

NO. 44842-4-II

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

STATE OF WASHINGTON, Respondent

v.

RYAN DEE WHITAKER, Petitioner

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO. 11-1-01948-9

BRIEF OF RESPONDENT AND RESPONSE TO PERSONAL
RESTRAINT PETITION

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PART ONE – DIRECT APPEAL RESPONSE

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TO SPECIFY A DATE CERTAIN FOR EXPIRATION.

B. STATEMENT OF THE CASE

The defendant was a Sunday school teacher at the St. John's Ward of the Church of Latter Day Saints. CP 225. From the time period between January 2011 and August 2011, M.S. was a student in the defendant's Sunday school class. CP 225-26. M.S. was eight or nine years old during that time. CP 227. In the big classroom, also called the "sharing room," her class sat in the very back of the room. RP 473, CP 226. Her class had about ten students and they sat together in the sharing room, in which they were mixed with other classes. RP 473-75. In the sharing room M.S. sat next to the defendant, either because he asked her to sit next to him or because he just took the seat next to her. RP 476, CP 226. In the sharing room a person would lead the lesson and the children's attention was focused up front on that person. RP 477. During the time he was her teacher, the defendant, fifty-seven year-old Ryan Whitaker, touched M.S. on at least two occasions on her vagina with his hand. RP 480, CP 226. At least one of these incidents occurred in the sharing room. The defendant would have M.S. sit in the back row with him. When he touched her he would use his jacket to hide his actions, either putting it across their laps, or placing it behind her. CP 226. He massaged her vagina and buttocks with his hand both over her tights and under her clothing, on her skin. CP

226. M.S. testified that the other kids didn't see what was happening. RP 484. On another occasion Whitaker asked M.S. to stay behind and help him in the smaller classroom. RP 492, CP 226. When they were alone, the defendant knelt in front of M.S. and asked her why she wasn't wearing tights that day. CP 226. M.S. testified the question made her feel weird. RP 492. While kneeling in front of her he massaged her vagina with his hand over her dress. CP 226. He asked her if it made her uncomfortable when he touched her. CP 226. It was this incident that prompted M.S. to tell her mother what was happening to her. CP 226. M.S. disclosed the molestation to her mother in August 2011. CP 226. The defendant claimed that during this incident in the small classroom, he was preparing to hand M.S. a CD player and as he set it on the table the cord started to unravel and fall. In an effort to stop this he slid his hand down the cord which made it swing more, eventually hitting M.S. on her front near her waist. RP 993. He testified he asked her if she was embarrassed by it and she just shrugged. RP 993. He agreed that this particular Sunday was his last day at the church. RP 994.

Ashley Denton was the primary president at the St. John's Ward during this time. RP 667. She explained that the adults would sit with their assigned classes and there would be about fifteen adults in the sharing room at any given time. RP 670-71. The attention of people in the room

was upfront. RP 672. There was a period of time in which the defendant was the only teacher assigned to M.S.'s class. RP 674. While in the sharing room she observed that the defendant sat in the back and that M.S. was frequently sitting with him. RP 678. On one occasion in July 2011, Ms. Denton asked the kids to sit on the floor for a story but M.S. stayed in her chair. RP 680. M.S. didn't speak and the defendant said that M.S. was cold and would stay there with him. RP 681. Ms. Denton testified it was unusual for M.S. not to speak in response to a question. RP 681.

Danielle Wilcox testified as an expert witness for the State. RP 762. She is a family and child therapist with the Children's Center. RP 720. She was M.S.'s counselor following her disclosure of sexual abuse. RP 724. She has a Master's Degree in Counseling Psychology from Lewis and Clark College and is a registered counselor in the state of Washington. RP 721. At the time of her testimony she was not yet a licensed therapist because she hadn't yet completed the required number of post-graduate hours to be licensed as a therapist. RP 721. Prior to receiving her Master's degree she worked as an intern therapist in order to gain clinical experience. RP 722. At the Children's Center she works with children who have been sexually abused or experienced trauma in their past. RP 722. Ms. Wilcox received specialized training in treating children who have suffered sexual abuse. RP 723. She was permitted to offer an opinion

about whether M.S. expressed feelings that were consistent with someone who experienced a traumatic event such as sexual abuse. RP 758. She was not permitted to testify about any statements M.S. made or offer an opinion that M.S. was, in fact, sexually abused. RP 758.

This case was tried before the Honorable Robert Lewis, the defendant having waived his right to a jury trial. At the close of the case Judge Lewis found the defendant guilty of two counts of child molestation in the first degree, counts III and IV. CP 225-28. This timely appeal followed. CP 233.

C. ARGUMENT¹

III. THE TRIAL COURT DID NOT ERR IN ALLOWING DANIELLE WILCOX TO PROVIDE EXPERT TESTIMONY WHERE WHITAKER DID NOT OBJECT BELOW TO THE ERRORS HE NOW COMPLAINS OF ON APPEAL.

