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DIVISION ONE

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NO. 62109-2-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

PATRICK L. MORRIS,
Appellant.

FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON, FOR SKAGIT COUNTY

STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

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I. SUMMARY OF RESPONSE TO PETITION

Patrick Morris was convicted of two counts of Child Molestation in the First Degree and one count of Rape of a Child in the First Degree. Morris filed the present personal restraint petition claiming that there was a violation of Morris's right to public trial by conducting a portion of *voire dire* in chambers. The State contends that there was no closure in the manner in which this was conducted, and Morris participated in and benefitted from the process, so he should not be able to raise this issue on appeal or in a personal restraint petition.

Morris also makes claims that the trial court erred in excluding offered expert testimony as to the child interviews and that his counsel was ineffective as to the choice not to call the claimed expert after the testimony was limited. Because the trial court did not err in excluding the testimony and defense counsel could have made a tactical decision not to call the expert, a new trial is not merited. Morris also raises a claim of ineffective assistance of appellate counsel for failure to raise the issues noted above. Because the substantive issues resolve in favor of the State, appellate counsel cannot be shown to have been ineffective.

II. ISSUES RELATING TO CLAIMED ERROR

Where the trial court conducted a portion of voire dire in private at the request of some jurors and there was closure order, was there a closure of the courtroom implicating a right to public trial?

Can a defendant who participates in and benefits conducting a portion of voire dire in chambers raise an issue as to courtroom closure on direct appeal or collateral attack?

Has the petitioner established that the trial court abused its discretion in denying expert testimony and that defect results in a complete miscarriage of justice?

Has the petitioner established that his trial counsel did not make a tactical decision in not calling an expert and did that decision result in a complete miscarriage of justice?

Has the petitioner established that prior appellate counsel was ineffective for failing to raise the issues claimed above?

III. STATEMENT OF THE CASE

1. Statement of procedural history.

On August 21, 2003, Patrick Morris was charged with two counts of Child Molestation in the First Degree and one count of

Rape of a Child in the First Degree alleged to have occurred on or about August 6, 2001 and March 6, 2003. The victim was alleged as A.W., a minor female child with a date of birth of August 6, 1997.

On June 8, 2004, the case proceeded to trial. 6/8/2004 RP 1.¹

On June 9, 2004, the State amended the information to clarify that the three counts were alleged to have occurred on or about August 6, 2003 through March 6, 2003. Testimony was taken across six days.

On June 16, 2004, the trial court instructed the jury and the parties made their closing arguments. 6/16/2004 RP 13.

On June 17, 2004, the jury returned guilty verdicts on two counts of Child Molestation in the First Degree and one count of Rape of a Child in the First Degree. CP 78.

On September 2, 2004, Morris was sentenced by the trial court to a term of 189 months.

On September 3, 2004, Morris timely filed a Notice of Appeal. In the direct appeal, Morris raised claims pertaining to the testimony of a "diagnosis" of a therapist, ineffective assistance for not objecting to that diagnosis and improper rebuttal testimony pertaining to the

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are listed in Appendix A attached.

defendant applying diaper rash ointment on the victim. See Appendix A. The State filed a Respondent's Brief. See Appendix B.

On November 28, 2005, the Court of Appeals issued a decision denying the appeal and affirming the conviction. See Appendix C. Morris filed a petition for review with the Supreme Court.

On July 11, 2007, the Supreme Court entered an order denying the petition for review. See Appendix D.

On August 31, 2007, the mandate on the direct appeal was issued by the Court of Appeals. See Appendix E.

On August 8, 2008, Morris filed the present personal restraint petition in the Court of Appeals.

On October 8, 2008, the Court of Appeals called for a response to the Personal Restraint Petition.

2. Statement of factual history.

The State respectfully requests that this court refer to the detailed statement of facts as provided in the Respondent's Brief filed in the Court of Appeals in the direct appeal. That brief is attached hereto as Appendix B. Because some of the claims herein pertain to ineffective assistance of both trial and appellate counsel, the State believes that this Court is required to review the trial court and

appellate record as a whole to evaluate those claims of ineffective assistance.

The victim, A.W. who was six at the time of trial, testified that her father Patrick Morris touched her with his finger in her private parts. 6/9/2004 RP 32, 40, 62. A.W. indicated on a diagram where her father touched her. 6/9/2004 RP 40. A.W. said that her father's finger wiggled when he touched her. 6/9/2004 RP 41-2. She testified that she was in her bed in her downstairs bedroom at his house when he did that to her. 6/9/2004 RP 42-3. A.W. testified that these incidences happened more than two times. 6/9/2004 RP 43-4. A.W. testified that she was sleeping in her bedroom with a nightgown on when he came in and woke her up by touching her on her private parts. 6/9/2004 RP 46. Her father was either on his knees or sitting on the floor when he touched her. 6/9/2004 RP 46-7. A.W. testified that it was her father and that she saw his face every time. 6/9/2004 RP 47-8. A.W. said that she had told her mother and Sam that her father hurt her. 6/9/2004 RP 55.

Patrick Morris testified on his own behalf. 6/14/2004 RP 92-151, 6/15/2004 RP 3-35. The defense focused on the differences in A.W.'s "story" about what occurred as it was related by A.W. herself on the stand, in the videotape and through six witnesses. 6/16/2004

RP 42-50. The defense argued that A.W. had help from Theresa about her story. 6/16/2004 RP 52. Defense concluded by stating their theory of the case.

Conclusion, we want to talk about motive. We want to talk about what Theresa Scribner wanted to get out of it. It's very simple. Theresa decided to do for herself what Pat Morris would not agree to do. And that was to terminate his parental rights to get Pat out of the picture one way or another. And the evidence is that Theresa did it by coaching [A.W.] and making an allegation against Pat of child abuse.

6/16/2004 RP 86.

IV. ARGUMENT

Both constitutional and nonconstitutional errors may be raised in a collateral challenge. In re Pers. Restraint of Davis, 152 Wn.2d 647, 671, 101 P.3d 1 (2004). A petitioner has the burden of showing actual prejudice as to claimed constitutional error; for alleged nonconstitutional error, he must show a fundamental defect resulting in a complete miscarriage of justice. In re Pers. Restraint of Rice, 118 Wn.2d 876, 884, 828 P.2d 1086 (1992); In re Pers. Restraint of Cook, 114 Wash.2d 802, 813, 792 P.2d 506 (1990).

In re Pers. Restraint of Elmore, 162 Wn.2d 236, 251, 172 P.3d 335 (2007).

1. Where the defendant participated in the proceedings in chambers, the defendant cannot raise a new rule to a case already final, there was no closure order and there was no violation of the right to public trial meriting reversal.

i. New procedural rules may not be applied for the first time on collateral review.

Except in certain narrowly construed circumstances, a "new rule" of constitutional law may only be applied to cases not yet final on direct appeal. State v. Evans, 154 Wn.2d 438, 444-5, 114 P.3d 627, cert. denied, 546 U.S. 983, 126 S.Ct. 560, 163 L.Ed.2d 472 (2005) (*citing* In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992), and Teague v. Lane, 489 US. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)). The Supreme Court explained that this Teague analysis "involves a three-step process":

First, the court must determine when the defendant's conviction became final. Second, it must ascertain the "legal landscape as it then existed," and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the rule is actually "new." Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.

Beard v. Banks, 542 US. 406, 411, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004) (citations omitted). Applied to the present case, three issues are thus presented:

1. Is Morris's conviction "final"?

2. Does Morris seek a "new rule"?

3. If he does, does the propose rule fall within the narrow exceptions to the St.Pierre/Teague rule?

"The critical issue in applying the curent retroactivity analysis is whether the case was final when the new rule was anounced." St. Pierre, 118 Wn.2d at 327. By "final," the Court means "a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." St. Pierre, 118 Wn.2d at 327, *citing* Griffith, 479 US. at 321 n. 6. Here, the mandate issued on August 31, 2007, and the time to certiorari review expired well before this instant petition was filed. His conviction is thus final for the purposes of St.Pierre and Teague.

A new rule is one that breaks new ground or imposes a new obligation. Evans, 154 Wn.2d at 9, *citing* Teague, 489 US. at 301. "A new rule is a 'result ... not dictated by precedent existing at the time the defendant's conviction became final.'" State v. Hanson, 151 Wn.2d 783, 790, 91 P.3d 888 (2004) (emphasis and ellipses the Court's) (*quoting* Teague, 489 U.S. at 301). The focus of the inquiry is whether reasonable jurists could differ as to whether precedent compels the sought-for rule. Banks, 542 U.S. at 413. A

decision is "dictated" by then-existing precedent when the "unlawfulness of (defendant's) conviction was apparent to all reasonable jurists." Lambrix v. Singletary, 520 U.S. 518, 527-28, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997). The rule Morris seeks fails this test and thus announces a new rule.

While Morris relies on existing precedent such as State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), the cases he cites do not "compel" the result he seeks. Because no existing precedent dictates the result Morris seeks, it is thus a "new rule" subject to St. Pierre and Teague.

Nor does Morris's proposed new rule fall within either of the narrow "exceptions" to Teague. These "exceptions" were addressed in Schriro v. Summerlin, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). In Summerlin, Justice Scalia explained that while the courts commonly speak of the Teague exceptions, they are more accurately characterized as substantive rules that are not subject to Teague's bar. Summerlin, 542 US. at 352 n.4. Such rules generally apply retroactively:

New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the

State's power to punish(.) Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him.

Summerlin, 542 US. at 351-52 (emphasis the Court's; footnote and citations omitted). New procedural rules, on the other hand, because they do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise, generally do not apply to cases already final. Summerlin, 542 U.S. at 352. Procedural rules that so impact the reliability of a conviction as to justify disturbing finality are thus extraordinarily rare:

Because of this more speculative connection to innocence, we give retroactive effect to only a small set of "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." That a new procedural rule is "fundamental" in some abstract sense is not enough; the rule must be one "without which the likelihood of an accurate conviction is seriously diminished." This class of rules is extremely narrow, and "it is unlikely that any... 'ha(s) yet to emerge. ",

Summerlin, 542 US. at 352 (emphasis and editing the Court's; citations omitted).

Applying these principles, the Court explained that procedural rules are those that affect the manner of determining the defendant's culpability, not what facts must be found:

A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa.

Summerlin, 542 US. at 354. The rule Morris seeks will not alter the elements of any offense or the range of conduct that may be punished. Indeed, it only tangentially even affects the manner of determining culpability. It is procedural, not substantive.

Nor would his proposed change create a "watershed" procedural rule. Such rules "implicat(e) the fundamental fairness and accuracy of the criminal proceeding." Summerlin, 542 US. at 355. Thus in Summerlin, where the issue was the right to a jury, the Court concluded that although the Constitution may mandate jury fact finding, fairness and accuracy do not:

The question here is not, however, whether the Framers believed that juries are more accurate fact finders than judges (perhaps so--they certainly thought juries were more independent). Nor is the question whether juries actually are more accurate fact finders than judges (again, perhaps so). Rather, the question is whether judicial fact finding so "seriously diminishe(s)" accuracy that there is an "impermissibly large risk" of punishing conduct the

law does not reach. The evidence is simply too equivocal to support that conclusion.

Summerlin, 542 U.S. at 355-56 (emphasis and editing the Court's; citations omitted). The Court thus concluded that a jury was not essential to an accurate finding of aggravating circumstances for death penalty purposes, and that Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), which held that aggravating circumstances had to be found by a jury, was not a watershed procedural rule subject to retroactive application. Summerlin, 542 U.S. at 358. Surely if the right to jury finding of aggravating circumstances in a death penalty proceeding, is not a watershed rule, the requirement that the request of a juror not to speak in public on sensitive issues cannot rise to that level. Morris's proposed rule thus cannot be regarded as a watershed procedural rule subject to retroactive application.

- ii. **Morris invited error by seeking, participating and using the jury selection process held in the jury room without any order of closure.**

At the trial court, both the defense and the State participated in the interview of individual jurors in the jury room outside the presence of the rest of the jurors. 6/8/04 RP 46-92. The jurors were provided questionnaires to complete. 6/8/04 RP 14. Eleven of the jurors had

responded on the questionnaire asking to be interviewed in private due to the nature of some of the information to be shared. 6/8/04 RP 45-6. The defendant waived his presence at the hearing at which the eleven jurors were questioned. 6/8/04 RP 46. Morris waived his presence because he believed the jurors would be more forthcoming if he were absent. 6/8/04 RP 46. The trial court then brought the eleven jurors into “chambers” and questioned them individually. 6/8/04 RP 46-92. Defense used the process to ask to excuse a number of jurors for cause. 6/8/04 RP 50, 54, 62, 68, 76 & 86.

Morris claims for the first time in the petition that his right to public trial was violated by the process individual voir dire, even though he participated in the procedure used by the trial court and used the process because he believed the jurors would be more forthcoming.² Any error was either invited or waived. A defendant who invites error -- even constitutional error -- may not claim on appeal that the error requires a new trial. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (counsel may not request an instruction and then challenge the instruction on appeal); State v.

² This present issue is before the Washington Supreme Court in State v. Momah, 141 Wn. App. 705, 171 P.3d 1064 (2007), rev. granted 163 Wn.2d 1012, 180 P.3d 1297 (2008) (case number 81096-6, oral argument heard June 10, 2008). This case was heard on the same date as State v. Strode, No 80849-0 (A Division Three case certified to the Supreme Court for oral argument).

Aho, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999) (same); State v. Smith, 122 Wn. App. 294, 299, 93 P.3d 206 (2004) (defendant who participated in drafting of jury instruction may not challenge the instruction on appeal). Invited error precludes review even if counsel inadvertently encouraged the error. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (defective jury instruction). The invited error rule recognizes that “[t]o hold otherwise would put a premium on defendants misleading trial courts.” State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

This Court has held that a defendant who is merely silent in the face of manifest constitutional error does not “invite” the error. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). But, a defendant who “affirmatively assents” to error may invite it. For example, it has been suggested that, for purposes of applying the doctrine of invited error, there is a distinction between “whether defense counsel merely failed to except to the giving of the instruction, or whether he *affirmatively assented* to the instruction or proposed one with similar language.” State v. LeFaber, 128 Wn.2d 896, 904, 913 P.2d 369 (1996) (Alexander, J. dissenting -- italics added). See People v. Thompson, 50 Cal.3d 134, 785 P.2d 857 (1990) (failure to object to private voir dire not reviewable where

defendant participated without objection and benefitted).

Under these authorities, this Court should conclude that Morris invited the procedure used by the trial court. The parties had submitted a jury questionnaire to be completed by the jurors. 6/8/04 RP 14. The eleven jurors who indicated they wished to provide information in private were spoken with in chambers. 6/8/04 RP 46-92. Due to the nature of the charges, the defense used the process to excuse jurors who revealed their concerns, most of which had to do with past personal history of related events. Defense used the process to excuse six of the jurors for cause due to bias revealed. 6/8/04 RP 50, 54, 62, 68, 76 & 86.

At no time did Morris tell the court that an in-chambers inquiry might violate his rights or request that the process be held open to the public. Instead, Morris fully and aggressively engaged in the individual selection of the jurors. 6/8/04 RP 46-92. Under such circumstances, this Court should hold that Morris invited error. His public trial claim should not be reviewed.

Even if the alleged error was not invited, it was waived. RAP 2.5 (a) expresses the "nearly universal rule that an appellate court may refuse to review a claim of error that was not raised in the trial court." 2A Karl B. Tegland, *Washington Practice: Rules Practice*

RAP 2.5(a) author's cmts. at 192 (6th ed. 2004). In part, the rule "arose out of solicitude for the sensibilities of the trial court -- that the trial court should be given an opportunity to correct errors and omissions" as they occur. Id. The more substantive rationale, however, recognizes that "the opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal." Id. In essence, RAP 2.5 (a) is "designed to eliminate the time and expense of unnecessary appeals by encouraging the resolution of issues at the trial court level — a policy that benefits the parties and the appellate courts alike." Id.

RAP 2.5 (a)(3) creates an exception to the rule that a party must object to error in the trial court, but review is appropriate only as to "manifest error affecting a constitutional right." State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988) (failure to instruct on "knowledge" was not manifest error); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992) (failure to establish unavailability of witness was not manifest error). RAP 2.5(a)(3) is not intended to afford defendants a means for obtaining new trials whenever they can identify a constitutional issue not raised before the trial court. Scott,

110 Wn.2d at 688.

Issues raised for the first time on appeal are frequently more difficult to analyze because the facts were never developed below. In State v. Kirkpatrick, 160 Wn.2d 873, 161 P.3d 990 (2007), for example, this court refused to consider the constitutionality of a search where the claim was not raised in the trial court. The Court explained that it was impossible to assess the record when no factual record was developed. Kirkpatrick, 160 Wn.2d at 879-81. Likewise, in State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007), this Court held that to fall within the RAP 2.5 (a)(3) exception, “[t]he defendant must identify a constitutional error and show how the alleged error actually affected the defendant’s rights at trial. It is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” Kirkman, 159 Wn.2d at 926-27 (*quoting State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

The difficulty of review remains for the claimed error at the trial court when raised for the first time in a personal restraint petition as here.

Although this Court has permitted public trial claims to be raised for the first time on appeal, in each case the error was clearly “manifest.” In State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325

(1995), the trial court summarily granted the State's request to clear the courtroom for pretrial testimony of an undercover detective. Bone-Club, at 256-57. In State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005), the trial court sua sponte ordered that the courtroom be closed for the entire 2½ days of voir dire, excluding the defendant's family and friends. Brightman, 155 Wn.2d at 511. Likewise, in In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), the trial court summarily ordered the defendant's family and friends excluded from all voir dire proceedings. And, in State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006), the trial court ordered the defendant and his attorney excluded from pretrial motions. Easterling, 157 Wn.2d at 172-73.

In each of these cases, the constitutional violation was clear; it was “manifest.” Thus, none of these cases precludes application of RAP 2.5 (a) to this case, where Morris never objected and where the alleged error is not manifest because it is unclear whether a right to public trial was violated, or whether Morris was prejudiced.

Nor do this Court's decisions establish that *all* violations of the right to public trial are “manifest” error. In Bone-Club, this Court cited State v. Marsh, 126 Wash. 142, 217 P. 705 (1923), for the proposition that Bone-Club's failure to object did not waive his public trial claim.

Marsh does not, however, always preclude waiver of the public trial issue; Marsh should be limited to its facts, which involved the total deprivation of public trial rights, not a partial closure of some aspect of the case.

Marsh was distinguished four years after it was decided, in a true public trial case. State v. Gaines, 144 Wash. 446, 258 P. 508 (1927). The court in Gaines distinguished Marsh as follows:

The case of State v. Marsh, bears no relation to this case upon the facts. There the defendant was charged with contributing to the delinquency of a minor and was tried without a jury in private as are juvenile delinquents. **The question as to whether ‘there is power in the trial court, proceeding in the exercise of discretion, to exclude the public or any portion of it during the trial of a criminal case, and if so to what extent and under what circumstances it may be done,’ was not there involved.**

Gaines, at 463-64 (emphasis added). The holding in Gaines suggests that Marsh simply states the usual rule -- that manifest error may be raised for the first time on appeal -- rather than the broader rule that any public trial claim may be raised for the first time on appeal.

Additionally, this Court has held that a defendant who fails to object to partial closure of the courtroom waives any claim that the trial court violated the state constitution. State v. Collins, 50 Wn.2d

740, 314 P.2d 660 (1957). In Collins, the trial court locked the courtroom door due to overcrowding. The defendant did not object, but raised the issue on appeal. This Court held:

Where the ruling is discretionary, a defendant who does not object when the ruling is made waives his right to raise the issue thereafter. Keddington v. State, 1918, 19 Ariz. 457, 462, 172 P. 273, L.R.A.1918D, 1093. A trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may well believe that both sides have acquiesced in its ruling. (We would add that this is a discretion that should be sparingly exercised; even the suspicion of an invasion of a defendant's constitutional right to a public trial should be avoided.)

Collins, at 748. In-chambers questioning of jurors is more like the highly discretionary decision in Collins, where failure to object was a bar to consideration of the issue on appeal. Thus, Marsh and Bone-Club simply illustrate that a violation of the right to public trial *can* be manifest error, not that any such violation *is always* manifest error.

The United States Supreme Court and a majority of jurisdictions prohibit defendants from raising the public trial claim for the first time on appeal. See Peretz v. United States, 501 U.S. 923, 936, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991) (*citing* Levine v. United States, 362 U.S. 610, 619, 80 S. Ct. 1038, 1044, 4 L. Ed. 2d 989 (1960)). See *also, e.g.*, Wright v. State, 340 So.2d 74, 79-80 (Ala.1976); People v. Bradford, 14 Cal.4th 1005, 60 Cal.Rptr.2d 225,

929 P.2d 544, 570 (1997); Commonwealth v. Wells, 360 Mass. 846, 274 N.E.2d 452, 453 (1971); People v. Marathon, 97 A.D.2d 650, 469 N.Y.S.2d 178, 179 (N.Y.App.Div.1983); Dixon v. State, 191 So.2d 94, 96 (Fla. 2d DCA 1966); State v. Butterfield, 784 P.2d 153, 157 (Utah 1989).

Furthermore, in every courtroom closure case decided in Washington, the appellate court has reversed only upon a showing that the trial court actually issued an order closing the courtroom, or where it was clear that people were in fact excluded from the proceedings. Marsh, 126 Wash. at 142-43; Collins, 50 Wn.2d at 745-46; Bone-Club, 128 Wn.2d at 256-57; Orange, 152 Wn.2d at 801-03; Brightman, 155 Wn.2d at 511; Easterling, 157 Wn.2d at 171-73.

The evidence here suggests that the trial court did not order closure of the proceedings, and there is no evidence that anyone who wanted to observe was, or would have been, turned away. Because neither Morris nor anyone else objected to the manner of voir dire, the only available evidence is circumstantial. Still, that evidence shows that the court did not close the proceedings.

The court never ordered -- orally or in writing, directly or indirectly -- that proceedings in chambers or in the jury room be closed in any way, shape or form. One would think that the court

would have made even a *brief* comment if it had intended to preclude attendance by the press or public. In short, the best Morris can *allege* is a *de facto* closure. But, as pointed out in this brief, the evidence simply does not support that claim. A large group of jurors remained in the open courtroom as individual questioning of certain jurors was done in chambers or in the jury room. The bailiff remained in the courtroom, too, and ushered jurors into chambers or the jury room for individual questioning each time another juror was needed. It stands to reason that the court personnel could have assisted any member of the public or press had such a person wanted to observe. Thus, this Court should reject Morris's invitation to conclude that any part of voir dire was closed.

