

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KEITH DOW,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Keith Dow's trial was fundamentally unfair from start to finish. At the outset, the State was wrongly permitted to file an untimely affidavit of prejudice against a judge who had already issued discretionary rulings with which the State disagreed. The State continues to defend this action on appeal, even though the Division Three case on which it relies conflicts with Supreme Court cases, the statute, and public policy.

During trial, the State was permitted to call an expert witness to support its theory that the complainant's constantly changing stories about the events at issue did not mean her memory was inaccurate, while Mr. Dow's proposed expert on the fallibility and malleability of memory was excluded. The issue in the case was whether the complainant accurately perceived and remembered what happened for 15-30 seconds eight years earlier when she was three years old, yet Mr. Dow was not permitted to exercise his constitutional right to present a witness supporting his defense that her memory was compromised by post-event influences.

Finally, over Mr. Dow's objections the court permitted the State to play a recording of the complainant's mother stating that Mr. Dow molested several other children, including his own daughter, and that it was "documented." The State admits there is "no indication" that the allegations are true, yet it refuses to concede that it was error to allow the

jury to hear the baseless allegations. This Court should reverse and remand for a fair trial.

B. ARGUMENT

1. **The trial court erred in denying Mr. Dow's motion to vacate the State's untimely affidavit of prejudice against Judge Warning, and adopting the State's view of the law would violate the statute, contravene Supreme Court caselaw, and promote judge-shopping.**

As explained in the opening brief, the State was improperly permitted to remove Judge Warning by filing an affidavit of prejudice after Judge Warning had already issued discretionary rulings in the case. Br. of Appellant at 9-15. The State agrees that this Court reviews the question *de novo* and that the issue comes down to the definition of "case" in RCW 4.12.050. Br. of Respondent at 21. The State argues that this is a different "case" than the one over which Judge Warning presided, even though it is the same charge against the same person based on the same alleged facts. The State is wrong under the standard set forth in *State v. Belgarde*, 119 Wn.2d 711, 837 P.2d 599 (1992). Furthermore, the Division Three case the State relies on has been abrogated by *State v. Taylor*, 150 Wn.2d 599, 80 P.3d 605 (2003). Finally, adopting the State's view would promote judge-shopping, which is exactly what the timeliness requirement was designed to prevent.

- a. This is the same “case” for purposes of the statute because it is the same charge against the same defendant based on the same alleged facts.

The State acknowledges that the test for whether something is a new “case” under RCW 4.12.050 is whether it “presents new issues arising out of new facts occurring since the entry of final judgment.” Br. of Respondent at 23 (citing *Belgarde*, 119 Wn.2d at 717). Under this definition, the State’s case against Mr. Dow has been the same “case” all along.

To begin with, the charge is the same. The State in its brief states that the original charge was rape of a child but does not mention that it amended the information to charge child molestation instead under the same cause number in April of 2006. *Compare* Br. of Respondent at 21-22 *with* CP 138. Thus, when the State re-filed the information after the appeal, it alleged exactly the same crime based on the same alleged facts against the same defendant. CP 1-4. Mr. Dow believes it would be the same “case” for purposes of the statute regardless, but it is worth clarifying that the charge was the same. The issue is certainly the same: whether Mr. Dow is guilty of the charge beyond a reasonable doubt.

The alleged facts are also the same: that Mr. Dow engaged in sexual contact with K.W. when she was three years old. CP 1-4, 138; *State v. Dow*, 168 Wn. 2d 243, 246, 227 P.3d 1278 (2010). The State

attempts to obfuscate the analysis by stating that it had new “evidence” when it re-filed the charge, and because of this new evidence it was a new case. Br. of Respondent at 24. But this is not the test. The question is not whether the State will present new or different evidence the second time around – after all, this can and does happen following appellate reversals or mistrials – yet a party may not file an affidavit of prejudice in such circumstances. *Belgarde*, 119 Wn.2d at 715; *State v. Clemons*, 56 Wn. App. 57, 59, 782 P.2d 219 (1989). The question is whether the case presents new issues arising out of new alleged facts. *Belgarde*, 119 Wn.2d at 717. This is not a new case simply because K.W. grew older and became competent to testify; she testified about the same incident that had been alleged along.

- b. This is the same “case” for purposes of the statute because a dismissal without prejudice is not a final judgment.

