

**FILED**

**MAR 15 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 293173**

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON,**

**RESPONDENT,**

**v.**

**RODNEY R.G. REEDY,**

**APPELLANT.**

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**BRIEF OF RESPONDENT**

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**D. ANGUS LEE  
PROSECUTING ATTORNEY**

**By: Douglas R. Mitchell, WSBA #22877  
Deputy Prosecuting Attorney  
Attorney for Respondent**

**PO BOX 37  
EPHRATA WA 98823  
(509)754-2011**

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A. IDENTITY OF RESPONDENT

The State of Washington was the Plaintiff in the Superior Court, and is Respondent herein. The State is represented by the Grant County Prosecutor's Office.

B. RELIEF SOUGHT

The State is asking this Court to affirm the decision of the Superior Court and uphold Appellant's convictions for Child Molestation in the First Degree.

C. STATEMENT OF FACTS

Appellant's Summary of Proceedings describing the facts of the case (Br. of Appellant, at 1-5) is sufficient for the purpose of Respondent's response, and will be accepted as it is, unless otherwise noted below.

D. RESPONSE TO APPELLANT'S ISSUE PRESENTED

1. The Superior Court did not err when it did not grant Mr. Reedy's motion for a mistrial. The State was completely surprised by and did not solicit the opinion testimony of witness Noni Jackman. RP 247, 300. The

Court's response to the improper witness opinion was appropriate, within its discretion, and legally sufficient. "Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary." *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citations omitted). "A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion." *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010) (citations omitted). "Abuse occurs when the trial court's decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Saunders*, 120 Wn. App. 800, 811, 86 P.3d 232 (2004) (citations and internal quotation marks omitted). There was no error, and this Court should uphold the trial Court on this issue.

The State agrees that witnesses generally cannot offer testimony on the issue of whether or not another witness is telling the truth. *State v. Casteneda-Perez*, 61 Wn. App. 354, 360, 810 P.2d 74 (1990) (citations omitted). Certainly, to ask a witness to express such an opinion is improper for multiple reasons. *Id.* at 362. Specifically, it is improper for a prosecutor to do so. *State v. Jerrels*, 83 Wn. App. 503, 507, 925 P.2d 209 (1996) (citations omitted). "The fact that a witness has invaded the province of the jury does not, however, always require a new trial." *State v. Hager*, \_\_\_ Wn.2d \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_ (slip opinion, March 10, 2011, at 7) (citation omitted).

It appears that the typical situation in which such an issue has come before the Appellate Courts is one in which a party seeks that opinion testimony by the nature of their questions. As noted, such would be improper. That is not what occurred in this case. In this case, the Deputy Prosecutor was completely surprised by the answers given. He immediately stipulated at side bar that the opinion testimony was improper. The Court had already appropriately admonished the jury. RP, 247. When the motion for mistrial was argued later in the day, the Deputy Prosecutor explained the nature of the answer he had expected, and had been seeking. RP, at 300. The Court at that time made an oral ruling and related findings, correctly denying the motion. RP, at 300–301. As the Court noted in its oral ruling, Mr. Reedy in fact elicited during cross examination testimony virtually identical to that anticipated by the State. RP, at 300, referencing RP, at 258–259. In a case with similar<sup>1</sup> facts, the Washington Supreme Court has recently held that it was not error to not grant a mistrial. *State v. Hager*, \_\_\_ Wn.2d \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_ (slip opinion, March 10, 2011, at 2).

In *Hager*, at a second trial of the case after a jury was unable to reach a verdict, a detective inadvertently violated a motion in limine by describing the defendant as being “evasive” when he was encountered. There was an

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<sup>1</sup> The inadvertent testimonial error was about the defendant, not the victim. The question, however, was similar and used the word “demeanor”, and the prosecutor was similarly surprised.

immediate motion for a mistrial. During argument outside the presence of the jury, the deputy prosecutor apologized to the court, saying he had forgotten to remind the detective about not using the word “evasive”. He acknowledged that the word should not have been used, but argued that a mistrial was not necessary as long as the jury was admonished to disregard the remark. The trial court denied the motion for mistrial, concluding the error was not made in bad faith and that a jury instruction could correct the error. The jury was instructed accordingly. *Id.* (slip opinion, March 10, 2011, at 2-3). The testimony of Ms. Jackman was similarly inadvertent, and did not violate any pre-trial order. Ms. Jackman is not a “professional witness”, and Appellant not only does not provide any Washington criminal case authority to support the position that she is, but the cases cited do not support that position either once carefully read. While her testimony was error, the error did not mandate a mistrial. “In a criminal proceeding, a new trial is necessary only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly.” *Id.* (slip opinion, March 10, 2011, at 3) (citation and internal quotation omitted).