Such a holding would not diminish the important interests in the open administration of justice. It is possible to question jurors in a jury room or in chambers and still protect the defendant's constitutional right to a public trial. The trial court must simply be careful to accommodate those interests. Still, the practicalities of life and litigation require a certain degree of flexibility in balancing these rights, so trial judges are given wide discretion to manage their courtrooms.

In the personal restraint context, a defendant is required to prove actual and substantial prejudice. Even if a constitutional error is per se prejudicial on direct appeal, the burden on a petitioner in a personal restraint petition to prove actual prejudice is waived only where the error results in a *conclusive* presumption of prejudice. In re Pers. Restraint of Orange, 152 Wn.2d at 804 (emphasis added). As was noted in the seminal case of Waller v. Georgia, “the remedy should fit the violation.” Waller v. Georgia, 467 U.S. 39, 50, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). Just as the windfall of a new trial would not have been in the public interest in that case, so too here. *Id.* In a case involving a similar issue out of Massachusetts, the court there held:

In light of the defendant’s consent to the procedure, his presence throughout the voir dire, and the fact that the less public setting for the voir dire in all likelihood helped rather than harmed the defendant, we find no prejudice to the defendant from the setting in which this voir dire was conducted.

Commonwealth v. Horton, 434 Mass. 823, 753 N.E.2d 119, 128 (2001).

Additionally, pursuant to RCW 7.36.130(1), a court is not permitted to inquire into the legality of any judgment unless “it is alleged in the petition that the rights guaranteed the petitioner by the

Constitution of the state of Washington or of the United State's have been violated...." See also Pettit v. Rhay, 62 Wn.2d 515, 518, 383 P.2d 889 (1963). Morris's claim is that his right to public trial has been violated. However, as explained above, Morris should not be permitted to raise a constitutional right which he waived by his action at the trial court and then turn around and assert the right of the public to an open trial.

2. The trial court did not abuse its discretion in excluding portions of the proposed testimony of Lawrence Daly and Morris has not sufficiently established that .

ER 702, which governs the admissibility of expert testimony, provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

This court has stated that the admissibility of expert testimony under ER 702 depends upon whether "(1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact." The decision whether or not to admit expert opinion evidence is within the discretion of the trial court and will not be disturbed absent a showing of an abuse of that discretion.

State v. Swan, 114 Wn.2d 613, 655, 790 P.2d 610 (1990) (footnote references omitted. Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)

The State objected to portions of the testimony of Lawrence Daly. 6/14/04 RP 4-5. The parties addressed the potential testimony of Mr. Daly the morning he was scheduled to testify. 6/14/04 RP 4-10, 20-28.

The State also objected to the claimed expertise of Mr. Daly. 6/14/04 RP 28. Defense sought to admit the testimony of Mr. Daly based upon his report as well as a curriculum vitae (C.V.) that had been filed with the court. 6/14/04 RP 29-30. The trial court took Mr. Daly's testimony outside the presence of the jury. 6/14/08 RP 30-71. Daly admitted a number of inaccuracies, mistakes and omissions in his C.V.. 6/14/04 RP 31, 32, 42, 43, 49, 50, 56, 57. Daly also had disciplinary actions as a sheriff as well as being sued civilly for wrongfully turning over confidential investigation files. 6/14/04 RP 35. Daly did not hold any certifications. 6/14/04 RP 36. Daly's claimed master's degree in forensic child studies from the University of Poursmouth in England. 6/14/04 RP 36-7. Daly did not attend the university in person. 6/14/04 RP 36. The course consisted of 3,000

hours of work via distance learning and a forty hour research project. 6/14/04 RP 37, 39. Daly was required to have a bachelor's degree in psychology before enrolling in the program which he did not have. 6/14/04 RP 37. Daly did not know if Dr. Yuille was a preeminent expert in the field of psychology and he did not know anyone who was an expert in the field of child interviewing. 6/14/04 RP 44-5. Daly claimed to be able to testify as to false allegations as a result of his experience and the literature. 6/14/04 RP 59. However, Daly claimed that false allegations are established by jury verdicts. 6/14/04 RP 59. Defense counsel conceded that the defense did not want Daly to testify as to his opinion that the allegation in this case was false. 6/14/04 RP 62. Daly acknowledged that his tying of custody battles to false reporting was not present given that the disclosure occurred before any custody battles. 6/14/04 RP 63-4. Defense did not choose to offer testimony about whether the victim's affect was consistent with someone who had been molested. 6/14/04 RP 64. Daly acknowledged that his opinion about whether A.W. had encouraged to present a certain version of events was based upon his opinion that A.W.'s mother was lying. 6/14/04 RP 67-9

The trial court went over the areas of Daly's potential testimony with both parties. 6/14/04 RP 71-91. The State agreed to

allow Daly describe the interview of A.W. and also present the videotape of the interview. 6/14/04 RP 72-3. Daly was permitted to testify as to the differences between his interview and that of Candy Ashbrook. 6/14/04 RP 74-5.

Defense also sought to have Daly testify about the civil standards for breach of the standard of care of a law enforcement officer by Detective Ryan. 6/14/04 RP 75-6. Although defense counsel did use the term adequacy of the investigation in response to the Court, counsel did not point out to the trial court that he was proposing that difference when the trial court explained the ruling upon the standard of care. 6/14/04 RP 76. Defense agreed that Daly would not provide an opinion as to the standard of care of the child interview specialist. 6/14/04 RP 77. The trial court was skeptical as to Daly's opinion as to the false allegations being established by acquittal. 6/14/04 RP 78. Daly's opinion as to the rate of false reporting of between two and fifty-percent was such a wide range that it would not have been helpful to the jury. 6/14/04 RP 80, 82. Daly had offered an opinion as to scientific studies regarding "stereotype induction, et cetra." 6/14/08 RP 82. Daly's report in this regard had suggested testimony pertaining to scientific studies by explaining the studies, but provided no opinion as to the acceptance of the theories

presented in these studies. See Appendix F at pages 11-17.³ The State objected to the presentation of scientific studies. 6/8/04 RP 83. The trial court characterized the testimony as children being misled. 6/8/04 RP 83. Morris characterized the testimony as pertaining to creation of memories that had not actually occurred. 6/8/04 RP 83. The trial court read State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990) and State v. Willis, 113 Wn. App. 389, 54 P.3d 184 (2002) to limit admission of testimony as to suggestibility or manipulation of young children. 6/8/04 RP 84. Morris also sought to allow Daly to permit testimony that offered that “it is typical for pedophiles to speak to the children that they are molesting.” 6/8/04 RP 85. In that regard, Daly was asked further questions and indicated that there were no studies that he relied upon and thus no theory accepted within a scientific community. 6/8/04 RP 87-89. The trial court determined that Daly indicated there was no significant underlying literature to support Daly’s opinion regarding speaking with victims and use of tools in grooming. 6/8/04 RP 90-1. The trial court also noted that Daly’s testimony needed to avoid Daly’s very

³ Morris has filed a true and correct copy of the report given to the defense counsel and the prosecutor. The State has attached as Appendix F, the copy of the report filed with the trial court and believed to have been reviewed by the trial court in making the decision on admissibility of Mr. Daly’s testimony.

strong opinion as to the truthfulness of the victim's mother. 6/8/04
RP 91.

- i. **Exclusion of claimed expert testimony as to the adequacy of the investigation was not an abuse of discretion and Morris cannot establish that the outcome of the proceedings would have been different.**

Morris relies upon a citation to the case of Kyles v. Whitley, 514 U.S. 419, 446-7, 115 S.Ct. 1555, 1313 L.Ed.2d 490 (1995), for the proposition that defense is entitled to explore the adequacy of the police investigation. However, at the page cited Kyles provides only that it is a common tactic of the defense to discredit the caliber of the investigation, not that a defendant has a right to attempt to discredit the investigation by calling an expert as to the civil standard or care.

In the present case, Morris's petition is based upon a claim that the detective assigned to the case, did not limit victim interviews, search for physical evidence, explore alternate hypotheses or test the recall of the victim's mother. Petition at page 13. The question that the trial court evaluated was whether expert testimony as to these areas would have been helpful to the trier of fact. Portions of these claims are misleading. Since A.W. and Morris, resided at the residence together and there was delayed reporting, is highly doubtful

that physical evidence would have been relevant at the location where the sexual contact occurred. Whether limiting the victim interview, exploring alternate hypotheses or testing the mother's recall would have actually turned up any additional information is unknown. The offered expert's opinion was as to the civil standard of care which the detective should have followed. Appendix F at report pages 4-8. When the trial court characterized the situation as the standard of care, the defense agreed that was what was proposed. 6/8/04 RP 75. Defense counsel stated: "I think that it is not within the layperson's - - getting to an expert, a layperson's understanding and knowledge, the standard of care required by a law enforcement officer." 6/14/08 RP 75. The trial court decided that the evidence was not appropriate because the civil standard of care was not relevant to the determination of the facts in issue. 6/14/08 RP 76.

Additionally, defense also actually pointed out the problems with multiple statements and the inadequacy of the investigation of Detective Ryan during closing argument 6/14/08 RP 41-2, 59, 71-2. Thus, the defense was still able to point out the problems of multiple interviews as well as the alternative hypotheses as to what occurred.

The trial court has not been shown to have abused its discretion. Additionally, Morris has failed to establish that this

claimed error was a fundamental error resulting in a complete miscarriage of justice.

- ii. **The proposed admission of evidence regarding “coaching” was based upon studies that Daly claimed to rely upon and his opinion as to when allegations are established to be “false.”**

Morris sought the admission of testimony from Daly based upon the report he provided that listed certain studies. Daly’s report explained the studies, but provided no opinion as to the acceptance within the scientific community of the theories presented in these studies. See Appendix F at pages 11-19. The State objected to the presentation of scientific studies. 6/8/04 RP 83. The trial court characterized the testimony as children being misled. 6/8/04 RP 83. Morris characterized the testimony as pertaining to creation of memories that had not actually occurred. 6/8/04 RP 83. There was no offer of proof made that Mr. Daly was basing his testimony based upon any theories that were generally accepted in any scientific community. In fact his discussion regarding the studies pertaining to false allegations indicated that “[t]he proportion of such false or malicious allegations is a continuing source of debate with estimates ranging from 2% (Jones and McGraw, 1987) to claims of over 50% in cases involving custody disputes (Raskin and Yuille, 1989).”

Appendix F at page 20. Daly's testimony was colored by the fact that he based his opinion on his belief that false allegations and his ability to identify them were established by jury verdicts in cases in which he was involved. 6/14/04 RP 59.

The trial court read State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990) and State v. Willis, 113 Wn. App. 389, 54 P.3d 184 (2002) to limit admission of testimony as to suggestibility or manipulation of young children. 6/8/04 RP 84.

State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990) involved a case of the charges of statutory rape. At the trial court, the defense sought to admit an expert to testify regarding how a child's memory capacity is affected by age and about the factors that create a suggestion when an adult interviews a child. Both the Court of Appeals and the Supreme Court held that the trial court did not abuse its discretion in denying the expert testimony because it had not been shown that the psychologist's position had on child interviewing was generally accepted in the scientific community. State v. Swan, 114 Wn.2d at 656. The Supreme Court also noted:

Moreover, the argument that child interviews could be suggestive was amply aired during the cross examination of the State's witnesses and, as the trial court declared, was well within the understanding of the jury.

State v. Swan, 114 Wn.2d 613, 656, 790 P.2d 610 (1990),

In State v. Willis, 151 Wn.2d 255, 87 P.3d 1164 (2004), the Supreme Court again had an opportunity to address the admissibility of expert testimony pertaining to child witnesses in a sex offense case. In Willis, the defendant was charged with two counts of first degree rape of a child. The defense sought to call Dr. Yuille, a professor at the University of British Columbia who had developed a system for interviewing children which was followed in five states and numerous countries. The trial court found that Dr. Yuille was an expert in child interview techniques and was relying on scientific studies and data that was generally accepted in the scientific community. State v. Willis, 151 Wn.2d at 260. However, the trial court found that Dr. Yuille's testimony was not helpful to the trier of fact. The Supreme Court upheld that ruling noting:

We hew to our conclusion in Swan that the general principle that younger children are more susceptible to suggestion is "well within the understanding of the jury." Swan, 114 Wn.2d at 656, 790 P.2d 610.

State v. Willis, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004). The Willis court did go on to explain that specialized knowledge of specific interview techniques and protocols is not likely within the common

experience of the jury and that expert testimony on that issue may be appropriate. State v. Willis, 151 Wn.2d at 261. The Willis court went on to hold that the trial court did not abuse its discretion in the facts of that particular case because although Dr. Yuille's opinion of the interview as negative, he did not offer that the victim's memory or ability to recall the events were compromised by the interview techniques utilized. Dr. Yuille also testified that:

Everybody in this field knows that the biggest problem we have is interviewing preschoolers. And no one yet has developed a technique that we know will work with every preschooler.

State v. Willis, 151 Wn.2d 255, 263, 87 P.3d 1164 (2004).

The State believes that the trial court properly applied the rule pertaining to expert witnesses in excluding the proposed testimony of Mr. Daly. Regarding the three standards, the trial court did not find that Daly was not an expert. Although his educational qualifications were subject to debate and his acknowledgement of the lack of qualifying bachelor's degree rendered his master's degree subject to attack, he did have past experience and some training in child interviewing techniques. The trial court did permit Daly to testify pertaining to why he chose to ask the witnesses certain questions the way he did and the

difference between his questions of those and other interviewers. It was the two other factors upon which Daly's proposed testimony fails.

In the defendant's petition, Morris claims that it was undisputed that "his opinions on this matter were generally accepted." Petition at page 18. The State disputes that statement. In the State's review of the record including Mr. Daly's report, the State has been unable to find any indication that Daly would have testified to any theories which were generally accepted in a scientific community. Daly's reference to the scientific studies in his report including references to "coaching" was done without stating whether or not the theories were generally accepted in a relevant scientific community. Appendix F at pages 12-18, 6/14/04 RP 82-3. Morris also indicated that he would not be asking Daly if this was a coached child. 6/14/04 RP 62. There was also no finding by the trial court that any of Daly's areas of proposed testimony covered theories which were generally accepted in a scientific community.

In the absence of such references in the record, the defense cannot show that the trial court abused its discretion. In addition, given the absence of any record showing that there theories which were generally accepted, the trial court did not abuse its discretion

in finding that the testimony would not have been helpful to the trier of fact.

Furthermore, in evaluating Morris's additional burden of proof in a personal restraint petition, there is not a reasonable possibility that the outcome of the trial would have been different, because the defense was still able to argue that the child was more susceptible to suggestion.⁴ Defense in fact so argued to the jury. 6/16/04 RP 46 (specifically arguing the victim's age makes her less reliable); 6/16/04 RP 54-5 (arguing about children believing in Santa Claus or monsters under the bed). That theory is "well within the understanding of the jury." State v. Swan, 114 Wn.2d at 656, 790 P.2d 610 (1990).

3. Defense counsel's handling of Lawrence Daly did not amount to ineffective assistance of counsel.⁵

The State believes that defense cannot establish that the decision not to call Mr. Daly to testify was not a tactical decision given the testimony at the hearing regarding the admissibility of his

⁴ In the context of the present case, Daly could have explained the reasons for the manners in which he posed questions to the victim during the course of his interview of the victim. He was permitted to testify as to the difference between his questions and those of the State's interview specialist. 6/14/04 RP 74-5.

⁵ Morris did not raise the claim of ineffective assistance of trial counsel on the direct appeal which was handled by different counsel than trial counsel. The basis

testimony. Additionally, Morris cannot establish that there is a reasonable probability of a different outcome had been Daly called to testify.

The constitutional standard for a violation of the right to counsel is set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A petitioner must show that defense counsel's conduct was deficient, i.e., that counsel's performance fell below an objective standard of reasonableness. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing Strickland, 466 U.S. at 687, 104 S.Ct. 2052), and that there is a reasonable probability that, but for the deficient conduct, the outcome of the proceeding would have been different. Id. To establish a constitutional violation, a petitioner must show that counsel's deficiency was "so serious as to deprive the defendant of a fair trial." Strickland, 466 U.S. at 687, 104 S.Ct. 2052. There is a strong presumption that counsel's decision constituted sound trial strategy. Rice, 118 Wn.2d at 889, 828 P.2d 1086.

In re Pers. Restriant of Elmore, 162 Wn.2d 236, 251-252, 172 P.3d 335 (2007). A claim for ineffective assistance of counsel cannot be based on conduct that can be fairly characterized as legitimate trial strategy or tactics. State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). Failure to call a witness is rarely grounds to support ineffective assistance of counsel. State v. Robinson, 79 Wn. App. 386, 396, 902 P.2d 652 (1995).

for this claim of ineffective assistance is not based on any record outside that of what existed in the direct appeal.

The State contends that the decision not to call Daly could have a tactical decision. By letting the tape to be played, defense had the ability to point out the differences between the interview done by Daly and that done by the State's expert. Also, by not putting Daly on the stand, the State did not have the opportunity to examine the glaring flaws in Daly's education history and background. Morris did also not risk the chance that Daly's strong opinions of the victim's mother would have clouded his testimony.

Morris's counsel initially indicated that they wished to have Mr. Daly describe his interview of the victim and how that differed from the State's interview specialist. 6/14/04 RP 6, 72-3. The State offered that Daly could testify about his interview but that the tape could be played at a separate time. 6/14/04 RP 73-4. Defense did not object to that method. 6/14/04 RP 73. The court concluded that Daly could testify about "his interview, his description of it, and his identification, the differences between his and Ashbrook's technique, and the answers that resulted." 6/14/04 RP 75. Morris then chose not to call Daly, instead calling his client first. 6/14/04 RP 92. Defense ended up not playing the victim's interview in their case, but did not object to the State's playing of the interview in rebuttal.

6/14/04 RP 3-4, 6/16/04 RP 2-4.⁶ In fact, defense wished to have the entire tape of the interview, which was about 53 minutes in length, because there were some important things on the first part of the tape for the defense. 6/14/04 RP 3, 6/16/04 RP 2.

Admission of the tape without the testimony of Mr. Daly, allowed the defense to argue their theory regarding the credibility of the victim's account of the events without coloring the jury by Mr. Daly's testimony, his biases and flaws. With the tape of Daly's interview of the victim in, Morris was able to argue based upon the questions asked and he in fact did so. 6/16/04 RP 42, 49. Defense argued based upon the tape where the victim denied that her father had ever touched her with his tongue which was different than what the victim had told her mother initially. 6/16/04 RP 42-3. Based upon the tapes, defense even argued based upon Daly's theory that noises occur during sexual encounter that victims should be able to recall. 6/16/04 RP 49.

Given these circumstances, the playing of the tape without the testimony of Mr. Daly cannot be shown not to have been a trial tactic. On this basis alone the challenge to the conviction should be denied.

⁶ The State had made its intent to play the tape in its entirety. 6/14/04 RP 73.

In challenging an appeal based upon ineffective assistance grounds, Morris also must establish that there is a reasonable probability of a different outcome. Contrary to Morris's position in this regard, the State believes that Daly's proposed testimony would have done little if anything to affect the jury's consideration of the issues. In this regard, defendant's counsel had noted to the trial court that defense specifically did not wish to have Daly testify as to why his interview techniques provided reliable answers, because the victim's responses during the interviews by Candy Ashbrook and Lawrence Daly were virtually identical. 6/14/04 RP 74-5. Thus, although there was critique of the methods and questions, the defense ended up getting to the same point during the defense interviews. Morris was also not deterred from his defense at trial that Theresa Scribner got A.W. to report the allegations. 6/16/2004 RP 86. Defense argued at length about the statements of Theresa and their claim of her motive of trying to divest Morris of his parental rights. 6/16/2004 RP 57-65, 69-78, 86. Additionally, as noted above, in closing argument defense was able to argue many of the unsupported theories offered by Daly. The addition of the proposed testimony of Daly does not undermine the confidence in the conviction.

4. The defendant had effective assistance of appellate counsel.

Generally, upon collateral review, a petitioner may raise a new error of constitutional magnitude or a nonconstitutional error which constitutes a fundamental defect that inherently results in a miscarriage of justice. In re Pers. Restraint of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). Where constitutional error or fundamental defect is alleged, the petitioner must show that he or she was actually and substantially prejudiced by the error. Id. If a petitioner raises ineffective assistance of appellate counsel on collateral review, he or she must first show that the legal issue that appellate counsel failed to raise had merit. In re Pers. Restraint of Maxfield, 133 Wn.2d 332, 344, 945 P.2d 196 (1997). Second, the petitioner must show that he or she was actually prejudiced by appellate counsel's failure to raise the issue. Id.

In re Pers. Restraint of Dalluge, 152 Wn.2d 772, 777-778, 100 P.3d 279 (2004).

Morris' claim regarding ineffective assistance of appellate counsel applies to the three claims raised above: courtroom closure claim, exclusion of defense expert, and ineffective assistance to decision not to call defense expert.

As to the first claim, courtroom closure, the State agrees that this decision will be greatly affected by the Supreme Court's decision in State v. Momah, 141 Wn. App. 705, 171 P.3d 1064 (2007), rev. granted 163 Wn.2d 1012, 180 P.3d 1297 (2008). The State believes

that there is a reasonable probability that the Supreme Court will follow the decision of Division One of the Court of Appeals and determine that there was no closure or that there was no constitutional violation from which the defendant may benefit on appeal. Either analysis would apply to the facts of the present case and would apply to possibility of whether or not appellate counsel was ineffective. For this reason, the State believes that this Court should stay the proceedings in this matter pending the decision in Momah and thereafter decide whether or not to call for further responses based upon that outcome.

As to the second and third claims of ineffective assistance of appellate counsel, the State contends that these issues are resolved by the reasoning presented above. Additionally, the State contends that as to the issue of appellate ineffectiveness, the defense also must show that the appellate counsel did not make an appropriate tactical decision on raising these issues instead of the issues that were attempted to be raised. See Appendix A for issues raised on direct appeal. Even a decision not to pursue a particular avenue of appeal in a case involving a potential death sentence, the decision not to pursue a particular avenue of appeal can be a tactical decision.

