

63423.2

63423.2

NO. 63423-2-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

BEVERLY MARLEY,

Appellant.

RESPONSE BRIEF ON APPEAL

ROBERT M. MCKENNA
Attorney General

AILEEN MILLER
Assistant Attorney General
WSBA No. 27943
P.O. Box 40114
Olympia, WA 98504-0114
360-586-8888

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
~~2018~~ AUG 23 AM 8:58

TABLE OF CONTENTS

I. ISSUES.....1

II. STATEMENT OF THE CASE1

III. SUMMARY OF ARGUMENT.....5

IV. ARGUMENT6

 A. MARLEY’S CLAIMS OF UNFAIR PREJUDICE AND BOLSTERING WERE NOT PRESERVED FOR APPEAL; MARLEY’S SOLE OBJECTION DURING THE CHALLENGED TESTIMONY WAS RELEVANCE.....6

 1. The Challenged Testimony Does Not Implicate A Constitutional Right.....8

 B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED DANIELLE JACKSON TO PROVIDE THE JURY WITH A CONTEXT IN WHICH TO GAUGE HER ATTENTIVENESS TO THE UNDERLYING FACTS OF THIS CASE.12

 C. UNDER THE INVITED ERROR DOCTRINE, MARLEY IS BARRED FROM COMPLAINING ABOUT JACKSON’S TESTIMONY CONCERNING THE CHALLENGES ASSOCIATED WITH CARING FOR A SPECIAL NEEDS CHILD BECAUSE IT WAS MARLEY, NOT THE STATE, WHO ELICITED THE TESTIMONY.17

 D. ALTHOUGH NOT PRESERVED FOR APPEAL, MARLEY’S UNFAIR PREJUDICE AND BOLSTERING ARGUMENTS ALSO FAIL ON THE MERITS.....18

 1. Jackson’s Testimony Was Not Sought To Appeal To The Jury’s Sympathies And Any Risk That The Jury

	Would Have Taken It As An Appeal To Sympathy Was Cured By The Jury Instruction Telling The Jury That Their Verdict Should Not Be Based On “Sympathy Or Prejudice.”	18
2.	The prosecutor did not express a personal opinion about Jackson’s credibility or otherwise vouch for her credibility; the prosecutor’s questions focused on Jackson’s own beliefs not the beliefs of the prosecutor.	22
E.	MARLEY CANNOT ESTABLISH THAT THE OUTCOME OF THIS THREE DAY, SEVENTEEN WITNESS TRIAL WAS MATERIALLY AFFECTED BY JACKSON’S COMMENT; THE BULK OF THE TESTIMONY ESTABLISHED THAT PAULA WAS NOT LIVING WITH MARLEY DURING THE CHARGING PERIOD.	23
F.	MARLEY IS NOT ENTITLED TO RELIEF UNDER HER STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW; THE ATTACHMENTS TO THAT STATEMENT SHOULD BE STRICKEN AS THEY ARE NOT PROPERLY BEFORE THE COURT.	25
V.	CONCLUSION	27

TABLE OF AUTHORITIES

Cases

<i>Carson v. Fine</i> , 123 Wn.2d 206, 867 P.2d 610 (1994).....	19
<i>City of Seattle v. Patu</i> , 147 Wn.2d 717, 58 P.3d 273 (2002).....	17
<i>Dubria v. Smith</i> , 224 F.3d 995, 1004 (9th Cir.2000)	22
<i>In re Duncan</i> , 167 Wn.2d 398, 219 P.3d 666 (2009).....	12
<i>State v. Brett</i> , 126 Wn.2d 136, 892 P.2d 29 (1995).....	22
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	24
<i>State v. Clafin</i> , 38 Wn. App. 847, 690 P.2d 1186 (1984).....	20
<i>State v. Cunningham</i> , 96 Wn.2d 31, 633 P.2d 886 (1981).....	13, 23
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	10
<i>State v. Gregory</i> , 158 Wn.2d 759, 690 P.2d 1186 (1984).....	20, 21
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	26
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	8, 26

<i>State v. Olson,</i> 126 Wn.2d 315, 893 P.2d 629 (1995).....	18
<i>State v. Pam,</i> 101 Wn.2d 507, 680 P.2d 762 (1984).....	18
<i>State v. Powell,</i> 166 Wn.2d 73, 206 P.3d 321 (2009).....	8
<i>State v. Reed,</i> 102 Wn.2d 140, 684 P.2d 699 (1984).....	9
<i>State v. Rice,</i> 48 Wn. App. 7, 737 P.2d 726 (1987).....	19
<i>State v. Robinson,</i> 120 Wn. App. 294, 85 P.3d 376 (2004).....	7
<i>State v. Smith,</i> 106 Wn.2d 772, 725 P.2d 951 (1986).....	23
<i>State v. Walton,</i> 64 Wn. App. 410, 824 P.2d 533 (1992).....	24
<i>State v. Warren,</i> 165 Wn.2d 17, 195 P.3d 940 (2008), <i>cert. denied</i> , 129 S.Ct. 2007 (2009).....	21, 24
<i>Strickland v. Washington,</i> 466 U.S. 668, 104 S.Ct. 2052 (1984).....	26

