NO. 42202-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JESSE LAKE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Susan Serko

No. 09-1-03264-7

BRIEF OF RESPONDENT

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1. Procedure

On July 9, 2009, the State filed an information charging the defendant with Count I, child molestation in the first degree; Count II, incest in the second degree; Count III, child molestation in the first degree; and Count IV, incest in the second degree. CP 1-2.

On March 18, 2010 the defendant filed a motion to sever counts. CP 8-14.

On December 21, 2010, the case was reassigned to the Honorable Judge Susan Serko. CP 206.

On February 11, 2011 the State filed an Amended Information, which changed the time periods during which the crimes were alleged to have occurred. CP 70-71. On February 28, 2011 the State filed a Second Amended Information, which removed the language, "and not in a state registered domestic partnership with the defendant" from counts I and III. CP 82-83.

A jury was empaneled on March 1, 2011. CP 208. On March 10, 2011 the State filed a Third Amended Information, which altered the period during which the crime in count IV was alleged to have occurred. CP 139-140. See also 5 RP 786, ln. 3 to p. 788, ln. 9.

On March 11, 2011 the jury returned a verdict of not guilty as to count I, but guilty as to counts II-IV. CP 166-169.

On May 6, 2011, the court sentenced the defendant to a total of 109 months in custody. CP 187-201. *See* CP 193. In doing so, the court held that counts III and IV encompassed the same course of criminal conduct for purposes of determining the offender score. CP 190.

On June 3, 2011 the defendant timely filed a notice of appeal. CP 170-86.

2. Facts

A.M. was born in 1990. A.M. is the daughter of K.L. (mother) and F.M. (father).[1] 1 RP 14, ln. 7-8. K.L. and F.M. also had a son, also F.M, Jr. who was A.M.'s older brother. 1 RP 13, ln. 22 to p. 14, ln. 3.

The marriage of K.L. and F.M. began to end with them getting separated, shortly after which K.L. began a relationship with Lake, the defendant. 1 RP 14, ln. 11-17; p. 16, ln. 3-4; p. 16, ln. 10-25; 3 RP 553, ln. 6 to p. 555, ln. 23. When Kathy Lake and the defendant began living together A.M. was in the first or second grade, about age 6 or 7, and they got married when A.M. was in the 7th grade. 1 RP 15, ln. 22 to p. 16, ln. 9.

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[1] In order to protect the identity of the victims, the names of their parents, other than the defendant are also referred to by initials except where it is necessary or expedient to refer to them by name for purposes of the argument.

K.L. and Lake do not have any children in common, however Lake did have two children by a prior relationship, S.L. and J.L. 1 RP 14, ln. 18-24.

After K.L. started living with Lake, A.M. and F.M lived with them full time, other than visiting their father on weekends. 1 RP 15, ln. 5-9; p. 18, ln. 12-20. S.L. and J.L. lived with K.L. and Lake on weekends, and sometimes more often than that. 1 RP 14, ln. 12-14.

Shortly after Lake moved in with Kathy Lake and her children, Lake began touching A.M. in a manner that made her uncomfortable. 1 RP 19, ln. 21 to p. 20, ln. 1. Lake would cuddle with A.M. when they were both naked, and play what he called the horsey game with her where A.M. would straddle him and he would lie on his back and have her rock back and forth on top of him. 1 RP 20, ln. 15 to p. 21, ln. 5; p. 22, ln. 2-5. At Lake's request, A.M. would sit across Lake on his private area and it was touching hers when he would have her rock back and forth. 1 RP 21, ln. 20-24.

This would generally happen after school because Lake worked nights and K.L. would be at work. 1 RP 21, ln. 8-11. It happened at a time when they lived at the Crystal Pointe apartments and happened too many times to count, really often, a couple of times a week, every other day or so. 1 RP 18, ln. 9 to p. 19, ln. 11; p. 22, ln. 6-16.

A little less frequently, but frequently enough that it got to the point where it was normal, Lake engaged in another kind of activity with

A.M at the Crystal Lake apartment. 1 RP 27, ln. 4-13; p. 28, ln. 4-6; p. 29, ln. 25 to p. 30, ln. 2. Lake would sit on the edge of the bed and have A.M. get down on her knees on the floor in front of him so that her head would be about at his waist and he would have A.M. suck what Lake claimed were his fingers. 1 RP 27, ln. 2-18; p. 31, ln. 8-10. A.M. never saw what Lake put in her mouth because she was too scared to open her eyes. 1 RP 27, ln. 19-21. But it did seem to her to be skin [e.g. as opposed to plastic or some other material etc. 1 RP 27, ln. 25 to p. 28, ln. 1; p. 28, ln. 12-18. The only explanation he gave her as to why he wanted her to suck on something was that it was nice, or something like that. 1 RP 29, ln. 14-17.

One time after Lake had done that, A.M. was crying and told him that she thought he was having her suck on his penis, or pee pee, or something to that effect. 1 RP 28, ln. 9-11; p. 28, ln. 24 to p. 29, ln. 8. In response, Lake reached over quite a distance to his dresser and on top of his dresser he had some sort of toy, like a little ball or something and he indicated that no, he had that in her mouth. 1 RP 28, ln. 12-16. However, that didn't make sense at all, because he just picked that up and why would it be way over there (on the dresser). 1 RP 28, ln. 15-18. Also, the object he showed her didn't correlate with what she felt in her mouth. 1 RP 29, ln. 9-13. After she confronted him that she suspected he had her suck on his penis, that was the last time it happened. 1 RP 28, ln. 19-21.

Both types of sexual abuse, the horsey game and the "fingers in the mouth" happened when they lived at the Crystal Pointe Apartment, when

A.M. was in first and second grade, up until the beginning of third grade, so when A.M. was about seven to nine years old. 1 RP 31, ln. 18 to p. 32, ln. 9.

After that they moved to a town house at the Surprise Lake Village. 1 RP 32, ln. 20 to p. 33, ln. 5. Lake continued the "horsey" game with A.M. until 3rd, 4th, or even 5th grade. 1 RP 35, ln. 1-3. A.M. didn't know what made it stop. 1 RP 35, ln. 4-5.

