

65147-1

65147-1

NO. 65147-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EZEQUIEL APOLO-ALBINO,

Appellant.

2011 JAN 20 PM 4:10  
COURT OF APPEALS  
DIVISION I  
CLERK OF COURT  
K

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY WHITE

**BRIEF OF RESPONDENT**

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

RANDI J. AUSTELL  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

## TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	3
3. CHILD HEARSAY .....	8
4. COMPETENCY HEARINGS .....	10
5. MOTION FOR NEW COUNSEL AND NEW TRIAL .....	12
C. <u>ARGUMENT</u> .....	13
1. STANDARD OF REVIEW .....	13
2. THE TRIAL COURT PROPERLY DENIED APOLO'S MOTION FOR A NEW TRIAL .....	16
a. Foregoing Cross Examination .....	17
b. Prior Bad Acts .....	20
i. M.G. ....	20
ii. Apolo abused D.G. and B.G. multiple times .....	21
iii. "Amy" .....	22
c. Other Potential Witnesses .....	24

3.	APOLO HAS FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.....	26
a.	Impeachment Evidence.....	26
b.	Evidence Of Bias .....	30
c.	Failure To Object .....	32
d.	Hue And Cry .....	34
e.	Closing Argument .....	37
f.	Substitute Counsel.....	38
4.	CUMULATIVE ERROR DID NOT DENY APOLO A FAIR TRIAL.....	39
D.	<u>CONCLUSION</u> .....	41

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Blackburn v. Foltz, 828 F.2d 1177  
(6<sup>th</sup> Cir. 1987) ..... 31

Clozza v. Murray, 913 F.2d 1092  
(4<sup>th</sup> Cir.1990) ..... 38

Harrington v. Richter, 2011 WL 148587, 562 U.S. \_\_\_, \_\_  
(2011) (slip op. filed January 19, 2011) ..... 16, 17

Padilla v. Kentucky, 559 U.S. \_\_\_, \_\_ (2010) (slip op.) ..... 14

Strickland v. Washington, 466 U.S. 668,  
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ..... 13-16, 29, 41

Washington State:

In re Personal Restraint of Benn, 134 Wn.2d 868,  
952 P.2d 116 (1998)..... 15, 30

In re Personal Restraint of Rice, 118 Wn.2d 876,  
828 P.2d 1086 (1992)..... 14, 16

State v. Alexander, 64 Wn. App. 147,  
822 P.2d 1250 (1992)..... 35

State v. Allen, 70 Wn. 2d 690,  
424 P.2d 1021 (1967)..... 11

State v. Bray, 23 Wn. App. 117,  
594 P.2d 1363 (1979)..... 35

State v. Byrd, 30 Wn. App. 794,  
638 P.2d 601 (1981)..... 31

State v. Crotts, 22 Wash. 245,  
60 P. 403 (1900)..... 24

<u>State v. Dawkins</u> , 71 Wn. App. 902, 863 P.2d 124 (1993).....	17
<u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001).....	24
<u>State v. Ferguson</u> , 100 Wn.2d 131, 667 P.2d 68 (1983).....	35
<u>State v. Greiff</u> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	40
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	13, 14
<u>State v. Hodges</u> , 118 Wn. App. 668, 77 P.3d 375 (2003), <u>review denied</u> , 151 Wn.2d 1031 (2004).....	40
<u>State v. Holm</u> , 91 Wn. App. 429, 957 P.2d 1278 (1998).....	17
<u>State v. Horton</u> , 116 Wn. App. 909, 68 P.3d 1145 (2003).....	27, 28
<u>State v. Hunter</u> , 18 Wn. 670, 52 P. 247 (1898).....	35
<u>State v. Jackman</u> , 113 Wn.2d 772, 783 P.2d 580 (1989).....	17
<u>State v. Johnston</u> , 143 Wn. App. 1, 177 P.3d 1127 (2007).....	20
<u>State v. Jury</u> , 19 Wn. App. 256, 576 P.2d 1302, <u>review denied</u> , 111 Wn.2d 1022 (1978).....	31
<u>State v. Lane</u> , 125 Wn.2d 825, 889 P.2d 929 (1995).....	24

<u>State v. Madison</u> , 53 Wn. App. 754, 770 P.2d 662, <u>review denied</u> , 113 Wn.2d 1002 (1989).....	23
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	14, 29
<u>State v. Murley</u> , 35 Wn.2d 233, 212 P.2d 801 (1949).....	35
<u>State v. Neal</u> , 144 Wn.2d 600, 30 P.3d 1255 (2001).....	37
<u>State v. Piche</u> , 71 Wn.2d 583, 430 P.2d 522 (1967).....	15, 17
<u>State v. Ryan</u> , 103 Wn.2d 165, 691 P.2d 197 (1984).....	9
<u>State v. Smith</u> , 3 Wn.2d 543, 101 P.2d 298 (1940).....	35, 36
<u>State v. Soonalole</u> , 99 Wn. App. 207, 992 P.2d 541 (2000).....	39
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990), <u>cert. denied</u> , 498 U.S. 1046 (1991).....	21, 24
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	14, 15
<u>State v. White</u> , 81 Wn.2d 223, 500 P.2d 1242 (1972).....	14
<u>State v. Young</u> , 89 Wn.2d 613, 574 P.2d 1171, <u>cert. denied</u> , 439 U.S. 870 (1978).....	36

Statutes

Washington State:

RCW 5.60.050..... 10  
RCW 9A.44.083 .....2  
RCW 9A.44.120 .....9

Rules and Regulations

Washington State:

CrR 6.12..... 10  
CrR 7.5..... 12, 17  
ER 613 ..... 27, 29  
ER 801 ..... 32  
ER 802 ..... 32

**A. ISSUES PRESENTED**

1. Whether the trial court properly denied Apolo's motion for a new trial based on a claim of ineffective assistance of counsel where Apolo failed to establish that trial counsel's conduct was deficient and "clearly ha[d] not been able to show resulting prejudice" because there was "substantial[,] if not overwhelming evidence of the defendant's guilt."

2. "Effective assistance of counsel" does not mean "successful assistance," nor is counsel's competency measured by the result. In this case, defense counsel's decisions can fairly be characterized as legitimate trial strategy. But, even if any of defense counsel's conduct fell below an objective standard of reasonableness, the defendant has failed to establish that, but for counsel's conduct, there is a substantial likelihood that the outcome of the trial would be different. Should the Court reject the defendant's claim and affirm his convictions for child molestation?