Another reason the State cannot meet the *Belgarde* standard is that in order for a case to be a new “case,” it must not only present new issues based on new facts, but those new facts must have occurred “since the entry of final judgment.” *Belgarde*, 119 Wn.2d at 717. A dismissal without prejudice is not a “final judgment.” *State v. Taylor*, 150 Wn.2d 599, 80 P.3d 605 (2003). The Division Three case the State relies on predated *Taylor* and evaluated this prong incorrectly. *See State v. Torres*, 85

Wn. App. 231, 233, 932 P.2d 186 (1997). The *Torres* court concluded that a dismissal without prejudice was a final judgment based on Division One's opinion in *State v. Rock*, 65 Wn. App. 654, 658, 829 P.2d 1143 (1992). *Torres*, 85 Wn. App. at 233. But the Supreme Court explicitly overruled *Rock* in *Taylor*, and instead agreed with this Court that a dismissal without prejudice is not a "final judgment." *Taylor*, 150 Wn.2d at 602 ("We agree with Division Two's rejection of Division One's decision in *Rock*"). The Court explained:

In our view, an order of dismissal without prejudice does not fit within this court's definition of "final judgment," nor does it fit under *Black's* [Law Dictionary] definition. We say that because an order of dismissal without prejudice in a criminal matter does not bar the State from refiling charges against the defendant within the applicable statute of limitations.

Taylor, 150 Wn.2d at 602.

Under *Taylor*, the dismissal of the original information against Mr. Dow was not a "final judgment." Under *Belgarde*, the "case" against Mr. Dow is the same "case" for which Judge Warning had already issued discretionary rulings, and the State's affidavit of prejudice was untimely. This Court should follow the Supreme Court's decisions in *Belgarde* and *Taylor* rather than Division Three's opinion in *Torres*.

- c. Mr. Dow's reading of the statute comports with public policy, and the remedy is remand for a new trial.

As noted in the opening brief, the State's removal of Judge Warning in this case was not only improper under the statute and caselaw, but also violated the very purpose of the timeliness requirement, which is to prevent judge-shopping. Br. of Appellant at 14 (citing *Clemons*, 56 Wn. App. at 61-62). The State was permitted to remove a judge who had already issued a ruling in the case with which the State disagreed, and it was permitted to do so simply because the information was dismissed and re-filed. If this decision is permitted to stand, the State can always change judges after adverse rulings by simply dismissing and refiling charges. This is contrary to the policy of RCW ch. 4.12, in addition to violating the plain language of the statute and the Supreme Court's decision in *Belgarde*.

Finally, the State claims that even if its affidavit of prejudice was untimely, Mr. Dow is not entitled to reversal because he "cannot show any rulings that Judge Warning would have made if he [were] the presiding judge." Br. of Respondent at 25-26. Although there were serious errors in Mr. Dow's trial, it is of course true that Mr. Dow cannot prove that Judge Warning would not have made the same errors – nor could any litigant ever show that a particular judge would have issued particular rulings. By

the State's logic, therefore, there is simply no remedy for the improper grant of an untimely affidavit of prejudice. This cannot be the law. *See Ashby v. White*, 2 Ld. Raym. 938, 92 Eng. Rep. 126 (1703) ("it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal"). The timeliness requirement of RCW 4.12.050 would be rendered a nullity if there were no remedy for its violation.

As noted in the opening brief, this Court has reversed and remanded for a new trial when an affidavit of prejudice was improperly denied. *State v. Norman*, 24 Wn. App. 811, 814, 603 P.2d 1280 (1979). This Court did not require the defendant to show that the judge who presided over his trial actually prejudiced his case, or that a different judge would have issued different rulings. *See id.* This Court engaged in statutory construction, determined that the ruling on the affidavit of prejudice was incorrect, and reversed and remanded for a new trial. *Id.* Similarly here, this Court should hold that under the statute and caselaw the ruling on the affidavit of prejudice was improper, and should reverse and remand for a new trial.

2. The trial court erred under ER 702 and violated Mr. Dow's constitutional right to present a defense by prohibiting him from calling an expert witness to explain the fallibility and malleability of memory.

As explained in the opening brief, the trial court erred under ER 702 and violated Mr. Dow's constitutional rights by prohibiting him from presenting an expert witness on the fallibility of memory while permitting the State to call its own expert witness on the same question. The contested issue in this case was whether K.W. accurately perceived and remembered what happened for 15-30 seconds eight years earlier when she was three years old. Her stories had changed drastically over the years, yet the State was permitted to present an expert saying that none of that mattered, while the defense was prohibited from presenting their own expert explaining the fallibility and malleability of memory. This ruling deprived Mr. Dow of a fair trial, and constitutes an independent basis for reversal. *See* Br. of Appellant at 15-32.

a. The nature of perception and memory is not within the common understanding of the jury.

The State insists that the nature of memory is within the common understanding of the jury because it is well known that "memories fade with time." Br. of Respondent at 35. The State's characterization of the issue demonstrates the fallacy of its argument. The reason Dr. Yuille's testimony was necessary and helpful is that the nature of perception and

memory is far more complex than “memories fade with time.” As explained in the offer of proof, unlike what jurors commonly understand, episodic memory “is reconstructive in nature.” CP 264. In other words, when a person initially perceives an event, the “episode is not stored in memory in the fashion that a video or computer would store information.” CP 264. Furthermore, the problem is not just that memories “fade” with the passage of time – it is that they can change dramatically and unconsciously as a result of post-event influences:

[T]he reconstructive process can make errors. The content of a reconstructed episode can be influenced by current information (i.e., at the time of recall) as well as by the original experience. Thus, an episodic memory may change over time as a result of re-interpretation of an event or as a result of suggestion. The change in memory over time can happen without the awareness of the rememberer.