However, at the Surprise Lake Village residence Lake did convince himself that they would be a closer family if he and A.M. would cuddle naked. 1 RP 36, ln. 16-17. The naked cuddling probably started when they were still at Crystal Pointe, because A.M. remembered cuddling with him there too. 1 RP 37, ln. 3-5.

Lake claims Native American ancestry, and told A.M. that his rationale for the naked cuddling with A.M. was that back in the day when the Native American's had long houses, they would just all be naked around each other and children did not clothe, they were just always held by their parents when they were naked. 1 RP 36, ln. 17 to p. 37, ln. 1. Lake told A.M. that they weren't going to let the world tell them what was in appropriate, that they would be close because they were going to cuddle naked. 1 RP 36, ln. 22-24.

Lake would either tell A.M. to undress or he would help her and Lake would undress himself. 1 RP 37, ln. 8-11. A.M. didn't remember anybody else being around when the naked cuddling happened. 1 RP 37,

ln. 12-15. It happened more often when A.M.'s mother wasn't around. 1 RP 37, ln. 20-21. They would on their sides, with A.M. either facing toward or facing away from Lake. 1 RP 38, ln. 6-8. Pretty much every part of their bodies would be touching because they were so close, and Lake would usually have his arms around A.M. 1 RP 38, ln. 9-18.

A.M. never wanted to confront Lake full on, so she would say that she was cold or wanted her clothes back on. 1 RP 38, ln. 19-23. This continued on to within a month of A.M. leaving Lake's residence, at which point she would have been 18. 1 RP 39, ln. 2-5. So this continued from about age six or seven through age 18. 1 RP 39, ln. 6-10.

At Surprise Lake Village, Lake would also give A.M. massages. 1 RP 39, ln. 11-14. A.M. remembered the massages as standing out to her when she started doing track in the 10th grade, but is not sure if they started then, or just got more frequent. 1 RP 39, ln. 21-23.

A.M. had never done a school sport before and wasn't used to working out, so she got really bad shin splints. 1 RP 40, ln. 13-15. So A.M. was sore a lot, and Lake would say that he would give her a massage so the soreness would go away. 1 RP 40, ln. 17-19. So he would do that, but then when one gets a professional massage they are naked so Lake would have A.M. be naked when he gave her the massage. 1 RP 40, ln. 19-21; p. 41. ln. 11-12.

The naked massages would happen almost every day. 1 RP 40, ln. 22-24. However, A.M. did not ask for the massages. 1 RP 40, ln. 25 to p.

41, ln. 4. Lake would be in his pajamas or underwear or sometimes in his regular daily clothes. 1 RP 41, ln. 13-14. A.M. was always in Lake's bed when he gave her the naked massages. 1 RP 42, ln. 5-7. When Lake gave A.M. the naked massages, none of the other family members would be present, although Lake might have given A.M. massages with other family members around when Lake was clothed. 1 RP 41, ln. 16 to p. 42, ln. 4.

They had all done Karate as a family ever since A.M. was about seven and from that were aware of a theory of energy flow in the body that referred to chakras. 1 RP 42, ln. 24 to p. 43, ln. 3. The chakras were at certain points on the body, including the top of the head, the forehead, the throat, the chest, the belly button area and one right above or on your private area. 1 RP 42, ln. 4-10. To make A.M. feel better, Lake insisted on massaging the chakra areas on A.M.'s body when he gave her the naked massages. 1 RP 42, ln. 10 to p. 45, ln. 1. When he gave A.M. the naked massages, he used his hands, and it would include massaging A.M.'s breasts and on her vagina, not inside of it, but outside it and also underneath the lips of her vagina. 1 RP 44, ln. 18 to p. 45, ln. 7; p. 46, ln. 21-23.

When Lake would give A.M. the massages, he would be either standing or kneeling next to the bed. 1 RP 47,ln. 1-3. Shortly into massaging A.M., Lake would have her face away so she wouldn't be facing Lake. 1 RP 47, ln. 7-9. He would then reach over to his dresser drawer and grab something. 1 RP 47, ln. 9-10. After A.M. got a little

suspicious about what he was doing in the dresser, when he wasn't home, she looked in the drawer and there was a rubber vagina – used to pleasure one's self with – and what looked like a rubber mouth and there was also lubrication and condoms. 1 RP 47, ln. 10-16. The vagina was lime neon green in color and the mouth was skin colored. 1 RP 47, ln. 17-20.

Sometimes it would happen a little differently from this, what A.M. referred to as rubbing, e.g. Lake would lay on his back naked and have A.M. lay on him naked face to face and rub her back like that. 1 RP 46,ln. 5-10. This type of rubbing probably started before the regular massages and did not happen as frequently as the regular massages. 1 RP 46, ln. 16-20.

However, Lake did try to play the "horsey game" again one time when A.M. was 17 or 18 years old and they were living at another house. 1 RP 35, ln. 7-8.

They were cuddling, both naked – A.M. was pretty sure it was after Lake gave A.M. a massage - and he tried to position her over him and tried to have her rock back and forth. 1 RP 35, ln. 12-14; ln. 19-23. But A.M. said that no, that wasn't comfortable. 1 RP 35,l n. 14-15. A.M. kind of tried to play it off, and rather than telling Lake no, that he was disguisting, and she wasn't going to do that, she told him that no, she was just going to lay "over here" [i.e. somewhere else in the room]. 1 RP 35, ln. 16-18.

The defendant, Jesse Lake, was S.L.'s biological father. 1 RP 165, ln. 11-13; p. 168, ln. 3-11. S.L. lived with her father and Kathy Lake full-time for about a year in late elementary school at the Surprise Lake apartments. 1 RP 172, ln. 20 to p. 173, ln. 19.

Starting at this time, when S.L. was in Fifth grade, every day when the girls would get out of the showers and go their room, the defendant would come into the bathroom, pull the shower curtain back and view them in the shower, then he would go into the bedroom with them as they dried off and got dressed. I RP 174, ln. 14 to p. 175, ln. 13; p. 176, ln. 7-9.

Lake would also rub the breasts or but of S.L. and A.M. 1 RP 176, ln. 24 to p. 177, ln. 6; p. 189, ln. 11-15. This was his skin to their bare skin and would occur very commonly. 1 RP 190, ln. 20 to p . 191, ln. 5. At bed time Lake would also climb into bed with them and although he would be fully clothed, he would put his hands underneath their clothes and touch them on their breasts and buttocks. 1 RP 191, ln. 20 to p. 192, ln. 9. See also, 1 RP 195, ln. 14-24.