3. To seek reversal pursuant to the "accumulated error" doctrine, the defendant must establish the presence of multiple trial errors and that the accumulated prejudice affected the verdict. Where errors have little or no effect on the trial's outcome, the doctrine is inapplicable. Because the defendant has failed to

establish either the existence of multiple errors or that any error affected the verdict, should the Court rule the accumulated error doctrine is inapplicable?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged the defendant, Ezequiel Apolo-Albino (“Apolo”), with two counts of child molestation in the first degree - domestic violence, contrary to RCW 9A.44.083.<sup>1</sup> CP 1-2. The State alleged that Apolo molested D.G. and B.G. during 2007 or 2008 when he visited them in foster care. CP 1-4. Both victims, D.G. (date of birth February 4, 1998) and B.G. (date of birth May 30, 2000), are Apolo's daughters. CP 1-2; 6RP 33-34, 63-66.<sup>2</sup> A jury convicted Apolo as charged. CP 26-27.

---

<sup>1</sup> “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.”

<sup>2</sup> The State adopts the appellant's designation of the verbatim report of proceedings. See Br. of Appellant at 3 n.1.

## 2. SUBSTANTIVE FACTS

In May 2007, after having received more than 20 referrals from different service providers related to neglect, DSHS removed 9-year-old D.G., 7-year-old B.G. and 7 of their siblings from the care of their biological mother and placed some of the children in foster care.<sup>3</sup> 5RP 19, 23-27; 6RP 34, 63-64. At that time, Apolo was an absentee parent. 5RP 26.

D.G. and an older sister, R.G., were placed in Sharon Cormier's foster home. 3RP 78; 5RP 52-53. B.G. and a younger brother, M.G., were placed in Sarah Anderson's foster home.<sup>4</sup> 3RP 78; 5RP 52-53. Later that same year, in August 2007, the youngest sibling, N.G. (referred to by B.G. and D.G. as "Amy"), was placed in Anderson's home. 3RP 78; 5RP 53; 6RP 67. Anderson and Cormier live 3.4 miles apart and are part of a foster parent community. 3RP 74; 5RP 43.

The siblings were fiercely protective of one another. 3RP 79-80; 5RP 24. They abided by a "code of silence," and had lots of intra-familial secrets. 3RP 80; 5RP 53. The siblings played with

---

<sup>3</sup> DSHS initially had removed all 9 siblings. However, apparently 4 of the children were either returned to their biological mother or placed somewhere other than in foster care. 5RP 24, 27.

<sup>4</sup> D.G. and B.G. arrived in foster care with a garbage bag filled with dirty clothes, a lice infestation and poor dental health. 3RP 80; 5RP 57.

each other, but often shunned the other foster children. 3RP 79. The children behaved oddly. For instance, B.G. refused to change her clothes if anyone else was present. 3RP 81. M.G. only changed his clothes in the closet. 3RP 81. When D.G. showered or changed clothes, she barricaded the door. 5RP 58.

Beginning June 2007, Apolo sought visitation with his children. 5RP 26. Apolo's sporadic visits started in September. 5RP 54, 59-60. The children were unhappy; they did not want Apolo to visit because, before foster care (when D.G. and B.G. had lived with their biological mother), Apolo touched them in "wrong areas." 3RP 83; 5RP 54; 6RP 47, 50-52, 78-79. Apolo had put D.G. on his lap, rubbed her leg and touched her "privates." 6RP 51-52. D.G. said Apolo's touching made her feel "horrible, sad." 6RP 49. D.G. begged Apolo, "Please stop it," but he did not. 6RP 49. Once, when B.G. had lain on the bed and watched television, Apolo touched her "privates"; he rubbed really hard. 6RP 78-80. Often, D.G. and B.G. would run to their room and hide under the covers or under the bed, but Apolo followed them. D.G. said, "It was freaky." 6RP 51.

Initially, the supervised visits occurred at Cormier's house after school. 3RP 84; 5RP 51. The interactions were peculiar.

5RP 55. The children did not run to Apolo and greet him. 3RP 84. Apolo brought lots of food, which the children ate "like a bunch of squirrels," and then they disappeared. 3RP 84-85; 5RP 55. D.G. liked the snacks that Apolo brought, but she did not like the visits. 6RP 42.

Eventually, visitation was moved from Cormier's house to a local elementary school where Cormier taught Tae Kwon Do to Anderson and all of the foster children. 3RP 86, 88. In part, visitation changed venue because Apolo started showing up earlier and earlier and that made Cormier uncomfortable. 3RP 87; 5RP 59-60. Apolo's 20-year-old daughter (and half-sister to D.G. and B.G.), Maria Juarez, drove Apolo to all of the visits--whether at Cormier's house or at the school--because Apolo did not have a driver's license. 6RP 93-96; 7RP 50-53.

At Tae Kwon Do, Apolo sternly directed the children to sit with him on the stage or on his lap. 3RP 88-89; 5RP 67. As with the home visits, Apolo brought lots of food and, as with the home visits, the children ate the food--then disappeared. 3RP 89; 5RP 61; 6RP 99; 7RP 52, 61. D.G. refused to eat the food that Apolo brought. 5RP 67. B.G. wanted to eat the food and then she wanted to be left alone. 5RP 67.

In April 2008, at one of the Tae Kwon Do classes, Anderson turned her attention to the stage when she heard D.G. scream, "No!" 3RP 99; 5RP 68. D.G. swatted her arm at Apolo, then ran across the gym, crying. 3RP 99-100; 6RP 48. Cormier tried to console D.G. D.G. felt uncomfortable because Apolo had put his arm around her waist and she felt "trapped." 3RP 99-100. D.G. wanted to go home. 5RP 69. After this incident, D.G. did not want to see Apolo. 3RP 101; 5RP 69. D.G. was scared and she made excuses for not attending Tae Kwon Do. 3RP 101; 5RP 67.

During the Tae Kwon Do classes, Apolo touched B.G. too. 6RP 69, 75. Apolo rubbed her "private spot" really hard. 6RP 69-70. It made B.G. mad. 6RP 69-70. B.G. removed Apolo's hand and told him to stop, but Apolo just put his hand back on B.G. 6RP 78. B.G. wanted to sit on Apolo's lap--but she did not want him to touch her. 6RP 77. B.G. told D.G. about Apolo's abuse; D.G. said, "Stay away from him." 6RP 78.

On June 4, 2008, D.G. and Cormier discussed the possibility of Apolo visiting on Sundays. 5RP 70-71. D.G. looked at the ground and cried. 5RP 71. D.G. told Cormier that Apolo had molested her. 5RP 71; 6RP 48-49. Cormier asked Anderson to join her conversation with D.G. 3RP 102; 5RP 71. D.G. told them

that Apolo forced her to sit on his lap. 6RP 46-47. Apolo touched her private spots, including her breasts, and forcibly rubbed his hand between her legs. 3RP 103; 6RP 47-48. D.G.'s voice trembled; she seemed scared to talk about the abuse. 3RP 103.

