96483-1

NO. 35370-2-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JERREMY JOE GMEINER,

Defendant/Appellant.

AMENDED PETITION FOR DISCRETIONARY REVIEW

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1. IDENTITY OF PETITIONER

JERREMY JOE GMEINER requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Gmeiner seeks review of an unpublished decision of Division III of the Court of Appeals dated October 9, 2018. (Appendix "A" 1-16)

3. ISSUE PRESENTED FOR REVIEW

Does the Court of Appeals reliance on *State v. Shafer*, 156 Wn.2d 381, 128 P.3d 87 (2006) contravene *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990) and *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984)?

4. STATEMENT OF THE CASE

Sarah Gmeiner is Mr. Gmeiner's sister. She has a three-year-old daughter A.B.G. who was born on May 31, 2013. (Cochran RP 265, ll. 24-25; RP 266, ll. 5-6; ll. 18-19; RP 752, ll. 16-17)

On September 21, 2016 Mr. Gmeiner contacted his sister for a massage. She is both a licensed massage therapist and a physical therapist. He arrived later that day, received the massage, and they then visited. (Cochran RP 270, l. 6; RP 271, ll. 14-22; RP 273, ll. 2-6; RP 753, l. 6; RP 756, ll. 16-17; RP 757, l. 24 to RP 758, l. 4)

While Mr. Gmeiner and his sister were visiting A.B.G. was playing with a dump truck in his lap. Mr. Gmeiner told her to stop playing in his lap. His sister also directed the child to quit playing in Mr. Gmeiner's lap. She did not listen. (Cochran RP 277, ll. 8-19; RP 764, ll. 23-25; RP 765, ll. 2-10)

Ms. Gmeiner then noticed that Mr. Gmeiner was not listening to her. She observed him looking at the child in a way that she described as being sexually aroused and/or lustful. (Cochran RP 277, l. 20 to RP 278, l. 22; RP 766, ll. 4-22; RP 767, ll. 6-12)

After observing her brother's look Ms. Gmeiner stood up and so did Mr. Gmeiner. Her son who was playing a video game in the basement then screamed hysterically. She immediately went downstairs to take a cell-phone away from him. A.B.G. started to follow her downstairs but did not do so. Mr. Gmeiner was standing in the living room at that time. (Cochran RP 278, l. 23 to RP 279, l. 19; RP 280, ll. 4-13; ll. 4-13; RP 768, ll. 3-7; RP 769, l. 18 to RP 770, l. 1; ll. 8-20)

Ms. Gmeiner was only in the basement for a short period of time. She immediately went back upstairs and observed Mr. Gmeiner and A.B.G. between a couch and chair in the living room. Mr. Gmeiner was on his

knees. A.B.G. was standing between his legs. Their foreheads were touching. (Cochran RP 281, ll. 4-23; RP 282, ll. 1-7; RP 771, ll. 4-9; RP 772, ll. 4-17)

Ms. Gmeiner observed Mr. Gmeiner with his hand inside his shorts. He appeared to be masturbating. He was humping and appeared to be touching A.B.G. on her abdomen and vagina. Ms. Gmeiner only saw his right side profile and could not see his left hand. (Cochran RP 282, ll. 16-20; RP 283, ll. 2-10; RP 283, l. 21 to RP 284, l. 1; RP 284, ll. 11-16; RP 773, ll. 1-11)

Ms. Gmeiner observed that the same hand which Mr. Gmeiner was using to masturbate was the hand on A.B.G.'s abdomen. His penis was not exposed. She believed his pelvis was thrusting against A.B.G. Mr. Gmeiner's breathing was heavy and he was moaning. (Cochran RP 284, ll. 17-25; RP 285, ll. 19-22; RP 286, ll. 11-19; RP 773, ll. 12-16; ll. 19-24; RP 774, ll. 15-23)

When Ms. Gmeiner stepped in between the child and her brother he jumped up, removing his hand from his shorts, and said "What did you think you saw?" (Cochran RP 288, ll. 16-20; RP 314, ll. 1-20; RP 776, ll. 4-15)