Rules

RAP 10.10.....	25
RAP 2.5(a)	7
Rule of Evidence 403	19

I. ISSUES

1. Did Marley waive her right to appeal on the grounds of unfair prejudice and bolstering when she failed to object on those grounds during the State's questioning of Jackson and the testimony implicated no constitutional right but, instead, properly provided the jury with a context to use in gauging Jackson's ability to recall the events in this case?
2. Did the trial court properly exercise discretion when it allowed inquiry into the circumstances that contributed to witnesses' ability to recall events, including Jackson's testimony that she was attentive to Paula Smith's living situation because Jackson had a special needs daughter?
3. Under the doctrine of invited error, is Marley prohibited from complaining about Jackson's testimony about the challenges associated with caring for a special needs child because Marley, not the State, elicited the testimony?
4. Should Marley's appeal be denied because she cannot show prejudice under any theory regardless of whether the issue was preserved for appeal?

II. STATEMENT OF THE CASE

Beverly Marley (Marley) was charged, tried, and convicted of two counts of Theft in the First Degree and seven counts of Medicaid False Statement.¹ The charging period spanned from June 28, 2005, through April 6, 2006.²

Marley contracted with the Department of Social and Health Services' Division of Developmental Disabilities (DSHS/DDD) to provide

¹ Clerk's Papers (CP) 56-60; 73-74.

² CP 56-60.

Medicaid personal care services to her niece, Paula Smith.³ Under this contract, Marley was required to perform various duties for Paula (cooking, cleaning, assist with personal hygiene) in Paula's home and report any change in circumstances (such as the client moving) to DSHS.⁴

In order to receive payment for services under this program, Marley was required to submit invoices for the actual number of hours she provided care.⁵ Between June 2005 and December 2005 Marley submitted invoices claiming to have provided the maximum number of authorized hours of services to Paula: 144 hours for June 2005 through October 2005; and 118 hours for November 2005 and December 2005.⁶ The resulting checks were issued to Marley and cashed or deposited into her Bank of America account.⁷

Marley was also Paula's representative payee for social security benefits.⁸ As the representative payee, Marley was required to use all funds for Paula's exclusive benefit and notify the Social Security Administration if Paula moved.⁹ Testimony from representatives of the Social Security Administration and Bank of America established that

³ Report of Proceedings (RP) 3/5/09 274:13-21; 279:20-25; 280:1-3. Due to the extensive number of citations to the record they are included in footnotes for purposes of readability.

⁴ RP 3/9/09 277:14-20; 300-02; 304; 308-10.

⁵ RP 3/9/09 492: 3-24.

⁶ RP 3/10/09 497-502.

⁷ RP 3/9/09 373-82.

⁸ RP 3/9/09 428.

⁹ RP 3/9/09 436: 18-24; 437: 21-22.

Paula's social security checks between June 2005 and June 2006 were issued to Marley as Paula's representative payee; the checks were cashed or deposited into Marley's Bank of America account.¹⁰

Testimony was taken over three days.¹¹ The State called 13 witnesses.¹² Seven of those witnesses testified about where Paula Smith was living during the charging period.¹³

Paula testified that she had spent the first months of 2005 gradually increasing the amount of time she spent at other people's homes until, in June of 2005, she stopped living at Marley's.¹⁴ Paula explained that from June of 2005 to June of 2006, she "bounced around" living with her friends Carr, Farrington and Jackson for days to weeks at a time.¹⁵ Testimony from Carr, Farrington, Jackson, and Paula was fairly consistent on this point.¹⁶ Jackson also testified that Paula spent Thanksgiving,

¹⁰ RP 3/9/09 424; 435-38; 440; 373-85.

¹¹ RP 3/5/09 142-43; RP 3/9/09 294-96; RP 3/10/09 477-79.

¹² RP 3/5/09 143; RP 3/9/09 295-96; RP 3/10/09 478-79.

¹³ RP 3/10/09 175: 14-25; 178: 15-25; 179; 180: 15-24; 181: 2-19; 182: 1-19; 183: 6-19; 184: 10-14; 244:1-5; 245: 8-15; 252: 10-12; RP 3/9/10 324; 336: 10-24; 337:2-15; 339-40; 340: 16-19; 343: 4-12; 350; 353: 24-25; 355: 23-25; 356; 357:6-24; 364: 3-5; 367: 6-24; 393-94; 413: 10-19; 416: 17-22; 421-22; 463; 521: 12-14; RP 3/10/10 522: 2-6; 523: 7-24; 523:1-9; 531: 20-24; 536: 14-23.

¹⁴ RP 3/5/09: 175-76; 178-184.

¹⁵ RP 3/10/09 175: 14-25; 178: 15-25; 179; 180: 15-24; 181: 2-19; 182: 1-19; 183: 6-19; 184: 10-14; 244:1-5; 245: 8-15; 252: 10-12.