The argument is squarely foreclosed by our decision in Carrier, which holds that “the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default.” Supra, 477 U.S., at 486-487, 106 S.Ct., at 2641. See also Engle v. Isaac, supra, 456 U.S., at 133-134, 102 S.Ct., at 1574-75. Nor can it seriously be maintained that the decision not to press the claim on appeal was an error of such magnitude that it rendered counsel's performance constitutionally deficient under the test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Carrier reaffirmed that “the right to effective assistance of counsel ... may in a particular case be violated by even an isolated error ... if that error is sufficiently egregious and prejudicial.” Supra, 477 U.S., at 496, 106 S.Ct., at 2650; see also United States v. Cronin, 466 U.S. 648, 657, n. 20, 104 S.Ct. 2039, 2046 n. 20, 80 L.Ed.2d 657 (1984). But counsel's deliberate decision not to pursue his objection to the admission of Dr. Pile's testimony falls far short of meeting that rigorous standard. After conducting a vigorous defense at both the guilt and sentencing phases of the trial, counsel surveyed the extensive transcript, researched a number of claims, and decided that, under the current state of the law, 13 were worth pursuing on direct appeal. **This process of “winnowing out weaker arguments on appeal and focusing on” those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.** Jones v. Barnes, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 3312-3313, 77 L.Ed.2d 987 (1983). It will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule. But, as Strickland v. Washington made clear, “[a] fair assessment of attorney performance requires that every effort be

made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S., at 689, 104 S.Ct., at 2065. Viewed in light of Virginia law at the time Mr. Pugh submitted his opening brief to the Supreme Court of Virginia, the decision not to pursue his objection to the admission of Dr. Pile's testimony fell well within the "wide range of professionally competent assistance" required under the Sixth Amendment to the Federal Constitution. *Id.*, at 690, 104 S.Ct., at 2066.

Smith v. Murray, 477 U.S. 527, 535-536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). The Washington Supreme Court has recognized the tactical benefits to pursue what appear to be the most meritorious claims on direct appeal.

Before beginning our analysis of the substance of Lord's petition, however, we must comment on its scope. The PRP filed by Lord's appointed counsel is 387 pages long and includes a 430-page appendix. In response, the State filed a 333-page brief along with an additional 400 pages of appendix. Lord then filed a 50-page reply brief. These briefs are in addition to those filed on the direct appeal, as well as the numerous motions filed in connection with this action.

The "process of 'winnowing out weaker arguments ... and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy".

Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986) (quoting Jones v. Barnes, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987 (1983)). Here, appointed counsel has thrown the chaff in with the wheat, ignoring their duty under RPC 3.1 to present only meritorious claims and

contentions and leaving it for this court to cull the small number of colorable claims from the frivolous and repetitive.

In re Pers. Restraint of Lord, 123 Wash.2d 296, 302-303, 868 P.2d 835 (1994).⁷

5. Cumulative error does not merit reversal.

As the State contends above, there were no errors meriting reversal of the convictions. In the absence of individual bases of error, cumulative error cannot be established.

V. CONCLUSION

For the foregoing reasons, Morris's personal restraint petition should be denied.

⁷ The Lord decision also includes the following footnote:

We recognize that claims must often be brought first in state court in order to be cognizable in a later federal habeas corpus petition. Nonetheless, a claim which is adjudged frivolous in state court will not suddenly develop merit merely from a change in jurisdiction. Counsel do a disservice to their clients and the courts by taking a shotgun approach to appellate and postconviction advocacy.

DATED this 20th day of January, 2009.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

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DIVISION ONE

JAN 22 2009

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [] United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: David B. Zuckerman, Attorney for Petitioner, addressed as 1300 Hoge Building 705 Second Avenue, Seattle, WA 98104. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 21st day of January 2009.


KAREN R. WALLACE, DECLARANT

APPENDIX A

No. 54924-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

PATRICK MORRIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR SKAGIT COUNTY

The Honorable Susan Cook

APPELLANT'S OPENING BRIEF

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3. The Court erred when it allowed the State to introduce rebuttal evidence on a collateral matter through the lay opinion of a witness.....1

Issues Pertaining to Assignments of Error 1

Was the Defendant prejudiced when the court allowed a therapist to provide a diagnosis that her patient, the child complainant, had been sexually abused when the only foundation was the statements made by the child to the therapist?.....1

Was the Defendant deprived of his constitutional right to effective assistance of counsel when trial counsel failed to object to testimony elicited from a pediatrician that she had formed a diagnosis of sexual abuse based wholly on the child’s statements to her. Additionally, was trial counsel’s performance defective when he failed to move to strike similar testimony?.....1

Was the Defendant prejudiced when the Court allowed the State to call a witness during rebuttal to provide a lay opinion that she considered it unusual that the Defendant took his daughter into a room and closed the door while applying lotion, and that the amount of time it took him to apply the lotion also, in her opinion, was unusual?.....1

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A. ASSIGNMENTS OF ERROR

1. The Trial Court erred when it allowed a therapist to testify to a diagnosis based solely on the child's statements.
2. The Trial Counsel failed to provide effective assistance of counsel when he neither objected to, nor sought to strike inadmissible testimony.
3. The Court erred when it allowed the State to introduce rebuttal evidence on a collateral matter through the lay opinion of a witness.

Issues Pertaining to Assignments of Error

1. Was the Defendant prejudiced when the court allowed a therapist to provide a diagnosis that her patient, the child complainant, had been sexually abused when the only foundation was the statements made by the child to the therapist?
2. Was the Defendant deprived of his constitutional right to effective assistance of counsel when trial counsel failed to object to testimony elicited from a pediatrician that she had formed a diagnosis of sexual abuse based wholly on the child's statements to her. Additionally, was trial counsel's performance defective when he failed to move to strike similar testimony?
3. Was the Defendant prejudiced when the Court allowed the State to call a witness during rebuttal to provide a lay opinion that she considered it unusual that the Defendant took his daughter into a room and closed the door while applying lotion, and that the amount of time it took him to apply the lotion also, in her opinion, was unusual?

B. STATEMENT OF THE CASE

The State charged Mr. Morris with two counts of Child Molestation in the First Degree and one count of Rape of a Child in the First Degree (CP 1). The alleged victim for all three counts was his minor daughter, A.W. (DOB: 08/06/97). Mr. Morris' trial began on June 8, 2004 (CP 101). The jury returned a verdict of guilty to all three counts. On September 3, 2004 Judge Cook sentenced the Defendant to 130 months on Count I, 130 months on Count II and 189 months on Count III, the terms of incarceration to run concurrently. (CP 129). The Defendant filed a timely Notice of Appeal. (CP 138).

C. STATEMENT OF FACTS

One evening in early March, 2003, five year old AW was lying in bed watching television with her mother and her mother's husband when she disclosed that her father, Patrick Morris, had been touching her inappropriately. (RPI 39)¹. Further questioning by her mother, Theresa Scribner, caused Ms. Scribner to believe that the touching was sexual. Ms. Scribner called her pediatrician who told her to take her daughter in

¹ The verbatim report of proceedings arrived in multiple volumes each of which begins with page 1. For purposes of this brief the volumes will be designated as follows: RPI – June 8, 2004; RPII – June 10, 2004; RPIII – June 11, 2004; RPIV – June 14; RPV – June 15, 2004 (AM session); RPVI – June 15, 2004 (PM session); RPVII – June 16, 2004.

for a sexual assault examination. Ms. Scribner took AW to see Dr. Smith, who examined her. The police were called and an investigation began.

To substantiate its accusation the State called AW to testify. AW's testimony deviated from the statements that she had provided to others², though she did maintain that her dad had touched her with his fingers in her private parts. (RPI 41) Ms. Scribner and her husband, Sam, testified to the initial disclosure made by AW. (RPI 94-5) Ms. Scribner also related a subsequent conversation with AW during which her daughter told her that Mr. Morris licked her private area. (RPI 111) Ms. Scribner further described the chronology of events that occurred from the time of the disclosure up to the trial. A significant portion of her examination concerned ongoing financial problems between her and Mr. Morris relating to child support. During cross examination the defense explored the problems concerning the child support payments and focused on a fight between Ms. Scribner and Mr. Morris shortly before AW's disclosure. RPI 160 The argument occurred within earshot of AW, and she heard Ms. Scribner complaining about the late and partial payments of

² In her testimony AW denied that her father had touched her with his mouth or tongue (RP 48, 59). She did not recall going to see a doctor, being culposcoped, discussing the abuse with her therapist, or talking to the defense investigator on the Monday preceding trial. (RP 50-1). She remembered telling her mother that her dad had hurt her, but could not remember how he hurt her. (RP 55) Nor could she remember whether there was any penetration during the touching. (RP 55) AW could not recall that her grandparents were living at the same house where the abuse allegedly occurred, when the abuse began, for how long it continued, how many times it occurred, or when it stopped. (RP60)

child support. AW also heard her mother suggest to Mr. Morris that he terminate his parental rights and allow Sam, her husband, to adopt AW. RPI 159-61 Mr. Morris testified that this argument occurred the weekend before the disclosure by AW. RPIV 109-1.

The State also called as witnesses those people who spoke with AW during the investigation to repeat that which AW had told them. These statements, which were statements made for medical treatment or child hearsay, were admitted without objection. In fact, the defense waived a child hearsay hearing stating it wanted the jury to hear all of the statements, no doubt believing that the inconsistencies would undermine AW's credibility.

To bolster its case, the State repeatedly sought to enhance the credibility of its child witness. This strategy was necessary as the only evidence that AW had been molested were her statements. There were no admissions by Mr. Morris and no physical evidence to corroborate AW's testimony. On three occasions, only one of which was objected to by defense counsel, the State introduced testimony that other individuals believed the complainant when she disclosed sexual abuse by her father. These statements also formed the foundation for opinions by the experts that the child had been sexually abused by her father.

The first instance of such testimony was introduced through Dr. Andrea Smith, a pediatrician. Dr. Smith testified that she examined the child in March of 2003 (RPII 66). At the end of Dr. Smith's examination, the following questions and answers occurred.

Question: So at the conclusion of your examination, did you come up with a diagnosis?

Answer: Yes. In medicine you have to have a diagnosis.

Question: Okay. And what was your diagnosis as it pertains to Alyssa?

Answer: History of sexual assault.

Question: Since there were no physical findings that you could look to, what is the diagnosis based on?

Answer: Well, it's a history of sexual assault. That is how I was trained to do that when you examine a patient that's a concern.

Question: Is that based on the statements she made to you?

Answer: Correct.

(RPII 81-2).

Similar testimony was introduced through Leanne King. Ms. King is a CPS social worker with the Department of Social and Health Services. (RPII 173). She contacted the child and her mother in March,

2003, following a CPS referral. (RPII 174). She did a home visit to investigate the allegations. (RPII 175-6). Ms. King testified on direct examination regarding her contacts with the child's mother. She was asked: "What was the contact, if any, with Ms. Scribner? . Ms. King gave this answer, the latter portion of which was non-responsive to the question asked:

At that point, shortly thereafter, and into June—I may have had a conversation with her in June, I don't recall, didn't document it. And then I closed the case the end of June. At that point, I had a brief telephone statement from Mr. Morris. And I closed the case and determined that the **allegation of sexual abuse was founded**. And Mr. Morris received a letter stating that." (RPII 187)(emphasis added)

On the morning of June 11, 2004, defense counsel stated that he had been surprised when Leanne King testified that she had found sexual abuse. (RP 3). He explained the reason why he did not object and sought, in essence, a motion in limine to prevent it from happening again. However, he did not move to strike the testimony.

The defense, at long last, did object during the testimony of Lisa Clark, a clinical therapist employed at Compass Health. (RPIII 95-6, 114). Ms. Clark did an intake interview of the child to see if she met the criteria for counseling at Compass Health (RPIII 101). Ms. Clark was allowed to testify over defense objection that based on her intake

interview of the child, she arrived at a diagnosis of “adjustment disorder with anxiety” and “sexual abuse of a child.” These two diagnoses were based on the information she acquired during her evaluation. (RPIII 116). She went on to explain that an adjustment disorder is “when there is a maladaptive behavior, behaviors to a sudden event or change in their lives, with anxiety added onto it, meaning that they are also showing signs of anxiousness, like clinginess to a parent and sleeplessness.” (RPIII 117).

To defend himself Mr. Morris took the witness stand and testified that he never had sexually abused his daughter. RPIV 92, 116 Searching to explain the origin of the false accusation, Mr. Morris could only offer problems that he had with his former girlfriend, the complainant’s mother. The trial degenerated into a controversy as to whether Mr. Morris was a “dead beat dad” who never paid child support, or whether the mother was vindictive and using her daughter to get back at Mr. Morris.

In his defense, Mr. Morris called a number of witnesses who had seen him in the company of his daughter. The witnesses, who included his mother, stepfather, and friends of the family, testified that they had never seen any signs that the child was afraid of Mr. Morris. Each of them witnessed a loving child-father relationship.

A sub rosa theme running through the State's case was that Mr. Morris had been sexually abusing his daughter for years. The topic first was introduced through the child's treating pediatrician, Dr. Richards. The doctor testified that as an infant the child suffered from a number of rashes that were difficult to resolve. Eventually, Dr. Richards referred the child to a dermatologist. RPII 7-8 Dr. Richards did not have an explanation for the cause of the rash. The rash, under the care of the dermatologist, eventually disappeared by April or May, 2000. (RPII 15). The information filed in this case alleged sexual abuse between August 6, 2001 and March 6, 2003.

Over the defense objection, the State was allowed to call Jessica Brooks as a rebuttal witness. Ms. Brooks had been involved in a relationship with the Defendant beginning in 1998. (RPVI 64). On occasion Mr. Morris' daughter would visit. Ms. Brooks testified that Mr. Morris would go into a separate room to change his daughter's diaper. (RPVI 68). She stated that one time in 1998, when AW was between the ages of 15 to 18 months she went into the room in which Mr. Morris was changing his daughter's diaper. RPVI 67-9 Based on this one occurrence, she was allowed to state her opinion that she thought it unusual that he went into another room and closed the door to change the child's diaper.

RPVI 69 When she walked in the room she saw Mr. Morris applying ointment on his daughter. Ibid. She testified to her opinion that the manner in which he was applying the ointment was unusual. She said it took him quite awhile to do it. Next, the following question and answer occurred:

Question: What do you mean by quite awhile?

Answer: Meaning that a lot of times you try to when you are touching somebody else in that area that you're not supposed to be touching you do it quickly; you get it done and over it, seems like he was taking too long. RPVI 71.

D. ARGUMENT

I. The Court erred when it allowed a therapist to testify to a diagnosis based solely on the child's history.

The case law from our appellate courts is clear; an expert cannot provide an opinion that a child was sexually abused based on a foundation that includes no more than the child's history. Whether the courts analyze the issue as a comment on the child's credibility or an opinion that violates the Frye standard, the result is the same. It is error to admit such testimony.

In State v. Fitzgerald, 39 Wash.App. 652, 657, 694 P.2d 1117 (1985), the Court of Appeals ruled that an expert may not offer an opinion.

on an ultimate issue of fact when it is based solely on the expert's perception of the witness' truthfulness.

In State v. Florczak, 76 Wn.App. 55, 74 882 P.2d 199 (1994), the trial court allowed the child's counselor to give an opinion, based only on the child's statements that she had been sexually abused. The appellate court reversed stating:

[C]onstitutional error did occur when, after being asked whether a diagnosis of posttraumatic stress syndrome is "consistent with a child who has suffered sexual abuse," Wilson stated, "[w]hen we give the child posttraumatic stress, it can be to any traumatic event. It is secondary, in this case, in [KT]'s case, to sexual abuse." By stating that her diagnosis of posttraumatic stress syndrome was secondary to sexual abuse, Wilson rendered an opinion of ultimate fact--i.e., whether KT had been sexually abused--which was for the jury alone to decide...

In State v. Black, 109 Wn.2d 335, 745 P.2d 12 (1987) the Supreme Court reversed the defendant's conviction because a counselor testified that the child complainant fit within a "specific profile" for rape victims. It held that this testimony "carries with it an implied opinion that the alleged victim is telling the truth and was, in fact, raped." 109 Wn.2d at 349.

In State v. Madison, 53 Wn.App. 754, 770 P.2d 662 (1989), the defendant was charged with first degree statutory rape. He claimed on appeal that a Child Protective Services caseworker had given testimony

amounting "to a statement of belief in the victim's story...." The appellate court was "satisfied that some of the statements ... would properly have been subject to an objection or motion to strike." 53 Wn.App. at 762. It declined to grant relief, however, because no objection or motion to strike had been made at the trial.

In State v. Carlson, 80 Wn.App. 116, 906 P.2d 999 (1995) the Court reversed a conviction for child molestation in the first degree. The defendant alleged that the trial court erred when it allowed Dr. Feldman to testify that the child had been sexually abused when the sole foundation for that opinion was the history taken from the child. Rather than hold that Dr. Feldman's testimony constituted a comment on the child's credibility, which it recognized as being inadmissible, the Court considered whether Dr. Feldman's testimony was admissible as an opinion of an expert under ER 702. Holding that an opinion based solely on the child's history did not satisfy the Frye test, the Court reversed holding that the opinion should not have been admitted.

The repeated introduction of testimony from professionals in this case improperly invaded the province of the jury whose function it is to determine the credibility of witnesses. It constitutes constitutional error that denied Mr. Morris a fair trial. Because the error is of constitutional

magnitude the issue may be raised on appeal even absent an objection by trial counsel. See State v. Clark, 139 Wn.2d 152, 156, 985 P.2d 377 (1999)(RAP 2.5(a)(3) excepts "manifest error affecting a constitutional right," allowing us to consider an error of constitutional magnitude even though that issue was not raised at trial.)

II. Trial Counsel Failed to Provide Effective Assistance of Counsel When He Neither Objected to nor Sought to Strike Inadmissible Testimony.

Under the Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wash.2d 61, 77, 917 P.2d 563 (1996).

To successfully challenge the effective assistance of counsel, the Appellant must satisfy the following two-part test: "(1) defense counsel's representation was deficient, that is, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, that is, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v.

McFarland, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995) (citing State v. Thomas, 109 Wash.2d 222, 225-26, 743 P.2d 816 (1987)) (applying the two-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The United States Supreme Court has defined reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Id.* at 694. A failure to establish either element of the test defeats the ineffective assistance of counsel claim. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)(citing Strickland, 466 U.S. at 688-89, 104 S.Ct. 2052).

Based on counsel's colloquy following the admission of the testimony from Ms. King, the CPS worker, and his objection to the anticipated testimony of Ms. Clark, the therapist, it is clear that he knew that such testimony was inadmissible. Surprised by the non-responsive testimony provided by Ms. King, he made a strategic decision not to object for fear that it would only reinforce the testimony for the jurors. However, there was no strategic reason for not requesting that the jury disregard her testimony that the sexual abuse was "founded" when he

raised the issue with the court on the following day. Nor can one fathom a strategic reason for not objecting to the testimony of Dr. Smith relating to her diagnosis. In light of the questions that preceded Dr. Smith's opinion, defense counsel could not have been surprised by her answer; yet he made no objection.

The prejudice to Mr. Morris caused by this defect in counsel's performance was substantial. Throughout the trial, the State told the jury that impartial experts had formed opinions, based on nothing more than the statements by AW that the child had been sexually abused. Because there was no physical evidence the jury had to decide whether to believe the child beyond a reasonable doubt and thereby disbelieve Mr. Morris' denials. The erroneous admission of this testimony offered through witnesses with no apparent bias improperly bolstered the credibility of A.W. to the prejudice of Mr. Morris. One cannot say that absent this evidence there did not exist a real probability that the result of the trial would have been different had the jurors not heard this evidence.

III. The Court erred when it allowed the State to introduce rebuttal evidence on a collateral matter through the lay opinion of a witness.

The issue is whether the trial court abused its discretion in allowing Ms. Brook to testify in rebuttal. Mr. Morris contends that her

testimony was not actually rebuttal testimony and even if it was, it was improper in form and concerned a collateral issue.

The question of admissibility on rebuttal is largely within the discretion of the trial court. State v. Swan, 114 Wash.2d 613, 653, 790 P.2d 610 (1990) (quoting State v. White, 74 Wash.2d 386, 394-95, 444 P.2d 661 (1968)), cert. denied, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991). Generally, a witness cannot be impeached on matters that are collateral to the principal issues being tried. State v. Allen, 50 Wash.App. 412, 423, 749 P.2d 702, review denied, 110 Wash.2d 1024 (1988).

The issue here is controlled by the Information that alleged crimes occurring between August 6, 2001 and March 6, 2003. Ms. Brooks' testimony concerning an event that occurred in 1998, some three years before the charging period, did not rebut anything raised during the defense case. Rather than rebut, it corroborated Dr. Richards' testimony that in 1998 AW had recurring rashes that required the application of ointment. The purported rebuttal testimony also corroborated Ms. Scribner's testimony regarding AW's recurring rash problem from her infancy through the time that she began to wear pull-ups. She stated that she would send prescription ointment with AW when she visited her father so that he could apply it. RPI 168.

The problem with her testimony transcends the fact that it was not rebuttal. The more appropriate focus concerns the opinions about which she was allowed to testify. Not only did the manner in which Mr. Morris applied the lotion prescribed for AW not rebut any evidence offered by the defense, it allowed the jury to speculate, based on her opinion that Mr. Morris took too long when applying the lotion, that the rashes experienced by AW were caused by sexual abuse and that Mr. Morris' method of applying the lotion presented him with an additional opportunity to abuse his daughter. This speculative testimony should not have been admitted. Its prejudicial impact clearly outweighed any probative value. See ER 403.

ER 701 provides that if a witness is not an expert:

[T]he witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

ER 701 is intended to emphasize what a witness knows rather than how the witness expresses his or her knowledge. Comment 701, Washington Court Rules at 131 (1999). The rule presupposes that the witness will testify to his or her observations, but permits the witness to resort to inferences and opinions when such testimony will be helpful to

the jury. Our courts have admitted lay opinion testimony in situations regarding the speed of a car, whether a person was healthy, the value of property, and the identification of a person. See, e.g., Clevenger v. Fonseca, 55 Wash.2d 25, 345 P.2d 1098 (1959) (lay opinion regarding vehicle's approximate speed admissible) overruled in part on other grounds by Danley v. Cooper, 62 Wash.2d 179, 381 P.2d 747 (1963); Port of Seattle v. Equitable Capital Group, Inc., 127 Wash.2d 202, 898 P.2d 275 (1995) (lay opinion regarding property's value admissible); State v. Hardy, 76 Wash.App. 188, 884 P.2d 8 (1994) (lay opinion regarding identity of person in surveillance video was admissible).

