NO. 45607-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GEORGE THOMAS STRANGE,

Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Factual History

The State charged the defendant with one count of Child Molestation in the second degree and one count of Voyeurism. CP 9-11. The defendant married Jane Doe's mother, Melissa Mullins, when Jane Doe was 9 years old. RP 222, 272-279.[1]

At trial Jane Doe testified when she was 12 years old the defendant came into her room offering to give her a breast exam when her mother was at work. RP 224-225, 227. This offer was out of the blue and she didn't have any idea when he offered what his intention was. RP 224-225. The defendant lifted up her shirt and touched her naked breasts. RP 226. For about five minutes, he felt around her breasts and was showing her how to find if she had cancer. RP 224, 227-228. He pressed hard all around her breasts, but did not touch her nipples. RP 253. He stopped because her mother arrived home. RP 229. Afterwards he sternly told her not to tell her mother, because her mother would take offense. RP 229. Jane Doe did not tell her mother at that time. RP 230.

At another time, Jane Doe caught Strange looking down her shorts. RP 231. When she woke up one morning, Doe felt him pulling out the waistband of her shorts and looking at her vaginal area. RP 232-233, 257. She rolled over and pretended to go back to sleep. RP 234. At another time,

[1] The record on appeal consists of three continuously numbered volumes of verbatim reports of proceedings. They are referred herein as "RP [page #]."

she felt him reach under the blanket, but he didn't touch her because she turned over. RP 238.

Jane Doe explained Strange was very affectionate, hugging, hanging on her, and give her massages where he would touch her shoulders, back, butt, and thighs. RP 238, 240-242. He would also kiss her on the lips. RP 239. This made her feel uncomfortable, but she did not complain to her mother because she didn't want mom to lose another guy and hurt her mother. RP 239-240.

Others noticed odd behavior of Strange towards Jane Doe. Jane's brother C.M. testified the defendant would spend twice as long in Jane's bedroom when saying goodnight compared to the other kids. RP 266-267. He also observed Strange massaging Jane's shoulders and was told to leave the bedroom. RP 268. He was also present when Strange took Jane Doe to buy bras and underwear at Target. RP 269. CM testified Strange recommended Jane Doe pick out very adult underwear, such as thongs. RP 269-270. CM thought this inappropriate and told Strange this. RP 271. Strange replied he didn't think Melissa would approve of his choices for Jane either. RP 271.

John Layman, a co-worker and friend of Melissa Mullins also noticed Strange was very touchy with Jane. PR 329. John described Strange would have Jane stand between his legs, and he would place his hands around her in a half-hug with his hands cupping underneath Jane's breasts. RP 330. Strange would also kiss Jane on the lips, and complain

when she would only kiss him on the cheek. RP 329, 331. Strange also admitted he took Jane bra shopping because in his opinion she didn't know how to pick out the correct bra size. RP 331.

Melissa Mullins testified while she didn't see Strange kiss Jane on the lips, she did see him rub Jane's back and he would hold Jane and hug her a lot. RP 286-287. Mullins recalled Jane Doe's breasts grew rapidly going from a B cup to a D cup when she was 12 years old. RP 287. This rapid growth created stretch marks. RP 289. Mullins testified she never discussed or expressed any concerns to Strange about cancer and didn't have any family history with breast cancer. RP 290-291.

Jane first told her friend Stacy Baker in the sixth grade and again in eighth grade about Strange's behavior making her uncomfortable. RP 242-243, 323-26. She also told a co-worker at her mother's restaurant, John Layman. RP 244-245. He encouraged her to tell her mother, and Jane did tell her mother the next day. RP 246, 334-336. Melissa reported the matter to the police and immediately moved her and the kids to the shelter. RP 248, 293

The State also called Karen Joiner to testify the Defendant was a nursing student for less than a quarter in the fall of 2004. RP 317. During the program, he was never actually taught how to give a breast exam and was not expected to do so. RP 319. It was considered an advance nursing skill. RP 319.

Tracy Alarid, the Defendant's ex-wife testified that after Melissa left with the children, Strange called her. RP 340, 342. Strange told Alarid that during the summer, Jane's bust line increased dramatically. RP 343. He told her there was a conversation about breast cancer and Jane was concerned, asking him to do a self-breast exam on her. RP 343. He told Tracy he gave Jane the breast exam over Jane's clothing. RP 343, 345. He explained Jane was more comfortable coming to him about these concerns and because he had gone to nursing school, it would be ok. RP 343-344. He did admit he told Jane not to tell Melissa because Melissa would not like the idea. RP 345.

Alarid was aware Strange never completed the nursing program and testified he never offered to give her a breast exam nor indicate he needed to practice for school. RP 346.

