NO. 47693-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

PAUL ALAN GILMORE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-01222-3

BRIEF OF RESPONDENT

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SERVICE		
	John A. Hays 1402 Broadway, Ste. 103 Longview, WA 98632 Email: jahayslaw@comcast.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED March 31, 2016, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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2. Whether defense counsel was ineffective for failing to object to evidence that was admissible?

3. Whether the trial court abused its discretion in not allowing Gilmore to wear his military uniform during trial?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Paul Alan Gilmore was charged in the original information filed in Kitsap County Superior Court with child molestation in the first degree, domestic violence. CP1. Several months later, a first amended information was filed charging count I child molestation first degree, with special allegations of domestic violence and abuse of a position of trust, count II communication with a minor for immoral purposes, with special allegation of domestic violence, and four counts (III, IV, v. and VI) of viewing depictions of minors engaged in sexually explicit conduct in the first degree ("viewing depictions") CP 21. Before trial, a second amended

information was filed with the same charges but omitting some alternatives on counts III, IV, V, and VI. CP 109.

Trial commenced on May 11, 2015. In opening statements, defense counsel placed the victim's credibility squarely in issue. He told the jury

> And you will find out that -- well,
> that the child has given -- her memory is faulty and
> she's given inconsistent allegations about the
> statement.
> Furthermore, you will learn that the people
> that know her best -- her mother, perhaps her
> grandmother to a lesser degree -- when they found out
> about these allegations, they either did not believe
> her or at least did not act consistent with someone
> who would believe their child.

SuppRP 13. Later, he points out that the victim's grandmother on hearing the victim's report "didn't do anything about it," and "[t]he next day didn't call police." SRP 15. And again, "[w]hat Kathy Brooks [the grandmother] will tell you is that they didn't really know what to believe. And these are the people that know her best." SRP 17.

Gilmore was found guilty of all counts. CP 146-148. Affirmative answers where given on the domestic violence and abuse of trust special

allegations. CP 149- 151. Gilmore received a standard range sentence. CP 221. This appeal was timely filed. CP 247.

B. FACTS

MB was eight years old and in the third grade at the time of trial. 3RP 305. She was at that time living in Oregon but had resided in Bremerton, Washington before that. 3RP 308 She had told her grandfather that she had a secret. 3RP 309. She didn't tell her grandfather the secret but told her mother and grandmother; telling her grandmother first. Id. She wrote in open court that she had told her grandmother "what he looked like" and "I also told her what was on the computer." 3RP 313.

MB related that she had seen things on a computer in her mom and dad's rom. 3RP 316. It was her dad's computer (3RP 318) and she knew the password. 3RP 367. Her dad was in the room and holding the computer when she saw it. 3RP 322. Her dad told her what was on the computer. 3RP 323. Eventually, she told her mother too. 3RP 325-26. She told her mom about a web site. 3RP 327. MB wrote down in open court what the web site was—"daddy's little girl giving him a blow job." 3RP 328. She had seen pictures and videos on the web site. 3RP 329. There were girls and boys and grownups and kids on the web site. Id. The people's clothes were off. 3RP 331. Their private parts were showing. 3RP 335. She said the male private parts looked like a pickle. 3RP 338. The people's private parts were going in each other. 3RP 340.

One day she went in her dad's room and saw him on the web site; she could see the pictures. 3RP 373-74.

MB testified to items in her mother's bedside table. 3RP 345. There was a "scrunchie like thing that vibrates and it was handcuffs." Id. Her dad was present when she saw this and told her that it was for vibrating another person. 3 RP 346. She had only looked in the bedside table in the company of her dad. 3RP 380.

MB and her dad were on the bed together. 3RP 350. She said her dad was the only one who ever touched her private part. 3RP 352. The part from which she goes "potty." 3 RP 353. At first she testified that he touched her with a part that looked like a pickle but correctd herself and said it was a finger. Id; 3RP 376. Her dad told her not to tell or there would be a divorce. 3RP 355.

MB's grandmother, Kathleen Brooks (K. Brooks), learned of MB's secret from her husband and came to Washington from Oregon to find out what was going on. 2RP 215. She took MB out to dinner. 2RP 218. She asked MB about the secret and MB "curled up into the booth," she was pale, anxious, ready to cry and tearful. Id. Later they watched a movie in bed and MB suddenly said "my daddy has me touch him when he's naked and we share a computer—daddy's little girl and something about a blow job." 2RP 220. Next day, K. Brooks told her daughter, Candice Brooks-Gilmore, who is MB's mother. 2RP 221. The two women looked on the

computer and failing to find anything they asked MB to show them. Id. MB typed in a password, the computer screen came up, Candice looked and slammed the computer shut. 2RP 222. K. Brooks took MB back to Oregon with her. 2RP 222-23. Eventually, K. Brooks contacted the police (2RP 224) without telling her daughter Candice. 2RP 233. At trial, the defense asked K. Brooks "Did you believe Mackenzie?" and she responded "Yes. But I wasn't sure." 2RP 232.

Candice Brooks-Gilmore recalled her mother telling her about MB's revelation. 2RP 245. When MB came home she, Ms. Brooks-Gilmore, asked her to go on the computer and show her what she had told her grandmother about. 2RP 246-47. MB typed in a password opened the web-browser and the screen populated with a pornographic video. 2RP 247. Ms. Brooks-Gilmore spoke with Paul Gilmore. 2RP 249. She did not take action initially not knowing who to believe. 2RP 249-50. Later, Ms. Brooks-Gilmore realized what was going on and "have not stopped supporting my daughter since." Id. The police had provided her with details of MB's statement. 2RP 266. On questioning by the defense, she said she was initially upset about Paul's arrest but after talking to police she was no longer upset and felt that if he was showing these things to MB he needed to be arrested. 2RP 269.