Whitaker's complaints in issue number three are quite disorganized and difficult to follow. He appears to make two complaints: That Danielle Wilcox was not a qualified expert and that her testimony was based upon principles that are not generally accepted in the scientific community. Whitaker failed to object on these bases below. The objections lodged by Whitaker below were that he allegedly didn't know that Ms. Wilcox might be called both as an expert witness and a fact witness, and that her

¹ The State's response to Assignments of Error 1 and 2 are contained in the response to the personal restraint petition.

proffered testimony was inadmissible opinion testimony because it was repackaged “sexual abuse syndrome” testimony which has been held inadmissible under *Frye*.² When the court clarified that Ms. Wilcox would not be permitted to offer “sexual abuse syndrome” testimony or make a diagnosis of sexual abuse, nor was the State proffering such testimony, Whitaker did not make a *Frye* objection to the testimony that would be permitted, to wit: whether M.S. had feelings that were consistent with someone who had experienced trauma, such as sexual abuse. Further, Whitaker did not accept the court’s invitation to revisit the issue at the conclusion of Ms. Wilcox’s testimony if he felt that her testimony exceeded the permissible scope. RP 761, 776.

Whitaker waived these arguments on appeal by not making specific objections below on the bases he now raises. “Failure to object to the admissibility of evidence at trial precludes appellate review of that issue unless the alleged error involves manifest error affecting a constitutional right.” *State v. Florczak*, 76 Wn. App. 55, 72, 882 P.2d 199 (1994), citing *State v. Lynn*, 67 Wash. App. 339, 342, 835 P.2d 251 (1992); *State v. Stevens*, 58 Wash. App. 478, 485–86, 794 P.2d 38, review denied, 115 Wash.2d 1025, 802 P.2d 128 (1990). “Such error is not

² *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

created by the failure to lay an adequate foundation under *Frye*.” *Florczak* at 72. This claim fails.

IV. MS. WILCOX DID NOT TESTIFY THAT SHE BELIEVED M.S. WAS MOLESTED, OR THAT THE DEFENDANT WAS GUILTY. SHE DID NOT OFFER IMPROPER OPINION TESTIMONY, AND WHITAKER HAS NOT PRESERVED THESE CLAIMS FOR APPEAL.³

Ms. Wilcox testified during the offer of proof that for purposes of treating her patient, when a child tells her they’ve been abused she believes the child RP 732. This information was elicited by Whitaker. *Id.* He did not object to this testimony (that he elicited) and has waived his right to complain of it on appeal, as argued in part III, above. RP 732. He elicited this testimony for the tactical reasons of showing bias and the unreliability of Ms. Wilcox’s opinion. Moreover, this portion of Ms. Wilcox’s testimony was not incorporated as trial testimony. At the beginning of Ms. Wilcox’s trial testimony the prosecutor asked defense counsel if she would stipulate to Ms. Wilcox’s prior testimony (during the offer of proof) about her *qualifications*. Defense counsel said she would “stipulate to her previous testimony.” RP 762. The court then ruled that the prior testimony could be “transferred” from the hearing to the trial.

³ Although Whitaker melds Issues Pertaining to Assignments of Error 3 and 4 under number 2 of his argument sections, it is far clearer to simply respond to the issues as they are identified in the Issues Pertaining to Assignments of Error section. That is how the State organized its response.

However, the context of this conversation centered upon Ms. Wilcox's professional qualifications. Because the trial court declined, following the offer of proof, to allow Ms. Wilcox to testify about statements M.S. made to her during treatment, much of her offer-of-proof testimony would be irrelevant at the trial. It is therefore unlikely the parties and court intended for the entirety of Ms. Wilcox's offer of proof testimony to be incorporated into the trial as substantive evidence. The more accurate reading of the record, and the conclusion the State urges this Court to make, is that the only portion of Ms. Wilcox's offer-of-proof testimony that was incorporated as trial testimony was the portion in which she outlined her education, qualification and professional experience. As such, the testimony in which Ms. Wilcox supposedly stated that the victim was truthful was not a part of the trial testimony. It was not evidence. Even if an objection was made to this testimony below, it is of no consequence because this testimony was not offered during the trial.

Whitaker's second assertion, that Ms. Wilcox expressed her personal opinion that Whitaker molested M.S., is unsupported by the record. The testimony Whitaker now complains of, found at pages 774-75, constituted M.S.'s expression to Ms. Wilcox of why she felt betrayed, not Ms. Wilcox's personal view of Whitaker's guilt. Ms. Wilcox was aware

that M.S. had accused her Sunday school teacher of touching her sexually and she treated her based upon that premise. As she stated during her offer-of-proof testimony, it is not her job to investigate. RP 732. In any event, Whitaker did not object to this testimony and has waived any objection to it on appeal, as argued above.

