

64604-4

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No. 64604-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

STEVEN MONTGOMERY,

Appellant.

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

The Honorable Judge Ellen J. Fair

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. Defense counsel failed to provide effective assistance of counsel.
2. Mr. Montgomery did not receive a fair trial when State's witness, Teresa Hall, testified that she believed her daughter's disclosure 100%.

Issues Pertaining to Assignments of Error

*Assignment of Error number 1.*

Does an attorney fail to provide competent representation when he fails to object to the admission of "vouching" testimony and introduces evidence that "opens the door" to allow the State to admit unduly prejudicial "bad act" evidence?

*Assignment of Error number 2.*

Did the testimony by a State's witness that she one hundred percent believed the complainant's disclosure deny the defendant a fair trial?

## II. STATEMENT OF THE CASE<sup>1</sup>

The State charged Steven Montgomery with two sex crimes: Child Molestation in the Third Degree and Communicating with a Minor for Immoral Purposes. To those charges, Mr. Montgomery entered pleas of not guilty and elected to go to trial. Gurjit Pandher represented Mr. Montgomery at trial.

The State's case rested upon the testimony of C.H. who testified that she babysat for Mr. Montgomery's children on July 13, 2008. Mr. Montgomery drove her home from his house. On the way home, C.H. stated that Mr. Montgomery provided her with two wine coolers, which she drank. She further testified that while driving Mr. Montgomery exposed his penis and began to masturbate. He then placed his hand briefly on her breast.

During cross-examination, Mr. Pandher engaged in the following exchange with C.H.

This concluded his cross-examination.

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<sup>1</sup>. A more detailed statement of the case can be found in the Appellant's Opening Brief.

Q: You don't like my client, do you?  
A: Not anymore.  
Q: In fact, you told my investigator that you were angry at my client, correct?  
A: Yes.  
Q: And you were angry at my client not only based on the allegations in this situation but for other allegations; isn't that correct?  
A: Yes, in the past.

Having "opened the door" the State conducted the

following redirect:

Q: So what were you upset about in the past?  
A: That I found out that he's done this to my mom, my mom's friend and my aunt.  
Q: And that makes you angry?  
A: yes.  
Q: And you're angry with what he did to you?  
A: Yes.

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The State also called Teresa Hall, the complainant's mother, to testify what occurred when C.H. returned home from the babysitting. During direct examination the following exchange took place between the prosecutor and Teresa Hall concerning C.H.'s disclosure upon her return to her home:

Q. Did you believe your daughter?

A. One hundred percent.

RP 63.

The defense neither objected, nor moved to strike the testimony.

No doubt concerned that Mr. Pandher's question about C.H. being mad at Mr. Montgomery might become an issue on appeal should he be convicted, the prosecutor raised the issue with the Court. The following colloquy took place between the Court and Mr. Pandher:

MR. PANDHER: First of all, Your Honor, it was contemplated. Her anger came out during my investigator's interview with her. I knew about it. The investigator told me about it. I heard the taped interview. So that was contemplated. I need to have a motivation for Ms. Hall's reasoning for coming up with the story. So that's where I was going with that. As far as the limiting instruction, I'm glad Mr. Hupp brought it up. I guess there's two ways to go about that. One is that if you don't ask for one, you don't necessarily highlight it, and I can address it – we don't bring more attention to it than there already is and, obviously, I'm going to be talking about it in closing, but I'm not going to, obviously, slam–

THE COURT: Hang on.

THE LAW CLERK: I'm sorry.

(The law clerk went into the jury room.)

MR. PANDHER: -- slam it into the ground. She merely mentioned, my recollection is that she merely mentioned that he had done similar acts to her mom and her aunt. I didn't, I guess I'm not -- I don't think we need a limiting instruction is what I'm saying, because her aunt and her mother, her mother obviously testified, is much older. It's not a situation where Mr. -- the age of Mr. Montgomery and the mother is such a dichotomy that it would be another possible allegation of child molestation. It's an individual making a pass at another adult that doesn't go to fruition is my argument.

THE COURT: Right. You know, because we have so few details about it, I don't even know--

MR. HUPP: That's fine. I just wanted to make sure --

THE COURT: We couldn't even necessarily consider them prior bad acts.

MR. HUPP: We may not be. I just wanted to make sure since oftentimes, this is something the appellate court jumps on--

THE COURT: Right.

MR. HUPP: -- I wanted to make sure we had a record.

THE COURT: Very good.

MR. PANDHER: It was contemplated.

The defense did not offer any other evidence concerning C.H.'s bias against Mr. Montgomery, nor did he request a limiting instruction concerning the testimony elicited during the prosecutor's redirect of C.H.

In his closing argument, Mr. Pandher referenced C.H.'s dislike of Mr. Montgomery stating:

Any personal interest that the witness might have in the outcome of the issues, any bias or prejudice that the witness may have shown. So where am I going with that? I asked her, I said, you don't like my client? She initially said no, based on what he did to me. And I asked her, you don't like my client for a number of other reasons? Oh, yeah, I don't like him for those other reasons, too. That's a bias or prejudice, ladies and gentlemen. I don't know what else that is.

