11. She testified the defendant put his finger in her lower areas while he was babysitting her. RP 412. She explained that it was in her front private and it hurt. RP 413. At that time, her clothes were halfway on and halfway off. RP 414. She testified this happened more than one time and that the defendant would give her candy. RP 415. While he never said anything, she explained she told him to stop, but he would not stop. RP 415-16. When she tried to leave the room, he pulled her back by her shirt. RP 416.

M.A.'s brothers, A.A. and C.A., testified that during the time the defendant baby-sat them, they would be playing video games. RP 480, 488. Both testified that the defendant would be in the room with M.A. with the door shut. RP 481, 488. A.A. testified that the defendant gave M.A. candy. RP 481.

Ms. Dennison, a nurse practitioner, testified she had examined M.A. and M.A. had a normal physical exam. RP 519. She stated that "most victims of sexual abuse will indeed have a normal exam and a normal exam does not rule out the possibility of sexual abuse." RP 520. She stated that during the exam M.A. disclosed that, "grandpa put his finger in my private,"

and “grandpa put his private halfway in my butt.” RP 542. M.A. told Ms. Dennison it was the front and back private. RP 542. She said only his fingers went in her private in the front, and that he would tell her to go to her room and he would then take off her pants and underwear. RP 543. M.A. also told Ms. Dennison that when defendant’s private was halfway in her private it hurt, but there was no bleeding. RP 543. Ms. Dennison testified she was not surprised to find a lack of physical injuries during M.A.’s exam because most exams were normal. RP 543.

On January 10, 2017, M.A. participated in a recorded forensic interview with nurse practitioner Tatiana Williams at Partners with Families and Children. An audio-video recording of this interview was shown to the jury. Ex. P1. M.A. told Ms. Williams that her grandpa was, “doing bad stuff to me like, um, putting his finger in my privates ... and putting his privates in my other private.” Ex. P1 at 17:17-17:34. M.A. said that it happened more than one time and that after he left the last time, she told her mom. Ex. P1 at 23:46, 23:55. M.A. told Ms. Williams that the defendant untied his sweatpants and put it in her butt, but “it’s hard to remember” what happened next. Ex. P1 at 27:08-27:58. M.A. said it “hurt real bad ... that’s all I could remember.” Ex. P1 at 31:19-31:29.

The jury convicted the defendant of two counts of first-degree child molestation and one count of unlawful imprisonment with sexual

motivation. RP 810-11; CP 150-51. The jury found the defendant not guilty of both first-degree child rape counts. CP 152, 153. The court sentenced him to 114 months to life and 41 months to run concurrently. RP 835; CP 236-52.

#### IV. ARGUMENT

##### A. THE DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY DEFENSE COUNSEL'S DECISION TO NOT CHALLENGE M.A.'S TESTIMONIAL COMPETENCY.

1. This issue has been waived under the invited error doctrine because defense counsel affirmatively informed the trial court that he had no objection or contest to M.A.'s competency.

After the child hearsay/competency hearing, but before ruling on whether M.A. was competent, or whether the *Ryan*<sup>1</sup> factors had been established, defense counsel informed the trial court:

Judge, I -- we don't have a -- any objection or any contest as to competency and so we -- I agree that we're -- we're now looking to the *Ryan* factors and the reliability of the statements.

RP 113.

This Court should decline to address the merits of this claim. The defendant's child competency arguments have been waived under the invited error doctrine, which "prohibits a party from setting up an error at

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<sup>1</sup> *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

trial and them complaining of it on appeal.” *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995).

Under the invited error doctrine, a party cannot set up an error at trial and then complain of the same error on appeal. *State v. Ellison*, 172 Wn. App. 710, 715, 291 P.3d 921 (2013), *review denied*, 180 Wn.2d 1014 (2014). This prohibition applies even to constitutional issues, *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990), and it is strictly applied *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999), *as amended* (July 2, 1999).

In *Ellison*, the defendant signed an agreement for a stipulated trial upon agreed facts. The agreement stipulated the court could consider the facts as true and correct and proved beyond a reasonable doubt. 172 Wn. App. at 715. After submitting his case for trial on stipulated facts, the trial court convicted the defendant. *Id.* at 714. On appeal, the defendant claimed insufficiency of the evidence. *Id.* at 715. Division Two of this Court rejected this argument. *Id.* at 716. In doing so, it held that it was of no moment that the State presented insufficient evidence at a CrR 3.6 hearing regarding a finding of fact, the defendant was bound by his stipulation and the invited error doctrine barred him from challenging the same fact stipulated to at the time of trial. *Id.* at 716. Ultimately, the *Ellison* court held

that the invited error doctrine prohibits a defendant from challenging a fact he or she stipulated to at trial. *Id.* at 716. Likewise, here the challenge to the competency of the witness fails because the defendant affirmatively agreed that the witness was competent and that there was no issue to her competency.

