

NO. 47373-9-II

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

---

STATE OF WASHINGTON,  
Respondent,

v.

JUAN GUEVARA,  
Appellant.

---

APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

---

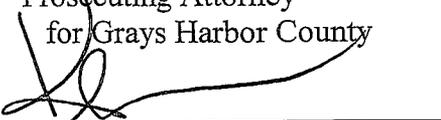
THE HONORABLE F. MARK MCCAULEY, JUDGE

---

BRIEF OF RESPONDENT

---

KATHERINE L. SVOBODA  
Prosecuting Attorney  
for Grays Harbor County



---

WSBA #34097

OFFICE AND POST OFFICE ADDRESS

County Courthouse  
102 W. Broadway, Rm. 102  
Montesano, Washington 98563  
Telephone: (360) 249-3951

---

TABLE

**Table of Contents**

I. COUNTER STATEMENT OF THE CASE .....	1
A. Procedural History.....	1
B. Factual History .....	1
II. RESPONSE TO ASSIGNMENTS OF ERROR .....	5
A. Prosecutorial Misconduct.....	5
a. <b>Did the State shift the burden of proof?</b> .....	7
b. <b>Did the State improperly “bolster” C.M.C.’s testimony with facts that were not admitted into evidence during closing argument?</b> .....	14
c. <b>Did the State improperly urge the jury to consider facts that were not admitted into evidence during closing argument?</b> .....	17
B. Ineffective Assistance of Counsel.....	18
a. <b>Was defense counsel ineffective for failing to object to “grooming evidence?”</b> .....	20
b. <b>Was defense counsel ineffective for “opening the door” to previous acts of abuse?</b> .....	23
c. <b>Was defense counsel ineffective for failing to object to the State’s closing?</b> .....	24
C. Sufficiency of the Evidence .....	24
a. <b>Are there sufficient facts to support the jury’s verdict of guilty?</b> .....	25
b. <b>Are there sufficient facts to support the jury’s finding that the appellant’s crime was aggravated?</b> .....	26
D. Impositions of Legal Financial Obligations .....	28
III. CONCLUSION.....	29

## TABLE OF AUTHORITIES

### Cases

<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068 (1970) .....	27
<i>State v. Boast</i> , 87 Wash.2d 447, 451, 553 P.2d 1322 (1976).....	10
<i>State v. Boehning</i> , 127 Wash.App. 511, 518, 111 P.3d 899 (2005)	9
<i>State v. Brown</i> , 132 Wash.2d 529, 561, 940 P.2d 546 (1997).....	9
<i>State v. Dhaliwal</i> , 150 Wash.2d 559, 578, 79 P.3d 432 (2003).....	9
<i>State v. Fleming</i> , 83 Wn.App. 209, 921 P.2d 1076 (1996).....	15
<i>State v. Graham</i> , 67 Wash.App. 930, 841 P.2d 785 (1992).....	24
<i>State v. Guloy</i> , 104 Wash.2d 412, 422, 705 P.2d 1182 (1985).....	10
<i>State v. Hendrickson</i> , 129 Wash.2d 61, 917 P.2d 563 (1996) .....	23
<i>State v. Hyder</i> , 159 Wash. App. 234, 244 P.3d 454, 468 (2011)..	30
<i>State v. Larios-Lopez</i> , 156 Wash.App 257, 233 P.3d 899 (2010) 15, 16, 17	
<i>State v. Lynn</i> , 67 Wash.App. 339, 835 P.2d 251 (1992).....	12
<i>State v. McFarland</i> , 127 Wash.2d 322, 899 P.2d 1251 (1995)....	11, 12, 23
<i>State v. Russell</i> , 125 Wash.2d 24, 882 P.2d 747 (1994). .....	15
<i>State v. Salinas</i> , 119 Wash.2d 192, 829 P.2d 1068 (1992).....	27, 28
<i>State v. Scott</i> , 110 Wash.2d 682, 757 P.2d 492 (1988) .....	11, 12
<i>State v. Stein</i> , 144 Wash. 2d 236, 27 P.3d 184, 189 (2001).....	18
<i>State v. Stevens</i> , 58 Wash.App. 478, 794 P.2d 38 (1990).....	24, 25
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987). .....	21
<i>State v. Thorgerson</i> , 172 Wash.2d 438, 442, 258 P.3d 43 (2011). 9, 15	
<i>State v. Tolia</i> s, 135 Wash.2d 133, 954 P.2d 907 (1998).....	11
<i>State v. WWJ Corp.</i> , 138 Wash.2d 595, 980 P.2d 1257 (1999)....	11
<i>Strickland v. Washington</i> , 466 U.S. 668, 80 L. Ed. 2d 674 (1984) .....	21, 22, 23