CP 264. The bottom line is that, contrary to common understanding, “[a]n individual could come to hold a memory for an event that is not true: that is, the memory is a narrative truth but not an historic truth. The reconstructive nature of Episodic Memory makes it possible for this to occur.” CP 264.

Courts have recognized the complexity of the issue. “Today, there is no question that many aspects of perception and memory are not within the common experience of most jurors” *United States v. Smithers*, 212 F.3d 306, 316 (6th Cir. 2000). Indeed, the State acknowledges, as it must,

that our Supreme Court recently endorsed the use of expert testimony on perception and memory based on numerous scientific studies. Br. of Respondent at 34-35 (citing *State v. Allen*, 176 Wn.2d 611, 294 P.3d 679 (2013)); *see also* Br. of Appellant at 25-28. Yet the State seems to think that *Allen* and other cases Mr. Dow cites are inapposite because they involved problems with remembering perpetrator characteristics, as opposed to remembering other aspects of events. Br. of Respondent at 35 (“Appellate counsel does not provide any information to the court about how Dr. Yuille’s memory testimony is akin to eyewitness identification”). The State’s response makes no sense. Obviously, perceiving and remembering the physical characteristics of a perpetrator is merely a specific subset of perceiving and remembering an event. Indeed, like Dr. Yuille’s offer of proof, the scientific literature relied on in *Allen* stresses the “influences on memory and memory reports of suggestive questioning and postevent information.” *See* Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 Psychol. Pub. Pol’y & L., 909, 916 (1995) (cited in *Allen*, 176 Wn.2d at 641 (Wiggins, J., dissenting)).

The State’s claim that Dr. Yuille’s “memory testimony is [not] akin to eyewitness identification” is dispelled not only by common sense and by the discussion in the cases cited in the opening brief, but also by a cursory review of the articles written by scientists in the field. For

instance, it is well known that Dr. Elizabeth Loftus is one of the preeminent experts on the fallibility of eyewitness identifications. But her field is not so narrow. Her countless books and articles discuss the fallibility of perception and malleability of memory in general, and address perpetrator (mis)identification as a subset of the issue. *See, e.g.,* Elizabeth Loftus, *Our changeable memories: legal and practical implications*, 4 *Nature Reviews: Neuroscience* 231 (2003) (hereafter “*Our changeable memories*”). Dr. Loftus, like Dr. Yuille, has recognized that “[m]emory is malleable. It is not, as is commonly thought, like a museum piece sitting in a display case.” *Id.* at 231. Further echoing Dr. Yuille, Dr. Loftus notes that memory is not like “a replay of a videotape.” *Id.* She agrees with the prosecutor’s point that everyone knows that memories fade, but, like Dr. Yuille, she explains that this is not the only problem:

[M]emories are not fixed. Everyday experience tells us that they can be lost, *but they can also be changed or even created.*

Id. (emphasis added).

Dr. Loftus goes on to mention a notorious case in which a rape victim mistakenly identified Ronald Cotton as the perpetrator. *Our changeable memories*, at 231. But she notes, “Faulty memory is not just about picking the wrong person.” *Id.* For instance, in the Washington, D.C. sniper attacks, post-event information contaminated witness

memories such that they wrongly thought a white truck was involved. *Id.* As particularly relevant here, Dr. Loftus stated that post-event influences “could actually make people believe that a childhood experience had occurred when in fact it never happened.” *Id.* at 232.

In sum, there can be no doubt that the cases Mr. Dow cited involving the fallibility of eyewitness identifications and the importance of expert testimony are highly relevant to the case at hand. The issue in the cited cases, as in this case, is that problems of perception and memory can lead to unreliable testimony – yet the ways perception and memory work are not within the common understanding of jurors. Thus, expert testimony is essential to illuminate the issue. *See Our changeable memories* at 233 (describing case of Jacob Beard, who was wrongfully convicted after first trial but acquitted after second, where expert testimony on suggestion and false memory was presented).

b. Expert testimony on perception and memory does not invade the province of the jury.

The State also claims that Dr. Yuille’s testimony would have invaded the province of the jury because it would have been a comment on R.W.’s credibility. Br. of Respondent at 31. The State is wrong. As already explained, no one was claiming the child was lying; the question was whether her memory was accurate and reliable. Testimony on the

way memory works does not invade the province of the jury but rather helps the jury perform its job of determining which – if any – of the complainant’s renditions of what happened was accurate. If such testimony invaded the province of the jury by commenting on the credibility of the complaining witness, then the Court in *Allen* would not have endorsed expert testimony. After all, if a complainant testifies that he is sure the defendant committed the crime, but the defense expert says that memories of a perpetrator’s face can be tainted by post-event suggestion, then by the State’s logic the expert is commenting on the complainant’s credibility and invading the province of the jury. But that is not what the Court held. See *Allen*, 176 Wn.2d at 624 n.6 (lead opinion); see also *id.* at 643 (Chambers, J., concurring) (“The recognition that expert testimony is admissible is very important to our justice system”).