¹⁶ RP 3/10/09 175: 14-25; 178: 15-25; 179; 180: 15-24; 181: 2-19; 182: 1-19; 183: 6-19; 184: 10-14; 244:1-5; 245: 8-15; 252: 10-12; RP 3/9/10 336: 10-24; 337:2-15; 339-40; 340: 16-19; 343: 4-12; 350; 353: 24-25; 355: 23-25; 356; 357:6-24; 364: 3-5; 367: 6-24; 393-94.

Christmas and New Years with Jackson.¹⁷ Paula testified that she had to be moved back and forth between houses so that Carr, Farrington, and Jackson, would not lose their Section 8 housing.¹⁸

Paula also testified that Marley's daughter met her at Jackson's house during this timeframe to get Paula's key to Marley's house.¹⁹ Marley's daughter confirmed that she had gone to Jackson's house and picked up the key around Christmas.²⁰

Wright, a DSHS case manager, testified that in February of 2006 Marley told her she had not seen Paula for two weeks.²¹ Danner, another DSHS case manager, testified that when she became Paula's case manager in March of 2006, Paula was living with Jackson.²² Baker, a DSHS worker who was investigating a referral, testified that Marley told her Paula had moved out in January.²³ Baker also testified about prior consistent statements from Paula, Carr, Farrington and Jackson, that consistently placed Paula out of Marley's home beginning in June 2005.²⁴

¹⁷ RP 3/10/09 523: 1-9.

¹⁸ RP 3/5/09 244-45.

¹⁹ RP 3/5/09 185: 3-7.

²⁰ RP 3/5/09 565: 13-25.

²¹ RP 3/9/09 324:8-21.

²² RP 3/9/09 393-94.

²³ RP 3/9/09 413: 10-19.

²⁴ RP 3/9/09 416: 17-22; 421-22.

Marley and three relatives testified on her behalf; they testified that Paula moved out on February 26, 2006.²⁵ Marley also testified that Paula was with her between June 2005 and December 2005; Paula never left her home.²⁶

Medicaid Fraud Control Unit Investigator Maddox testified she had interviewed Marley on December 7, 2006, and was initially told by Marley that Paula had moved out in December of 2005.²⁷ This was somewhat consistent with the testimony from Marley's daughter that she picked up Paula's key in December.²⁸ When Investigator Maddox asked about Paula's Social Security money, Marley changed the date Paula left to February 26, 2006.²⁹

III. SUMMARY OF ARGUMENT

There is one issue before this court that was properly preserved below: whether the trial court abused its discretion when it ruled that information that could provide the jury with a context in which to view one witnesses' testimony was relevant. This ruling occurred on the third day of a three-day trial in which Marley had inquired into a variety of events to provide context for witnesses' ability to recall information.

²⁵ RP 3/10/09 561: 16-25; 565: 11-20; 577-78; 594: 2; 604: 10-13; 609: 1-5; 615: 4-19.

²⁶ RP 3/10/09 615: 4-19.

²⁷ RP 3/10/09 623: 5-6; 624: 1-19.

²⁸ RP 3/5/09 565: 13-25.

²⁹ RP 3/10/09 625: 2-7.

Marley has attempted to elevate this single evidentiary ruling, and the resulting testimony, to the level of a constitutional violation. In order to do so, she has pointed to potentially prejudicial testimony that she interjected into the case during cross examination. She has also identified two grounds for review that were not preserved at trial: unfair prejudice and bolstering.

Marley's claims fail. Not only because she did not preserve the issues. Not only because she invited the error. Her claims fail because she suffered no prejudice. The court did not abuse its discretion. The evidence was relevant and even if it was not relevant, Marley cannot establish prejudice.

IV. ARGUMENT

A. **MARLEY'S CLAIMS OF UNFAIR PREJUDICE AND BOLSTERING WERE NOT PRESERVED FOR APPEAL; MARLEY'S SOLE OBJECTION DURING THE CHALLENGED TESTIMONY WAS RELEVANCE.**

Marley challenges testimony elicited from one witness regarding her belief that having a special needs child impacted her view of the events at issue in this case. Marley argues that the issues were preserved for appeal based on explicit relevance and improper bolstering objections. Brief, p. 9. She also argues that an unfair prejudice objection should be implied. Brief, pp. 9-11. With one exception, Marley did not object to the

testimony challenged on appeal. Nor did she object on the basis of unfair prejudice or bolstering. The only objection at trial was relevance; it was made when Jackson was asked to explain how her experience with a special needs daughter impacted her view of the facts in this case.³⁰ The court overruled the objection noting that Jackson could explain her perception of why she would have an increased interest in the events of the case.³¹

Marley's only mention of bolstering occurred in argument during Marley's cross-examination of Jackson.³² No objection of unfair prejudice or bolstering was raised when Jackson was asked about her daughter or the impact of her experiences with her daughter on her view of the events, or her "heightened sensitivity."³³

In general, failure to object during trial results in a waiver of the right to raise the issue on appeal. See *State v. Robinson*, 120 Wn. App. 294, 300, 85 P.3d 376 (2004). Absent a "manifest error affecting a constitutional right" appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). The manifest constitutional error exception is strictly construed because it denies the trial court an opportunity to correct the error during trial. *State v. Powell*, 166 Wn.2d

³⁰ RP 539: 6, 12-16.