After D.G. resumed playing with the other foster children, Cormier and Anderson talked to B.G. 3RP 104; 5RP 71. Anderson asked B.G. how her visits with Apolo had been going. 3RP 105; 5RP 71. B.G. dropped her shoulders, looked at the ground and said that she was not sure if she should talk about it. 3RP 105; 5RP 72. Ashamed, B.G. said that Apolo forced her to sit on his lap and he would then run his hands between her legs. B.G. pointed to her vagina and said that Apolo touched her "right here." 3RP 105; 5RP 72.

Neither Anderson nor Cormier discussed these disclosures again with either girl until the next Monday when Cormier told D.G. that Apolo had scheduled another visit.<sup>4</sup> 3RP 107-08; 5RP 73. D.G. became hysterical. 5RP 73. Cormier then called the DSHS

---

<sup>4</sup> Anderson and Cormier said that they did not ask any more questions at the time because they did not want D.G. and B.G. to "shut down" or feel as though she had done anything wrong. Cormier has been trained to let the children approach her in situations such as this. 3RP 107-08; 5RP 73-75.

case worker and the police and reported the abuse. 3RP 108; 5RP 33, 73-74; 6RP 15-17.

Apolo said that he had never touched D.G.'s or B.G.'s private areas. 7RP 48, 63-64. Apolo said that he hugged them "like a child from a father." 7RP 58, 61. Juarez, who attended all of the Tae Kwon Do classes and sat with Apolo on the stage, said that she had never seen Apolo inappropriately touch D.G. or B.G. 6RP 97-101; 7RP 53. Juarez did not recall either girl ever sitting on Apolo's lap or running away from him. 6RP 110. Apolo remembered D.G. cried at one of the classes, but Apolo thought that she was upset because her biological mother had missed a visit. 7RP 55-57. Apolo said, "I love my daughters." 7RP 58. And, he said D.G. and B.G. "loved me very much." 7RP 68.

Cormier said that since the allegations surfaced, D.G. has remained "guarded," but she is more relaxed because Apolo no longer visits. 5RP 75. And now, D.G. never misses Tae Kwon Do class. 5RP 75-76.

### **3. CHILD HEARSAY.**

Because B.G. was under the age of ten when she disclosed the sexual abuse to Anderson and Cormier, the State sought to

admit her hearsay statements pursuant to RCW 9A.44.120.<sup>5</sup> The State also sought to introduce B.G.'s later hearsay statements to Carolyn Webster, a child interview specialist for the King County Prosecutor's Office. 2RP 11, 19-32; 3RP 4-27, 29; Pre-trial Ex. 1.<sup>6</sup>

After a pre-trial hearing, defense counsel conceded that B.G.'s hearsay statements were reliable under the factors enumerated in State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).<sup>7</sup> 3RP 30, 36-37. Defense counsel confirmed that he had watched the taped interview between B.G. and Carolyn Webster (Ex. 6) and reviewed the transcript (Ex. 7). 3RP 30. Defense counsel said, "I want to be very candid. I believe that the State has met those [the Ryan] requirements." 3RP 37.

The trial court agreed. The court stated that B.G.'s relationship with Anderson, her foster mother, was "close."<sup>8</sup> 3RP 40. B.G. had no apparent motive to lie. 3RP 39-40. Anderson said that B.G. is a "very honest little girl," unlike some of Anderson's other foster children. 2RP 30-31. B.G.'s demeanor at

---

<sup>5</sup> Text of RCW 9A.44.120 attached as Appendix A.

<sup>6</sup> Pre-trial exhibit 1 was withdrawn and then admitted at trial as exhibit 6. Appellant has designated exhibit 6 and exhibit 7 (a transcript of B.G.'s interview with Carolyn Webster) to this Court.

<sup>7</sup> The Ryan factors are listed in Appendix B.

<sup>8</sup> Anderson said that she and B.G. were "very close." 2RP 27.

the time of disclosure—as described by Anderson—was corroborative. B.G. “immediately looked at the ground and got a sad look on her face.” 2RP 26-27; 3RP 42. Anderson said that whenever B.G. discussed the allegations, she could not look Anderson in the eyes; B.G. was ashamed, embarrassed. 2RP 27, 32. The trial court found B.G.’s statements reliable and admissible.<sup>9</sup> 3RP 41.

#### **4. COMPETENCY HEARINGS.**

Defense counsel asked the trial court to determine D.G.’s and B.G.’s competency to testify.<sup>10</sup> 2RP 9.

At a pre-trial hearing, D.G. said that she understood the difference between telling the truth and telling a lie—and why it was better to tell the truth: “If . . . you tell a lie, like you will like get in trouble probably.” 6RP 28-29. D.G. recalled the incidents and

---

<sup>9</sup> Apolo has not challenged any of the trial court’s findings of fact or conclusions of law with regard to the reliability or admissibility of B.G.’s hearsay statements.

<sup>10</sup> RCW 5.60.050(2) prohibits testimony by “[t]hose who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.” Similarly, CrR 6.12(c) states that “children who do not have the capacity of receiving just impressions of the facts about which they are examined or who do not have the capacity of relating them truly” are incompetent to testify.

understood that she needed to tell the jury how Apolo had molested her. 6RP 28-29.

After considering D.G.'s testimony, in light of the Allen factors, the trial court ruled that D.G. was "certainly competent to testify."<sup>11</sup> 6RP 31-32. Defense counsel "readily acknowledged" D.G.'s competency.<sup>12</sup> 6RP 31-32.

Before B.G. testified, the trial court held a hearing to determine B.G.'s competency as a witness. 6RP 54-61. B.G. said that it is "bad, really bad" to tell a lie. 6RP 61. B.G. understood that she was in court to testify about what had happened when she lived at Anderson's house and what occurred at her Tae Kwon Do classes (the two locations where Apolo molested B.G.). 6RP 59-60; CP 3-4. B.G. understood the obligation to tell the truth. 6RP 72. B.G. had a sufficient memory of the events at issue and the ability to express in words her memory. 6RP 72.

In addition to B.G.'s testimony, the trial court considered Sarah Anderson's and Carolyn Webster's testimony from the child hearsay hearing. The court found B.G. competent to testify.

---

<sup>11</sup> State v. Allen, 70 Wn. 2d 690, 424 P.2d 1021 (1967) (the Allen factors are set forth in Appendix C).

<sup>12</sup> Apolo has not challenged any of the trial court's findings of fact or its conclusion of law regarding D.G.'s competency.

6RP 72-73. Defense counsel did not challenge B.G.'s competency.<sup>13</sup> 6RP 71-72.

**5. MOTION FOR NEW COUNSEL AND NEW TRIAL.**

Before the December 11, 2009 sentencing hearing, Apolo, with the assistance of SCRAP attorney, Alfred Kitching, asked the trial court to appoint new counsel to assist him in preparing a motion for a new trial based on a claim of ineffective assistance of trial counsel.<sup>14</sup> CP 50-55; 8RP 3-5. After finding that Apolo and defense counsel, Michael Danko, had an irrevocable breakdown in communication, the trial court appointed new counsel and continued the sentencing hearing. 9RP 16-18.