2. The defendant was not denied effective assistance of counsel for failing to object to M.A.'s competency because, as the trial court found, she was competent to testify at trial and the unchallenged findings of fact support this conclusion of law.

To demonstrate ineffective assistance of counsel, the defendant must show that counsel's representation was deficient in that it fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficiency was prejudicial in that there is a reasonable probability that, except for counsel's unprofessional error, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). An attorney's strategic and tactical decisions are not subject to second guessing. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). If a petitioner fails to establish either element of an ineffective assistance claim, this Court need not address the other element. *Id.* at 78.

The findings of fact regarding the child competency/hearsay hearing are set forth at CP 158-160 of the trial court's Findings of Fact and Conclusions of Law re: Child Hearsay. They are repeated in an almost identical fashion below, with references to the finding number and the testimonial support for that finding from the report of the proceedings.

M.A. testified at the hearing on January 11, 2019.<sup>2</sup> M.A.'s date of birth is September 22, 2009; at the time of the hearing she was nine years of age.<sup>3</sup> M.A. demonstrated that she understood her obligation to tell the truth and also demonstrated an understanding of the importance of telling the truth.<sup>4</sup> She demonstrated clear memories of the time period during which these events occurred.<sup>5</sup> M.A. answered questions and clarified questions on the stand.<sup>6</sup>

M.A. lived with her mother Danielle Nesbitt and two twelve-year-old brothers.<sup>7</sup> Ms. Nesbitt worked until 5:30 or 6:00 p.m., which was later than the time her children got out of school.<sup>8</sup> In August 2016, the defendant

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<sup>2</sup> CP 158 (FF 1); RP 6-20.

<sup>3</sup> CP 158 (FF 2, 3); RP 6-7.

<sup>4</sup> CP 159 (FF 4, 5); RP 8.

<sup>5</sup> CP 159 (FF 6); RP 8-20.

<sup>6</sup> CP 159 (FF 7); RP 8-20.

<sup>7</sup> CP 159 (FF 8); RP 7.

<sup>8</sup> CP 159 (FF 9); RP 23-24.

would babysit M.A. and her two brothers primarily at their home from the time they were done with school until Ms. Nesbitt returned home.<sup>9</sup> On December 28, 2016, M.A. disclosed to her mother that the defendant had been sexually abusing her.<sup>10</sup> This disclosure arose in the context of a conversation between M.A. and Ms. Nesbitt about the new family puppy.<sup>11</sup> M.A. told her mother that the defendant made the puppy stay outside her room when he and M.A. played in her room with the door shut.<sup>12</sup> Ms. Nesbitt asked what they would play and M.A. said barbies.<sup>13</sup> Ms. Nesbitt asked what the barbies would do and M.A. stated they would kiss and have sex.<sup>14</sup> Ms. Nesbitt asked M.A. if the defendant had ever done anything like that to her and M.A. said yes.<sup>15</sup> Ms. Nesbitt then asked a series of leading questions about the abuse and introduced terms that M.A. had not used.<sup>16</sup> In response to those questions, M.A. answered with a “yes” or

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<sup>9</sup> CP 159 (FF 10); RP 25.

<sup>10</sup> CP 159 (FF 11); RP 27.

<sup>11</sup> CP 159 (FF 12); RP 27-28.

<sup>12</sup> CP 159 (FF 13); RP 28.

<sup>13</sup> CP 159 (FF 14); RP 28-29.

<sup>14</sup> CP 159 (FF 15); RP 29.

<sup>15</sup> CP 159 (FF 16); RP 29-30.

<sup>16</sup> CP 159 (FF 17); RP 28-29, 41-42, 46.

with a “no” and also with her own narrative using her own words.<sup>17</sup> There was no evidence that M.A. had any reason to lie about the defendant’s actions.<sup>18</sup> M.A.’s initial statements were to her mother Ms. Nesbitt with whom she has a close relationship.<sup>19</sup> M.A.’s statements to Ms. Nesbitt were close in time to the abuse.<sup>20</sup>

M.A. was examined by Fiona Dennison at Partners with Families and Children on January 4, 2017.<sup>21</sup> M.A. made statements to Ms. Dennison about the abuse by the defendant.<sup>22</sup> These statements to Ms. Dennison were not in response to questions but were made spontaneously during the exam.<sup>23</sup> M.A.’s statements to Ms. Dennison were made seven days after the initial disclosure.<sup>24</sup>

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<sup>17</sup> CP 159-60 (FF 18); RP 41-42, 46, 92.

<sup>18</sup> CP 160 (FF 19); RP 6-20, 123 (court explains given the demeanor and totality of M.A.’s testimony, the possibility that her recollection was faulty was remote. The circumstances surrounding the statements made by M.A. do not leave reason to suppose she was misrepresenting the defendant’s involvement).

