

FILED

FEB - 5 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

30917-7-III

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DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DEWITT A. HARRELSON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
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INDEX

APPELLANT’S ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....2

STATEMENT OF THE CASE.....2

ARGUMENT.....3

 A. THE TRIAL COURT PROPERLY EXERCISED
 ITS DISCRETION IN REFUSING TO ALLOW
 NEGATIVE CHARACTER EVIDENCE UNDER
 THE GUISE OF SUBSTANTIVE DEFENSE
 TESTIMONY3

 B. THE FAILURE OF DEFENSE COUNSEL TO
 OBJECT TO THE ADMISSION OF THE
 VIDEOTAPE OF A.B.’S INTERVIEW, PRECLUDES
 RAISING THAT ISSUE ON APPEAL.....6

 C. THERE WAS NO ERROR IN THE ADMISSION
 OF MS. HALL’S TESTIMONY9

 D. THERE WAS NO ERROR IN THE CROSS–
 EXAMINATION OF THE DEFENDANT12

 E. THE CUMULATIVE ERROR DOCTRINE HAS
 NO APPLICATION IN THIS CASE15

CONCLUSION.....14

TABLE OF AUTHORITIES

WASHINGTON CASES

CITY OF BELLEVUE V. KRAVIK, 69 Wn. App. 735, 850 P.2d 559 (1993).....	6
IN RE MORRIS, -- Wn.2d --, 288 P.3d 1140 (2012).....	8
LEWIS V. SIMPSON TIMBER CO., 145 Wn. App. 302, 189 P.3d 178 (2008).....	6
STATE V. BOWERMAN, 115 Wn.2d 794, 802 P.2d 116 (1990).....	7
STATE V. COE, 101 Wn.2d 772, 684 P.2d 668 (1984).....	3
STATE V. HUDLOW, 99 Wn.2d 1, 659 P.2d 514 (1983).....	4
STATE V. KOLESNIK, 146 Wn. App. 790, 192 P.3d 937 (2008).....	8
STATE V. LAUREANO, 101 Wn.2d 745, 682 P.2d 889 (1984) <i>overruled on other grounds</i> <i>State v. Brown</i> , 111 Wn.2d 124, 761 P.2d 588 (1988).....	3
STATE V. MAUPIN, 128 Wn.2d 918, 913 P.2d 808 (1996).....	4
STATE V. McDONALD, 138 Wn.2d 680, 981 P.2d 443 (1999).....	3, 6
STATE V. McFARLAND, 127 Wn.2d 322, 899 P.2d 1251 (1995).....	7
STATE V. ORTIZ, 119 Wn.2d 294, 831 P.2d 1060, (1992).....	3

STATE V. POWELL, 126 Wn.2d 244, 893 P.2d 615 (1995).....	3
STATE V. RIVERS, 129 Wn.2d 697, 921 P.2d 95 (1996).....	3
STATE V. THOMAS, 109 Wn.2d 222, 743 P.2d 816 (1987).....	7
STATE V. WILSON, 60 Wn. App. 887, 808 P.2d 754 (1991).....	3

SUPREME COURT CASES

STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	7, 8
--	------

STATUTES

RCW 9A.44.010(2).....	4, 5
RCW 9A.44.083.....	4

COURT RULES

ER 404(b).....	5
ER 608	5
ER 609	5
ER 801(d)(1)(ii).....	8

I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The court erred by excluding evidence of A.B.'s prior misconduct where it supported the defendant's theory of the case as to direct elements of the charged crime.
2. The court erred by admitting the child hearsay videotaped interview.

Defense counsel was ineffective for failing to object.¹
3. The court erred by admitting evidence of one witness who expressed her personal opinion on guilt and A.B.'s veracity. Defense counsel was ineffective for failing to object. The opinion on guilt violated the defendant's constitutional right to a decision by an unbiased jury based on factually-supported evidence.
4. The prosecutor committed misconduct that prejudiced Mr. Harrelson's defense by referring to facts not in evidence and failing to later introduce evidence to support the implied facts.
5. The court erred by accepting the jury's verdict of guilty and convicting Mr. Harrelson of first-degree child molestation following the unfair trial in this case.

¹ Defense counsel did not enumerate this Assignment of Error.

II.

ISSUES PRESENTED

- A. DID THE TRIAL COURT CORRECTLY REFUSE TO PERMIT THE DEFENDANT TO PRESENT IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE?
- B. DOES A FAILURE TO OBJECT TO A VIDEOTAPE PRECLUDE RAISING THE ISSUE ON APPEAL?
- C. WERE THERE ANY ERRORS IN MS. HALL'S TESTIMONY?
- D. WAS THERE ANY ERROR IN CROSS-EXAMINATION OF THE DEFENDANT?
- E. WAS THERE ANY CUMULATIVE ERROR?