On January 22, 2010, Brian Todd appeared as Apolo's counsel. 10RP 2; CP 45. The trial court granted Todd a one-month continuance to explore the issues that Apolo had raised and to brief any motions. 10RP 7.

On March 12, 2010, Apolo filed a motion for a new trial, pursuant to CrR 7.5(a)(8), claiming that "substantial justice has not

---

<sup>13</sup> Apolo has not challenged any of the trial court's findings of fact or its conclusion of law regarding B.G.'s competency.

<sup>14</sup> SCRAP (Society of Counsel Representing Accused Persons) attorney Alfred Kitching represented Apolo in five dependency/termination of parental rights cases. CP 52-53.

been done.”<sup>15</sup> CP 45-69; 11RP 4. Apolo contended that he had received ineffective assistance of counsel. CP 45-69. The trial court denied Apolo's motion. The court found that Apolo had failed to satisfy his burden of establishing either deficient performance or resulting prejudice.<sup>16</sup> 12RP 35; CP 71.

The trial court imposed an indeterminate minimum sentence of 89 months. CP 72-81. Apolo appeals. CP 82.

Additional procedural and substantive facts will be discussed in the sections to which they pertain.

## **C. ARGUMENT**

### **1. STANDARD OF REVIEW.**

To prevail on a claim of ineffective assistance of counsel, Apolo must establish both deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61,

---

<sup>15</sup> In consideration of Apolo's motion for a new trial, the trial court heard testimony from Dr. Chris Harris (Apolo had been Dr. Harris's gardener for many years and Dr. Harris had asked Michael Danko to represent Apolo in this matter). 11RP 9-10, 13-14; 12 RP 3. The court also considered affidavits from Leigh Hearon (a private investigator who Dr. Harris had asked to investigate the allegations against Apolo), Viviana Galardo (social worker at SCRAP), Alfred Kitching (SCRAP attorney) and Apolo's declaration. 12RP 3; CP 45-61.

<sup>16</sup> The motion for a new trial is fully discussed in the State's brief in section C.2, *infra*.

77-78, 917 P.2d 563 (1996). A failure to prove either element defeats the claim. Strickland, 466 U.S. at 700. "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. \_\_\_, \_\_\_ (2010) (slip op., at 14).

First, a defendant must show deficient performance, i.e., that counsel's performance fell below an objective standard of reasonableness based on consideration of all of the circumstances. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). "Effective assistance of counsel" does not mean "successful assistance," nor is counsel's competency measured by the result. State v. White, 81 Wn.2d 223, 500 P.2d 1242 (1972).

The defendant alleging ineffective assistance of counsel "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). "[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 689). Accordingly, reviewing courts make "every effort to eliminate the distorting effects of hindsight." In re Personal Restraint of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). Because trial strategies may vary

among lawyers, a defense attorney's trial tactic or strategy will not support a claim of ineffective assistance of counsel. In re Personal Restraint of Benn, 134 Wn.2d 868, 888, 952 P.2d 116 (1998). As Justice Hale presciently acknowledged:

In assessing the comparative skill, learning and devotion of counsel, we recognize that trial practice, despite persistent efforts toward its advancement, remains more of an art than a science,

\* \* \*

To assure the defendant of counsel's best efforts then, the law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactics. If counsel is to be stultified at trial by a post trial scrutiny of the myriad choices he must make in the course of a trial: whether to examine on a fact, whether and how much to cross-examine, whether to put some witnesses on the stand and leave others off- indeed, in some instances, whether to interview some witnesses before trial or leave them alone - he will lose the very freedom of action so essential to a skillful representation of the accused.

State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967).

Second, the defendant must show prejudice—"that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Thomas, 109 Wn.2d at 226; Strickland, at 694. "The likelihood of a different result must be *substantial*, not just conceivable."

Harrington v. Richter, 562 U.S. \_\_\_, \_\_\_ *Richter*, 2011 WL 148587

\*18 (2011) (citing Strickland, at 693) (italics added).

A reviewing court need not address whether counsel's performance was deficient if it can first say there was no prejudice. See In re Rice, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992) (citing Strickland, at 697).

**2. THE TRIAL COURT PROPERLY DENIED APOLO'S MOTION FOR A NEW TRIAL.**

Apolo contends that the trial court erred when it denied his motion for a new trial based on alleged ineffective assistance of counsel. Specifically, Apolo claims that trial counsel did not (1) do a "vigorous cross examination" of the victims, (2) object to the introduction of "prior bad acts by the defendant," and (3) call "several witnesses" who Kitching (Apolo's SCRAP attorney) said provided a defense for Apolo. CP 46-48.

This Court should reject the claim. The trial court ruled that Apolo failed to establish either deficient performance or prejudice. The court also said, that in the face of "substantial[,] if not overwhelming evidence of the defendant's guilt[]," Apolo "clearly has not been able to show resulting prejudice." 12RP 35.

Under CrR 7.5(a)(8), a trial court may grant a new trial when “substantial justice has not been done.” A trial court's decision to grant or deny a new trial is reviewed for a manifest abuse of discretion or a mistake of law. State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989); see also State v. Dawkins, 71 Wn. App. 902, 906-07, 863 P.2d 124 (1993) (applying abuse of discretion/error of law standard when reviewing trial court decision to deny a motion for a new trial based on ineffective assistance of counsel). This Court reviews a trial court's factual findings on ineffective assistance of counsel to determine whether they are supported by substantial evidence standard; the Court reviews its legal conclusions de novo. State v. Holm, 91 Wn. App. 429, 435, 957 P.2d 1278 (1998). “Even under de novo review, the standard for judging counsel's representation is a most deferential one.” Harrington v. Richter, 2011 WL 148587 \*13, 562 U.S. \_\_\_, \_\_\_, 562 U.S. \_\_\_, \_\_\_.

a. Foregoing Cross Examination.

The decision of whether to cross examine a witness is tactical. See Piche, 71 Wn.2d at 590. In this case, Danko declined to cross examine D.G. and B.G. 6RP 53, 82. The trial court fairly

characterized Danko's decision to forego cross examination as "the best strategic course." 12RP 6-7. Even though there were inconsistencies between statements that each girl made to child interview specialist Carolyn Webster and statements made to defense private investigator Leigh Hearon, Danko had expressed his reluctance to attack two young sexually abused children. 7RP 23-26; 12RP 6-7. The trial court said, "I think we all can . . . understand that there may be some strategy involved in [not cross examining the child victims]." 12RP 6. Defense counsel did not want to appear to be "beating up on child witnesses . . . who might appear more sympathetic to the jury under those circumstances." 12RP 6. The trial court said,

[E]ven [if] some other attorney might have employed a different strategy, is it ineffective to -- when your defense is it didn't happen, to decline to cross examine if you think it's most likely all you are going to do is repeat the same incriminating evidence that was already presented and appear to be confident in the case in effect by saying we don't need to cross examine these witnesses.