RP 215

The prosecutor responded:

Defense argues that – I guess it's some kind of argument that there's a motive here for Ms. Hall to say all this, but he says that she was angry about other things. Well, once that question was asked, I got up, had to, and asked, what were you angry about? She said she was angry; she found out this happened to other people. Okay. That's all we

know. Don't know when she found that out. All we know is that's also why she's angry with him, not a motive, though. She's very clear that she's angry with him for doing this to her.

RP 233

The jury returned guilty verdictson each count. The Court sentenced Mr. Montgomery to sixty (60) months on the Child Molestation and 12 months suspended on the Communicating charge. Mr. Montgomery filed a timely Notice of Appeal.

### III. ARGUMENT

1. Defense counsel was ineffective when he opened the door for the admission of other bad act testimony.

A. To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. McFarland, 127 Wash.2d 322, 335, 899 P.2d 1251 (1995). Generally, when counsel's conduct can be characterized as legitimate trial

strategy or tactics, performance is not deficient.” State v. Garrett, 124 Wash.2d 504, 520, 881 P.2d 185 (1994) (“[T]his court will not find ineffective assistance of counsel if ‘the actions of counsel complained of go to the theory of the case or to trial tactics.’ ” (quoting State v. Renfro, 96 Wash.2d 902, 909, 639 P.2d 737 (1982))). Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” State v. Reichenbach, 153 Wash.2d 126, 130, 101 P.3d 80 (2004); State v. Aho, 137 Wash.2d 736, 745–46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the prejudice prong of the Strickland test, the

defendant must establish that “there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.” State v. Kylo, 166 Wash.2d at 856, 862, 215 P.3d 177. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694, 104 S.Ct. 2052; Garett, 124 Wash.2d at 519, 881 P.2d 185. In assessing prejudice, “a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law” and must “exclude the possibility of arbitrariness, whimsy, caprice, ‘nullification’ and the like.” Strickland, 466 U.S. at 694–95, 104 S.Ct. 2052. State v. Grier 171 Wash.2d 17, 33-34, 246 P.3d 1260, 1268–1269. (2011)

The emotional component in child sex prosecutions makes it difficult for the accused to select an unbiased jury and receive a fair trial. For that reason, the courts are reluctant to allow into evidence “bad act” testimony concerning allegations unrelated to

the incident being tried. As stated in State v. Sutherby, 165 Wash.2d 870, 886-887, 204 P.3d 916, 924 (2009)

ER 404(b) prohibits the use of “other acts” evidence to prove the character of a person in order to show that he acted in conformity with that character. *State v. Smith*, 106 Wash.2d 772, 775, 725 P.2d 951 (1986). Even evidence that is otherwise relevant can be excluded if it is highly prejudicial. *Id.* at 776, 725 P.2d 951. We have previously cautioned about the admissibility of other sex crimes, warning that “[c]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest.” *State v. Coe*, 101 Wash.2d 772, 780-81, 684 P.2d 668 (1984). In cases where admissibility is a close call, “ ‘the scale should be tipped in favor of the defendant and exclusion of the evidence.’ ” *Smith*, 106 Wash.2d at 776, 725 P.2d 951 (quoting *State v. Bennett*, 36 Wash.App. 176, 180, 672 P.2d 772 (1983)).

Had the State sought to introduce into evidence testimony that Mr. Montgomery previously sexually assaulted C.H.’s mother, her mother’s friend, or her aunt, the Court properly would have sustained a defense objection. Even had it allowed testimony concerning an unrelated sexual assault by Mr. Montgomery, the Court, upon request, would have given

some sort of limiting instruction designed to minimize the prejudice to Mr. Montgomery.

It was error, not legitimate trial strategy, for defense counsel to “open the door” without any evidence to substantiate its theory.

Mr. Pandher told the Court that he “opened the door” that allowed the State to introduce testimony that C.H. believed Mr. Montgomery had done to her mother, her mother’s friend, and her aunt, the same things that he did to her. The defense theory apparently was that C.H. was fabricating her story because she was mad at the defendant because of what he had done to her family members.

This is not a reasonable strategic decision by counsel. Simply establishing that the complainant was mad at the defendant did nothing to undermine her credibility. The defense offered no testimony that C.H. was mad at the defendant prior to the night of the alleged incident. He did not establish when she learned that Montgomery had done the

similar things to these people. If she were not angry with the defendant prior to her disclosure to her mother following her return from babysitting, these other incidents would not have provided a motive for her to lie about Mr. Montgomery. During the trial all the jury learned was that she was mad at Mr. Montgomery for touching her inappropriately and for doing the same thing to her family members.

During the colloquy Mr. Pandher rejected an offer to request a limiting instruction. A limiting instruction would have advised the jurors that the testimony concerning what had allegedly occurred between the defendant and C.H.'s family members was being offered for the limited purpose of showing the complainant's state of mind or bias, and for no other reason. Absent a limiting instruction the jury was free to use the testimony for any purpose it wished. The natural inference is that the jury would use it to conclude that Mr. Montgomery sexually assaulted three other females, making it more likely that he also sexually assaulted C.H. His reason for

not wanting a limiting instruction makes no sense.

