

No. 39293-3-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**THERESA HUTTON**

Appellant.

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COURT OF APPEALS  
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STATE OF WASHINGTON  
BY  IDENTITY

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Appeal from the Superior Court of Washington for Lewis County

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**RESPONSE BRIEF**

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## SUPPLEMENTAL STATEMENT OF THE CASE

In addition to the statement of the case set out by Hutton, the State submits the following supplemental statement of the case.

The victim in this case, K.H. (K.), was born on May 27, 1995, to defendant Theresa Hutton, and Lee Auman, K.'s biological father. 2RP 22.<sup>1</sup> Theresa Hutton and Lee Auman never married. 4RP 48. When K. was born, K.'s father, Lee Auman, assumed the "motherly" role, changing K.'s diapers and getting up with her at night. 3RP 173. Lee Auman died on December 30, 2000, after a car accident. 4RP 36,37. The care of K. then fell exclusively to her mother, Theresa Hutton, and Hutton and K. moved to a parcel of land in Toledo, Washington. 2RP 1-21, 24,25.

K. was fourteen at the time of trial. 2RP 22. K. has a sister, C., who was born on 9/15/2001. 2RP 22. K. said when she lived in Toledo with Hutton, they first lived in a "5th wheel" trailer. 2RP 25. K. had to feed all of the horses and dogs, and clean up after them. 2RP 25. As a discipline method, Hutton made K. do the

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<sup>1</sup> There are 5 volumes of trial transcripts (five different days), but unfortunately page numbering is not continuous from one volume to the next. Accordingly, Respondent cites to the record as 1RP - 5RP as follows: 1RP=4/14/09; 2RP=4/15/09;3RP=4/16/09; 4RP=4/17/09;5RP(4/20/09).

"cockroach" by keeping her legs straight and putting her hands on her feet without bending her legs. RP 26. Sometimes while K. had to stand that way, Hutton had C. hit K. on the back with a spatula or a hairbrush. 2RP 26. K. had to do the cockroach when she didn't get the chores done. 2RP 27. K. said she had to do chores before school and after school, and before school she had to feed the horses. 2RP 27. K. also had to clean the horse stalls and stack hay bales. 2RP 28. K. said the hay bales were big and she tried to pack them by putting them on her shoulder, which hurt. 2RP 28. K. said she usually slept outside in the hay when she lived with Hutton, because K. didn't get her chores done. 2RP 29. K. said she had to sleep outside because Hutton told her to. 2RP 29. K. said she did not have any blankets or a coat to wear when she slept outside, so she put hay over herself to keep warm. 2RP 30. Sometimes it would be raining or snowing when K. had to sleep outside. 2RP 30. When K. got to sleep inside, she slept in the closet because Hutton told her to. 2RP 30. K. said Hutton hit her with a plastic spatula more than once. 2RP 31. K. said it was normal for Hutton to hit her with the spatula. 2RP 32. K. said she had bruises from Hutton's hitting her with the spatula but they were hidden under her clothes. 2RP 32. K. said that when people from

school gave her clothes, she wasn't allowed to wear them because Hutton told her C. would grow into them. 2RP 35. K. sometimes hid the clothes she had been given at school. 2RP 35. K. said Hutton never gave her a coat or an umbrella or a hat or gloves or boots to wear. 2RP 36. K. said Hutton made her clean big dog cages with bleach, and the bleach got on her skin. 2RP 36.37. Once Hutton made K. dig a big hole for a horse than died. 2RP 37. K. said they only had a Christmas tree once when she lived with her mom. 2RP 39. K. did not get Christmas or birthday presents from Hutton, but her sister, C., did get presents. 2RP 39.

K. said that she "rarely ever" got food with she lived with Hutton. 2RP 40. K. said she was out doing chores in the morning when C. and Hutton ate cereal for breakfast. 2RP 41. K. said C. and Hutton had dinner but she did not. 2RP 41. When K. went inside to get food, she would "get more cockroach." 2RP 42. K. said Hutton never hugged her or said she loved her or kissed her. 2RP 43. K. said Hutton called C. "princess and angel" but that Hutton called K. "bitch, it, cunt." 2RP 44. The first year that K. lived in Toledo there was no inside plumbing so they had to go out in the woods to go to the bathroom, but only C. was given toilet paper. 2RP 48. K. said that had she continued to live with Hutton,

she "would probably end up dying." 2RP 55. K. likes living with her aunt. 2RP 59. On cross, K. said that she had read a book called, "A Child Called It," and it was about "a kid being beat up and starved." 2RP 71. K. admitted that a lot of the facts from that book are like some of her testimony. 2RP 71. K. said Hutton cleaned the house when CPS visited. 2RP 85. K. said that when she lived with Hutton she went to the dentist a couple of times and had follow up medical visits after her surgery. 2RP 88.

Seven employees of the Toledo Elementary School--either teachers or other school employees--testified consistently at trial that K. routinely came to school filthy, inappropriately dressed for the weather, routinely hungry, and had a terrible odor about her. For example, Randall Apperson, a fifth grade teacher at Toledo Elementary School, said K. was in his fifth grade classroom in 2006-2007. 2 RP 1, 2. Apperson said that K.'s appearance was "very filthy, just a bad sign of neglect, mud all over her legs and shoes. . . dirt stains all over her." 2 RP 2. Apperson said he could usually tell where K. sat in the classroom at the end of the day "by the amount of dirt that may be on the floor around the desk area." 2 RP 2. Apperson said that K. rarely had a coat. 2 RP 3. Apperson said K. smelled very bad and that some students asked to be

moved away from K. because of the "strong stench." 2 RP 3.

Apperson said that K. appeared hungry in his classes so he let her snack throughout the day. 2 RP 5. Apperson thought K. seemed underweight for her height. 2 RP 5. Apperson said he called CPS (child protective services) once to voice his concern over K.'s "conditions." 2 RP 5,6. But K. did not report any "physical" abuse to Apperson. 2 RP 7.

Kim Satcher also worked at Toledo Elementary School for sixteen years as a secretary and in the past in the behavioral modification room. 2 RP 8,9. Satcher first met K. when K. was in the first grade. 2 RP 9. Satcher noticed that K. often was filthy. 2 RP 9,11. Satcher said that K. had a very strong odor about her and would often have feces on her and dirt on her hands and under her nails, and when K. had longer hair, it was matted. 2 RP 10. Satcher said K. consistently smelled bad. 2 RP 11. Satcher said that K. had a shaved head more than two or three times because of lice. 2 RP 10. In the winter months, K. was not properly dressed for the cold. 2 RP 11. Satcher said that people at the school would give K. clothing "four or five times a year," but Hutton would usually make K. return it to the school. 2 RP 12. But once Hutton was sure the clothing was not from K.'s father's family, she let K. keep the

clothes. RP 19. Satcher said that K. would steal food and take it home because she was hungry, and K. said she wasn't being fed enough at home. 2 RP 13,14. Satcher said K. would be in the "behavior modification room" because K. would pull the hood up over her head and eyes and not sit up in the classroom, probably because she was being teased because she didn't have hair. 2 RP 14. K. said that her mother shaved her hair off, even though K. begged her not to. 2RP 14. Satcher said that shaving kids' hair off is not the typical way other students were treated for lice. 2 RP 18. K. sometimes missed the bus because she had to clean the dog pens and feed the dogs before going to school. 2RP 15. K. had feces on her clothing "almost daily." 2 RP 16.