The State called Detective Todd McDaniel to testify. Detective McDaniel had over twenty years experience as an officer, six years as a detective. RP 351. His experience included training in investigative interview techniques of suspects. RP 352. McDaniel stated in an interview it is important to pay attention to body language and what a suspect says. RP 357. McDaniel explained that "soft language" where a suspect uses qualifying language in answering questions is something he is trained to look for. RP 358.

McDaniel interviewed Strange and recorded the interview. RP 358. Strange asked to see the allegations prior to starting the interview. RP 362.

McDaniel told him the allegations were for the inappropriate touching of Jane's breasts. RP 362. When asked if Strange knew anything about the allegations, Strange answered, "I wish I could say yes but no." RP 363. Strange said the allegation was ludicrous. RP 364. He explained that in dealing with children he approaches things in a medical manner because he went to school to be a nurse. RP 364.

Strange said he would see Jane in various states of undress because she would leave her door open. RP 365. Strange then explained, without being questioned, that he would go in the mornings and give Jane a kiss on the cheek. RP 366. Because it would be dark in the morning and he didn't see well he would sometimes put his hand out and it may land on inappropriate places. RP 366.

Detective McDaniel then asked why Jane would say these things. RP 367-368. Strange guessed Jane's mother may have coached Jane. RP 368. McDaniel explains the child forensic interview is an open ended, storytelling process and McDaniel didn't get that sense. RP 368. McDaniel explained to Strange that Jane's story is consistent with others information that he kisses her goodbye in the morning and tucks her in. RP 369.

Strange then said he would tuck her in and when she started to develop she was very cuddly. RP 369. He stated he started to withdraw from Jane and she asked him to stop tucking her in. RP 369-370. Additionally that she gave him a kiss goodnight in the living room. RP 370. McDaniel tells Strange that what he's said up to then is consistent with what

others are saying. RP 371. However, Jane said he would reach under and touch her butt and she would roll over. RP 371. Strange denies this, saying he wouldn't try to touch her anywhere inappropriate. RP 371. He again explains that his hand might land on her butt, waist or leg. RP 372. McDaniel says, "I'm having – okay. I'm having a hard time with that (inaudible) because why – I don't know why you would touch her in any way. Do you know what I'm saying?" RP 372.

Strange says it's a balance issue and he doesn't see well. RP 372. When he goes to kiss her, he tends to kneel and in bending over the bed he grabs at the bed to make sure he doesn't fall over on top Jane. RP 373.

McDaniel then asks Strange about lifting Jane's sweats to look at the privates. RP 373. Strange emphatically denies this. RP 373. He explains he only saw them once when nine-year-old Jane was getting out of the shower, and about four weeks prior when she was getting dressed in her room with the door open. RP 374.

McDaniel then moved on to asking about Strange giving Jane back massages. RP 375. Strange admitted to giving her back massages, the same as Melissa, because Jane had a bad back. RP 375. Strange then talks about Melissa filing for divorce and taking 90% of the stuff. RP 376.

McDaniel asked whether cancer and a self exam came up with Jane. RP 377. Strange says, "Yeah, sure, I did do that." RP 377. He explained it was through Jane's shirt and was in response to a question from Jane. RP 377. He commented Jane's breasts are relatively large and larger than

Melissa's. RP 379. He did not believe Melissa gave herself breast exams and when Jane asked about it, he responded "Sweetheart, I don't think that's necessarily appropriate." RP 379. He said he tried to show Jane on himself, but she didn't understand how it worked. RP 379. Strange told McDaniel he touched Jane where "it was not innocuous and said, this is what – you need to do." RP 379. He explained she then understood and he told her when she was doing the exam she "need to look to make sure there is no discharge." RP 379.

McDaniel told Strange he didn't understand about the innocuous and asked Strange to explain. RP 379. Strange said he touched Jane on the upper part towards her pectoralis majors, then down the sides, down to her armpit and down to the bottom. RP 379. With this explanation, McDaniel asked if Strange touched Jane's breasts. RP 379. Strange admitted he did, but tried not to. RP 379-380. McDaniel confronts Strange at this point, saying he's having a hard time understanding how if Strange is trying to show someone how to do a breast exam how he could not end up touching the breast, but just go around it. RP 380. Strange replies that he sees what McDaniel is trying to get at, but Strange says he was not trying to be sexual. RP 380.

McDaniel replies he's only trying to get at the truth, because Jane said he touched her breasts, but he says he did not. RP 380. The Defendant then admits that he did touch the sides of Jane's breasts, but never came in full contact with the breast. RP 381. McDaniel then says to Strange, why

Jane would say that he did have full contact, when he says he did not. RP 381. The Defendant admitted he was frazzled at this point. RP 382. McDaniel admits if he was in Defendant's shoes he would feel the same way. RP 382. However, McDaniel tells Strange his actions were questionable. RP 382. Strange agrees, admitting that after he did it he realized it was wrong and how someone could construe this as something it wasn't. RP 382. In hindsight, he admits he should have left it up to Melissa. PR 384.

