

62949-2

62949-2

NO. 62949-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CALVIN WILLIAMS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GREGORY P. CANOVA

BRIEF OF RESPONDENT

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A. ISSUES

1. Did a State's witness violate any of the defendant's constitutional rights or improperly comment on his guilt when the witness truthfully answered the questions posed to him by defense counsel?

2. Has the defendant shown ineffective assistance of counsel when his attorney conceded in closing arguments that, consistent with the testimony of a forensic scientist, that DNA evidence found at the scene belonged to the defendant?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Calvin Elijah Williams was charged by Information with the crime of Rape of a Child in the Second Degree. CP 1. This charge alleged that Williams had sex with a 12-year-old, and that Williams was 36 months older than the victim. CP 1. Williams was tried by jury before King County Superior Court Judge Greg Canova and found guilty as charged. CP 42. At sentencing, the court imposed a standard range sentence of 250 months based on an offender score of "10." CP 45-55. Williams appealed. CP 43.

2. SUBSTANTIVE FACTS

On April 18, 2007, 12-year-old JD tied bed sheets together and crawled out of the window at the Ruth Dykeman Juvenile Housing Facility, where she was living. RP 232-35. JD then took a bus to downtown Seattle. RP 235. As she walked around downtown, the defendant, Calvin Williams, who introduced himself as “Chris,” approached her. RP 239-40. JD told Chris that she was 13, and that she was looking for a place to stay because she was a runaway. RP 240-42. Williams told her that he was 16, even though he was actually 26, and invited JD to his home where she could sleep. RP 240-41. JD agreed and they took a bus to Skyway and then walked to Williams’s home. RP 242.

When they arrived, JD saw another girl who said that she was 14 and also a runaway. RP 243. Williams then told JD that the police were after him and commanded the other girl to go outside and stand as a look-out. RP 244-45. The girl complied. RP 245.

Williams then showed JD the house. RP 245-46. He showed her a room that he described as his brother’s room, and told JD that that was where she was going to sleep. RP 245-46.

Williams then told her to sit on the bed and take off her pants. RP 247. JD told him that she was not like that. RP 247. Williams offered to pay her, and she again said that she was not like that. RP 247. Williams

then removed JD's bra and pants. RP 248. JD asked him to stop, but he refused. RP 248-49. Williams then vaginally raped JD. RP 248-49. JD tried to resist, but she could not overcome his strength. RP 249. Williams raped JD for roughly 20 minutes. RP 250. JD believed that Williams ejaculated because she felt something wet inside of her. RP 250. After raping JD, Williams told her not to tell anyone or else he would send his friend to get her. RP 250. Williams then left the room. RP 250.

JD got dressed and, not seeing Williams, ran out of the house. RP 251. She then ran from house to house knocking on doors. RP 251. She finally found someone who was willing to talk to her — a woman named Elizabeth Aquino. RP 78, 251. Aquino let JD use the phone to call the police, and then gave her a blanket. RP 252-53. JD then sat on the front stoop waiting for the police. RP 252-53.

Seattle Police Department Officer Umporowicz arrived and took JD to Spruce Street, a temporary shelter. RP 89, 93-94. While there, JD told the intake staff that she met someone named "Chris" who "touched" her. RP 96, 99. At that time, JD did not provide more details about the assault. RP 97.

Later that morning, Janice Newton, a staff member from Spruce Street, took JD to Harborview Medical Center ("HMC") for a Sexual Assault Exam. RP 139-40. At HMC, Joanne Mettler, a Sexual Assault Nurse

Examiner (“SANE”), met with JD. RP 291. Also present during the exam was Allison McNally, another nurse. RP 331. JD explained to them how she had been raped. RP 294-95. Specifically, JD told Nurse Mettler that during the assault, Williams had licked her breasts and vagina, and anally and vaginally raped her. RP 294. JD also told the nurse that she was bleeding and had pain in her vagina. RP 295-96.