The Supreme Court had also endorsed expert testimony on memory in *State v. Cheatam*, 150 Wn.2d 626, 649-50, 91 P.3d 830 (2003). There, the Court held that the trial court did not abuse its discretion in excluding the expert, but only because the complaining witness carefully examined the face of her attacker and described him to a sketch artist *the very same day*. *Id.* at 649. Accordingly, there was not much of a memory issue in the case at all, and the expert’s testimony “would have had only

marginal relevance and would have been of debatable help to the jury.” *Id.* at 650. Of course, the opposite is true here where the trial occurred eight years after the alleged incident and the complainant’s description of the event varied wildly over the intervening years.

Moreover, in *Cheatam* the Court disapproved of some aspects of the trial court’s ruling – including the claim that expert testimony would invade the jury’s role in determining credibility. The Court noted that the expert would have testified as to certain factors that “render memory less accurate,” and that “[d]epending on the facts of a given case, this testimony may be very helpful to a jury’s assessment of credibility.” *Cheatam*, 150 Wn.2d at 649. Just as the State here faults Dr. Yuille for not addressing “the victim’s specific memories, but [instead addressing] memory in general,” Br. of Respondent at 35, the trial court in *Cheatam* had faulted the expert for not meeting with the complaining witness. *Cheatam*, 150 Wn.2d at 649 n.5. But the Supreme Court pointed out that doing so would have been inappropriate because the expert’s role is not to assess the credibility of a particular witness. *Id.* Rather, the expert’s role would be to explain the factors that render memory less accurate, in order to help the *jury* assess the reliability and credibility of the complaining witness’s statements. *Id.* at 649. This is exactly what Dr. Yuille would have done in Mr. Dow’s case. CP 258-61 (listing 24 criteria Dr. Yuille

and others developed to evaluate the reliability or accuracy of a complainant's statements). Accordingly, the trial court erred in excluding the testimony.

c. The cases the State cites are inapposite and outdated.

In contrast to the cases Mr. Dow cited involving perception and memory issues, the primary case the State relies on is not on point. Br. of Respondent at 29 (citing *State v. Rafay*, 168 Wn. App. 734, 285 P.3d 83 (2012)). In *Rafay*, the defendants sought to introduce expert testimony on the factors that can cause false confessions. *Id.* at 781-97. The trial court excluded the testimony and Division One affirmed, concluding that coercion is within the common understanding of jurors and that the expert's testimony "would have been highly speculative and provided the jury with scant assistance in evaluating the unusual facts of this case." *Id.* at 784. Mr. Dow's case, in contrast, has nothing to do with false confessions. Even if the factors causing false confession are within the common understanding of jurors, the factors causing faulty perception and memory are not so commonly understood. *Cheatam*, 150 Wn.2d 646; *Smithers*, 212 F.3d at 316.

Furthermore, the main problem in *Rafay* was that the proposed witness was an expert on the ways in which standard police custodial

interrogations produce false confessions, but the confessions at issue did not occur during a custodial interrogation. *Rafay*, 168 Wn. App. at 784-85. Thus, the expert testimony would not have been very helpful to the jury. *Id.* But here, the proposed witness was an expert in the relevant area – namely, human memory and child interview techniques. CP 252. Thus, his testimony might not have been helpful if this were a case with an adult complaining witness whose recitation of events had never changed, but it was highly relevant and helpful in this case, where a child changed her story repeatedly over eight years, and where the reliability of her perception and memory was *the* contested issue.

The court in *Rafay* noted that another reason the proposed expert’s testimony would not have been helpful is that he “has not developed any methodology based on his research that could assist in assessing the reliability of a particular confession.” *Rafay*, 168 Wn. App. at 786. But here, Dr. Yuille would have provided 24 criteria he and others developed to help the jury evaluate the reliability and accuracy of R.W.’s statements. CP 258-61. Thus, *Rafay* does not help the State.

The State also relies on *Swan*, but that is a 25-year-old case whose primary holding is not even at issue in this case, and whose secondary holdings have been abrogated by more recent cases. *See* Br. of Respondent at 32-33 (citing *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610

(1990)). In *Swan*, the Court held that the defendant had not shown the proposed expert's research was generally accepted in the scientific community. *Swan*, 114 Wn.2d at 656. But here, there is no question that Dr. Yuille's research is generally accepted, and the State never argued otherwise. CP 301-04, 385-90. Indeed, in *Willis*, the Court stated:

[T]he predicate for our holding in *Swan* is not present in this case. In *Swan*, the trial court specifically found that the witness's theories were *not* generally accepted by the scientific community. *Swan*, 114 Wn.2d at 656. Here, the trial court found Dr. Yuille's theories *were* generally accepted in the scientific community. The State does not challenge this finding, and it is a verity on appeal.