Whitaker's third complaint under this Issue Pertaining to Assignment of Error is that Ms. Wilcox should not have been permitted to testify about the common characteristics of abused children. Because Whitaker jumbled his arguments in support of issues III and IV together in his brief, the State responded to this argument in Part III, above. As noted in Part III, Whitaker did not specifically object to this testimony.

Whitaker's trial objection was based on his concern that Ms. Wilcox was going to offer testimony on "sexual abuse syndrome" and that she was going to testify that she diagnosed M.S. as having suffered sexual abuse. When the trial court made it clear that Ms. Wilcox would not be allowed to offer such testimony and opinion, and would only be permitted to testify whether M.S. had feelings that were consistent with someone who had experienced trauma, such as sexual abuse, Whitaker did not lodge a specific objection to this testimony. Further, as noted above, Whitaker did not accept the court's invitation to revisit the issue at the conclusion of Ms. Wilcox's testimony if he felt that her testimony exceeded the

permissible scope. RP 761, 776. Whitaker has waived this claim on appeal.

V. WHITAKER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY CHOSE NOT TO OBJECT TO MS. WILCOX'S TESTIMONY, AND THE CLAIMED ERROR IS NOT MANIFEST CONSTITUTIONAL ERROR.

The first claim Whitaker makes under this Issue Pertaining to Assignment of Error is that Danielle Wilcox offered an opinion about the credibility of M.S. and that the opinion invaded the province of the trial court, and that this error is manifest error affecting a constitutional right that he should be permitted to raise for the first time on appeal. Yet he doesn't state what portion of Ms. Wilcox's testimony constituted an opinion on M.S.'s credibility and doesn't cite to the record. See Brief of Appellant at pages 39-40. Is he referring to the portion of Ms. Wilcox's testimony in which she said she accepts the claim of her patient as true in order to provide treatment and that she doesn't independently investigate the claim? (See RP at 732). As noted above, this testimony was not part of the trial. It was part of an offer of proof. Second, this testimony was elicited by Whitaker in an effort to portray Ms. Wilcox as biased and to call into question the validity of any opinion she might offer. This error

was invited and cannot be deemed manifest error affecting a constitutional right.

“The general rule in Washington is that a party’s failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a ‘manifest error affecting a constitutional right.’” *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 292 (2011), quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) and *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The rule requiring issue preservation at trial encourages the efficient use of judicial resources and ensures that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *Robinson* at 305, *McFarland* at 333; *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). “[P]ermitting appeal of all unraised constitutional issues undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources.” *Robinson* at 305.

As explained in *McFarland*, supra RAP 2.5 (a) (3) is “not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court.” *McFarland* at 333. In order to obtain review under RAP 2.5, the error must be “‘manifest,’—i.e. it must be ‘truly of constitutional magnitude.’” *Id.*; *State v. Scott* at 688. To be deemed manifest

constitutional error, a defendant must identify the error and show how, in the context of the trial, the alleged error actually affected the defendant's rights. *McFarland* at 333. "It is not enough that the Defendant allege prejudice—actual prejudice must appear in the record." *Id.* at 334. Here, no actual prejudice appears in the record.

First, Ms. Wilcox's testimony was not erroneous. She did not offer an opinion on the credibility of M.S. or on the guilt of Whitaker. "Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a 'manifest' constitutional error. 'Manifest error' requires a nearly explicit statement by the witness that the witness believed the accusing victim. *State v. Kirkman*, 159 Wn. 2d 918, 936, 155 P.3d 125 (2007). What Ms. Wilcox essentially said in her non-trial testimony was that she had no reason to assume her patient was lying to her to procure treatment she didn't need; that people who voluntarily come to her for help presumably need that help and don't fabricate a treatment motive. She acknowledged she would have no way of knowing whether the underlying accusation was true and that she is not an investigator.

Second, even if improper, there is no danger that the error actually affected the defendant's rights. This was a bench trial, not a jury trial. In *State v. Read*, 147 Wn.2d 238, 244-45, 53 P.3d 26 (2002), the Supreme

Court held the admission of irrelevant testimony does not warrant reversing a conviction in a bench trial because the reviewing court “presumes the trial judge did not consider inadmissible evidence in rendering the verdict.” The Court cited *Harris v. Rivera*, 454 U.S. 339, 346, 102 S.Ct. 460 (1981), which held “[i]n bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.” The Court also relied on *Builders Steel Co. v. Comm’r of Internal Revenue*, 179 F.2d 377, 379 (8th Cir.1950), which held:

In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made.

This presumption can be rebutted by showing that the verdict is based on insufficient evidence, or that the judge “relied on the inadmissible evidence to make essential findings that it otherwise would not have made.” *Read* at 245-46. Whitaker has not made these showings, and thus cannot demonstrate prejudice.

Finally, as noted above, this testimony was not part of the trial evidence and was *elicited by Whitaker* for a legitimate tactical reason.

Whitaker cannot complain about this testimony for the first time on appeal.