Once they moved to the Porter way house, and S.L. was about 15 years old, the touching and walking in the girls while they were showering continued. 1 RP 197, ln. 3-11. While they were in the shower, he would also rub them on their back and buttocks while the girls were naked. 1 RP 198, ln. 3-7. Lake would also touch S.L. in her lower abdomen, but not in her vaginal area. 1 RP 200, ln. 19-23.

One time when S.L. was in junior high school, Lake was at the computer and pulled on S.L.'s pubic hair, so S.L. told him it hurt. Kathy saw him doing it and finally had to tell Lake to stop because he would not listed. 1 RP 201, ln. 20-24. He did this by pinching the fabric of her pants and pulling the pubic hair from outside the pants, but through her pants. 1 RP 201, ln. 25 to p. 202, ln. 5. This pulling of her pubic hair happened quite a few times for about a month. 1 RP 202, ln. 6-23.

Lake would also try to kiss S.L. and put his tongue in her mouth. 1 RP 205, ln. 10 to p. 206, ln. 13.

Lake would also often be naked in the shower and call for S.L. to bring him a towel. 1 RP 209, ln. 16-25.

Lake would also call the girls sluts and whores. 1 RP 213, ln. 25 to p. 214, ln. 9.

C. ARGUMENT.

The admission or exclusion of relevant evidence is within the discretion of the trial court. ***State v. Thomas***, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), ***State v. Swan***, 114 Wn.2d 613, 658, 700 P.2d 610 (1990). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Proper objection must be made at trial to perceived errors in admitting or excluding evidence and

failure to do so precludes raising the issue on appeal. ***Thomas***, 150 Wn.2d at 856; ***Guloy***, 104 Wn.2d at 421.

Even when an objection was made at trial, the trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. ***City of Kennewick v. Day***, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). An abuse of discretion exists only when no reasonable person would have taken the position adopted by the trial court. ***State v. Castellanos***, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). The appellant bears the burden of proving abuse of discretion. ***State v. Hentz***, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983).

Relevant evidence is:

> [E]vidence having 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.

State v. Wilson, 144 Wn. App. 166, 176, 181 P.3d 887 (2008) (quoting ER 401). Under that definition, to be relevant evidence must: 1) have a tendency to prove or disprove a fact; and (2) the fact must be of consequence in the context of other facts and the applicable substantive law. ***State v. Sargent***, 40 Wn. App. 340, 349, 698 P.2d 598 (1985) (citing 5 K. Tegland, Wash. Prac., Evidence § 82 at 168 (2d ed. 1982) [now published as 5 K. Tegland, Wash. Prac., Evidence § 401.2 at 258, (5th ed. 2007)]. It is also the case that relevant evidence may be excluded if its

probative value is substantially outweighed by the danger of unfair prejudice. ***Sergeant***, 40 Wn. App. at 349, ln. 4 (citing ER 403).

Moreover, "An insufficient appellate record precludes review of the alleged errors." ***In re Detention of Morgan***, 161 Wn. App. 66, 253 P.3d 394 (2011). *See also*, ***State v. Groth***, 163 Wn. App. 548, 568, 261 P.3d 183 (2011); ***State v. Sublett***, 156 Wn. App. 160, 186, 231 P.3d 231 (2010); RAP 9.2(b).

1. THE COURT SHOULD DECLINE TO CONSIDER SEVERAL OF THE ISSUES RAISED IN THE BRIEF OF APPELLANT WHERE THEY ARE NOT SUPPORTED BY CITATION TO RELEVANT PORTIONS OF THE RECORD.

Where a defendant fails to support an argument with citation to relevant authority or to relevant facts in the record, the court will not consider the issue. *See* ***Spradlin Rock Products, Inc. v. Public Utility District No. 1***, 164 Wn. App. 641, 667, 226 P.3d 229 (2011); ***Ensley v. Pitcher***, 152 Wn. App. 891, 906 n. 12, 222 P.3d 99 (2009) (citing RAP 10.3(a)(6)); ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); ***Smith v. State***, 135 Wn. App. 259, 270 n. 11, 144 P.3d 331 (2006).

Further, "'Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.'" ***Spradlin Rock***

Products, Inc., 164 Wn. App. at 667 (quoting ***Holland v. City of Tacoma***, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)).

Here, the Brief of Appellant makes no citation to the record with regard to the claimed errors in sections B, C, and D of the Brief of Appellant.

As to the argument in these sections of the Brief of Appellant, the only reference to the record a general description of the issue below. No citations to the record are included.

Because the argument in the Brief of Appellant fails to cite to specific portions of the record, it is unclear what specific rulings of the trial court the defense is challenging. Neither the State nor the court should have to guess at which rulings the defense is challenging. Nor should the State be put in the position of having to identify and respond to every conceivable action by the trial court that the defense could be challenging.

Where the defense has failed to cite to the record for specific rulings of the court, the issue has not been adequately raised, and this court should decline to review it.

2. THE TRIAL COURT PROPERLY PROHIBITED THE DEFENDANT FROM TESTIFYING THAT THIS WAS THE FIRST TIME HE HAD BEEN ARRESTED.

The defendant claims that the trial court erred when it precluded him from testifying that he had not previously been arrested. Br. App. 13. The defense claims that such testimony was precluded by pre-trial rulings. Br. App. 13.

However, the defense fails to cite to such rulings. Nor has the State found them in the record. This issue is not susceptible of review where the court's ruling does not appear in the record, nor does the record indicate whether or not the defense objected, nor on which basis.

The defendant claims that the testimony regarding this being his first time arrested was necessary in response to the State's cross examination of him regarding his incomplete statement to police when he was arrested. Br. App. 13.

However, if the State extensively crossed the defendant on his incomplete statement to the police, presumably the defense could have argued that the State opened the door to the introduction of the fact that this was the defendant's first arrest and he didn't know what to say to the police.

The defense also claims that after the state challenged the defendant as to why he failed to make a more complete statement to the police, it was precluded from addressing the issue when the court sustained the State's objection to the question whether he had ever been investigated before. Br. App. at 13 (citing 5 RP 808, ln. 6-14). This was the only time the defense sought to elicit that testimony from Lake.