JD’s physical examination was abnormal. Nurse Mettler found that there was vaginal tearing and bruising near the hymen and the SANE opined that this was consistent with JD’s account of being sexually assaulted. RP 296-99. During the exam, the nurse obtained anal and vaginal swabs. RP 300-01. She also collected JD’s underwear. RP 301. The “rape kit” was packaged by McNally and turned over to the Seattle Police Department. RP 334-36.

Seattle Police Department Detective Jess Pitts met with JD about a month after the Sexual Assault Exam. RP 338. At that point, Williams had not been identified. RP 341. In an attempt to locate his house, Det. Pitts brought JD to the area. RP 340. JD could not find the home where she was raped. RP 344-45.

JD’s “rape kit” was sent to the Washington State Patrol Crime Lab (“WSPCL”) for DNA analysis. Two forensic analysts reviewed the evidence. Denise Rodier, the first scientist to look at the swabs taken during

JD's exam, found semen on her vaginal and anal swabs, as well as in her underwear. RP 164-65, 171-72. She also found blood in JD's underpants. RP 169-70. Another scientist, Amy Jagmin, then obtained a male DNA profile from the swabs. RP 206-07.

Jagmin subsequently obtained a reference sample from Williams that Williams voluntarily provided to Det. Pitts. RP 209-10. Jagmin concluded that the DNA found on the swabs matched Williams's DNA. RP 210-11. She testified that the probability of an unrelated individual matching the same profile was 1 in 20 quadrillion. RP 210.

In December 2007, Det. Pitts received the DNA results and interviewed Williams. RP 353. Williams admitted that he went by the name of "Chris" and that he lived at 5517 S. Leo Street in Skyway. Ex. 21. This home matched the description of the home provided by JD as to where the rape occurred. Ex. 21; RP 354. Further, this home was .02 miles from where JD had called 911 the night of the rape. RP 352. Williams denied knowing JD and denied having sex with her. Ex. 21. Williams also indicated that his brother does not have a house, but that he lives in Muckleshoot with his wife, and that they live with his wife's parents. Ex. 21.

C. **ARGUMENT**

1. **DETECTIVE PITTS'S RESPONSES TO DEFENSE COUNSEL'S QUESTIONS DID NOT VIOLATE WILLIAMS'S CONSTITUTIONAL RIGHTS.**

Williams argues that answers by Det. Pitts on cross-examination violated Williams's constitutional rights to a jury trial and the presumption of innocence. Specifically, Williams takes issue with Det. Pitts's testimony that he did not further investigate the case because the DNA taken from JD matched that of Williams, and Williams was unable to provide an explanation for why his DNA was found on JD. Williams claims that Det. Pitts's testimony improperly commented on his guilt.

For several reasons, this argument fails. First, Williams has waived his right to challenge most of the testimony that he now claims was improper. Second, the testimony at issue came when Det. Pitts simply answered Williams's questions and, thus, Williams opened the door to this testimony. And third, Det. Pitts never commented on Williams's guilt, but merely explained why he did not further investigate the crime after learning that Williams's DNA matched that of the DNA found on the swabs.

a. Relevant Facts

During the cross-examination of Det. Pitts, Williams's counsel tried to lay the seeds to show that Det. Pitts did not conduct a thorough investigation. To support this theme, defense counsel got Det. Pitts to concede that he did not obtain the 911 tape, did not take JD back to Williams's house to confirm that that is where the rape occurred, did not obtain a search warrant to enter Williams's house, did not take photographs of the house, did not verify that someone was currently living in the house, did not ascertain whether Williams had a brother and did not try to contact this brother, did not try to locate other witnesses, did not show JD a photomontage with Williams's picture, and did not perform a line-up. RP 366-71.

On redirect, Det. Pitts emphasized that it was important to his investigation to learn that Williams's DNA was found in anal and vaginal swabs taken from JD. RP 373-74.