Appellant correctly quotes certain portions of Ms. Jackman’s testimony regarding her credentials and role as a Guardian ad Litem (GAL). Br. of Appellant at 9. However, Appellant does not acknowledge the context

in which that testimony was presented. This testimony was part of the introduction of the witness to the jury, not an effort to play up any credentials or claim any insight or knowledge as to human behavior. Typical of those introductory questions was “For the education of the jury, can you explain what a guardian ad litem does in simple enough terms that everyone can understand what you’re doing?” RP, at 242. While in some settings a GAL may have a special status to which Appellant refers as being a “professional witness”, that is not the situation here. Ms. Jackman is not an attorney or otherwise qualified or expected to be conversant with the rules of evidence. RP, at 299. In this case, the fact that the witness was introduced to the jury as having been a GAL in a family law matter was a matter of placing the basis of her testimony in proper context.

Even if Ms. Jackman were to somehow qualify as a “professional witness”, the testimonial error did not justify a mistrial, and does not justify reversal of the convictions. Appellant’s reliance upon *State v. Gamble*, 168 Wn.2d 161, 225 P.3d 973 (2010) is misplaced. In *Gamble*, defendant Matthews<sup>2</sup> had filed a pre-trial motion to exclude certain evidence, which was granted by the trial court. A prosecution witness, Detective O’Keefe, introduced evidence covered by the rulings. After proper objections and the

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<sup>2</sup> The *Gamble* case involved five cases from four counties, consolidated for the purposes of appeal.

jury being told to disregard the testimony, the defense moved for a mistrial. Even though the trial court was concerned that the violations were intentional, the motion was denied at the end of the trial. *State v. Gamble*, 168 Wn.2d 161, 176, 225 P.3d 973 (2010). This error by that witness is not at all similar to that of Ms. Jackman. The *Gamble* Court in fact addressed differing types of testimonial error. “An intentional introduction of inadmissible evidence relating to criminal history is more serious than an unintentional interjection of inadmissible testimony.” *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010) (citation omitted).

Appellant’s reliance on *In re Guardianship of Stamm*, 121 Wn. App. 830, 91 P.3d 126 (2004) is also misplaced. *Stamm* can be readily distinguished from the current case on multiple grounds. First, in *Stamm*, the Court held that pursuant to ER 702, a trial court has the discretion to permit a GAL to testify to his or her opinions if those opinions would be of assistance to the trier of fact. *In re Guardianship of Stamm*, 121 Wn. App. 830, 837, 91 P.3d 126 (2004). However, that is not what happened in this trial. The Court did not permit the testimony to which objection was made. The Court in fact sustained Mr. Reedy’s objection and instructed the jury to disregard the testimony. RP, at 247-248. If not directly opposite to admission of that testimony, it is so close as to be indistinguishable. “A trial court has wide

discretion to cure trial irregularities resulting from improper witness statements.” *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010) (citation omitted). One manner in which a trial court can address such an issue is to direct the jury as to the manner in which they are to consider or not consider such a statement, and juries are presumed to have followed the trial court’s instructions. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

Appellant also asserts that Ms. Jackman, as an experienced GAL, should have known her testimony was improper. While this may seem to be a logical assertion, it is not correct. It is also an additional misstatement of the *Stamm* case. The statutes relevant to the duties of a GAL anticipate that the fact finder is to have the benefit of the GAL’s investigation, recommendations, and opinions. *In re Guardianship of Stamm*, 121 Wn. App. 830, 838-839, 91 P.3d 126 (2004)<sup>3</sup>. One of the analytical keys to the decision in *Stamm* is the difference in what is acceptable information to present to a judge as opposed to jurors. As a family law GAL, most if not all of Ms. Jackman’s experience in the courtroom is almost certainly in bench trials. A GAL accustomed to that setting would not be sufficiently familiar with the realities of a jury trial to understand that what is appropriate in a written