In the usual circumstances, a lay witness should only relate observations to the jury and let jurors form their own opinions and conclusions. If there was any relevance to either the fact that Mr. Morris would change his daughter's diaper behind closed doors and/or the method and amount of time that he took in applying ointment, the testimony should have been limited to what Ms. Brooks observed rather than allowing her opinion. The jury could then have formed its own opinion on the weight to be given to the "facts." This is because a lay witness is in no better position to arrive at an opinion or conclusion from the facts known to a witness. See 5A KARL B. TEGLAND, WASHINGTON

PRACTICE: EVIDENCE LAW AND PRACTICE, ch. 7, § 282, at 348-49 (3d ed.1989).

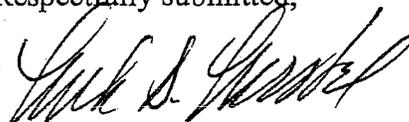
The admission of the evidence offered through Ms. Brooks did prejudice Mr. Morris. It allowed the jury to speculate that AW's rash was caused by sexual abuse rather than some other reason and that he was sexually abusing his daughter while applying the ointment prescribed to her. In a case in which the jury had to decide the ultimate issues based on the credibility of the accused and his accuser, this evidence cannot be said to be harmless.

E. CONCLUSION

Confronted with a false accusation that he sexually molested his daughter, Patrick Morris sought to convince a jury of his innocence. One of the anomalies of a charge that involves a child victim is the subtle shifting of the burden of proof. The jury upon hearing the accusation by the complainant wants the Defendant to convince it that the complainant should not be believed. There is an unwritten presumption indulged in by the jurors that the trial complainant is credible. The State no longer is held to its burden of proving the credibility of the complainant beyond a reasonable doubt; rather, the defense must now prove the lack of credibility of the complainant in order to create a reasonable doubt. The

introduction into evidence of the opinions of experts was error that improperly enhanced the credibility of the child. The erroneous admission of Ms. Brooks' rebuttal testimony unduly prejudiced Mr. Morris by allowing the jury to speculate that he had been molesting his daughter for years preceding the charging period. Accordingly, this Court should vacate the convictions and remand this matter for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark D. Mestel", written in a cursive style.

Mark D. Mestel, WSB# 8350
Attorney for Appellant

F. CERTIFICATE OF SERVICE

I hereby certify that a copy of the Appellant's Opening Brief was served upon the following by depositing the same in the United States mail at 3221 Oakes Avenue, Everett, Washington, 98201, addressed to:

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Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, Washington 98520

DATED this 9th day of March, 2005.


Vianna Cady, Secretary

APPENDIX B

PLEASE CONFORM
FOR FILE
AT PA'S & RETURN

NO. 54924-3-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

PATRICK MORRIS,
Appellant.

RECEIVED
COURT OF APPEALS
DIVISION ONE

JUL - 5 2005

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Susan K. Cook, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Patrick Morris was convicted of two counts of Child Molestation in the First Degree and one count of Rape of a Child in the First Degree of his daughter, A.W. who was between ages 4 and 5 during the charging period. A.W. testified and six other witnesses testified as to her statements. Those witnesses included a doctor who examined her, a CPS social worker and a clinical psychologist. In addition, a videotape of a defense interview of A.W. was admitted.

Morris claimed that the doctor, social worker and psychologist improperly provided opinion as to their belief of A.W.'s statements. However, Morris failed to object to the statements and those witnesses either stated they did not evaluate A.W.'s statements as to truthfulness or provided no testimony on truthfulness. Given these circumstances, Morris failed to properly object to preserve the issue for appeal.

Morris also claims that trial counsel was ineffective for failure to object. However, the defense theory stated on closing and hence trial strategy was to show that A.W. was coached by her mother to help the mother terminate Morris' parental rights. The testimony of the witnesses allowed Morris to show that the mother's actions had

the desired effect. Additionally, Morris has not established that the trial outcome would have likely been different.

Finally, where the defendant himself testified that he tried to avoid doing anything improper regarding sexual contact with A.W. and there was repeated testimony about A.W.'s rashes, the trial court did not err in admission of the testimony of Morris' ex-girlfriend about incidents regarding diaper rashes and changing A.W. behind closed doors.

II. ISSUES

1. Where the defendant did not make any focused objections or motions to strike claimed opinion evidence about belief of the victim, was the issue preserved the issue for appeal?
2. If the defendant did not object, is the issue of constitutional magnitude such that it could be raised for the first time on appeal?
3. If the defendant did object, was there actual testimony that the witnesses indicated they believed the victim?
4. Was trial counsel ineffective by not making the objection?
5. Was there a related trial tactic related to the claimed motive of the victim's mother to deprive the defendant of his parental rights?

6. Where the testimony of the witnesses was that they did not make an opinion as to truthfulness, has the defendant established that there is a reasonable probability that the outcome of the trial would be different?
7. Did the trial court abuse its discretion in admission of rebuttal testimony relating to the defendant's claim that he tried to avoid the appearance of impropriety with the victim?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On August 21, 2003, Patrick Morris was charged with two counts of Child Molestation in the First Degree and one count of Rape of a Child in the First Degree alleged to have occurred on or about August 6, 2001 and March 6, 2003. CP 1-2. The victim was alleged as A.W., a minor female child with a date of birth of August 6, 1997. CP 1-2.

On June 8, 2004, the case proceeded to trial. 6/8/2004 RP 1.¹

On June 9, 2004, the State amended in information to clarify that the three counts were alleged to have occurred on or about

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are listed in Appendix A attached.

August 6, 2003 through March 6, 2003. CP 25-6. Testimony was taken across six days.

On June 16, 2004, the trial court instructed the jury and the parties made their closing arguments. 6/16/2004 RP 13.

On June 17, 2004, the jury returned guilty verdicts on two counts of Child Molestation in the First Degree and one count of Rape of a Child in the First Degree. CP 78.

On September 2, 2004, Morris was sentenced by the trial court to a term of 189 months. CP 82.

On September 3, 2004, Morris timely filed a Notice of Appeal. CP 90.

2. Statement of Facts Regarding Trial

The State provides a detailed statement of trial proceedings to provide background for the claim of ineffective assistance of counsel.

A.W. testified that her birthday is August 6th. 6/9/2004 RP 31. Her birthday is August 6, 1997, and she was six years old at the time of trial. 6/9/2004 RP 62. Her father is Patrick Morris, the defendant. 6/9/2004 RP 32, 62.

A.W. was in the first grade at the time she testified. 6/9/2004 RP 34. A.W. testified that she told her mother and step father that her father touches her private parts. 6/9/2004 RP 39. A.W. testified

that her father touched her with his fingers in her private parts. 6/9/2004 RP 40. A.W. indicated on a diagram where her father touched her. 6/9/2004 RP 40. A.W. said that her father's finger wiggled when he touched her. 6/9/2004 RP 41-2. She testified that she was in her bed in her downstairs bedroom at his house when he did that to her. 6/9/2004 RP 42-3. A.W. testified that these incidences happened more than two times. 6/9/2004 RP 43-4. A.W. testified that she was sleeping in her bedroom with a nightgown on when he came in and woke her up by touching her on her private parts. 6/9/20004 RP 46. Her father was either on his knees or sitting on the floor when he touched her. 6/9/2004 RP 46-7. A.W. testified that it was her father and that she saw his face every time. 6/9/2004 RP 47-8. A.W. testified that she told her mother and Sam that she crossed her legs when her father tried to touch her private parts. 6/9/2004 RP 53-4. A.W. said that she had told her mother and Sam that her father hurt her. 6/9/2004 RP 55.

A.W. testified that Diana Lowry was a person that A.W. talked to about her father touching her. 6/9/2004 RP 51. A.W. testified that she had talked to a man on Monday, a few days before. 6/9/2004 RP 51-2. A.W. couldn't recall being seen by a doctor. 6/9/2004 RP 52.

On cross examination, A.W. testified that she had talked to a lot of people about the touching and that she had talked about it with Diana Lowry many times. 6/9/2004 RP 60.

Theresa Scribner testified. 6/9/2004 RP 61. She married Sam Scribner in 2001, and she has a daughter, A.W. 6/9/2004 RP 62. A.W.'s date of birth is August 6, 1997, and she was six years old when the trial occurred. 6/9/2004 RP 62.

Theresa had met Patrick Morris in 1995. 6/9/2004 RP 63. They dated for a couple of months. 6/9/2004 RP 64. Theresa and Morris weren't together when she found out she was pregnant. 6/9/2004 RP 64. They never got back together. 6/9/2004 RP 65. Morris was there when A.W. was born. 6/9/2004 RP 66. They did not have a regular visiting schedule and she had financial troubles until a parenting plan was established. 6/9/2004 RP 66-7.

When A.W. was a year and a half, she started spending the night there. 6/9/2004 RP 83. In March of 2003, Morris was taking A.W. on Saturday mornings and returning her on Sunday evening. 6/9/2004 RP 84. In 2002, Morris moved in with his parents and A.W. initially had a first floor bedroom in the three story house. 6/9/2004 RP 86-7. In April 2002, Morris told Theresa that A.W. had fallen off a chair while A.W. was with Morris. 6/9/2004 RP 88. A.W. showed

Theresa where she was sore and Theresa saw that A.W. had blood on her underwear there. 6/9/2004 RP 88. Theresa took A.W. to the emergency room to check it out. 6/9/2004 RP 88. A.W. saw Dr. Petty at Island Hospital in Anacortes. 6/9/2004 RP 89. Petty told Theresa that A.W. had a tear on the inside in her genital area, but that A.W. would be okay. 6/9/2004 RP 89-90. The injury healed after a few days. 6/9/2004 RP 91.

Theresa went on to testify to what occurred on March 3, 2003 when A.W. told her she had been touched by Morris. 6/9/2004 RP 91. At that time Theresa was married to and living with Sam Scribner. 6/9/2004 RP 91. Morris was living with his parents on H Avenue in Anacortes. 6/9/2004 RP 91.

At about 7:00 p.m., Theresa and Sam were watching Wheel of Fortune when A.W. came into their bedroom and started watching it with them. 6/9/2004 RP 93-4. While they were sitting there, A.W. told Theresa, "My daddy touches me." 6/9/2004 RP 94. Theresa testified that she asked a few questions and that A.W. demonstrated that she crossed her legs and that A.W. started getting upset because she was frightened. 6/9/2004 RP 94. A.W. went on to explain that Morris touched her private parts with his fingers. 6/9/2004 RP 95. A.W. told Theresa that it occurred at night in her

room at her dad's house. 6/9/2004 RP 95. A.W. told Theresa that sometimes she crossed her legs so that her dad couldn't get in there. 6/9/2004 RP 96. A.W. was upset and said she was afraid that Morris would go to jail. 6/9/2004 RP 98. After A.W. made the disclosures, she had to have the hallway light on and the door open to her room at night because she was scared. 6/9/2004 RP 99-100. Before that time, A.W. had thrown temper tantrums about going to Morris' house and one occasion had said she was scared. 6/9/2004 RP 101.

Theresa discussed what she would do with Sam. 6/9/2004 RP 107. Theresa called her pediatrician. 6/9/2004 RP 107-8. After talking to the pediatrician, Theresa was given a referral to another doctor and told not to discuss the details with A.W. 6/9/2004 RP 109-10. However, the next morning A.W. brought it up and stated that her father had licked her with his tongue and pointed to her privates. 6/9/2004 RP 110-1.

Theresa contacted CPS the next day and they wanted to go over safety plans with the child. 6/9/2004 RP

A day or two after the incident, Theresa reported the incident to Anacortes Police. 6/9/2004 RP 116. Sergeant D'Amelio talked to Theresa about what to do to keep A.W. safe and keep Morris away from A.W. 6/9/2004 RP 117. The weekend after the incident, A.W.

didn't go to Morris' because she had parties on Saturday and Sunday to attend. 6/9/2004 RP 118.

Theresa didn't tell Morris about what A.W. had said and waited to get a protective order to give police time to interview Morris. 6/9/2004 RP 119-20.

The same week that A.W. told Theresa, A.W. had an appointment with Dr. Smith at Skagit Pediatrics. 6/9/2004 RP 121-2. Dr. Smith spoke alone with A.W. and did a physical examination. 6/9/2004 RP 122-3.

Theresa testified that A.W. was interviewed by Candy Ashbrook at the sheriff's department. 6/9/2004 RP 127. Theresa was not present. 6/9/2004 RP 127.

Theresa Scribner testified that Michelle Lambert was a guardian ad litem that was appointed to represent A.W. 6/9/2004 RP 128.

Theresa Scribner testified that Lisa Clark interviewed A.W. at Compass Mental Health. 6/9/2004 RP 130. Theresa was present during that interview. 6/9/2004 RP 130. Then Diana Lowry from Compass Mental Health became A.W.'s counselor and was her counselor at the time of trial. 6/9/2004 RP 131. A.W. saw Lowry

every other Friday. 6/9/2004 RP 131. Theresa sat in on the first few sessions. 6/9/2004 RP 132.

Theresa also testified that A.W. was interviewed by defense investigator Mr. Daly, the week of the trial. 6/9/2004 RP 134-5.

Theresa stated that she did not tell or coach A.W. into stating that Morris touched her private parts. 6/9/2004 RP 140.

On cross-examination, Theresa stated that there had been a lot of stress in the family following the disclosure by A.W. 6/9/2004 RP 144. The defense questioned Theresa at length about the visitation relationship and financial dealings between Theresa and Morris. 6/9/2004 RP 146-161.

Defense counsel questioned Theresa about whether A.W. meant "daddy" was Morris or Sam Scribner when she made the initial disclosure. 6/9/2004 RP 163-4.

Theresa stated that she had entered into a written safety plan with Child Protective Services. 6/9/2004 RP181-2. The agreement stated that Theresa would agree not to have A.W. contact Morris unless approved, that she would obtain a no contact order and that she would have A.W. engage in counseling. 6/9/2004 RP 183. The defense had Theresa repeat that she waited three weeks to get a no contact order. 6/10/2004 RP 25. Defense questioned A.W.

regarding her dealings with Morris' civil attorney. 6/10/2004 RP 25-29. Defense questioned Theresa about statements she made in a civil deposition indicating that she was afraid that Morris would have contact with A.W. during the three week period. 6/10/2004 RP 29-32. Defense questioned Theresa's motives in delaying the reporting to give police a chance to talk to Morris. 6/10/2004 RP 33-35.

Theresa stated that A.W. quit having rashes when she was through with diapers around age two and a half which was in the end of 1999. 6/10/2004 RP 36. Defense questioned Theresa about statements she made to Lisa Harvey Clarke at CPS that she "always came home with rashes on her private parts." 6/10/2004 RP 37-8. Defense also questioned Theresa's testimony about when the night light was started and the excuses that she was giving after contacting Detective Ryan. 6/10/2004 RP 40-1. Theresa was questioned about the statements she made in support of the no contact order that described a fall by A.W. when Morris had her and she related that "ER doctors said she had a tear." 6/10/2004 RP 45. Again, Theresa was examined as to different statements regarding the "tear" made during the prior deposition. 6/10/2004 RP 47-50.

Defense questioned Theresa about the statement that A.W. came home with rashes on her private parts. 6/10/2004 RP 103.

And again questioned her about statements made during a deposition. 6/10/2004 RP 103-4.

Theresa took A.W. to Compass Health and met with Diana Lowry as a result of a child safety plan that had been arranged. 6/10/2004 RP 107. Defense questioned Theresa about her getting A.W. in for the counseling sessions that had been set up. 6/10/2004 RP 108-10.

On redirect, Theresa testified that if her husband adopted A.W. they would have been receiving less in child support. 6/10/2004 RP 132-3. Theresa testified that A.W. had a problem with bedwetting after the disclosure that she had not had for years. 6/10/2004 RP 138.

Dr. Marvin Richards testified. 6/10/2004 RP 6-7. Richards was A.W.'s pediatrician from birth. 6/10/2004 RP 7. Richards testified that A.W. had a number of rashes in her diaper area that were difficult to resolve and included some abrasions. 6/10/2004 RP 7-10. Some of those rashes could have been caused by rubbing. 6/10/2004 RP 10. Richards recalled receiving the call from Theresa Scribner about A.W.'s report. 6/10/2004 RP 10. Richards recalled that Theresa was concerned. 6/10/2004 RP 10. Theresa was calling Richards to find out what was proper for her to do to protect A.W.

6/10/2004 RP 11. Richards arranged an appointment with Skagit Pediatrics for A.W.. 6/10/2004 RP 11-12. Richards has not examine A.W. regarding allegations of sexual abuse and had only looked at her genital region while dealing with a urinary tract infection. 6/10/40 RP 14.

On cross-examination, Richards testified about the time frame for the rash that he treated A.W. for was from January of 2000 to March of 2000. 6/10/2004 RP 15. Richards stated that he told Theresa not to talk to A.W. regarding the disclosure. 6/10/2004 RP 16. The defense also sought to have Richards state that child victims are suggestible especially by trusted people. 6/10/2004 RP 16-18. The defense went on to have Richards state that Theresa, as A.W.'s mother, was a trusted person to her. 6/10/2004 RP 19. Richards also testified that he would recommend to parents not to ask questions suggesting a specific action. 6/10/2004 RP 20.

On redirect, Richards explained that he would counsel parents to try to find out what the child meant by disclosure of sexual contact. 6/10/2004 RP 22.

Dr. Andrea Smith, the pediatrician who saw A.W., testified 6/10/2004 RP 64-101. She was practicing as a pediatrician for ten years and had done 50 to 100 examinations of children regarding

sexual abuse. 6/10/2004 RP 65. She saw A.W. in March of 2004. 6/10/2004 RP 66. There was standard protocol that Smith followed. 6/10/2004 RP 66-7. Smith testified to Theresa's statements about what her daughter told her. 6/10/2004 RP 69. Smith testified that Theresa said that fingers were used and A.W. was licked. 6/10/2004 RP 70. Smith also related the statements that A.W. made to her including that "he would put his finger in her body" and "that sometimes he would lick first." 6/10/2004 RP 73. Smith looked for bruising, irritation or infection, but found none. 6/10/2004 RP 78-9. Smith testified that the conduct described by A.W. wouldn't necessarily cause any injuries. 6/10/2004 RP 79-80. Smith stated that in medicine, she was required to provide a diagnosis. 6/10/2004 RP 81. Her diagnosis was history of sexual assault based upon the statements made by A.W. 6/10/2004 RP 81-2. No objection was made. 6/10/2004 RP 81-2.

Defense clarified with Dr. Smith that her diagnosis of a history of sexual assault was based simply because it was reported to her. 6/10/2004 RP 82-3. Smith acknowledged there was no rash, and that diaper rashes are a common reason in children. 6/10/2004 RP 84. Smith testified that A.W. did not state she was touched on her bottom. 6/10/2004 RP 84-5. Smith testified that penetration by a

finger would not necessarily result in a tear and that hymens have a lot of stretch. 6/10/2004 RP 88. Smith was questioned about her training not to ask leading questions. 6/10/2004 RP 89-91. Smith was questioned about what she told Theresa. 6/10/2004 RP 93-4.

On redirect, Smith testified that she told Theresa that the exam was normal and that the examination did not rule out sexual abuse. 6/10/2004 RP 95-6.

Dr. Robert Petty testified. 6/10/2004 RP 110-30. Petty testified that she was a treating physician who attended to A.W. on April 21, 2002, when she had reported falling while on the leg of a stool and injuring her genital area. 6/10/2004 RP 113. Petty found some swelling and an "abrasion" or breakage of the skin. 6/10/2004 RP 115-6. Petty was evaluating the case to see if there was an sexual abuse. 6/10/2004 RP 118. Petty related that Theresa had indicated that she believed that the child had fallen to get the injury. 6/10/2004 RP 118.

On cross examination, Petty testified that he was required to report sexual assaults if he believed it might have occurred. 6/10/2004 RP 120-1. Petty did not report the incident. 6/10/2004 RP 121. Petty testified to the difference between an abrasion and a tear

and stated that he did not observe a tear and would not have used the word "tear" to Theresa. 6/10/2004 RP 124-5.

Sam Scribner testified. 6/10/2004 RP 151-173. He related the incident when A.W. stated that "my daddy touches me." 6/10/2004 RP 153-4. He recalled talking to A.W. shortly about what occurred before her bedtime. 6/10/2004 RP 154-5. Sam described how he and Theresa were in shock. 6/10/2004 RP 156. Sam talked with Theresa about what to do including taking A.W. to the doctor and to counseling. 6/10/2004 RP 156-7. On cross examination, Sam testified that Theresa had brought up an option of Sam adopting A.W. on one occasion. 6/10/2004 RP 163. Sam testified that A.W. seemed upset with something before she revealed what had occurred. 6/10/2004 RP 165, 170.

Leanne King, a Child Protective Services (CPS) social worker, testified. 6/10/2004 RP 173-202. CPS had received a referral on March 4, 2003, regarding A.W. and Morris. 6/10/2004 RP 174. On March 10, 2003, King interviewed A.W. at her home. 6/9/2004 RP 112, 6/10/2004 RP 175. King interviewed the mother without A.W. present and discussed safety issues with her. 6/10/2004 RP 177-8. Because Theresa had full custody and of the visitation schedule, King did not tell Theresa it was urgent to get a protection order. 6/10/2004

RP 179-80. King recommended Diana Lowry to Theresa for the counseling. 6/10/2004 RP 181. King interviewed A.W. alone without Theresa present. 6/9/2004 RP 113, 6/10/2004 RP 183. King did not interview A.W. as to the allegations since Candy Ashbrook was going to do an interview. 6/10/2004 RP 183-4. King reviewed Ashbrook's interview of A.W. 6/10/2004 RP 184. King eventually contacted Morris on June 16th. 6/10/2004 RP 185. King did not get a statement from Morris. 6/10/2004 RP 185. King testified that Theresa contacted her a couple of times to deal with issues regarding the protection and safety of her daughter. 6/10/2004 RP 186-7. King testified that she closed the case in June stating: "I closed the case and determined that the allegation of sexual abuse was founded." 6/10/2004 RP 187. No objection was made at that time. 6/10/2004 RP 187. On cross examination, King stated that Theresa did not mention that she was having custody issues with Morris. 6/10/2004 RP 193. King thought that Theresa and Morris had a good working relationship in terms of visitation. 6/10/2004 RP 197. On re-cross examination, King was questioned:

- Q. Are you ever concerned that one parent who might want the other parent to terminate parental rights might use the child?
- A. Yes, uh-huh.
- Q. In order to manufacture a false allegation?