<sup>19</sup> CP 160 (FF 20); RP 22, 56-57 (M.A. would tell her mother everything and did not hold back much).

<sup>20</sup> CP 160 (FF 21) (disclosure on December 28, events occurred from August through December).

<sup>21</sup> CP 160 (FF 22); RP 61.

<sup>22</sup> CP 160 (FF 23); RP 63-64, 65.

<sup>23</sup> CP 160 (FF 24); RP 64-65.

<sup>24</sup> CP 160 (FF 25) (December 28, 2016 disclosure, interview January 4, 2017).

M.A. participated in a recorded forensic interview with Tatiana Williams at Partners with Families and Children on January 10, 2017.<sup>25</sup> M.A. made statements to Ms. Williams about the abuse by the defendant.<sup>26</sup> M.A.'s statements to Ms. Williams were made two weeks after the initial disclosure.<sup>27</sup> Ms. Williams followed nationally accepted protocol in her questions.<sup>28</sup> Ms. Williams asked open-ended questions and did not introduce terms to M.A.<sup>29</sup> During the forensic interview, M.A. demonstrated that she understood what it meant to tell the truth and the importance of doing so.<sup>30</sup> M.A. corrected Ms. Williams and clarified statements throughout the interview.<sup>31</sup>

From these findings, the trial court's first conclusion of law was that M.A. was competent as a witness. Counsel does not assign error as to any of these findings of fact and all are supported by the record. The trial court's unchallenged findings of fact are verities on appeal. *State v. Broadaway*,

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<sup>25</sup> CP 160 (FF 26); RP 87.

<sup>26</sup> CP 160 (FF 27); Ex. P1 (copy of forensic interview, admitted as P-1 at RP 89).

<sup>27</sup> CP 160 (FF 28) (the January 10, 2017 interview was two weeks after the December 28, 2016 disclosure).

<sup>28</sup> CP 160 (FF 29); RP 80-82.

<sup>29</sup> CP 160 (FF 30); RP 86.

<sup>30</sup> CP 160 (FF 31); RP 83-84.

<sup>31</sup> CP 160 (FF 32); RP 92.

133 Wn.2d 118, 131, 942 P.2d 363 (1997). This Court reviews the trial court's challenged findings of fact for substantial evidence and its conclusions of law de novo. *State v. Garvin*, 166 Wn.2d 242, 207, 207 P.3d 1266 (2009). Because the findings of fact support the trial court's conclusion that M.A. was competent there is no issue here, even had the defendant objected to the competency finding.

Nothing in the record indicates M.A. failed to meet the low threshold for competence. She testified coherently and was able to differentiate the truth from a lie. Although she made some inconsistent statements and expressed some lapses in memory, these common circumstances are insufficient to overcome the strong presumption of competence. *See State v. Carlson*, 61 Wn. App. 865, 874, 812 P.2d 536 (1991).

Competency is a low bar; all persons, including children, are presumed competent. RCW 5.60.020; *State v. Brousseau*, 172 Wn.2d 331, 347, 259 P.3d 209 (2011). A young child is competent to testify as a witness at trial if that child has: (1) an understanding of the obligation to speak the truth on the witness stand, (2) the mental capacity at the time of the occurrence to receive an accurate impression of the matter about which the witness is to testify, (3) a memory sufficient to retain an independent recollection of the occurrence, (4) the capacity to express in words the witness's memory of the occurrence, and (5) the capacity to understand

simple questions about it. *State v. Swan*, 114 Wn.2d 613, 645, 790 P.2d 610 (1990), *as clarified on denial of reconsideration* (June 22, 1990). The determination of competency rests primarily with the trial judge who sees the witness, notices his or her manner and demeanor, and considers his or her capacity and intelligence. *State v. C.J.*, 148 Wn.2d 672, 682, 63 P.3d 765 (2003). Courts afford significant deference to the trial judge's competency determination and disturb such a ruling only upon a finding of manifest abuse of discretion. *Brousseau*, 172 Wn.2d at 340. Not every factor must be satisfied in every case. *State v. Woods*, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005), *as amended* (July 27, 2005). But the factors must be “substantially met.” *Id.* at 623-24 (quoting *Swan*, 114 Wn.2d at 652).

*a. Factor one: an understanding of the obligation to speak the truth on the witness stand.*

The defendant argues that there was not enough inquiry to establish that M.A. understood her obligation to be truthful in court. However, the trial court found M.A. demonstrated that she understood her *obligation* to tell the truth, CP 159 (FF 4); that M.A.'s mother stressed the *importance* of telling the truth in their home; and M.A. *demonstrated* an understanding of the *importance* of telling the truth and had no motive to lie. CP 160 (FF 19). Additionally, the trial court found that M.A. demonstrated that she understood what it meant to tell the truth and the importance of doing so

during her forensic interview. CP 160 (FF 31). The defendant does not take exception to these findings and they are verities on appeal. *Broadaway*, 133 Wn.2d at 131. Moreover, M.A. was subject to the greatest legal engine at truth finding – she was cross-examined.<sup>32</sup> As Mark Twain stated, “If you tell the truth, you don’t have to remember anything.”<sup>33</sup> The defendant does nothing to overcome the presumption that a witness is competent to testify or that M.A. did not understand the importance of telling the truth in court.