### Statutes

RCW 43.43.754 .....	31
RCW 43.43.7541 .....	31
RCW 7.68.035 .....	31

### Other Authorities

WPIC 300.23.....	30
------------------	----

**Rules**

RAP 2.5(a) ..... 11  
RAP 2.5(a)(3),..... 11

## **I. COUNTER STATEMENT OF THE CASE**

### **A. Procedural History**

The appellant was charged with Child Molestation in the First Degree by Amended Information on May 20, 2014. The State also alleged that the defendant used a position of trust to facilitate the commission of his crime. CP 7.

The parties stipulated on January 14, 2014 that the defendant's statements to law enforcement were admissible at trial. CP 2.

Prior to the trial beginning, the court considered whether or not to admit alleged instances of molestation between C.M.C. and the appellant. The court ruled that these would be allowed in as evidence of the appellant's lustful disposition towards C.M.C. The court found that the probative value of this evidence outweighed any prejudice. RP 12.

### **B. Factual History**

C.M.C. was born on September 6, 2002. RP 16. The trial in this matter began on June 3, 2014. RP 5. Therefore, at the time of trial, C.M.C. was 11 years old.

C.M.C.'s mother, Veronica Nunez, first met the appellant four years prior to the trial. RP 14. They moved in together a short while after that into housing in Hoquiam. RP 14. When Nunez and the appellant moved in together, he brought a son from another relationship. RP 14-15. After living in Hoquiam for six months, the family moved around, eventually settling in Aberdeen. RP 15. Nunez and the appellant also have a child in common; this child was one year old at the time of trial. RP 14, 16.

Nunez has medical issues and takes medication that makes her sleepy. RP 20. The appellant took on parental role in the household and C.M.C. viewed the appellant as her dad. RP 20, 47.

When C.M.C. was seven years old, C.M.C. was left home alone with the appellant. When Nunez returned, C.M.C. disclosed that the appellant had touched her inappropriately. RP 27. C.M.C. described the appellant rubbed her belly and pulled "his hand away on her vagina on top of clothes." RP 27. Nunez confronted the appellant and he denied anything inappropriate. After this, Nunez "asked Mr. Guevara not to touch [C.M.C.] in any way." RP 28.

In 2013, Nunez was given a note by C.M.C. RP 16. After receiving the note, Nunez confronted the appellant about touching

C.M.C. The appellant denied any inappropriate touching, but then admitted “he actually touched her on her leg.” RP 18-19. Nunez explained that the appellant showed where he touched as being “on the inside of her thigh, close to her vagina.” RP 19. Nunez then called police. RP 19-20.

Prior to receiving the note, Nunez noticed a change in C.M.C.’s behavior. She saw that “she would talk back more and she was like pretty grumpy” and that C.M.C. stopped wearing tank tops and wanted to cover her body more. RP 29.

At trial, C.M.C. testified that the appellant had touched her “[m]ore than one time” on a “part that it’s not supposed to be touched.” RP 35. The first time C.M.C. described happened when she was 10 years old on the living room couch in the South Side house, and the appellant touched her with “his hand” on her “vaginal part.” RP 35, 37.

C.M.C. specified that her “vaginal part” was “between [her] legs, and it’s below [her] stomach” and that she uses it “[t]o go to the bathroom.” RP 36. The appellant put his hand on her vagina and squeezed. RP 36. Afterwards, the appellant told C.M.C. “it was a secret.” RP 36.

About two weeks later, the touching happened again in a Blazer driven by the appellant. RP 38. When C.M.C. and the appellant parked in the driveway, the appellant “started rubbing” C.M.C.’s vagina over her clothes. Again, the appellant told her it was a secret. RP 38.