The second claim Whitaker makes under this Issue Pertaining to Assignment of Error is that he was denied effective assistance of counsel when his attorney failed to object to Ms. Wilcox supposedly offering an opinion about the credibility of M.S. and the guilt of Whitaker. As noted above, Ms. Wilcox offered no such opinion. Also as noted above, the portion of the testimony Whitaker complains of was elicited during the offer of proof, not the trial. This testimony was elicited for a tactical reason and did not prejudice Whitaker in this bench trial. Indeed, Whitaker's entire discussion of ineffective assistance of counsel on this issue is devoid of an attempt to show prejudice.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland at 689.

But even deficient performance by counsel “does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland* 691. A defendant must affirmatively prove prejudice, not simply show that “the errors had some conceivable effect on the outcome.” *Strickland* at 693. “In doing so, ‘[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (quoting *Strickland* at 694). When trial counsel's actions involve matters of trial tactics, the Appellate Court hesitates to find ineffective assistance of counsel. *State v. Jones*, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And the court presumes that counsel's performance was reasonable. *State v. Bowerman*,

115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and 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); *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). “The decision of when or whether to object is a classic example of trial tactics.” *Madison*, 53 Wn. App. at 763. This court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *In re Personal Restraint of Davis*, 152 Wn.2d, 647, 714, 101 P.3d 1 (2004) (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). Further, “[t]he absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Edvalds*, 157 Wn. App. 517, 525-26, 237 P.3d 368 (2010), citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). “Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or an appeal.” *Swan* at 661, quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960).

“Criminal defendants are not guaranteed ‘successful assistance of counsel.’” *State v. Dow*, 162 Wn. App. 324, 336, 253 P.3d 476 (2011), quoting *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) and *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Not every error made by defense counsel that results in adverse consequences is prejudicial under *Strickland*, supra. *State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011). Whether a “strategy ultimately proved unsuccessful is immaterial.” *Grier* at 43, see also *Dow*, supra, at 336. Last, with respect to the deficient performance prong of *Strickland*, “hindsight has no place in an ineffective assistance analysis.” *Grier* at 43.

The testimony Whitaker complains of was not improper and an objection to this testimony would not have been sustained. “[A]n observation that a victim exhibits behavior typical of a group does not relate directly to an inference of guilt of the defendant.” *State v. Jones*, 71 Wash. App. 798, 815, 863 P.2d 85, 96 (1993). “Testimony that certain behaviors or injuries of victims are not inconsistent with abuse in general has been found admissible as not constituting an opinion on the defendant’s guilt.” *Jones* at 815, n. 6; citing *State v. Sanders*, 66 Wn. App. 380, 388, 832 P.2d 1326 (1992); *State v. Toennis*, 52 Wn. App. 176, 185, 758 P.2d 539, review denied, 111 Wn.2d 1026 (1988); see also *State v. Jones*, 59 Wn. App. 744, 749–51, 801 P.2d 263 (1990), review denied, 116

Wash.2d 1021, 811 P.2d 219 (1991); *State v. Simon*, 64 Wn. App. 948, 964, 831 P.2d 139 (1991), *aff'd in part and rev'd on other grounds*, 120 Wn.2d 196, 840 P.2d 172 (1992). Whitaker's claim fails.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ELECTING NOT TO TRAVEL TO THE SCENE OF THE CRIME AND VIEW IT.

CrR 6.9 governs the trial court's authority to allow a jury to view the crime scene. In this case, the trial judge was the trier of fact as Whitaker waived his right to a jury trial. The judge determined that he did not need to view the scene in order to decide the case. A trial judge's decision to decline a request for a crime scene viewing is reviewed for abuse of discretion. *State v. Land*, 121 Wn.2d 494, 502, 851 P.2d 678 (1993); *State v. Holden*, 75 Wn.App. 413, 414, 451 P.2d 666 (1969). "The purpose of permitting a jury to view the crime scene is to enable it to better understand the evidence produced in court." *Land* at 501. Here, the trial court did not abuse its discretion by declining the request to view the crime scene. Judge Lewis heard and viewed extensive evidence about the layout of the sharing room at the St. John's ward and the design of the chairs the defendant and victim sat in. RP 482, 498-500, 570-75, 642-46, 670-72, 676-77, 685, 688, 707, 865-66, 887-88, 921, 1074-78, 1082, 1087, 1091, 1095, 1099, 1100-01, 1104, 1107, 1110-13, 1119-20. Judge Lewis

was in the best position to know whether he needed to view the scene. Judge Lewis did not abuse his considerable discretion by declining to travel to St. John's ward to view the sharing room.

VII. THE TRIAL COURT DID NOT ERR IN IMPOSING A LIFETIME NO CONTACT ORDER WHICH HAPPENED TO SPECIFY A DATE CERTAIN FOR EXPIRATION.