Child hearsay having been admitted, Alexandra "Sasha" Mangahas, a forensic interviewer, testified about her interview with MB.

2RP 275. The substance of that interview is contained in state's exhibit 1. [1] MB spoke to Ms. Mangahas about pictures and videos her dad would watch. She saw a bad website. She had shown her mother and typed it up for her. As she tried to remember what the bad website was, she recalled that her dad "has always been typing this in." She recalled that it was "Daughters giving her ... daddy's little giving him a ... that's all I remember of it." But she went on to recall that it was blow job. She related that her father would point at the screen and say "do you want to, do you want to," apparently meaning watch the video. She said she saw grownups and kids on the video. They were wearing nothing and she didn't like what the kids were doing or the adults. He described "fake picture" with a "talking bubble" saying "I don't want to do this but I'm being forced to do this," and the dad saying "tough you have to." She said that her dad said that the pictures are a secret. She said the thing with her dad happened a couple of times. Her dad tells her what he and her mom do at night. He did different things to her than he does to her mom. He showed her the sex toys in the bedside table. She wrote for Ms. Mangahas that 'he does putting his finger on my private part." It felt "weird." She said that her dad strips her and sometimes she would get mad and leave with her clothes back on. He touched her with his finger twice. He

[1] No page numbers appear on exhibit 1.

touched her private part with his private part. His body was "standing." His private part looks like a big pickle. Once he put his part on her forehead while she was asleep. On the computer she saw privates going into bodies, where you go pee and mouths. He puts vibrating things in her mom where she pees and told MB that she shakes. Her dad told her that she is not old enough to do that.

Additional testimony regarding police investigation of Gilmore's computer is addressed at length below in argument on Gilmore's claim of insufficient evidence on the viewing depictions counts.

III. ARGUMENT

A. EXPERT COMPUTER ANALYSIS, THE TESTIMONY OF THE CHILD MOLESTATION VICTIM, AND GILMORE'S ADMISSIONS PROVIDE MORE THAN SUFFICIENT EVIDENCE TO SUPPORT CONVICTION FOR VIEWING DEPICTIONS OF MINORS ENGAGED IN SEXUALLY EXPLICIT CONDUCT.

Gilmore argues that there is insufficient evidence to support his convictions for viewing depictions of minors engaged in sexually explicit conduct. This claim is without merit because substantial circumstantial evidence and reasonable inferences from that evidence support the

convictions. Further, Gilmore's argument ignores the testimony of MB and ignores his own admissions.

It is well settled that

> Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. On appeal, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences therefrom. We will reverse a conviction for insufficient evidence only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt. In evaluating the sufficiency of the evidence, circumstantial evidence is as probative as direct evidence.

State v. Garbaccio, 151 Wn.App. 716, 742, 214 P.3d 168 (2009) (internal citation omitted). Moreover, appellate courts defer to the trier of fact on issues of "conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Hernandez,* 85 Wn.App. 672, 675, 935 P.2d 623 (1997). Gilmore cannot overcome these very high standards in the present case.

In attempting to do so, Gilmore argues that the police did not find sexually explicit images <u>on</u> Gilmore's computer and that Detective Baker accessed prurient pictures on Gilmore's computer only months later. At bottom, he asserts that the evidence was insufficient to show that he actually viewed the offending material. In counts III, IV, V, and VI, Gilmore was accused of violating RCW 9.68A.075(1), which provides

> A person who intentionally views over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e) is guilty of viewing depictions of a minor engaged in sexually explicit conduct in the first degree, a class B felony punishable under chapter 9A.20 RCW.

Further, the legislature provides specific guidance on how the state is to prove this offense in subsection (3), which provides

> For the purposes of determining whether a person intentionally viewed over the internet a visual or printed matter depicting a minor engaged in sexually explicit conduct in subsection (1) or (2) of this section, the trier of fact shall consider the title, text, and content of the visual or printed matter, as well as the internet history, search terms, thumbnail images, downloading activity, expert computer forensic testimony, number of visual or printed matter depicting minors engaged in sexually explicit conduct, defendant's access to and control over the electronic device and its contents upon which the visual or printed matter was found, or any other relevant evidence. The state must prove beyond a reasonable doubt that the viewing was initiated by the user of the computer where the viewing occurred.

No reported case found explains the application of subsection (3). Certainly, subsection (3) appears to be a codification of the above quoted principle that circumstantial evidence is as probative as direct evidence. Clearly it applies to situations where no percipient witness can say they actually observed a defendant look at the prohibited material. The legislature appreciates that absent that direct evidence, the enumerated circumstances are sufficient to establish guilt. It is likely that many such cases would fall into this category.

However, this is not one of those cases as here we have nearly all

the evidence alluded to in subsection (3) and a percipient witness, MB. After MB's disclosure of abuse, police went to the Gilmore house and seized Paul Gilmore's computer. The computer was taken to the Washington State Patrol High Tech Crime Unit. RP 430; RP 393. WSP Detective Jason Keays examined the computer in light of the facts of case as relayed to him. He removed the hard-drive from the computer and connected it to a WSP computer. RP 393-94. The two things are mediated by a write blocker that will not allow the WSP computer to write data on to the hard-drive. RP 394. Then, a forensic image is created; a bit by bit copy of the hard-drive. Id. Software is used that looks for internet artifacts like searches, downloads, and things viewed. Id. Items are embedded on the hard-drive because the search mechanism will "cache" a web page and save "cookies," which record site visit information like user name, time a site is visited, and duration of the visit. RP 396.

