

No. 67219-3-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

TREVER COLLIN SNOW, Appellant.

BRIEF OF RESPONDENT

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COURT OF APPEALS
STATE OF WASHINGTON
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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether Snow can demonstrate from the record that his attorney was constitutionally ineffective such that Snow should be entitled to a new trial where the record reflects Snow's attorney's conduct was reasonable and could not have resulted in the requisite prejudice to warrant reversal of Snow's conviction.
2. Whether the prosecutor's alleged misconduct warrants reversal where the record reflects the prosecutor did not vouch for the victim during closing arguments and the trial court, nonetheless, struck alleged vouching arguments by the prosecutor and reminded the jury they were the sole judges of credibility.
3. Whether the trial court erred in admitting Snow's telephone statements after determining Snow's admissions were sufficiently authenticated and where the trial court's consideration of a declaration for preliminary purposes of determining authenticity did not violate Snow's Sixth Amendment right to confrontation.

C. FACTS

1. Procedural Facts

Trevor Snow was charged with child molestation in the first degree. CP 64-65. Following a jury trial, Snow was convicted as charged and given a standard range sentence of 65 months. CP __ (sub no. 50 5/31/11). Snow timely appeals. CP ___ (sub no. 53 6/1/2011).

2. Substantive Facts

In late January 2010-early February, N. Baldwin walked in her living room and noticed her nine year old son T.B. on the floor with his face by her dog's genitals. RP 236, 223. Alarmed, N. Baldwin asked what he was doing and T.B. responded it wasn't wrong if he wanted to try something new once. RP 223. N. Baldwin then reassured her son telling him he wasn't in trouble but that she just wanted to know where this was coming from. RP 223. T.B. initially responded he had seen it on a detour with his dad but then said it was a detour with his grandma and finally responded it was "Trevor." RP 224, 234.

At trial, T.B. explained that something happened when he was staying at his dad's house during Christmas vacation in 2009. RP 251. T.B. detailed and Snow corroborated, that Snow was visiting T.B.'s father's home one evening and played a video game and watched transformers with T.B. in the guest bedroom T.B. usually stayed in. RP 264, 272-3. T.B. explained that at some point Snow told him a story about his friend wanting to touch his penis and that Snow let him. RP 253. Snow ended by telling T.B. "its ok to do something once." Id. Snow then got some lotion from the bathroom, told T.B. again it was ok to do something once, pulled out his penis and began rubbing his own penis. RP 254. T.B. then had his penis out and they were both rubbing their own penises. RP

254-55. Then Snow had T.B. rub his penis and he began to rub T.B.'s penis. RP 256. Eventually, T.B. said he couldn't rub Snow's penis anymore and stopped. RP 257. T.B. then asked Snow to stop rubbing his penis. RP 258. Snow however, kept rubbing T.B.'s penis. RP 257. T.B. was worried his grandma or his dad would see them since the bedroom door was open. RP 258. Snow left T.B.'s room after this incident but the next day told T.B. to remember their conversation. RP 259. T.B. thought he was referring to Snow's statement that "it's okay to do something once." RP 259.

T.B.'s father John Baldwin explained that he shared a house with roommate Joseph Eaterer and that his mom, Kathleen Baldwin lived on a trailer on the same property. RP 272. John confirmed Snow did visit when T.B. was staying during Christmas vacation and that Snow was alone with T.B. on one occasion. RP 274. John explained he was busy working – trying to get ahead on a machinist class he was taking when T.B. asked him if he would play a video game. RP 274. John stated he couldn't because of homework but Snow volunteered to help. RP 274-5. John testified that later he had to leave the house, so he arranged for his mom to come up from her trailer to be at the house with T.B. RP 289. John confirmed that T.B.'s bedroom door was open and that he did not hear anything concerning when Snow was with T.B. RP 288. T.B. never

mentioned anything to his dad during multiple visits following this alleged incident. RP 292. John didn't hear anything until T.B.'s mom N.Baldwin called and told John he wouldn't be seeing his son anymore because of the allegations. RP 293. When Detective Harris informed John of these allegations, John expressed reluctance – wasn't sure this incident occurred. RP 332.