12RP 20-21.

The court ruled that Danko's presentation of Maria Apolo-Juarez, a "logical and credible witness," and the defendant in lieu of cross examining D.G. and B.G. was a matter of trial strategy.

12RP 20-21, 32-34. The court said, "I thought she was a good witness and that it certainly affected [Danko's] strategy to call her."

12RP 32. In addition, Apolo told the jury his description of what had occurred when they were at Tae Kwon Do.

The trial court concluded that even if the decision to forego cross examination of D.G. and B.G. was not a matter of trial strategy, Apolo failed to establish prejudice. 12RP 20-21, 32-35. The court said that in addition to likely securing only repetition of the same testimony on cross examination--incriminating evidence that the State would have emphasized yet again on re-direct--there was nothing before the court to demonstrate that any inconsistent statements by either victim would have changed the outcome of the trial.<sup>17</sup> 12RP 33. The court stated,

[U]nfortunately for the defendant the jury simply did not find his testimony or Ms. Juarez' testimony sufficiently credible to create a reasonable doubt in the mind of the jury after having heard what I think the record would reflect would be substantial[,] if not overwhelming evidence of the defendant's guilt[.]

12RP 34-35.

---

<sup>17</sup> Danko had reviewed the transcripts of Hearon's interviews with D.G. and B.G.; he said that the discrepancies between what each child had said to the State and to Hearon were "so few." CP 61; 7RP 22.

b. Prior Bad Acts.

Apolo claims that Danko was also ineffective for failing to object to prior bad acts evidence. 12RP 10-11; CP 48. The State disagrees. In one instance, Danko did object (and the trial court sustained the objection and instructed the jury to disregard the remark), in another instance, counsel did not object for sound tactical reasons, and in the final instance, the court instructed the jury it could not consider alleged abuse of any child other than D.G. or B.G. Consequently, Apolo has failed to establish prejudice.

“Counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions,” and an appellate court presumes that a failure to object constituted a legitimate strategy or tactic. State v. Johnston, 143 Wn. App. 1, 19, 21, 177 P.3d 1127 (2007).

i. M.G.

Anderson said that after July 2007, one of D.G. and B.G.'s siblings, M.G. (date of birth 5/8/02), visited with Apolo alone-- without D.G. and B.G. 3RP 113; CP 52-53. Anderson said that after the solo visit, M.G. “quit talking to adults.” 3RP 113. Defense counsel immediately objected. 3RP 113. The trial court sustained

the objection and instructed the jury “not to consider evidence about some of the interaction between the defendant and [M.G.]. It is not an issue that is before the Jury.” 3RP 113-14. The jury is presumed to follow the court's instructions. State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991).

- ii. Apolo abused D.G. and B.G. multiple times.

D.G. testified that Apolo had “touched her in wrong spots . . . lots of times.” 6RP 48-49. Likewise, B.G. said that Apolo touched her “private area” some--but not all--of the times that Apolo came to B.G.'s Tae Kwon Do class. 6RP 76-77.

Danko did not object to the testimony because he and the deputy prosecutor had discussed the admissibility of the other bad acts evidence in lieu of the State charging additional child molestation counts. 7RP 13-14. That is, the State could have charged multiple counts of child molestation per victim, in which case the evidence inarguably would have been admissible. Danko's tactic was legitimate, especially given the trial court's position that the evidence was admissible. 7RP 14-15; see also

12RP 17-19, 27, 32-33 (the court stated that even if there had been objection, it would nevertheless have admitted the evidence).

Apolo has also failed to establish prejudice. The court stated the other bad acts evidence was not unfairly prejudicial. 12RP 32-33. Furthermore, the trial court instructed the jury that it had to consider each count of child molestation separately and, for each count, the jurors had to unanimously agree which particular act had been proved. 12RP 19; CP 16-17 (jury instructions 5 and 6).

iii. "Amy."

After B.G. disclosed to child interview specialist Webster that Apolo had rubbed her "private spot," Webster asked B.G. if Apolo had done "touching on anybody else." Ex 7, at 16, 23. B.G. said that Apolo touched "Amy," B.G.'s two-year-old sister.<sup>18</sup> Ex. 7, at 23-24. B.G. had not seen the touching, but said that when she heard Amy screaming, B.G. knew that Apolo's "doing that." Ex 7, at 24. The taped interview was played for the jury without objection. 5RP 123-24.

---

<sup>18</sup> "Amy," is the nickname of one of D.G. and B.G.'s younger siblings (N.G., date of birth 11/8/05). 5RP 128; 6RP 9-10; CP 52.

Afterward, the trial court expressed concern that B.G.'s response referred to an uncharged allegation of sexual abuse against a sibling other than D.G. 5RP 127-30. The court asked Danko if he wanted a curative instruction.<sup>19</sup> 6RP 9-12, 114-19. Danko said that a curative instruction "probably will be appropriate," but he wanted some time to think about it. 6RP 12. Danko stated that he had not objected because he did not want to "call undue attention" to the comment. 7RP 8. The decision to object is a "classic example of trial tactics." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989).

Even if Danko's decision to forego an objection was not tactically sound, Apolo has failed to establish prejudice. The trial court instructed the jury as follows:

The jury may recall that during the video interview between Carolyn Webster and [B.G.], [B.G.] made reference to possible touching by the defendant of her little sister [N.G.], whom she referred to as Amy.

You are instructed that you are not to consider any testimony or reference to alleged abuse of any other child. You should consider only the allegations of abuse of [B.G.] and [D.G.].

---

<sup>19</sup> The trial court thought that prejudice from B.G.'s remark, if any, could be ameliorated by a curative instruction. The State, therefore, disagrees with Apolo's assertion that the trial court likely would have granted a motion for a mistrial. See Br. of Appellant at 36-37.

7RP 44. The jury is presumed to have followed the trial court's instructions to disregard improper evidence. Swan, 114 Wn.2d at 661-62. There is nothing here to forestall that presumption.

c. Other Potential Witnesses.

Apolo next contends that counsel was ineffective for failing to endorse two of D.G. and B.G.'s siblings as witnesses who would have testified that they did not believe D.G.'s and B.G.'s allegations of sexual abuse. 12RP 8-9, 11-13; CP 47-48, 51. The trial court properly rejected this claim because Apolo failed to specify which siblings, and the proffered testimony was inadmissible opinion evidence. 12RP 12-13.