Leslie Wood is also a teacher at Toledo Elementary. Wood had been a school teacher for 16 years. Wood met K. when she was a student in Wood's first grade class. 2RP 151. Wood also saw K. without a warm coat in the winter months, and saw how dirty K. always was, and gave K. extra snacks because K. often seemed hungry. 2RP 152,154. Wood began keeping notes about her concerns for K. 2RP 156. Wood and Paula Warne (therapist at school) decided that CPS should be called regarding K. 2RP 161. Wood also sent notes home with K. about her dirty clothes. 2RP

165. Additionally, K. had been sent home twice with lice problems while in Wood's class. 2RP 166. Wood also became concerned when K. had a recurring bad toothache. 2RP 155. K. complained about the toothache from March 13th to March 21st, 2003. 2RP 168. K.'s toothache substantially affected K.'s activities at school. 2RP 168. On January 10, 2003, Wood saw a bump on K.'s head and K. said that Hutton had hit her on the head. 2RP 170. Wood reported this to the school office. 2RP 171. Wood did not contact CPS until two months after seeing the bump on K.'s head. 2RP 171.

Deborah Taylor also teaches at Toledo Elementary, and has been a teacher for 33 years. 2RP 172. Taylor taught K. in second grade. 2RP 173. Taylor kept notes about her concerns for K. 2RP 173. This was during the 2003 and 2004 school year. 2RP 174. During that time, Taylor noted that K. was small in stature, was uncleanly, wore ill-fitting clothing, and had chronic head lice. 2RP 174. Taylor noted that after being sent home with head lice K. returned to school wearing a hat because her hair had been chopped off severely and in an uneven fashion. 2RP 174, 177. Taylor noted that K. seemed hungry and brought leftover lunches into the classroom---saying she was saving it for later. 2RP 175.

Taylor's husband and K.'s grandmother Joleen are first cousins. 2RP 176. Taylor did meet with Hutton once and thought she seemed supportive and concerned for K. 2RP 179. Taylor did not contact CPS. 2RP 180.

Catherine DeFord has been a cook at Toledo Grade School for thirty years, and knew K. from seeing her come through the "food line" at school. 2RP 181. Like the others working at the school, DeFord noticed that K.'s clothes were soiled, were ill-fitting, and that K.'s shoes were dirty. 2RP 182. DeFord also gave K. extra food "because she was hungry." 2RP 182,183. K. put food in her pockets to take home. 2RP 183. DeFord noticed that K. smelled bad and that other children did not sit with K.--apparently because of her odor. 2RP 183. DeFord saw that K. did not wear a coat when it was cold outside. 2RP 185. Once, DeFord saw K. wearing a bathrobe in the lunch line. 2RP 186. DeFord asked K. why she was wearing a bathrobe and K. told her that it was all she could find to wear was a bathrobe because her other clothes were dirty. 2RP 186. DeFord also saw K. wearing a hat to cover up her shaved head. 2RP 188. K. told DeFord that Hutton shaved K.'s head. 2RP 188. DeFord was concerned about K. and told others at the school about it. 2RP 186, 187.

Similarly, Karen Edwards, a "reading specialist" who volunteered at the elementary school, recalled the first time she saw K. 3RP 36,37. K. was walking in the hallway and Edwards got the impression that K. "had leukemia or cancer or something because she--her head was shaved and she had a close fitting tight cap on like little cancer patients have. . ." 3RP 37,38. Edwards had all of the same concerns the other teachers and employees voiced about K., although Edwards did not call CPS. 3RP 38.

Teri Nowlen, who worked as a teacher's aid at Toledo Elementary School, also monitored recesses four times a day. 3RP 101. Nowlen first noticed K. when K. was in the second grade, because K. had head lice and had her head shaved. 3RP 102. Nowlen said that K. "wore a little stocking cap and she looked pitiful." 3RP 102. Nowlen said that "it was just common knowledge that . . . [K] was hungry. She was the only student we allowed to eat that way in class and recess." 3RP 102. Nowlen had the same concerns about K. as others at the school, and Nowlen also saw that K. put hay in her shoes to keep warm. 3RP 104. Nowlen said K.'s hands were filthy and had warts all over them, and once K.'s hands were bright red, apparently from cleaning cages with bleach. 3RP 107. Nowlen visited K. after K. had been removed from

Hutton's care, and found that K. "looked like a completely different child." 3RP 105. K. had on cute clothes, her hair was brushed, and she was very clean. 3RP 106. However, Nowlen never saw K. and Hutton together, and did not see Hutton abuse K. 3RP 106.

Others acquainted with K. and the Hutton family had the same observations and concerns about K. as the employees at the elementary school. Brook Blessum lives about a mile from Hutton, and first met Hutton about 5.5 years ago. 1 RP 31. Blessum interacted with K. a lot. 1 RP 34. Blessum said she saw K. in the winter when it was raining and that K. barely had anything on--no socks, no gloves, no hat. 1 RP 34. Blessum also said that K. always had "dirt all over her" and that K. "smelled really bad." 1 RP 35. Blessum never called child protective services (CPS) with concerns about K. 1 RP 44, 51. Blessum admitted that "early on" she let Theresa Hutton watch Blessum's son. 1 RP 47,48. Another neighbor, Tonja Nichols, a registered nurse, lives about 100 yards from Hutton's residence, and had the same observations and concerns about K. as Blessum. 3RP 8. As a nurse, Nichols also thought that K. was malnourished, or had failure to thrive. 3RP 10. But Nichols did not call CPS, nor did she ever see Hutton strike K. 3RP 16.

Toni Nelson. is a social worker and advocate and also does housing and utility assistance. 2RP 204, 205. Nelson first met Theresa Hutton in January of 2004, when Hutton was living in a 5th wheel trailer with K. and C. and some animals. 2RP 208. Nelson did not think the trailer was fit to live in by humans, or animals and had no electricity or running water. 2RP 208,209,212. Nelson brought blankets and food to give to the family. 2RP 210. Nelson returned a fourth time with food, clothing, blankets, cleaning supplies, etc. 2RP 216. But Hutton was extremely hostile towards Nelson, and refused to take the items. 2RP 216. Nelson never returned again, but continued calling CPS. 2RP 217.

Deputy Stacey Brown visited the Hutton property in 2007 and there was a new mobile home there. But when Brown stepped inside the new home, the ammonia smell was so overwhelming that Brown had to pull her t-shirt up over her nose to try to keep out the smell. 3RP 67. Brown said there was cat feces on the floor, and that she did not think the new mobile home was a safe environment for children. 3RP 68. Other deputies concurred with this assessment. 3RP 13-35;130-143.

The State put on expert testimony from medical doctors who said that Hutton's inadequate care of K. caused K. to suffer from a

condition called "psychological dwarfism." Dr. Deborah Hall explained that psychosocial dwarfism is a condition in which a child fails to grow as a result of emotional abuse and deprivation. 2RP 132. Some of the symptoms of psychosocial dwarfism include the failure to grow normally, eating disorders or food hoarding. 2RP 134. After reviewing K.'s medical records, Dr. Hall concluded that K. suffered from psychosocial dwarfism and abuse and neglect. 2RP 137. Agreeing with this assessment was Doctor Robert Newman, a doctor of endocrinology. 3RP 17. Newman defined psychosocial dwarfism as "a condition in which a child fails to grow and mature and developmentally mature due to psychosocially toxic environment." 3RP 19. Newman said he has no doubts K. suffered from this condition because

[s]ince the time I first saw her since the removal from her home, her height and her development have exploded. She is almost on the normal height curve. She was far below it a year and a half ago. And, developmentally, she is now a social butterfly. She's talking, laughing, smiling, and her puberty is progressing as well.