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<sup>3</sup> While *Stamm* is a proceeding pursuant to Title 11, the role of a GAL in proceedings pursuant to Titles 13 and 26 is, if not identical, so similar that the comparison is reasonable.

report and testimony to a judicial officer may not be when testifying to a jury. *Id.*, at 839-840. As a result, Appellant's assertion that Ms. Jackman is a "professional witness" does not withstand scrutiny. In addition, in both its oral curative instruction about this testimony and the instructions to the jury, the Court correctly informed the jurors that they were not to consider any evidence ruled to be inadmissible or that they were told to disregard, and that they are the sole judges of the credibility of the witnesses and the facts. RP, 248; CP 22-23.

Appellant vigorously asserts that the topic matter of this case is a sensitive and "highly inflammatory" subject. Br. of Appellant, at 12-13. While this has logical appeal, and may even qualify as intuitively obvious, Appellant has cited no Washington criminal cases to support his position. A court is entitled to conclude that the failure of counsel to cite authority means that no authority exists supporting counsel's position. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Washington case law has consistently held that a court is not obligated to search out authority to support a party's position. See, for

example, *State v. Chapman*, 140 Wn.2d 436, 453, 998 P.2d 282, *cert. denied*, 531 U.S. 984, 121 S. Ct. 438, 148 L.Ed.2d 444 (2000).

Only one of the eight appellate briefs filed in these cases refers to the privacy section of our state constitution, Const. art. 1, § 7. As far as the record before us reflects, the parties neither raised nor discussed this issue at the trial court level in either case. As expressed by the Eighth Circuit, “**naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.**” *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir.1970). *See also Null v. Grandview*, 669 S.W.2d 78, 81 (Mo.Ct.App.1984); *State v. Perbix*, 349 N.W.2d 403, 404 (N.D.1984). The constitutional argument made in the cases before us does not merit our consideration, and we therefore decline to consider it. *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986). (Emphasis added.)

Certainly, Appellant’s argument that as a result of the type of case the instruction to disregard is futile is not worthy of serious consideration.

E. CONCLUSION

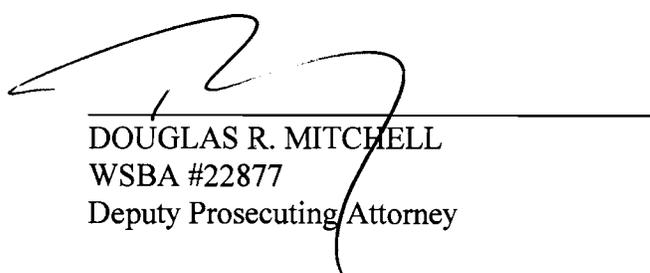
The Appellant has not raised a supportable claim of error. The testimonial error of the witness did not justify, let alone mandate, a mistrial. The Washington Supreme Court has just decided a case which involves essentially the same legal issue and analysis, and which makes clear that Appellant cannot prevail in his efforts before this Court.

As in *Warren*, the trial court here sustained Hager’s objection to Detective Callas’s improper statement and promptly

instructed the jury to disregard it. In addition to giving this oral instruction, the trial court presented the jurors with a written instruction that they were the sole judges of credibility, and that, if they had been directed to disregard any evidence, they must not discuss it during their deliberations or consider it in reaching their verdict. We presume that the jury followed these instructions. *State v. Hager*, \_\_\_ Wn. 2d \_\_\_, \_\_\_, \_\_\_ P3d \_\_\_ (slip opinion, March 10, 2011, at 8) (citations and internal quotations omitted).

The trial court did not err in its discretionary decision. Accordingly, this Court should uphold the decision of the trial court and the conviction of the Appellant.

Respectfully submitted this 14<sup>th</sup> day of March, 2011.



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DOUGLAS R. MITCHELL  
WSBA #22877  
Deputy Prosecuting Attorney