On recross examination, Williams's counsel then asked Det. Pitts several more questions about his investigation, apparently in an effort to show the jury that once Det. Pitts realized that Williams's DNA was on the vaginal and anal swabs, Det. Pitts stopped his investigation and just assumed that Williams committed the crime:

Q: So essentially what you just said on redirect is that, once you had the DNA, that was all that was important? There was no reason to do any follow-up investigation.

Mr. O'Donnell: Objection, argumentative.

The Court: Overruled.

A: No, we did do follow-up. Once we had that, that was when I went and spoke with him to try to get his side of the story to see if he could explain how the DNA might have arrived there. Now –

Q: (By Mr. Conant) No more –

A: I'm sorry.

Q: No more follow-up with Jennifer, no more follow-up with investigating the house or other witnesses?

A: Again, we talked with him to see if he could explain to me how that DNA arrived there.

Q: Right, and we heard that.

A: Without an explanation from him as to how that DNA arrived there, with everything else that we had that corroborates [JD]'s side of the story, everything leads back to Mr. Williams who was the suspect. Now if he can explain how it –

Mr. Conant: Your Honor, I'm going to object to this.

The Court: Counsel, you asked the question. He is answering the question.

A: Mr. Williams can explain how his semen is in her rear end –

Q: (By Mr. Conant) And you heard his explanation – was that he didn't know?

A: No, his explanation was he wasn't there. He didn't know her.

Q: Yes, he didn't know, so –

A: So that's not an explanation. All that is is a denial.

Q: So you are assuming guilt, then?

A: No, I am not assuming anything. I am assuming that her DNA, or excuse me, his DNA was in her body. How did it get there if he didn't know her – if he didn't have sex with her?

Q: So –

A: It is pretty difficult unless –

Q: You're asking –

A: Unless –

Q: So you are asking him to explain something that didn't happen?

A: No, I'm asking him to explain how it did happen. If his DNA is inside him, unless he is a sperm donor, and she made a withdrawal from the sperm bank and inserted it herself, how did it get in her?

Q: This is the presumption that you are operating from – that he did deposit the DNA?

A: Yes, that is the assumption I am offering. Right.

Q: Okay. So you are asking to him to explain that away?

A: I am asking him to give me a plausible explanation as to how that could have happened in some other form other than having sexual intercourse with a 12-year-old child. That is what I am asking.

Q: And he said he did not know?

A: No, he said he didn't do it.

Q: You just told me earlier that he said he didn't know?

A: He didn't know her. He didn't know anything about the situation. He didn't do it. He told me it was not him.

Q: No, it doesn't mean –

Mr. O'Donnell: Objection, argumentative.

A. -- to me he doesn't know.

The Court: Sustain the objection. It is argumentative. Don't answer the question –

RP 375-78.

In closing argument, Williams then argued to the jury that they should not conclude, like Det. Pitts apparently did, that just because Williams's DNA was found inside JD, that this necessarily means that Williams raped her. This theme, along with Det. Pitts's failure to further investigate, was stated repeatedly in Williams's closing argument:

Now in this case you can't do what the detective did, and by that I mean you can't look and say, Well, I am assuming that he is guilty.

RP 406.

Now that leads me to the detective and his incomplete investigation. The detective told us, told me, we were going back and forth, perhaps too much, that he got the DNA so all he needed to do was talk to Mr. Williams and see if Mr. Williams had an explanation for why the DNA was there, which doesn't make a lot of sense . . . He tells us that his job is to look at all of the evidence, which is the evidence of guilt, the evidence of innocence, and put the case together. That's his job. Instead he got the DNA and thought he was done.

RP 413-14.

The detective had the DNA so he didn't do a search warrant of the house He didn't go inside the house to see if it matched the description that Jennifer said. He didn't go inside the house to if there – even though this many months later, to see if there was any evidence of the crime. He didn't go inside the house to see the trash that was lying around. Didn't do any of that.

RP 414-15.

So a lot of investigation is lacking. It is inadequate. And why is it inadequate? Because DNA. Because the detective got the DNA, and essentially it was case closed – unless you have another explanation.