3RP 25. Newman believes K. is permanently affected by psychosocial dwarfism. 3RP 28,29.

Hutton testified at trial and denied all of the allegations and felt that K. made up the allegations after K. read a book called "A Child Called It.:" 5RP 151-206. Hutton said some of the things K.

accused her of are from that book. 4RP 190,191. Hutton said K.'s clothes were "clean enough" (she didn't have a washer in the 5th wheel) and were clean "according to us, but probably not according to regular people." 5RP 10. Hutton said there was only one time that K. went to school smelling like urine, and that was when K. wet the bed but forgot to change her underwear. 4RP 12. Hutton said that her house was clean. 5RP 20. Hutton agreed that she was "not overly affectionate with K." 5RP 37.

Hutton's companion of eight years, Ernest Oberloh, also testified for the defense, and, like Hutton, denied that K. was ever mistreated or denied food or made to sleep outside, or forced to do chores.. 5RP 77-114. Oberloh said that the only "real" chore K. had to do was fill the water trough for the horses. 4RP 84. Oberloh said Hutton's house was clean and did not have animal feces in it and did not have an odor. 4RP 109. Like Oberloh, Hutton's sister Gloria Spears testified that K. never disclosed any abuse to her.. 4RP 143. Spears said K. dressed appropriately for cold weather, was never dirty, and never smelled bad. 4RP 145, 146.

Keith Sand is a social worker with CPS. 4RP 121. Sand visited Hutton's house on June 16, 2007, and found the house to be clean, but said there was a strong odor inside the house. 4RP 125.

Sand said that without a disclosure of abuse from a child, it is very unlikely that a child would be removed from the home. 4RP 128.

Sand said that it is fairly common for children to delay disclosing abuse. 4RP 129. Sand said he would not be comfortable living in the conditions present in Hutton's home. 4RP 129.

The jury found Hutton guilty as charged, and further found the aggravating factor of deliberate cruelty. Hutton appeals her conviction and sentence. The State submits this brief in response to Hutton's opening brief.

### ARGUMENT

#### **A. THE PROSECUTOR DID NOT COMMIT MISCONDUCT WHEN HE WITHDREW THE PLEA OFFER BEFORE HUTTON INTERVIEWED THE VICTIM, NOR DID THIS VIOLATE HUTTON'S CONSTITUTIONAL RIGHTS.**

Hutton first claims that the prosecutor committed misconduct when the initial plea offer was contingent on Hutton's agreement not to interview the victim, and that such an offer violated Hutton's "right to counsel and due process." Brief of Appellant . This argument is without merit.

First of all, this is a moot issue because the offer was *withdrawn by the State* for other reasons-- before Hutton interviewed the victim. 11/19/08 RP 8. The prosecutor said that after

[t]alking to [the victim] and actually hearing it from her and listening to what she had to go through was a complete different eye-opening experience . . . And the State did not feel at all that its original offer was going to be appropriate given what I learned about talking with the victim. And the offer was not to be revoked just simply on the mere scheduling of an interview. . . . The two things that... originally triggered an expiration date on the offer still to this day have not happened: an entry of an omnibus order, or the victim interview, and the State withdrew it for other reasons, so I think the facts of this case make it different than the situation your Honor points out.

Id.(emphasis added). Thus, the prosecutor withdrew the offer after deciding he could not justify the offer in this case—he did not withdraw it because Hutton interviewed the victim—which is obvious, because Hutton had not interviewed the victim when the State withdrew the offer. Id. Despite the mootness of this issue, the State will further discuss it because Hutton raised the issue in her brief.

In the second place, there is no constitutional right to a plea bargain. State v. Wheeler, 95 Wn.2d 799, 804, 631 P.2d 376, 379 (1981); State v. Bogart, 57 Wn. App. 353, 356, 788 P.2d 14, 15 (1990) ; 11/19/08 RP 5,6 (trial court noting there is no constitutional right to a plea bargain). Third, *even if* the prosecutor had withdrawn the plea offer once Hutton interviewed the victim (which did not happen), the fact of the matter is that no Washington Court has held that such a policy violates a defendant's constitutional

rights, or constitutes prosecutorial misconduct. And Hutton cites none. While there is a *concurring* opinion in one Washington Supreme Court case in which Justice Sanders expresses his disapproval of such a plea policy--the fact remains that at this time, there is no Washington law prohibiting such a policy. State v. Zhao, 157 Wash.2d 188, 205-6, 137 P.3d 835 (2006)(Sanders concurring).

Fourth, both the United States Supreme Court and the Washington Supreme Court have upheld the legality of plea proposals that required the defendant to forego specific Constitutional rights in order to receive the benefit of the offer. See U.S. v. Ruiz, 536 U.S. 622, 628-33, 122 S. Ct. 2450, 2453 (2002) (plea bargain requirement that defendant waive the right to evidence impeaching the Government's witnesses was not unconstitutional, and a guilty plea under the agreement could be accepted as knowing and voluntary; plea agreement requiring defendant to waive right to discovery regarding any "affirmative defense" she could raise at trial was not unconstitutional); State v. Moen, 50 Wn.2d 221, 224-31, 6 P.3d 721, 723 (2003)(trial court properly denied defense motion to dismiss under CrR 8.3(b) based on prosecutor's no-plea-bargain policy that once a defendant

successfully compels disclosure of the State's confidential informant in a civil forfeiture action; State's policy did not jeopardize any fundamental right of defendant).

In Moen, the Washington Supreme Court held that the informal, unwritten "no-plea-bargain" policy of a county prosecutor's office, foreclosing a reduction or dismissal of charges against a criminal defendant who has successfully compelled disclosure of a confidential informant's identity in a civil forfeiture proceeding, does not violate the defendant's right to due process by allegedly chilling his right to discovery in a civil case, and does not warrant dismissal of the criminal charge under CrR 8.3(b). Moen, 150 Wn.2d at 224-31. The Moen court reasoned as follows:

Under the policy, the State gains protection of its informants and, in exchange, the defendant receives the opportunity to bargain for a reduction or dismissal of charges.

We recognize that the prosecutor's policy requires the defendant to forgo his right to request disclosure of an informant's identity. **However, a condition insisted on by the State that requires a defendant to give up a constitutional right does not, by itself, violate due process.** "Agreements to forgo seeking an exceptional sentence, to decline prosecuting all offenses, to pay restitution on uncharged crimes, and to waive the right to appeal are all permissible components of valid plea agreements." The theoretical basis for all plea bargaining is that defendants will agree to waive their constitutional rights.

More aggressive exercises of prosecutorial authority have been upheld. For example, due process is not violated when

a prosecutor carries out a threat made during plea bargaining to reindict a defendant on more serious charges if the defendant refuses to plead guilty to lesser charges. [In *Bordenkircher v. Hayes*, 434 U.S. 357, 358, 98 S. Ct. 663, 54 L.Ed.2d 604 (1978),] **[t]he Court noted the distinction between cases where the prosecutor's actions might deter a defendant from exercising a legal right, which did not necessarily violate due process, and cases where the prosecutor's action was in *retaliation* for exercising a right, which violates due process.** Similar to the situation in *Bordenkircher*, the State's policy in this case may deter a defendant from seeking to compel disclosure of a confidential informant's identity, but the policy is intended to protect that identity, not to retaliate for the exercise of the right to discovery nor, as explained, to give an advantage in a civil action.