Ms. Gmeiner told her brother to get out. After he stepped out the door she looked out a side door and saw him adjusting his shorts. He had

an obvious erection. (Cochran RP 289, l. 11 to RP 290, l. 7; RP 777, ll. 1-5; RP 778, ll. 20)

Ms. Gmeiner never saw Mr. Gmeiner's penis. She does not know if he had a climax. No fluids were seen. When she told him that she saw him masturbating he did not deny the accusation. (Cochran RP 779, ll. 21-25; RP 781, ll. 3-19)

Later that evening Ms. Gmeiner and her mother were having a discussion about what occurred. A.B.G. was present. She asked - "Mom, are you mad at Jerremy?" Ms. Gmeiner answered - "Yeah, Ava, I'm very mad at Jerremy. Do you know why?" A.B.G. - "Yes, because Jerremy touched my butt." (Cochran RP 399, ll. 1-7; RP 788, ll. 1-23)

A.B.G. generally refers to her lower anatomy as her "butt." (Cochran RP 293, ll. 8-20; RP 789, ll. 5-8)

An Information was filed on September 30, 2016 charging Mr. Gmeiner with first degree child molestation. (CP 1)

A child hearsay notice was issued on November 7, 2016 and again on November 29, 2016. (CP 9; CP 11)

A child hearsay hearing was conducted on December 5, 2016. A.B.G. did not appear or testify. (Cochran RP 8, l. 11 to RP 9, l. 10)

Ms. Gmeiner testified at that as to what occurred on September 21, 2016. (Cochran RP 50, l. 13 to RP 51, l. 14; RP 53, ll. 19-25; RP 54, ll. 16-

25; RP 56, l. 3 to RP 58, l. 3; RP 58, ll. 9-17; RP 59, l. 19 to RP 60, l. 1; RP 61, ll. 12-15)

Ms. Gmeiner then told the Court that A.B.G. had never been exposed to anything sexual. It was her opinion that her daughter had no idea what happened and was already over it. (Cochran RP 70, ll. 2-3; ll. 12-13)

Ms. Gmeiner was then questioned concerning A.B.G.'s truthfulness. The following exchange occurred:

> Q. How verbal is Ava?
>
> A. She's 3 ½. She knows how to talk and communicate pretty well, five, six, seven words at a time for sentences.
>
> Q. Have you ever talked to Ava about telling the truth versus lying?
>
> A. Um, for being her age, I talk to her age-appropriately about telling the truth versus -- I don't know if a 3-year-old necessarily lies. But she will -- she's 3, so I'll direct her appropriately.
>
> Q. What have you told her about telling lies?

A. Like I said, I don't think we even really talk about telling lies in the family.

Q. Have you had any problems with Ava since she's been verbal with her telling you things that weren't true?

A. No.

(Cochran RP 44, l. 15 to RP 45, l. 4)

The Court of Appeals decision relies upon *State v. Shafer, supra*. In relying upon *Shafer* it ruled that Mr. Gmeiner's reliance upon *State v. Hopkins,* 137 Wn. App. 441, 154 P.3d 250 (2007) failed on multiple grounds. (Appendix A-9, fn.4)

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Mr. Gmeiner contends that the Court of Appeals' determination that the *Hopkins* case is inapplicable to the facts and circumstances of his case is erroneous. The Court of Appeals reliance upon *State v. Shafer* does not undermine his challenge to counsel's stipulation to A.G.'s lack of competency.

RCW 9A.44.120 provides:

> A statement made by a child when under the age of ten describing any act of sexual conduct performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another … not

> otherwise admissible by statute or court rule, is admissible in … criminal proceedings, … in the courts of the State of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
> (2) The child either
> (a) Testifies at the proceedings; or
> (b) Is unavailable as a witness **PROVIDED,** That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Mr. Gmeiner argues that the absence of the child at the child hearsay hearing, along with the stipulation as her competency and unavailability, resulted in the trial court abusing its discretion. The later entry of the findings of fact and conclusions of law determining the statements to be admissible amounts to speculation and contravenes the necessity of the child's required presence.

The statute requires the child's appearance. An in-court determination of the child's competency and reliability is necessary. It cannot be obtained when the child is not examined.