RP 415-16.

The prosecutor, by contrast, never mentioned or referred to Det. Pitts's testimony in his closing argument or on rebuttal. RP 392-404, 422-26.

b. Williams Did Not Preserve His Challenge To Most Of Detective Pitts's Testimony.

As a preliminary matter, Williams failed to preserve his right to challenge most of Det. Pitts's testimony about why he did not further investigate the case.

Under RAP 2.5(a)(3), a defendant who fails to raise a constitutional error in the trial court waives his right to challenge that purported error on appeal unless he shows a "manifest" constitutional error. RAP 2.5(a)(3). To show a constitutional error is "manifest," the defendant must show that the error had "practicable and identifiable consequences." State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). To preserve an issue for appeal, counsel must object in time for the trial court to correct the error. State v. Classen, 143 Wn. App. 45, 64, 176 P.3d 582 (2008).

Here, defense counsel asked Det. Pitts why he did not follow up with JD, talk to additional other witnesses, or investigate the house. Det. Pitts responded that without an explanation of how Williams's DNA arrived on the swabs, Det. Pitts was the main suspect. Defense counsel then objected to this answer, which was overruled by the trial court.

Then, instead of turning to another issue, defense counsel continued to ask questions about why Det. Pitts did not conduct further

investigation and whether he assumed that Williams was guilty.¹

Det. Pitts responded to these questions, and defense counsel did not object to any of these additional responses. Indeed, not only did Williams's counsel not object to these answers, but he purposefully and specifically elicited the answers.

At best, Williams preserved his right to challenge the sole answer that he objected to:

Without an explanation from him as to how that DNA arrived there, with everything else that we had that corroborates Jennifer's side of the story, everything else leads back to Mr. Williams who was the suspect. Now if he can explain how it --- . . . Mr. Williams can explain how his semen is in her rear end . . .

RP 376.

Because Williams did not object to the other answers by Det. Pitts, he did not preserve his right to challenge those other statements. On the other answers, Williams must show that the error was a manifest constitutional error that actually and substantially prejudiced him. Williams, however, does not even attempt to show how his arguments are properly before this Court.

¹ The record, in fact, shows that the State tried to stop this line of questioning several times through objections. RP 375-78.

c. Williams's Constitutional Rights Were Not Violated Because Detective Pitts Merely Responded To Defense Counsel's Questions.

Even if Williams preserved his right to challenge Det. Pitts's statements, his claim still fails. Generally, a witness may not offer opinion testimony regarding the guilt or veracity of a defendant. City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). Such testimony is unfairly prejudicial because it invades the exclusive province of the finder of fact. Id. "Improper opinions on guilt usually involve an assertion pertaining directly to the defendant." State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977 (1998). We review the trial court's decision to admit or refuse opinion testimony for an abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992).

A party "opens the door" to inadmissible evidence when that party itself introduces inadmissible evidence. Patterson v. Kennewick Pub. Hosp. Dist. 1, 57 Wn. App. 739, 744-45, 790 P.2d 195 (1990). In State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969), the Washington Supreme Court explained:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly

advantageous to the party who opened the door, but might well limit the proof to half-truths.

The scope of redirect or cross examination lies within the trial court's discretion and will not be disturbed absent a manifest abuse of discretion. State v. Descoteaux, 94 Wn.2d 31, 39, 614 P.2d 179 (1980).

When a defense attorney asks a detective why that detective failed to engage in further investigation, that detective has a right to explain his reasons. In State v. Carter, 23 Wn. App. 297, 300, 596 P.2d 1354 (1979), for example, the defendant was charged with first degree theft for stealing a wallet from the victim's purse. The defendant was arrested after the officer observed the defendant place the victim's wallet into a trash can. Id. at 298-99.

The defense called the detective in its case-in-chief and asked him whether fingerprints were taken of the wallet. Id. at 300. The detective responded no. Id. On cross-examination, the prosecutor asked him why fingerprints had not been taken, and detective responded that no fingerprints had been taken because there was sufficient evidence against the defendant, evidence that included hearsay statements from the victim and a bystander. Id.