McDaniel starts asking Strange for more details. When Strange denies touching Jane on her skin, McDaniel confronts him with Jane's story that he did go under her clothing. RP 385. Strange again denies this, explaining he didn't have any reason to try to lie and knows it would be perjury. RP 385. Strange admits he told Jane not to tell her mother, explaining it has to do with Melissa behavior. RP 386. McDaniel confronts him on this explanation, asking if his ex-wife would be ok with Strange doing this to his own 14 year-old daughter. RP 386.

Strange tries to explain to McDaniel that he never had an erection. RP 388. McDaniel tells Strange that giving a breast exam is unusual behavior for any man. RP 389. Strange explains he's just an open kind of man. RP 389. McDaniel tells Strange he can kind of see that, but he has a hard time believing the reason is just medical. RP 389. Strange maintains it was for medical reasons. RP 389. Strange acknowledges the situation doesn't look good, and he wished Jane would've stopped him. RP 390.

McDaniel tells Strange Jane said he touched her nipples (contrary to Jane's own statement). RP 390. He tells Strange he thinks Strange is telling him half-truths and he's dancing around the subject. RP 391. When Strange denies this, McDaniel explains at first Strange tells him it didn't happen, then he only touched around the breasts, then he says he touched the breasts. RP 391. Defendant then accuses McDaniel of using semantics. RP 391-392.

McDaniel repeats Strange's words to him that he did the breast exam and then told Jane not to tell her mother. RP 392-393. Strange admits this and then says he should have told Melissa. RP 393. When McDaniel gives Strange an out by saying maybe he and Jane remember things differently, Strange insists Jane is not a liar. RP 393. Strange then describes Jane's breasts as having extreme stretch marks and thinning. RP 395.

Strange asks McDaniel if he is going to be arrested. McDaniel tells him he will likely be charged, but he's not sure about the arrest. RP 396-397. He asks Strange if he thinks his behavior was appropriate. RP 397. Strange replies yes and it would be what any father would do, other than the comment about not telling. RP 397. McDaniel tells Strange that he disagrees. RP 397-398. McDaniel then says he has a hard time believing the whole story because of these kind of statements. RP 398. He then says that most single guys would have a female relative that could handle these things for them. RP 398. McDaniel says if the two of them just met and Strange was telling him this story that McDaniel would call BS on it. RP

398. McDaniel says he has nieces and he would never do this, and certainly not by himself. RP 398. He accuses Strange of trying to feed him a line. RP 398. McDaniel tells Strange that usually the truth in what two different sides are saying is usually in the middle. RP 399. He tries going over Strange's story and says he thinks Strange is giving out certain details to make his story better. RP 399. McDaniel continues to confront Strange with information about how it started. RP 403-407. Strange maintains Jane asked him and he would never do this on his own. RP 403-407. Strange then admits that he did something wrong and knows it. RP 407, 409

McDaniel tells Strange he is a truth seeker and doesn't want him to say anything that didn't happen. RP 410. McDaniel tells Strange he doesn't necessarily believe all, but is cut off by Strange telling him there are shades of grey in the story. RP 410. McDaniel again confronts him that Jane would be able to know whether the touching was on her bare breasts or over clothing, and there is isn't any history for her to make it up to get him in trouble. RP 410-411. Strange maintains it was over the clothing, but in looking back he should have done it a bit differently. RP 411-412, 415. McDaniel confronts Strange by saying that Strange can't name one reasonable person standard that would give their fourteen-year-old daughter a breast exam. RP 415. He tells Strange that a jury will not believe it was a medical reason because he didn't do it when Melissa was there or let Alex know what he was doing and told her not to say anything. RP 416-417. McDaniel tells Strange if there is another reason, now is the time to say it.

RP 417. McDaniel gives three reasons why Strange's story doesn't add up: 1) Strange isn't saying Jane is liar, 2) most women are not getting a breast exam from a doctor over their clothing, and 3) she is in the bed. RP 418.

After the State played the interview for the jury, the State had Detective McDaniel explain to the jury some of the tactics he used in the interview. McDaniel explained when he expressed belief in Jane's story he was using this as a tactic to get Strange to tell his side of the story. RP 424. He explained it is the same tactic he used when he confronted Strange about believing Strange. RP 424. Additionally, it is a tactic to start an interview as non-confrontational, but then switch to a more confrontational fashion at the end. RP 427. He also testified that after the interview with Strange he did additional investigation about the things Strange told him in the interview. RP 427-428.

The Defendant did not cross-examine McDaniel and did not testify. RP 428.

Procedural History

The matter proceed to trial on October 15, 2013. RP 1. The jury panel consisted of 56 members. CP 12-16. When asked by the judge if anyone had a personal experience with the charged crimes, either as a victim, witness, accused or had family members as such, 17 persons raised their hands. RP 27-29. Juror #5 indicated his father was convicted of a similar crime against a family member when #5 was about 10 years old. RP 28-29, CP 12.[2] He did not believe it would influence his consideration of the case. RP 29.