³¹ RP 539: 9-11.

³² RP 546: 6-11.

³³ RP 538-540.

73, 82, 206 P.3d 321 (2009). The burden is on the defendant to “identify the constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights; it is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). (Internal citations omitted).

Marley has not established that the admission of the testimony challenged for the first time on appeal affected a constitutional right or that it caused actual prejudice.

1. The Challenged Testimony Does Not Implicate A Constitutional Right.

Jackson’s testimony that her experience with a special needs child impacted her view of the facts was properly elicited to contextualize her testimony. Specifically, it provided the jury with information about why Jackson paid attention to Paula’s living circumstances, information relevant to her ability to recall events.

Marley asserts that this testimony violated her Sixth Amendment right to a fair trial by invading the jury’s right to evaluate witness credibility. Brief, pp. 1, 18. She suggests that the questions and testimony bolster or vouch for the witnesses’ credibility, thus depriving her of a fair trial. Brief at 18. Marley cites no cases prohibiting a witness from

testifying that she is telling the truth, or paid specific attention to facts based on her life experiences.

The Sixth Amendment “grant[s] defendants the right to trial by an ‘impartial jury.’” *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). It does not, however, create “a right to an error-free trial.” *Id.* In determining whether Marley was denied her Sixth Amendment right to a fair trial, the court “must first determine that the comments are in fact improper.” *Id.* If deemed improper, the court “must consider whether there was a ‘substantial likelihood’ that the comments affected the jury.” *Id.*

Information that provides a jury with a context in which to gauge a witnesses’ ability to recall events, or the reason that a witness may have a specific recollection of events, is directly relevant to a jury’s determination of what actually occurred. It helps the jury gauge credibility and weigh each witnesses’ testimony in light of all the evidence presented during trial. Accordingly, the testimony elicited from Jackson was relevant.

Evidence is relevant when it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence.” ER 401. The threshold for determining relevance is “very low.” *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

As Marley notes, in this case, the primary issue during trial was where Paula was living between June 2005 and April 2006 (charging period). Brief, pp. 2 and 24. The jury heard three days of testimony.³⁴ The State called 13 witnesses.³⁵ Seven of those witnesses provided direct and/or circumstantial evidence about where Paula Smith was living during the charging period.³⁶ Marley and her three witnesses, all relatives, contradicted the testimony of the State’s witnesses to varying degrees.³⁷

Testimony that helped the jury to evaluate each witnesses’ ability to recall the events, including testimony about life experiences or significant events that caused the witness to pay particular attention to events was relevant. It provided the jury assistance in weighing witness testimony and credibility.

Because it is necessary to provide context for, as well as a basis to challenge the accuracy of, witnesses’ recollection of events, Marley

³⁴ RP 3/5/09 142-43; RP 3/9/09 294-96; RP 3/10/09 477-79.

³⁵ RP 3/5/09 143; RP 3/9/09 295-96; RP 3/10/09 478-79.

³⁶ RP 3/10/09 175: 14-25; 178: 15-25; 179; 180: 15-24; 181: 2-19; 182: 1-19; 183: 6-19; 184: 10-14; 244:1-5; 245: 8-15; 252: 10-12; RP 3/9/10 324; 336: 10-24; 337:2-15; 339-40; 340: 16-19; 343: 4-12; 350; 353: 24-25; 355: 23-25; 356; 357:6-24; 364: 3-5; 367: 6-24; 393-94; 413: 10-19; 416: 17-22; 421-22; 463; 521: 12-14; RP 3/10/10 522: 2-6; 523: 7-24; 523:1-9; 531: 20-24; 536: 14-23.

³⁷ RP 3/10/09 561: 16-25; 565: 11-20; 577-78; 594: 2; 604: 10-13; 609: 1-5; 615: 4-19.

herself elicited such contextual testimony.³⁸ This included counsel asking witnesses how and why they remembered events,³⁹ and whether the witness remembered specific events such as: getting kicked out of Jackson's house, "an incident," Paula cursing Jackson out and going "ballistic," getting married, a death of a family member, and specific dates based on context such as time of year.⁴⁰

During trial, Marley acknowledged the importance of context in helping assess a witnesses' ability to recall events. Specifically, during cross examination of the victim, Paula, counsel responded to an objection stating:

The *relevance is both her memory of the events, the circumstances* under which she had to leave Danielle's house, *and the specificity or lack thereof that she remembers these incidents* against the timeline that we'd discussed under the pretrial rulings.⁴¹

(Emphasis added.)