A claim by the prosecuting attorney, or the mother, that the child would be unable to testify is insufficient to meet the statutory criteria.

Mr. Gmeiner relies upon *State v. Hopkins, supra* to support the position he takes in this section of his petition. The factual predicates in *Hopkins* substantially parallel the factual predicates in Mr. Gmeiner's case.

As the *Hopkins* Court observed at 445-46:

> Rather than call M.H., the State proposed to call Samantha Hannah (M.H.'s mother), Janet Blake (Hannah's mother), and Patricia Mahaulu-Stephens, a Child Protective Services (CPS) social worker, to testify about M.H.'s hearsay disclosures to them concerning her allegations against Hopkins. **The trial court held a child hearsay hearing to determine whether M.H.'s hearsay statements were admissible under the child hearsay statute. During the child hearsay hearing, the trial court heard testimony from the State's three adult witnesses. But it did not interview M.H., and Hopkins' counsel did not object to the trial court's failure to interview the child.**
>
> **Nor did the trial court conduct a child competency hearing under RCW 9A.44.120. Instead, the State and defense counsel agreed that M.H. was incompetent to testify based on "her young age."** The trial court made no express findings about whether M.H. was incompetent and therefore, unavailable to testify for purposes of RCW 9A.44.120.
>
> Nonetheless, the trial court ruled that M.H.'s hearsay statements to the State's three adult witnesses were admissible based on *State v. C.J.*, 148 Wn.2d 672, 63 P.3d 765 (2003), and *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984), because her statements

> bore evidence of reliability and there was sufficient corroborating evidence under RCW 9A.44.120.

(Emphasis supplied.)

This is exactly what occurred in Mr. Gmeiner's case at the child hearsay hearing.

The *Hopkins* Court clearly found that the trial court improperly admitted M.H.'s statements. The Court ruled at 449-51 as follows:

> … [I]n *Ryan*, our Supreme Court expressly ruled that the RCW 9A.44.120 requirement also applies to RCW 9A.44.120(2). The court held that: (1) **"[s]tipulated incompetency based on an erroneous understanding of statutory incompetency is too uncertain a basis to find unavailability" and** (2) **the trial court must determine a child's competency within the framework of RCW 5.60.050 by conducting a competency hearing to examine the child's manner, intelligence, and memory.** 103 Wn.2d at 172. …
>
> … **Absent compliance with the strict requirements of RCW 9A.44.120** or falling within some exception to the rules of evidence generally excluding hearsay, **a child hearsay statement is simply inadmissible as a matter of law when the child does not testify at trial.**
>
> Finding *Ryan* controlling, we hold that (1) the trial court erred in presuming M.H.'s incompetency from her age, in spite of the parties' apparent agreement; (2) the trial court erred in failing to conduct a competency

> hearing and to enter the statutorily required findings before finding M.H. "unavailable" to testify at trial; (3) therefore, M.H.'s hearsay allegations of Hopkins' sexual contact were not admissible under RCW 9A.44.120; and (4) because M.H.'s hearsay statements were not otherwise admissible the trial court improperly allowed them into evidence.

(Emphasis supplied.)

The presumption by the trial court, the prosecuting attorney, the mother, and in part by defense counsel, that A.B.G. was not competent to testify creates a void in Mr. Gmeiner's defense that cannot be filled through simple cross-examination of the mother and grandmother.

The void involves the word "butt." Both the mother and grandmother testified that "butt" meant all of the child's lower anatomy.

The central question is what portion of that anatomy that Mr. Gmeiner may have touched. Only the child could truly say.

Mr. Gmeiner claims that defense counsel was deficient in representing him and he did not receive effective assistance of counsel as provided in the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

A combination of factors points toward Mr. Gmeiner's ineffective assistance claim. These include: the failure to request that the child appear

in court for the child hearsay hearing; and the stipulation at the child hearsay hearing concerning competency and unavailability.

Defense counsel should have been aware of *State v. Hopkins, supra* and *State v. Ryan, supra*. Failure to bring those cases to the trial court's attention at the time of the child hearsay hearing was deficient performance. It also prejudiced Mr. Gmeiner at the trial since neither the jury nor the trial court ever had the opportunity to ascertain either the reliability or competency of A.B.G.