Juror #13 then told the court her ex-husband was convicted of child molestation against a neighbor. RP 30, CP 12. While #13 thought it might be a factor in the case, she indicated she could apply the law to the facts. RP 31. Juror #15 stated although her uncle and husband's cousin were convicted of such charges, they would not influence her. RP 31-32, CP 13. Juror #16 knew his neighbor was convicted of similar charges, but this would not pose a problem for him in sitting as a juror. RP 32-33, CP 13. Juror #21 had an ex-son-in-law charged with molesting his granddaughter a couple of months prior to the trial. RP 33-34, CP 13. He said the result was "a slap on the hand," and said he could not be fair. RP 34.

Juror #25 indicated her granddaughter was molested four years prior and the suspect was let go because of a lack of investigation. RP 35, CP 13.

[2] The State means no disrespect by referring to the juror as a number, but uses a number to protect that person's identity given the subject matter.

When she expressed negative feelings about the result, the judge in open court stated, "...nobody comes with a blank slate. We all have life experiences and things that impact us. Do you think in this case you would have the ability to listen to evidence that's presented, consider it in an impartial matter – manner with an open mind and – and render a fair decision." RP 36. Juror #25 thought this might be difficult. RP 36. Later during the State's voir dire, Juror #25 stated she could separate her own experience and be fair and impartial. RP 138-39.

Juror #27 stated even though his brother-in-law and cousin's ex-husband and multiple neighbors were convicted, he would not be influenced. RP 36-37, CP 14. Juror #30 stated she had a family member involved, but wanted to talk in private. RP 37-38, CP 14. Juror #43 stated his wife was molested as a child, but could be fair and impartial. RP 38, CP 15. Juror #45 stated he was on a previous jury involving the prosecutor that was later overturned, he did not state what the charges were. RP 39, CP 15. Juror #37 indicated he was close to multiple victims of abuse. RP 39, CP 14. He did not believe these relationships would cause a problem in "finding the truth. Only maybe in sentencing." RP 39-40.

Juror #47 expressed her difficulty in being present because of personal history and family history and began to cry. RP 40, CP 15. No questions were asked of her. RP 40. Juror #49 then stated she had an adopted sibling with a history that had a significant impact on their life. RP 40-41, CP 15. Additionally, because she is an elementary school principal

she see the results of abuse on victims. RP 41. She thought she might be impaired. RP 41. Later during questions from the State, the juror clarified her natural tendency is to protect children and listen to them because of her job. RP 139.

Juror # 52 indicated her son was a victim and she would not be able to listen to the evidence. RP 41-42, CP 16. Number 54 then stated two of his really close friends were victims and were affected. RP 42-43. The juror stated he wasn't sure if this would affect his ability to sit as a juror. RP 42. He did explain the perpetrator wasn't punished because the two victims did not come forward with the information in time. RP 42-43. Juror number 32 stated she currently mentored a victim who was in the middle of a case. RP 43, CP 14. She was unsure if this would affect her. RP 44.

Juror number 1 in response to a general question of impartiality stated he had a natural bias against the accusations because he had two friends that were accused of similar crimes. RP 69-70, CP 12. Another juror concurred explaining two family members were molested and the suspects got off "scot-free" and her daughter had to live with the repercussions. RP 70-71.

Juror #54 then reiterated his earlier conversation with the court. RP 72, CP 16. He stated "...it's not an easy accusation to make. Like, it is hard for people (inaudible). It's like if accusations were made there's something behind that." RP 72. When the court reviews the presumption of innocence

and asks Juror #54 if he could use and implement this presumption, the juror answers, "I don't – like, I don't have a ton of experience but it has just been my experience people don't make that accusation, you know, for no reason. Like, I feel like if an accusation was made there had to be something that had happened." RP 72.

At this point, out of the presence of the jury, the court excused Jurors #21, 23, 30, 39, 47, and 54. RP 74-80, 96, 97, CP 13-16. The State proceeded with voir dire. During the State's voir dire, Juror # 52 said she couldn't listen to the trial as it would bring up memories of what happened to her son. RP 107, CP 16. She explained that she hadn't made any decision about guilt, but that she couldn't listen. RP 107. Another juror explained in her situation the accusations were not reported because other family members did not believe the accusations and didn't want their children involved. RP 115. The juror stated she believed it happened because her daughter told her. RP 115.

At this point three jurors indicated they felt uncomfortable listening to the facts of such cases and worried they could not be fair. RP 119-125. Of the three, one stated she didn't want to participate and the second indicated he could. RP 120-121. The third juror stated she had a similar experience where she went back and forth about what to believe, ending up believing the abuse happened because the defendant pled guilty. RP 125-127.