³⁸ See RP 3/5/09 212: 23-25 (asking Paula if she remembered being kicked out of Jackson's house and the reason for it); 213: 6-7 (asking Paula if she remembered when she was kicked out of Jackson's house); 213: 24-25 (asking Paula if she remembers an incident); 214: 2 (asking Paula if she was told to leave after the incident); 214: 7 (asking Paula what kind of things she did that Jackson did not like); RP 3/10/09 541: 21-22 (asking Jackson if she remembered kicking Paula out of her house); 542: 19-23 (asking Jackson if she remembered kicking Paula out for not paying rent); 544-45 (referring to events when Paula "cursed out" Jackson and went "ballistic"); 545: 3-6 (asking about Jackson calling 911); 545: 18-19 (asking Jackson if she remembered getting married); 546:1-2 (asking Jackson if she remembered talking to Marley about caring for Jackson's daughter); 561: 16-22 (asking Marley's daughter what she remembered most about Paula moving out and why she remembered that date); 565: 16-20 (asking Marley's daughter how she remembered that she got Paula's key in December); 616:20-21 (asking Marley's sister if she remembered when Marley's son passed away).

³⁹ RP 3/10/09 561: 16-22.

⁴⁰ *Id.*

⁴¹ RP 3/5/09 214: 11-16 (emphasis added).

Because there was conflicting testimony about where Paula lived during the charging period, the jury was required to weigh the evidence and evaluate witness credibility. Testimony that helped the jury evaluate witness credibility by placing their testimony in context was directly relevant to that determination. Jackson's testimony properly provided the jury with context in which to evaluate her testimony and the specificity with which she remembered the events. Marley has failed to establish a violation of a constitutional right. This Court should confine review to the sole issue that was properly preserved: whether the Court properly allowed testimony about why Jackson believed that her life experiences caused her to pay specific attention to the facts of this case.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED DANIELLE JACKSON TO PROVIDE THE JURY WITH A CONTEXT IN WHICH TO GAUGE HER ATTENTIVENESS TO THE UNDERLYING FACTS OF THIS CASE.

The trial court did not abuse its discretion when it allowed Jackson to testify that she paid attention to Paula's living situation because of her own life circumstances because the testimony provided the jury with information that would assist in the evaluation of the evidence and witness credibility.

"[E]videntiary rulings are reviewed for abuse of discretion." *In re Duncan*, 167 Wn.2d 398, 405, 219 P.3d 666 (2009). Discretion is abused

if a decision is “manifestly unreasonable” or based on “untenable grounds” or reasons. *Id.* Untenable decisions are those decisions that no reasonable person would adopt. *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981).

Testimony from Jackson, and six other state witnesses, indicated that Paula was not living with Marley during the charging period.⁴² Overall, testimony from Paula, Jackson, Farrington, and Carr, placed Paula “bouncing” between Jackson, Farrington and Carr’s homes for several days and sometimes weeks.⁴³ Testimony from Carr, Farrington, Jackson, and Paula was fairly consistent on this point.⁴⁴ Wright, a DSHS case manager, testified that in February of 2006 Marley told her she had not seen Paula for two weeks.⁴⁵ Danner, another DSHS case manager, testified that when she became Paula’s case manager in March of 2006, Paula was living with Jackson.⁴⁶ Baker, a DSHS worker who was investigating a referral, testified that Marley told her Paula had moved out

⁴² RP 3/10/09 175: 14-25; 178: 15-25; 179; 180: 15-24; 181: 2-19; 182: 1-19; 183: 6-19; 184: 10-14; 244:1-5; 245: 8-15; 252: 10-12; RP 3/9/10 324; 336: 10-24; 337:2-15; 339-40; 340: 16-19; 343: 4-12; 350; 353: 24-25; 355: 23-25; 356; 357:6-24; 364: 3-5; 367: 6-24; 393-94; 413: 10-19; 416: 17-22; 421-22; 463; 521: 12-14; RP 3/10/10 522: 2-6; 523: 7-24; 524:1-9; 531: 20-24; 536: 14-23.

⁴³ *Id.*; see RP 3/5/09 181:18-19 (Paula was bouncing from place to place).

⁴⁴ RP 3/10/09 175: 14-25; 178: 15-25; 179; 180: 15-24; 181: 2-19; 182: 1-19; 183: 6-19; 184: 10-14; 244:1-5; 245: 8-15; 252: 10-12; RP 3/9/10 336: 10-24; 337:2-15; 339-40; 340: 16-19; 343: 4-12; 350; 353: 24-25; 355: 23-25; 356; 357:6-24; 364: 3-5; 367: 6-24; 393-94.

⁴⁵ RP 3/9/09 324:8-21.

⁴⁶ RP 3/9/09 393-94.

in January.⁴⁷ Baker also testified about prior consistent statements that consistently placed Paula out of Marley's home beginning in June 2005.⁴⁸

Marley challenges one evidentiary ruling made by the court during the course of this three-day trial involving testimony of 17 witnesses. The challenged ruling occurred after Jackson had testified, without objection, about her relationship with Paula, her family circumstances, and where Paula was living during the charging period. Jackson had testified that she had met Paula when she worked at South Lake High School as a family support worker.⁴⁹ After Paula left school, the two maintained contact and Paula would participate in church outings with Jackson and her children.⁵⁰ Jackson testified that she and Paula became close and Paula began to refer to her as a Godmother.⁵¹ She explained that she had a daughter with a disability and knew "the importance of having someone really care for you."⁵² Jackson testified that Paula lived with her on and off between June 2005 and March of 2006, including spending Thanksgiving, Christmas and New Years.⁵³

⁴⁷ RP 3/9/09 413: 10-19.