State v. Willis, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004) (emphases in original).

The *Swan* Court's other musings have been abrogated. The Court stated that cross-examination could address any issues and that a child's suggestibility was within the understanding of the jury. *Swan*, 114 Wn.2d at 656. But the Court in *Allen* recognized that cross-examination is an ineffective tool for uncovering the inaccuracy of memories, because the witness genuinely believes her memories *are* accurate. *Allen*, 176 Wn.2d at 633 (Madsen, C.J., concurring); *id.* at 640 (Wiggins, J., dissenting); accord *State v. Lawson*, 352 Or. 724, 759-60, 291 P.3d 673 (2012). And as to the statement that a child's suggestibility is within the understanding of the jury, the issue is not that simple, as explained above. Current

caselaw recognizes that the ways in which memories are malleable is not common knowledge and that expert testimony on the issue is necessary and helpful. *Cheatam*, 150 Wn.2d at 646; *Smithers*, 212 F.3d at 316; *Lawson*, 352 Or. at 759-61 & n.10.

The State correctly notes that the Supreme Court affirmed the exclusion of expert testimony on child interview techniques in *Willis*. Br. of Respondent at 33. However, the Court rejected the State's claim that under *Swan* such expert testimony is always inappropriate. *Willis*, 151 Wn.2d at 260-62. Instead, a case-by-case inquiry is required. *Id.* at 262. On the facts of *Willis* expert testimony would not have been helpful because the child's most critical statements – that the defendant touched, licked, and kissed her vagina – were always consistent and could not have been tainted by post-event suggestion. *Willis*, 151 Wn.2d at 264.

The opposite is of course true here. K.W. constantly changed her story, saying once in September of 2005 that Mr. Dow's "wee-wee" touched her "go-go," then saying later in the same month that his "wee-wee" never touched her. RP (5A) at 1001; RP (2) at 378. In December she flipped back to the first story, but in March 2006 she again said that Mr. Dow's "wee-wee" never touched her and that Mr. Dow never touched her "go-go." RP (5B) at 1159; RP (5B) at 1248-49. In 2011 K.W. again said that Mr. Dow never touched her "go-go," but in 2013 she told this

jury that Mr. Dow did touch her “go-go.” RP (1A) 72, 91; RP (5A) at 918-19. Thus, unlike in *Willis*, the evidence that inadvertent post-event suggestions tainted the complainant’s memory is strong, and expert testimony on the malleability of memory would have been extremely helpful to the jury. Thus, the trial court abused its discretion when it prohibited the defense from calling Dr. Yuille to testify.

- d. The exclusion of the defense expert also violated Mr. Dow’s constitutional rights – particularly in light of the fact that the State’s expert was permitted to testify – and the State does not explain why this imbalance is allowable.

Although this Court should reverse under ER 702 alone, it is worth noting that the exclusion of Dr. Yuille’s testimony also violated Mr. Dow’s rights under the Sixth and Fourteenth Amendments. *See* Br. of Appellant at 28-30. The State claims there is no constitutional concern, relying on *State v. Lord*, 161 Wn.2d 276, 165 P.3d 1251 (2007) and *State v. Strizheus*, 163 Wn. App. 820, 262 P.3d 100 (2011). Br. of Respondent at 36-37. The State is wrong.

In *Lord*, the Supreme Court affirmed the exclusion of proposed expert testimony which would have been irrelevant to any material fact in issue. *See Lord*, 161 Wn.2d at 294-95. The proposed witness was a dog handler who tracked the victim’s scent on a particular path. The defense theory was that this tracking showed the victim was alive and walking the

route in question after she allegedly disappeared, but in fact, the dog tracker could not be so precise. His results could show only that the victim walked that path sometime during the two weeks leading up to the tracking date, and it was undisputed that the victim was alive for most of this period. *See id.* Accordingly, the evidence was irrelevant, and a defendant has no constitutional right to present irrelevant evidence. *Id.* Here, in contrast, there can be no doubt that Dr. Yuille's proposed testimony was highly relevant, because the disputed issue in the case was the accuracy of the complainant's memory, and Dr. Yuille's research explains the factors that create inaccurate memories, as well as factors to consider in assessing the reliability of a memory. Thus, *Lord* does not help the State.

Strizheus is also inapposite. There, the victim's ex-husband was charged with attempted murder after he stabbed her multiple times, was found covered in blood, and was repeatedly identified as the assailant by the victim. *Strizheus*, 163 Wn. App. at 823. Seven months later, the couple's son made the cryptic statement, "it's my fault, arrest me, I should be in jail." *Id.* at 824-25. He later clarified that he was not the one who attacked his mother. *Id.* at 825. The father nevertheless sought to introduce the son's statement to police as evidence that the son perpetrated the crime. *Id.* at 826. The State pointed out that the son never said he

committed the crime and in fact explicitly stated he did not, which was consistent with all of the other evidence. *Id.* at 826-27. The trial court excluded the “other suspect” evidence, and the Court of Appeals affirmed, noting there was an insufficient nexus between the son and the crime. *Id.* at 830-33.