> … "[R]easonable conduct for an attorney includes carrying out the duty to research the relevant law." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) ….
>
> Where an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's performance is constitutionally deficient. [Numerous cases cited with regard to deficient performance including RPC 1.1, cmp. 2] …Indeed, "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S., 134 S. Ct. 1081, 1089, 188 L. Ed.2 1 (2014).

Personal Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102, 351 P.3d 138 (2015).

The combination of factors previously set out meet the criteria for ineffective assistance of counsel.

The Court of Appeal's decision concluded that Mr. Gmeiner waived his statutory claims by failing to raise them in the trial court. (Appendix A-8)

The *Shafer* case involved a constitutional challenge to RCW 9A.44.120. Mr. Gmeiner is not challenging the constitutionality of the statute. He is challenging the trial court's noncompliance with the statute.

The noncompliance with the statute resulted from the stipulation by defense counsel that A.G. was not competent to testify.

The Court of Appeals speculated about A.G.'s ability to communicate. The Court of Appeals also presumed that defense counsel may have been making a tactical decision not to have the child present at the child hearsay hearing. (Appendix A-11, fn.5)

It appears that the Court relied upon the following exchange between the attorneys and the trial court prior to the child hearsay hearing:

> THE COURT: All right. I've got witnesses listed out in the joint trial management report. And they are – now, my understanding is you're not having – you're not bringing the minor in to testify, right?

Mr. MARTIN: Well, Judge, I didn't know what your Honor's preference was going to be. I fully expect her not to be – not to have the capacity to testify. She's – we've met her. During our meet-and-greet she was barely able to let go of her mother the entire time that we were doing it. She cried when I tried to talk directly to her. So I'm not sure if she's going to be open to that kind of testimony. And I can elicit a little testimony from her mom, but I don't know that she'd going to be sufficiently verbal. I didn't know if your Honor wanted a chance to see the child in court to make that ruling yourself or you'll just accept my representation of it.

The COURT: I don't know. What does the defense think? Were you expecting the child to be here?

MR. ZELLER: No, your Honor.

Mr. CHARBONNEAU: (Moved head from side to side.)

> THE COURT: Okay. So the testimony with regard to capacity would come from Mom?
>
> MR. MARTIN: That's exactly right, Judge. So I think that we're going to be on the prong of the child hearsay statute that's going to require independent corroboration of --
>
> THE COURT: Correct.
>
> Mr. MARTIN: -- the statements.

(Cochran RP 8, l. 11 to RP 9, l. 10)

As the *Hopkin's* Court noted at 448, fn. 6:

> Hopkins not only failed to challenge M.H.'s competency below, but also agreed that she was incompetent to testify because of her young age. Nonetheless, he can raise this issue for the first time on appeal because a finding of witness availability is constitutionally mandated. *See: State v. Swan*, 114 Wn.2d 613, 646, 790 P.2d 610 (1990).

The Court of Appeals totally ignored this constitutional mandate in its ruling.

Moreover, as the *Hopkins* Court determined at 448-49:

> It is uncontroverted that (1) M.H. was under the age of 10; (2) but for this statutory exception, her hearsay statements to the State's

> adult witnesses were not otherwise admissible; and (3) M.H. did not testify at Hopkins' trial. RCW 9A.44.120 (2)(a). Therefore, we focus on whether the trial court conducted a hearing under RCW 9A.44.120 (1) and found that M.H. was "unavailable as a witness" under RCW 9A.44.120 (2)(b).

The *Hopkins* Court went on to determine that the trial court failed to appropriately conduct a child hearsay hearing to determine whether or not the child was unavailable as a witness.

Mr. Gmeiner contends that the failure to appropriately conduct a child hearsay hearing deprived him of not only the opportunity to cross-examine A.G. concerning the word "butt;" but also resulted in compound error based upon his cross-examination by the prosecuting attorney involving the credibility of his sister.

During the prosecuting attorney's cross-examination of Mr. Gmeiner he repeatedly, over objection, asked Mr. Gmeiner to comment on his sister's credibility.

> Q. So the testimony coming from Sarah, then, is in your view what she believes to be the truth?