However, the defense could have accomplished substantially the same thing by simply asking Lake why he didn't give a more complete answer to the police, to which he properly could have responded to the effect "Because I was not familiar with the process and didn't know I needed to give a more complete statement."

The fact that the defendant had not previously been arrested was not essential to this issue, and it could have been addressed by other means. For this reason as well, the defense claim is without merit.

3. THE COURT PROPERLY SUSTAINED THE OBJECTIONS TO HEARSAY TESTIMONY.

The court should decline to consider this issue for the reasons stated in section 1 above. The defendant's claim also fails on the merits.

The defense raises claims as to two different types of evidence that it claims was improperly excluded as hearsay. Br. App. 15-16. The first is the content of a telephone conversation between Kathy Lake and B.H.

Br. App. 15-16. The second is the defendant's testimony regarding his knowledge and understanding of his Native American Heritage. Br. App. 16. Because each claim turns on the specifics of the argument as to that particular piece of testimony, each will be considered separately.

Moreover, where the brief of appellant fails to cite to the record, the State is at a disadvantage in responding to the defense claims. Nonetheless, the State has attempted a careful review of the record, after which the State was able to identify the exchanges described in each sub-section below that appear to conform to the description of the error claimed by the defense. The State will therefore attempt to address the issues based on those potentially relevant portions of the record that could be identified. However, the State cannot assure the court that its identification is comprehensive, or even that these are the specific instances to which the defendant objects.

> [i]f a specific objection is overruled and the evidence in question is admitted, the appellate court will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not argued at trial.

State v. Mak, 105 Wn.2d 692, 718-19, 718 P.2d 407 (1986), *overruled on other grounds by*, ***State v. Hill***, 123 Wn.2d 641, 870 P.2d 313 (1994) (quoting K. Tegland, 5 Wash. Prac., Evidence § 10, at 25 (2d ed.1982) and citing ***State v. Ferguson***, 100 Wn.2d 131, 138, 667 P.2d 68

(1983). Nor may such an error be raised for the first time on appeal. ***Mak***, 105 Wn.2d at 719.

a. The Court Properly Excluded Hearsay Testimony Of The Conversation Between Kathy Lake And B.H.[2]

The defense claims:

> Kathy Lake's attempt to testify about the conversation she had with [B.H.]. The defense attempted to question him about the same conversation. However, the court sustained the hearsay objections from the state even though it went directly to why and how Mr. Lake reacted and the credibility and motivations for A.M. to make false accusations.

Br. App. 15-16.

The State found two exchanges that appear to conform to this description. One occurred during the testimony of B.H. The other occurred during the testimony of Kathy Lake. Accordingly, each is considered separately in order to focus on the question(s) asked, the objection made, and any response.

Whether a particular out of court statement is hearsay depends upon the purpose for which it is offered. K. Tegland, 5 WASH. PRACTICE: EVIDENCE LAW AND PRACTICE, (5th ed. 2007) § 801.8, p. 332. A statement

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[2] Although he is a third party witness and was not a crime victim, the State has elected to use B.H's initials where he was a minor at the time of his involvement in this matter.

is hearsay if offered to prove the truth of the matter asserted. Tegland, § 801.8, p. 332. However, if a statement is offered for some other purpose, it is not hearsay. Tegland, § 801.8, p. 332. Whether a particular statement is hearsay cannot be determined in a vacuum. Tegland, § 801.8, p. 332.

While the hearsay rule is easily stated, in practice many borderline situations can arise in which the result is less than obvious. Tegland, § 801.8, p. 333.

i. Nothing In The Record Supports The Defense Claim That The Court Erred When It Excluded The Testimony Of B.H. As Hearsay.

The following occurred during the testimony of B.H.:

> Q. [DEFENSE COUNSEL FRICKE]: Okay. All right. Now – and then you had the phone conversation or at least one phone conversation with Kathy Lake, right?
> A. [B.H.]: Yes.
> Q. And you mentioned that was in the context of these text messages going back and forth between you and [A.M.], correct?
> A. Yes.
> Q. Okay. Did you actually speak to her, Kathy Lake?
> A. Yes
> Q. Okay. And could you tell if she was angry or not over the phone?
> A. She sounded pretty upset.
> Q. Okay. Did she tell you to stay away from her daughter or anything –
> [Prosecutor] MS. HYER: Your Honor, objection.
> MR. FRICKE: I'm just – not offered for the truth of the matter asserted, just for a conversation occurring, Your Honor.

MS. HYER: I'm not sure why else – it wouldn't' be offered except for the truth.
MR. FRICKE: It's a conversation, it's witnessing an event.
THE COURT: Sustained. Objection is sustained.
MR. FRICKE: And is that hearsay?
THE COURT: I'm sustaining the objection, Mr. Fricke.
MR. FRICKE: Yeah, can I just put my – I need to know – why don't I show you.
THE COURT: We'll do this outside the presence of the jury.
MR. FRICKE: Okay. All right, thank you.

2-A RP 258, ln. 10 to p. 259, ln. 15.

The trial continued with the testimony of B.H. and then went into the testimony of S.L. before the court took a recess and returned to the discussion of the objection. The court reviewed the record for counsel regarding the testimony above. 2-A RP 286, ln. 22 to p. 288, ln. 9. The court then continued:

THE COURT: I'm sustaining it on the basis of hearsay. I didn't hear anything in the responses that would suggest to me that there was an exception or anything else. It was – the reference was a conversation of witnessing an event.
MR. FRICKE: Well –
THE COURT: That's not sufficient to overcome a hearsay objection, I don't believe.
MR. FRICKE: Well, here's, obviously we weren't going to have the full discussion there but – and certainly that wasn't very articulate on my part, but hearsay, I don't think it's hearsay and what I was trying to communicate is that it was a conversation and actually a conversation that he was part of and witnessed because he was part of it. But the statement itself within the context of the conversation, and this goes for most conversation, is not an assertion of a past event. No one is – I mean it could potentially, but in that context she was not she was just, you know, portraying her

feelings.
To my knowledge, it wasn't saying – going to say, for instance, in the conversation which would be typical hearsay, you know, John Doe killed Jane Doe which is an assertion of a past event. But the conversation itself, unless there is something like that, is asserting nothing. It's just, it's like witnessing a person walking down the street. Yeah, I saw him walking down the street and I also witnessed a conversation and here was the subject to of the conversation so long as there is no assertion. So that's my – would be my explanation in response.
THE COURT: Okay. Thank you. I would have sustained the objection even with that record.
MR. FRICKE: Okay. So are you saying that – I guess what I need to know, I mean, are you indicating that anytime there's a conversation someone is part of, you can't talk about the conversation because it's hearsay? I mean, that's what I'm hearing.
THE COURT: If it's someone else, if it's a conversation that's outside the courtroom, someone else is speaking ant it's offered for the truth of the matter asserted, I think that's hearsay. If there is an exception or if it's not hearsay for some reason, bring it to my attention and I'm happy to allow it.
MR. FRICKE: And I guess are you saying the truth of the matter asserted is the conversation itself?
THE COURT: No, she was saying something substantive in that conversation, something substantive that the prosecutor was objection to. It was not just the fact that the conversation occurred, there was substantive information that was being provided by someone outside the courtroom. My understanding is that's classic hearsay.
MR. FRICKE: And obviously that's the Court's ruling, so I'll just – okay.
THE COURT: There are many exceptions, there's many things that aren't hearsay, there is things that aren't offered for the truth of the matter asserted and I'm happy to take those up as they come up.
MR. FRICKE: Okay.

> THE COURT: And if you need to make a record outside the presence of the jury, just ask me Mr. Fricke. I'm happy to excuse them.
> MR. FRICKE: It wasn't so important at that moment but I appreciate that, thank you.

2-A RP 288, ln. 11 to p. 290, ln. 22.

The defense appears to assert a couple of possible reasons as to why the testimony sought may not be hearsay. One defense argument appears to be that the statements are not offered to prove the truth of the matter asserted. 2-A RP 259, ln. 1-2. More specifically, the argument may be that it is not an assertion because, "the statement itself, within the context of the conversation is not an assertion of a past event." *See* 2-A RP 289, ln. 1-2. On the other hand, it may be that to the extent Karen Lake was just portraying her feelings, it was not an assertion. *See* 2-A RP 289, ln. 2-4.

The defense also argued to the court that the statement was not hearsay because the reference was a conversation of witnessing an event. 2-A RP 259, ln. 2-4; p. 288, ln. 14-15.

The court's understanding from the question asked was that Kathy Lake's out of court statement was being offered for the truth of the matter asserted. "If it's someone else, if it's a conversation that's outside the courtroom, someone else is speaking and it's offered for the truth of the matter asserted, I think that's hearsay." 2-A RP 289, ln. 22-25. A

moment later, in response to defense query for further clarification, the court indicated "...she [Kathy Lake] was saying something substantive in that conversation, something substantive that the prosecutor was objecting to. It was not just the fact that the conversation occurred, there was substantive information that was being provided by someone outside the courtroom. 2-A RP 290, ln. 5-9.

Nothing in this record supports the defense position that the court's ruling was error. This is so for three reasons.

First, no proffer was ever made, either before or outside the presence of the jury, as to what B.H. would have testified to as the statement from Kathy Lake. Where no statement of Kathy Lake as testified to by B.H. was proffered, the court had no way to evaluate what the statement was offered for, whether it made an assertion, or what it asserted. Without putting the anticipated testimony before the court, the defense response was inadequate to preserve the issue and overcome the court's grant of the objection.

Second, the defense failed to articulate in a way the court could understand how any statement would have fallen within an exception to the hearsay rule. The court stated, "I didn't hear anything in the responses that would suggest to me that there was an exception [to the hearsay rule] or anything else." 2-A RP 288, ln. 12-13. Then again the court said, "If

it's someone else, if it's a conversation that's outside the courtroom, someone else is speaking and it's offered for the truth of the matter asserted, I think that's hearsay. If there is an exception or if it's not hearsay for some reason, bring it to my attention and I'm happy to allow it." 2-A RP 289, ln. 22 to p. 290, ln. 2. The court continued shortly thereafter, "There are many exceptions, there's many things that aren't hearsay, there is [sic] things that aren't offered for the truth of the matter asserted and I'm happy to take those up as they come up." 2-A RP 290, ln. 13-16.

Third, before making a record outside the presence of the jury as to what B.H. would have testified to, the defense did not object to B.H. being released. *See* 2-A RP 268, ln. 22-25. Moreover, when the court later advised the defense that if it needed the court to make a record outside the present of the jury, to ask for such as the court was happy to excuse the jury, the defense responded, "It wasn't so important at that moment but I appreciate that, thank you." 2-A RP 290, ln. 21-22.

Where the expected testimony of B.H. was never proffered to the court, the record is inadequate to support the defense claim on appeal that the court's ruling excluding the statement of Kathy Lake was error.

ii. Nothing In The Record Supports The Defense Claim That The Court Erred When It Excluded The Testimony Of Kathy Lake As Hearsay.

When Kathy Lake testified, the defense also sought to elicit the content of the phone conversation with B.H. through her. Again the State objected as hearsay, and again the court sustained the objection. 4 RP 654, ln. 20-23.

Defense requested a further colloquy on the issue outside the presence of the jury, during which the court explained,

> "The reason that I sustained it was because I anticipated that there was going to be some kind of solicitation of the conversation itself as between the two of them, including the out-of-court witness who is [B.H.] speaking. And so I really just want to know before we get this in front of the jury exactly what you're seeking to elicit from this witness.

4 RP 656, ln. 22 to p. 657, ln. 3.

The court then inquired of the witness what she would answer, and then allowed the defense to follow-up with additional questions. 4 RP 657, ln. 10-19.

In their brief, the defense claims that the conversation between Kathy Lake and B.H. "went directly to why and how Mr. Lake reacted and the credibility and motivations for A.M. to make false accusations." Br. App. 15-16. However, the colloquy of the defense with Kathy Lake

revealed nothing of the sort. Instead, it merely indicated that Kathy Lake asked B.H. what he was doing texting her daughter, and that as a result of the conversation, she disputed the charges on the cell phone [bill]. 4 RP 657, ln. 12-24. Ultimately, when defense asked Kathy Lake whether she asked A.M. if she and B.H. had a relationship, Kathy Lake responded that she did not ask that. 4 RP 658, ln. 12-13.