⁴⁸ RP 3/9/09 416: 17-22; 421-22.

⁴⁹ RP 3/10/09 515:6-22.

⁵⁰ RP 3/10/09 517:1-10.

⁵¹ RP 3/10/09 518: 12-25.

⁵² RP 3/10/09 518:23-25.

⁵³ RP 3/10/09 522: 2-6; 523: 7-24; 524:1-9; 531: 20-24; 536: 14-23.

Immediately before the challenged testimony, Jackson testified that she thought her perceptions about Paula and Marley's relationship were subject to a "heightened level of sensitivity" because she had a special needs daughter.⁵⁴ She also testified that her sensitivity impacted the information she had provided in her statement.⁵⁵ Again, the testimony was received without objection.⁵⁶

The ruling challenged on appeal appears in the following context:

Q: **How does it [having a special needs child] make you have a heightened level of sensitivity?**

MR. HAMLIN: **Objection. Relevance.**

MS. JARMON: It's absolutely relevant.

MR. HAMLIN: That's your opinion.

THE COURT: **Well, I guess the witness can explain her perception of why this would increase her interest, I guess, in this matter.**

MR. HAMLIN: Your Honor, her interest is irrelevant. She's here to testify about dates, what she observed. Her sensitivity, her feelings, they don't have anything to do with the issues we are trying to get to the bottom of in this case.

THE COURT: You can answer the question.

THE WITNESS: **Being that my daughter is disabled, I feel it's wrong for people to take advantage of people that are vulnerable.**

⁵⁴ RP 3/10/09 538: 14-21.

⁵⁵ RP 3/10/09 538: 22-24.

⁵⁶ *Id.*

...

Q: (BY MS. JARMON) Your feelings about how Ms. Marley may or may not have cared for Paula, did that impact the accuracy of the information that you provided in this statement, ma'am?

A: Yes. Because Paula wasn't able to provide for herself other than the part-time job she had. She had no other income.

THE COURT: Listen to the question once again.

Q: (BY MS. JARMON) Ma'am my question to you is -- I'm almost done, okay? -- you wrote a statement out when you signed this statement?

A: Yes.

Q: You indicated that you were telling the truth; is that correct?

A: Correct.

Q: And so my question is: You've indicated that you have a heightened level of sensitivity because you have a special needs child, okay? And all I'm asking you is if that would impact whether or not you would have told the truth in this statement.

A: I did tell the truth.⁵⁷

The Court's decision to allow this testimony occurred on the third day of a three-day trial. The Court was in the best position, having heard

⁵⁷ RP 3/10/10 539-541 (emphasis added).

all of the evidence, to determine the relevance of how Jackson's experiences with a special needs daughter impacted her perception of the events in question. As noted, evidence that contextualizes how a witness may have viewed an event or why a witness may have remembered a specific event is directly relevant to a jury's ability to weigh evidence and evaluate credibility. Indeed, the jury could just have easily decided that Jackson's "heightened sensitivity" was nothing more than a bias in favor of Paula that called into question her reliability. The Court's determination that the evidence was relevant was not manifestly unreasonable or untenable. The Court did not abuse its discretion.

C. UNDER THE INVITED ERROR DOCTRINE, MARLEY IS BARRED FROM COMPLAINING ABOUT JACKSON'S TESTIMONY CONCERNING THE CHALLENGES ASSOCIATED WITH CARING FOR A SPECIAL NEEDS CHILD BECAUSE IT WAS MARLEY, NOT THE STATE, WHO ELICITED THE TESTIMONY.

In fact, some of the testimony complained of was elicited during cross-examination of Jackson. Under the invited error doctrine, Marley is barred from raising this purported error, even if it were of constitutional magnitude. *City of Seattle v. Patu*, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002). Parties are prohibited from contributing to an error and then raising it on appeal. *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762

(1984), *overruled on other grounds in State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995).

Marley implies that the State elicited testimony from Jackson “about how frustrating and tiring it was for her to take care of a special needs child.” *See* Brief, p. 10 and 13 (arguing that “State’s extended elicitation of the burdens borne by this witness in caring for her special needs child” was “‘more’ irrelevant” than the line of questioning actually pursued by the state). This purported reference to the record is misleading. The testimony about frustrations associated with caring with a special needs child was elicited by Marley during cross examination of Jackson.⁵⁸ If any error occurred relative to this testimony, Marley is barred from raising it because she elicited the testimony and invited the error.