MR. CHARBONNEAU: Objection, Judge. Commenting on the testimony. Is there -- could we rephrase?

THE COURT: Yeah, I -- I have a --

A. I'm not sure what --

THE COURT: Let's have --

A. -- what you're asking.

THE COURT: -- you rephrase that, please.

MR. MARTIN: Okay.

Q. Well, do you believe that Sarah's lying about you?

A. Do I believe she's lying about me?

MR. CHARBONNEAU: Objection, Judge.

THE COURT: Overruled.

A. I do. I believe that she had made it up. But as time's gone on, I realize now that even me and my memory of the -- the events of that day are different. The simplest thing, being dropped off at that -- at the home by a

> buddy of mine, I'd -- I'd completely forgotten that. It's six months now, seven, eight months later that I remember that -- that he had told me and I remember. I don't think she thinks -- I don't believe that she's actually trying to lie about me. I think she seen it as her -- her way and she -- she's going to stick by that. Um, I don't think she's purposefully trying to lie about me, but they -- in my mind they are lies.

(Cochran RP 954, l. 12 to RP 955, l. 11)

6. CONCLUSION

The Court of Appeals decision is contrary to the authority and procedure set out in *State v. Swan, supra: State v. Ryan, supra; and State v. Hopkins, supra.*

Moreover, as set forth in Judge Fearing's concurrence, which is supported by Judge Pennell, the argument that the prosecuting attorney's cross-examination of him had an adverse impact upon the trial as a whole has merit.

DATED this 1st day of November, 2018.

Respectfully submitted,

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APPENDIX “A”

FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 35370-2-III
Respondent,	)	
	)	
v.	)	
	)	
JERREMY JOE GMEINER,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, J. — Jerremy Gmeiner appeals from a conviction on one count of first degree child molestation, arguing that the trial court prematurely declared a mistrial when the first jury was unable to reach a verdict and that errors at the second trial require a third trial. Since there was no significant error, we affirm.

FACTS

Mr. Gmeiner was accused of molesting his niece, three-year-old A.G., the daughter of his sister, S.G. Prior to the incident, Mr. Gmeiner had lived with his sister and her family for about a year and was good friends with them. He no longer lived with the family, but had come over to the house to get a massage from S.G., a licensed massage therapist and physical therapist.

S.G.'s mother arrived from Montana that evening in response to a telephone call about the incident. Hearing her mother and grandmother talking, A.G. asked her mother, "You're mad at Jerremy, Mom?" Report of Proceedings (RP) at 788. S.G. responded that she was mad and asked if the child knew why. In response, A.G. stated, "Yes, because Jerremy touched my butt." *Id.* S.G. later would testify that the child used the word "butt" to describe her entire genital area.

A single charge of first degree child molestation was filed against Mr. Gmeiner, and the matter proceeded to jury trial in the Spokane County Superior Court. The court conducted a child hearsay hearing prior to the first trial. The parties "stipulated" that A.G., whom they had interviewed, was unavailable to testify. RP at 78. S.G. was the only witness at the hearing. After hearing argument, the court applied the criteria for assessing the admissibility of child hearsay under RCW 9A.44.120 and determined that A.G.'s statement to her mother bore sufficient indicia of reliability to be admitted. RP at 78-81; Clerk's Papers (CP) at 100-104. A.G. was determined to be unavailable, but there was corroboration of her statement.

The case proceeded to trial, with both S.G. and Mr. Gmeiner testifying about their version of the event. Trial ended on the second morning and the jury began deliberations around 11:30 a.m. The jury alerted the court around 3:00 p.m. that it was unable to agree. After consultation with the attorneys, the court brought the jurors into the courtroom and asked the presiding juror if there was a probability of the jury reaching an agreement

recall it." *Id.* He also agreed with the prosecutor's suggestion that S.G. also had not recalled the incident properly when she reported it. *Id.*

The parties argued the case to the jury on their respective theories of what happened. The jury determined that Mr. Gmeiner committed the offense. After sentence was imposed, he timely appealed to this court.