6/10/2004 RP 199. Defense went on to question about suggestibility due to age. 6/10/2004 RP 199-200. Both counsel went back and forth with questions for King on this topic. 6/10/2004 RP 200-2.

Defense concluded with the questions:

- Q. In the real world? Sometimes adults tell children what to say and sometimes they feed the information?
- A. Correct.
- Q. Which is then adopted by the child and repeated later?
- A. Yes, absolutely.

6/10/2004 RP 202.

The next day, the defense made a motion to limit testimony that day regarding other witnesses so they would not testify similar to King when she stated the allegations were founded. 6/11/2004 RP 3. Defense acknowledged that he did not "jump up and object for fear that would just draw more attention to it. 6/11/2004 RP 3. The State agreed that other witness would not testify similarly. 6/11/2004 RP 4-5. As the trial court explained, a CPS determination of founded is a CPS term of art that doesn't necessarily mean that she believed it happened. 6/11/2004 RP 6. No curative instruction was requested by the defense. 6/11/2004 RP 6.

Karen Talbert, the day care worker who has had A.W. since she was three weeks old, testified. 6/11/2004 RP 7-24. She had run

a day care for thirty-one years. 6/11/2004 RP 7. Talbert testified about some incidents by A.W. in daycare in January and February of 2003. 6/11/2004 RP 8-9. There were three incidents where A.W. and other children had their pants down and A.W. was the older child involved. 6/11/2004 RP 9-11. Talbert described this as sexual acting out. 6/11/2004 RP 12.

Talbert next testified that Theresa had told her about A.W.'s disclosure in early March of 2003. 6/11/2004 RP 12. Talbert reported it to CPS. 6/11/2004 RP 12.

Sergeant D'Amelio of the Anacortes Police Department testified. 6/11/2004 RP 25-46. D'Amelio met with Theresa and Sam Scribner on May 6, 2003, when they reported the incident where A.W. had made the disclosure to them. 6/11/2004 RP 25-6. D'Amelio testified that Theresa appeared upset and he gave her information about a protection order and generally discussed what would occur next. 6/11/2004 RP 27, 29. They told D'Amelio that Dr. Smith had examined A.W. and they filled out medical release forms. 6/11/2004 RP 27-8. D'Amelio did not provide information about who would be contacting Morris and when, because that would be dealt with by detectives. 6/11/2004 RP 32. Defense raised that Theresa reported to D'Amelio that Dr. Smith had said that there was evidence

of molestation in the form of smoothing inside the vagina. 6/11/2004 RP 39.

Detective Ryan of the Anacortes Police Department testified. 6/11/2004 RP 46-66. Ryan was assigned the case. 6/11/2004 RP 46-7. She arranged the interview by Child Interview Specialist Candy Ashbrook. 6/11/2004 RP 47. The interview had to be re-scheduled and Theresa asked Ryan for help providing an excuse why A.W. couldn't visit with Morris. 6/11/2004 RP 49. Theresa had been holding off on a restraining order because she did not want to tip off Morris and Ryan suggest that she just obtain the restraining order. 6/11/2004 RP 49-50.

Michelle Lambert was an attorney focusing on guardian ad litem work. 6/11/2004 RP 67-95. She was the guardian ad litem assigned to A.W. and basically acts as "the child's lawyer." 6/11/2004 RP 67-8. Lambert spoke with Morris over the phone on May 1, 2003. 6/11/2004 RP 69. Morris denied the allegations to Lambert, stated he tried to avoid situations that could be misconstrued by A.W. and "about hit the floor" by the allegations. 6/11/2004 RP 69-70. Morris told Lambert that there was a possibility that Theresa had made the allegations up because he was behind on some child support. 6/11/2004 RP 70-1. Morris didn't know if A.W. was capable of

making up the allegation. 6/11/2004 RP 71. Morris did not berate Sam or Theresa Scribner to Lambert. 6/11/2004 RP 82-3. Morris thought Theresa was demanding about paying the child support as ordered. 6/11/2004 RP 88-90. Morris when thinking about where the allegations were coming from mused that maybe Theresa was angry with him. 6/11/2004 RP 91.

Lisa Harvey Clarke was a clinical therapist at Compass Mental Health. 6/11/2004 RP 95-120. She has a masters degree in psychology. 6/11/2004 RP 96. She had worked as a clinical therapist for ten years. 6/11/2004 RP 96. Clarke specialized in children and adolescents. 6/11/2004 RP 97. Clarke did an intake evaluation of A.W. with her mother on April 30, 2003. 6/11/2004 RP 99. Theresa reported that A.W. was having trouble sleeping, wanted to sleep with her mother, was waking up a lot and was very clingy to her mother. 6/11/2004 RP 100. Clarke testified that children have to have symptoms requiring therapy before they can be treated. 6/11/2004 RP 102. Clarke did not ask A.W. any details about her disclosure. 6/11/2004 RP 103. The statements pertaining to the abuse were limited to A.W. claiming that it happened more than once and that she would wake up when he did it. 6/11/2004 RP 104. A.W. provided no other statements to Clarke. 6/11/2004 RP 104. Clarke

approved A.W. for treatment and set her up with Diana Lowry as a therapist. 6/11/2004 RP 104-5.

On cross examination, Clarke stated she didn't talk to A.W.'s guardian ad litem because Theresa had refused to give consent. 6/11/2004 RP 107. Clarke was also questioned about the scheduling of the appointment as well as whom the information was gathered from. 6/11/2004 RP 110-2

On redirect examination, the State sought to have Clarke state what they were providing A.W. counseling for as result of the disclosure. 6/11/2004 RP 113-4. The defense objected. 6/11/2004 RP 114. Outside the presence of the jury,² the prosecutor asked Clarke about what the symptoms they were treating A.W. for and the diagnosis related to that. 6/11/2004 RP 114-5. Clarke confirmed that that diagnosis was based upon the report of the child and parent, not based upon a determination that it had happened. 6/11/2004 RP 115. The defense just suggested that it would be easier to avoid the second diagnosis of sexual abuse altogether. 6/11/2004 RP 115. The trial court held that since the witness would make it clear that the

² The transcript does not state that the portions of the transcript at pages 114-6 are outside the presence of the jury. But the argument on the record and the questioning of the court on the record shows that the court was making an evidentiary hearing based upon an offer of proof. 6/11/2004 RP 114-6. This is

diagnoses were not based upon history and not a determination as to truthfulness, they could be admitted. 6/11/2004 RP 116.

Clarke went on to testify that diagnoses were made of adjustment disorder with anxiety and sexual abuse of a child. 6/11/2004 RP 116. Clarke added that she made no determination as to truthfulness of the allegations. 6/11/2004 RP 117. Defense went on to clarify that Clarke was not making a determination that the abuse had occurred. 6/11/2004 RP 117.

Candy Ashbrook, a child interview specialist, testified. 6/11/2004 RP 120-189. Ashbrook testified about her training and experience as a child interview specialist for eighteen years. 6/11/2004 RP 121. She had just under 3,000 interviews done. 6/11/2004 RP 121. She worked for the county on a contract basis. 6/11/2004 RP 122. Ashbrook explained the procedure she followed for five year old children. 6/11/2004 RP 123-8. Ashbrook interviewed A.W. starting at about 10:00 a.m. on March 27, 2003. 6/11/2004 RP 128. Ashbrook interviewed A.W. by herself. 6/11/2004 RP 129-30. With the consent of the defense the interview was read into the record. 6/11/2004 RP 132-40, 42-9.

especially the case since when the trial court asks the prosecutor to resume at page 116, line 15, the same questions are asked and answered again.

On cross examination, Ashbrook was examined about her experience and the interview and note taking process. 6/11/2004 RP 153-70. She also testified about some of the statements of A.W. 6/11/2004 RP 170-83.

Diana Lowry, the therapist treating A.W., testified. 6/11/2004 RP 189-240. Lowry had a bachelor's degree in education and psychology and a master's degree in psychology. 6/11/2004 RP 190. Treating victims of child sexual abuse is a specialty of Lowry. 6/11/2004 RP 192. On June 4, 2003, Lowry began treating A.W. 6/11/2004 RP 193. Lowry testified about her counseling and treatment of A.W. 6/11/2004 RP 194-201. During the second counseling session, A.W. stated that she "told mom about dad and he touched me in the middle of the night." 6/11/2004 RP 202. At the third counseling session, Lowry provided Theresa with some relaxation skills that would help A.W. sleep at night which was still a problem. 6/11/2004 RP 204-5. At a session in November, Lowry dealt with A.W. regarding her anxiousness about being in court. 6/11/2004 RP 207. Lowry testified about the other counseling sessions as well. 6/11/2004 RP 208-15.

On cross-examination, Lowry was questioned generally about how victims behave in front of the victimizer. 6/11/2004 RP 218-9.

Defense asked Lowry if she told A.W. what to say in court. 6/11/2004 RP 221. Lowry told A.W. that she needed to tell the truth. 6/11/2004 RP 221. Lowry was also questioned about the chronology of the treatment sessions and various cancellations. 6/11/2004 RP 221-6. The defense admitted the *Please Tell* book dealing with molestation and questioned Lowry about the story of the abused child in it. 6/11/2004 RP 229-32. The defense also admitted pages of a *Just Tell the Truth* book and pointed out the smiles on the faces of all the people except the scowl on the face of the person who hurt the victim. 6/11/2004 RP 231-3. Finally, Lowry was questioned about a statement of Theresa Scribner claiming that a signature on a court document that appointed Michelle Lambert was forged. 6/11/2004 RP 235.

When dealing with the issue of the possibility of a victim's advocate from the prosecutor's office testifying that the victim was not asked about the substance of her allegation during a first interview, the court noted:

It's an important issue to decide. It's an important issue because the number of times this child has been asked questions and how the questions were asked had become an issue in this case. So if this interview included any questions about abuse, it's certainly an important area of inquiry.

6/14/2004 RP 12-3.

Gretchen Van Pelt, a victim's advocate from the prosecutor's office, testified. 6/14/2004 RP 13-19. She testified that she was present during a meeting by a prosecutor with A.W. and her mother Theresa Scribner. 6/14/2004 RP 14-5. Van Pelt took notes during the interview. 6/14/2004 RP 15. The meeting was considered a "meet and greet" where the prosecutor would meet the victim to get comfortable and give the victim an overview of the procedure. 6/14/2004 RP 15-6. A.W. was not asked questions about the allegations. 6/14/2004 RP 16-7.

The court held a lengthy hearing about the defense expert, Larry Daly. 6/14/2004 RP 20-91. The testimony was limited and the witness was never called by the defense.

Patrick Morris testified on his own behalf. 6/14/2004 RP 92-151, 6/15/2004 RP 3-35. Morris lived with his natural mother and step father. 6/14/2004 RP 93. Morris described his life with Theresa and relationship with A.W. 6/14/2004 RP 94-100. Morris described the sleeping arrangements at the home he was living in. 6/14/2004 RP 100. Morris described the incident with the foot stool. 6/14/2004 RP 100-2. Morris told Theresa about the incident when he returned A.W. from visitation. 6/14/2004 RP 104. Morris testified about his child support obligations and falling behind. 6/14/2004 RP 104-8.

Morris testified that it was the last time he had visitation with A.W. that Theresa brought up about him terminating his parental rights. 6/14/2004 RP 109. Morris testified that he put his daughter to bed most of the time when there was visitation. 6/14/2004 RP 115. He occasionally went into her bedroom to turn off her television and make sure she was covered up when asleep. 6/14/2004 RP 115-6. Morris denied ever touching his daughter for sexual purposes. 6/14/2004 RP 116.

On cross-examination, Morris was questioned about his payment of child support and his expenses. 6/14/2004 RP 117-21. Morris claimed that there was tension between him and Theresa and that it was over money. 6/14/2004 RP 123-4. Morris admitted that Theresa had never denied him visitation with his daughter before there were court orders. 6/14/2004 RP 126. Morris received a settlement of \$7,000 from an injury following back support being taken out. 6/14/2004 RP 129. Morris was questioned at length about his child support, expenses and visitations. 6/14/2004 RP 129-148. Morris testified that he didn't take his daughter to the doctor when she fell at Kathy Morris' house. 6/14/2004 RP 149. In 2000 up until September, Morris was behind on his support and childcare. 6/14/2004 RP 154. Morris testified that the first time Theresa had

mentioned Sam adopting A.W. was in late 2002. 6/15/2004 RP 8. Morris claimed there was a second conversation about Morris terminating parental rights in March of 2003. 6/15/2004 RP 9. Morris claimed to terminate the conversation in front of A.W., but admitted that A.W. didn't know what terminating parental rights meant. 6/15/2004 RP 10-11. Morris stated that Theresa was frustrated with him and that frustration was over years and years of him rarely being current on payments. 6/15/2004 RP 13.

Morris testified that the first time he found out about his daughter's accusations was when the officer delivered the protection order. 6/15/2004 RP 17. Morris obtained a civil attorney to try to assist with the protection order and try to let A.W. come back on weekends. 6/15/2004 RP 19. Morris testified that he told Michelle Lambert that his daughter loved him to death. 6/15/2004 RP 20. Morris stated that he had never been questioned about his physical contact with A.W. 6/15/2004 RP 20. When questioned about being questioned by Jessica Brooks about physical contact while he was changing a diaper, he stated that he did not recall the conversation. 6/15/2004 RP 21. Morris also admitted to the guardian ad litem that he went to great lengths to avoid doing any contact with A.W. that would be misconstrued. 6/15/2004 RP 21-2. Morris didn't think A.W.

was lying. 6/15/2004 RP 23. Morris found Jessica Brooks a little over a month before the trial to explain to her why he hadn't seen his son Cody. 6/15/2004 RP 24. Morris also admitted to not telling the guardian ad litem about the fight he claimed he had with Theresa the night before A.W. reported to her mother. 6/15/2004 RP 26-8. Morris claimed that was the first big fight the ever had in front of A.W. 6/15/2004 RP 32.

Leta Benfield, Patrick Morris' mother, testified. 6/15/2004 RP 42-84. Leta was a registered nurse. 6/15/2004 RP 43. Her husband was James Benfield and her son, Patrick Morris. 6/15/2004 RP 43-4. Leta testified that Morris moved back into her home in September of 2002. 6/15/2004 RP 45. Leta stated that A.W. loved Morris. 6/15/2004 RP 47. Leta stated that A.W. normally slept curled up on her side. 6/15/2004 RP 48. Leta testified that she normally bathed A.W. and that she had discussions with A.W. about good versus bad touching. 6/15/2004 RP 49-50. Leta testified about Morris' response when he came home after March 2, 2003, when Morris claimed he had the argument with Theresa. 6/15/2004 RP 52-3.

On cross-examination, Leta testified that he paid \$250 per month in rent and that on occasions he made arrangements to pay support first. 6/15/2004 RP 54-5. Leta testified she didn't recall

Morris giving her \$3,500 from his \$7,000 worth of the injury settlement and that she probably would have remembered. 6/15/2004 RP 57. Leta testified that Morris never missed his visitation. 6/15/2004 RP 61. Leta acknowledged that it wouldn't be unusual for A.W. to reveal bad touching to her mother. 6/15/2004 RP 66. Leta testified it wasn't unusual that Morris would be upset and slam the door after dropping off A.W. 6/15/2004 RP 69. Leta admitted to not liking Theresa and it developing after Leta couldn't see A.W. 6/15/2004 RP 70. Leta admitted that she didn't see A.W. between being a newborn and eleven months old because she stopped calling. 6/15/2004 RP 74-5. Leta testified that she went back over her recollection of Morris' interaction with A.W. and never found anything unusual and never would have suspected Morris. 6/15/2004 RP 83-4.

James Benfield, Patrick Morris' stepfather, testified. 6/15/2004 RP 84-91. James said that the visitations by A.W. were regular. 6/15/2004 RP 86-7. James stated that he never saw A.W. act quiet, shy or scared around Morris. 6/15/2004 RP 88. James didn't recall anything unusual occurring after Morris took A.W. home the last time they saw her. 6/15/2004 RP 91.

Clara Riggs testified. 6/15/2004 RP 92-102, 6/15/2004 p.m. RP 5-28. Riggs was a pharmacy technician who worked with Kathy Morris. 6/15/2004 RP 92-3. Riggs had an opportunity to see how Morris interacted with A.W. 6/15/2004 RP 94. Riggs never saw A.W. act withdrawn, quiet or scared of her father. 6/15/2004 RP 95. Riggs testified that she saw Morris on occasion around Anacortes after he broke up with Kathy Morris. 6/15/2004 RP 96-7. Riggs was first contacted by Kathy Morris about being a witness in the winter of 2003 and 2004. 6/15/2004 RP 97. Riggs related that Kathy Morris had wanted her to be a character witness for Morris. 6/15/2004 RP 98. Riggs said that she did not look for any interaction between Morris and A.W. when she saw them together. 6/15/2004 p.m. RP 5. Riggs did not see A.W. between September of 2002 and March of 2003. 6/15/2004 p.m. RP 6. Riggs told Morris she would support him without gathering any information about the allegations. 6/15/2004 p.m. RP 10. Riggs revealed that she had been abused and both sides examined as to why she would believe Morris without getting information on the other side. 6/15/2004 p.m. RP 11-28.

Kathy Morris, Patrick Morris' wife, testified. 6/15/2004 p.m. RP 29-53. Kathy married Morris in April of 1999. 6/15/2004 p.m. RP 29. They separated in September of 2002. 6/15/2004 p.m. RP 30. While

they were married, Morris had visitation with his daughter most every weekend. 6/15/2004 p.m. RP 30-1. Morris didn't see any shyness, withdrawnness, reluctance or hesitancy by A.W. toward Morris. 6/15/2004 p.m. RP 31. Kathy testified about the incident when A.W. fell off a stool. 6/15/2004 p.m. RP 32-4. On cross examination, Kathy testified that the abrasion was on the bony area of the pubic bone, not on the labia. 6/15/2004 p.m. RP 37. That abrasion was different from the location where the doctor saw. 6/15/2004 p.m. RP 37. Kathy testified that Morris had a son with another woman, Jessica Brooks, while they were separated but before they were married. 6/15/2004 p.m. RP 39-40. Kathy testified that Morris did not see that son much. 6/15/2004 p.m. RP 42. Kathy was aware that Morris was behind on child care most of the time. 6/15/2004 p.m. RP 45. Kathy testified that she told Clara Riggs about the allegations because A.W.'s mother accused Morris of molesting A.W. 6/15/2004 p.m. RP 46. Kathy assumed it was A.W.'s mother that was accusing Morris. 6/15/2004 p.m. RP 46. Kathy did not check out the allegations herself. 6/15/2004 p.m. RP 46.

On rebuttal, the State called Jessica Brooks, the mother of Morris' son Cody. 6/15/2004 p.m. RP 64-98. Prior to calling Brooks,

the parties addressed the admissibility of her testimony. The court ruled:

There's been a lot of testimony in this case about Mr. Morris having never done anything inappropriate in his conduct with [A.W.]. And, in fact, I think he agreed that he went out of his way to avoid doing anything that could be misconstrued as inappropriate with [A.W.]. And his witnesses have corroborated that his behavior with [A.W.] and hers with him was always appropriate, and nothing out of the ordinary ever happened. I don't think the State needed to put this testimony in their case in chief in light of that. There's clearly now in the defense's case testimony that can be rebutted by Ms. Brooks. The question is: Is the time period relevant? It is, as you say, well before any timeframe in the charging document. The problem, however, is that a child sexual abuse case is not like an assault case or murder case where the incident happens, boom suddenly it's over. This is a relationship that develops over time. And things that happen even before any criminal conduct can be relevant to the development of that relationship. So motion to exclude the testimony of Ms. Brooks is denied. Her testimony is relevant.

6/15/2004 p.m. RP 59-60.

Brooks testified that she lived with Morris at his parent house and had seen Morris with A.W. on about half a dozen occasions.

6/15/2004 p.m. RP 65-6. Brooks testified that A.W. was fifteen to eighteen months at the time and acted quiet and shy around Morris and appeared to be withdrawn. 6/15/2004 p.m. RP 66. Brooks

testified that Morris changed A.W.'s diapers in another room with a closed door and did not let Brooks be present while he did it.

6/15/2004 p.m. RP 68. One time Brooks had come upon Morris

changing the diaper and he was putting Vaseline or something other than diaper ointment on A.W. and Brooks saw that A.W. did not have a rash. 6/15/2004 p.m. RP 69-70. A.W. was laying on the bed when Morris put the ointment on. 6/15/2004 p.m. RP 69. Morris was rubbing the ointment on A.W. and took at least the 45 seconds that Brooks was in the room to do it. 6/15/2004 p.m. RP 71. Morris said his ex told him to put it on her every time he changed a diaper. 6/15/2004 p.m. RP 71-2. Brooks and Morris argued about it. 6/15/2004 p.m. RP 72. In addition, it took about ten minutes for Morris to changed A.W.'s diapers when he did it. 6/15/2004 p.m. RP 72-3. Morris had visited his son with Brooks who was five at the time of trial on about half a dozen times over the last four years. 6/15/2004 p.m. RP 95-6.

On June 16, 2004, the jury reviewed a videotape done by Larry Daly, the defense child interview expert. 6/16/05 RP 10. After that both parties rested and the jury was instructed. 6/16/2004 RP 12-13. Thereafter, the parties presented closing argument.

The defense focused on the differences in A.W.'s "story" about what occurred as it was related by A.W. herself on the stand, in the videotape and through six witnesses. 6/16/2004 RP 42-50. The defense argued that A.W. had help from Theresa about her story.

6/16/2004 RP 52. Defense claimed that Theresa's motive was lack of child support. 6/16/2004 RP 55-6. Defense pointed out inconsistencies between what Theresa and other witnesses said. 6/16/2004 RP 57-65, 69-78. Defense even hypothesized that Theresa was bringing A.W. to counseling just for the benefit of trial preparation. 6/16/2004 RP 75. Defense finally put their true theory:

Conclusion, we want to talk about motive. We want to talk about what Theresa Scribner wanted to get out of it. It's very simple. Theresa decided to do for herself what Pat Morris would not agree to do. And that was to terminate his parental rights to get Pat out of the picture one way or another. And the evidence is that Theresa did it by coaching [A.W.] and making an allegation against Pat of child abuse.

6/16/2004 RP 86.

On June 17, 2004, the jury returned guilty verdicts two counts of Child Molestation in the First Degree and one count of Rape of a Child in the First Degree. CP 78.