We are persuaded that the prosecutor's conduct in this case did not offend due process. We find the trial court did not abuse its discretion in denying Moen's motion to dismiss.

*Id.* at 230-1 (citations omitted; bold emphasis added). The reasoning of these cases shows that even if the State in the present case conditioned the plea offer on Hutton's agreement not to interview the victim, this would not be a violation of Hutton's constitutional rights. Just as the prosecutor in Moen sought to protect the identity of its informant, the State has an important interest in protecting a young child victim from repeated interviews that can further traumatize the child.

Finally, Hutton characterizes such a contingent plea bargain policy as being the same as a prosecutor's interfering with, or obstructing defense counsel's access to an interview with the

victim, or advising the witness not to speak to defense counsel, citing State v. Hofstetter, 75 Wn.App. 390, 402, 878 P.2d 474 (1994) in support of her argument. Hofstetter is inapposite. Hofstetter discussed a situation where the prosecutor told the witness not to speak with defense counsel unless a prosecutor was present. Id. Hofstetter said that a prosecutor should not plea bargain "in such a way as to impose such instructions or advice on a witness." Id. In the present case, the contingency in the plea offer was imposed on the defendant--not the victim, and there is a difference. ABA Standards for Criminal Justice: Prosecution Function and Defense Function Sec. 3-3.1(d), at 47 (3d.ed. 1993)). Hofstetter discusses in general, situations where a prosecutor directly interferes with the interview process by expressly *telling a witness not to submit to an interview.* Id. That *clearly* is misconduct. But that did not happen here. In this case, the prosecutor did not tell the victim not to speak with defense counsel, nor did he tell the victim not to speak to defense investigators unless a prosecutor was present. Instead, the contingency was directed at Hutton--without the prosecutor instructing the victim to do anything "obstructive." Indeed, the prosecutor told the court that he "personally called the ethics hotline. . . . They indicated there was

no violation of an RCP here." <sup>2</sup> 11/19/08 RP 5. Although the "hotline" did say that this would be a "legal issue, not an ethical issue"--the State is not aware of any case or rule that prohibits making a plea offer contingent on a defendant's agreement to forego an interview with the victim. Therefore, as of now, such a plea policy remains "legal." Perhaps someday that may change-- but at the time the prosecutor in this case made the offer (which he withdrew for different reasons), there was nothing prohibiting the practice. And the circumstances in Hofstetter are distinguishable.

Hutton further argues that conditioning the plea offer on Hutton's agreement to forego a victim interview (which was not really happened here) was particularly improper here because the victim (K.), was the State's "most important" witness. Brief of Appellant. This argument is also flawed. That is because the State had a virtual parade of witnesses with first-hand knowledge of K.'s coming to school dirty, hungry, in soiled, ill-fitting clothing,

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<sup>2</sup> See State v. Fisher, 165 Wn.2d 727, 740, n.1, 202 P.3d 937 (2009), where that Court notes that, "Prosecutorial misconduct" is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial. If prosecutorial mistakes or actions are not harmless and deny a defendant fair trial, then the defendant should get a new one. Attorney misconduct, on the other hand, is more appropriately related to violations of the Rules of Professional Conduct.

inadequately dressed for the cold. 2RP 1-21, 150-160; 3RP 35-45, 181-190. Several other State's witnesses saw the deplorable conditions of Hutton's home with their own eyes. 3RP 116-119, 130-143; 2RP 204-218. The State also had several qualified medical witnesses who gave powerful testimony that K. suffered from a condition called "psychological dwarfism," an apparently permanent affliction likely caused from malnourishment, emotional abuse, and lack of parental affection and nurturance. 2RP 105-110 (Dr. Reiswig), 129-149 (Dr. Hall); 3RP 17-35 (Dr. Newman). Simply put, the State had many "important" witnesses-- apart from the victim-- so Hutton's claim that this case somehow hinged entirely on the victim's testimony so she could not make a decision whether to accept the plea offer is not persuasive.

The prosecutor withdrew the plea offer for other reasons before Hutton interviewed the victim, so the issue of the propriety of conditioning a plea offer on a defendant's agreement to forego an interview with the victim is moot in this case. However, even if the plea offer contained such a condition, no case has held that such a condition is improper or that it constitutes misconduct. And Hutton cites no case on-point. Accordingly, her argument is without merit.

**B. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT BUT IF THERE WAS ERROR, IT WAS HARMLESS, GIVEN THE OVERWHELMING EVIDENCE IN THIS CASE.**

Hutton claims several remarks by the prosecutor in closing argument constituted misconduct. The State disagrees, but even if the prosecutor misspoke, any error was harmless, given the overwhelming evidence in this case.

"The Sixth Amendment to the United States Constitution guarantees a defendant a fair trial but not a trial free from error." State v. Fisher 165 Wash.2d 727, 747, 202 P.3d 937(2009)(citations omitted). It is the defendant's burden to show the prosecuting attorney's conduct was both improper and prejudicial. State v. Gregory, 158 Wash.2d 759, 858, 147 P.3d 1201 (2006). Misconduct is prejudicial when, in context, there is a "substantial likelihood" that the misconduct "affected the jury's verdict." State v. Barrow, 60 Wn.App. 869, 876, 809 P.2d 209, *review denied*, 118 Wn.2d 1007, 822 P.2d 288 (1991).

Defense counsel's failure to object to the misconduct at trial constitutes waiver on appeal unless the misconduct is " 'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' " incurable by a jury instruction. Gregory, 158 Wash.2d at 841, 147 P.3d 1201 (quoting State v. Stenson, 132 Wash.2d 668,

719, 940 P.2d 1239 (1997)); State v. Neidigh, 78 Wn.App. 71,77-80, 895 P.2d 423 (1995). A prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). A prosecutor has wide latitude to make arguments and draw inferences from the evidence. *Id.*; State v. Brown, 132 Wn.2d 529, 565, 940 P.2d 546 (1997), *cert.denied*, 523 U.S. 1007(1998). Hutton has not made the required showings here.

#### **Expression of Personal Opinion**

Hutton claims the prosecutor improperly stated his personal opinions about defense witness's credibility. The State disagrees.

In general, it is improper for a prosecutor to express a personal opinion about the credibility of a witness. State v. Horton, 116 Wn.App. 909, 921, 68 P.3d 1145 (2003). However, the prosecutor is entitled to wide latitude to draw inferences from the evidence, including references to a witness' credibility. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Indeed, so long as the prosecutor is drawing inferences and arguing from the evidence, it is not misconduct to call a witness or the defendant a

"liar." State v. Luomo, 88 Wn.2d 28, 40, 558 P.2d 756 (1977). Moreover, there is no misconduct unless it is *clear and unmistakable* that counsel is not arguing an inference from the evidence, but is expressing a personal opinion. State v. Papadopoulos, 34 Wn.App.397, 400, 662 P.2d 59(1983). The prosecutor may properly draw inferences from the evidence as to why the jury would want to believe one witness over another. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert.denied*, 516 U.S. 1121 (1996). Thus, even so-called "liar questions" and comments will be held harmless if they "'were not so egregious as to be incapable of cure by an objection and an appropriate instruction to the jury.'" Neidigh, 78 Wn.App. at 77 (citation omitted).