Again, the defense never proffered a statement by B.H., nor anything that would suggest a motive for B.H. or A.M. to make a false accusation against the defendant. Where no such statement was proffered, the record does not support the defense claim that the court's ruling was error, much less that it was prejudicial to the defendant.

In support of their position, the defense cited ***State v. Rangel-Reyes***, 119 Wn. App. 494, 81 P.3d 157 (2003). The court in that case did state that, "[a]n out-of-court statement is hearsay only if it is 'offered in evidence to prove the truth of the matter asserted.'" ***Rangel-Reyes***, 119 Wn. App. at 498 (citing ER 801(c)). On that basis, the court reaffirmed the rule that when out of court assertions are used for nonhearsay purposes, no issue arises under the confrontation clause. ***Rangel-Reyes***, 119 Wn. App. at 498.

However, that case was inapplicable to this because it involved a statement made to an informant by a co-conspirator. ***Rangel-Reyes***, 119

Wn. App. at 498-99. As the statement of a co-conspirator, it was attributable to the defendant as a statement in furtherance of a conspiracy under ER 801(d)(2)(v). ***Rangel-Reyes***, 119 Wn. App. at 498. As such, the informant's statement was not hearsay and did not violate the defendant's right of confrontation. ***Rangel-Reyes***, 119 Wn. App. at 499.

Nothing in the record supports the defense claim that the trial court erred when it excluded the testimony regarding the content of the telephone conversation between Kathy Lake and B.H. Moreover, the defense has failed to show any prejudice where Kathy Lake testified that she did not ask A.M. if she was in a relationship with B.H. and Kathy Lake merely testified that the result of her conversation with B.H. was merely that she challenged her phone bill.

b. The Court Properly Excluded Defendant Lake's Statement Regarding His Native American Heritage.

The defense sought to elicit and explain why the defendant, who claimed to be a Native American and member of the Seneca tribe was not a registered member. 4 RP 712, ln. 24 to p. 713, ln. 4; p. 714, ln. 6-9. In order to explain his lack of registration, the defendant claimed that his great, great grandparents chose not to be registered and started to state why when the State objected that it was hearsay. 4 RP 714, ln. 6-15. In

attempt to lay foundation, the defense elicited from Lake that it was based on an oral tradition, from his Father and Uncle, as well as a written tradition [that apparently was not before the court as an exhibit]. 4 RP 714, ln. 21 to p. 715, ln. 11.

The defense then stopped that line of questioning, without laying any further foundation. 4 RP 715, ln. 13-15.

Nothing in this exchange about why he was not a registered member of the Seneca tribe prevented the defense from developing his knowledge and understanding of his Native American heritage. Moreover, the court properly sustained the objection, where the defendant's answer was in fact hearsay.

Nothing in the record supports the defense claim that the court's ruling on this issue was error.

The trial court did not abuse its discretion when it sustained the objections and excluded the hearsay testimony where the defense never made a record to establish that any of the statements it sought to admit were not hearsay or were subject to an exception. Moreover, the defense has failed to show any prejudice from the court's failure to admit the statements. For these reasons, the claim should be denied.

4. THE COURT DID NOT ERR WHEN IT ADMITTED CERTAIN EVIDENCE THAT THE DEFENSE CLAIMS WERE NOT RELEVANT OR WERE UNFAIRLY PREJUDICIAL.

The court should decline to consider this issue for the reasons stated in section 1 above. Moreover, this claim fails on the merits as well.

The defense claims that the court improperly admitted a variety of evidence because it was no relevant, or was unfairly prejudicial. Br. App. 16ff. Because each claim turns on the specifics of the argument as to that particular item of evidence, each will be considered separately.

Moreover, again, where the brief of appellant fails to cite to the record, the State is at a disadvantage in responding to the defense claims. Nonetheless, the State has attempted a careful review of the record, after which the State was able to identify the exchanges described in each sub-section below that appear to conform to the description of the error claimed by the defense. The State will therefore attempt to address the issues based on those potentially relevant portions of the record that could be identified. However, the State cannot assure the court that its identification is comprehensive, or even that these are the specific instances to which the defendant objects.

The admission or exclusion of relevant evidence is within the discretion of the trial court. ***State v. Thomas***, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), ***State v. Swan***, 114 Wn.2d 613, 658, 700 P.2d 610 (1990). A party objecting to the admission of evidence must make a

timely and specific objection in the trial court. ER 103; ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal. ***Thomas***, 150 Wn.2d at 856; ***Guloy***, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. ***State v. Castellanos***, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

a. The court properly admitted the defendant's statements that A.M. looked like her mother, and that Kathy Lake should loose weight to look more like A.M.

The defense claims that the court improperly admitted testimony that the defendant said that Kathy Lake and A.M. looked alike. Br. App. 17.

S.L. testified that the defendant made comments in front of A.M. that A.M. looked like Kathy Lake. 1 RP 215, ln. 8-11. However, what he said more precisely was that if Kathy lost weight, she would look like A.M. 2 RP 269, ln. 23 to p. 270, ln. 3. This stuck out for S.L. because it was said in front of the whole family and made Kathy really sad. *See also* 1 RP 216, ln. 15-22.

The defense objected to this inquiry on the basis of relevance when it was initially made. 1 RP 215, ln 14-15. However, the defense did not

renew that objection when S.M's testimony resumed the next day. *See* 2-A RP 269, ln. 19-24.

The State explained that the defendant's statement was relevant because it showed that the defendant who had a sexual relationship with his wife viewed A.M. as a younger, more attractive version of his wife. 1 RP 219, ln. 7-17. Thus, it in part explained the defendant's attraction to A.M. and his motive for committing the crimes against her.

At the least, the statement is certainly relevant as an indication from which the jury could infer the defendant's sexual interest in A.M. Nor could it be unfairly prejudicial where both A.M. and S.L. had already testified that he had repeatedly sexually molested them for many years. Moreover, its probative value outweighed any unfair prejudice, again because it showed Lake's physical attraction to A.M.

b. The Court Properly Admitted Testimony That The Defendant Called His Daughters Sluts And Whores.