But again, Dr. Yuille’s testimony is highly relevant to the issue at hand, so *Strizheus* is not on point. Furthermore, *Strizheus* has been undermined by the later Supreme Court case of *State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159 (2014), which chastised courts for applying an improperly high bar to “other suspect” evidence. *Compare Strizheus*, 163 Wn. App. at 830 (“Mere motive, ability, and opportunity to commit a crime alone are not sufficient” to establish the foundation for admissibility of other suspect evidence) *with Franklin*, 180 Wn.2d at 373 (“We have never adopted a per se rule against admitting circumstantial evidence of another person’s motive, ability, or opportunity.”); *see also id.* at 381. As the Court emphasized in *Franklin*, “[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.” *Id.* at 378 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). Mr. Dow was deprived of that right in this case.

As noted in the opening brief, *State v. Jones* is instructive on the constitutional issue. Br. of Appellant at 29-30 (citing *State v. Jones*, 168

Wn.2d 713, 230 P.3d 576 (2010)). The State mischaracterizes *Jones*, describing it as holding that *because* the trial court erred in excluding certain evidence under a statute, the defendant's constitutional rights were violated. Br. of Respondent at 38. This was not the holding. The Court did hold that the exclusion of the evidence was improper under the statute. But it held that *even if* the exclusion had been proper under the statute, it would be improper under the Constitution. *Jones*, 168 Wn.2d at 722; *accord id.* at 723 ("Even if the rape shield statute did apply, it cannot be used to bar evidence of extremely high probative value per the Sixth Amendment."). For evidence of high probative value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22." *Jones*, 168 Wn.2d at 720. The Court held that because the proffered evidence was "Jones's entire defense," the trial court violated the defendant's constitutional rights by excluding such evidence. *Id.* at 721. Again, the same is true here. The inaccuracy of K.W.'s memory was Mr. Dow's entire defense, yet he was not permitted to introduce his proffered evidence supporting that defense.

As mentioned in the opening brief, it is especially egregious that the trial court permitted the State to present an expert witness supporting its theory that the child's memories were accurate, while defense counsel was left to argue the contrary with his hands tied behind his back. The

State never addresses this imbalance, which only exacerbates the constitutional concern. *Cf. Ake v. Oklahoma*, 470 U.S. 68, 83-84, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (reversing for due process violation where trial court denied the defendant funding to hire expert psychiatrist but State presented its own psychiatrist to support its theory that defendant was dangerous); *Hinton v. Alabama*, ___ U.S. ___, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014) (reversing for deficient performance of defense counsel because counsel failed to seek sufficient funding to hire qualified expert to rebut State's expert). In sum, the trial court not only erred under ER 702 but also violated Mr. Dow's constitutional rights to due process and to present a defense by excluding Mr. Dow's expert testimony on the key issue in the case while permitting the State to present its expert on the same issue. The ruling resulted in a fundamentally unfair trial, and this Court should reverse.

- e. The State cannot prove that the erroneous exclusion of the defense expert was harmless beyond a reasonable doubt.

Finally, the State claims that the error in excluding Dr. Yuille was harmless beyond a reasonable doubt because Mr. Dow "did present this argument [about how memory works] through his cross-examination and closing argument." Br. of Respondent at 38. But as already explained, cross-examination is an ineffective tool for revealing memory problems,

because witnesses do not realize their memories are inaccurate. *Allen*, 176 Wn.2d at 633 (Madsen, C.J., concurring); *id.* at 640 (Wiggins, J., dissenting); *Lawson*, 352 Or. at 759-60. And in closing argument, the State relied heavily on its expert's testimony, even telling the jury that they were to consider K.W.'s testimony through the lens of the State's expert. Meanwhile, Mr. Dow's attorney was left to argue that the complainant's memory was unreliable without being able to support the argument with his own expert testimony – and the jury was instructed that the arguments of counsel were not evidence. Thus, they viewed the testimony through the lens of the State's expert in reaching their verdict, and did not have a competing lens through which to view the evidence.

Furthermore, the State is absolutely wrong in stating that the only issue was “whether the touching occurred for the purposes of sexual gratification.” Br. of Respondent at 39. There was much conflicting evidence about whether any touching occurred at all. *See* Br. of Appellant at 16-17 (listing in detail the many places in the record in which K.W. says Mr. Dow did not touch her). It is precisely because K.W. kept changing her story about what happened that experts on both sides were required to explain how perception and memory work, and to assist the jury in learning how to determine whether a memory is reliable and accurate. The State cannot prove that the exclusion of Mr. Dow's expert was

harmless beyond a reasonable doubt. This Court should reverse and remand for a new trial.

3. The trial court improperly admitted a recording of Cecilia Walde's out-of-court statements that her daughter did not lie, that Mr. Dow molested her child, and that Mr. Dow likely molested other children as well – a claim the State acknowledged was completely unfounded.