On appeal, this Court held that this testimony was not improper because "Carter had opened the fingerprint issue and the State was entitled

to bring out why the wallet had not been checked for fingerprints.” Id. at 300; see also State v. Murray, 285 Kan. 503, 518-22, 174 P.3d 407 (2008) (where defense asked detective whether he asked the defendant about the injuries to his hand and whether the victim caused them, the court properly allowed the State to have the detective explain that he did not ask the defendant these questions because defendant would not speak with the detective on the advice of counsel).

This Court should reach the same conclusion here. Like the situations in Carter and Murray, the defense specifically asked the detective why he did not conduct further investigation on the case. These questions, however, went beyond what occurred in Carter and Murray because Williams’s counsel actually insisted on knowing *why* Det. Pitts did not engage in further investigation into the case. Det. Pitts was able to answer these questions of why he did not engage in further investigation.

Indeed, defense counsel *specifically intended* to elicit Det. Pitts’s response that he did not investigate further because the DNA evidence pointed to Williams as the main suspect. The principal theme and argument of the defense was simple: that Det. Pitts assumed Williams’s guilt based on the DNA results and did not do anything else to corroborate or disprove that initial assumption. This theme was stated repeatedly in closing arguments and was a deliberate defense strategy. Williams cannot

claim that Det. Pitts's responses were improper when his own attorney elicited these answers and relied on them for the defense theme and strategy.

Williams contends that since a defendant does not have the power to open the door to prosecutorial misconduct, a defendant also does not have the authority to open the door to witness misconduct. Williams Br. at 17. This argument has no merit. First, although the defense cannot open the door to prosecutorial misconduct, it is not "grounds for reversal [when improper prosecutor statements] were invited or provoked by defense counsel and are in reply to his or her acts and statements" State v. Gentry, 125 Wn.2d 570, 643-44, 888 P.2d 1105 (1995). By the same token, even if it were inappropriate for Det. Pitts to testify about why he felt Williams was the main suspect, it is not grounds for reversal when Det. Pitts made these statements in direct response to defense counsel's questions.

Further, Williams misunderstands the difference between statements made by prosecutors and those by witnesses. Regardless of the conduct of the defense, the prosecutor has the obligation to ensure that the jury renders a verdict by hearing only "competent evidence on the subject." State v. Jones, 144 Wn. App. 284, 298, 183 P.3d 307 (2008). This is the prosecutor's duty as a quasi-judicial officer.

The same is not true of a police officer testifying in a criminal case. In that context, the officer has a legal duty to answer the questions posed to it, and could subject him to criminal sanctions by refusing to answer a question or not answering a question truthfully. See RCW 7.21.010(1)(c) (refusing to answer a question without lawful authority constitutes contempt). Det. Pitts merely answered the questions posed by defense counsel, and Williams fails to cite any law showing that the officer had any legal right to act any other way.

d. Detective Pitts Never Commented On Williams's Guilt.

Opinion testimony is admissible even though it “embraces an ultimate issue to be decided by the trier of fact.” ER 704. That being said, “no witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). This is because an opinion by either an expert or a lay witness on the ultimate question of a defendant's guilt violates his constitutional right to an impartial trial, including the independent determination of the facts by a judge or jury. State v. Read, 100 Wn. App. 776, 781, 998 P.2d 897 (2000).

Here, Det. Pitts did not comment on Williams's guilt. Indeed, Det. Pitts did not comment on Williams's credibility, did not say that he did not believe Williams, and did not say that Williams committed a crime. To the contrary, Det. Pitts merely explained why he decided not to do any additional investigation.

Indeed, Det. Pitts stated, in no uncertain terms, that *he was not saying* that he believed that Williams was guilty:

Q: *So you are assuming guilt, then?*

A: *No, I am not assuming anything. I am assuming that her DNA, or excuse me, his DNA was in her body. How did it get there if he didn't know her – if he didn't have sex with her?*

RP 376 (emphasis added).