A month later, the appellant came into C.M.C.’s room in the South Side house. RP 39. The appellant told C.M.C. to hug him, and, when she did, he started putting his hands down to her bottom and kept them there. RP 39. C.M.C. described that this made her feel “uncomfortable.” RP 40.

A few days later, the appellant again approached C.M.C. in her bedroom. RP 41. This was at night time and C.M.C. had pajama pants on. The appellant hugged C.M.C. and then moved his hands to her vaginal area and started “squeezing.” RP 41-42. C.M.C. backed away from the appellant and he told her to “keep it a secret.” RP 42.

The last time C.M.C. described at the South Side house was in the morning. The appellant came into her room and asked if she wanted to watch a movie. C.M.C. got up and hugged the appellant, and he put his hand on her bottom and rubbed it again. RP 43. This

time, C.M.C. told her mother what happened by writing her a note.  
RP 43.

Pursuant to cross-examination, C.M.C. also discussed the two additional incidents that happened while the family lived in Hoquiam. RP 53. Once occurred while the appellant was with C.M.C. on the couch, and one time it occurred in her room. RP 57. C.M.C. described a similar “squeezing” of her vaginal area. RP 57. She stated that this made her feel “uncomfortable” and made her body feel “ugly.” RP 58.

The appellant was interviewed by law enforcement during the investigation. Genva Bernabe testified that he told them about him and C.M.C. giving “each other back massages.” RP 111. This was described as occurring on the outside of C.M.C.’s clothing. RP 111. He did however say that he massaged C.M.C. on the “butt” going “as far as the triangular area above her butt crack.” RP 117.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

### **A. Prosecutorial Misconduct**

The appellant makes several allegations of prosecutorial

misconduct in this case. An appellant who alleges prosecutorial misconduct bears the burden of proving that, in the context of the record and circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wash.2d 438, 442, 258 P.3d 43 (2011).

A defendant establishes prejudice by showing a substantial likelihood that the misconduct affected the jury verdict. *Thorgerson*, 172 Wash.2d at 443. Where the defendant fails to object to the prosecutor's improper statements at trial, such failure constitutes a waiver unless the prosecutor's statement is “ ‘so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.’ ” *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003) (quoting *State v. Brown*, 132 Wash.2d 529, 561, 940 P.2d 546 (1997)).

In determining whether the misconduct warrants reversal, the Court will consider its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wash.App. 511, 518, 111 P.3d 899 (2005). The Court will review a prosecutor's remarks during closing argument in the context of the total argument, the issues in the

case, the evidence addressed in the argument, and the jury instructions. *Dhaliwal*, 150 Wash.2d at 578.

The appellant complains of three specific statements in the State's closing argument. These will be addressed separately below.

**a. Did the State shift the burden of proof?**

**No. The State's argument that having an abiding belief in C.M.C.'s testimony was proper.**

The appellant asserts that the State's closing argument improperly shifted the burden of proof by arguing C.M.C. "deserved to be believed." Appellant's Brief 11. However, the appellant takes the State's argument out of context and only cites to the rebuttal portion of the argument.

Further, there was no objection during the trial to the statement at issue. A party may assign evidentiary error on appeal only on a specific ground made at trial. *State v. Guloy*, 104 Wash.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). This objection gives a trial court the opportunity to prevent or cure error. *State v. Boast*, 87 Wash.2d 447, 451, 553 P.2d 1322 (1976). For example, a trial

court may strike testimony or provide a curative instruction to the jury.

In this case, the appellant failed to object or move to strike allegedly erroneous statement of the prosecutor and did not give the trial courts such an opportunity. Thus, he did not preserve the issue for appellate review.

The general rule is that appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. Tolias*, 135 Wash.2d 133, 140, 954 P.2d 907 (1998); *State v. McFarland*, 127 Wash.2d 322, 332–33, 899 P.2d 1251 (1995). However, a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). *State v. Walsh*, 143 Wash.2d 1, 7, 17 P.3d 591 (2001); *Tolias*, 135 Wash.2d at 140, 954 P.2d 907.