Additionally, the defendant does not address or contest the related finding that M.A. had no motive to lie. The trial court found that “[t]here is no evidence that M.A. had any reason to lie about the Defendant’s actions.” CP 160 (FF 19). The trial court concluded “M.A. had no motive to lie to Ms. Nesbitt, Ms. Dennison, or Ms. Williams.” CP 160 (CL 2). This unchallenged finding is also supported by the evidence. *See Broadaway*, 133 Wn.2d at 131. Nothing in M.A.’s testimony or the testimony of others

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<sup>32</sup> Cross-examination is an indispensable component of the Confrontation Clause’s preference for live testimony because of its central role in ascertaining the truth. *See California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970) (characterizing cross examination as “the greatest legal engine ever invented for the discovery of truth”) (quoting 5 John Henry Wigmore, *Evidence in Trials at Common Law* § 1367 (3d ed. 1940)); *see also, State v. Rohrich*, 132 Wn.2d 472, 477-78, 939 P.2d 697 (1997).

<sup>33</sup> Mark Twain Quotes. BrainyQuote.com, BrainyMedia Inc, 2020. [https://www.brainyquote.com/quotes/mark\\_twain\\_133066](https://www.brainyquote.com/quotes/mark_twain_133066), (last accessed January 13, 2020).

suggested otherwise. M.A. was subject to cross-examination at the *Ryan* hearing. Because this unchallenged finding is supported by the testimony, the findings, and the trial court's analysis, the defendant fails to establish any manifest abuse of discretion. Therefore, this Court should not disturb the trial court's ruling that M.A. was competent to testify.

*b. The mental capacity at the time of the occurrence to receive an accurate impression of the matter about which the witness is to testify.*

The trial court found that there was no evidence to indicate that M.A.'s recollection was inaccurate. CP 161 (CL 13). The disclosure and subsequent interviews were close in time to the events; M.A. was able to answer questions and was able give a narrative using her own words and was able to correct Ms. Williams and clarify her statements throughout that interview. CP 159-60 (FF18, 32). She was consistent in her statements. The defendant fails to adequately address M.A.'s capacity and there is no assignment of error to these findings. There simply is nothing in the record to establish that there was any issue as to M.A.'s mental capacity.

*c. A memory sufficient to retain an independent recollection of the occurrence to testify.*

M.A. was able to testify at trial, and, in most regards, her testimony was consistent with her statements at the forensic and medical interviews and with the disclosures made to her mother. Although she may have made some inconsistent statements and expressed some lapses in memory, these

common circumstances are insufficient to overcome the strong presumption of competence. *See Carlson*, 61 Wn. App. at 874. Rather, such inconsistencies generally relate to the witness's credibility and the weight to give to her testimony. *Id.*

In *Carlson*, the trial court did not abuse its discretion by finding that a three-year-old witness was competent where the child demonstrated her ability to distinguish between the truth and a lie, gave consistent testimony about the defendant's acts, was able to testify accurately about her age and her friend's names, and identify people in the courtroom. *See id.* at 874-75.

*d. The capacity to express in words the witness' memory of the occurrence.*

Again, there is no challenge to the trial court's findings or conclusions of law regarding this factor. M.A. was able to answer questions from her own mother, she was able to use her own narrative in her own words, and she was able to respond to non-leading questions in her statements to Ms. Dennison and to Ms. Williams. CP 160 (FF 18, 23-24, 29-32). These findings are unchallenged.

*e. The capacity to understand simple questions about the event.*

Defense counsel had little difficulty posing questions to M.A. and M.A. was more than capable of understanding questions put to her at both the *Ryan* hearing and at trial.

The trial court determined M.A. was competent after viewing the forensic video, and evaluating M.A. and the reliability of her statements. The court articulated its reasoning, considered the *Ryan* factors, and ultimately concluded M.A. statements demonstrated sufficient indicia of reliability. The defendant does not establish any abuse of the trial court's discretion. Any other error is either not preserved, or not prejudicial. There was no failure of counsel warranting reversal of this case. Counsel had the opportunity to observe M.A. both in and out of court and was in the best position to understand that any argument regarding her competency was doomed. Defense counsel does not perform deficiently simply by declining to pursue arguments or theories that lack legal or factual support. *See State v. Johnston*, 143 Wn. App. 1, 18, 177 P.3d 1127 (2007). The defendant's attorney, Mr. Christian Phelps, provided effective assistance of counsel.