III.

STATEMENT OF THE CASE

For purposes of this appeal only, the State accepts the defendant's Statement of the Case.

IV.

ARGUMENT

A. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO ALLOW NEGATIVE CHARACTER EVIDENCE UNDER THE GUISE OF SUBSTANTIVE DEFENSE TESTIMONY.

Admission of evidence is left to the sound discretion of the court and a trial judge has wide discretion in balancing the probative value of evidence against its potential prejudicial impact. *State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984), *State v. Laureano*, 101 Wn.2d 745, 682 P.2d 889 (1984) *overruled on other grounds State v. Brown*, 111 Wn.2d 124, 132-33, 761 P.2d 588 (1988); *State v. Rivers*, 129 Wn.2d 697, 921 P.2d 95 (1996). "The admission or exclusion of relevant evidence is within the discretion of the trial court and its decision will not be reversed absent a showing of manifest abuse of discretion." *State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754 (1991). *See also State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)); *State v. Ortiz*, 119 Wn.2d 294, 831 P.2d 1060, (1992); *State v. McDonald*, 138 Wn.2d 680, 693, 981 P.2d 443 (1999).

A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual

contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.083.

(2) “Sexual contact” means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.010(2).

The defendant put forth the unusual argument that the victim exhibited behaviors that the defendant found repulsive. The defendant wished to present evidence that the victim had told lies, been caught smoking in the girl’s restroom at school, had been disruptive at school, etc. RP 12-15. The defense also wanted to explore allegations that the defendant did not get along with the victim. RP 16.

The proffered trial defense was that the defendant found A.B’s behavior so repulsive that he would not have had “sexual contact” with A.B. “[A] criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.” *State v. Maupin*, 128 Wn.2d 918, 924–25, 913 P.2d 808 (1996); (quoting *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)).

The defendant argued for admission of A.B’s bad behavior on the theory that A.B’s bad behavior was being admitted in support of the defendant’s substantive defense of: “I would not touch A.B. because I did not like her.” When asked by the trial court how the defendant was going to get past ER 404(b)

problems, the defendant argued that ER 404(b) and ER 608, ER 609 were not implicated in the defendant's theory of defense.

The State maintains that the trial court properly excluded most of the defendant's evidence. The more the defendant argued, the more obvious the absurdity of the defense material became. The only possible point of application for the proffered material would be to prove that the defendant had no sexual desire towards A.B. The defendant does not explain to the trial court how his proffered evidence would prove that at a particular instance in time, the defendant did not like A.B. and therefore did not touch her for the purposes of sexual gratification. This portion of the defense theory also neglects the fact that the law of this state provides: "Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). The proffered evidence says nothing about A.B.'s sexual desires. The proffered evidence says nothing about the defendant's sexual desires towards A.B. It is hardly uncommon for a male to develop a sexual desire for someone he does not particularly care for.

At the very best, the proffered evidence for a "defense" was barely relevant and completely self-serving. It would be very easy for the defendant to concoct any number of claims of dislike of A.B. centered on any known misbehavior.

On the other side is the simple fact that the defendant wanted to smear A.B.'s character in whatever way he could and then label his attacks a substantive defense.

The defendant did not proffer a straightforward avenue for admission of his proffered "bad character" evidence. The proffered evidence was only a thinly veiled attempt to "slam" A.B. The trial court properly excluded the defendant's preferred "defense" evidence as being irrelevant and prejudicial to the State.

B. THE FAILURE OF DEFENSE COUNSEL TO OBJECT TO THE ADMISSION OF THE VIDEOTAPE OF A.B.'S INTERVIEW, PRECLUDES RAISING THAT ISSUE ON APPEAL.

The defendant argues that the trial court erred by permitting the State to show a DVD of an interview with A.B. and Karen Winston. Even if the trial court admitted the video erroneously, a point not conceded by the State, the defendant cannot raise the issue on appeal as he failed to object at trial.

The defendant had to object to preserve the alleged error for review, but he did not. *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 331 n. 22, 189 P.3d 178 (2008); *City of Bellevue v. Kravik*, 69 Wn. App. 735, 742, 850 P.2d 559 (1993). The court should not hear this allegation of error.