IV. ARGUMENT

1. Testimony by various witnesses was not objected to or was properly admitted by the trial court.

Morris has not explained why the admission of any of the items of evidence are of constitutional magnitude allowing them to be raised for the first time on appeal.

The state argues Clark's failure to object to the admission of the child hearsay statements at trial precludes him from raising the issue on review. Indeed, the state frames the issue before us as "[w]hether fairness dictates that the long-standing contemporaneous objection rule that is recognized by virtually every jurisdiction in the United States [should] be preserved?" Supplemental Br. of Resp't at 1.

The state is correct that an issue must normally be raised in the trial court before it may be considered on appeal. RAP 2.5(a); State v. Paysse, 80 Wn. 603, 608, 142 P. 3 (1914) ("It is a principle, applicable to criminal as well as civil cases, that objections to evidence or matters or proceedings occurring at the trial, not going to the jurisdiction of the court, must be presented to and ruled upon by the trial court before they can be made available upon appeal."). However RAP 2.5(a)(3) excepts "manifest error affecting a constitutional right," allowing us to consider an error of constitutional magnitude even though that issue was not raised at trial. The state's argument that we cannot address the issue raised by Clark on appeal for the first time therefore fails to the extent that Clark raises a constitutional issue.

Because Clark failed to object below and because our review is limited to the confrontation issue, we must distinguish between the interpretation of RCW 9A.44.120 and the question of whether the proceedings at this trial satisfied the requirements of the confrontation clause. These are separate issues because a statute may provide greater protection than that guaranteed by the Constitution. The focus in this case is therefore not upon the requirements of the statute but rather the guarantees of the confrontation clause, and whether the proceedings at trial violated Clark's constitutional rights.

State v. Clark, 139 Wn.2d 152, 155-7, 985 P.2d 377 (1999).

In State v. Clark, the Supreme Court reviewed the admission of evidence because Clark had raised a confrontation clause issue since the victim had testified and recanted. In the present case,

similar to Clark the victim was subject to cross-examination and did not recant. Morris had the right to confrontation.

The issue that Morris raises with respect to testimony by various witnesses claiming that they "believed the complainant when she disclosed sexual abuse by her father." Appellant's Opening Brief at page 4. He claimed that the statements were admitted as expert's opinions. In addition, a review of the statements shows that they were not provided as an opinion based on belief of the victim but based upon action taken.

Jones also contends the trial court erred by permitting testimony of Judy Mitchell, the CPS caseworker. An expert may not testify on an ultimate issue of fact based upon the expert's perception of the witness's veracity. State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985); State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). Nor may the expert state an opinion as to the defendant's guilt; such testimony invades the province of the jury to weigh the evidence and decide the credibility of witnesses. Alexander, 64 Wn. App. at 154, 822 P.2d 1250; State v. Madison, 53 Wn. App. 754, 760, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989).

Jones alleges Mitchell's testimony regarding her remarks to A. that "I believe you" and her statement that "I felt that this child had been sexually molested by Donnie at that point" are impermissible opinions as to A.'s truthfulness and Jones' guilt. **The "I believe you" statement, however, taken in the context of the surrounding testimony, appears to have been intended to reassure the child in an effort to encourage the child to respond. Moreover, even if the remark would have been the proper subject of**

an objection, no objection was made and therefore error may not be raised unless it constitutes manifest constitutional error. State v. Madison, 53 Wash.App. at 762, 770 P.2d 662. In Madison, an expert witness testified to her observations of the complaining witness, and her statements implied her belief in the victim's story. **Because the expert did not explicitly state her belief in the victim's story the Madison court held the testimony did not constitute manifest constitutional error. Madison, 53 Wn. App. at 763, 770 P.2d 662. Similarly, in this case, Mitchell did not expressly state to the jury that she believed A., therefore any error may not be raised for the first time on appeal.**

State v. Jones, 71 Wn. App. 798, 812-3, 863 P.2d 85 (1993)
(emphasis added).

Thus, Morris cannot raise issue regarding admission of evidence where he failed to object at the trial court level. The State addresses the testimony in turn.

i. Andrea Smith, M.D.

Dr. Smith was the pediatrician, who did an examination of A.W. as to sexual abuse. 6/10/2004 RP 64-6. Dr. Smith testified that in medicine, she was required to provide a diagnosis. 6/10/2004 RP 81. Her diagnosis was history of sexual assault based upon the statements made by A.W. 6/10/2004 RP 81-2. No objection was made. 6/10/2004 RP 81-2. However, the defense clarified with Dr. Smith that her diagnosis of history of sexual assault was based

simply because it was reported to her. 6/10/2004 RP 82-3. Dr. Smith testified: "you still call it a history of sexual assault because my job isn't to decide whether that happened. My job is to collect evidence." 6/10/2004 RP 82-3.

This record establishes that the defendant did not object and furthermore that Smith was not providing an opinion as to her belief of the victim.

ii. Leanne King, CPS Social Worker

Leanne King was the CPS social worker who interviewed A.W. alone. 6/9/2004 RP 113, 6/10/2004 RP 173-7,183. King did not interview A.W. as to the allegations since Candy Ashbrook was going to do an interview. 6/10/2004 RP 183-4. King eventually contacted Morris on June 16, 2003. 6/10/2004 RP 185. King did not get a statement from Morris. 6/10/2004 RP 185. King testified that she closed the case in June and made a determination that sexual abuse was "founded." 6/10/2004 RP 187. No objection was made at that time. 6/10/2004 RP 187, 202. In fact, the defense questioned King at length about whether she believed a child of A.W.'s age was suggestible and also, what a child does to demonstrate whether a child is credible. 6/10/2004 RP 199.

When the statement about the abuse being founded was brought to the court's attention the next day, the defense acknowledged that there was no objection and that there was a tactical reason for it. 6/11/2004 RP 3. Instead the defense sought to have further witnesses testimony be limited. 6/11/2004 RP 3. The state agreed to the limitation. 6/11/2004 RP 4-5. As the trial court explained outside of the jury, a CPS determination of "founded" is a CPS term of art that doesn't necessarily mean that she believed it happened. 6/11/2004 RP 6. No curative instruction was requested by the defense. 6/11/2004 RP 6.

Although the record about what was presented to the jury does not specifically explain that the witness's finding was not a determination as to belief of the victim, the context in which it was presented about the actions of CPS and also the fact that the witness did not interview A.W. shows that this was not a situation where the witness was presenting an opinion as to credibility or belief of the victim. Even if that were the case, the defense sought to use the evidence presented to suggest that this was a situation where A.W.'s mother was suggesting things to A.W.

iii. Lisa Clarke, Clinical Therapist

Lisa Clarke was the clinical therapist at Compass Mental Health who did an intake evaluation on A.W. 6/11/2004 RP 95-6, 99

On redirect examination, the State sought to have Clarke state what they were providing A.W. counseling for as result of the disclosure. 6/11/2004 RP 113-4. The defense objected. 6/11/2004 RP 114. Outside the presence of the jury, the prosecutor asked Clarke about what the symptoms they were treating A.W. for and the diagnosis related to that. 6/11/2004 RP 114-5. Clarke confirmed that that diagnosis was based upon the report of the child and parent, not based upon a determination that it had happened. 6/11/2004 RP 115. The defense just suggested that it would be easier to avoid the second diagnosis of sexual abuse altogether. 6/11/2004 RP 115. The trial court held that since the witness would make it clear that the diagnoses were not based upon history and not a determination as to truthfulness, they could be admitted. 6/11/2004 RP 116.

Clarke went on to testify that diagnoses were made of adjustment disorder with anxiety and sexual abuse of a child. 6/11/2004 RP 116. Clarke added that she made no determination as to truthfulness of the allegations. 6/11/2004 RP 117. Defense went on to clarify that Clarke was not making a determination that the abuse had occurred. 6/11/2004 RP 117.

Morris claims there was an objection lodged by the defense. However, a review of the record instead shows that the defense wished to just characterize the diagnosis a certain way. However, the actual diagnosis was directly related to the type of treatment that would later be provided to A.W. as testified to by Diana Lowry. Thus, there was relevancy that permitted the diagnosis to be admitted.

Furthermore, the record establishes that both counsel had Clarke testify that her diagnosis had in no way an opinion as to truthfulness. 6/11/2004 RP 117. Thus, similar to the other witness testimony, this was not an opinion as to truthfulness that could be raised for the first time on appeal.

2. Where the trial tactic was to show that the disclosure was caused by the victim's mother to take custody away and the defense did not oppose admission of evidence, counsel was not ineffective.

In Strickland, the Court established a two-part test for ineffective assistance of counsel. **First, the defendant must show deficient performance. In this assessment, the appellate court will presume the defendant was properly represented.** State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); Strickland, 466 U.S. at 688-89, 104 S.Ct. at 2064-65. Deficient performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994); State v. Mak, 105 Wn.2d 692, 718 P.2d 407, *cert.*

denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).

Second, the defendant must show prejudice-"that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Thomas, 109 Wn.2d at 226, 743 P.2d 816. If either part of the test is not satisfied, the inquiry need go no further. Lord, 117 Wn.2d at 894, 822 P.2d 177; State v. Fredrick, 45 Wn. App. 916, 729 P.2d 56 (1986).

State v. Hendrickson, 129 Wn.2d 61, 77-8, 917 P.2d 563 (1996)

(emphasis added).

To establish a claim of ineffective assistance of counsel, Howell must prove both that his trial attorney's representation was deficient and that the deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). In determining whether a defendant has met the first prong of this test, "scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." Thomas, 109 Wash.2d at 226, 743 P.2d 816. Trial conduct that can be characterized as legitimate trial strategy or tactics cannot form the basis for a claim of ineffective assistance of counsel. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (citing State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)). If the defendant meets the first burden, the second prong requires the defendant to show only a "reasonable probability" that the outcome of the trial would have been different absent the attorney's deficient performance. Strickland, 466 U.S. at 693, 104 S.Ct. 2052; Thomas, 109 Wn.2d at 226, 743 P.2d 816.

State v. Howell, 119 Wn. App. 644, 650-1, 79 P.3d 451 (2003).

To prevail on this issue, Petitioner must rebut the presumption that counsel's failure to object "can be characterized as *legitimate* trial strategy or tactics." Although deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance, "exceptional deference must be given when evaluating trial counsel's strategic decisions."

In re Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

The State believes that Morris' claim fails both because there was a legitimate trial tactic and as well because there was no actual opinion provided by a witness indicating that they believed the defendant.

From the closing argument of counsel, Morris showed that his defense was that Theresa Scribner coached A.W. to report the allegations. 6/16/2004 RP 86. Defense argued at length about the statements of Theresa and their claim of her motive of trying to divest Morris of his parental rights. 6/16/2004 RP 57-65, 69-78, 86. In addition, the Appellant's Opening Brief explains that the defendant did not have a child hearsay hearing stating: "it wanted the jury to hear all of the statements, no doubt believing that the inconsistencies would undermine A.W.'s credibility." Appellant's Opening Brief at page 4.

Given these circumstances, counsel's decision not to object to the statements of the witnesses regarding their actions on the victim's statements was a legitimate trial tactic to show that Theresa manipulated A.W. to tell the story and thus got those in the system to take actions to divest Morris of his parental rights. Simply put, the actions taken by Dr. Smith, Leanne King and Lisa Clarke supported Morris' claim that Theresa acted to terminate his rights.

The case of State v. Howell, gives an example of a legitimate trial strategy as it pertains to a claim of ineffective assistance for failure to object to opinion evidence.

However, counsel's failure to object to Paynter's testimony may have been the product of sound trial strategy. As previously noted, Howell's defense was that the police were biased against him and would have pursued the case against him regardless of the evidence. From the beginning of trial, Howell characterized the prosecution as "a case about harassment." RP (Jul. 16, 2002) at 74. In his closing argument, Howell's attorney explicitly accused Officer Stray of lying, forging part of Sage's written statement, and perjuring himself on the witness stand in order to convict Howell. Given this strategy, Howell's defense was arguably strengthened by Detective Paynter's testimony that he would have referred the case to the prosecutor's office even in the face of potentially exculpatory evidence.

State v. Howell, 119 Wn. App. 644, 651-2, 79 P.3d 451 (2003).

Furthermore, the facts of the case establish that the testimony would not result in a “reasonable probability of a different outcome” because as explained above none of the witnesses testified directly as to whether they believed A.W. or not, and, both Dr. Smith and Lisa Clarke testified directly that they did not make any evaluation as to truthfulness of the statements by A.W.

Morris fails on both prongs of a claim of ineffective assistance.

3. The trial court did not err in admitting the testimony of a witness to rebut the claim that the defendant tried to avoid the appearance of impropriety.

A decision involving the admission of evidence lies within the sound discretion of the trial court and will not be reversed unless abuse of discretion can be shown. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

State v. Shaw, 120 Wn. App. 847, 850, 86 P.3d 823 (2004).

Morris claims that the trial court erred in admission of testimony of the defendant’s ex-girlfriend regarding the defendant’s actions while changing the diaper of A.W. This evidence was offered to rebut Morris’ claim that he went to great lengths to avoid contact with A.W. that would be misconstrued. 6/15/2004 RP 21. In addition,

Morris when questioned had denied recalling the conversation with his ex-girlfriend. 6/15/2004 RP 21.

In addressing the rebuttal, the trial court noted that the defense had put on Kathy Morris to testify about Patrick Morris' interaction with A.W. in the same time frame. 6/15/2004 p.m. RP 55.

The court ruled:

There's been a lot of testimony in this case about Mr. Morris having never done anything inappropriate in his conduct with Alyssa. And, in fact, I think he agreed that he went out of his way to avoid doing anything that could be misconstrued as inappropriate with Alyssa. And his witnesses have corroborated that his behavior with Alyssa and hers with him was always appropriate, and nothing out of the ordinary ever happened. I don't think the State needed to put this testimony in their case in chief in light of that. There's clearly now in the defense's case testimony that can be rebutted by Ms. Brooks. The question is: Is the time period relevant? It is, as you say, well before any timeframe in the charging document. The problem, however, is that a child sexual abuse case is not like an assault case or murder case where the incident happens, boom suddenly it's over. This is a relationship that develops over time. And things that happen even before any criminal conduct can be relevant to the development of that relationship. So motion to exclude the testimony of Ms. Brooks is denied. Her testimony is relevant.

6/15/2004 p.m. RP 59-60. When the defense tried to limit the testimony, the trial court allowed the witness to testify that what Morris was doing was making her uncomfortable. 6/15/2004 p.m. RP 63.

Brooks testified that Morris changed A.W.'s diapers in another room with a closed door and did not let Brooks be present while he did it. 6/15/2004 p.m. RP 68. One time Brooks had come upon Morris changing the diaper and he was putting Vaseline or something other than diaper ointment on A.W. and Brooks saw that A.W. did not have a rash. 6/15/2004 p.m. RP 69-70. A.W. was laying on the bed when Morris put the ointment on. 6/15/2004 p.m. RP 69. Morris was rubbing the ointment on A.W. and took at least the 45 seconds that Brooks was in the room to do it. 6/15/2004 p.m. RP 71. Morris said his ex told him to put it on her every time he changed a diaper. 6/15/2004 p.m. RP 71-2. Brooks and Morris argued about it. 6/15/2004 p.m. RP 72. It took about ten minutes for Morris to changed A.W.'s diapers when he did it. 6/15/2004 p.m. RP 72-3.

Morris characterizes this testimony as opinion evidence that the trial court improperly admitted.³ However, the statements by Brooks about why she was uncomfortable about the situation are not provided as an expert opinion but instead as ruled by the trial court to "help describe the conduct and the reason for the conversation." The trial court did abuse its discretion in admission of the evidence.

³ Morris does not cite to any specific testimony as expert opinion.

V. CONCLUSION

For the foregoing reasons, the State would respectfully ask this Court to hold that the defendant failed to preserve the issues regarding claimed opinion evidence based upon a lack of objection and furthermore that this was not ineffective assistance of counsel. Furthermore, the State would ask that this Court hold that the trial court did not abuse its discretion about prior actions of the defendant with the victim. And based upon these holdings, the convictions of Morris must be affirmed.

DATED this 1st day of July, 2005.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: Erik Pedersen
ERIK PEDERSEN, WSBA#20015
Senior Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

RECEIVED
COURT OF APPEALS
DIVISION ONE
JUL - 5 2005

DECLARATION OF DELIVERY

I, Gail Sundeau, declare as follows:

served the attorney for Mr. Morris, Mark Mestel, in person; or sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Mark D. Mestel, addressed as The Moose Tower, 3221 Oakes Avenue, Everett, WA 98201. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 1 day of July, 2005.

Gail Sundeau
GAIL SUNDEAN, DECLARANT

APPENDIX A

TABLE OF REPORT OF PROCEEDINGS

STATE OF WASHINGTON

v.

PATRICK MORRIS

Skagit County Superior Court #03-1-00660-1

Court of Appeals # 54924-3-I

VRP	DATE	HEARING TYPE	
1	May 6, 2004	Status Hearing	
2	June 8 & 9, 2004	Trial Days 1 & 2	June 8 - Voire Dire / June 9 – Opening Witnesses: A. W. Theresa Scribner
3	June 10, 2004	Trial Day 3 - AM	Witnesses: Les Richards Theresa Scribner Andrea Smith, MD
4	June 10, 2004	Trial Day 3 - PM	Witnesses: Theresa Scribner Robert Petty, MD Sam Scribner Leanne King
5	June 11, 2004	Trial Day 4	Witnesses: Karen Talbert Sgt Lou D'Amelio Det. Kathleen Ryan Michelle Lambert Lisa Clarke Candy Ashbrook Diana Lowry
6	June 14, 2004	Trial Day 5	Witnesses: Gretchen VanPelt Larry Daly (outside jury's presence) Defense Case: Witness: Patrick Morris
7	June 15, 2005	Trial Day 6 – AM Reporter Corpolongo	Witnesses: Patrick Morris Leta Benfield James Benfield Clara Riggs
8	June 15, 2005	Trial Day 6 – PM Reporter Schroeder	Witnesses: Clara Riggs Kathy Morris State's Rebuttal Case: Witness: Jessica Brooks
9	June 16, 2004	Trial Day 7	Evidence: Videotape Interview of Victim Jury Instruction Closing Argument

APPENDIX C

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	DIVISION ONE
Respondent,)	
)	No. 54924-3-1
vs.)	
)	UNPUBLISHED OPINION
PATRICK LYNN MORRIS,)	
)	
Appellant.)	FILED: November 28, 2005
_____)	

PER CURIAM – Patrick Lynn Morris was charged with two counts of first degree sexual molestation and one count of first degree rape of his daughter, A.W. The State’s case was primarily the testimony of the child and of others who recounted the child’s behavior and statements. At trial, three professionals involved with the case each testified to a “diagnosis” or “finding” of sexual abuse. Defense counsel objected only to the third statement, and did not move to strike or ask for a curative instruction. However, he did clarify on cross-examination that the statements were simply professional terms of art, rather than statements of belief that the abuse had occurred. In the State’s case in chief, A.W.’s guardian ad litem (GAL) testified that during an interview with Morris, he stated that he made efforts to ensure that no one could misconstrue his relationship with A.W.

Morris denied the allegations and testified that he believed the charges were invented by A.W.’s mother in an attempt to terminate his parental rights.

On cross-examination, Morris admitted telling the GAL that he had made efforts to avoid his relationship with A.W. being misconstrued. Over defense objection, Morris's former girlfriend testified on rebuttal about an incident she believed to be inappropriate when the defendant was changing A.W.'s diaper in 1998. Morris was convicted on all three counts.

None of the challenged testimony invaded the province of the jury. Two of the three claimed errors were not preserved for appellate review. Although we determine that the trial court erred in allowing the challenged rebuttal testimony, the error was harmless. We affirm.

I.

Patrick Morris is A.W.'s father. He and the child's mother, Theresa Scribner, were not married, and did not reside together during the period in question. A.W. lived with her mother.

Scribner testified that A.W. came into her bedroom and said "my daddy touches me." Scribner took A.W. to see a pediatrician, Dr. Andrea Smith. Dr. Smith's examination revealed no physical evidence of sexual abuse. Based on her daughter's statements, Scribner called Child Protective Services (CPS), obtained a protective order, and talked with the police. A number of professionals treated A.W. and made extensive notes of her behavior and statements. A.W. was also questioned by a child interview specialist. At no time did she recant her claim that she had been touched. Patrick Morris was charged with twice molesting and once raping A.W.

At trial, the State's chief witness was A.W. She testified that Morris had touched her. Dr. Smith, therapist Lisa Clarke, and CPS caseworker Leanne King were also called to testify for the State. Dr. Smith testified that the absence of physical evidence was not inconsistent with the described sexual abuse. She made a diagnosis based on what A.W. had told her:

Q: So at the conclusion of your examination, do you come up with a diagnosis?

A: Yes. In medicine you have to have a diagnosis.

Q: Okay. And what was your diagnosis as it pertains to [A.W.]?

A: History of sexual assault.

Q: Since there were no physical findings that you could look to, what is that diagnosis based on?

A: Well, it's a history of sexual assault. That's how I was trained to do that when you examine a patient where that's a concern.

Q: Is that based on the statements she made to you?

A: Correct.

No objection was made by the defense. On cross-examination, defense counsel clarified that the "diagnosis" was not a finding that abuse had occurred.

CPS caseworker Leanne King testified that after speaking with Scribner, Morris, and reviewing the transcript of A.W.'s discussion with a child interview expert, she "closed the case and determined that the allegation of sexual abuse was founded." No immediate objection was made, but the next day, before the jury was brought in, defense counsel expressed his concern about the statement. He stated that he did not object at the time because he did not want to "draw more attention to it." He moved that no witnesses should be allowed to testify that they believed A.W. or that they believed sex abuse had occurred. The court granted the motion. Defense counsel did not move to strike the statement by Leanne King, nor did he request a curative instruction.

Therapist Lisa Clarke was called to testify that she had diagnosed A.W. with “adjustment disorder with anxiety” and “sexual abuse of a child” based on her interviews with A.W. Defense counsel objected, and outside the presence of the jury, the court verified that this was in fact a diagnosis based only on the reports of A.W. and Scribner.¹ However, the court allowed the testimony:

I think she's entitled to offer her diagnoses, both of them, the adjustment disorder and the history of sexual abuse – or sexual abuse based on history, so long as it's clear it's based on history given, not on an independent determination.

The jury was brought back in and Dr. Clarke stated that her diagnosis was “adjustment disorder with anxiety and sexual abuse of a child.” As an attempt to follow the judge's instructions, the prosecution followed up the diagnosis testimony with this exchange:

Q. And you do not make a determination yourself as to the – one way or the other as to the truthfulness of the allegations?