For example, in State v. Warren, the prosecutor in closing argument said that some of the details recounted by the victim were a "badge of truth" and had "the ring of truth," and argued that the victim's testimony was "credible" based on the details she recounted. State v. Warran, 134 Wn.App. 44, 68, 138 P.3d 1081 (2006). The reviewing Court found this was not "vouching" or misconduct, because the prosecutor's argument was based on the

evidence presented at trial. Id. There was no vouching in the present case either.

Like in Warren, the prosecutor's comments here, when viewed in the context of the total argument and the evidence in the case, did not constitute "vouching." Looking to the transcript of the closing argument, we see that Immediately before one of the statements Hutton finds objectionable, the Prosecutor correctly told the jury that

[i]nstruction Number 1 tells you that you the jury are the sole judges of the credibility of each witness. You are the sole judges of the value or weight to be given to the testimony of each witness. In other words, you get to decide who is believable and who's not. . . .

5RP 76 (emphasis added). Hutton finds fault with the prosecutor's comments that K. and C. were "believable" or "very believable."

Brief of Appellant 29. Again, this was not misconduct because the prosecutor also pointed to facts that the jury could consider when determining K.'s credibility, stating, "[i]f her life is really as good as the defendant says it is, why would she have left." 5RP 76.

Furthermore, K.'s and C.'s credibility was bolstered by the corroborative testimony of a bevy of other State's witnesses who saw K.'s poor physical condition and the terrible living conditions in Hutton's residence. 1RP 1-21, 150-160, 172-180, 204-218; 3RP

13-35. Accordingly, the prosecutor's remarks were properly based on facts in the record, and were not "clearly and unmistakably" his personal opinions. Papadopoulos, 34 Wn.App.at 400.

The same is true about the prosecutor's comments that defense witness's testimony should be "taken with a grain of salt" or that the defense's argument was "grasping at straws" and "really out there." Brief of Appellant 30. A prosecutor may comment on the arguments of defense counsel, characterize the arguments of the defense, and argue that the evidence does not support the defense theory. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994); State v. Johnson, 80 Wn.App. 337, 339, 908 P.2d 900, *review denied*, 129 Wn.2d 1016, 917 P.2d 575 (1996). Here, after making these observations, the prosecutor went on to point out facts in the record that reflected on some of the defense witness's credibility. The prosecutor pointed to defense witness Oberloh's body language during direct examination, and Oberloh's and Gloria Spears' close relationship to Hutton when the Prosecutor said,

[s]ome of the questions, when they would be asked of Mr. Oberloh, defendant's counsel started his question, started shaking his head, then when the answer was suggestive at the end, oh, yeah. . . . It's apparent he either didn't really know the answer to the questions. . . or he was just bending the truth to try to help out the defendant. And he had been living with her for several years now. They're very close, in love, he will do

what it takes to help her out. Same with Gloria Spears, the sister of the defendant, she's doing what she can to help out the defendant, not credible.

5RP 77. The prosecutor thus properly pointed out facts from the record that could adversely impact these defense witness' credibility. This was not misconduct. All of the allegedly improper statements by the prosecutor and raised by Hutton were valid inferences from facts in the record. 5RP 77. Neidigh, supra (argument that defendant had concocted a "fairy tale" was permissible comment on the credibility of witnesses).

Hutton also complains that the prosecutor expressed his "personal opinion" when he said that K. and C. were "courageous" or "incredibly brave" for testifying against their mother. 5RP 76, 139. But these remarks were merely the prosecutor stating the *obvious*: it is scary for young children to testify about being abused by a parent--not to mention having to do so with the parent sitting right in front of them in open court. This is "courageous." Anyone with a spoonful of common sense or life experience would conclude the same thing. And jurors bring their life experiences and common sense with them when they enter the courtroom. Furthermore, the jury is given an instruction stating that closing argument is just that: argument--not the law, and jurors are presumed to follow the trial

court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487(1995). Indeed, "[w]hen judged in the context of the whole argument and the totality of the evidence, 'it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence.'" Papadopoulos, 34 Wn.App. at 400. That is what occurred here. Accordingly, the prosecutor did not express his personal opinion in closing argument, and there was no misconduct.

**Passion and Prejudice Allegation**

Hutton further claims that the prosecutor committed misconduct by "appealing to the passions and prejudices of the jurors." This argument is not persuasive.

"Prosecutorial remarks that may otherwise be improper do not constitute grounds for reversal if they are made in reply to defense arguments, unless a curative instruction would not have cured them." State v. Jones, 71 Wn.App. 798, 809, 863 P.2d 85 (1993). Furthermore, "[a]rguments which may evoke an emotional response are appropriate if . . . restricted . . . to the circumstances of the crime." Brett, 126 Wn.2d at 214.

Here, when read in the context, the prosecutor's comments were not improper, because they were made during the State's

rebuttal *in response to arguments made by Hutton*. Hutton told the jury that this case "is a work of fiction." 5RP 100. Hutton said "[y]ou're going to hear some things that tug at your heartstrings. That's exactly what you heard." 5RP 100. She told the jury that the differences in K.'s behavior after she came back from visiting Hutton was a "red herring" and "an attempt by the state to pull at heartstrings. . . . Don't let it sway you." 5RP 102. Hutton accused the prosecutor of "making light of what's going on here." 5RP 102. Hutton told the jurors "you must not let your emotions overcome your rational thought process. That's what I alluded to in opening, heartstrings, can't let the heartstrings control the mind." 5RP 133. Hutton called the victim "calculating" and that she continually tried to "outwit" everyone. 5RP 129,130.

Given the defense's closing argument in this case, the prosecutor properly responded to the defense claims on rebuttal.

Right after Hutton's lengthy closing argument basically calling K. a cold and calculating brat who made the whole thing up because she didn't get what she wanted, and that the case was "fiction" and the State's case was aimed at the jury's "heartstrings" the prosecutor began his rebuttal by saying, "[t]here is an old proverb, a drowning man will clutch at a straw. . . . That's what we

just heard, a lot of grasping at straws that was unreasonable and really out there suggestions." 5RP 137,138. Otherwise improper remarks "are not grounds for reversal where they are invited, provoked, or occasioned by defense counsel and where they are in reply to or retaliation for his acts and statements unless they go beyond the scope of an appropriate response." State v. LaPorter, 58 Wn.2d 816, 822, 365 P.2d 24 (1961).

The prosecutor here was surely entitled to respond in *some way* to Hutton's "heartstrings" and "it's all fiction" comments. As to the exact words used by the prosecutor, telling the jury to "have human feeling and emotion" or that they were not "robots" --well, as previously mentioned, isn't this stating the obvious? Jurors are, after all, "human," including whatever else being a human includes--like having feeling and emotion. Is a prosecutor required to talk to the jury as if they were nothing but inanimate blocks of cement? Respondent thinks not. Indeed, even where there *has been* testimony, evidence, and argument likely to incite an emotional response on the part of the jury; it is not improper if it is limited to the circumstances of the crime. State v. Elledge, 144 Wash.2d 62, 85, 26 P.3d 271, 284 (2001). The prosecutor's remarks in the present case were provoked by defense counsel and, even if

emotion-provoking, they were "limited to the circumstances of the crime." Elledge, supra. Accordingly, the remarks were not misconduct. On the other hand, if this Court finds the remarks were improper, any error should be held harmless.