The State covered topics of preconceived ideas of children lying, expected reactions of children to abuse, the timing of disclosures, and expectations of how children testify, RP 140-141, 147-154. The defendant also covered the topic of who did not feel comfortable listening the evidence and deciding the case. RP 178-180. A couple of jurors commented, but the majority did not indicate they would have a problem. RP 178-181. Defense counsel specifically asked the entire panel if they would base their decision on anything other than the testimony, exhibits and the law. RP 181. Upon hearing they would only base the decision the law and evidence, the defense attorney ended his voir dire. RP 182.

The court instructed the jury as to the charges. During closing argument the State argued when Strange touched Jane's breasts during the breast exam he committed sexual touching for the charge of Child Molestation. RP 448-467. At no time did the State ever argue Defendant touched Jane in any other sexual manner to constitute this charge. RP 448-467, 475-480.

IV. ARGUMENT

A. THE DEFENDANT FAILS TO SHOW HOW THE JURY VENIRE WAS BIASED WHEN THE COMMENTS BY PROSPECTIVE JURORS WERE NOT MADE BY A PERSON WITH EXPERTISE, WERE BASED UPON COMMON SENSE UNDERSTANDING OF SUCH CRIMES, AND WERE NOT A POSITION ON THE DEFENDANT'S GUILT.

i. Standard of Review

The Defendant argues under *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1997) he was denied a fair and impartial jury because the number of persons relating similar experiences tainted the entire venire. The Defendant does not state what level of review the court of appeals should use in the present case and the State professes confusion based upon the existing applicable law.

Most of the law considering jury taint comes from the federal courts and occurs when the defendant preserves the issue by objecting.

In *Mach*, the defendant moved for a mistrial on the basis of venire bias. He then raised the issue in a habeas corpus proceeding. Typically the review is "whether the error had substantial and injurious effect or influence in determining the jury's verdict." *Mach*, 137 F.3d 630, 632. This would be subject to a harmless error analysis. *Id.* at 633-34. However, when the issue raised involves a structural error, an error that affects the proceedings from the beginning, harmless error analysis does not apply. *Id.* The 9th circuit never reached the question of whether there was a structural error when the venire is tainted because they concluded even under the harmless

error there was substantial and injurious effect or influence on the verdict. *Id.* at 634.

In *U.S. v. Guzman*, 450 F.3d 627 (6th Cir, 2006), the court reviewed the trial court's voir dire for abuse of discretion, overturning only for manifest error. Both the Eighth and Seventh circuits seem to follow this review. *U.S. v. Lussier*, 423 F.3d 838 (8th Cir. 2005); *U.S. v. Wey*, 895 F.2d 429 (7th Cir, 1990). However, in each case the courts compare the facts of the case to *Mach* and distinguish them factually.

ii. The present case does not amount to jury taint under the facts of *Mach v. Stewart*, 137 F.3d 630 (1997).

In *Mach v. Stewart*, 137 F.3d 630, 632 (1997), a prospective juror was a social worker who stated she would have a difficult time being impartial because of her line of work. She told the entire panel she had a background in psychology, took courses, and worked extensively with psychologists and psychiatrists. *Id.* She stated in her cases sexual assault was confirmed in every case where it was reported and in her three years no child had lied about being sexually assaulted. *Id.* She repeated these statements a total of four times. *Id.* Mach moved for a mistrial arguing the entire panel was tainted. *Id.*

The Ninth circuit found the juror's statement amounted to expert testimony that did taint the jury. The court stated, [g]iven the nature of the [juror's] statement, the certainty with which they were delivered, the years of experience that led to them, and the number of times they were repeated," the court presumed at least one juror was tainted. *Id.* at 633.

In *U.S. v. Lussier*, 423 F.3d 838, 840 (2005), a prospective juror related to the panel he was familiar with the defense witness and this person was a neighborhood nuisance and he would have a problem judging his credibility. Lussier moved to strike the panel as tainted, but the court denied this motion. *Id.* Instead the court gave a curative instruction at the end of the case. *Id.* On appeal, the Eighth Circuit declined to apply *Mach* on these facts. *Id.* at 842. The court found the prospective juror's comments neither charged Lussier with a crime, nor had a bearing on Lussier's guilt of the crime charged. *Id.* While the comments could go to the witness' credibility they were neither expert-like nor highly inflammatory. *Id.* Moreover, the curative instruction to the jury cautioned them that nothing in jury selection was evidence. *Id.*

In *U.S. v. Wey*, 895 F.2d 429, 431 (7th Cir. 1990) a potential juror stated he would have trouble being impartial because of a personal experience where he was cheated by a firm and his personal experience was similar to the crime charged. Again, defense counsel moved for a mistrial. *Id.* The Seventh circuit agreed with the trial court, finding the juror did not express a view of the merits of the case and no other juror expressed doubt on this juror's statement. *Id.*