Detective Keays searched Gilmore's hard-drive using search terms having to do with family sexual abuse. RP 398. He used "PTHC" which means "preteen hard core"; he used key word like "father," "daughter," "daddy," "incest." Id. The software goes through the hard-drive and generates a report identifying the queried terms. RP 399. Here, reports were generated for the terms listed. RP 400. The reports indicate internet links, whether the link was clicked on, how many times the site was

visited, and the date and time. RP 403. For instance, under the search tern "incest" the report indicated a web site called "dark incest.com." RP 406. The software will also reveal search queries used. RP 409. One search term used by the computer user was "illegal incest." RP 410.

Gilmore had clicked a link called "mom-daughter-sex.com," which was found under the search term "daughter." RP 414. The user profile on the hard-drive was "Paul." RP 421. Anyone on the computer could have this profile if it was not passworded or it the person knew the password (note that MB said she knew the password). RP 422.

Aaron Baker, a Kitsap county Sheriff's Office detective, was assigned to the case. RP 427. He reviewed MB's forensic interview in order to get context about the allegations in the case. RP 428. Thus he knew of MB's allegations of internet pornography being shown to her. RP 429. On service of a search warrant, he seized Gilmore's computer. Detective Baker interviewed Paul Gilmore.[2] RP 444. Gilmore admitted viewing pornography on the computer. Exhibit 4 at 6. He looks up just about anything having to do with pornography. Id. at 7. He has looked up pornography involving children but claimed it was by accident. Id. He admitted that he may have searched sites like "My daddy's Little Girl." Id. at 8. But he claimed these were not real children. Id. at 8 When asked

[2] The interview was published to the jury by video tape; state's exhibit 4.

if he would have looked up a web site called "Daddy's Little Girl Giving Him a Blow Job," Gilmore said first "possibly yes" and then "probably yeah." Id. at 9.

Eventually, Detective Baker received the computer back from WSP along with the reports of Detective Keay's work. RP 449-50. With the reports, Detective Baker was able to view the websites listed on the reports. Id. There were thousands of entries. Id. He went to a site that had images similar to those described by MB. RP 453. The heading of that page included words like "3-D incest, dash, forbidden incest dot-com, 3-D incest videos, 3-D incest pics." Id. He found the images included the kind of thought bubbles or thinking bubbles that MB had described. Id. Detective Baker found search terms regarding sexual relations between fathers and daughters, including "Daddy-daughter incest" and "Daddy's little girl, incest." RP 458-59. The user had typed in a search query "real young incest." RP 460.

Detective Baker indicated that in searching the URLs and typed in searches on Gilmore's computer, images popped up. RP 462. He testified as to his parenting experience raising his children and volunteering for youth activities. RP 463. Based thereon, he opined that the children depicted in the pictures that came up were under 16 years of age. RP 464. He thus described a few of many pictures with sexually explicit conduct

depicted. RP 464-66; 489, 492. When he typed in URLs from the reports of Gilmore's hard-drive, there would be "rows and rows" of images. RP 480. Detective Baker testified as to the time and dates of these visits, which coincided with the state's charging dates. In doing the review, they looked at hundreds or thousands of images. RP 505.

Taken together, the testimony of Detectives Keays and Baker provide a large amount of circumstantial evidence that Gilmore often accessed child pornography from his own computer. The two detectives provided expert forensic testimony, including title, text and content of web sites found on the computer, internet history, search terms, thumbnail images, download activity, and large numbers of visual and printed matter. Gilmore's access to and control over the computer was established. Thus the testimony covered all the circumstantial evidence underwritten by the legislature as establishing the offense plus Gilmore's admission that he has in fact been to those sites. RCW 9.68A.075 (3). But Gilmore argues that no direct evidence of viewing is shown and thus the evidence remains insufficient.

As noted this position ignores the fact that MB actually saw him viewing the material when he showed it to her. Thus more than sufficient circumstantial evidence supports MB's direct evidence of viewing. The evidence is thus somewhat overwhelming on this point and certainly is

sufficient under any view let alone in the light most favorable to the state. Gilmore's claim as to insufficient evidence on counts III, IV, V, and VI fails.

B. COUNSEL WAS NOT INEFFECTIVE AS THE EVIDENCE HE DID NOT OBJECT TO WAS ADMISSIBLE.

Gilmore next claims that his counsel was ineffective for failing to object to credibility evidence by one witness about another witness, exacerbated by closing argument on the point, to irrelevant evidence, and to improper opinion evidence. This claim is without merit because the defense raised the issue of credibility, because the pictures admitted served to corroborate the victim's testimony and tended to prove the elements of the viewing depictions counts and Gilmore's state of mind regarding the child molestation and communication with a minor counts, and because the police officer's opinions were not improper expert opinions.