"Strong policy reasons support the use of harmless error analysis. 'A judicial system which treats every error as a basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one.'" Neidigh, 78 Wn.App. at 77-80, *quoting State v. White*, 72 Wn.2d 524, 531, 433 P.2d 682 (1967). Reversal should occur only when the reliability of the verdict is called into question. Id. A harmless error under the constitutional standard, occurs if the reviewing "court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 140 Wn.2d 412, 425, 705 P.2d 1182(1985).

In the present case, Hutton cannot show that the alleged misconduct was so serious that the "reliability of the verdict is called into question." Neidigh, supra. Even if this Court finds the prosecutor's remarks crossed the line, the fact of the matter is that overwhelming evidence supports the verdict in this case. Many witnesses *other than K.* consistently testified to facts that

corroborate K.'s testimony (cited earlier), and medical witnesses diagnosed the physical and emotional damage suffered by K. while in the custody of Hutton (cited above). It is not often that the State has other credible witnesses with first-hand knowledge about the manifestations of abuse or neglect as shown by the appearance of a victim. Accordingly, although the State does not concede misconduct, if there was any error, it should be held harmless given that overwhelming evidence was presented so "any reasonable jury would have reached the same result in the absence of the error." Guloy, supra.

#### **Statements of Law Not in the Instructions**

Hutton also claims that the prosecutor committed misconduct by "making arguments that were not supported by the instructions." Brief of Appellant 31. Hutton claims the allegedly improper statements "of law" were from the prosecutor's discussion of evidence that showed Hutton withheld the "basic necessities of life" from the victim.--when the prosecutor said that "growing is a bodily function." 5RP 95. And the prosecutor's statement that "nurturing, love and affection" is a necessary element of proper care of a child. 5RP 96. This argument is not persuasive. Hutton did not object to these supposedly improper statements by the

prosecutor. A defendant must not only object, but also move for a mistrial or request a curative instruction. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Furthermore, Respondent questions the characterization of the statements as "statements of law" in the first place. Not to mention the fact that the evidence presented at trial overwhelmingly supports both supposedly-improper statements. The statements were "growing is a bodily function" and "'nurturing, love, and affection' are included in the definition of medically necessary health care." Brief of Appellant 31. But this is not exactly what the prosecutor said. He said, "[w]e heard both doctors state that nurturing, love and affection from a parent, they consider that to be basic necessity [sic] of life." 5RP 96(emphasis added). This was not a "statement of law" by the prosecutor. It was the prosecutor properly pointing to testimony in the record where medical doctors said that a parent's love and affection is necessary to healthy development in a child. 2RP 132-135; 3RP 19,20. Here, the State had testimony from three medical doctors about the condition of K.'s bones, and her stunted growth in the form of "psychological dwarfism"--all resulting from Hutton's failure to provide K. with adequate food, nurturance, affection, emotional support, and a

safe, clean living environment. This testimony came from expert witnesses Dr. Robert Newman, Dr. Deborah Hall, and Dr. Robert Reiswig. 3RP 17-35; 2RP 129-149, 105-110. Thus, even if the prosecutor's statements were improper, the statements were supported by the evidence, were relevant, and should not be cause for reversal because there is no likelihood that these statements affected the jury's verdict.

### **Cumulative Error**

Hutton further claims that cumulative error requires reversal. This argument is without merit.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when errors that do not individually require reversal cumulatively produced a trial that was fundamentally unfair. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). It is the defendant's burden to prove an accumulation of error of sufficient magnitude to require a new trial. Lord, 123 Wn.2d at 3332. "Where the defendant fails to show prejudicial error," the reviewing Court "will not find cumulative error that deprived the defendant of a fair trial." State v. Radcliff, 139 Wn.App. 214, 224, 159 P.3d 486 (2007), *citing* State v. Stevens, 58 Wn.App. 478, 498, 794 P.2d 38 (1990).

Because the State submits there is no error to "accumulate," (as previously discussed) and even if there were some minor error it was not prejudicial, "cumulative error" did not deny Hutton a fair trial. Radcliff, supra. Hutton's conviction should be affirmed.

**C. THE TRIAL COURT DID NOT ERR IN ITS EVIDENTIARY RULINGS.**

Hutton claims the trial judge erred when he "allowed K.'s friend Elizabeth to testify that K. had never lied to her" and erred when he "allowed K.'s counselor to testify that C. suffered from PTSD." 3RP 53-54 (Elizabeth); 1RP 70-82(counselor). The judge did not abuse his discretion when he allowed this testimony.

Admission of evidence is within the trial court's sound discretion and will not be disturbed on review absent a showing of abuse. State v. Stubsjoen, 48 Wn.App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). Abuse occurs when the trial court's discretion is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The appellant bears the burden of proving abuse of discretion. State v. Hentz, 32 Wn.App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538 (1983). Erroneously admitted evidence is not grounds for reversal unless it unfairly prejudices the defendant.

State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Evidentiary error is not prejudicial 'unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.' Bourgeois, 133 Wn.2d at 403 (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

Hutton has not shown she was prejudiced by the court's admission of the complained-of statements. As to the statement by Elizabeth, Hutton frames this statement as being far more significant than it really was. Hutton says, "the trial judge allowed K.'s friend Elizabeth to testify that K. had never lied to her." Brief of Appellant 35 (emphasis added). But those words did not come out of Elizabeth's mouth. Elizabeth did not say that "K. had never lied to her." The only word that came out of Elizabeth's mouth was, "no." --and her answer was not immediate because it was interrupted by an objection, which further disjointed the allegedly-improper question from the extremely short "no." 3RP 53. Here is what was actually said (note the absence of the word "lie"):

**PROSECUTOR:** Has Katie ever told you *anything that wasn't true?*

**DEFENSE COUNSEL:** Objection.

**COURT:** Overruled.

**ELIZABETH:** No.

3RP 53 (emphasis added). Elizabeth's utterance of the word "no" was so utterly brief and fleeting that it is impossible to believe that the jury even *heard* it--let alone giving it any great weight. It is not reasonable to think this inconsequential "blip" amongst the sea of overwhelming evidence in this case had any impact on the verdict whatsoever. The trial court properly overruled the objection.

**Counselor's Statement that K.'s Sister had PTSD**

Nor did admission of the the counselor's statement that K.'s sister C. had PTSD, or the social worker's comment that it is not unusual for children to deny abuse constitute reversible error.

As to the testimony about C. suffering from PTSD, the trial court ruled:

The conclusion that C. suffers the same symptoms corroborates that the abuse of K. occurred [as explained by the prosecutor] that a young individual witnessing this kind of thing is going to suffer the same type of impact as the person to whom it was actually dealt out to.

3RP 74. The trial court's analysis was correct. This testimony was properly admitted because it corroborated K.'s testimony and C. was present in the home for much of the abuse or neglect. 1RP 104-110. Furthermore, the credibility of victims is the central issue in most child abuse cases, because the testimony of the victim and the accused are usually in direct conflict. State v. Black, 109

Wn.2d at 338, 745 P.2d 12. That is certainly the case here, where the defense theory is that K. made the whole thing up--"this is a work of fiction"--and Hutton denied everything K. accused her of. 5RP 100; 5RP 151-206. By claiming K. made the whole thing up, Hutton put K.'s credibility squarely on the line, and the fact that C. was similarly impacted corroborated K.'s version of events. The trial court did not abuse its discretion when it allowed this testimony.