ANALYSIS

The appeal raises four[1] issues: a claim of double jeopardy resulting from the mistrial ruling, various alleged errors impacting the child hearsay ruling, ineffective assistance of counsel, and prosecutorial misconduct.[2] We address those claims in the order listed.

Double Jeopardy

Mr. Gmeiner initially argues that the trial court erred in granting his motion for a mistrial, resulting in a violation of his protection against double jeopardy. There was no error and, hence, no double jeopardy.

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[1] Appellant also contends that cumulative error requires a new trial, but since we do not find multiple errors, we do not address that claim.

[2] Mr. Gmeiner also filed a statement of additional grounds, which we do not address because it is both duplicative of an argument raised by counsel and also makes a claim outside the record of the trial. RAP 10.10(a). Mr. Gmeiner's remedy, if any, is to marshal the evidence he has in support of his claims and present them in a personal restraint petition. *See, e.g.*, *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995); *State v. Norman*, 61 Wn. App. 16, 27-28, 808 P.2d 1159 (1991).

there was no probability of the panel reaching a verdict. The defense then requested the mistrial; the prosecutor did not object.[3]

Under these facts, there was no abuse of discretion in granting the defense request. The jury did not believe it would be able to resolve the case and it likely would have been error to direct that they continue their deliberations at that point. The court, therefore, did not err in granting the mistrial. While that is dispositive, the result would not vary if we treated this solely as a double jeopardy claim.

It is fundamental that a defendant cannot be placed in jeopardy twice for the same offense. U.S. CONST. amend. V; WASH. CONST. art. I, § 9. One "valued right" protected by double jeopardy principles is the right of a defendant to have the charges against him or her resolved by a particular tribunal. *Wade v. Hunter*, 336 U.S. 684, 689, 69 S. Ct. 834, 93 L. Ed. 974 (1949). Where a jury is discharged without rendering a verdict and without the consent of the defendant, retrial is constitutionally impermissible unless the trial ended due to a "manifest necessity." *State v. Wright*, 165 Wn.2d 783, 793, 203 P.3d 1027 (2009).

[3] In light of our conclusion on the merits, we decline to address the prosecutor's argument that the defense invited this alleged error. *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999).

different question might be presented. *See, e.g.*, *Shafer*, 156 Wn.2d at 388-389. However, that is not this fact pattern. There is no constitutional violation.

Instead, Mr. Gmeiner claims that the court erred in conducting the child hearsay hearing in the absence of A.G. and in accepting the stipulation of the attorneys that she was not available to testify.[4] These alleged statutory violations are procedural claims involving the child hearsay statute rather than constitutional contentions. A proper objection must be made at trial to perceived errors in admitting or excluding evidence; the failure to do so precludes raising the issue on appeal. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). "'[A] litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.'" *Id.* (quoting *Bellevue Sch. Dist. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967)).

The general rule in this state is that an appellate court will not consider an issue on appeal that was not first presented to the trial court. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). An exception to this general rule exists if the issue involves a manifest error affecting a constitutional right. RAP 2.5(a). As

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[4] Mr. Gmeiner's reliance on *State v. Hopkins*, 137 Wn. App. 441, 154 P.3d 250 (2007), fails on multiple grounds. For one, there was no discussion in *Hopkins* concerning preservation of this issue. Second, at least some of the disclosures at issue in *Hopkins* were made to law enforcement operatives, taking that fact pattern outside of this one and putting it squarely on Sixth Amendment grounds. This case, instead, is governed by *Shafer*, where (like here) the disclosures were to family members and the parties also stipulated that the child was not competent to testify. 156 Wn.2d at 385-391.

not consider both *Strickland* prongs. *Id.* at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

As to the absence of A.G. from the child hearsay hearing, Mr. Gmeiner cannot establish that his attorney erred. Unlike the trial court and the judges of this court, the attorneys met with A.G. and could assess her ability to communicate. Neither side thought she would be able to testify. There simply is no evidence in this record to suggest that A.G. could have testified. Thus, defense counsel cannot be faulted for stipulating that she would not be present.[5]

The remaining contention fails for inability to establish prejudice from counsel's failure to object to alleged prosecutorial misconduct. As we discuss in the next section, any errors made by the prosecutor did not prejudice the defense. Accordingly, counsel's failure to object did not constitute prejudicial error.