In order to establish that counsel was ineffective, a defendant must show that counsel's conduct was deficient and that the deficient performance resulted in prejudice. *State v. Brockob*, 159 Wn.2d 311, 344–45, 150 P.3d 59 (2006); *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Both prongs of Strickland need not be considered if a defendant's showing on one prong is insufficient. *In re*

Pers. Restraint of Crace, 174 Wn.2d 835, 847, 280 P.3d 1102 (2012). To show deficient representation, the defendant must show that it fell below an objective standard of reasonableness based on all the circumstances. *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P .2d 1251 (1995). The defendant must overcome a strong presumption that counsel's performance was not deficient. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Further, scrutiny of counsel's performance is highly deferential, including the strong presumption of reasonableness. *State v. Thomas,* 109 Wn.2d 222, 226, 743 P.2d 816 (1987). This particularly when the alleged deficient performance is failure to object: "the decision of when and whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *State v. Madison,* 53 Wn.App. 754, 763, 770 P.2d 662 (1989). On such a claim, "a defendant must show that an objection would likely have been sustained." *State v. Fortun-Cebada,* 158 Wn.App. 158, 172, 241 P.3d 800 (2010).

1. ***Defense counsel was not ineffective for not objecting to credibility evidence from one witness about another or for not objecting to the state's argument of the same when the defense placed the issue of credibility in issue.***

Gilmore properly observes that in the normal course opinion testimony by a witness about the credibility of another witness is

objectionable. But here, from opening statement on, the defense placed MB's credibility in issue, claiming that her mother and grandmother did not believe her. See excerpt of opening *supra*. Thus, the state did nothing but rebut this defense assertion and prove that if in fact those witnesses questioned the allegations at the outset, they later believed them. The defense, then, sought the very sort of credibility opinions that Gilmore now assails on appeal.

Gilmore wanted the jury to believe that since MB's mother and grandmother, the people who know her best, didn't believe MB that the jury should not either. The Washington Supreme Court has noted that this state of litigation is not unusual.

> In incest rape cases, the defense frequently chooses to attack the credibility of the alleged victim where the complainant is the only witness. Under such circumstances, it is not unusual for the trier of fact to be presented with evidence of an extremely unstable family unit. A child has accused his or her parent of rape, and the parent accuses the child of making false and malicious accusations of a particularly abhorrent nature. In the face of such distasteful, contradictory, emotional and perturbing testimony, a judge or juror who did not have personal knowledge or some type of exposure to such familial patterns may well not know how to understand the actions and reactions of the parties.

State v. Black, 109 Wn.2d 336, 353, 745 P.2d 12 (1987) (Utter, J. concurring). And so in the present case. Here, the defense from the outset of trial attacked MB's credibility. Moreover, this is a classic case where lay jurors, presumably uninitiated in these sorts of familial situations, would find it difficult to understand the actions and reactions of the people

involved.

Moreover, it is the reactions of MB's mother and grandmother that Gilmore focused on. It has been observed that "in particular cases, the credibility of a witness may be an inevitable, central issue." *State v. Petrich,* 101 Wn.2d 566, 575, 683 P.2d 173 (1984). Here, MB's credibility was indeed a central issue. Further,

> Cases involving crimes against children generally put in issue the credibility of the complaining witness, especially if defendant denies the acts charged and the child asserts their commission. An attack on the credibility of these witnesses, however slight, may justify corroborating evidence.

Id; *see State v. Jensen,* 5 Wn.App. 636, 638, 489 P.2d 1136 (1971) (credibility critical where statements of complaining witness uncorroborated). In the present case, the defense was based on attacking MB's credibility. Thus, there is justification for corroborating evidence. *See also State v. Froehlich*, 96 Wn.2d 301, 635 P.2d 127 (1981) (corroborative expert testimony allowed because defense had attacked complaining witness' competency and credibility).

In circumstances where the defense places the complaining witness' credibility in issue, failure to object reflects this strategy. In *State v. Soonalole,* 99 Wn.App. 207, 992 P.2d 541 (2000), appellant argued ineffective assistance of counsel for failing to object to credibility evidence regarding the complaining witness. The Court of Appeals noted

that the ineffective assistance claim constituted bootstrapping of an unpreserved error into a constitutional error that may be raised for the first time on appeal. Id. at 215; *see State v. Kirkman,* 159 Wn.2d 918, 936, 155 P.3d 125 (2007) ("admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a manifest constitutional error.") The *Soonalole* Court held

> Using the various statements MT made, counsel attempted to undermine her credibility. The statements to her sister, her mother, and her uncle could be classified as inconsistent, at least in part. In closing argument counsel argued that the case was a straight credibility call between Soonalole and MT. Counsel claimed that MT's testimony was not credible because she told different versions of the events to her mother and uncle. The record clearly establishes that defense counsel's failure to object to these repetitions was a tactical decision. There was no ineffective assistance of counsel.

Id. Similarly, in the present case, the failure to object can be seen as tactical. Moreover, the defense clearly opened the door to inquiry about MB's credibility and in these circumstances it is unlikely that an objection would have been sustained. The failure to object to the testimony of MB's mother and grandmother was not deficient.

Nor was it then deficient to not object to the prosecutor's reference to this evidence in argument. Trial court rulings on improper prosecution arguments generally are reviewed for abuse of discretion. *State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008). Here, the trial court could not exercise its discretion because Gilmore did not object.

"Failure to object to a prosecutor's improper remark constitutes waiver unless the remark is deemed to be so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Edvalds*, 157 Wn.App. 517, 522, 237 P.3d 368 (2010) (citing *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)). "The absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *Edvalds*, 157 Wn.App. at 525-26. "A court must consider the comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." 157 Wn.App. at 522.