Detective Harris of the Whatcom County Sherriff's Office met with T.B. and his mom, N.Baldwin after T.B. disclosed he was molested. RP 294, 295. N.Baldwin provided Harris with Snow's name and a cell phone number as a means of getting in touch with Snow. RP 303. Harris left a message for Snow with the number provided by N.Baldwin, identifying who Harris was and asked Snow to return his call. RP 304. Snow responded leaving a message for Harris saying he had been at John Baldwin's home, he had met with T.B.'s mom, that he was on a greyhound bus headed for Texas and rehab and that the allegations were false. RP 304, 305. Harris again called Snow back and spoke to him. RP 308. Snow explained he wasn't on a bus but was at his dad's in Hermiston Oregon waiting to get a bed at a rehab center. RP 308-9. Snow told Harris he was very high at the time of the incident and it wasn't like him to do something like that. He didn't recall that occurring. RP 312.

At trial Snow confirmed he visited John Baldwin in December 2009, helped T.B. with a video game but did not molest him. RP 340. Snow said he spent most of the evening with Kathleen Baldwin and John's roommate, playing darts at the other end of the house. RP 391. Kathleen Baldwin confirmed she was playing darts with Snow after John Baldwin left the residence and didn't recall seeing Snow go into T.B.'s bedroom. RP 377. T.B.'s mom N.Baldwin, father John and Kathleen also testified T.B. had previously been involved in some sexual incident the previous summer. RP 379, 280. Snow also testified that he did speak with Detective Harris over the telephone but that he was detoxing at the time, waiting to enter rehab for drugs and alcohol and couldn't remember the evening at the Baldwin's at that time. RP 399.

Following a jury trial, Snow was convicted as charged.

D. ARGUMENT

- 1. The record reflects Snow's trial attorney's conduct and decisions throughout trial could not, based on the record below, have resulted in sufficient prejudice to Snow to warrant a new trial.**

Snow asserts his trial attorney was ineffective for failing to object to the consideration by the trial judge of a declaration by Michelle Moritz confirming she lent her cell phone to Snow. Moritz' declaration was considered by the trial court pursuant to ER 901 to authenticate statements

allegedly made by Snow over a telephone lent to him by Moritz, to the investigating officer in this case, Detective Harris. Snow specifically asserts his trial attorney should have objected to this declaration pursuant to CrR 4.7 because Moritz' declaration was provided the day of trial, the declaration was irrelevant and should have insisted that the trial court hold a separate inquiry pursuant to Passovoy v. Nordstrom, 52 Wn.App. 166, 758 P.2d 524 (1988), *review denied*, 112 Wn.2d 1001 (1989), to determine if Snow's telephone statements, even if authenticated, qualify as an admission by a party opponent pursuant to ER 801(d)(2).

Snow additionally asserts his trial attorney was constitutionally ineffective because he failed to reasonably cross examine Detective Harris regarding his ability to identify the person he spoke to on the phone claiming to be Snow, by failing to reveal inconsistencies in Kathleen Baldwin's testimony from her previous defense interview, by allegedly failing to review the first amended information filed May 3rd, 2011 and by pursuing defense theories and a motion for new trial without providing necessary evidence to support the theories or motion.

In order to demonstrate ineffective assistance of counsel, a defendant must show that (1) trial counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for

counsel's unprofessional errors, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev. den.*, 150 Wn.2d 1016 (2003).

To establish his trial attorney's representation was deficient, Snow must show that his trial counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances. State v. Thomas, 109 Wn.2d 222, 229-230, 743 P.2d 816 (1987). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 326, 899 P.2d 1251 (1995). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *rev. den.*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).