Pursuant to RAP 2.5(a)(3), to raise an error for the first time on appeal, the error must be “manifest” and truly of constitutional dimension. *State v. WWJ Corp.*, 138 Wash.2d 595, 602, 980 P.2d 1257 (1999); *State v. Scott*, 110 Wash.2d 682, 688, 757 P.2d 492 (1988). The defendant must identify a constitutional error and show how the alleged error actually affected the

defendant's rights at trial. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review. *McFarland*, 127 Wash.2d at 333, 899 P.2d 1251; *Scott*, 110 Wash.2d at 688, 757 P.2d 492. If a court determines the claim raises a manifest constitutional error, it may still be subject to harmless error analysis. *McFarland*, 127 Wash.2d at 333, 899 P.2d 1251; *State v. Lynn*, 67 Wash.App. 339, 345, 835 P.2d 251 (1992).

From the beginning of the trial, it is clear that C.M.C.'s credibility is the linchpin of the State's case. This credibility was repeatedly and vigorously challenged by defense counsel during cross-examination.

The State's closing should be read in total; however, most important are the following:

And, so, your job is to evaluate the evidence. And one of the biggest pieces here is the victim's credibility. Do you believe [C.M.C.]? And when evaluating that, you need to look at – the jury instructions tell you some of the things to look at: Her manner while testifying, her demeanor, her ability to recall... RP 130-131.

...

So, is the evidence sufficient to convince you beyond a reasonable doubt. And the most important thing to remember, is, the victim's testimony is evidence... And under the law, her testimony is sufficient to support a conviction, if you believe her. If you believe her beyond a reasonable doubt, that is enough. RP 131-132.

...

And so in the end, ladies and gentleman, it comes down to a pretty basic question: Do you believe [C.M.C.]? Do you believe what she told you beyond a reasonable doubt? Do you have an abiding belief after hearing all of this? If your answer is I believe her, I believe this happened to her, I believe the defendant did this to her, then that is a verdict of guilty. RP 135.

The appellant responded to the State's closing argument with the following:

And children will tell stories, you know, happens. I guess the degree of severity of the story, I think, really depends on the child and the lifestyle of the child. RP 136.

...

So [C.M.C.] takes the stand, and she willingly answers the questions of [the State], and she details five instances. I get up to ask her questions, and all of a sudden, she is confused. She is confused about everything. I mean, she doesn't want to answer any question whatsoever. She doesn't want to look at anybody. She doesn't want to do anything, and she never looked at Mr. Guevara...she never says, he is the one that did it. And that's a problem. RP 139.

...

So I started to question her about what she had said previously, because she tells the prosecutor five times, and she says, well, that's all he did, and I started to ask her questions, because that's not what she had said before when she talked to the Child Advocacy Center...she said, well, it happened eight or nine times, but she didn't want to talk about it.

And then she said, well, it happened two other times in housing...so she upped it from five to seven, so she kept

changing it...then I wanted to know why that was changing, and then she just kind of reverted into this practiced statement, it happened two times in housing, and it happened five times at the other house...like she had practiced it. And I would hope that would be of a concern to you. RP 140.

...

As I said before, this is one of the most serious charges. All they have is girl's statement. She told the story to get him in trouble because she was mad. She didn't cooperate with the physical exam, because she knew that would show that nothing had happened....she stuck to her story. She couldn't get in trouble if she does this to him, but she can't keep her story straight. RP 143.

The State responded to the appellant's argument in rebuttal as follows:

...there was no evidence that this kid was told someone would get in trouble if she told. The evidence was that this mom had a talk her kids about where they should be touched...[C.M.C.] should not be disbelieved because her mother was trying to protect her.

Counsel also says it's the State's burden and our responsibility to come and mound on the evidence. I agree it is absolutely the State's burden. And beyond a reasonable doubt is the highest burden in the criminal justice system and it should be, because these are serious allegations. However, the State has no responsibility to ["mound on"] the evidence. RP 144.

...

...counsel want to argue that this is a family with issues, children tell stories. And all of those theories have to be supported by the evidence. There was no evidence that

[C.M.C.] was telling a story, that she was making anything up. And, in fact, when the defense counsel asked her, isn't it true you are making this up? No. She absolutely said no. And every person that takes that chair deserves to be believed.