"A prosecutor does not commit misconduct anytime he mentions credibility." *State v. Edvalds,* 157 Wn.App. 517, 525, 237 P.3d 368 (2010). In *Edvalds*, the prosecutor prefaced impeachment questions to the defendant with the words "in truth." Other questions were prefaced with the phrase "you expect the jury to believe," and "you expect the jury to believe that you're being up front with them with that testimony; is that right?" Edvalds claimed that these questions constituted misconduct; but the Court of Appeals disagreed, holding

> It is improper for a prosecutor to make comments which express a personal opinion of witness veracity. But, a prosecutor may

> comment on a witness's veracity as long as a personal opinion is not expressed and as long as the comments are not intended to incite the passion of the jury. Because the prosecutor did not offer a personal opinion or incite the passion of the jury, the comments here do not rise to the level of the reversible comments made by the prosecutor in Stith.

Edvalds, 157 Wn. App. at 525 (internal citation omitted). The reference is to *State v. Stith*, 71 Wn. App. 517, 237 P.3d 368 (1993), wherein reversal was had when the prosecution argued that to believe the defendant was to call the police liars, that the defendant had only recently gotten out of prison, and that guilt was already established by a previous judicial finding of probable cause. *Edvalds*, 157 Wn.App. at 525-26. As in *Edvalds*, in the present case, the prosecutor's argument does not rise to the level of *Stith*.

Counsel herein simply argued the crucial evidence in the case, the unobjected to credibility testimony, on the primary issue in the case, MB's credibility. The prosecutor never injected her personal opinion into the case. Here, the prosecutor's argument went to what Candice Brooks-Gilmore said:

> And Candice was the same way. Candice
> described being stuck between a rock and a hard place.
> On the one hand, her eight-year-old is disclosing that
> her husband has been molesting her and showing her
> images on the computer. And on the other hand, her
> husband is denying it, a man that she's known for over 20 years.
> And again, when you are put in that
> position, hindsight is 20/20. We can go back and say,
> hey man, she should have reported to law enforcement
> right away.
> But actually her actions make more sense. I
> wanted to let the dust settle and figure out what was

> going on here because we have two people that I didn't want to necessarily -- I didn't want to believe Mackenzie. I wanted to believe that this man who I had married, had a child with, had known for 20 years would not do this.
> But then when law enforcement came and told her some of the disclosures that Mackenzie had made, it became absolutely clear to her that her daughter was telling the truth. And what she said was, I haven't stopped supporting my daughter since.
> Does Mackenzie have a motive to lie?

RP 622-23. Further,

> Greater latitude is given in closing argument than in cross examination. Counsel may comment on a witness's veracity or invite the jury to make reasonable inferences from the evidence so long as counsel does not express a personal opinion.

State v. Stover, 67 Wn.App. 228, 232, 834 P.2d 671 (1992). Given the issues in the case, it was not deficient performance to not object to the prosecutor's argument that directly confronted the defense theory.

2. ***Trial counsel was not ineffective for failing to object to the admission of images of minors engaged in sexually explicit conduct.***

Gilmore claims that trial counsel should have objected when the state offered exhibits 21-24. Brief at 29-32. These exhibits are not in the record on review[3] but are described by Detective Baker as follows:

Exhibit 22, two photographs:

> It's a female that appears to be under the age of 16.

[3] The record reflects that these exhibits were ordered by Gilmore in a Supplemental Designation of Clerk's Papers dated December 14, 2015. A review of the trial court file indicates that Gilmore's counsel was advised that those exhibits had been ordered to be sealed and no motion to unseal is in the record.

She has -- she has darker brown hair. She's a white female. She's wearing a -- looks to be a gray sweatshirt. Her eyes are closed. She has her head kind of turned to the right.

RP 464

So she appears to be laying down. Her head and her upper body are on some kind of an object. I don't know if it is a pillow or a bed or something, but she appears to be laying down. Her eyes are closed, her head is off to the right. Her mouth is closed. It appears just a few fingertips are in -- the photo is cropped, meaning her head from about here down is visible, and from the corner of here is visible. Actually, here, her right side. Her left ear is visible. So it appears that her fingers -- the image is cropped up to about the top of her fingers so they are about in this position on her gray sweatshirt.

And then there's a white male holding an erect penis less than an inch away from her lips. And the left -- the male's left hand is holding the erect penis very close to her lips. Like I said, within an inch. And then again the image is cropped so as to only show about this much of the male's hand.

RP 465, and

Again, under the age of 16. Female, white female. She is not wearing any clothing on her upper body. She has darker brown hair. Her head is kind of positioned up and her eyes are closed. And then there are two erect penises in her face. The one on the right is of a male holding his erect penis in his left hand. There's semen on her face. And then the erect penis on her left looks like it is touching her cheek right about in this location.
Again the image is cropped, so it shows basically the female's -- the tops -- she appears to be squatting, so the image is looking down. It shows the top of her left thigh, her exposed breasts, her right shoulder. There's some text in the bottom of the image that reads –

RP 466. Exhibit 23 is described as including "many, many, many images." RP 486. One is described as

> The first one, again, is -- would be that Bing home page. The border around the cropped image is dark. There's a cropped image of a white male, doesn't have any clothing on. You can see basically from just above his belly button down; he's got some hair on his lower body. And there is a white female that appears to be under the age of 16 lying in between his legs holding on to his erect penis close to her face.

RP 486. And,

> Two -- again, Bing screen shot image, dark screen, again with a number of smaller photos to the right. Cropped photo in the center of the screen with two white females, a white male that's cropped just above his genitals, erect penis in the mouth of one of the female's. And there's another female to the left that appears to be under the age of 16 with her tongue on his testicles.