The case law further supports the conclusion that Det. Pitts did not comment on Williams's guilt in this case. In State v. Wei, 138 Wn. App. 716, 725-26, 158 P.3d 1238 (2007), for example, a fire investigator stated that the defendant's motive for starting the fire was "insurance fraud" even though Wei testified that she had enough money and had no need to defraud the insurance company. On appeal, this Court rejected the argument that the witness commented on the defendant's guilt. Although the expert's testimony certainly "cast doubt on Ms. Wei's version of the events," the expert did not tell the jury what result to reach and did not

offer an opinion as to Wei's credibility. Id. To the contrary, he simply stated that she had a motive, which was part of his investigation. Id. Other courts have come to similar conclusions. See, e.g., State v. Jones, 59 Wn. App. 744, 749-50, 801 P.2d 263 (1990) (allowing experts to opine that injury was inflicted rather than accidental because the inferences were drawn from the evidence and the doctors did not opine that the defendant committed the offense); State v. Read, 100 Wn. App. 776, 781-82, 998 P.2d 897 (2000) (where the defense to assault was self defense this Court allowed doctor to testify that defendant was "sighting right down the gun when it went off" because the jury still had to decide whether to believe the doctor's testimony and decide whether defendant shot the victim in self defense or by accident).

This Court should come to the same conclusion here. Like the situations in Wei, Jones, and Read, Det. Pitts did not say that Williams committed the offense, did not offer an opinion as to his credibility, and did not tell the jury what result to reach. To the contrary, Det. Pitts simply explained that Williams was the main suspect because his semen was found in JD's anus and vagina, and Williams did not have an explanation for how it got there.

Williams relies on State v. Hudson, ___ Wn. App. ___, 208 P.3d 1236 (2009), but that case is inapposite. In Hudson, the defendant was

charged with rape, and the defense was consent. During the trial, two nurses explicitly opined that the victim's injuries were caused by nonconsensual sex. Since the defense was consent, this Court concluded that their testimony amounted to improper statements that he was guilty of rape. Id. at 1239-40.

In this case, however, Det. Pitts did not, explicitly or implicitly, testify that Williams was guilty, that he had sex with JD, that he was even with JD that evening of the sexual assault. To the contrary, he merely explained why Det. Pitts was the main suspect, an entirely appropriate response to defense counsel's questions on this subject.

Williams has failed to show that the trial court abused its discretion by denying Williams's objection, or that Det. Pitts's testimony violated any of Williams's constitutional rights.

2. WILLIAMS HAS FAILED TO SHOW THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR CONCEDING THAT WILLIAMS'S DNA WAS ON THE SWABS TAKEN FROM JD.

Williams contends that his counsel provided ineffective assistance of counsel because his attorney conceded that the DNA found on the anal and vaginal swabs belonged to Williams. This argument fails, as Williams

does not show that his counsel acted deficiently or that any deficient performance prejudiced him.

In order to demonstrate ineffective assistance of counsel, the defendant bears the burden to show (1) that trial counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, in that there is a reasonable probability that but for counsel's errors, the outcome would have been different. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). If the challenged action can be characterized as legitimate trial strategy, then it cannot serve as a basis for a claim of ineffective assistance of counsel. Id. at 77-78.

a. Relevant Facts

The forensic scientist, Amy Jagmin, testified that Williams's DNA matched the DNA found on the anal and vaginal swabs and that the chances of an unrelated individual matching this DNA profile was 1 in 20 quadrillion. RP 209-10. Williams's counsel, on cross-examination, successfully elicited testimony about secondary DNA transfer, where a person deposits DNA to an object, and a second person then touches that object and the DNA from the first person is then transferred to the second person via the object. RP 217-18.

On recross examination, Jagmin clarified that the statistic 1 in 20 quadrillion meant that the chances of a person *unrelated* to Williams chosen at random would have a 1 in 20 quadrillion chance of having a DNA profile that matched the profile found in the anal and vaginal swabs. RP 225.