In *U.S. v. Guzman*, 450 F.3d 627, 628 (6th Cir. 2006), the court inquired whether the jury had any prior personal experience with the criminal justice system. In seven instances Guzman argued the response that a defendant was convicted, even in an unrelated case, could lead the

jury to conclude most criminal defendants are guilty. *Id.* In all, there were 15 prior instances of unrelated criminal prosecutions, 14 resulted in conviction. *Id.*

The Sixth circuit started with the presumptions of juror impartiality and that jurors follow trial court's instructions. *Id.* The court found Guzman presented no evidence of actual juror bias to overcome the presumptions and the argument of juror indoctrination was unpersuasive. *Id.* The court found that "[g]eneral statements about crime, the criminal justice system, and even the crimes charged are of no constitutional concern." *Id.* at 630. When statements do not regard the guilt or innocence of the defendant or relate to knowledge about facts, parties, or witnesses involved and when the court inquires of the panel if there is any specific reason they cannot be impartial, there is only speculation on the defendant's part. *Id.* Mere speculation is insufficient proof of taint. *Id.*; *State v. Doerr*, 193 Ariz. 56, 61-62, 969 P.2d 1168 (1998). The court relates that if they were to believe Guzman's argument, the entire voir dire process would have to be done entirely in camera to prevent the risk of complete venire contamination from innocent, extraneous remarks, without any corresponding benefit. *Id.* at 632.

In the present case, the defendant does not point to any specific juror who was tainted by the process. He argues because a juror who indicated he did not have a lot of experience, but had an opinion that accusations are not easy to make and felt there had to be something that happened, the panel

was tainted. Under the cases cited above, this is insufficient to prove any taint of the entire panel.

The facts in the present case are much different from a social worker, with the experience and expertise of someone in a position to know, vouching for victim's credibility. No juror who indicated any familiarity with victims or accusations was seated on the panel. Moreover, they were instructed the evidence had to come from the witness stand. CP 19-21.

B. THE DEFENDANT FAILS TO PROVE INEFFECTIVE ASSISTANCE OF COUNSEL AS THE EVIDENCE OF THE DETECTIVE CONFRONTING THE DEFENDANT WITH HIS STORY WAS ADMISSIBLE.

The Defendant argues defense counsel's failure to object to the video-taped interview of the defendant was ineffective as the officer gave his opinion of the defendant's credibility.

i. Standard of Review.

Both the Federal and Washington State Constitutions provide the right to assistance of counsel. *See State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302, 1306 (1978); *see also* U.S. CONST. AMEND. VI, WASH. CONST. ART. 1, § 22. "[T]he substance of this guarantee is that courts must make 'effective' appointments of counsel." *Jury*, 19 Wn.App. at 262, 576 P.2d at 1306 quoting *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). The test for determining effective counsel is whether: "[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *Id.* citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). Moreover, "[t]his test

places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby." *Id.* at 263, 576 P.2d at 1307. The first prong of this two-part test requires the defendant to show "that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122 (1986). The second prong requires the defendant to show "that there is a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different." *Id.* citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122 (1986).

To establish ineffective assistance for failure to object, Strange must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; 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 364 (1998), citing *State v. McFarland,* 127 Wn.2d 322, 336 and 337 n. 4, 899 P.2d 1251 (1995), and *State v. Hendrickson,* 129 Wn.2d 61, 80, 917 P.2d 563 (1996).

ii. Counsel's failure to object was a trial tactic.

"In considering claims of ineffective assistance of counsel, the courts have declined to find constitutional violations when the actions of counsel complained of go to the theory of the case or to trial tactics." *State v. Ermert*, 94 Wn.2d 839, 849, 621 P.2d 121, 126 (1980). Differences of opinion regarding trial strategy or tactics are not sufficient to prove a claim of ineffective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). "The decision of when or whether to object is a classic example of trial tactics." *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (Div 1, 1989). This court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *In Re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)).

In the present case it is a legitimate trial tactic for defense counsel to allow the entire video and confrontation by the officer to go to the jury. In the present case, Strange did not testify. In essence the interview by Detective McDaniel was the Defendant's best evidence of his defense. The Detective put every reasonable question to the Defendant, confronted him in every way possible, and the Defendant maintained his innocence, even in light of expressions of disbelief. The jury was able to see and view the body language, demeanor and expressions of the Defendant in an uninterrupted fashion. Had defense counsel objected to portions of the interview, it would

have taken away this evidence from the jury. The State would be forced to either cut up the video or more likely present a synopsis of the interview through the eyes of the detective. As such, the jury was not only able to hear the defendant's statements, but able to put them in context with all the information seeing a person can bring to bear on their credibility. This evidence clearly support the defendant's theory at trial and is a legitimate trial tactic.

iii. The defendant fails to show an objection would be sustained as the officer's comments did not amount to inadmissible opinion evidence.

The Defendant cannot meet his second burden to prove an objection to the evidence would likely have been sustained as the evidence was not improper opinion evidence.