To establish prejudice under the second prong of the Strickland test, Snow must demonstrate that his trial counsel's deficient performance deprived him of a fair trial. Strickler v. Greene, 527 U.S. 263, 119 S.Ct 1936, 144 L.Ed.2d 286 (1999). That is, Snow must show there is a reasonable probability, but for his counsel's errors, the result of the

proceeding would have been different had the error not occurred. Strickland, 466 U.S. at 694, State v. McFarland, 127 Wn.2d at 334-35. “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ... not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.” State v. West, 139 Wn.2d 37, 46, 983 P.2d 617 (1999) (*citing Strickland*, 466 U.S. at 693).

It is the defendant’s burden to overcome the strong presumption that counsel’s representation was effective. Wilson, 117 Wn. App. at 15; Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Defendant must meet both parts of the test or the claim of ineffective assistance fails. State v. Mannering, 150 Wn.2d 277, 285-86, 75 P.3d 961 (2003). The Court need not address both prongs of the Strickland test if a defendant fails to make a showing under one of either prong. State v. Thomas, 109 Wn.2d at 226.

Appellate review of counsel’s performance is highly deferential and it is Snow’s burden to overcome this strong presumption based on the record below. In re Personal Restraint of Stenson, 142 Wn.2d 710, 742, 16 P.3d 1 (2001). Appellate review of a challenge to effective assistance of counsel is de novo. State v. White, 80 Wn.App. 406, 907 P.2d 1310, *rev. den.*, 129 Wn.2d 1012, 917 P.2d 130 (1995).

Snow first contends his attorney was deficient for failing to object to the consideration of Michelle Moritz' declaration provided the first day of trial as a discovery violation pursuant to CrR 4.7 and should have asked for a continuance or recess to follow up on this new information. He also argues his trial attorney should have objected on relevancy grounds and that his attorney should have insisted on a "separate inquiry on whether the statements qualify as admissions by a party opponent under ER 801(d)(2). See, Br. of App. at 17-18.

Prior to trial, the State moved to admit statements Snow made to Detective Harris over a series of telephone calls made during the investigation pursuant to CrR 3.5. RP 18. Detective Harris recounted that after speaking with T.B.'s mom, she provided Harris with contact information for Snow. RP 24. Specifically, she gave Harris Snow's name and a cell phone number for Snow that she was provided and previously used to contact Snow. RP 24. Harris called the number and left a brief message identifying who he was and requesting a phone call back. RP 25. Harris did not specify however, what the phone call was in reference to. Id. Someone identifying themselves as Snow called Harris back, said he talked to T.B.'s mom, denied the allegations and said he was only at his friend John Baldwin's home to get drugs. RP 26. Harris called Snow back and the two discussed the allegations and Snow's current whereabouts

over the telephone. RP 28. Snow admitted being at the Baldwin residence but stated he was currently in Hermiston Oregon at his father's house waiting to secure a bed in a rehabilitation facility. RP 28. Snow agreed with Harris to meet with Hermiston police and take a polygraph test. RP 29. Harris contacted Hermiston police and they confirmed they were familiar with Snow's father's residence in Hermiston. RP 32.

The trial court preliminarily determined this information, standing alone, was insufficient to authenticate statements Snow allegedly made over the telephone but that it would reconsider its ruling if additional information corroborating Snow's identity could be established. RP 50. Subsequently, the State obtained and provided a declaration, a day later, from Michelle Moritz who confirmed she had provided Snow with her cell phone during the time frame in question. RP 189. Moritz also provided law enforcement with a phone bill that confirmed the number assigned to her phone and detailing calls made during the time frame in question. RP 189, 190. After the State provided this additional information, the trial court determined statement's Snow made to Detective Harris over the telephone were sufficiently authenticated to warrant admission of Snow's telephone statements. RP 191-193.