**B. DID MS. NESBITT IMPROPERLY EXPRESS AN OPINION AS TO M.A.'S CREDIBILITY; IF SO, WAS ANY CHALLENGE WAIVED BY DEFENDANT'S FAILURE TO OBJECT?**

The defendant has raised an argument that trial counsel was ineffective for failing to object in one instance involving Ms. Nesbitt's testimony, and for failing to move to strike the testimony after his objection was sustained during the testimony of Ms. Williams. Because each claim involves a separate analysis, these two instances will be dealt with by the

respondent separately, starting with the complaint regarding Ms. Nesbitt's testimony.

The total complaint regarding Ms. Nesbitt's "opinion" testimony arises from the following italicized words contained in Ms. Nesbitt's response to the prosecutor's question:

Q (By Prosecutor Ms. Fry): How did -- how did you respond to her when she was telling you these things?

A (By Ms. Nesbitt) I mean, *obviously I told her I believed her* and I -- I let her know it was going to be okay. I panicked at first and officially I was about to freak out and call my mom and Mark and confront the situation. But then I called my dad, and he just said you need to go to the police, don't call them, stay calm, go talk to [ M.A.]; you know, he told me to take notes to give to the police. And so then -- I mean, that was maybe a quick few-minute conversation, and then I went back to the room with [ M.A.] and just made sure I had all the facts straight.

RP 443-44.

This response was only on the borderline of being improper, it does not directly state Ms. Nesbitt's opinion on the child's veracity but is a statement she made to the child while she, as a mother, was in a "panic mode" and "about to freak out." RP 443-44. The statement was not that she personally believed her daughter, but, was a statement of *what she told the child*, most likely to prevent the child from becoming panicked and clamming up. The failure to object was simply a tactical decision, where the mother's brief statement to the child after the child's disclosures was

contained in a narrative answer that was not directly a response to the question asked.

It is generally improper for a witness to testify regarding the veracity of another witness because such testimony invades the province of the jury as the factfinder in a trial and violates a defendant's right to a jury trial. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001);<sup>34</sup> *State v. Thach*, 126 Wn. App. 297, 312, 106 P.3d 782 (2005).

Importantly, under RAP 2.5, admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a "manifest" constitutional error. *Kirkman*, 159 Wn.2d at 936. Manifest error requires a nearly explicit statement by the witness that the witness believed the accusing victim. *Id.* "Requiring an explicit or almost explicit statement by a witness is also consistent with ... precedent that it is improper for any witness to express a personal opinion on the defendant's guilt." *Id.* (citations omitted). In this case, therefore, where no objection was made to this sole remark now assigned as error, the remarks must be an explicit or nearly explicit personal expression in order to be reviewable. Even if this isolated incident could be construed as an improper comment,

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<sup>34</sup> *Demery* involved tape recordings of police officers directly accusing the defendant of lying. 144 Wn.2d 757.

it was not sufficiently “explicit or nearly explicit” to an extent which would allow for review absent objection. Therefore, the claim does not warrant review by this Court.

If reviewable, the decision not to object was simply a matter of trial tactics. As this Court held, “[t]he decision of when or whether to object is a classic example of trial tactics.” *Johnston*, 143 Wn. App. at 20 (quoting *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989)). Appellate courts presume that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Here the short statement was contained in a lengthy response and the defense attorney most likely decided that an objection would only highlight the few objectionable words in that lengthy response. He had objected many times before and he objected many times after this isolated statement.<sup>35</sup> The

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<sup>35</sup> RP 137 (objection to use of State’s proposed vaginal definition, stating “we should use the WPIC’s”); RP 204 (objection to chain of custody of spiral purple notebook putting State on notice prior to admitting the notebook); RP 416 (objection to question after witness stated she did not remember, when prosecutor tried to lead the witness into a response after already stating she did not remember; objection sustained by trial court); RP 421 (objection to question on whether it was hard for witness to be in same room as the defendant; sustained); RP 433-34 (objection interposed and sustained as to hearsay as witness stated “there was a time when the boys had come to me and expressed that they felt like - -”); RP 437 (objection sustained as hearsay to question “why did she move out of that bedroom”); RP 443 (objection to question as to how the mother felt hearing

defendant cannot establish, as is his burden, that this failure to object was other than a simple tactical decision. *In re Davis*, 152 Wn.2d at 714.

**C. DID MS. WILLIAMS IMPROPERLY VOUCH FOR M.A.'S CREDIBILITY AND DID THE DEFENDANT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHERE TIMELY OBJECTIONS WERE MADE AND SUSTAINED BY THE TRIAL COURT, BUT WHERE COUNSEL DID NOT ALSO MOVE TO STRIKE THE ANSWER?**

The defendant has raised an argument that he received ineffective assistance of counsel such that the outcome of the trial would have been different because counsel failed to move to strike an answer after his two successive contemporaneous objections to the testimony were sustained by the trial court.