In general, no witness is allowed to offer opinion evidence regarding guilt or veracity of the defendant, as it may invade the exclusive province of the jury. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). The Defendant argues when Detective McDaniel said to the defendant in his hour long interview that he did not believe the story, and was giving only half-truths, this was inadmissible opinion evidence. Def. Brf. at 23.

To determine whether statements are impermissible opinion testimony a court considers the circumstances of the case, including the following factors:

(1) "the type of witness involved,

(2) the specific nature of the testimony,

(3) [t]he nature of the charges,

(4) [t]he type of defense, and

(5) [t]he other evidence before the trier or fact."

Id. (citing *Seattle v. Heatley*, 70 Wn.App. 573, 577, 854 P.2d 658 (1993)). Only if the court determines the evidence violated the defendant's constitutional right to a jury trial is the admission error. *Id.* Additionally, even if the court finds the admission is error, the error is not automatically prejudicial. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). A defendant must still show the error would have changed the result. *State v. Smith*, 72 Wa.2d 479, 484, 434 P.2d 5 (1968), *see, State v. Kirkman*, 159 Wn.2d at 935.

In *State v. Demery*, the State played a taped interview for the jury between the police officers and the defendant. *Id.* at 756-57. During the interview, the officers made statements suggesting the defendant was lying. *Id.* at 756. The defendant appealed, arguing the statements were opinion testimony commenting on the defendant's veracity. *Id.* at 758.

After citing to the five factors above, the Supreme Court noted the officers' statements were not offered during live testimony at trial, but were on a tape and a part of a commonly used police interview technique designed

to see whether a defendant will change their story during the course of an interrogation. *Id.* 760. The Court found that [b]ecause the officers' statements were not made under oath at trial, ...they [did] not fall within the definition of opinion testimony." *Id.* The court expanded on this idea in a footnote saying a statement made out of court is inherently less reliable than a sworn statement, because at the time the statement is made the declarant is not subject to the safeguards of trial. *Id.* The Court also stated that out of court statements are considered differently than sworn testimony and jurors consider them less reliable. *Id.* The court found a jury will not give an "officer's statements in a pretrial interview any more weight than the fact the prosecutor chose to bring charges." *Id.* at 763 citing *Dubria v. Smith*, 224 F.3d 995, 1002 (9th Cir. 2000). Additionally, these statements are not the type that "carry any special aura of reliability." *Id.* The court affirmed their opinion was consistent with other cases, strengthening the court's stance to expressly decline an expansive view of opinion testimony. *Id.*

In addition to the nature of the testimony, the Supreme Court looked at the way in which the statements were offered in *Demery*. The Court agreed with the trial court that the statements were admitted solely to provide context for the responses offered by the defendant. *Id.* 761. The trial court found the defendant made relevant voluntary responses to the officers, and found the officers' statements were non-hearsay and necessary to provide context to the defendant's responses. *Id.* The Supreme Court did note the trial court should have given a limiting instruction to the jury explaining that only the

defendant's responses and not the officer's statements should be considered as evidence. *Id.* However, said the instruction was unnecessary in *Demery* because the jury was able to easily deduce the context. *Id.*

In considering the five factors under *Demery*, Detective McDaniel's was a police officer, but his testimony was not the type a jury would give a particular aura of reliability as demonstrated by *Demery*. *Id.* at 760. Moreover, the Defendant's statements were not a confession to the charges, but rather an argument over sexual gratification, and the other evidence at trial, particularly the Defendant's grooming behavior and voyeurism, was overwhelming to any statements Detective McDaniel made during the interview.

Additionally like *Demery*, the State offered McDaniel's testimony to showcase the Defendant's responses. Just like *Demery*, the Defendant's statements were made knowingly, intelligently, and voluntarily and after Miranda warnings. RP 356, 361-362. Each of Detective McDaniel's statements to Strange are linked in with a piece of evidence. For instance, McDaniel confronts Strange that Jane would be able to know whether the touching was on her bare breasts or over clothing. PR 410. There is isn't any history for her to make it up to get him in trouble. RP 410-411. Because Strange maintains it was over the clothing, but in looking back he should have done it a bit differently, McDaniel confronts Strange by saying that Strange can't name one reasonable person standard that would give their fourteen-year-old daughter a breast exam. RP 411-412, 415. He tells

Strange that a jury will not believe it was a medical reason because he didn't do it when Melissa was there or let Alex know what he was doing and told her not to say anything. RP 416-417. McDaniel tells Strange if there is another reason, now is the time to say it. RP 417. McDaniel reiterates the reason his explanation has holes is based upon Strange's own admissions: 1) Strange isn't saying Jane is liar, 2) most women are not getting a breast exam from a doctor over their clothing, and 3) they are in bed. RP 418.