A witness may not offer a personal opinion as to the truthfulness of another witness or the guilt of the defendant. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Rather, “[t]he constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses.” State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (quoting State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900)).

In this case, Alfred Kitching (Apolo's attorney in the dependency matters), submitted a declaration to the trial court.

CP 52-54. Kitching asserted that there were "*potentially* helpful witnesses" and information that "*might* be helpful" in Apolo's criminal case. CP 53; 12RP 11 (italics added). Kitching said that when told of D.G.'s and B.G.'s allegations against Apolo, two older siblings said "their sisters were being untruthful and that they didn't believe the allegations." CP 54; 12RP 11.

The trial court said, "Nobody has identified for the Court who these older siblings might be." 12RP 11-12, 14-15; CP 51. More importantly, the court said that the proffered testimony was inadmissible. 12RP 12-15. It would be impermissible for the siblings to simply testify that they did not believe D.G. and B.G. 12RP 12-13, 15. The court stated, "They would have to have some factual, personal knowledge rather than saying our sisters are lying." 12RP 12.

Finally, Apolo failed to demonstrate that he had any admissible evidence from any of his other children that would have made a difference in the trial's outcome. 12RP 13, 34-35.

In sum, the trial court ruled:

It is the defendant's burden to show both deficient performance and resulting prejudice to the defendant, meaning a likelihood that the outcome would be different here[.] [T]he Court does not believe that the defense has been able to meet either

of those tests; but clearly [the defense] has not been able to show resulting prejudice and the Court's understanding of the law is if the defendant fails to satisfy either of the tests, then no further inquiry is really required in any event.

I believe that the record will support the Court's decision here today that the motion for a new trial properly should be denied; and therefore, the Court does deny that motion.

12RP 35.

This Court should affirm the trial court's denial of Apolo's motion for a new trial.

**3. APOLO HAS FAILED TO ESTABLISH  
INEFFECTIVE ASSISTANCE OF COUNSEL.**

In addition to the above claims, Apolo contends that trial counsel was ineffective in myriad ways. This Court should reject Apolo's claims because, even if counsel's strategy could be fairly characterized as deficient conduct, Apolo has failed to establish prejudice. Apolo's claim of ineffective assistance of counsel thus fails.

**a. Impeachment Evidence.**

Apolo contends that Danko rendered deficient performance when he failed to impeach D.G. and B.G. with statements each girl

made to investigator Hearon that varied from her statements to Carolyn Webster. Apolo claims that because Danko did not understand the proper procedure for impeachment under ER 613(b), his conduct was deficient. Br. of Appellant at 24-27.

This claim fails. After the court and counsel discussed the proper procedure for impeachment (about which Danko was admittedly confused), Danko consulted with Apolo and then declined to call Hearon as a witness. As discussed above, the decision of which witnesses to call is a matter of trial strategy and cannot support a claim of ineffective assistance of counsel.

To impeach a witness with a prior inconsistent statement under ER 613(b), the witness must be given an opportunity to admit or deny the statement and to explain it. ER 613(b) states:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

This can be done either before or after the extrinsic evidence is introduced. State v. Horton, 116 Wn. App. 909, 916, 68 P.3d 1145 (2003). If the witness is not asked about the statement during direct or cross-examination, impeachment may still be

accomplished at a later point so long as arrangements are made for the witness to be recalled. Horton, at 915-16.

Even though Danko could have recalled D.G. and B.G. and inquired about inconsistent statements, as discussed fully above, Danko did not want to attack the young girls in front of the jury, an imminently reasonable trial strategy.

Admittedly, Danko was initially under the mistaken belief that he could impeach D.G. and B.G. by introducing statements made to Hearon that were inconsistent with statements made to Carolyn Webster, despite foregoing cross examination. 7RP 16-38. In particular, Danko sought to introduce a chart that Hearon created that compared statements made to her with statements made to Webster. 7RP 16-38.

After much discussion, the court ruled that Hearon could testify about statements that D.G. and B.G. made to her. 7RP 25-29, 35-39. Danko could then point out to the jury in closing argument any such statements that were at odds with either girl's trial testimony. 7RP 25-29, 35-39. In addition, B.G.'s statements to Webster had already been admitted at trial. Thus, Danko could also highlight any inconsistencies between those statements, B.G.'s statements to Hearon and B.G.'s trial testimony. 7RP 25-29, 35-39.

Although Danko initially misapprehended the procedure for impeachment under ER 613(b), after the trial court ruled, Danko consulted with Apolo and then decided not to call Hearon as a witness. 7RP 41-42. Thus, ultimately it was a matter of trial tactics not to call Hearon as a witness.

Moreover, Apolo cannot show prejudice. Danko's failure to impeach D.G. or B.G. was an issue raised in Apolo's motion for a new trial, supported by declarations, and litigated below. 12RP 8. Yet, Apolo failed to cite even one material inconsistent statement.<sup>20</sup> Apolo bears the burden of proving prejudice--to show that

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694. Here, as the trial court said, there was "substantial[,] if not overwhelming evidence of the defendant's guilt[]." 12RP 35. Because Apolo has not met his burden, this claim fails.

---

<sup>20</sup> The reviewing court considers an ineffective assistance claim only in light of those matters included in the trial record. See State v. McFarland, 127 Wn.2d at 335. No inconsistent statements were introduced below. Additionally, the chart that Hearon apparently created—that summarized the inconsistent statements—was not introduced at Apolo's motion for a new trial.

b. Evidence Of Bias.

Apolo next claims that his counsel rendered deficient performance because he “chose to ignore” information of the victims' alleged bias. Br. of Appellant at 30. Specifically, SCRAP attorney Kitching believed that the timing of the molestation allegations coincided with D.G.'s and B.G.'s expressed preference to be placed in foster care with Jeff [Ivy].<sup>21</sup> Apolo contends that it was this bias, which counsel “chose to ignore,” that motivated D.G. and B.G. to “falsely accuse their own father of molesting them.”<sup>22</sup> Yet, if that assertion is correct, then it implies that counsel did not fail to investigate the bias--rather, he knew of the potential bias and “chose” not to introduce duplicative evidence. Because counsel's choice was a legitimate trial tactic, it cannot support a claim of ineffective assistance of counsel. See In re Benn, 134 Wn.2d at 888.

The State does not quibble with the proposition (or the cases cited by Apolo for the proposition) that the presumption of counsel's competence can be overcome by a showing, among other things,

---

<sup>21</sup> Jeff Ivy is one of the foster parents in the same foster community as Cormier and Anderson. 3RP 74.

<sup>22</sup> Br. of Appellant at 30.

that counsel failed to conduct an appropriate investigation. See Br. of Appellant at 28-29 (citing State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 111 Wn.2d 1022 (1978); State v. Byrd, 30 Wn. App. 794, 799-800, 638 P.2d 601 (1981); and Blackburn v. Foltz, 828 F.2d 1177, 1183 (6<sup>th</sup> Cir. 1987)). Rather, the State takes issue with Apolo's claim that counsel's refusal to discuss the timing of the molestation allegations with Kitching constituted ineffective assistance of counsel.