The Sentencing Reform Act (SRA), in RCW 9.94A.505(8) authorizes the trial court to impose "crime-related prohibitions" on a defendant at sentencing. "Crime-related prohibitions" are orders that directly relate to the "circumstances of the crime." RCW 9.94A.030(13). This Court reviews a trial court's imposition of sentencing conditions for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (citing *MacKay v. MacKay*, 55 Wn.2d 344, 347 P.2d 1062 (1959)). Conditions are generally upheld if they are reasonably crime related. *Id.* at 36-37. A no contact order with the victim of a crime is a crime-related prohibition. See *In re Personal Restraint Petition of Rainey*, 168 Wn.2d 367, 376, 229 P.3d 686 (2010) (holding that RCW 9.94A.505(8) authorizes a sentencing court to impose a no-contact order with the victim of the crime).

In conjunction with the trial court's authority under RCW 9.94A.505(8), RCW 7.90.150 specifically authorizes issuance of a separate sexual assault protection order if no contact with the victim is imposed as a condition of a defendant's sentence. RCW 7.90.150(6)(a). This statute allows the trial court to impose an order prohibiting the defendant from having contact with the victim for a period of time to include two years following expiration of sentence or community supervision. The statute states:

(6)(a) When a defendant is found guilty of a sex offense as defined in RCW 9.94A.030..., and a condition of the sentence restricts the defendant's ability to have contact with the victim, the condition shall be recorded as a sexual assault protection order.

(c) A final sexual assault protection order entered in conjunction with a criminal prosecution shall remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole.

RCW 7.90.150(6) (a), (c). Whitaker was sentenced to an indeterminate sentence that could include up to life in prison, subject to review by the Indeterminate Sentence Review Board, with lifetime community custody. CP 211-12. Given his sentence, RCW 7.90.150(6) (c) authorizes a sexual assault protection order be entered that remains in effect for up to two years after Whitaker's death.

It is clear that any expiration date set by the trial court for Whitaker's sexual assault protection order would be within the confines of the statute. Once Whitaker dies no protection order against him can be enforced. Whitaker's argument that the trial court acted outside its authority in issuing the no contact order to expire 100 years after issuance is without merit. The trial court had the authority to issue a no contact order that would protect the victim for as long as Whitaker remains alive. The trial court cannot know of this exact date, and therefore set a date which is certain to achieve the court's goal and the statute's goal: to protect the victim from Whitaker as long as Whitaker remains alive. The trial court's choice in date clearly supports and promotes that goal. It is clear this decision was not manifestly unreasonable, or made for untenable reasons. The trial court did not abuse its discretion in issuing this no contact order pursuant to RCW 7.90.150(6). The trial court's issuance of the no contact order should be affirmed.⁴

D. CONCLUSION

Whitaker's convictions should be affirmed.

⁴ The reason for picking a date certain, as appellate counsel for Whitaker is well aware based on his prior service as a judge in Clark County Superior Court, is that the judges in Clark County insist upon it. The clerks prefer to have an actual expiration date for the computer. The State has no particular preference for how "life" is memorialized.

PART 2—PERSONAL RESTRAINT PETITION

A. IDENTITY OF RESPONDENT AND AUTHORITY FOR RESTRAINT

The State of Washington is the Respondent in this matter. Mr. Whitaker is restrained pursuant to the judgment and sentence of the Clark County Superior Court dated April 5, 2013 under cause number 11-1-01948-9. A copy of the judgment and sentence is attached at Appendix A.

B. STATEMENT OF THE CASE

Whitaker denied that he ever touched M.S. sexually. RP 994. He called several witnesses to testify about the supposed impossibility of him committing this crime in the manner described by M.S. Steven Gonsalves is a member of the LDS church at St. John's Ward. RP 838. He was a primary teacher at the church beginning in August of 2011. RP 840. He served as a co-teacher with Whitaker on four Sundays. RP 841. Their class sat in the last two rows of the primary room. RP 846. He testified that no particular students consistently sat next to Whitaker. RP 848. He would look around at his students during the class to make sure they were reverent. RP 849. He testified that Whitaker never took his suit coat off during class. RP 854. He was given the following hypothetical: If a student was sitting directly between him and Whitaker, would Whitaker

have been able to put his hand behind the chair, through the opening, underneath the waistband, underneath the tights and massage that person's genitals without being noticed? RP 861. He testified it was "not humanly possible," that Whitaker would have been noticed right away, that he would have to be "invisible" to have gotten away with it. RP 861. He further testified that Whitaker would not have been able to touch M.S. sexually while sitting behind her. RP 863. Although he claimed on direct examination that he always sat in the back row (like Whitaker), he admitted on cross examination that he told Detective Bull that he always sat in the front of the class, that he couldn't say what Whitaker might have done because he wasn't with him "24/7," and that he was not looking at Whitaker constantly. RP 871-72. He also conceded on cross examination that he told Detective Bull that Whitaker would most often sit next to M.S. and K.O., and that they were his favorites. RP 874. Also contrary to his testimony on direct examination, he admitted that he told both Detective Bull and the defense investigator that he did, in fact, see Whitaker take his suit coat off occasionally. RP 874-76. He also conceded that he really wasn't paying attention to Whitaker in the class because he was paying attention to the boys and the singing. RP 877. He also told Detective Bull that Whitaker was more touchy with the girls than the boys, and was keen on M.S. in particular. RP 878. He told the defense investigator he could

see the other teachers in the primary room but couldn't see what they were doing, and couldn't see anything but their heads once they sat down. RP 884. He disavowed that statement at trial, saying he had been inaccurate (although not denying he said it.). RP 884.