The reason why justice is [blind], it doesn't matter what your gender it, what your age it, what your race is. They deserve to be believed unless you have a reason to do otherwise. And in this case, she has given you no reason. There has been no evidence that tells you she is doing anything other than telling the truth. RP 145.

In closing argument, the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses.

*Thorgerson* at 448. It is not misconduct to argue that the evidence fails to support the defense's theory, and the prosecutor is entitled to make a fair response to the defense's arguments. *State v. Russell*, 125 Wash.2d 24, 87, 882 P.2d 747 (1994).

In this case, the appellant wants to argue that the rationale of *State v. Fleming*, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996), should be applied. However, this case is much closer on its facts to *State v. Larios-Lopez*, 156 Wash.App 257, 233 P.3d 899 (2010).

In *Larios-Lopez*, the prosecutor argued, in closing:

Now, in the end, what you are asked to do is determine the truth of this case; this is your function. You will determine

what you believe happened and then apply the laws that you are given.

Every person who sits in this chair deserves to be believed by you until they prove themselves to be unbelievable, and that is your sole venue; that is why you are here.

... The court clarifies in your instructions what a reasonable doubt means: If after a fair consideration you have an abiding belief of the charge, you are satisfied beyond a reasonable doubt. You have an abiding belief. That is the definition of beyond a reasonable doubt. If, in the end, after all the deliberations, after all the evidence is considered, you still believe, that is an abiding belief.

Abiding belief is one that you can take out of this courtroom. In the end, you have to have moral certainty. Whether you vote guilty or not guilty, you have to know that you did the right thing. That is an abiding belief.

In rebuttal, the prosecutor argued:

In the end, if you believe this officer is telling the truth, and you believe him to an abiding belief, I have proven to you beyond a reasonable doubt that the defendant is guilty of this crime, and I ask you to find him guilty of assault in the third degree.

*State v. Larios-Lopez*, 156 Wash. App. 257, 259, 233 P.3d 899, 900 (2010).

As in this case, *Larios-Lopez* argued that the above-quoted portions of the State's closing arguments constituted prosecutorial misconduct because they shifted the burden of proof and violated his right to a fair trial. The *Larios-Lopez* Court rejected this

contention. *State v. Larios-Lopez*, 156 Wash. App. at 260. Instead, the Court found this case distinguishable from *Fleming* because “the State correctly told the jury to acquit Larios–Lopez unless it had an abiding belief in the truth of Gonzalez's testimony against him. Again viewing the argument as a whole, it was not improper.” *Larios-Lopez* at 262.

Similarly, the argument in the instant case was a proper statement of the law. The State underscored that the burden of proof solely belonged to the State, that beyond a reasonable doubt was the highest burden in the justice system, and that they could only convict if they had an abiding belief in the testimony of C.M.C., and thereby an abiding belief in the truth of the matter charged.

**b. Did the State improperly “bolster” C.M.C.’s testimony with facts that were not admitted into evidence during closing argument?**

**No. The State’s argument is not evidence, and the argument reflected the testimony at trial.**

The appellant argues that the State “claimed in closing that C.M.C.’s additional claims were not fabricated because she had told the sexual assault nurse about them during her interview.”

Appellant's Brief 16. The exact statement in closing is not cited by the appellant, just the page.

The State's argument was: "In [C.M.C.'s] direct examination...she described five times that it occurred at south side. And then through cross examination...she described two more that happened while they lived in housing at Hoquiam. And those were all parts of her different interview. She had talked about those with Lisa Wahl, and that it wasn't anything that she just came to court and said for the first time." RP 134.

First, as argued above, the appellant made no objection to this statement in the trial court and has waived any appellate review. Second, even if the appellant could show that this was a Constitutional error that should be reviewed, any error is harmless.

The State's argument is not evidence, and the jury was instructed that "[i]t is important, however, for you to remember that the lawyers' statements are not evidence... You must disregard any remark statement, or argument that is not supported by the evidence or the law in my instructions." CP 20-25, Instruction no. 1. The Court presumes that juries follow all instructions given. *State v. Stein*, 144 Wash. 2d 236, 247, 27 P.3d 184, 189 (2001).