D. ALTHOUGH NOT PRESERVED FOR APPEAL, MARLEY’S UNFAIR PREJUDICE AND BOLSTERING ARGUMENTS ALSO FAIL ON THE MERITS.

- 1. Jackson’s Testimony Was Not Sought To Appeal To The Jury’s Sympathies And Any Risk That The Jury Would Have Taken It As An Appeal To Sympathy Was Cured By The Jury Instruction Telling The Jury That Their Verdict Should Not Be Based On “Sympathy Or Prejudice.”**

Marley’s unfair prejudice and bolstering arguments, which as discussed in Section I.A. above were not preserved for appeal, also fail on

⁵⁸ RP 3/10/09 546: 13-18.

the merits. Marley argues that an unfair prejudice objection was preserved for appeal under an implied objection theory; that the objection was so obvious from the context of the proceedings that the issue was preserved for appeal. Brief, pp. 10-11. Assuming, for the sake of argument, that the unfair prejudice objection was preserved for appeal, it fails on the merits.

Rule of Evidence 403 allows a court to exclude otherwise relevant evidence if “its probative value is substantially outweighed by the danger of unfair prejudice. . .” ER 403. “[T]here is a presumption favoring admissibility under ER 403.” *Carson v. Fine*, 123 Wn.2d 206, 225, 867 P.2d 610 (1994), *citing* 5A K. Tegland § 237, at 243; 5 K. Tegland § 105, at 346. The “trial judge has broad discretion in balancing the probative value of the evidence against its possible prejudicial impact” and a trial court’s determination will not be overturned absent a “manifest abuse of discretion.” *State v. Rice*, 48 Wn. App. 7, 11, 737 P.2d 726 (1987).

Unfair prejudice may be caused if evidence “appeals to the jury’s sympathies” or “arouse[s] an emotional response rather than a rational decision among the jurors.” *Carson*, 123 Wn.2d at 224. However, the simple fact that evidence may be prejudicial does not require its exclusion; “nearly all evidence will prejudice one side or the other in a lawsuit.” *Id.* The party seeking to exclude evidence bears the burden of showing prejudice. *Carson*, 123 Wn.2d at 225.

Marley specifically relies on *State v. Clafin*, 38 Wn. App. 847, 690 P.2d 1186 (1984), as an example of the type of emotional appeal that is prohibited. Brief, p. 15. The facts in *Clafin* are distinguishable from the facts in this case. *Clafin* was a case involving the sexual abuse of several young girls. In *Clafin* the prosecutor read, over objection, a graphic poem about the emotional effect of rape on its victims. *Clafin*, 38 Wn. App. at 857. The poem also alluded to prejudicial facts that were not in evidence. *Id.* The Court concluded that the reading of the poem was so prejudicial, not even a curative instruction could have “erased the prejudice.” *Id.*

In this case, Jackson’s challenged testimony was properly elicited to provide the jury with a context from which to evaluate Jackson’s ability to recall events by gauging her purported attentiveness to those events. The State did not reference this portion of Jackson’s testimony during closing, let alone make improper appeals to inflame juror passion.⁵⁹ Eliciting evidence that assists the jury in weighing witness testimony and credibility is proper. *See State v. Gregory*, 158 Wn.2d 759, 807, 690 P.2d 1186 (1984) (recognizing the propriety of questioning and argument that focused on credibility).

In *Gregory*, the prosecutor asked a rape victim how it felt to be cross-examined and she responded, in essence, that she did not like having

⁵⁹ RP 3/11/09 637-56; 674-81.

to relive the crime. *Id.* The prosecutor argued from this testimony during closing. *Id.* Credibility was a key issue in the case. *Id.* In concluding that the questioning and argument were proper, the court noted that the focus was on the credibility of the victim. *Id.* The court also noted that the jury instruction telling jurors not to decide a case based on sympathy was curative. *Gregory*, 158 Wn.2d at 809.

In this case, credibility was a key issue. Marley's contention that the testimony was sought to appeal to the juries sympathies is not supported by the record. When read in context, the State's questions focused on explaining why Jackson, with her unique life experiences, was attentive to the events in question, and was not an effort to appeal to the jury's sympathy.⁶⁰ No reference to the comment, or impermissible appeal to sympathy, occurred during the State's closing.⁶¹ Additionally, the jury was instructed that "neither sympathy nor prejudice" should influence their verdict.⁶² Juries are presumed to follow the court's instructions. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008), *cert. denied*, 129 S.Ct. 2007 (2009).

Marley's suggestion that the State offered evidence "about the genuine, but utterly immaterial burdens on Ms. Jackson from caring for a

⁶⁰ RP 3/10/09 538-41.

⁶¹ RP 3/11/09 637-656; 674-681.

⁶² CP 78.

special needs child” is unsupported by the record.⁶³ To the contrary, the evidence of how tiring it was to care for a special needs child was proffered by Marley herself.⁶⁴

2. **The prosecutor did not express a personal opinion about Jackson’s credibility or otherwise vouch for her credibility; the prosecutor’s questions focused on Jackson’s own beliefs not the beliefs of the prosecutor.**

The State’s questioning of Jackson did not constitute improper vouching. Prosecutors are prohibited from personally vouching for the credibility of a witness. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995); *Dubria v. Smith*, 224 F.3d 995, 1004 (9th Cir.2000). Vouching is the expression of a personal belief by the prosecutor, such as “I believe . . .” *Brett*, 126 Wn.2d at 175. Prejudice “will not be found unless it is ‘clear and unmistakable’ that counsel is expressing a personal opinion.” *Id.*

Here, the focus was on Jackson’s beliefs, not the beliefs of the prosecutor.⁶⁵ Marley has failed to establish that any personal opinion was expressed by the prosecutor when Jackson was questioned. As such, she has not shown that the State engaged in improper vouching or bolstering.