RP 487. Exhibit 24, again describing two of many pictures

> The first one is the same image as in the last exhibit of a white male straddling over a white female that appears to be under the age of 16.
> The second image is a different image, again, dark screen shot, many photos on the right-hand side. And on this image it is a cropped image of a white -- or a white male that appears to be standing over two white females. There is a white female in the rear of the younger female. The one in the rear appears to be 30 to 40 years old. She appears to have clothes on. She is kneeling behind a white female that appears to me to be approximately 6 to 8 years old, under 10. The image is cropped, so you can see basically the top of her shoulders. She is blindfolded. She has light blonde hair very thin and wispy. And the older female

> behind the younger white female is holding her mouth open and the male has his erect penis inside of her mouth.

RP 489. Exhibit 21

> On the left side of the screen there was four images, and then there's -- the right side is dark but there's text within boxes: "Taboo paradise," "dad and girl taboo," "forced family sex," "dad and girl videos." And then the third image down, though, is of a young Asian female, appears under the age of 16, lying on her back, dark hair, with an erect penis over her, slightly in her mouth.

RP 492. These, then, are the images that Gilmore claims were irrelevant in this prosecution for viewing depictions of minors engaged in sexually explicit conduct. Admissibility of evidence is addressed to the sound discretion of the trial court. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001).

As noted by Gilmore, relevant evidence is "evidence 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." ER 401. "The threshold to admit relevant evidence is low; even minimally relevant evidence is admissible." *Mutual of Enumclaw Ins. Co. v. Gregg Roofing*, 178 Wn.App. 702, 729, 315 P.3d 1143 (2013), *rev denied*, 180 Wn.2d 1011 (2014). Relevant evidence includes "facts which offer direct or circumstantial evidence of any element of a claim or defense." *State v. Weaville*, 162 Wn.App. 801, 818,

256 P.3d 426 (2011). Without doubt, pictures of minors engaged in sexually explicit conduct that were the result of accessing web sites found on Gilmore's computer have a strong tendency to prove that Gilmore in fact "viewed' such depictions as charged. Certainly that is in part the import of RCW 9.68A.075 (3) discussed *supra.* Although the state cannot find the phrase "logical nexus" in the case cited by Gilmore, that case does assert that "[r]elevancy means a logical relation between evidence and the fact to be established." *State v. Whalon,* 1 Wn.App. 785, 791, 464 P.2d 730 (1970). Here the fact to be established was, again, that he viewed this material. What material? the jury may ask. The answer is the material admitted and much more not directly discussed from the witness stand. This evidence simply was relevant. It is at least unlikely that an objection to this relevant evidence would have been sustained.

Sadly, this type of evidence will always attend a prosecution of this sort. The state need not shrink from proving its case simply because the proof includes relatively disgusting images that the court and the jury would rather not have to see. Such is the case with gruesome pictures of a victim in a murder prosecution where the state must prove the manner of death. *See State v. Burkins,* 94 Wn.App. 677, 691, 973 P.2d 15 (1999), *rev denied* 138 Wn.2d 1014 (1999). Thus ER 403 provides that probative value must be "substantially outweighed" by the danger of unfair prejudice. Analysis under ER 403 begins with the finding that the

evidence is otherwise relevant ("although relevant") and thus "evidence is presumed admissible under ER 403." *Burkins* at 692. Further, crucial to the present case, "[w]ether evidence actually plays a part in a crime is not the definition of relevant evidence." Id. at 693*; see also State v. Quigg*, 72 Wn.App. 828, 866 P.2d 655 (1994) (in child rape case, a story written by defendant having similarity with the acts done to the victim admitted though not proving element of crime).

The pictures admitted tend to establish the type of image viewed by the user of Gilmore's computer and tend to prove Gilmore's grooming of MB in that these or similar pictures were shown to MB; in short, they tend to prove his state of mind. *See State v. Luther*, 157 Wn.2d 63, *77*, 134 P.3d 205 (2006) (even depictions arguably protected by the First Amendment (i.e., depictions of adults) may be probative of defendant's state of mind regarding child pornography). More generally, in prosecutions involving child pornography, the evidence against the accused will always be of this nature and in such prosecutions will always have very high probative value just as it did in the present case. Here, the evidence was not gratuitous and the state limited its presentation to what amounts to samples of the thousands of images discovered on the web sites that were visited on Gilmore's computer. There was no deficiency in failing to object to this highly probative evidence.

3. ***Detective Baker's opinion that the images he described appeared to be of women under the age of 16 was not improper opinion evidence.***

Gilmore claims that the admission of Detective Baker's testimony that the female images in the pictures appeared to be under the age of 16 constitutes improper opinion evidence and as such defense counsel should have objected to those opinions. The allegedly offending testimony is included *supra*. There was adequate foundation lain for this testimony. The foundation was

> Q. Okay. And let me ask you what experience you have with children? Do you have any experience with children?
> A. I have three.
> Q. Okay. And do they span an age?
> A. Yes. My older -- sorry.
> Q. That's fine.
> Do you also have other experience with children?
> A. Yes. I occasionally volunteer at my kids' -- my kids' classrooms. I also volunteer helping with their little league, coaching little league baseball.
> Q. So do you have some experience with generally assessing kids' age?
> A. Generally.
> Q. Okay. And what do you mean by "generally"?
> A. My oldest daughter, and I've watched her grow up until nearly 21 years old.
> Q. So you've seen her go through stages?
> A. Yes. And my two sons, I've watched them grow up until 7 and 11 years old.
> Q. So is it safe to say you can't say, you know, that person right there is 11 years old, if you don't know them?
> A. Correct.
> Q. But could you -- do you feel comfortable just based on your experience giving a general age?
> A. Yes.