Neither D.G. nor B.G. made any secret of her preference to stay with her foster mother, rather than to return home.<sup>23</sup> D.G. said she liked living with Cormier because "she helps me with my homework like a normal parent would do." 6RP 40. D.G. did not like it when Apolo visited her because he touched her in the "wrong areas," which made D.G. feel "horrible" and "sad." 6RP 41, 47-49. Similarly, B.G. said that she liked living with Anderson. 6RP 68. When B.G. lived with her biological mother, Apolo stared at B.G. when she got dressed, and he followed her around the house and touched her "privates." 6RP 78-79.

---

<sup>23</sup> At the time of the trial, both D.G. and B.G. had already been placed in pre-adoptive foster care with Jeff Ivy. 3RP 106; 5RP 29-30.

It was undoubtedly clear to the jury that D.G. and B.G. were biased in favor of remaining in foster care--whether with Anderson and Cormier, or Jeff Ivy--rather than returning to live with their biological mother--who neglected them--and Apolo--who repeatedly molested them.<sup>24</sup> This claim fails.

c. Failure To Object.

Apolo claims that his counsel rendered deficient performance when he failed to object to hearsay. Again, the decision of whether to object is tactical. But even if counsel should have objected--and highlighted the very remarks that Apolo claims prejudiced him--there was no prejudice.

Anderson testified that her husband, Corey, told her that during one visit, Apolo picked up a chair, turned his back to Corey and had the girls sit on his lap. 3RP 85. Counsel did not interpose a hearsay objection.<sup>25</sup>

Apolo first argues that this testimony prejudiced him because it demonstrated that Apolo had engaged in "highly suspicious

---

<sup>24</sup> Sharol Donoso, D.G. and B.G.'s DSHS case worker, said that there had been more than 20 referrals related to neglect. 5RP 19, 25.

<sup>25</sup> See ER 801(c); ER 802.

behavior” during one of the visits. Br. of Appellant at 32. The State disagrees. Anderson explained that at the time she just thought Apolo was uncomfortable being watched (because all of Apolo's visits were supervised). 3RP 85. Thus, the jury heard a perfectly innocent explanation for Apolo's conduct.

Apolo next contends that he was prejudiced by the hearsay because no witness directly corroborated the girls' claims of molestation. Br. of Appellant at 32. Again, the State disagrees. Anderson and Cormier said that during visits (at the house and at Tae Kwon Do), Apolo would force the girls to sit on his lap. 3RP 84, 88-89; 5RP 56-57. Once, at Tae Kwon Do, Anderson heard D.G. scream, “No!” D.G. swatted her arm at Apolo and then ran across the gym, crying. 3RP 99-100; 5RP 68-69. After this incident, D.G. was “very scared” of seeing Apolo. 3RP 101. Additionally, Anderson and Cormier said that when Apolo visited the girls at Tae Kwon Do classes, he would sit on the stage, which meant that often Anderson's and Cormier's back was to him. 3RP 88-95; 5RP 65. So, although neither Anderson, nor Cormier, could say that she had seen Apolo rub the girls' private parts, each could certainly testify to events that she had seen or heard that corroborated the girls' claims.

Apolo also contends that counsel's failure to object to Anderson's characterization of him arriving as much as an hour before scheduled visits as "kind of creepy," was deficient conduct. Br. of Appellant at 34 (citing 3RP 87). Yet, an objection would have only highlighted the very remark that Apolo claims prejudiced him.

Moreover, Apolo and Juarez said that Apolo often arrived early because of traffic and transportation issues. 6RP 93-94; 7RP 50. So, the jury had an alternative, perfectly innocent explanation for Apolo's early arrivals.

d. Hue And Cry.

Apolo claims that he was prejudiced when his counsel did not object to the details—which exceeded the mere fact of complaint—surrounding D.G.'s disclosure to Anderson and Cormier. Br. of Appellant at 32-33. The Court should reject this claim. Although the identity of the offender and the nature of the offense are generally inadmissible under the "hue and cry" doctrine, given D.G.'s testimony, any error was harmless.

The "fact of complaint" doctrine stems from the feudal "hue and cry" doctrine, and allows the admission of "hearsay" that a sexual assault victim complained after being assaulted. State v.

Murley, 35 Wn.2d 233, 237, 212 P.2d 801 (1949); State v. Hunter, 18 Wn. 670, 672-73, 52 P. 247 (1898). Under these doctrines, Washington courts have long held that the fact that the victim complained is admissible because it bears upon the victim's credibility. See, e.g., Murley, 35 Wn.2d at 237; Hunter, 18 Wn. at 672-73; State v. Alexander, 64 Wn. App. 147, 151-52, 822 P.2d 1250 (1992). The parameters of such testimony were described as follows by the Washington Supreme Court in 1940:

We think the rule in this and the majority of states is well established that, in cases of this kind, the prosecuting witness may testify that she made complaint after the assault, and where, to whom and under what circumstances, but she may not detail the story that she told in making such complaint; and the person to whom she made complaint may also testify that she complained, and may state the time, place, and circumstances under which the complaint was made, but not what she said concerning the circumstances and details of the assault.

State v. Smith, 3 Wn.2d 543, 550, 101 P.2d 298 (1940).

Thus, the fact of complaint exception allows the State in a child molestation case to present evidence of the fact of the victim's complaint. State v. Bray, 23 Wn. App. 117, 121, 594 P.2d 1363 (1979). But evidence of the details of the disclosure, including the specifics of the act and the identity of the offender is not admissible. State v. Ferguson, 100 Wn.2d 131, 136, 667 P.2d 68 (1983).

Here, Anderson said D.G. had told her that during visits, Apolo forced her to sit on his lap. Apolo rubbed D.G.'s back and touched her breasts and vaginal area. 3RP 102-03. Anderson said that D.G. appeared “scared to be talking,” and that D.G.'s voice trembled a little. 3RP 103.

Under the “hue and cry” doctrine, the statements identifying Apolo as the offender and the description of what Apolo had done should not have been admitted. However, Apolo has not cited any authority in support of his claim that Anderson should not have been permitted to describe D.G.'s demeanor at the time of the disclosure.<sup>26</sup> See Br. of Appellant at 33. Under Smith and its progeny, *what* D.G. said about the details of her father's molestation was inadmissible, but *how* D.G. said it, i.e., scared and with her voice trembling a little bit, was not inadmissible.