Laurie Ogden testified for Whitaker. She is a member of the LDS church at St. John's and is a primary teacher like Whitaker. RP 887.

Whitaker's wife is one of her "very best friends." RP 907. She didn't pay attention to which row Whitaker sat in, and didn't pay attention to where M.S. sat. RP 891-92. She testified that unless the classroom was "extremely hot" Whitaker would have his coat on. RP 894. But then she testified that if it was cold, he might drape it over the shoulders of someone else. RP 894. She was given the following hypothetical: If two people were sitting right next to each other would it be possible for one person to reach between the chair of the person sitting next to him, reach under her tights and underwear, and fondle her genitals without being seen? RP 896. She testified it was "absolutely impossible," and there was "no doubt in her mind" that Whitaker could not have done it without being seen. RP 896-97.

Pamela Wise testified for Whitaker. She is another primary teacher at the St. John's Ward. RP 918. In 2011, she was sitting in the middle section of the primary room. RP 920. She has known Whitaker for six or

seven years. RP 920. Although she would occasionally glance over at Whitaker's class, she mostly focused on her own students. RP 922. Whitaker sat in the back row toward the wall. RP 923. She testified she never saw Whitaker take his coat off in the primary room. RP 924. She claimed there was nowhere in the room that one could sit and not be seen. RP 928. She was given the following hypothetical: Could an adult sitting in the back row next to a child reach behind the child, put his hand through the chair opening and underneath her tights and buttocks, reach her genitals and massage them without being noticed? RP 929. She testified that it couldn't happen without him being noticed. RP 929. She clarified that she was referring to the children who would have noticed, and that there "could be" adults who would notice. RP 930-31. She conceded that she wouldn't be able to see what was going on with every student in every row at all times, and that she was not able to see Whitaker's lap. RP 933, 942.

Paul Pecora testified for Whitaker. He is a member of St. John's Ward. RP 1038. He is a parent, not a primary teacher. RP 1040-41. As such, he was only in the classroom when his child was presenting to the class, only four or five times in 2011. RP 1051-52. While in the classroom his attention was focused on his child. RP 1052. Nevertheless, when presented with the same hypothetical as the other defense witnesses, he

testified it was not possible Whitaker could have done what he was accused of. RP 1044. He claimed that Whitaker would have to be a “contortionist,” and that

[E]verybody’s there seeing--I mean there’s adults in the front looking back. There’s adults on the side looking this way. I just personally would not think that would be physically possible because that’s a lot of movement. But the second part is there’s a lot of people in that room. It’s not a little private room. You know?

RP 1044.

Michelle Pecora, Paul’s wife, also testified for Whitaker. She was present in the sharing room three or four times in 2011. RP 1067. She was presented with defense counsel’s hypothetical and said she didn’t believe it would be possible for someone to do what Whitaker was accused of. RP 1062. When asked why, she said “[t]hat’s a long way to reach around so I just don’t--I don’t see how that would be able to happen.” RP 1062.

Whitaker testified in his defense. He was the one who prepared demonstrative exhibit 19, a schematic of the sharing room which defense counsel utilized with each defense witness when questioning them about the possibility this crime could have been committed in the manner described by M.S. RP 999. He testified that when the children would jump out of their chairs in an effort to get attention he would put something on their chairs such as a pen, marker or book in order to teach them not to

jump out of their chairs. RP 981-82. His clear purpose in offering this testimony was to imply that M.S. mistook his fingers on her bare skin for a pen, marker or book. He testified that M.S. was one of the children who would jump out of her chair to be noticed, but conceded that Pamela Wise was correct in characterizing M.S. as shy. RP 1011. Contrary to his attorney's efforts to portray it as impossible to reach through the back of someone else's chair without everyone noticing, Whitaker conceded that he could place these items on the childrens' chairs (either in his own row or in the row in front of him) without great effort unless it was a student who was "two or three seats down." RP 1013-14. He also testified that M.S. wanted to sit next to him all the time. RP 1014.

The State admitted two of the chairs from the primary room as exhibit 45. RP 1076. Rachael Probstfeld recovered the chairs from St. John's Ward and was asked to sit in the chair. RP 1075-76. She was asked to sit in one of the chairs and place her hand in the opening of the other chair next to her. RP 1076. She testified she was not particularly strained in doing that. RP 1076.