The defendant complains that the following passage constitutes ineffective assistance of counsel simply because there was no motion to strike made after the trial court sustained the objection of defendant:

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these things from her daughter); RP 450-51 (objection to admission of notebook on foundation and chain of custody; overruled); RP 454 (sustained objection to question as being overly broad); RP 456 (relevance objection; overruled); RP 477 (sustained objection to hearsay); RP 476-77 (objection to leading question sustained); RP 481 (overruled objection to whether brother knew whether there were times when the defendant was alone with M.A.); RP 541 (objection to relevance overruled); RP 591 (sustained objection to leading question); RP 623 (two almost simultaneous objections to answer that these certain types of things you would not find coming from a child without the child experiencing them); 663 (objection overruled as to hearsay).

[Prosecutor]: Based on all of your training and experience, if a child was being led in their answers, what type of answers would you expect to hear?

[Ms. Williams]: They can sound very -- just very straightforward, very matter of fact, and then that's it. They're not able to provide any additional details or information when asked for follow-up questions. So like, for example, in this interview, when [M.A.] was talking about the private -- or the bladder and describing how it looked, she talked about crinkly and said something about hard or soft or something like that. Like those type of things you wouldn't find coming from a child if it hadn't really been experienced --

MR. PHELPS: Objection.

[Ms. Williams]: -- and know about it.

THE COURT: Sustained.

MR. PHELPS: Objection.

Q (By MS. FRY) Based on the responses that she was providing to you, did you have concerns that she was being led through your questions?

A No.

RP 623.

Although the court sustained the objections, the defendant now claims that because counsel did not move to strike the short response(s) interposed between the objections and the trial court sustaining the objections, that the outcome of the trial would have been different had he done so. In support of this argument, the defendant directs this Court to the evidentiary discussions occurring before closing arguments, where the

defense attorney stated he should probably have moved to strike the testimony, and would request that the State be prohibited from arguing in closing that the forensic examiner indicated that this was precocious knowledge consistent with somebody who has been abused:

MR. PHELPS: Judge, also that -- I don't envision counsel would do this because she's aware of the objection, but the forensic examiner also -- you heard testimony that, oh, the picture that was drawn is only consistent with somebody who would have experienced that, and which was improper testimony. And I suppose I -- although I objected twice in rapid succession and the Court sustained that as being improper, I probably should have moved to strike that testimony. *But I would ask that counsel be prohibited from indicating that -- that the forensic examiner indicated that this is consistent with somebody who's been abused.*

RP 724 (emphasis added).

The trial court agreed with this argument and pointed out that this type of statement was excluded in the motions in limine, was improper, and, although the trial court was not sure whether the response was voiced, as it was given in the middle of the objections, that the trial court would have granted a motion to strike. RP 724. *As requested by the defendant's counsel*, the trial court ordered the State not to argue or discuss Ms. Williams' beliefs as to the validity of M.A.'s statements. RP 724. The State agreed it would follow this directive. *Id.*

Here, the defendant made the *tactical* choice as to *what remedy* he would request as a result of his failure to move to strike the testimony. He

could have moved for a mistrial, arguing (as the defendant does now – Br. of Appellant at 36-38) that the statement constituted improper vouching such that it denied him effective assistance of counsel. The timing of a motion for mistrial, and the trial court’s decision of whether to grant it is well within the trial court’s discretion. *See e.g. State v. Gamble*, 168 Wn.2d 161, 176-77, 225 P.3d 973 (2010) (where in consolidated appeals, in defendant Matthews case the trial court delayed any ruling until the end of trial, and then denied the motion for a mistrial. On appeal, the Court of Appeals concluded that the irregularities were not serious, and the trial court’s actions in sustaining the objections and instructing the jury to disregard the evidence cured any prejudice).

Additionally, attorney Phelps could have asked for, and would have likely received,<sup>36</sup> a limiting instruction from the trial court precisely fashioned to instruct the jury to disregard Ms. Williams unsolicited response regarding her opinion on why a child would know certain things. *See State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979) (generally, the trial courts have wide discretionary powers in conducting a trial and dealing with irregularities which arise); *King Cty. Fire Prot. Districts*

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<sup>36</sup> The jury had not been instructed and closing arguments had not commenced. As both sides agree the trial judge indicated he would have granted a motion to strike. *See* Br. of Appellant at 36.

*No. 16, No. 36 & No. 40 v. Hous. Auth. of King Cty.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994) (the timing of a ruling on a motion to strike is discretionary with the trial court). Out of the available remedies, counsel made the strategic choice regarding his potential remedies. Counsel's performance will not be considered deficient if it can be characterized as legitimate trial strategy. *Kyllo*, 166 Wn.2d at 863. Because this choice was the best tactic under the circumstances, a claim of ineffective assistance cannot be maintained.