The ineffective assistance argument is without merit.

Prosecutorial Misconduct

Mr. Gmeiner's final argument is that the prosecutor committed misconduct in his questioning of the detective, the cross-examination of Mr. Gmeiner, and in closing argument. There was no prejudicial error.

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[5] It also may well have been a tactical decision not to call the child. If A.G. had testified consistent with the disclosure, that fact would only hurt the defense.

completely differing views of the incident, it would have been a serious error for the detective to accept one version uncritically without checking for possible motives. The fact that he did not discover any motives is not the same thing as saying that the witness was credible. The question was not objectionable; the prosecutor did not err in asking it.

Appellant next contends that the prosecutor erred in cross-examining Mr. Gmeiner. One result of a successful defense objection[6] was that the prosecutor rephrased his question to ask if Mr. Gmeiner thought his sister was lying. This was improper; no witness is permitted to opine on the credibility of another. Mr. Gmeiner answered and explained that S.G. believed her story, but was mistaken in doing so. He did not impugn his sister's credibility, but instead was able to set forth the defense theory of the incident. There was no prejudice from the prosecutor's errant rephrasing of the question.

Finally, appellant contends that the prosecutor erred in closing argument when he stated that the defense had to walk a fine line between saying S.G. was mistaken and that S.G. was lying, that counsel had "very honorably" declined to accuse S.G. of lying, but that the implication of some of the defense arguments was that S.G. was lying. RP at 1028. It is hard to identify what Mr. Gmeiner believes was error here since he does not explain his argument other than to say it "undermined" defense counsel's integrity. On

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[6] The prosecutor had asked Mr. Gmeiner if he thought that his sister believed in the story she was telling. The fact that Mr. Gmeiner thought his sister believed her story was relevant—and therefore proper—although it came close to commenting on the witness's credibility and could have been excluded under ER 403.

No. 35370-2-III

FEARING, J. (concurring) — The lead author writes at pages 12-13 of his opinion:

> The first challenge is to questioning the detective whether he was able to find a motive for S.G. to fabricate the story against her brother. This did not constitute error. The detective was not commenting on the credibility of S.G., but was instead addressing the thoroughness of the investigation. In this situation, where the only two witnesses had completely differing views of the incident, it would have been a serious error for the detective to accept one version uncritically without checking for possible motives. The fact that he did not discover any motives is not the same thing as saying that the witness was credible. The question was not objectionable; the prosecutor did not err in asking it.

We disagree with this paragraph.

The lead author writes that the detective testified about finding no motive for S.G. to fabricate her story in order to address the thoroughness of the investigation, not to address S.G.'s credibility. Assuming such to be true, the lead author presents no reason why the detective needed to testify about the quality of the investigation. The criminal trial encompassed the guilt or innocence of Jerremy Gmeiner, not the thoroughness of the police investigation. Generally, the quality of the investigation lacks relevance to guilt or innocence. *State v. Edwards*, 131 Wn. App. 611, 128 P.3d 621 (2006); *State v. Johnson*,

61 Wn. App. 539, 811 P.2d 687 (1991); *State v. Aaron*, 57 Wn. App. 277, 787 P.2d 949 (1990); *State v. Lowrie*, 14 Wn. App. 408, 542 P.2d 128 (1975).

We also disagree with the lead author's assertion that the detective's failure to discover any motives to fabricate does not bear on the witness' credibility. Motives to fabricate go indirectly, if not directly, to the question of whether someone prevaricates. Asking the detective to aver whether or not he found a motive to fabricate served no purpose other than to bolster the credibility of S.G.

We would affirm the conviction on the basis that the prosecutor's questioning of the detective with regard to finding a motive to lie was not so flagrant and ill-intentioned that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.

Fearing, J.

I CONCUR:

Pennell, A.C.J.

NO. 35370-2-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. JERREMY JOE GMEINER, Defendant, Appellant.	))))))))))))	SPOKANE COUNTY NO. 16 1 03798 5 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 1st day of November, 2018, I caused a true and correct copy of the *Petition for Discretionary Review* and to be served on:

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December 11, 2018 - 7:17 AM

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