Three children were interviewed by Detective Cindy Bull as part of her investigation. The children were J.W.K. (a girl), K.C. (a boy), and K.O. (a girl). RP 813, 815, 816. The interviews were recorded and transcribed. See Petitioner's Exhibit C.

K.C.'s interview spans 20 pages. He was nine years old at the time of the interview. Pg. 2. During the interview he told detective Bull that in the sharing room, M.S. would sit on one side of Whitaker and he would sit on the other. See pg. 9. He said that Whitaker usually kept his coat on but would give it to someone to wear if they got cold. Pg. 11. K.C. said Whitaker never gave his coat to M.S. Pg. 11. But when asked why Whitaker never gave his coat to M.S., K.C. said it was because "she'd (sic) mostly not at the church because she was gone for three months." Pg. 11. When redirected to the relevant time period (prior to the disclosure) he said that M.S. never wore Whitaker's coat. Pg. 11. He then immediately changed his mind and said that M.S. did wear Whitaker's coat. Pg. 11. He "didn't really know" if Whitaker's jacket was ever on M.S.'s lap. Pg. 12. K.C. is the Pecora's son. Pg. 13. He never saw Whitaker touch M.S. or any other kid inappropriately. Pg. 13.

K.O. was nine years old at the time of her interview with Detective Bull. Pg. 1. She said she never saw Whitaker take his coat off because it didn't get hot in class. Pg. 9. She said M.S. didn't sit by Whitaker very often. Pg. 10. She said Whitaker never did anything that made her uncomfortable. Pg. 13. She said that Whitaker sat in the last row, whereas she sometimes sat in the first of their two rows. Pg. 21. When asked if there was anyone in particular who usually sat next to Whitaker, she said

“just girls--he wanted the girls.” Pg. 21. She said M.S. usually sat by herself, by her (K.O.), or by another girl. Pg. 22. Contrary to what she said on page 9 of her interview, she later said that Whitaker did, in fact, take his coat off in class sometimes because it was hot in the classroom. Pg. 24. He would put the jacket on the back of a chair. Pg. 24. She then said that he would do that in the smaller classroom, and she wouldn’t notice what he did in the sharing room. Pg. 24.

Nine year old J.K. told Detective Bull that Whitaker sat in the back row during the sharing hour. Pg. 9. J.K. said that everybody sat next to Whitaker, and that M.S. sat next to him a lot. Pg. 10. J.K. said that Whitaker would sometimes take his jacket off and put it on the back of a chair. Pg. 10. She said that he never put his coat on someone’s lap, but then said she wouldn’t have seen what he did with his coat because she wouldn’t have been looking. Pg. 11. She said that sometimes Whitaker would tickle a student on the middle of the student’s back. Pg. 12. M.S. is one of the students he tickled. Pg. 14. J.K. thought that Whitaker only tickled her and M.S. Pg. 15. When he tickled J.K., he would do it from behind her in the big primary class (the sharing room). Pg. 16. When asked if Whitaker ever asked her to do something that she didn’t think was okay, J.K. said she didn’t remember. Pg. 17.

Detective Bull asked J.K. if she ever saw Whitaker touch M.S.'s leg and she said "I don't know." Pg. 18. Bull asked J.K. if there was anything about Whitaker that made her uncomfortable, about how he acted or what he did? J.K. replied:

In primary if I was sitting next to him he would sort of do this over the chair (moves arm as though putting it on the back of a chair.)

Pg. 18. Detective Bull asked J.K. if there was anything she didn't like about Whitaker and she shook her head "no." She then asked if there was anything she *did* like about Whitaker and she shook her head "no." Pg. 19. Bull asked J.K. "Is there—have you ever told anybody about having any problems with him?" J.K. shook her head "no." Bull then asked "Okay. Is that something you could tell somebody?" J.K. shook her head "no." Pg. 19. Detective Bull then told J.K. that she could tell her anything and she wouldn't get in trouble, to which J.K. nodded her head. Pg. 19-20.

Detective Bull then asked "So—is there anything that we should talk about?" J.K. replied "I don't know" and shrug her shoulders. Pg. 20.

Detective Bull then asked J.K. if she was ever touched on her privates and she replied "no." Pg. 20. She also said she never saw Whitaker touch M.S. in her privates. Pg. 21. Detective Bull asked how it made J.K. feel when Whitaker tickled her and she said it made her feel funny. Pg. 23-24.

C. ARGUMENT WHY PETITION SHOULD BE DISMISSED

A personal restraint petition is not a substitute for a direct appeal. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). A personal restraint petitioner must prove either a constitutional error that caused actual prejudice or a nonconstitutional error that caused a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petitioner must state the facts on which he bases his claim of unlawful restraint and describe the evidence available to support the allegations; conclusory allegations alone are insufficient. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988); *In re Pers. Restraint of Stockwell*, 161 Wn. App. 329, 254 P.3d 899 (2011)).