Moreover, while the objected-to portions of Ms. Williams' response were not directly related to the question asked,<sup>37</sup> her response involved the precocious knowledge possessed by M.A. which was not a forbidden area of inquiry, although opinions on veracity were forbidden. Ms. Williams' response cuts close to the line between improper opinion evidence and a proper discussion involving evidence of a child's precocious sexual knowledge.<sup>38</sup> Evidence of precocious knowledge of explicit sexual matters

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<sup>37</sup> The question, which was on redirect, related to whether the child had been led in her answers (by her mother). This was in response to the defendant's cross-examination questions dealing with M.A.'s statements that she was okay in the interview because she had gone over the subjects with her mother, and why Ms. Williams failed to inquire into that area. RP 606-09. Ms. Williams agreed that she had made a mistake. RP 609.

<sup>38</sup> In *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008), our Supreme Court reiterated an observation from *Kirkman*, 159 Wn.2d 918, that to avoid inviting witnesses to express their personal beliefs, one permissible and perhaps preferred way is for trial counsel to phrase the

is evidence indicating that a child has knowledge of explicit sexual matters at an earlier age than is typical for a child of that maturity and experience. *See, e.g., Swan*, 114 Wn.2d at 633 (three-year-old children’s description of fellatio, ejaculation, and intercourse); *State v. Jones*, 112 Wn.2d 488, 497, 772 P.2d 496 (1989) (four-year-old child’s descriptions of urolagnia); *In re Dependency of Penelope B.*, 104 Wn.2d 643, 654-55, 709 P.2d 1185 (1985) (five-year-old child’s gestures with anatomically correct male doll indicating her familiarity with male genitalia and the act of fellatio); *State v. Bishop*, 63 Wn. App. 15, 28, 816 P.2d 738 (1991). Therefore, the claimed violation is not as clear as the defendant now claims. *Cf. Madison*, 53 Wn. App. at 760, where an expert witness testified without objection, (or motion to strike) that a young child’s conduct was “typical of a sex abuse victim.” In *Madison*, cited with approval in *Kirkman*,<sup>39</sup> the court rejected

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question “is it consistent with” instead of “do you believe.” *Montgomery*, 163 Wn.2d at 592.

<sup>39</sup> *See Kirkman*, 159 Wn.2d at 936 (“In light of the underlying rationale for RAP 2.5(a)(3), *Madison* and [*City of Seattle v. Heatley* [70 Wn. App. 573, 854 P.2d 658 (1993)] provide the better approach. 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”).

the argument that the testimony amounted to a statement of belief in the victim's story and, consequently, an opinion on the defendant's guilt. *Id.*

In *Kirkman*, the defendants were convicted of child rape. A detective interviewed the child victim and testified to the "preliminary competency protocol" used to determine the victim's ability to tell the truth. 159 Wn.2d at 930. The detective used this protocol because he was interested in the victim's ability to distinguish between truth and lies. *Id.* at 922, 930. He stated that the victim distinguished truth from lies, that he asked the victim to promise to tell the truth, and that the victim explicitly promised to do so. *Id.* at 929. For the first time on appeal, the defendant argued the detective improperly testified to the victim's credibility. Our high court determined that the detective's testimony "simply" accounted for the interview protocol used to obtain the victim's statement and "merely provided the necessary context that enabled the jury to assess the reasonableness of the ... responses." *Id.* at 931. The court also concluded that the detective did not testify that he believed the victim or that she told the truth, that testifying as to the protocol used was not a comment on the truthfulness of the victim. *See also, State v. Warren*, 134 Wn. App. 44, 52, 138 P.3d 1081 (2006), *affirmed*, 165 Wn.2d 17 (2008), *cert. denied* 556 U.S. 1192 (2009) (claim that forensic interviewer and detective commented on child's credibility was not reviewable for the first time on appeal); *State v. King*,

131 Wn. App. 789, 130 P.3d 376 (2006), *as amended* (Mar. 7, 2006), *publication ordered* (Mar. 7, 2006), *review denied*, 160 Wn.2d 1019 (2007) (testimony from child interviewers did not infringe on the jury’s role of determining the victim’s testimony and claimed error was not manifest).

Under the *Kirkman* test,<sup>40</sup> whether Ms. Williams’ statement that “those type of things you wouldn’t find coming from a child if it hadn’t really been experienced -- and know about it” is impermissible opinion testimony, is determined by considering 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.

Here, the witness is a trained child interviewer. She had been extensively cross-examined and impeached by the defendant as to her failure to inquire into the child’s statement that she was fine with the interview because “[w]ell I got to go over all of this with my mom, so not so bad.” *See* RP 607-09 (cross-examination). Also, the jury was able to view the actual child interview and make its own determinations as to what took place at that interview.

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<sup>40</sup> *Kirkman*, 159 Wn.2d at 928.