RP 463-64. Notably, Detective Baker claimed no scientific education or specialized training in age identification. He merely said that he could put a general age on the images being discussed based on his experience with children.

Such evidentiary rulings are normally reviewed for abuse of discretion. *State v. McPherson*, 111 Wn.App. 747, 761, 46 P.3d 284 (2002). Moreover, "[w]hen the question pertains to expert opinion evidence, the trial court does not abuse its discretion if the ruling is fairly debatable." Id.; *citing Fraser v. Beutel*, 56 Wn.App. 725, 734, 785 P.2d 470 (1990). But of course the trial court could not exercise its discretion on the present issue because there was no objection. Here also, Gilmore's failure to include the actual images in the record diminishes argument on the point. *See State v. Wade*, 138 Wn.2d 460, 465, 979 P.2d 850 (1999) ("An appellate court may decline to address a claimed error when faced with a material omission in the record."). This Court cannot look for itself and consider the reasonableness of the opinions. *See State v. Luther*, 157 Wn.2d 63, 81, 134 P.3d 205 (2006) ("courts acting as triers of fact often rely on visual observations to determine whether an individual depicted is a minor.") *citing U.S. v. Riccardi*, 405 F.3d 852, 870 (10th Cir.) (while expert testimony may be necessary in some cases to establish that a person depicted is a minor, this judgment is made on a case-by-case basis, and in some cases the trier of fact may determine beyond a reasonable doubt

whether the person depicted is a minor without the assistance of an expert), *cert. denied*, 546 U.S. 919, 126 S.Ct. 299, 163 L.Ed.2d 260 (2005).

The jury retains the sole authority to determine the credibility and persuasiveness of the evidence presented. ER 701 allows admission of lay opinions, it provides

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

"Lay witnesses also may now give opinions or inferences based upon rational perceptions that help the jury understand the witness's testimony and that are not based upon scientific or specialized knowledge" under ER 701. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Further, under ER 704, an opinion is not inadmissible simply because it embraces an ultimate issue in the case. Thus, "[t]he mere fact that an expert opinion covers an issue that the jury has to pass upon does not call for automatic exclusion." *Montgomery*, 163 Wn.2d at 590; *see also Seattle v. Heatley*, 70 Wn.App. 573, 854 P.2d 658 (1993), *rev. denied*, 123 Wn.2d 1011 (1994).

In *State v. Ortiz*, 119 Wn.2d 294, 831 P.2d 1060, the Supreme Court considered a challenge to the opinions of a tracker employed by the United States Border Patrol. Id. at 297. He testified that the track he

followed allowed him to determine the size and weight of the individual as well as the person's familiarity with the land traversed and the person's relative age and ethnicity. Id. Ortiz argued that these were neither proper lay opinions, nor proper expert opinions. The court cited ER 701 and added

> Under Rule 701 and Rule 602, the witness must have personal knowledge of matter that forms the basis of testimony of opinion; the testimony must be based rationally upon the perception of the witness; and of course, the opinion must be helpful to the jury (the principal test).

Id. at 308-09 (page break omitted) *citing* E. Cleary, *McCormick on Evidence* 29 (3d ed. 1984).

Applying these rules, the *Ortiz* Court held that the trial court did not abuse its discretion in admitting the tracker's testimony as a lay opinion. Id. at 309. The witness had laid out how he had learned his craft and his experience doing the job. On the "principle test," the Court found that the evidence was helpful to the trier of fact. Id. Similarly in the present case, Detective Baker was able to give a lay opinion about the images he was viewing. Even though his testimony was likely not as useful as the tracker's testimony in *Ortiz*, Detective Baker had knowledge of the images and generally had knowledge from experience in identifying the age of children. His testimony was rationally based on experience with children and his perception of the children depicted. And, finally, his testimony was helpful in explaining his testimony about child

pornography, which of course constituted a fact in issue in the case. There would have been no abuse of discretion in admitting his opinions even had there had been an objection.

But the *Ortiz* Court was not done. It also affirmed the testimony as expert testimony. The crucial rule here is that "practical experience is sufficient to qualify a witness as an expert." Id. at 310. The Court noted that the tracker's testimony was based upon "his own practical experience and acquired knowledge." Id. at 311. Detective Baker's testimony had a similar foundation. And, "[m]oreover no particularized background knowledge would be necessary to an understanding of the evidence [the tracker] presented." Thus the tracker's evidence did not need to meet the test for the admissibility of novel scientific evidence. Id. (*Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923)). The Supreme Court gave deference to the jury's role noting that "the testimony was not so technical that a jury could not judge its reliability for itself." Id. And, "[i]t was for the jury to decide what weight should be attached to [the tracker's] testimony." Id.

The same is true in the present case. Detective Baker's testimony required no particularized background knowledge; his experience in raising his children suffices. Moreover, the evidence was not so technical that the jury could not decide for itself whether or not the opinions were reliable. *See Luther, supra* (triers of fact use visual observations in deciding age of person depicted). Detective Baker's opinions were

expressly identified as generalizations based on child-rearing experience. The jury maintained its position as the sole judges of the credibility and weight of the evidence. Detective Baker's testimony was more consistent with common sense and direct observation of the facts than it was with special training or education. His opinions were subject to cross-examination. They included no comment on the defendant's guilt or credibility. It was not deficient performance to not object.