In closing arguments, Williams's defense counsel remarked that 1 in 20 quadrillion was a huge number, but that "that probability is based on an unrelated individual." RP 417. In light of the astronomical statistics, however, the defense counsel conceded that the DNA found on the anal and vaginal swabs came from Williams and argued that there was no evidence that the DNA was not there because of secondary transfer:

The question, though, is not who the DNA belonged to, it is how did the DNA get there?

RP 417.

b. Williams's Decision To Focus On Secondary Transfer Was A Tactical Decision.

In closing arguments, Williams conceded that the DNA found on the swabs from JD and from her underwear belonged to Williams. This concession was entirely appropriate considering that Jagmin opined that the probability of an unrelated person to match this DNA profile was *1 out*

of 20 quadrillion. Anything but a full concession would have resulted in defense counsel losing all credibility with the jury.

The cases, in fact, emphasize that an attorney can even concede guilt on a charge — something that Williams’s attorney did not even do — in an effort to gain credibility with the jury. Indeed, if a “concession is a matter of trial strategy of tactics, it does not constitute deficient performance.” State v. Herman, 138 Wn. App. 596, 605, 158 P.3d 96 (2007) (holding that trial counsel did not act deficiently by conceding guilt to theft in an effort to gain credibility with the jury on the more serious charges); State v. Silva, 106 Wn. App. 586, 596-99, 4 P.3d 477 (2001) (concession to guilt to forgery and attempting to elude not deficient performance).

This Court should reach the same conclusion here in regards to strategic choice by defense counsel. In this case, Williams had essentially two possible arguments: (1) that the DNA found on the anal and vaginal swabs did not belong to Williams; and (2) that the DNA did belong to Williams but it was found on JD because of a secondary transfer. In light of the testimony by the expert — that the DNA found inside of JD matched Williams’s DNA — it was a reasonable, if not necessary, trial tactic to concede that the DNA belonged to Williams. This concession was necessary to gain credibility with the jury on Williams’s other

argument: that the State failed to prove that Williams's DNA did not get on JD by secondary transfer.

Williams asserts that the stronger argument would have been that the DNA did not belong to Williams, but belonged to his brother or someone else. But this argument would have been incredibly weak. The DNA expert stated, in no uncertain terms, that there was a direct match between the DNA found on the anal and vaginal swabs and *Calvin Williams*, not his brother or anyone else. Further, there was no reliable evidence that Williams's brother was there that evening, and no evidence that a brother (or any other relative) of Williams would have or could have matched the DNA profile found on JD. Indeed, Williams said himself that his brother did not live in Skyway, but lives with his wife's parents in Muckleshoot, Washington. Ex. 21. Further, Williams conceded that he went by "Chris" (the name JD said the perpetrator used) and that he lived at the house where the rape occurred; under those additional facts, it would have been almost impossible to successfully argue that Williams's DNA was not found on those swabs.

c. Any Deficient Performance Did Not Prejudice Williams.

Further, even if Williams had not conceded this point, it would not have made a difference. This is simply because, for the reasons discussed above, concession or not, the jury still would have concluded that the DNA found on JD belonged to Williams. See supra, at _____. Accordingly, Williams cannot show prejudice from his trial counsel's tactical choice, and his ineffective claim fails.

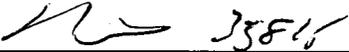
E. CONCLUSION

For the foregoing reasons, the State respectfully requests this Court to affirm Williams's convictions for Rape of a Child in the Second Degree.

DATED this 18th day of August, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Lind, attorney for the appellant, at Nielsen, Broman, & Koch, PLLC, 1908 East Madison, Seattle, WA 98122, containing a copy of the Brief of Respondent, in State v. Calvin Williams, Cause No. 62949-2-I, in the Court of Appeals, Division I. of the State of Washington.

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

W Brame

Name

Done in Seattle, Washington

8/18/09

Date

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