In evaluating personal restraint petitions, the Court can: (1) dismiss the petition if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error; (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record; or (3) grant the personal restraint petition without further hearing if the petitioner has proven actual prejudice or a miscarriage of justice. *Cook*, 114 Wn.2d at 810-11; *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). This personal restraint petition is timely.

Whitaker claims that his counsel was ineffective for failing to call K.C., K.O., and J.K. as witnesses in his defense. Whitaker's claim is meritless.

Respondent incorporates the legal standard for determining ineffective assistance of counsel from the direct appeal response. Assuming without conceding that a lawyer is incompetent when she fails to subpoena witnesses that she (erroneously) deems critical to her case, and that she is incompetent in believing that a police interview of said witnesses is admissible in lieu of testimony, Whitaker's claim nevertheless fails because he was not prejudiced by the absence of these witnesses.

The three child witnesses that are alleged to be exculpatory and critical to Whitaker's case were neither. They were anything but. The transcribed interviews with these children reveal that they were at best unobservant of what occurred and at worst hopelessly confused. Each of these three children at one point or another made statements that were wholly contrary to statements they made elsewhere in their interviews. In other words, they were typical of what one would expect of children who were focused on themselves rather than others around them. Moreover, they would have added nothing to the case beyond that of the other defense witnesses. Whitaker called five witnesses who each testified that they were familiar with the area in which these crimes occurred and that in their opinion, the crimes simply could not have happened. The adult defense witnesses testified variously that it was "absolutely impossible"

that Whitaker could have molested M.S. in the sharing room; that he would have to be “invisible,” or a “contortionist.”

In the case of J.K.’s interview, it didn’t merely fail to exculpate the defendant. A fair reading of the interview was that it inculpated him. No reasonable attorney would have called J.K. to testify given the responses she gave to Detective Bull in that interview. Defense counsel in this case wisely did not call J.K. to testify in Whitaker’s case.

The trial court, as the finder of fact and arbiter of credibility, determined that the State’s evidence that Whitaker molested M.S. was more reliable and credible than the defendant’s evidence that he didn’t. Stated another way, he did not agree that it was physically impossible for Whitaker to have secretly committed these acts in the presence of others.⁵ As noted in the direct appeal response, the trial court heard lengthy testimony about the configuration of the sharing room, the configuration of the chairs, the design of the chairs, the vantage point of the witnesses as well as the frequency of their presence in the room. The court viewed photographs and demonstrative exhibits. Finally, the court heard and observed the testimony of M.S. and believed her claim that Whitaker molested her. See Findings of Fact and Conclusions of Law, CP 225-229.

Defense counsel’s choice not to call K.C., K.O., or J.K. to testify was not ineffective, despite her assertion to the contrary in her subjective,

⁵ It is worth observing that the presence of others during the commission of these acts rendered this nearly the perfect crime. Who would do such a thing in the presence of as many as forty children and ten adults? Someone who counted on the incredulity of others when the crimes came to light.

unchallenged declaration. And even if her failure to call these witnesses could be deemed a mistake, Whitaker was not prejudiced. The trial court was very aware of the central issues in this case. They were: 1) is M.S. credible? 2) Is Whitaker credible? 3) Is it physically possible for Whitaker to have committed these acts in the manner described by M.S.? The trial court found M.S. credible and found that these acts were, in fact, possible and that Whitaker molested M.S.

Three additional child witnesses who failed to make any consistent substantive observations would not have added to Whitaker's defense where five adults each testified that M.S.'s assertions were "impossible." Whitaker did not suffer prejudice by his attorney's decision not to call these witnesses and his petition should be dismissed.

D. CONCLUSION

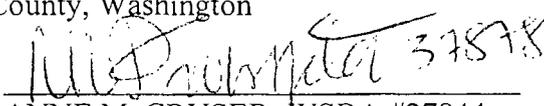
The personal restraint petition should be dismissed.

DATED this 6th day of December, 2013.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:


ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

December 06, 2013 - 4:23 PM

Transmittal Letter

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Sender Name: Connie A Utterback - Email: connie.utterback@clark.wa.gov

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

STATE OF WASHINGTON,
Respondent,

v.

RYAN DEE WHITAKER,
Appellant.

No. 44842-4-II

Clark Co. No. 11-1-01948-9

DECLARATION OF
TRANSMISSION BY MAILING
AND EMAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On December 6, 2013, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached. This same document was also emailed to the email address listed.

TO:

Roger A Bennett
Attorney at Law
112 W. 11th St, Suite 200
Vancouver WA 98660-3359

Rbenn21874@aol.com

DOCUMENTS: Brief of Respondent and Response to Personal Restraint Petition.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



Date: December 6, 2013.

Place: Vancouver, Washington.

CLARK COUNTY PROSECUTOR

December 06, 2013 - 4:24 PM

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