**Testimony by Social Worker re: Denial of Abuse**

Hutton similarly claims that the trial court erred when it allowed "the social worker to provide profile testimony (that it is common for abused children to deny abuse)." Brief of Appellant. However, Hutton does not cite to the record where this testimony allegedly occurred. Nor does she say which "social worker" said this. Consequently, the State cannot address this allegation. And the State is not certain that even if this statement was made, that it qualifies as "profile evidence." Furthermore, although at one time it was true that Washington Courts may have frowned on "profile" testimony, that is not necessarily still the case. More recently, there appears to be a trend to give greater latitude to expert testimony that corroborate the testimony of child abuse victims. See e.g.,

State v. Holland, 77 Wn.App. 420, 427, 891 P.2d 49, *review denied*, 127 Wn.2d 1008, 898 P.2d 308 (1995); State v. Florczak, 76 Wn.App. 55, 882 P.2d 1999(1994), *rev. denied*, 126 Wn.2d 1010, 892 P.2d 1089(1995). In Holland, the appellate court held that because the credibility of the victim had been put in issue, an expert could testify it was not uncommon for sexual abuse victims to delay reporting. Holland, 77 Wn.App. at 427. In Florczak, a social worker testified that several symptoms suffered by the alleged victim "could be correlated with a child who has been sexually abused." Florczak, 76 Wn.App. at 73. The appellate court upheld admission of the arguably "profile" testimony. Id.

Thus--despite the fact that the State has no idea which "social worker" made the remark that Hutton says is "profile testimony" (no cite to the record)--such a statement is not improper anyway as discussed in Holland and Florczak. Furthermore, Hutton's own witness-social worker Keith Sand--admitted on cross examination that it is not uncommon for child abuse victims to either delay disclosure, or never disclose. 4RP 129. Hutton made no objection to these similar "profile" comments by his own witness (as Hutton would apparently call it). Id.

Hutton further claims the trial court should have excluded K.'s grandmother's statement that K. had a "beautiful relationship" with her father. Brief of Appellant 36. Hutton argues that this statement was prejudicial and "created unfair prejudice by inviting the jury to compare Ms. Hutton's relationship with K. to the one K. had with her father before he died." Id. But it is highly unlikely this statement made any difference in this case because there had already been testimony by K.'s aunt, Ms. Music, that K.'s father "was the motherly role. . . He loved on [K.], changed diapers, got up with her at night." 3RP 173. (The trial court overruled Hutton's objection. Id. ) So, it just doesn't seem like the grandmother's calling this relationship "beautiful" would have any earth-shattering impact on the jury.

**D. THE TRIAL COURT DID NOT IMPROPERLY RESTRICT CROSS EXAMINATION OF K.'S COUNSELOR.**

Hutton also claims that her "right to confront witnesses" was violated when the trial court "restricted cross-examination of K.'s counselor." Brief of Appellant 37. This argument is without merit.

A trial court's decision to limit cross-examination of a witness for impeachment purposes is reviewed for abuse of discretion. State v. Aguirre, 2010 WL 727592(Wash. March 4, 2010)(citations omitted). "The Confrontation Clause does not guarantee

defendants cross-examination to whatever extent they desire.”

Bigby v. Dretke, 402 F.3d 551, 573 (5th Cir.2005). In other words, the right to cross examine witnesses is not absolute. State v. Ahlfinger, 50 Wash.App. 466, 474, 749 P.2d 190, review denied, 110 Wn.2d 1035 (1988). And a criminal defendant has no right to present irrelevant evidence. State v. Gallegos, 65 Wash.App. 230, 236-37, 828 P.2d 37, *review denied*, 119 Wash.2d 1024, 838 P.2d 690 (1992). A trial judge has discretion to “impose reasonable limits on cross-examination based on concerns about ‘harassment, prejudice, *confusion of the issues*, the witness’ safety, or interrogation that is repetitive or only marginally relevant.’ ” See Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)(emphaasis added).

In the present case, Hutton claims that K.'s counselor asked a detective for assistance in completing her *curriculum vitae* in preparation for trial, and that that information would show "that the counselor was more than just a neutral witness" and was "an advocate with an agenda." Brief of Appellant 39. First of all, the State is not aware of any rule stating that the State's witnesses must be "neutral." This suggestion is ridiculous. And, exactly what "agenda" would this particular "advocate" (Venus Masters) possibly

have anyway? The State's witnesses are not required to be "neutral." They are expected to be truthful. And yes, a party may cross examine a witness on matters tending to show the witness is biased. But here, Respondent wonders how asking another to look over a witness's *c.v.* in preparation for trial shows that the witness is "biased?" Is Hutton claiming this shows that the witness was "padding" her *c.v.* with false data? The trial court ultimately seemed to agree with Respondent's analysis, as set out below.

Here, Hutton inquired of Venus Masters, "Now, prior to you testifying here today, you spoke with someone to help polish your resume [sic], isn't that correct? 1RP 83. The State objected but was *overruled*, and Masters said:

MASTERS: I was asked to get a curriculum vitae together. I hadn't touched one for a while. . . .

DEFENSE: I'm talking about your conversation with retired Detective Dave Neiser?

MASTERS: . . . no, I had already done that before I had even emailed Detective Neiser. I had already done the curriculum vitae.

DEFENSE: But you wanted some suggestions from him as to how to be adequately prepared, is that correct?

1RP 83. The State objected again and asked to be heard, so the jury was removed and the discussion continued. The State explained that Masters was concerned about qualifying as an

expert, so she asked Detective Neiser what she might have to do to be qualified. 1RP 84. Defense counsel said that Masters' inquiry was, "what else do I need to supply or do to be qualified, so my witness, then in parens, (concerning the girls' emotional claims and traumas won't be thrown out [sic]. Id. Then, the following exchange took place:

COURT: I'm not following what--so she says, what do I need to provide of my background. Are you suggesting she lied about it?

DEFENSE: No.

COURT: So what are you trying to get out if you're not attacking the credentials?

DEFENSE: The extra length she went through to get ready for today's trial, that's what I want to get out.

COURT: Extra length, she actually reviewed her resume or drafted a resume.

DEFENSE: Then sought out the help of others to make sure that she would be given credit as an expert here today.

COURT: I'll sustain the objection. . . that's way too attenuated for me.

1RP 85 (emphasis added). In other words, this line of questioning was too far-afield to be relevant. And, a criminal defendant has no right to present irrelevant evidence. Gallegos, supra. The trial court did not abuse its discretion when it curtailed this line of questioning. Furthermore, Hutton otherwise cross examined

Masters at length--and had plenty of opportunity to straight-up ask Masters about her credentials. 1RP 85-96. There was no constitutional violation here.

#### **E. TRIAL COUNSEL WAS NOT INEFFECTIVE**

Hutton claims her counsel was ineffective because he did not object to "all" instances of misconduct by the prosecutor in closing argument. But trial counsel is held to *no such standard* regarding objections.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)(*quoting Strickland v. Washington*, 466 U.S. 668,687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "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, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989). Furthermore, "[i]f the failure to object could have been legitimate trial strategy, it cannot serve as a basis for a claim of ineffective assistance." Neidigh, 78 Wn.App. at

77, *citing State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407, *cert.denied.*, 479 U.S. 994, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).