Apparently "backstopping" his argument above, the defendant adds a claim of ineffective assistance of counsel. Defense counsel is strongly presumed to be effective. *State v. McDonald*, 138 Wn.2d at 696. "The burden is on a

defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To establish ineffective assistance of counsel, the defendant must meet a two-pronged test. The defendant must show (1) that counsel's performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the first prong of the test, the court makes reference to “an objective standard of reasonableness based on consideration of all of the circumstances.” *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Appellate review of counsel's performance is highly deferential and there is a strong presumption that the performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). In order to prevail on the second prong of the test, the defendant must show that, “but for the ineffective assistance, there is a reasonable probability that the outcome would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The two prongs are independent and a failure to show either of the two prongs terminates review of the other. *Thomas*, 109 Wn.2d at 226 (*citing Strickland*, 466 U.S. at 687). “If it is easier to dispose of an ineffectiveness claim on the ground of

lack of sufficient prejudice . . . that course should be followed.” *Strickland*, 466 U.S. at 697.

The defendant’s argument is anchored on the defendant’s position that the defense counsel should have objected to the admission of the video. The defense counsel stipulated to the admission of the video.

The defendant cannot know what the defense counsel was pursuing. Certainly, the defense would have simply highlighted the video if the defense objected to the admission of the video. Among other points, the jury would have wondered why the defense did not want them to see the video. These sorts of decisions are trial tactics and strategy and do not constitute ineffective assistance of counsel. “The decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel.” *State v. Kolesnik*, 146 Wn. App. 790, 801, 192 P.3d 937 (2008).

It is up to the defendant to rebut the presumption that his trial counsel's failure to object to the admission of the videotape was strategic or tactical. *In re Morris*, -- Wn.2d --, 288 P.3d 1140 (2012).

It is probable that the videotape would have been admitted even if trial defense counsel had not stipulated to the admission of the video. The video was admissible under the hearsay exception ER 801(d)(1)(ii), “prior consistent statements.” It would be difficult, considering the defendant’s appellate

arguments, to now say the video was not consistent with the witness' in-court testimony. The defense has argued on appeal that the videotape was repetitive and simply "bolstered" the victim's testimony. The harder the defendant pursues that argument, the more clearly he shows the admissibility of the videotape. The more the interview was repetitive, the weaker becomes the defendant's arguments for exclusion. Of course, the State does not agree that the videotape was simply repetitive.

Review of the transcript prepared from the Karen Winston interview with A.B., shows that contrary to the defendant' strident claims of how damaging the interview was to the defendant's case, the interview did not add all that much. The interview showed a young female with distinct problems in maintaining focus. The majority of substantive information obtained pertained to A.B.'s rather complicated family constellation. Exh. P5. There was little direct information about the crime itself and the tape was hardly the "damning" piece of evidence as mentioned by the defendant on appeal. Certainly the person alleged to have touched A.B. was discussed, but the record of the interview seemed more a "getting to know you" sort of item rather than answering forensic questions.

C. THERE WAS NO ERROR IN THE ADMISSION OF MS. HALL'S TESTIMONY.

The defendant alleges error in Ms. Hall's testimony in that she allegedly vouched for A.B. and gave an opinion pertaining to guilt. As in previous

discussions, the defendant did not object to the sections of Ms. Hall's testimony to which the defendant now assigns error. The defendant cannot raise any issues on appeal to the alleged errors in Ms. Hall's testimony.

Further, the allegations raised on appeal are not supported by the record. The defendant leaves out some of the testimony of Ms. Hall. At RP 262, the prosecutor asked: "Were you thinking it was – he touched her? Is that what you were thinking?" RP 262.

Ms. Hall replied by moving her head side to side, apparently a negative response as the prosecutor then asked: "What were you thinking?" RP 262. "I was thinking it had to be something bad for how she [A.B.] reacted." RP 262.

Ms. Hall stated, "You know, Anna's a good girl, and unfortunately she's had a rough start. She doesn't overreact to little things, you know. She—for her to be as upset like that—it had to be something not good." RP 262.

The defendant's claims that Ms. Hall was "vouching" for A.B. are not correct. "Vouching" requires that the witness testify that A.B. told the truth and/or that the defendant was guilty. Cite? In this case, all that Ms. Hall said was that A.B. had had a rough start in life and that she was a "good girl." At no point was "good girl" defined. "Good girl" could mean that A.B. was studious or perhaps tolerant of her situation. Nowhere in Ms. Hall's testimony does she say that A.B. is truthful.

Ms. Hall testified that “something bad” must have occurred. Ms. Hall does not connect the “something bad” to inappropriate touching, does not identify the defendant as having engaged in improper conduct, etc. The defendant on appeal has stretched what Ms. Hall actually stated in an effort to make a “vouching” argument.