A. Right.

Q. And your purpose is then to treat the patient, you're evaluating for whatever symptoms exist?

A. Yes.

A.W.'s GAL testified that when she interviewed Morris by phone, he stated that he was “floored” by the allegations and that he avoided any situation with A.W. that could be misconstrued. The other major elements of the State's case were numerous subsequent statements made by A.W. that her daddy had touched her, evidence of her emotional problems, the testimony of a day care worker that A.W. had acted out sexually on three occasions, and testimony from a doctor who had treated A.W. for an abrasion and swelling on her outer labia.

¹ The witness also contradicted herself outside the presence of the jury about whether or not this was actually a “diagnosis.”

Another doctor testified that A.W. had experienced unusually persistent rashes starting in January of 2000 while she was still in diapers.

Morris took the stand in his own defense and denied abusing his daughter. He testified that on multiple occasions Scribner had suggested that he terminate his parental rights. Morris and his mother both testified that the night before the allegations of abuse surfaced, he and Scribner had argued about money and that she had once again suggested that he terminate his rights. Morris also reiterated on cross-examination that he had told the GAL that he tried to avoid situations with A.W that could be misconstrued.

The State called Jessica Brooks in rebuttal to testify about an incident in 1998 when she questioned the propriety of the way Morris was changing A.W.'s diaper. The defense objected, arguing that the testimony was not properly the subject of a rebuttal, and that the State should have called the witness in its case in chief. The court disagreed and allowed the testimony.

Morris was convicted on all three counts. He appeals.

II.

Trial courts have broad discretion with respect to evidentiary matters.² We will reverse an evidentiary ruling only if the court abuses its discretion.³ "Discretion is abused if it is based on untenable grounds or for untenable reasons."⁴

² Cox v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000).

³ Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997).

⁴ In re Parentage of J.H., 112 Wn. App. 486, 495, 49 P.3d 154 (2002), rev. denied, 148 Wn.2d 1024 (2003).

Morris first assigns error to the trial court's decision to admit the statements of Dr. Smith, Child Protective Services caseworker King, and therapist Clarke regarding "diagnoses" or "findings" based solely on the statements of A.W. The State argues that all of these statements were properly explained as not being statements of belief that the abuse occurred, and that no objection was made to the testimony of Smith and King, so the issue was not preserved.

An expert may not state an opinion on the ultimate issue of fact when it is based solely on that expert's determination of the credibility of another witness.⁵ Allowing opinion testimony on the ultimate issue of fact in a rape trial invades the province of the jury and is manifest constitutional error.⁶ However, if the testimony is not a statement of explicit belief in the allegations of the victim, no manifest constitutional error exists, and the error may not be raised for the first time on appeal.⁷

Dr. Smith's examination concluded with a "diagnosis" of "history of sexual assault" based on the child's statements. It was not a statement of belief or an evaluation of A.W.'s credibility. Defense counsel clarified that this was simply a statement to be entered into the medical records for treatment purposes, not a statement of belief that abuse occurred. This was not manifest constitutional error, and the issue is not preserved for review because defense counsel failed to object.

⁵ State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985).

⁶ State v. Florczak, 76 Wn. App. 55, 74, 882 P.2d 199 (1994).

⁷ State v. Jones, 71 Wn. App. 798, 812-13, 863 P.2d 85 (1993).

Leanne King's testimony that "the allegation of abuse was founded" is not a statement weighing the credibility of witnesses. It is a CPS term of art meaning that "based on available information it is more likely than not that child abuse or neglect did occur."⁸ King did not testify that she believed A.W. Furthermore, defense counsel failed to preserve the issue by timely objecting or moving to strike. Nor did he ask for a curative instruction, which could have cured any prejudice.

Dr. Clarke's statement is similar to Dr. Smith's: a "diagnosis" of sexual abuse of a child. She did not state a belief in the child's allegations or that she believed the abuse had occurred. Clarke clarified on direct that she had made no determination as to the truthfulness of the allegations, and this point was reiterated on cross-examination.

Morris also assigns error to the court's decision allowing the rebuttal testimony of Jessica Brooks. The State argues that the testimony was admitted "to rebut Mr. Morris' claim that he went to great lengths to avoid contact with A.W. that would be misconstrued."

Rebuttal evidence allows a plaintiff to respond to a new issue presented by the defense. But the statement that Morris went to great lengths to avoid situations with his daughter that could be misconstrued was not raised by the defense. A.W.'s GAL testified to the statement in the State's case in chief. The State then elicited a reiteration of the same statement from Morris on cross-examination, and called Ms. Brooks on rebuttal allegedly to counter it. The

⁸ WAC 388-15-005.

evidence was not in reply to any new point raised by the defense, and could have been raised in the State's case in chief.⁹ The defense raised no issue requiring rebuttal evidence. Allowing improper rebuttal testimony was error.

Although admission of the rebuttal testimony was error, it is reversible error only if it is not harmless. An error is not harmless "if there is a reasonable probability it affected the verdict."¹⁰ In State v. Owens,¹¹ the defendant in a child molestation trial sought to exclude two statements made to the victim's mother and grandmother that he had been abused by the defendant.¹² Although the court found that the statements were improperly admitted, the error was held to be harmless because there was ample evidence supporting the verdict, including testimony by the child and his doctors as to the details of the abuse.¹³

The State's case did not rise and fall on Ms. Brooks's testimony about a suspicious diaper change. There was ample testimony from numerous witnesses relating to the crimes charged, including in-court testimony by the victim herself. A.W. consistently maintained throughout the investigation, medical and psychological sessions, and at trial that she had been improperly touched. The outcome would not have changed had Ms. Brooks's testimony been excluded. The error was harmless.

⁹ See State v. Burns, 53 Wn. App. 849, 851, 770 P.2d 1054 (1989) (rebuttal evidence not in reply to anything new by defense was admitted in error), aff'd, 114 Wn.2d 314, 788 P.2d 531 (1990); Kremer v. Audette, 35 Wn. App. 643, 648, 668 P.2d 1315 (1983) (exclusion of rebuttal witness on point admissible in State's case in chief was not error).

¹⁰ State v. Owens, 128 Wn.2d 908, 914, 913 P.2d 366 (1996).

¹¹ 128 Wn.2d 908, 913 P.2d 366, 369 (1996).

¹² Owens, 128 Wn.2d at 912.

¹³ Owens, 128 Wn.2d at 914.

The defendant has a heavy burden in proving a claim of ineffective assistance of counsel when the basis is a failure to object.

To prove that failure to object rendered counsel ineffective, Petitioner must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted.^[14]

Morris has not met this burden. Although counsel might have been more assiduous in moving to strike certain testimony and requesting curative instructions, he effectively defused most of the potential prejudice by cross-examining the witnesses to limit the adverse impact of their testimony on direct examination.

AFFIRMED.

FOR THE COURT:

Baker, J

Cox, CJ

Everton, J

¹⁴ In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1, 37 (2004) (footnotes omitted).

APPENDIX D

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PATRICK LYNN MORRIS,

Petitioner.

NO. 78135-4

ORDER

C/A NO. 54924-3-I

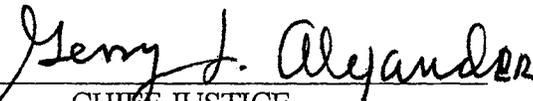
Department II of the Court, composed of Chief Justice Alexander and Justices Madsen, Bridge, Owens and J.M. Johnson, considered this matter at its July 10, 2007, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 11th day of July, 2007.

For the Court


CHIEF JUSTICE

FILED
SECRETARY
STATE OF WASHINGTON
JUL 11 AM 9:35
BY RONALD A. CRISPEN
CLERK

APPENDIX E

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

STATE OF WASHINGTON,)	No. 54924-3-1
)	
Respondent,)	
)	MANDATE
v.)	
)	Skagit County
PATRICK LYNN MORRIS,)	
)	Superior Court No. 03-1-00660-1
Appellant.)	

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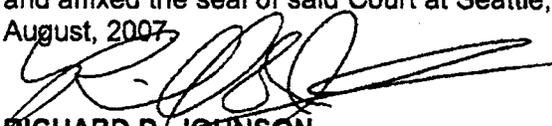
THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Skagit County.

10 This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on November 28, 2005, became the decision terminating review of this court in the above entitled case on August 31, 2007. An order denying a petition for review was entered in the Supreme Court on July 11, 2007. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

c: Mark Mestel
Erik Pedersen
Hon. Susan K. Cook
Indeterminate Sentencing Review Board



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 31st day of August, 2007

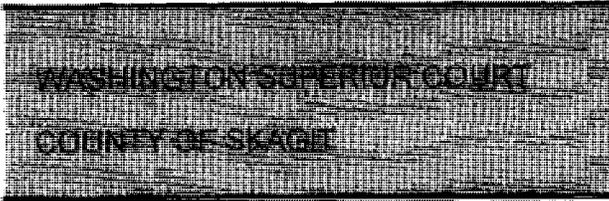

RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.

OK

APPENDIX F

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

2004 JUN 18 PM 1:26



STATE OF WASHINGTON,

Plaintiff,

v.

PATRICK MORRIS,

Defendant.

NO. 03-1-00660-1

**DEFENSE EXPERT REPORT OF
LAWRENCE DALY, MSc.**

COMES NOW Defendant in the above entitled cause of action and hereby submits to the Court the report of Defense expert Mr. Lawrence Daly, which was the subject of State's motions in limine heard by the Court and largely granted at a hearing outside the presence of the jury on June 14, 2004.

DATED: June 18, 2004

Respectfully submitted:

CORBIN T. VOLLUZ, WSBA #19325

**DEFENSE EXPERT REPORT OF LAWRENCE
DALY, MSc.**

**LAW OFFICE OF CORBIN T. VOLLUZ
409 MAIN STREET
MOUNT VERNON, WA 98273/ PHONE:360-336-0154**

From the desk of Lawrence W. Daly, MSc

(Draft) The Patrick Morris Report

I was retained by defense attorney Corbin T. Volluz to review the State's Discovery, interview the child, conduct scientific research and possibly testify if this matter were to go to trial. I have been asked to provide an opinion about the standard of care and the breach of that standard of care by law enforcement and the child interviewer in this case. I am competent to testify to the matters set forth herein and do so to the best of my personal knowledge.

1. Background: Experience/Education. I am a licensed private investigator in the State of Washington and the name of my business in Covington, Washington is Systematic Investigations. I have an MSc degree, which is a Masters in Psychology in Child Abuse and the Law. I also have a Bachelor's degree in Criminology from Southern Oregon State University in the year of 1977. I have been doing private investigations and consultations work since June of 1989, or at the time of this declaration, for 15 years now. One aspect of my work involves assisting attorneys in criminal cases, including investigations of child sexual abuse. This includes interviewing suspects, witnesses, alleged victims, doing background checks, analyzing statements, analyzing documents, and other investigative tasks. I have worked both for civil plaintiffs and defendants, as well as criminal defendants, since retiring from law enforcement.

Before private investigating, I was a police officer with the Department of Public Safety, King County; they are now referred to as King County Sheriff. I was in this position for ten years, and before that I was at City of Pacific Police Department for almost two years. Therefore, approximately 12 years of law enforcement experience. Combined, I have been involved professionally with criminal investigations as either a law enforcement officer or private investigator for over 26 years.

Over the years as both a law enforcement official and private investigator, I have received specialized training. Generally, I attend two to three seminars a year, so I've probably attended over 60 seminars in law enforcement related fields.

I also am a student of the literature on proper investigations, particularly in the area of criminal investigations of suspected child abuse, including sexual abuse.

1 I would estimate that in my career, I have worked on over 4000 cases involving
2 allegations of sexual abuse involving a child or children. The cases have ranged from simple
3 allegations to complex allegations. I was the lead investigator for many falsely accused suspects
4 in the Wenatchee Sex Ring Debacle of 1994-1995, which involved many false accusations of
5 child sex abuse and specifically spent 100s of hours not only reviewing the investigations done
6 by Wenatchee Police Department and Douglas County Sheriff's office, but also interviewing
7 witnesses, suspects, alleged victims, and reviewing reports.

8 I have testified for both civil plaintiffs and defendants, and criminal defendants in over
9 100 cases, including in the following jurisdictions, Lewis, Klickitat, Snohomish, King, Pierce,
10 Island, Clallam, Skagit and Douglas Counties, which are Counties in the State of Washington; I
11 have also testified in Alaska and Oregon. I have qualified as an expert in the field of police
12 criminal investigation involving child sexual abuse investigations and child interview protocols
13 and procedures.

14 I have written several books and articles, which began in 1988 with the book *Innocence,*
15 *The Ragged Edge.* Since that time I have written the book *Child Abuse Investigations, It Could*
16 *Happen To You,* and numerous articles all dealing with interviewing children and investigating
17 child sexual abuse allegations. I have lectured nationwide and provided seminars to a variety of
18 professional audiences on the subject of child sexual interviewing and investigations.

19 **2. My Opinions In General.** All opinions in this report are stated in terms of the duty of
20 care for a police officer investigating a potential crime in Washington under Washington law,
21 including but not limited to RCW 26.44.050. My knowledge of the standards described below is
22 based on my education, training, and more than 26 years of law enforcement experience. In my
23 opinion, the Anacortes Police Department and specifically Detective Ryan did not meet the
24 standard of care when investigating the allegations of child sexual abuse of Patrick Morris. The
25 items that I outline below in this report, in summary, show that Det. Ryan's investigation
26 amounted to improper and negligent police investigative work falling below the acceptable
27 standard of care in conducting investigations involving children and parents, and allegations of
28 child sexual abuse, in this State. In my opinion, as a direct and proximate result of Det. Ryan's
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1 failure to exercise ordinary care and meet the standard of care, Mr. Morris has been charged
2 criminally and suffered unnecessary separation from his child.

3 3. Sources Relied Upon. In making my opinions in this case, I rely not only on my
4 experience and education, but I rely on many sources on proper police investigative work. I
5 make it not only my profession to read the sources, but to use them in my investigative work here
6 in Washington. I have included a listing of some of the relevant and recent sources at the end of
7 this report

8 4. Specific Failures of Det. Kathy Ryan. Det. Kathy Ryan, as a criminal investigator
9 for the Anacortes Police Department in this case, must attempt to gather all the evidence in any
10 case, including exculpatory, inculpatory, and/or neutral evidence. This involves an active, as
11 opposed to a passive, duty. Just because she filled out some paperwork does not make her
12 exempt from completing her tasks as a police officer. These are all appropriate things to do, but
13 by doing these perfunctory, administrative tasks, by no means fulfills the legislative duty under
14 RCW 26.44.050 of investigating the case. Det. Ryan did not investigate this case, as she was
15 required to do.

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17 5. Failure to Provide All Information. Because the source of this allegation of sexual
18 abuse was the mother of the child, Mrs. Theresa Scribner and her husband Mr. Sam Scribner. A
19 thorough examination of their motives, hostility, malice, or other should have been
20 accomplished. That is, Det. Ryan should have done more than just "receive" the allegation from
21 Theresa Scribner and her husband. Det. Ryan should have assessed the custody issues, where
22 Mrs. Scribner was making increasingly serious efforts to terminate Mr. Morris's parental rights
23 and attempting to have Mr. Scribner outright adopt Ms. Morris. She could have accessed this
24 through simply doing an interview of Theresa Scribner, who admits to such an incident within
25 months of the allegations. She could then have accessed more information by interviewing Leta
26 Benfield, Pat Morris' mother, who was present in the home when the alleged abuse was
27 occurring, and who would have been a natural person to interview, as well as James Benfield,
28 who was also present in the home when the alleged abuse was occurring.

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2 Det. Ryan controls this flow of information to the courts, the prosecutors, and to decision
3 makers. In my opinion, it fell below the standard of care to overlook this information and more
4 importantly, to not follow up on this information by simply not interviewing direct witnesses as
5 well as collateral witnesses and asking the proper questions. Again, Det. Ryan's duty under
6 RCW 26.44.050 is not a duty of passivity where she just collects information and receives work
7 of others; instead, it is to conduct an investigation, which I opine she did not do.

8
9 In this regard, the information and reports that Mrs. Scribner was providing to the other
10 professionals and organizations (such as medical professionals, child protective services, etc.)
11 was certainly within the scope of Det. Ryan's duty and she should have obtained this
12 information, reviewed it, and provided this to the prosecutor, the Court and the decision makers.
13 This information formed an integral part of the investigation of the allegations against Mr.
14 Morris. Had Det. Ryan done her job, she would have seen the false allegations made by Mrs.
15 Theresa Scribner and how they were exaggerated, blown out of proportion, but also, expanding
16 over time. Otherwise, the allegation of sexual abuse by Mr. Morris was conveyed in a vacuum,
17 which is unacceptable. Although Det. Ryan only saw her duty as one of collecting information, it
18 was also her job to find out if the allegation were true or false. Det. Ryan's investigation did not
19 do this; it was a non-investigation. She did not do anything active. She received reports,
20 reviewed reports, and obtained documents, but she did do what she was required to do. Instead,
21 she relied on the reports of others, and did not even attend the interview of the child conducted
22 by Candice Ashbrook. She made no independent investigation. Had she conducted a thorough
23 investigation, a reasonable investigator would not have believed that Mr. Morris was guilty and
24 would not have been able to find a reasonable suspicion of guilt.

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26 Furthermore, Det. Ryan did not understand the concept of **repeated interviews**. It is
27 important to limit the number of interviews an alleged victim of child sexual abuse is subjected
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1 to . Repeated interviews undermine the reliability of the information received and can convey
2 to the child that his or her earlier responses were wrong or inadequate.

3
4 The primary government forensic interview of Ms. Morris was conducted by Ms. Candy
5 Ashbrook. Ms. Ashbrook's interview was simply unacceptable as a forensic interview. Some of
6 Ms. Ashbrook's questions were leading and suggestive. Her Forensic Protocol and Procedure is
7 unfamiliar to me and I am aware of the top protocols being used nationally and internationally.
8 Ms. Ashbrook only gathered evidence that would support a conviction or support probable cause.
9 She did not explore any alternative hypothesis regarding these disclosures by Alyssa Warner. At
10 one point in the interview she had an opportunity to explore an alternative theme with Alyssa
11 Warner, but chose not to. Ms. Ashbrook failed to ask her about Mrs. Theresa Scribner and how
12 many times she had discussed the case facts with her. Ms. Ashbrook did not detail what Alyssa
13 Warner's affect was during the interview. Instead of videotaping the interview, Ms. Ashbrook
14 taped the question and answer from her destroyed interview notes, which is unreasonable and
15 which procedure has specifically been termed "troublesome" by top experts in the field.
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18 Recording the interview, whether on video or audiotape, is the best way to maintain such
19 a record. Whatever the means used to record the interview, it is critical that every question and
20 the child's answer be recorded in exactly the language used by the child. This was not done here.
21 This is unacceptable. How do we know that Ms. Ashbrook simply failed to record exculpatory
22 information? All information obtained in the child interview must be included in the report,
23 whether exculpatory or inculpatory.
24

25 Det. Ryan's conduct also fell below the standard of care when she failed to corroborate
26 the information she obtained about sexual abuse with the medical examination. Det. Ryan
27 should have assessed the medical examination by Dr. Smith herself, not simply relying on Mrs.
28 Scribner's statements of what Dr. Smith allegedly stated the medical examination showed. The
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1 same is true of Theresa Scribner's representations regarding the medical examination Alyssa
2 received from Dr. Petty after she fell off the stool at her father's house in April of 2002. Again,
3 thorough police work and investigation requires at least reviewing the medical reports and/or
4 discussing the same with the doctor, (not just "skimming" the medical reports). Det. Ryan had
5 done neither. She did obtain the reports, but did not investigate the matter, nor apparently review
6 them or he would have caught these mistakes as well. Had Det. Ryan done so, she would have
7 discovered that Dr. Smith's findings were that Ms. Morris examination was a normal
8 examination, and that Dr. Petty's findings were that there was no tear in Alyssa's vagina, nor a
9 "cut inside of her vagina," as Theresa Scribner included in her petition for a no contact order, and
10 told Sgt. Lou D'Amelio, respectively.

11
12 Physical evidence is critical in child sexual abuse cases as well. Investigators should
13 search for physical evidence in every case. Det. Ryan should have executed a search for stain
14 and fiber evidence in every location in which sexual abuse was alleged to have occurred. Of
15 course, this would lead to exculpatory evidence if there was no such evidence.

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18 6. Alternative Hypotheses. Within the standard of care for law
19 enforcement investigations is to explore "Alternative Hypotheses." Lanning (2004)
20 states, "Every alternative way that a victim could have learned about the details of
21 the abuse must be explored, if for no other reason than to eliminate them and
22 counter defense arguments." American Prosecution Research Institute (2004) states,
23 "Throughout the investigation, the investigator must consider alternative
24 explanations for the child's statements that would indicate there was no abuse. As
25 the child is interviewed, the investigator should look for sufficient confirmation of
26 the people involved and the circumstances described so that the possibility of
27 deliberate falsehood, misinterpretation of innocent contacts, or coaching by someone
28 else can be ruled out." Milne and Bull, 1999 state, "Survey-involves taking an overview
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1 of the case, key players and evidence to allow the investigator to draw tentative conclusions,
2 predictions, estimations and alternative hypotheses. This allows a Summary to be produced
3 as an aid to briefing which notes (i) the state of plays as it stands, (ii) the change in lines of
4 investigation due to emergent information from collection, collation, and evaluation and (iii)
5 the outcome and recommendations for further investigations, where the model starts again at
6 Assess.”

7
8 Here, Det. Ryan did nothing to explore alternative hypotheses, and as such, her failure to
9 do so means she fell below the standard of care in Washington.

10
11 7. Mother's Memories Unexplored That Det. Ryan and Interviewer
12 Ms. Candy Ashbrook have a duty to keep abreast of the studies, protocols and procedures of
13 the current literature in child abuse interviews and investigations. That Det. Ryan and Ms.
14 Ashbrook should have been aware of a study written and published by Dr. Stephen Ceci, Dr.
15 Maggie Bruck and Dr. Emmett Francoeur, 1999. That, according to the study conducted by
16 Ceci, Bruck, and Francoeur (1999) you will see that the accuracy of mothers' memories of
17 conversations with their preschool aged children is extremely debatable. This article focuses
18 on memory for a specific type of conversation: an interview:
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20 When mothers were forewarned that their memories would later be recorded (within
21 days), their ability to recall information was not improved compared to mothers who
22 were given no forewarning.