As to the second factor, the statement is not a nearly explicit statement by the witness that the witness believed the accusing victim as required under *Kirkman*. 159 Wn.2d at 937. As above, it is more of a statement regarding the inference taken from evidence of precocious knowledge of explicit sexual matters. Ms. Williams did not say she believed the defendant committed the acts, or that she believed what the child told her, but, instead, inferred that the child must have experienced something, somewhere, to be able to have this precocious knowledge.

As to the third element, the nature of the charges, the State agrees that child sex cases generally involve issues of credibility of the child and the defendant.

As to fourth factor, the type of defense, here the defendant's overarching argument was that the victim's mother introduced every act of sexual activity through the use of leading questions. *See* RP 767 (defendant's closing argument). He also argued there was no evidence of penetration,<sup>41</sup> RP 771, and that there were inconsistencies in the child's memory, RP 773-75.

Concluding with the fifth factor, as to other evidence before the trier of fact, the jury was able to view the child interview and the drawings made

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<sup>41</sup> And the jury agreed, acquitting the defendant of two counts of child rape.

by the child, the consistency between what M.A. told her mother, what M.A. told Ms. Dennison, who performed the physical exam, and what M.A. told Ms. Williams.<sup>42</sup> M.A. told her mother that the defendant would give her candy when the abuse took place, and Ms. Nesbitt, the child's mother, found a large number of such wrappers in the child's bedroom. Both of her brothers, and the defendant, testified that the defendant and M.A. would be alone in her bedroom with the door closed while the brothers played video games at the other end of the house. Also, there was the notebook that was discovered after M.A. clearly described it in the recorded interview. She had informed her mother this notebook contained inappropriate pictures that the defendant made her draw, including women with ginormous breasts. Also, M.A. was able to describe what happened to her in her own words. Therefore, Ms. Williams' short statement does not constitute impermissible opinion testimony. It does not near the "explicit" statement of opinion required under *Kirkman*.

Finally, defendant's comparison of this case with the unpublished case of *State v. Flook*, 199 Wn. App. 1052, 2017 WL 2955539 (2017), is unhelpful to his argument. Br. of Appellant at 35. That unpublished case involved testimony of Sheriff Brett Myers, who was allowed by the trial

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<sup>42</sup> As argued by the State in closing. RP 726.

court to lay a foundation on how he was trained in “deception detection”<sup>43</sup> and was also allowed to “qualif[y] himself as an expert on the credibility of witnesses,”<sup>44</sup> and, moreover, was able to do so *over defense counsel’s objections*. He was allowed, by the trial court, to voice his opinion, *as an expert on veracity*, that the defendant was untruthful, and that the victim was telling the truth. The Court’s opinion contains lengthy quotations from the trial record, most of which constituted utterly objectionable questions and answers. In the instant case, we have a short answer entwined with the objections and the trial court’s ruling sustaining the objection.

For the reasons above, there was no failure in defendant’s representation that rises to the level of establishing ineffective assistance of counsel such that defendant has established his attorney’s performance cannot be characterized as legitimate trial strategy. And, with respect to prejudice, the appellant fails to establish that “there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. The unstricken statements were not “nearly explicit” comments on M.A.’s credibility, and, in any event, were harmless. Indeed, the defendant’s

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<sup>43</sup> *Flook*, 2017 WL 295539 at \*7.

<sup>44</sup> *Id.*

attorney, Mr. Phelps, was very effective. He was able to obtain two not guilty verdicts on the two most serious counts.

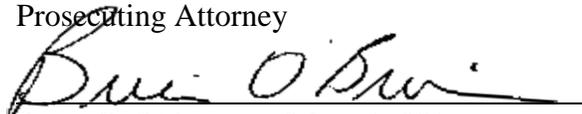
Additionally, the defendant tactically decided not to move for a mistrial or a curative instruction, but, instead, asked for and received an order from the court preventing the State from arguing, in closing, that the forensic examiner indicated that M.A.'s knowledge was consistent with somebody who's been abused. The defendant's contention that his attorney provided ineffective assistance of counsel is without merit.

## V. CONCLUSION

The defendant has failed to show that counsel's performance was not reasonably effective under prevailing professional norms, especially where such performance involves tactical choices involving legitimate trial strategy. The defendant has also failed to establish that he was prejudiced by any deficiency such that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.

Dated this 27 day of January, 2020.

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

STATE OF WASHINGTON,

Respondent,

v.

MARK MOEN,

Appellant.

NO. 36738-0-III

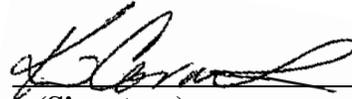
CERTIFICATE OF  
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on January 27, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Brooke Hagara  
[brooke@hagaralaw.com](mailto:brooke@hagaralaw.com)

1/27/2020  
(Date)

Spokane, WA  
(Place)

  
(Signature)

# SPOKANE COUNTY PROSECUTOR

January 27, 2020 - 9:35 AM

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