As explained in the opening brief, the trial court admitted a recording of an entire telephone call between R.W.'s mother and Mr. Dow, during which the mother stated her opinion that the crime occurred and that her child did not lie. Additionally, the mother made wild, unsubstantiated allegations that Mr. Dow also molested his own daughter and the daughters of previous girlfriends. The State admitted there was "no indication" that the accusations were true, and the court agreed that the allegations were not relevant to any issue in this case. But the court admitted the recording with the litany of baseless accusations anyway, stating these accusations "appear so minor" and "I don't see any prejudice." As discussed in the opening brief, this ruling was absolutely shocking, and violated ER 401, 402, 403, 801, and 802, as well as the constitutional right to a jury trial. Br. of Appellant at 32-44.

- a. The State again acknowledges that the allegations of prior molestations that the jury heard are baseless, yet the State improperly refuses to concede error on appeal.

Mr. Dow believes that most prosecutors would have conceded this issue on appeal, because the error is obvious and a prosecutor is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Instead, the prosecutor in this case responds with gibberish.

The State claims that the unfounded accusations were properly admitted because “[e]vidence of other crimes may be relevant under Evidence Rule 402 to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” Br. of Respondent at 42 (citations omitted). But regardless of whether “other crimes” evidence is relevant and admissible in a case pursuant to ER 401, 402, 403, and 404(b), this case did not involve “other crimes” evidence; both parties and the court agreed that there was “no indication” that these accusations were true. RP (5A) at 895. The State’s claim that “prior crimes” are relevant to show “res gestae” thus has no place in this case.

On the next page, the State reverts to acknowledging that “there is no evidence of proof in this case of prior sex acts.” Br. of Respondent at 43. Although its argument is difficult to discern, the State appears to be

claiming that *because* there is no evidence that these horrific accusations are true, it could not have been prejudicial to present them to the jury. Mr. Dow is at a loss regarding how to reply to this assertion. The State seems to think that someone told the jury that there was no proof that these accusations were true and that they should therefore question Cecilia Walde's credibility. This of course did not occur, and in any event, a juror might well assume that the accusations *were* true and that Mr. Dow was finally caught and prosecuted after getting away without punishment for prior criminal acts. The prejudicial nature of these statements could not be greater, and this Court should reverse on this basis alone.

The State also claims that defense counsel did not preserve the issue as to all of the baseless allegations, but only as to the allegation that Mr. Dow molested his own child, Dezi. Br. of Respondent at 41. This is incorrect. Mr. Dow objected to the portion of the recording dealing with allegations Ms. Walde had reportedly heard from "Mary," Mr. Dow's ex-wife. RP (5A) at 891-95. The allegations Ms. Walde made based on her conversation with Mary were that Mr. Dow molested Dezi, that he chose his girlfriends based on whether they had young daughters, and that he may have molested the daughters of those other girlfriends as well. Ex. 1A at 5-8. Based on her conversations with Mary, Cecilia Walde essentially accused Mr. Dow of being a predator, and the jury heard all of

it. *Id.* Mr. Dow properly objected to the admission of these statements on the basis that they were hearsay, were irrelevant, lacked foundation, and were substantially more prejudicial than probative. RP (5A) at 893, 894. Mr. Dow was correct, and this Court should reverse. *See Salas v. Hi-Tech Erectors*, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010) (reversing where evidence was improperly admitted under ER 403 and stating, “where there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.”).¹

- b. Mr. Dow was deprived of his constitutional right to the effective assistance of counsel when his attorney failed to object to other statements which constituted inadmissible hearsay and opinions on guilt and credibility, and the State mischaracterizes the Supreme Court’s opinion in *Demery*.

The error discussed above on its own requires reversal, but it is worth noting that other portions of the recording were also inadmissible and should have been challenged. Cecilia Walde’s statements that Mr.

¹ The State also persists in claiming that the exhibit could not be redacted, and asserts that the defense concurred in this assessment. Br. of Respondent at 44. In context, it appears the defense is merely acknowledging the *prosecutor’s* statement that the recording cannot be redacted. The defense characterizes this as a “problem,” and immediately continues explaining why Cecilia Walde’s allegations based on her conversation with Mary must be excluded. RP (5A) at 893-94. As discussed in the opening brief, it is not true that recordings cannot be redacted (even those made in 2005), and even if it were true, the solution is not to admit inadmissible evidence, but to provide a redacted transcript or live reading in lieu of the recording.

Dow molested her daughter, that her daughter did not lie, and that she believed her daughter “100%” were inadmissible hearsay and opinions on guilt and credibility. *See* Br. of Appellant at 38-40. Mr. Dow was deprived his right to the effective assistance of counsel when his attorney failed to lodge these specific objections to Cecilia Walde’s statements. *See* Br. of Appellant at 40-43.