The defense appears to claim that the court improperly allowed testimony that Lake called his daughters sluts and whores. Br. App. at 17.

In the first instance the State has been able to identify, the statement came up in the context of why the defendant touched and rubbed the girls sexually in the shower or when they had a towel on. 1 RP 176, ln. 20 to p. 10. Lake's explanation for why he would do that was that he

had read in a book that girls should be touched by their dad, otherwise they would grow up and be promiscuous and feel unloved because of neglect, and so they needed to be touched. 1 RP 178, ln. 8-12. Upon further questioning, A.M. explained that she had tried to put it nicely, but that he had told them that they would grow up to be sluts and whores if they were not touched by their father, that they would try to find it somewhere else, and that the only boyfriend they needed was him and they didn't need anyone else. 1 RP 178, ln. 13-25.

The defense did not object to these questions or answers. Accordingly, the objection is now waived for purposes of appeal. *See* ***Thomas***, 150 Wn.2d at 856; ***Guloy***, 104 Wn.2d at 421.

Testimony to this statement occurred a second time by S.L. When asked if Lake would ever call her or A.M. derogatory names, S.L. said "Yes." When asked what names, defense counsel objected on the ground that it was irrelevant, and under ER 403(b). 1 RP 214, ln. 1-2. The court overruled the objection and S.L. testified that Lake called them slut and whore. 1 RP 214, ln. 3-9.

Where similar testimony was admitted from A.M. without objection, the court properly admitted S.L.'s statement for several reasons. First, A.M.'s testimony made Lake's statement relevant to his touching them sexually and his attempts to explain, excuse or justify that contact. It is also relevant to the fact that he viewed them in a sexual context, as well as being evidence of his manipulation of them by degrading them.

Finally, it was also relevant to the credibility of A.M. Moreover, where A.M. had already testified to the statements without objection, there could be no harm in admitting them when S.L. testified to them.

For all these reasons, the court properly admitted Lakes statements that the girls were sluts and whores.

c. The Court Properly Admitted Testimony That Kathy Lake And Her Sister Were Sexually Abused By Their Father.

The defense claims that the court improperly admitted testimony that Kathy Lake and her sister, T.M. had been sexually abused by their own father.[3] Br. App. 17. However, the defense's own argument implicitly acknowledges that it was properly relevant to the issue of Kathy Lake's own credibility. Br. App. at 18.

T.M. testified that she had been in the bathroom and brushed her teeth and left while A.M. was still in the shower. 2-A RP 339, ln. 16-18. Moments later, the defendant came around the corner, opened the bathroom door without knocking, and that A.M. was standing there naked. 2-A RP 338, ln. 23-25. A.M. grabbed the shower curtain and attempted to cover herself up, but the defendant proceeded into the bathroom, closing the door behind him. 2-A RP 338, ln. 25 to p. 339, ln. 2. T.M. explained that this conduct greatly troubled her because she thought she and Kathy

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[3] Because the abuse suffered by T.M. occurred when she was a minor, the State refers to her by her initials.

Lake were on the same page as to [sexually] inappropriate conduct with their kids because they had been abused growing up and had discussed over the years how important it is to protect their children. 2-A RP 341, ln. 16-21. The defense objected to this statement, but only as to relevance. 2-A RP 341, ln. 11-12. The court overruled the objection. 2-A RP 341, ln. 13.

Indeed, the testimony was highly relevant to Kathy Lake's credibility for multiple reasons. Kathy Lake denied that her sister had called and in a telephone conversation with both Kathy Lake and the defendant expressed concerns regarding T.M.'s observation. 4 RP 666, ln. 14 to p. 667, ln. 7; p. 698, ln. 15 to p. 701, ln. 8. *See also* 2-B RP 348, ln. 14-18. Yet T.M. testified that the defendant admitted to massaging A.M.'s breasts and lower abdominal massages, but stopped at the pelvic bone. 2-B RP 349, ln. 11-16. The defendant also told her he gave the children what he called a colon rub, which was a lower abdominal rub, and that he gave those to A.M. 2-B RP 350, ln. 15-21. T.M. was shocked at hearing all of this. 2-B RP 352, ln. 6.

Additionally, Kathy Lake testified that she no longer spoke to her sister because her sister testified in support of the State presenting evidence. 4 RP 698, ln. 9-14.

Kathy Lake acknowledged that she and T.M. had been abused as children, said that T.M. had been upset about that for many years, but

denied that T.M. had told her that T.M. found upsetting what T.M. had observed in Kathy Lake's home. 4 RP 702.

This testimony his highly relevant to Kathy Lake's credibility, especially where she sought to support her husband and denied that anything inappropriate had happened in their household.

Because the evidence was relevant and where the defense failed to object that it was unfairly prejudicial, the court did not abuse its discretion by admitting the evidence.

5. THE COURT PROPERLY ADMITTED THE DEFENDANT'S WRITTEN STATEMENT.

The court should decline to consider this issue for the reasons stated in section 1 above.

The defense claims that the court improperly admitted the defendant's statement made at the time of his initial arrest. Br. App. 21. The defense claims that the admission of the evidence allowed undue influence as to a particular piece of evidence. Br. App. 21. However, the defense fails to identify the exhibit from the record, or locate any objections in the transcript.

Moreover, again, where the brief of appellant fails to cite to the record, the State is at a disadvantage in responding to the defense claims. Nonetheless, the State has attempted a careful review of the record, after which the State was able to identify the portions of the record that appear

to conform to the description of the error claimed by the defense. The State will therefore attempt to address the issues based on those potentially relevant portions of the record that could be identified. However, the State cannot assure the court that its identification is comprehensive, or even that these are the specific instances to which the defendant objects.

On March 8, 2011, the court admitted Plaintiff's Exhibit 15A, a redacted statement by the defendant. CP 209. The defense objected, however, rather than stating the basis of its objection at the time the exhibit was admitted, it referred to objections that it made some time in the week prior. 3 RP 457, ln. 17 to p. 458, ln. 24. Again, the Brief of Appellant does not cite to those objections. However, it appears that the defendant is referring to the objection that occurs at 1 RP 135, ln. 2-5.