In light of D.G.'s testimony—that on many occasions Apolo put her on his lap, touched and forcibly rubbed her private area, despite her pleas to “Please stop it,”—there is no reasonable probability that the outcome of this trial would have been different if the circumstances of D.G.'s disclosure to Anderson and Cormier

---

<sup>26</sup> See State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171, cert. denied, 439 U.S. 870 (1978) (court may assume that where no authority is cited, counsel has found none after search).

had not been admitted.<sup>27</sup> See State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (nonconstitutional error in admitting hearsay evidence requires reversal only if it is reasonably probable that the error materially affected the trial's outcome).

e. Closing Argument.

Apolo argues that defense counsel's acknowledgement in closing argument that D.G. and B.G. had been abused was tantamount to conceding Apolo's guilt. The Court should reject this claim. Defense counsel's only option in light of the strength of D.G.'s and B.G.'s testimony was to concede that D.G. and B.G. had been abused, but not by his client. Moreover, Apolo cites no authority for the proposition that defense counsel must offer up another suspect.

Any attorney would have been hard-pressed to tell the jury that D.G.'s and B.G.'s emotional stories of abuse were fabrications. When D.G. and B.G. spoke of the sexual abuse, each girl sobbed and needed to take a recess. 6RP 43-44, 70; 7RP 99. Defense counsel had to acknowledge that "these two children have been seriously harmed." 7RP 101. The concession was a tactical

---

<sup>27</sup> 6RP 47-50.

retreat, not a complete surrender. See Clozza v. Murray, 913 F.2d 1092, 1099 (4<sup>th</sup> Cir.1990) (“There is a distinction which can and must be drawn between a statement or remark which amounts to a tactical retreat and one which has been called a complete surrender.”).

Defense counsel never conceded Apolo's guilt. Counsel argued that Juarez was with Apolo on each of the visits and she had never seen inappropriate touching. 7RP 99-100. And, counsel argued that Apolo's testimony was credible, honest, and that the State had failed to prove its case. 7RP 101-02. This claim fails.

f. Substitute Counsel.

Apolo asserts that substitute counsel, Brian Todd, also rendered deficient performance because he failed to present complete or accurate information in his motion for a new trial.<sup>28</sup> Br. of Appellant at 23-24. This claim fails because, even if Todd should have been more familiar with the record, or should have had portions of the record transcribed, Apolo cannot show prejudice.

---

<sup>28</sup> Todd initially thought that Danko had cross examined D.G. or B.G., but had not asked about the molestation. Todd did not recall that Juarez testified on Apolo's behalf. The trial court corrected Todd's misperceptions before the court ruled on Apolo's motion for a new trial. 12RP 6-7, 12, 31-32.

Claims of ineffective assistance are of constitutional magnitude and may be raised for the first time on appeal. State v. Soonalole, 99 Wn. App. 207, 215, 992 P.2d 541 (2000). In this case, appellate counsel raised the issues that she believed had not been adequately supported in the motion for a new trial. Accordingly, Apolo has failed to establish prejudice.

Furthermore, considering Todd's conduct as a whole, Apolo has not demonstrated deficient performance. The trial court permitted Todd a one-month continuance, during which Todd gathered declarations, put on testimony from Apolo's employer, Dr. Harris (regarding how Danko and Hearon got involved in defending Apolo), and briefed the issues. CP 45-69; 11RP 9-18. Todd provided effective assistance of counsel.

**4. CUMULATIVE ERROR DID NOT DENY APOLO A FAIR TRIAL.**

Finally, Apolo argues that, if none of the alleged errors he has claimed warrants reversal of his convictions on its own, the convictions should nevertheless be reversed based on the combined effect of these errors. This argument fails.

The cumulative error doctrine applies only where several trial errors occurred which, standing alone, may not be sufficient to justify reversal, but when combined, may deny the defendant a fair trial. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003) (citing State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)), review denied, 151 Wn.2d 1031 (2004). It is axiomatic, however, that to seek reversal pursuant to the “accumulated error” doctrine, the defendant must establish the presence of multiple trial errors and that the accumulated prejudice affected the verdict. Where errors have little or no effect on the outcome of trial, the doctrine is inapplicable. Greiff, 141 Wn.2d at 929. Here, as explained above, Apolo has failed to satisfy this burden.

The strength of the State's evidence cannot be over-emphasized. The trial court correctly stated that not only was there sufficient evidence to convict Apolo of more counts of molesting D.G. and B.G. than the State had charged, but the evidence of the charged offenses was “substantial[,] if not overwhelming.”

12RP 17, 34-35.

Properly applied, the Strickland standard requires Apolo not just “to show that the errors had some conceivable effect on the outcome of the proceeding,” but counsel's errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Strickland, 466 U.S. at 687. Strickland cautions: It is “all too tempting” to “second-guess counsel's assistance after conviction or adverse sentence.” Strickland, at 689. Apolo has failed to demonstrate that the result in this trial was anything but reliable.

**D. CONCLUSION**

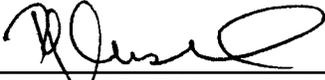
Apolo has failed to demonstrate prejudice. Although other attorneys may have made different strategic choices than the decisions that Danko made, that is not the standard under Strickland. Rather, Apolo must show that, but for Danko's decisions, the likelihood of a different result is substantial. As the trial court said, given the “substantial[,] if not overwhelming evidence of Apolo's guilt,” Apolo “clearly has not been able to show

resulting prejudice." Accordingly, the State respectfully asks this Court to affirm Apolo's judgment and sentence.

DATED this 24 day of January, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
RANDI J. AUSTELL, WSBA #28166  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

## APPENDIX A

### RCW 9A.44.120

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

## APPENDIX B

The court in Ryan identified the following factors for assessing the reliability of child hearsay statements:

- (1) whether there is an apparent motive to lie;
- (2) the general character of the declarant;
- (3) whether more than one person heard the statements;
- (4) whether the statements were made spontaneously; and
- (5) the timing of the declaration and the relationship between the declarant and the witness.

The Washington Supreme Court added that these factors taken from State v. Parris, 98 Wn.2d 140, 146, 654 P.2d 77 (1982), were not exclusive and should be considered with the additional factors in Dutton v. Evans, 400 U.S. 74, 88-89, 91 S.Ct. 210, 219-220, 27 L.Ed.2d 213 (1970):

- (1) the statement contains no express assertion about past fact,
- (2) cross examination could not show the declarant's lack of knowledge,
- (3) the possibility of the declarant's faulty recollection is remote, and
- (4) the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

## APPENDIX C

The Allen factors:

- (1) the child's understanding of the obligation to speak the truth on the witness stand;
- (2) the child's mental capacity, at the time of the events in question, to receive an accurate impression of the events;
- (3) whether the child's memory is sufficient to retain an independent recollection of the events;
- (4) whether the child has the capacity to express in words his or her memory of the events; and
- (5) whether the child has the capacity to understand simple questions about the events.