The State claims that Mr. Dow “argues that any statement made by a witness in an out-of-court conversation with the defendant is hearsay.” Br. of Respondent at 45. This is incorrect. Mr. Dow agrees with the State that only statements offered for the truth of the matter asserted are hearsay. *See* Br. of Appellant at 38 (quoting ER 801(c)). Mr. Dow also agrees with the State that when a statement is offered to “show it was made,” it is not hearsay. Br. of Respondent at 45. Thus, for example, in a defamation action, a defendant’s out-of-court statement that the plaintiff “raped me,” would be admissible to show the statement was made. *See, e.g., Momah v. Bharti*, 144 Wn. App. 731, 749-50, 182 P.3d 455 (2008). The statement would not be offered for the truth, because the whole point of a defamation case is that the defendant made a false statement about the plaintiff that caused harm. But here, the statements *were* offered for their truth – the State was trying to prove that Mr. Dow molested Cecilia Walde’s daughter, and the prosecution wanted the jury to believe K.W.’s

testimony. Thus, Ms. Walde's statements that K.W. was on Mr. Dow's penis and that K.W. "does not lie" were offered for their truth, and were "only relevant if true." Br. of Respondent at 45.

The State correctly notes that some statements of a conversation participant may be admissible to show the meaning of a defendant's responses. Br. of Respondent at 45. However, this is not the purpose for which the State offered these statements, because if it had been, the court would have provided a jury instruction "explaining that only the defendant's responses, and not the third party's statements, should be considered as evidence." *State v. Demery*, 144 Wn.2d 753, 761-62, 30 P.3d 1278 (2001). To the extent defense counsel should have requested such an instruction, this only supports Mr. Dow's ineffective assistance of counsel claim. But the State's failure to request such an instruction shows its real purpose was to offer the statements for their truth – in violation of the rule against hearsay.

Defense counsel was also ineffective for failing to object to the introduction of Ms. Walde's statements on the grounds that they were improper opinion on guilt and credibility, because the admission of this evidence violated Mr. Dow's constitutional right to a jury trial. Br. of Appellant at 39-40. On this issue, the State mischaracterizes *Demery* even though Mr. Dow explained that case in his opening brief. The State

claims that the Supreme Court in *Demery* “held that officers who told Defendants during interrogation that they didn’t believe them were not commenting on credibility or giving opinion testimony.” Br. of Respondent at 46 (citing *Demery*, 144 Wn.2d 753). The State also avers that the *Demery* court held that “statements not made under live testimony are different than those made while under oath and not considered as opinion evidence.” Br. of Respondent at 47 (citing *Demery*, 144 Wn.2d at 760). In making these claims, the State is relying on the opinion of *four* justices. Five justices held precisely the opposite. See Br. of Appellant at 40 n.5; compare *Demery*, 144 Wn.2d at 760 (four-justice lead opinion); with *id.* at 767 (four-justice dissenting opinion) and *id.* at 765 (concurring justice agrees with dissent except as to harmless error analysis). The State appears to believe that this Court will not actually read *Demery*, and will not read the opening brief.

The State also protests that statements that are “not a direct comment on the defendant’s guilt or on the veracity of a witness” may sometimes be admissible. Br. of Respondent at 47. But Cecilia Walde directly commented on Mr. Dow’s guilt and R.W.’s veracity. She said that R.W. was on Mr. Dow’s penis, that R.W. “did not lie,” and that she believed R.W. “100%.” Ex. 1A at 3-4. These statements are direct comments on Mr. Dow’s guilt and the credibility of the complaining

witness. *See State v. Quale*, 177 Wn. App. 603, 312 P.3d 726 (2013) (reversing for improper opinion evidence where trooper testified he had “no doubt” that defendant was impaired while driving).

This Court reversed two convictions for rape of a child where, among other things, the prosecutor improperly asked a witness whether the child “gave any indication that she was lying about the abuse.” *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). By stating he believed the child was not lying, the witness “effectively testified that Alexander was guilty as charged.” *Id.* Similarly here, Ms. Walde’s statements that R.W. “did not lie” and that she believed R.W. “100%” were effectively statements that Mr. Dow was guilty as charged, and violated Mr. Dow’s constitutional right to a fair jury trial. Mr. Dow was deprived of his right to the effective assistance of counsel when his attorney failed to object to this hearsay and opinion evidence.

4. Other issues

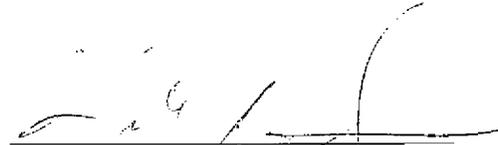
Mr. Dow relies on his opening brief for the argument that cumulative error deprived him of a fair trial. Br. of Appellant at 44. As to the sentencing issue, this Court should accept the State’s concession of error. Br. of Appellant at 44-47; Br. of Respondent at 52-53.

C. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Dow asks this Court reverse his conviction and remand for a new trial.

DATED this 31st day of December, 2014.

Respectfully submitted,



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Washington Appellate Project
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 45673-7-II
v.)	
)	
KEITH DOW,)	
)	
APPELLANT.)	

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