In each instance where McDaniel gives a statement of belief, McDaniel backs the belief with a reason he tells to Strange. The jury could easily conclude McDaniel's testimony was offered to provide context to the responses. Moreover, after the interview was played to the jury, McDaniel explained when he told Strange he didn't believe him this was an interview tactic he was trained to use to get Strange to open up and tell his story. RP 424. Additionally, it is a tactic he uses to start an interview as non-confrontational, but then switch to a more confrontational fashion at the end. RP 427. He also testified that after the interview with Strange he did additional investigation about the things Strange told him in the interview. RP 427-428. All of these things combined, would not lead the jury to conclude McDaniel was substituting his opinion as to credibility over theirs. The court also instructed the jury they were the sole judges of credibility. CP 20.

As such the testimony was not inadmissible opinion testimony and counsel was not ineffective for failing to object.

iv. If there was error, the defendant does prove the result of the trial would have been different.

Lastly, the defendant cannot show the result of the trial would have been different if this evidence were excluded. The State case was a strong one. The State presented evidence the Defendant was grooming Jane Doe. He kissed her on the mouth when her mother was not present. Gave her back massages, suggested inappropriate underwear, hugged her, and was overall very touchy. He admitted the conduct of touching her breasts to give a breast exam, and told her not to tell her mother. Moreover, he said this conduct could be misconstrued, said he would have not done it differently, and wished the victim has stopped him. This case was not a question so much of what happened, but was there sexual motivation. The context of the events plus the other behavior, even if the act was above the shirt, would leave a jury to believe there was sexual motivation and the defendant was guilty.

C. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AND A PETRICH INSTRUCTION WAS NOT REQUIRED AS THERE WAS ONLY ONE EVENT OF TOUCHING FOR THE PURPOSES OF SEXUAL MOTIVATION.

The Defendant argues the trial court violated the Sixth Amendment right to a unanimous jury when it failed to give a Petrich instruction. Def. Brf at 25. However, the defendant received a constitutionally fair trial as the State did not present multiple acts evidence to support the charge.

The Defendant correctly cites the law regarding multiple act evidence. "When the State presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act." *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). If this does not happen there is error. *Id.* The error is subject to harmless error analysis. *Id.* An error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. *Id.* at 411. This approach presumes the error is prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged. *Id.*

The Defendant argues the State presented multiple act evidence when it elicited testimony from the victim the defendant rubbed her back and touched her butt once. Def. Brf. 27-28. Moreover, Defendant argues when Detective McDaniel told Strange Jane said he touched her butt, this was proof of this evidence. Def. Brf. 28.

The Defendant is inaccurate to conclude the State presented multiple act evidence. The evidence the Defendant touched Jane's butt was never presented to the jury as other act evidence of molestation. The State did elicit the testimony of Jane that during a back rub, the defendant touched her butt. This was not evidence of another act of molestation though, it was

evidence of sexual gratification and lustful disposition.[3] This evidence was never argued to the jury it was the basis of the Molestation charge. Additionally, the information presented by McDaniel to Strange in the interview was never corroborated by the victim on the stand. In fact it was denied by the victim. RP 238.

Additionally, in every part of the State's closing argument, it presented the breast exam evidence as supporting the charge of Child Molestation. The State never argued the evidence about Defendant touching Jane's butt. Given the State's argument of the breast exam evidence, the State did elect the evidence of the charge of Molestation as required under *Kitchen*.

Should the court believe this was a multiple act evidence case wherein the State did not elect, the error was harmless. In *State v. Camarillo*, 115 Wn.2d 60, 72, 794 P.2d 850 (1990), the Court found when the child testified with specificity about the details of the defendant's action and there was no conflicting testimony to place a reasonable doubt in the mind of a jury that the events did not happen as described, the error was harmless.

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[3]Evidence of a defendant's prior sexual acts against the same victim is admissible to show the defendant's lustful disposition toward that victim. *State v. Ray*, 116 Wash.2d 531, 547, 806 P.2d 1220 (1991). When considering lustful disposition, it is important that the prior conduct reveals a sexual desire for that particular victim. *See State v. Ferguson*, 100 Wash.2d 131, 134, 667 P.2d 68 (1983) (quoting *State v. Thorne*, 43 Wash.2d 47, 60–61, 260 P.2d 331 (1953)).

In the present case, there was no inconsistency in the victim's statement or testimony, certainly none pointed out by the Defendant. Moreover, this was a question of not whether Strange touched Jane's breasts, but whether it was done for the purposes of sexual gratification. Given the strength of the State's evidence, the Defendant's grooming behaviors and comments, and the Defendant's own inconsistency, there is no reasonable doubt in the mind of the jury.

V. CONCLUSION

For the foregoing reasons and arguments the court should affirm the conviction.

Respectfully submitted this 16th day of September, 2014.

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CERTIFICATE OF SERVICE

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington, on the 16th day of September, 2014.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

September 16, 2014 - 10:23 AM

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