Hutton's trial counsel is an experienced, competent, and zealous trial attorney.<sup>3</sup> His performance in this case reflects that. Whether to constantly interrupt a prosecutor in closing argument with objections--is legitimate trial strategy where defense counsel believes doing so will turn the jury against him (regardless of the instruction telling the jury otherwise). In other words, defense counsel may legitimately "pick his battles" about which prosecutor statements he finds merit an objection. Furthermore, as previously argued, the prosecutor's statements were not "misconduct" in the first place, so it is highly unlikely that the court would have sustained objections to "all instances" of supposed misconduct. Because this was legitimate trial strategy, and Hutton has not shown prejudice, she has not shown her counsel was ineffective. Her conviction should be affirmed.

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<sup>3</sup> Jonathan Meyer, admitted to the Washington Bar in 1998.

**E. THE TRIAL COURT PROPERLY ALLOWED THE SEVEN-YEAR-OLD WITNESS TO TESTIFY WITHOUT STATING A FORMAL OATH OR AFFIRMATION.**

Hutton claims that it was error for the trial court to allow seven-year-old C. (sister of victim K.) to testify without being placed under oath. This argument is without merit.

When Hutton objected to the trial court's failure to administer a formal oath after seven-year-old C. took the stand, the trial court responded, "An oath is not required. . . . She had the mental understanding and obligation to speak the truth on the witness stand. That was clear from the responses to Mr. Hayes' questions." 1RP 113. The trial court was correct, and this was certainly not reversible error. ER 603 provides that, "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." However, as noted by Karl B. Tegland,

[t]he rule gives the court flexibility in dealing with religious adults, atheists, conscientious objectors . . . and children. For example, in State v. Dixon, 37 Wn.App. 867, 684 P.2d 725 (1984), the trial court properly allowed an 8-year-old to testify without stating a formal oath or affirmation, where the prosecuting attorney had asked the child a series of questions designed to demonstrate the child's intent to testify truthfully.

Karl B. Tegland, Courtroom Handbook on Washington Evidence, 309 (2009-2010 Ed.)(emphasis added). This analysis applies to the circumstances here, and this Court should agree. Here, when seven-year-old "C." (sister of the victim) was called to the witness stand by the prosecutor, after asking C. some general questions about school, where she lives, and who her sister is (K.), the following exchange took place between the prosecutor and "C".:

**PROSECUTOR:** ...[I]s it a good thing or a bad thing if someone tells a lie?

**C.** Bad.

**PROSECUTOR:** If you told a lie at school, what would happen?

**C.** You would go to the office.

**PROSECUTOR:** Do you know what it means if somebody makes a promise?

**C.** It has to be true.

**PROSECUTOR:** So if somebody makes a promise to do something, do they have to do it?

**C.** Yes.

**PROSECUTOR:** If I said it was snowing inside this room right now, would that be the truth or a lie?

**C.** A lie.

**PROSECUTOR:** If I told you my shirt was blue, would that be a truth or lie?

**C.** Truth.

**PROSECUTOR:** Let the record reflect my shirt is blue.

**PROSECUTOR:** When I ask you questions today, can you promise to tell the truth about everything?

**C.** Yes.

1RP 105, 106(emphasis added). This colloquy shows that C. knew the difference between the truth and a lie, that she understood what "promise" means, and that she intended to testify truthfully. Id.

These facts bring this issue within the Dixon Court's analysis. State v. Dixon, 37 Wn.App. 867, 684 P.2d 725 (1984). Accordingly, it was not error for the trial court to allow C. to testify without administering a formal oath. *See also*, U.S. v. Fowler, 605 F.2d 181 (5th Cir.1979)(witness must give some indication of truthful intent).

**F. BECAUSE HUTTON DID NOT OBJECT TO THE COURT'S INSTRUCTIONS ON THE AGGRAVATED SENTENCING FACTOR OR PROPOSE HER OWN INSTRUCTION DEFINING "DELIBERATE CRUELTY" THIS ISSUE HAS NOT BEEN PRESERVED FOR REVIEW AND CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.**

Hutton argues that the failure to instruct the jury on the definition of "deliberate cruelty" is a "manifest error affecting a constitutional right, which may be argued for the first time on appeal." Brief of Appellant. 46. The State disagrees, and this Court should refuse to review this issue because Hutton did not object below. 5RP 73,74.

A reviewing court may refuse to review any claim of error which the appellant did not raise in the trial court, unless the error is manifest and affects a constitutional right. State v. Hylton, \_\_\_ Wn.App. \_\_\_, 226 P.3d 246, 253 (2010). Furthermore, "[t]he trial court is not required to specifically define particular terms . . . . Accordingly, jury instructions that fail to define particular terms *are*

*not 'manifest' constitutional errors* that can be raised for the first time on appeal." Hylton, supra(emphasis added)., *citing* State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988)(defendant who fails to propose a defining instruction waives the issue on appeal).

In the present case, the aggravated sentencing factor of "deliberate cruelty" was submitted to the jury as now required pursuant to Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). And the jury returned a special verdict form finding that the crime was committed with deliberate cruelty. Special Verdict Form A, Supp. CP. However, there was no instruction defining the term "deliberate cruelty." Supp.CP. But Hutton did not object to the court's instructions on the aggravating factor, nor did she propose an additional instruction defining "deliberate cruelty." 5RP 73,74. Accordingly, under this Court's reasoning in Hylton, Hutton waived the right to raise this issue on appeal, and this Court should refuse to review the issue because it is not a "manifest error affecting a constitutional right." Hylton supra; Scott, Supra.

Hutton cites State v. Gordon, 153 Wn.App. 516, 223 P.3d 519(2009) in support of her argument that this definitional instruction issue may be raised for the first time on appeal because

it is a manifest error affecting a constitutional right. Brief of Appellant 45,46. However, this Court "questioned" Gordon's manifest error analysis in Hylton. Hylton, 226 P.3d at 253, n. 11. Additionally, even the Gordon Court noted that "failure to define a technical word or expression does not rise to the level of a constitutional error." Gordon, 153 Wn.App. at 532. This Court should follow its reasoning in Hylton, and find that Hutton cannot raise this definitional instruction issue for the first time on appeal. Accordingly, Hutton's exceptional sentence should be affirmed.

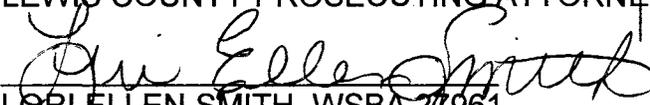
**CONCLUSION**

As fully set out above, there was no reversible error in this case. Accordingly, Hutton's conviction and sentence should be affirmed in all respects.

DATED THIS 30<sup>th</sup> day of April, 2010, at Chehalis, WA.

MICHAEL GOLDEN  
LEWIS COUNTY PROSECUTING ATTORNEY

By:

  
LORI ELLEN SMITH, WSBA 27961  
Deputy Prosecuting Attorney

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**DECLARATION OF SERVICE BY MAIL**

The undersigned declares under penalty of perjury that on this date a copy of this response brief was served upon Appellant's Attorney, Jodi Backlund, by placing said document in the United States Mail, Addressed as follows: BACKLUND & MISTRY, 203 East Fourth Ave., Suite 404, Olympia, WA 98501

Dated this 30<sup>th</sup> Day of April, 2010, at Chehalis, Washington.