In this case, the statement of the prosecutor was perhaps unartful, but not misleading to the jury. When taken in context, it is not apparent that the State was referring specifically to the additional allegations. In fact, Wahl testified that C.M.C. told her the molestation “happened time and again over a period of time...” RP 80. During her cross-examination, the defense was asking her why she would have told the investigator that the molestation “happened eight or nine times.” RP 53. C.M.C. responded that “Well, in housing it did. It happened twice in housing.” RP 53. C.M.C. also testified that she had disclosed this information to the investigator, Tom Taylor. “I told that guy that was talking to me that I was talking about it...Tom.” RP 58.

The State’s argument referenced the statement made to Taylor about the two incidents in housing. It can be inferred from Wahl’s testimony that this happened “over and over” that C.M.C. had also discussed it with her.

The statement at issue does not reach constitutional magnitude that would open it to appellate review. In any event, it was, at worst, a statement that was easily cured by the instructions given to the jury.

**c. Did the State improperly urge the jury to consider facts that were not admitted into evidence during closing argument?**

**No. The appellant has misrepresented the prosecutor's statement.**

The appellant accuses the prosecutor of having "testified" in this case and having "fabricated" evidence by "claiming that Mr. Guevara had escalated his attempts against C.M.C. by trying to put his hand down the *front* of her pants." Appellant's Brief at 18, 20 (emphasis added). However, this is a complete misreading of the transcript.

The prosecutor's argument was as follows:

Those time periods between got shorter, and then the last incident she described, the defendant a[c]tually tried to put his hands down the *back* of her pajama pants, and so that's taking it one step further, from the over-the-clothes touching, to trying to touch her under her clothes.

RP at 128 (emphasis added).

This was consistent with the testimony of C.M.C. at trial:

Q [C.M.C.], did any of the touching, did that happen, did any of it happen under your clothes?

A One time, almost.

Q Which time was that?

A When I was in the room, the same time that he put his hand on my bottom, he tried to put his hand in my pants, but I didn't let him.

Q Was that in the front, or the back of your pants?

A The back.

RP at 45.

The State's argument that the defendant escalated his contact by attempting to touch C.M.C. under her clothes was a reasonable inference based on the testimony presented. There was no misconduct.

Also, as argued above, this was not objected to at trial and the issue was not preserved for appeal.

B. Ineffective Assistance of Counsel

The appellant also alleges several matters that would constitute ineffective assistance of counsel. The Washington State Supreme Court adopted a two prong test stated for analysis of the effectiveness of a defense counsel performance. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The Court stated that "[t]he purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial." *State v. Thomas*, 109 Wn.2d 222, 225; 743 P.2d 816 (1987).

In order to maintain a claim of ineffective assistance of counsel, the defendant must show not only that his attorney's performance fell below an acceptable standard, but also that his attorney's failure affected the outcome of the trial.

*Strickland v. Washington* explains that the defendant must first show that his counsel's performance was deficient. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel's errors must have been so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel's performance is guided by a presumption of effectiveness. *Id.* at 689. In analyzing the first prong, the court must decide whether defense counsel's actions constituted a tactical decision which was part of the normal process of formulating a trial strategy.

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 687. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* For prejudice to be claimed there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors,

the result of the proceeding would have been different.” *Id.* at 694.

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Id.* at 687.

**a. Was defense counsel ineffective for failing to object to “grooming evidence?”**

**No. The evidence can be distinguished from the evidence complained of by the appellant.**

Additionally, where the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, *State v. McFarland*, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995); (2) that an objection to the evidence would likely have been sustained, *McFarland*, 127 Wash.2d at 337 n. 4, 899 P.2d 1251; *State v. Hendrickson*, 129 Wash.2d at 80, 917 P.2d 563; and (3) that the result of the trial would have been different had the evidence not been admitted, *Hendrickson*, 129 Wash.2d at 80, 917 P.2d 563.

The appellant cannot make this showing. First of all, the testimony that the appellant complains of consisted of one answer given by Lisa Wahl. RP 85-86. Unlike the testimony in *State v. Graham*, 67 Wash.App. 930, 841 P.2d 785 (1992), this was not an extensive examination of an expert witness. Nor was there any attempt to “profile” the appellant. Ms. Wahl did not opine, nor did the State argue that the appellant fit any type of profile.