Once more, the defendant argues on appeal that defense counsel was ineffective for not objecting to Ms. Hall’s testimony. The situation as it exists is that, once again, the burden is on the defendant to show his counsel was ineffective for failing to object to Ms. Hall’s testimony. The reason why a defense counsel might not want to object is very apparent: would any defense counsel want to stand in front of a jury and object when a witness says a little girl is good? Would any counsel want to stand in front of the jury and state that the little girl overreacts to things? Would a defense counsel want to fault Ms. Hall for her attempts to comfort A.B. during and after a large fracas in the street?

Technically, perhaps the defense could have “gotten somewhere” with objections to pieces of Ms. Hall’s testimony, but at the expense of creating a hostile jury. The most logical reason the trial defense counsel did not object is because objections would have been embarrassing. There was no vouching of any sort from Ms. Hall.

D. THERE WAS NO ERROR IN THE CROSS-EXAMINATION OF THE DEFENDANT.

The defendant attempts to claim error from the prosecutor's cross-examination of the defendant. The defendant on appeal claims that the prosecutor used "facts not in evidence."

The defendant argues that the prosecutor asked a question about the defendant's discussions surrounding Det. Lebsock's interview with the defendant in June of 2010. The prosecutor asked the defendant whether the defendant told Det. Lebsock that he loved A.B. RP 310.? This was relevant because the defendant's answer (he loved A.B.) countered the defendant's lengthy testimony trying to show that the defendant disliked A.B. The "I loved her" statement completely scuttled the defendant's defense.

The defendant on appeal claims that the prosecutor used facts not in evidence by asking the defendant if he loved A.B. The defendant on appeal uses a two month date difference to claim that the prosecutor did not have any supporting evidence for the question. This claim is disingenuous. The prosecutor was quite aware that the defendant had told Det. Lebsock that he loved A.B. The record does not clearly state whether the prosecutor made an error in asking about the defendant's interview in June or whether the prosecutor had simply "moved on" and was no longer specifically discussing the June interview. The prosecutor did not preface any cross-examination questions with a specific date. RP 310.

The defendant's claims that the prosecutor asked "leading questions" on cross-examination as if such questions were somehow improper. Brf. of App. 26.

In cross-examination practice, leading questions are *de rigueur*. In this case, the prosecutor did not "cut short" the defendant's answers and the defendant was free to explain his responses. He did not. A defendant deciding to testify at trial subjects himself to considerable risk. The defendant also had an opportunity for redirect which he did not use to explain his answers. RP 310-11.

When asked, the defendant answered that he had not said that he "loved" A.B. RP 310. Interestingly, the defendant also stated that Det. Lebsack tried to get the defendant to hit the detective in the chin. RP 310. The jury got a rare chance to see the defendant's true mendacious nature. All legal arguments aside, the jury would have taken a dim view of the defendant flatly and emphatically denying the "love" statement and then not telling the jury that two months later, he had made such a statement to the detective. The defendant's testimony that the detective tried to entice the defendant into striking the detective in the face was so bizarre as to have severely reduced the defendant's credibility.

Taking the stand as a rebuttal witness, Det. Lebsack testified that, in fact, the defendant had stated that he loved A.B. RP 312. This interview took place on August 11, 2010. On appeal, the defendant claims that the first time he was asked by the prosecutor if he stated he loved A.B. occurred in June. The defense must have derived that date by inference from when the big street altercation took

place. The defendant's argument on appeal that the prosecutor asked about June is not supported by the record.

Whether the "love" statement came at the June discussion with Det. Lebsock or two months later at a second interview in August seems of little moment. The defendant hurt himself by denying making the statement. He did not state that he had said "I love her" on a particular date. The defendant also did not state that he had made the "love" statement in August. The defendant simply denied completely stating he loved A.B. The defendant could have clarified the situation on re-direct, but he did not. RP 310. The defendant simply left the denial hanging. The defendant on appeal argues that if the prosecutor had asked specifically about August as opposed to June, the defendant might have agreed that he told the detective he loved A.B. Brf. of App. 27. If what the defendant argues on appeal were correct, the defendant could easily have told the jury on redirect that he did tell the detective that he loved A.B.

It was a long way, testimonally speaking, from the mention of the street fracas occurring in June to the prosecutor's cross-exam question of the defendant. Even the trial defense counsel did not object to the prosecutor's questions. On appeal the defendant attempts to construct an allegation of prosecutorial misconduct based upon the defendant's extrapolations of the testimony of Det. Lebsock and the prosecutor's questioning of the defendant. The defendant cannot show actual prosecutorial conduct without resorting to his chimeras.

E. THE CUMULATIVE ERROR DOCTRINE HAS NO APPLICATION IN THIS CASE.

The State maintains that there were no errors to form a “cumulative error.”

Dated this 5th day of February, 2013.

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