⁶³ Cf. Brief, p. 15 and RP 3/10/09 538-540.

⁶⁴ RP 3/10/09 546: 13-18.

⁶⁵ RP 3/10/09 538-540.

E. MARLEY CANNOT ESTABLISH THAT THE OUTCOME OF THIS THREE DAY, SEVENTEEN WITNESS TRIAL WAS MATERIALLY AFFECTED BY JACKSON'S COMMENT; THE BULK OF THE TESTIMONY ESTABLISHED THAT PAULA WAS NOT LIVING WITH MARLEY DURING THE CHARGING PERIOD.

Marley has failed to establish that Jackson's testimony was improper. However, even assuming for the sake of argument that its admission was erroneous, Marley has failed to establish that the outcome of the trial was materially affected by the challenged testimony.

"An accused cannot avail himself of error as a ground for reversal unless it has been prejudicial." *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986), citing *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). "[E]rror is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Id.*

Four of the State's witnesses, Paula, and the three women with whom she stayed between June 2005 and April 2006, testified that Paula was not living with Marley during that time. These witnesses were subject to cross examination. Three additional witnesses, who worked for DSHS, testified to a lesser degree about Paula's whereabouts and prior consistent statements by Paula and the other three witnesses with personal knowledge of Paula's living circumstances. Four witnesses contradicted

this testimony, Marley and three family members. Each of those witnesses said that Paula moved out in February of 2006. Although, Marley's daughter also testified that she had retrieved the key to Marley's house from Paula in December⁶⁶ and Marley herself ultimately testified that Paula had never left her home.⁶⁷

The challenged testimony consisted of mere moments in three days of testimony. The testimony was not revisited during closing argument. There is nothing to indicate that one isolated answer that contextualized Jackson's view of the events in question, materially altered the outcome of this case. The jury had an opportunity to hear all of the testimony, observe the witnesses and gauge their credibility. The jury is entitled to deference "on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence." *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992); *see also State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), (Determinations about credibility are the sole province of the jury and "cannot be reviewed on appeal.").

The jury is presumed to have followed the instruction not to base its decision on sympathy. *Warren*, 165 Wn.2d at 28. Under the facts of this case, Marley cannot establish that the outcome of this case was materially impacted by Jackson's testimony.

⁶⁶ RP 3/10/09 565: 13-25.

⁶⁷ RP 3/10/09 614: 22-25; 615: 4-19.

F. MARLEY IS NOT ENTITLED TO RELIEF UNDER HER STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW; THE ATTACHMENTS TO THAT STATEMENT SHOULD BE STRICKEN AS THEY ARE NOT PROPERLY BEFORE THE COURT.

Marley filed a Statement of Additional Grounds for Relief (*Pro Se* Brief) under RAP 10.10. While it does not appear that the State is required to address the issues raised in Marley's *Pro Se* Brief absent a request from the court (RAP 10.10(f)), in an abundance of caution, the State will address them.

Marley disagrees with the contents of the transcript. *Pro Se* Brief, p. 1. Specifically, she claims that a DSHS worker testified that she did nothing wrong and that the checks that the Social Security representative testified about were all returned to the Social Security administration. *Id.* She presents no evidence or legal authority to support her claim that a portion of the testimony of two witnesses is missing. The transcript directly contradicts Marley's contention about the Social Security representatives' testimony.⁶⁸ Additionally, the testimony from the DSHS worker that Marley says should be present in the transcript would have been improper as it would invade the province of the jury.

Marley also claims that her trial attorney should have called three additional witnesses. *Pro Se* Brief, p. 1. This is essentially an ineffective

⁶⁸ See RP 440:14-16 (testifying that the checks from June 2005 to 2006 were not returned they were paid to Marley).

assistance of counsel claim. To prove ineffective assistance of counsel Marley must show that the decision not to call three witnesses caused actual prejudice and constituted more than a difference of opinion on proper trial strategy and tactics. See *Strickland v. Washington*, 466 U.S. 668, 687-89, 104 S.Ct. 2052 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Trial counsel is entitled to great deference and is presumed to be effective. *Strickland*, 466 U.S. at 689. The burden is on the defendant to demonstrate ineffective assistance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Marley's conclusory allegation of ineffective assistance of counsel and reference to documents that are not part of the record on appeal are not sufficient to satisfy her burden. The issues raised in Marley's *Pro Se* Brief should be dismissed as meritless.

///

///

///

///

///

///

///

///

V. CONCLUSION

The State respectfully requests that the court affirm Marley's convictions.

RESPECTFULLY SUBMITTED this 23rd day of August, 2010.

ROBERT M. MCKENNA
Attorney General



AILEEN MILLER
WSBA #27943
Assistant Attorney General