In *Graham*, Ms. Berliner testified as to what constituted “grooming” but then took it one step further. She “described her recent study on the subject...” and how offenders would seek a particular type of child. The prosecutor then argued that the child fit “the profile” of a victim. *State v. Graham*, 67 Wash.App. at 934.

The testimony in the instant case is more akin to that presented in *State v. Stevens*, 58 Wash.App. 478, 794 P.2d 38 (1990). In *Stevens*, the defense attempted to show that C, who had taken on the caretaker role in the family, felt \*483 resentment toward Stevens because he usurped her authority when he babysat. The defense postulated that C retaliated by fabricating the story of sexual abuse by Stevens. *State v. Stevens*, 58 Wash. App. at 482-83.

At trial, the State presented the testimony of Dr. Carol Jenny, a child sex abuse expert. Dr. Jenny testified that sexually abused children exhibit common behaviors such as bedwetting, nightmares, sexual acting out, anger and other difficult behaviors. While testifying, she used a colposcopy photograph of C's vagina to point out physical evidence of sexual abuse. *Stevens* at 483.

The Court held that expert testimony generally describing symptoms exhibited by victims may be admissible when relevant and when not offered as a direct assessment of the credibility of the victim. *Id.* at 496.

Because Ms. Wahl's testimony was permissible as general information that was helpful to the jury's understanding of a matter outside the competence of an ordinary lay person, and did not attempt to act as "profile" evidence, it was a legitimate trial tactic to not object and draw further attention to this one answer.

Second of all, any error was harmless beyond a reasonable doubt. The testimony helped the jury to understand some potential victim behavior that might not be intuitive. However, nothing about Ms. Wahl's testimony exceed what common sense would

inform most people about child sexual abuse. There was no testimony or argument that the appellant fit a certain profile.

**b. Was defense counsel ineffective for “opening the door” to previous acts of abuse?**

**No.**

It is clear that defense counsel was using the statements C.M.C. had made about the prior abuse to try and impeach her with prior inconsistent statements.

So I started to question her about what she had said previously, because she tells the prosecutor five times, and she says, well, that’s all he did, and I started to ask her questions, because that’s not what she had said before when she talked to the Child Advocacy Center...she said, well, it happened eight or nine time, but she didn’t want to talk about it.

And then she said, well, it happened two other times in housing...so she upped it from five to seven, so she kept changing it...then I wanted to know why that was changing, and then she just kind of reverted into this practiced statement, it happened two times in housing, and it happened five times at the other house...like she had practiced it. And I would hope that would be of a concern to you. RP 140.

This is a legitimate trial strategy, especially considering that the additional incidents were not comprised of any abuse that was more severe or shocking than what was already testified to.

Trial counsel took a calculated risk in his attempt to impeach and discredit C.MC.

**c. Was defense counsel ineffective for failing to object to the State's closing?**

**No. The State's closing was not improper.**

As detailed above, the State's closing argument was not improper; therefore, trial counsel was correct in not making an objection.

**C. Sufficiency of the Evidence**

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). When a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* Furthermore, "[a] claim of insufficiency

admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.*

**a. Are there sufficient facts to support the jury's verdict of guilty?**

**Yes. There are sufficient facts to show the appellant was more than 36 months older than C.M.C. and that they were not married.**

The appellant asks this Court to find the evidence insufficient to prove that he was more than 36 months older than C.M.C. and that the two were not married. However, in order for this Court to arrive at such a conclusion would require a viewing of the facts in a light most favorable to the appellant, and this is not the correct standard. As discussed above, the facts must be looked at in a light most favorable to the State, and the law does not distinguish direct or circumstantial evidence as being of greater value.

In this case, the State had to show that the appellant was 14 years old at the time of trial. The State showed that the appellant was dating C.M.C.'s mother, and that this relationship started four years prior. Further, Nunez and the appellant had a one year old child together. In strains any type of common sense that Nunez

was having a relationship with a ten-year old that already had a son when she met him.

Further, there was evidence that the appellant was driving and that he was a father figure to C.M.C. Again, this would support the theory that the defendant was older than 14 years old at the time of trial, and that he was not married to C.M.C. She did not see him as a husband or boyfriend, but as a father.