Thus, on all three evidentiary issues raised by Gilmore in this ineffective assistance claim, analysis shows that objections would have been unavailing. Each piece was admissible. There is therefore no reasonable probability that the outcome would have been different. Gilmore's claim fails on the deficient performance prong and he cannot establish prejudice. His ineffective assistance claim fails.

C. THE TRIAL COURT RULING THAT GILMORE COULD NOT WEAR HIS MILITARY UNIFORM AT TRIAL WAS NOT PRESERVED FOR APPEAL AND WAS NOT AN ABUSE OF DISCRETION.

Gilmore next claims that the trial court abused its discretion by ruling that Gilmore could not wear his military uniform during trial. This claim is without merit because the issue was not preserved and because the trial court did not rule on untenable or unreasonable grounds.

First, the record is clear that Gilmore did not preserve this issue; he

conceded the point and lodged no objection. When the state raised the issue in motions in limine, the following discussion occurred between the trial court and defense counsel:

> Well, Your Honor, I'm familiar with this motion in limine. I've researched the issue. I would agree with -- there is a finding that basically in a civilian trial there is no right for the defendant to wear a military uniform. Mr. Gilmore is in the military. I'm not sure that he is still in. I think, officially, he's not been terminated from the military. From talking to his family this morning, his intention was to wear a Navy uniform during the trial. So I would say that Mr. Gilmore -- he would prefer to wear the uniform.
> THE COURT: So are you familiar with the case of State v. Gregory which is cited in the motion
> MR. KIBBE: I am aware of that case and another case more recently that I read this morning.
> THE COURT: So do you -- I mean, do you have any legal argument that would support your position for your client to wear a uniform?
> MR. KIBBE: No, Your Honor.
> THE COURT: Okay. So without any legal authority presented, I'm granting the State's request. So there will not be a wearing of military uniform in the trial.

1RP 7-8. Gilmore did not object to the ruling and conceded that there was no legal argument against the state's position. Under RAP 2.5(a), the issue does not implicate the trial court's jurisdiction, the sufficiency of the evidence, or a manifest error affecting a constitutional right. The issue was not preserved for appeal. *See State v. Roberts,* 73 Wn.App. 141, 145, 867 P.2d 697 (appellate court will consider only the specific objection raised below) *rev denied* 124 Wn.2d 1022 (1994).

Second, Gilmore asserts that the issue has not been addressed by the courts of this state. Brief at 37. The state respectfully disagrees. As early as 1971, this issue was discussed by the Washington Supreme Court in *State v. Gregory, infra.* There, the issue was addressed as follows

> Finally, appellant urges that the trial court erred in permitting the prosecutor to question him regarding prior acts of alleged misconduct. Specifically, the prosecutor, over appellant's objection, asked appellant if he was, at the time of trial, AWOL. Appellant responded in the affirmative.
>
> Appellant contends that such question was directed to a prior, unrelated act of misconduct. He argues that the question was improper first because the alleged misconduct had not culminated in a conviction, and, additionally, because appellant had not placed his character in issue at trial.
>
> The trial court, in allowing the question, determined that appellant had, in fact, placed his character in issue at trial. We agree. Appellant wore his military uniform throughout the trial, in addition to testifying at some length regarding his distinguished military career. Thus, the question was permissible as an attack upon appellant's character which the appellant, himself, had placed in issue.

State v. Gregory, 79 Wn.2d 637,646, 488 P.2d 757 (1971) (emphasis

added); *overruled on other grounds, State v. Rogers,* 83 Wn.2d 553, 520 P.2d 159 (1974). The case may not answer the present question but it does establish that the wearing of a military uniform constitutes a legal issue with regard to a defendant's character.

Under ER 404(a)(1), a criminal defendant may offer evidence of a 'pertinent trait of his character' to rebut the nature of the charged offense. '[A] pertinent character trait is one that tends to make the existence of any material fact more or less probable than it would be without evidence of that trait." *State v. Eakins*, 127 Wn.2d 490, 495–96, 902 P.2d 1236 (1995). The character trait must be relevant to the commission of the crime charged. ER 404(a). Through the use of character evidence, "the defendant generally seeks to have the jury conclude that one of such character would not have committed the crime charged." *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000) (*quoting State v. Kelly*, 102 Wn.2d 188, 195, 685 P.2d 564 (1984)).

Gilmore cites *Johnson v. Commonwealth of Virgina,* 19 Va.App. 163, 449 S.E.2d 819 (1994), and correctly argues that that court disapproved of a trial court order disallowing the defendant from wearing his military uniform. But that court concluded that the ruling was harmless, the verdict would have been the same, saying "Just as appearing in uniform would have worked Johnson no advantage, appearing in

civilian dress worked him no disadvantage." Id. at 166.

Gilmore was properly prohibited from wearing his military uniform. Here, his military service was not a "pertinent trait of character" with respect to the charges. He expects that such clothing would provide him with essentially un-rebuttable good character evidence, bolstering his credibility. He says as much in arguing that this ruling caused prejudice. Brief at 38. Disallowing this advantage, even if illusory as the court in Virginia found, was not untenable or manifestly unreasonable.

The issue should not be addressed because not preserved. If addressed, no abuse of discretion should be found. If abuse is found, Gilmore fails to establish substantial prejudice from this non-constitutional claim. The trial court should be affirmed.

IV. CONCLUSION

For the foregoing reasons, Gilmore's conviction and sentence should be affirmed.

DATED March 31, 2016.

Respectfully submitted,

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KITSAP COUNTY PROSECUTOR

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