Although Teresa Hall, C.H.'s mother, testified, Mr. Pandher did not elicit any information to establish that anything had occurred between her and Mr. Montgomery that would cause C.H. to want to get Montgomery into trouble. He did not even raise a suggestion that C.H. was upset with Mr. Montgomery prior to this incident. Additionally, it was not Ms. Hall (the mother) who called the police. It was a counselor, Ms. Egger, from C.H.'s school who received a disclosure from C.H. some six weeks later. Similarly Ms. Montgomery, the Appellant's wife, testified. She did not offer any testimony that showed any bias toward her husband by C.H. or C.H.'s family.

B. Defense Counsel was ineffective when he failed either to object or move to strike inadmissible opinion testimony

The decision of when or whether to object is a classic example of trial strategy. State v. Madison, 53 Wn.App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). Failure to object to improper testimony critical to the State's case may constitute

ineffective assistance of counsel. See State v. Hendrickson, 138 Wn.App. 827, 831-33, 158 P.3d 1257 (2007) (failure to object to testimony that was inadmissible hearsay and violated the confrontation clause was ineffective assistance), aff'd, 165 Wash.2d 474, 198 P.3d 1029, cert. denied, --- U.S. ----, 129 S.Ct. 2873, 174 L.Ed.2d 585 (2009). To prevail on an ineffective assistance of counsel claim based on the failure to object, Mr. Montgomery must show (1) an absence of legitimate strategic or tactical reasons for failing to object; (2) that the objection would likely have been sustained if raised; and (3) that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn.App. 575, 578, 958 P.2d 1251 (1995). In the case at bar the State introduced testimony, without a defense objection, that C.H.'s mother believed her 100%.

In general, no witness may offer opinion testimony regarding the guilt or veracity of the defendant or a witness because it unfairly prejudices the defendant by invading the jury province. State v. King, 167 Wash.2d 324, 331, 219 P.3d 642 (2009); State

v. Montgomery, 163 Wash.2d 577, 591, 183 P.3d 267 (2008). The case law also clearly shows that witness opinion as to another witness' credibility is improper. “[N]o witness may give an opinion on another witness' credibility.” State v. Carlson, 80 Wn.App. 116, 123, 906 P.2d 999 (1995).

Had defense counsel objected, the Court should have sustained his objection. There was no strategic reason for defense counsel to allow Ms. Hall to vouch for the credibility of her daughter. As both counsel noted in their closing arguments this was a “he said, she said” case. The credibility of C.H. was essential to the State’s case. Every bit of evidence that improperly bolstered C.H.’s credibility prejudiced Mr. Montgomery.

2. The testimony of a witness that she believed 100% the complainant’s claim of being sexually assaulted violated the defendant’s right to a fair trial.

This issue, discussed above, also forms the basis for a substantive assignment of error. While defense counsel failed to object to the testimony or move to strike it, it can be raised on

appeal as a “manifest” constitutional error. In State v. Kirkman, 159 Wash.2d 918, 936-938, 155 P.3d 125, 135 - 136 (2007) our Supreme Court held:

In light of the underlying rationale for RAP 2.5(a)(3), Madison and Heatley provide the better approach. Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a “manifest” constitutional error. “Manifest error” requires a nearly explicit statement by the witness that the witness believed the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow. WWJ Corp., 138 Wash.2d at 603, 980 P.2d 1257.

Requiring an explicit or almost explicit statement by a witness is also consistent with this court's precedent that it is improper for any witness to express a personal opinion on the defendant's guilt. State v. Garrison, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); State v. Trombley, 132 Wash. 514, 518, 232 P. 326 (1925).

The facts of this case satisfy the requirement announced by our Supreme Court in Kirkman, supra. The State sought and received from Ms. Hall an explicit statement that she believed her daughter one hundred percent. Her statement therefore is her

personal opinion that the appellant did what her daughter claimed and that he was guilty as charged.

IV. CONCLUSION

For the reasons set out above this Court should vacate the Judgment and Sentence and remand the matter for a new trial.

DATED THIS 22 DAY OF JUNE, 2011.

A handwritten signature in black ink, appearing to read "Mark D. Mestel", written over a horizontal line.

MARK D. MESTEL  
WSBA# 8350

V. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Supplemental Opening Brief was served upon the following by North Sound Legal Messengers, addressed to:

- 1) Court of Appeals
2. Snohomish County Prosecutor  
Division One                      3000 Rockefeller Ave  
600 University Street M/S 504  
One Union Square              Everett, WA 98201  
Seattle, WA 98101

I hereby certify that a copy of the foregoing Appellant's Supplemental Opening Brief was served upon the following by United States Postal Service, addressed to:

1. Steven Montgomery, DOC#288933  
c/o MCC-TRU, D-413-1  
PO Box 888  
Monroe, WA 98272-0888

DATED this 22nd day of June, 2011.

  
Brandy L. Ellis, Secretary