**b. Are there sufficient facts to support the jury's finding that the appellant's crime was aggravated?**

**Yes. The appellant used his position of trust to facilitate his crime.**

When analyzing whether or not the appellant abused a position of trust, it is helpful to look at the pattern jury instruction given.

A defendant uses a position of trust to facilitate a crime when the defendant gains access to the victim of the offense because of the trust relationship.

In determining whether there was a position of trust, you should consider the length of the relationship between the defendant and the victim, the nature of the defendant's relationship to the victim, and the vulnerability of the victim because of age or other circumstance.

There need not be a personal relationship of trust between the defendant and the victim. It is sufficient if a relationship

of trust existed between the defendant and someone who entrusted the victim to the defendant's care.

WPIC 300.23; CP 20-25.

The courts have held that, as long as it is not included as an element in the to-convict instruction, the parent-child relationship can be the basis for this aggravating factor.

In *State v. Hyder*, the defendant was convicted of Incest in the Second Degree and the jury found he abused a position of trust. The court held that “the relevant inquiry [of Incest 2<sup>nd</sup>] is whether the defendant is related to the person with whom he has sexual contact and that he knows of that relationship. The position of trust aggravating factor requires that the defendant used his position of trust to facilitate the crime.” *State v. Hyder*, 159 Wash. App. 234, 262, 244 P.3d 454, 468 (2011).

In this case, the court’s instruction would not have let the jury find abuse of a position of trust solely on the child’s age. The court’s instruction was “A defendant uses a position of trust to facilitate a crime when the defendant gains access to the victim of the offense because of the trust relationship.” CP 20-25. In determining whether or not there was a position of trust, the court instructed the jury to look at several possible factors, including

vulnerability of the victim. In considering vulnerability, age was one factor to be considered. Thus, the special verdict was not based solely on facts that are elements of the crime. Therefore, the jury properly considered this question, and their verdict should be affirmed.

D. Impositions of Legal Financial Obligations

At the time of sentencing, the trial court ordered the appellant to pay certain legal financial obligations. The majority of these are mandatory legal financial obligations that cannot be waived by the court. These were:

- \$500.00 Victim Assessment<sup>1</sup>
- \$200.00 Court Costs
- \$500.00 for court appointed counsel
- \$100.00 DNA collection fee<sup>2</sup>
- Restitution as determined by further order of the court.

The trial court's order for victim assessment, DNA collection, and restitution should be affirmed. The court costs and fee for counsel are discretionary and the case should be remanded

---

<sup>1</sup> "When any person is found guilty in any superior court of having committed a crime...there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each...felony..." RCW 7.68.035

<sup>2</sup>"Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars." RCW 43.43.7541. ("Every adult...convicted of a felony..." RCW 43.43.754(1)(a))

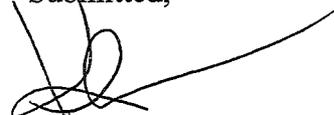
for the trial court to make the necessary evaluation of the appellant's financial situation.

### III. CONCLUSION

As articulated above, there was no prosecutorial misconduct or ineffective assistance of counsel in this case that would warrant overturning the jury's verdict. Also, sufficient facts support both the verdict of guilty and the aggravating factor.

DATED this 10<sup>th</sup> day of July, 2015.

Respectfully  
Submitted,

A handwritten signature in black ink, consisting of a stylized 'W' followed by a long horizontal stroke that extends to the right.

WSBA # 34097

# GRAYS HARBOR COUNTY PROSECUTOR

**July 10, 2015 - 10:06 AM**

## Transmittal Letter

Document Uploaded: 4-473739-Respondent's Brief.pdf

Case Name: State v. Juan Guevara

Court of Appeals Case Number: 47373-9

**Is this a Personal Restraint Petition?**  Yes  No

### The document being Filed is:

- Designation of Clerk's Papers  Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: \_\_\_\_\_
- Answer/Reply to Motion: \_\_\_\_\_
- Brief: Respondent's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Katherine L Svoboda - Email: [ksvoboda@co.grays-harbor.wa.us](mailto:ksvoboda@co.grays-harbor.wa.us)

A copy of this document has been emailed to the following addresses:

[backlundmistry@gmail.com](mailto:backlundmistry@gmail.com)