Nor does the exhibit even appear to be designated as part of the record. "An insufficient appellate record precludes review of the alleged errors." ***In re Detention of Morgan***, 161 Wn. App. 66, 253 P.3d 394 (2011). *See also* ***State v. Groth***, 163 Wn. App. 548, 568, 261 P.3d 183 (2011); ***State v. Sublett***, 156 Wn. App. 160, 186, 231 P.3d 231 (2010); RAP 9.2(b).

The defense objection was to the admission of the document. 1 RP 135, ln. 2-5. The defense had no objection to the statement being read to the jury. 1 RP 135, ln. 4-5. When asked if there was a rule the defense could refer the court to, the response was that counsel would have to look and ask the court to reserve ruling or allow him to take some time. 1 RP

135, ln. 11-16. Because at the time, the defense could not provide the court any authority contrary to the admission of the written statement, the court reserved ruling on the admission of the statement until the defense had a chance to prepare an argument. 1 RP 135, ln. 11 to p. 136, ln. 3. For the time being, the court allowed the statement to be read to the jury. 1 RP 135, ln. 25 to p. 136, ln. 3. Subsequently, the statement was read to the jury. 1 RP 151, ln. 19 to p. 152, ln. 20.

The defense objection was later considered more thoroughly outside the presence of the jury. *See* 1 RP 179, ln. 21 to p. 181, ln. 19. However, the defense never articulated a more specific legal basis for the objection. *See* 1 RP 180, ln. 6-18.

The court conducted its own analysis of the issue and concluded that the written statement was admissible under ER 801(d)(2). 1 RP 181, ln. 19 to p. 181, ln. 6. Everyone agreed that any further objection or argument could be raised on Monday, March 7, 2011. 1 RP 181, ln. 7-13. However, it does not appear that the issue was raised again until the exhibit was admitted on March 8, at which time the defense had no additional argument. 3 RP 457, ln. 17 to p. 458 ln. 24.

Having failed to raise a specific legal objection to the admission of the written statement, any objection was waived.

It is also worth noting that the defense claims the statement was allowed to go to the jury as impeachment evidence. Br. App. 21. However, this does not appear to be correct as the court indicated that it

was inclined to admit the statement under ER 801(d)(2). 1 RP 181, ln. 19 to p. 181, ln. 6. That provision indicates that an admission by a party opponent is not hearsay. It does not limit the statements to impeachment purposes, which would falls under ER 801(c) since statements for limited purposes of impeachment are admissible because they are not hearsay insofar as they are not being used to prove the truth of the matter asserted.

In any case, the defense objection is without merit, because nothing in ER 801 distinguishes generally between written and oral statements.

6. EVEN IF THE COURT WERE TO HOLD ANY OF THE CLAIMS WERE ERROR, ANY SUCH ERROR WAS HARMLESS.

Two different standards for harmless error have been applied to Washington cases. In ***State v. Whelchel***, the Washington Supreme Court held that a constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. ***State v. Whelchel***, 115 Wn.2d 708, 728, 801 P.2d 948 (1990) (holding the error was harmless were statements were admitted in violation of the defendant's rights under the confrontation clause). The court in ***Whelchel*** held that independent of the improperly admitted statements, there was overwhelming evidence to

support the defendant's conviction so that the erroneous admission was harmless beyond a reasonable doubt. ***Whelchel***, 115 Wn.2d at 730.

However, when the same case went before the Ninth Circuit Court of Appeals on an appeal to a habeas corpus motion, the Ninth Circuit held that the standard for harmless error was whether a given error had a substantial and injurious effect or influence in determining the jury's verdict. ***Whelchel v. Washington***, 232 F.3d 1197, 1205-06 (9th Cir. 2000). In ***Whelchel***, the Ninth Circuit affirmed the Federal District Court's grant of habeas corpus relief to the defendant, holding that the statements were not cumulative of other evidence, and were inherently suspect. ***Whelchel***, 232 F.3d at 1208. The court also noted that the other evidence did not point overwhelmingly to Whelchel's guilt. ***Whelchel***, 232 F.3d at 1208. The court did find harmless error as to other improperly admitted statements where they were merely cumulative. ***Whelchel***, 232 F.3d at 1211.

Here, the defense has failed to show that any error was harmful. Most of the claimed errors were not properly objected to, or substantially similar evidence was before the jury without objection through some other means. Given the substantial amount of evidence in this case, the claimed errors, if any, were harmless.

7. THERE WAS NO CUMULATIVE ERROR FROM THE COURT'S RULINGS CHALLENGED ON APPEAL.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." ***Rose v. Clark***, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. ***Rose***, 478 U.S. at 577. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." ***Neder v. United States***, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). "[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." ***Brown v. United States***, 411 U.S. 223, 232 (1973) (internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. ***Rose***, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. ***Rose***, 478 U.S. at 578; *see also* ***State v.***

Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) ("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The doctrine of cumulative error, however, recognizes the reality that sometime numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. ***In re Lord***, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); ***State v. Coe***, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also* ***State v. Johnson***, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. ***State v. Russell***, 125 Wn.2d 24, 93 94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test and therefore they will weigh more on the scale when accumulated. *See* ***Russell***, 125 Wn.2d at 93, 94. Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *See* ***Russell***, 125 Wn.2d at 93, 94. Second, there are errors that are harmless because of the strength of the untainted

evidence and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See e.g.*, ***Johnson***, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See e.g.*, ***State v. Stevens***, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) ("Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.") (emphasis added).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare ***State v. Whalon***, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with ***State v. Wall***, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error) and ***State v. Kinard***, 21 Wn. App. 587, 592 93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g.*, ***State v. Badda***, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the

prosecutor's statement that the state was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see e.g.*, ***State v. Coe***, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of state witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); ***State v. Alexander***, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see, e.g.*, ***State v. Torres***, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See* ***Stevens***, 58 Wn. App. at 498.

D. CONCLUSION.

For the foregoing reasons the defendant's claims on appeal should be denied. They are not properly preserved and not supported with

citation to the relevant portions of the record. Additionally, the claims should be denied where they are without substantive merit.

DATED: June 4, 2012

MARK LINDQUIST
Pierce County
Prosecuting Attorney

STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/4/12 [signature]
Date Signature

PIERCE COUNTY PROSECUTOR

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