23 In fact they had difficulty recalling how the information was elicited from their
24 children, whether the children's statements were spontaneous or prompted, or whether
25 specific utterances were spoken by themselves or by their child.

26 In many situations, adults provide hearsay testimony about their conversations with
27 children but there are good reasons for suspecting that adults cannot accurately recall
28 the contents or structure of conversations with their children.
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Being able to accurately recall the structure of a conversation is necessary for evaluating the statements of young children.

This study shows that adults have poor verbatim but good gist recall of the target sentence. They cannot differentiate the original target sentence from its paraphrase.

Adults must be able to reconstruct the context of the interview that led to a child's statement, not merely what the statement was. Otherwise, there is no basis for evaluating the validity of the child's statements because it is unknown if these were highly prompted or coached in some way.

Past research has shown that children's reports are most reliable when they are elicited by open-ended questions that are not repeated.

Conversely, children's reports are least reliable when they are elicited by specific leading questions, especially when they are repeated and across sessions.

Adults thrust into the role of interviewers have difficulty keeping track of the source of utterances, the spontaneity of the utterances, and, at times, even their gist, even when it's only been a few days following the conversation.

The difficulties of mothers in this study may reflect the attentional demands of structuring an interrogative interview with very young children, or they may reflect general difficulties in remembering aspects of conversations, regardless of the age of the participants.

That Det. Ryan nor Ms. Ashbrook never took the time to explore these factors with Mrs. and/or Mr. Scribner. That Det. Ryan's protocol is to utilize a handwritten statement that the witness is required to fill out and Ms. Ashbrook does not conduct any inquiry into how the disclosure came about as she apparently "assumes" the post event information was already dealt with.

1 8. Modeling Sexual Behavior Numerous studies listed below demonstrate that
2 children often model and express sexual behavior.

3 In the study conducted by Drs. Silovsky and Niec, on children with sexual behavioral
4 problems, 62% did not have a history of sexual abuse. This study supported the belief
5 that sexual behaviors are not an effect of having been sexually abused.

6 In the study conducted by Drs. Drach, Wientzen, and Ricci, on diagnosing sexual
7 behavior problems they found no relationship between sexual behavior and child
8 sexual abuse.

9 In the study conducted by Drs. Davies, Glaser, and Kossoff on children's sexual play
10 and behavior, they found children have a frequent curiosity about sex and sexual
11 behavior. Some children simulated sexual intercourse. Though it was rare, some
12 children did insert objects into other children.

13 In the study conducted by Drs. Friedrich, Grambsch, Broughton, Kuiper, and Beike,
14 on normative sexual behavior in children they found that the frequency of different
15 behaviors varied widely but the children "exhibit a wide variety of sexual behaviors at
16 relatively high frequencies." However, some behaviors were unusual (i.e., more
17 aggressive or imitative of adult sexual behavior). Older children were less sexual
18 than younger children. The frequency decreases after peaking at the 3 to 5 year age
19 span. This may be attributed to children learning cultural standards, which then cause
20 a more inverted expression of sexuality.

21 In the study conducted by Dr. R. Best on games children play in primary school, he
22 found that children learn and experiment on their own about sex. First grade children
23 play "house," where they chase, hug, and kiss. Children learn early on that such
24 games must be kept secret from adults. Children play "show-and-tell," even first
25 grade boys who use their finger in their pants and pretend to be displaying their penis.

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27 9. Theresa Scribner's Misrepresentations Pages 35-38 (of the transcript of the
28 interview I conducted with Thresa Scribner), Mrs. Scribner is unsure of when her daughter acted
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1 out with other children and how they "touched each other." On page 43 Mrs. Scribner
2 conveniently forgets who she talked to at the prosecutor's office who told her not to talk to the
3 GAL. When Mr. Daly tells her she will have to be reinterviewed because she's not prepared, she
4 suddenly remembers who: Robin Lakey. On page 68, Mrs. Scribner states that Detective Ryan
5 told her to make excuses to keep Pat away from Alyssa. This is inconsistent with Detective
6 Ryan's report which says that Mrs. Scribner called her asking for excuses and Detective Ryan
7 told her it was not her job to come up with excuses and that she should get a no contact order like
8 she was told in the first place. There are several areas in this report I will discuss Ms. Scribner's
9 lies; to outline each and everyone at this point seems futile since that will be up to Mr. Corbin
10 Volluz in his closing argument. However, and I will repeat this often in this report, Det. Kathy
11 Ryan had the responsibility and duty of following this case and maintaining a pulse on what was
12 transpiring and failed to do so. Instead the responsibility shifted to the prosecutor's office and it
13 is apparent that the prosecutor's office failed to note these discrepancies in Ms. Scribner's
14 reports, even though the prosecutor has the responsibility of reviewing the reports provided them
15 by police prior to making a filing decision. Had the prosecutor noted these discrepancies, it
16 would have been reasonable for the prosecutor to send the case file back to the detective with a
17 request that further investigation be done. This apparently did not happen. Rather, the
18 prosecutor simply filed the charges recommended by Detective Ryan.

19 10. Sam Scribner's Story At the bottom of page 34, Sam states that Theresea asked
20 what the next step should be with Alyssa making the statement that daddy touched her and
21 showing on specific area of her body where he allegedly touched her. Sam states, "Well, we
22 talked about, well, I think that she definitely needs to be, you know, examined. And then I think
23 we need to, you know, set up an appointment with a counselor to have somebody talk to her, you
24 know about the incident and have her share, you know, I just told her that I think you need to
25 take the proper steps with this. I mean, this is serious. And that's basically all I told her and then
26 she took it from there, so." Why wasn't Alyssa's father (the accused) called and asked about
27 this? With such radical statements from a five year old, why not get on the phone and ask the
28 father what is Alyssa talking about? Why jump to such conclusions without talking to Pat
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1 Morris? On page 42-43, Mr. Scribner states that the last time Alyssa talked to him about the
2 incident or that he overheard anything about the incident was on March 3, 2003. How is it
3 possible that after having medical examinations, multiple counseling sessions, etc., that Mr.
4 Scribner could not have heard any discussion on the alleged abuse? Wouldn't someone who
5 once considered adopting his stepdaughter take a greater interest in a case where her biological
6 father is sexually abusing her?

7 **11. Alyssa Morris Interview Comparison Analysis**

- 8 a. See Exhibit One
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10 b. See Exhibit Three: Not completed

11 **12. Scientific Studies**

12 a. **Sam Stone:** This study demonstrates the powerful effects of a stereotype
13 induction when it is paired with repeated suggestive questioning. A stranger
14 named "Sam Stone" visited preschoolers (ages 3 to 6 years) in their classroom
15 for 2 minutes in their day-care center (see Leichtman & Ceci, in press).
16 During this visit, he merely said, "Hello," walked around the room, then said,
17 "Goodbye," and left. He did not touch, tear, throw, or break anything.
18 Following Sam Stone's visit, the children were asked for details about the visit
19 on four different occasions over a 10-week period. During these four
20 occasions, the interviewer refrained from using suggestive questions. She
21 simply encouraged the children to describe Sam Stone's visit in as much detail
22 as possible.

23
24 One month following the fourth interview, the children were interviewed a
25 fifth time by a new interviewer who asked about two incidents that involved
26 Sam doing something to a teddy bear and a book. In reality, Sam Stone never
27 touched either one. When asked in the fifth interview, "Did Sam Stone do
28 anything to a book or a teddy bear?" most children rightfully replied, "No." Ten
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1 percent of the youngest (3- to 4-year-old) children's answers contained claims
2 that Sam Stone did anything to a book or teddy bear. When asked if they
3 actually saw him do anything to the book or teddy bear, as opposed to
4 thinking they saw him do something or hearing he did something, now only
5 5% of their answers contained claims that anything occurred.

6 Finally, when these 5% were gently challenged (You didn't really see him do
7 anything to the book/the teddy bear, did you?), only 2.5% still insisted on the
8 reality of the fictional event. None of the older (5- to 6-year-old) children
9 claimed to have actually seen Sam Stone do either of the fictional events.
10 These children's responses can be regarded as a control against which to
11 measure the effects of stereotype induction paired with repeated questioning.
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14 **b. Mousetrap:** We wondered what would happen if preschoolers were asked
15 repeatedly to think about some event, creating mental images each time they
16 did so. Would this result in subsequent source misattributions that lead to the
17 creation of false memories? In a series of recent studies, we have addressed
18 this issue (Ceci, Huffman, Smith, & Loftus, 1994; Ceci, Loftus, Leichtman, &
19 Bruck, 1994). The events that children were asked to think about were actual
20 events that they experienced in their distant past (e.g., an accident that
21 required stitches) and fictitious events that they never experienced (e.g.,
22 getting their hand caught in a mousetrap and having to go to the hospital to get
23 it removed).

24 Because repeatedly creating mental images is a pale version of what can
25 transpire in therapies where a variety of techniques are used to encourage the
26 creation of various images, our studies provide a fairly conservative test of the
27 hypothesis that repeatedly thinking about fictional events can lead to false
28 beliefs about their reality. Each week for 10 to 11 consecutive weeks,
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1 preschool children were individually interviewed by a trained adult. The adult
2 showed the child a set of cards, each containing a different event. The child
3 was invited to pick a card, and then the interviewer would read it to the child,
4 ask the child to think about it before replying, and ask if the event ever
5 happened to them. For example, when the child selected the card that read,
6 "Got finger caught in a mousetrap and had to go to the hospital to get the trap
7 off," the interviewer would ask, "Think real hard, and tell me if this ever
8 happened to you. Do you remember going to the hospital with a mousetrap on
9 your finger?" In our first study, (Ceci, Crotteau-Huffman, et al., 1994), 58% of
10 the preschool children produced false narratives to at least one of the fictitious
11 events, with 25% of the children producing false narratives to the majority of
12 the fictitious events. Twenty-seven percent of the children in this study
13 refused to accept our debriefing, insisting that they remembered the fictitious
14 events occurring.

15 c. Chester Clarke-Stewart, Thompson, and Lepore (1989; see also
16 Goodman & Clarke-Stewart, 1991) conducted a study in which 5-
17 and 6-year-olds viewed a staged event that could be construed as
18 either abusive or innocent. Some children interacted with a
19 confederate named "Chester" as he cleaned some dolls and other
20 toys in a playroom. Other children interacted with Chester as he
21 handled the dolls roughly and in a mildly abusive manner.
22 Chester's dialogue reinforced the idea that he was either cleaning
23 the doll (e.g., "This doll is dirty, I had better clean it") or playing
24 with it in a rough, suggestive manner (e.g., "I like to play with dolls,
25 I like to spray them in the face with water").
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The children were questioned about this event several times on the same day, by different interviewers who differed in their interpretation of the event. The interviewer was (a) iaccusatoryi in tone (suggesting that the janitor had been inappropriately playing with the toys instead of working), (b) iexculpatoryi in tone (suggesting that the janitor was just cleaning the toys and not playing), or (c) ineutrali and nonsuggestive in tone. In the first two types of interviews, the questions changed from mildly to strongly suggestive as the interview progressed.

...when the interviewer contradicted the activity viewed by the child, those children's stories quickly conformed to the suggestions or beliefs of the interviewer. By the end of the first interview, 75% of these children's remarks were consistent with the interviewer's point of view; and 90% answered the interpretive questions in agreement with her point of view, as opposed to what actually happened.

Children changed their stories from the first to second interviews only if the two interviewers differed in their interpretation of the events. Thus, when the second interviewer contradicted the first interviewer, the majority of children then fit their stories to the suggestions of the second interviewer. If the interviewer's interpretation was consistent across two interviews, but inconsistent with what the child had observed, the suggestions planted in the first session were quickly taken up and mentioned

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by the children in the second session. Moreover, when questioned by their parents, the children's answers were consistent with the interviewer's biases.

Finally, although the effects of the interviewers' interpretations were most observable in children's responses to the interpretive questions about what the janitor had done, 20% of the children also made errors on the factual questions in the direction suggested by the biased interpretation, even though no suggestions had been given regarding these particular details.

d. Pediatrician Visit - We have conducted one study that highlights the deleterious effects of repeating misinformation across interviews in young children's reports (Bruck, Ceci, Francoeur, & Barr, 1995). These effects are particularly pernicious because not only can the repeated misinformation become directly incorporated into the children's subsequent reports (they use the interviewers' words in their inaccurate statements), but it can also lead to fabrications or inaccuracies that, although not directly mirroring the content of the misleading information or questions, are inferences based on the misinformation.

The children in our study visited their pediatrician when they were 5 years old. During that visit, a male pediatrician gave each child a physical examination, an oral polio vaccine, and an inoculation. During that same visit, a female research assistant talked to the

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child about a poster on the wall, read the child a story, and gave the child some treats.

Approximately one year later, the children were reinterviewed four times over a period of 1 month. During the first three interviews, some children were falsely reminded that the male pediatrician showed them the poster, gave them treats, and read them a story and that the female research assistant gave them the inoculation and the oral vaccine. Other children were given no misinformation about the actors of these events. During the fourth and final interview, when asked to recall what happened during the original medical visit, children who were not given any misleading information gave highly accurate final reports. They correctly recalled which events were performed by the male pediatrician and by the female research assistant. In contrast, the misled children were very inaccurate; not only did they incorporate the misleading suggestions into their reports, with more than half of the children falling sway to these suggestions (e.g., claiming that the female assistant inoculated them rather than the male pediatrician), but 38 % of these children also included nonsuggested but inaccurate events in their reports. They falsely reported that the female research assistant had checked their ears and nose. These statements are inferences that are consistent with the erroneous suggestion that the research assistant had administered the shot: She therefore must have been the doctor, and therefore she carried out procedures commonly performed by doctors. None of the control children made such inaccurate inferences. Thus, young

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children use suggestions in highly productive ways to reconstruct and at times distort reality.

The pediatrician study just described also illustrates the differential impacts of providing misinformation immediately after an event compared with many months later. In the first phase of this study, we examined the effect of giving different types of feedback to 5-year-old children immediately following their inoculation. Children were given pain-affirming feedback (emphasizing that the shot hurt), pain-denying feedback (emphasizing that the shot did not hurt), or neutral feedback (the shot is over). One week later, when we interviewed these children about their visit, they did not differ in their reports concerning how much the shot hurt or how much they cried.

These results indicate that the children in this study could not be easily influenced to make inaccurate reports concerning significant and stressful procedures involving their own bodies - when their memory for the inoculation was still relatively fresh. The pattern of results changed dramatically when we provided the same children similar feedback during multiple interviews 1 year after the inoculation.... These results indicate that suggestive interviewing procedures can influence children's reports about stressful events involving their own bodies, when they are provided long after the event takes place and when they are provided on multiple occasions.

1 13. Medical Examinations Mrs. Theresea Scribner has lied about the medical
2 examinations performed upon Ms. Alyssa Morris by the professionals involved in this
3 matter to improve her position that child sexual abuse occurred.

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5 14. The Coached Child The iCoached Childi is not a new phenomenon, but finally
6 some prosecuting attorneys are talking about the subject. In a recent seminar in Huntsville,
7 Alabama I attended a seminar on the Coached Child. Alyssa Morris is a classic example of the
8 Coach Child. It appears likely that she has been the product of coaching by her mother, Mrs.
9 Theresa Scribner, most likely for reasons relating to Theresa Scribner's disenchantment with Pat
10 Morris remaining Alyssa's legal father. There is no doubt that Mrs. Theresa Scribner's reliability
11 and credibility has become a major issue of the pre-trial investigation, and should have been a
12 major issue, if not the major issue, of Detective Ryan's investigation, should she have decided to
13 do one.

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16 As Dr. Allison DeFelice, the instructor of iThe Coached Childi stated, ichildren that may
17 be being coached need to be treated differently when being interviewed.1 Ms. Candy Ashbrook
18 had no idea that Alyssa Morris was quite possibly a iCoached Childi because she works in a
19 system which is antiquated and was working with an incompetent investigator, Det. Ryan who
20 failed to keep abreast of the facts of the case, failed to note the misrepresentations of Theresa
21 Scribner in the reports Detective Ryan reviewed and sent to the prosecutor's office, and failed to
22 tell Candy Ashbrook prior to her interview of Alyssa Warner. In this way, Alyssa Morris's
23 being identified as a potential iCoached Childi slipped through the cracks in the Skagit County
24 Criminal Justice System until I identified Ms. Morris as a potential victim of being a iCoached
25 Childi. When I identified Ms. Morris as a Coached Child, I immediately brought my thoughts,
26 opinions and expertise to Mr. Corbin Volluz, who immediately brought the information to the
27 Skagit County Superior Court Judges and Prosecutors. The information fell on deaf ears, and
28 was apparently never acted upon in follow-up investigations.

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2 Dr. Allison DeFelice was adamant that the person I believed was coaching the child be
3 kept away from the child prior to the interview, near the interview room and so forth. In fact she
4 suggests that the person who is coaching the child not be allowed to bring the child to the
5 interview. *The Skagit County Superior Judges and Prosecutors failed to understand the necessity*
6 *of taking any proactive steps to assist Mr. Corbin Volluz or myself in getting these request*
7 *accomplished. It wasn't until DPA Dona Bracke frustrated my interview of Alyssa Morris on*
8 *two separate occasions that Judge John Meyer and Judge Susan Cook took notice that some*
9 *conditions needed to be placed upon my interview of the child. Although the sanctions that were*
10 *levied against the prosecutor brought about some of the conditions Dr. Allison DeFelice*
11 *suggested in interviewing a potential Coached Child, the iCoached Childi is a phenomenon that*
12 *the Skagit County Court Prosecutor's needs to realize does exist.*

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15 **15. The Need for Procedures and Protocols in Investigating**
16 **Allegations of Child Sex Abuse** I have read over 100 protocols internationally, nationally,
17 locally, county and state wide. Any police agency entrusted with the delicate, but important, duty
18 of investigating allegations of child sex abuse should follow a recognized protocol. This should
19 be a child sex abuse interview and investigative written procedure and protocol that is either
20 consistent with the Washington State Protocol or the Structured Protocol created by the National
21 Mental Health Institute. The Anacortes Police Department has no procedures or protocols in
22 investigating allegations of child sex abuse.

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26 **16. Affect of Ms. Alyssa Morris** I have interview well over five thousand
27 children over the past twenty-three years. I have developed some expertise in
28 discerning whether I am dealing with a true child abuse victim. It is the way
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1 they present. It is their affect. While recognizing that not all children respond
2 the same way to being victims of sexual abuse, there is nevertheless an overall
3 pattern of presentation. Ms. Alyssa Morris did not have any affect. In fact, she
4 had a very happy disposition about herself through out the interview never
5 getting upset about any of my questions. She was very pleasant to talk to.
6 Children who are real victims provide emotional affects when they provide
7 truth hits. Truth hits are descriptions of abuse. Ms. Morris told me a story
8 about a girl who was allegedly awoken by her father and rubbed in her vaginal
9 area for an hour, with no lotion, never making her sore, which barely awakened
10 her from her sleep, during which she said nothing to her father and her father
11 said nothing to her. This story is not consistent with an actual account of sexual
12 abuse.

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15 17. False Allegations Briefly I just want to talk about it here by quoting
16 a couple resources. Goodman and Bottoms state, "A false allegation can also occur
17 without the deliberate complicity of the child. For example, a parent, caught up in a
18 custody dispute, could deliberately generate a false allegation of abuse that a child
19 might come to believe. Alternatively, both parent and child may make behavior of
20 the other parent." Hollin and Howells (1991) state, "Distortions in testimony can
21 arise from factors other than the cognitive failings of the individual child. As others
22 have warned (Raskin and Yuille, 1989), in interviewing children suspected of being
23 abused the possibility of deliberate falsification can never be ruled out. The
24 proportion of such false or malicious allegations is a continuing source of debate
25 with estimates ranging from 2% (Jones and McGraw, 1987) to claims of over 50% in
26 cases involving custody disputes (Raskin and Yuille, 1989)."

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1 18. Summary. This case was flawed from the beginning. It was set to fail, because
2 the Criminal Justice System in Skagit County failed to investigate. In this matter Det. Kathy
3 Ryan and Sgt. DJ Amelio are not properly trained on how to conduct proper interviews of
4 witnesses. Instead of sitting down with the most important witnesses and trying to ascertain what
5 specific information they may have, they hand them a statement to be filled out by the witnesses
6 themselves. This method of interviewing went away when audiotaping became the popular way
7 of being the effective and efficient method of conducting interviews. Moreover, this allows the
8 investigating police officer a chance to evaluate the credibility of the witnesses. Secondly, this
9 allows the investigating police officer the opportunity to follow the flow of information, which
10 didn't take place in this case. Det. Kathy Ryan sat at the police station and waited for reports to
11 come to her. She did not conduct any follow-up interviews. She did not conduct the interview of
12 the alleged victim, Ms. Morris. There are multiple training sites in the United States available
13 for investigating police officers that work in this field to receive the necessary training.

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15 As source No. 10 below states, law enforcement interacts with a variety of professions
16 and agencies during the investigation process. It is not the job of law enforcement officers to
17 believe a child or any other victim or witness. Instead, law enforcement must listen, assess, and
18 evaluate, and then attempt to corroborate any and all aspects of a victim's statement. Lanning,
19 pages 247-248. In my opinion, Det. Ryan listened to others, but asked no questions nor made a
20 thorough or competent assessment or evaluation of the evidence

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22 Moreover, in Lanning, Source No. 10, it is stated that investigators must verify through
23 active investigation the exact nature and content of each disclosure, outcry, or statement made by
24 the victim. Second-hand information about disclosure is not good enough. Lanning, page 258.
25 Here, the key words above are active investigation. Det. Ryan did not actively investigate to
26 find corroboration or exculpatory evidence but relied on the work of others and second hand
27 information, which falls below the standard of care for investigation child sex abuse allegations.

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2 Therefore, it is my opinion, on a more probable than not basis, within a reasonable
3 degree of certainty, that the prosecution of Mr. Morris, and the separation of him from his
4 child, could have been avoided had a proper and competent investigation of this matter been
5 performed.
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3 24. RPC Misconduct 8.4

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5 The above sources are used in Washington by law enforcement investigators and are
6 relied upon in this field.

7 Exhibit 1: Alyssa Morrisís Comparative Analysis

8 Exhibit 2: Alyssa Morrisís Verbatim Witness Interview Statement

9 Exhibit 3: Alyssa Morrisís Interview Analysis with Candy Ashbrook (Not
10 Completed)

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