Snow's attorney objected, asserting in addition to his original objection that Snow's statements were inadmissible because they weren't

sufficiently authenticated, that Moritz should have to testify to satisfy Snow's right to confrontation. *Id.* The trial court, recognizing the issue was limited to whether or not Snow's statements were sufficiently authenticated to permit admission of Snow's statements, declined to require Moritz be compelled to testify but did require the State to give Moritz' contact information to Snow's attorney.

Snow's allegations are without merit. Snow cannot demonstrate from the record below that the State violated CrR 4.7. Moritz declaration was relevant for authentication purposes pursuant to ER 901 and no "separate inquiry" is required to determine if Snow's statements qualify as admissions by a party opponent because it was Snow, the actual party opponent, who made the statements.

CrR 4.7 provides:

[T]he prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than omnibus hearing;

The names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witness.

CrR 4.7(a)(1)(i). CrR 4.7 (h)(2) also provides however:

Continuing duty to disclose. If, after compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of

the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

CrR 4.7(h)(2).

Contrary to Snow's assertions, the record does not reflect that the State withheld or suppressed relevant evidence prior to trial; instead the record demonstrates the State immediately disclosed Moritz' declaration as it was obtained and provided by law enforcement, presumably after efforts were made to find additional circumstantial evidence to authenticate Snow's statements so the State could introduce Snow's statements at trial. Under these circumstances, Snow's attorney acted reasonably by not asserting a discovery violation. *See*, CrR 4.7(h)(2). Moreover, Snow's attorney likely did not request a continuance or recess after obtaining this additional information because he likely determined, even with additional time, consideration of Moritz declaration for authentication purposes was inevitable, the evidence was limited/easily confirmed and there was no basis to request the court exclude the declaration from its consideration for authentication purposes. Therefore, Snow's attorney reasonably did not see any benefit or need for requesting a continuance or recess.

Snow also asserts his trial attorney should have objected to the admission of his authenticated telephone statements and insisted that the

trial court hold a “separate inquiry” pursuant to Passovoy to determine if Snow’s telephone statements qualify as admissions of a party opponent pursuant to ER 801(d)(2).

Where the alleged hearsay statements are admissible, defense counsel’s failure to object will not constitute deficient performance. State v. Alvarado, 89 Wn.App. 543, 553, 949 P.2d 831 (1998). Trial courts have broad discretion when ruling on evidentiary matters. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). To properly authenticate evidence pursuant to ER 901, the State was required to introduce “sufficient proof to permit a reasonable juror to find in favor of authenticity or identification.” State v. Payne, 117 Wn.App. 99, 106 69 P.3d 889 (2003), *review denied*, 150 Wn.2d 1028 (2004). Authentication is a threshold requirement designed to assure that the evidence proffered is what it purports to be. ER 901(a). With respect to telephone calls, testimony that the person has spoken on the phone and identified himself as a specific person, standing alone, is insufficient to authenticate the identity of the caller. State v. Deaver, 6 Wn.App. 216, 419, 491 P.2d 1363 (1971). Additional direct or circumstantial evidence is necessary to authenticate identity of the caller in these circumstances. State v. Danielson, 37 Wn.App. 469, 472, 681 P.2d 260 (1984). ER 902(b)(6) states that telephone conversations may be authenticated by evidence that

a call was made to a number assigned to a particular person or in instances of self-identification, the content of the conversation itself may sufficiently corroborate the identity of the person on the telephone. *Id.*

In Passovoy v. Nordrom Inc, 52 Wn.App. 166, 758 P.2d 524 (1988), *review denied*, 112 Wn.2d 1001 (1989), the court determined statements over the telephone were sufficiently authenticated because in addition to identifying himself as a Nordstrom employee, the caller made the call in response to an earlier call and the caller was familiar with the facts of the incident. In State v. Deaver, 6 Wn.App. 216, 419, 491 P.2d 1363 (1971), statements made over the telephone were sufficiently authenticated based on the caller's self identification and content of the discussion on the phone even though the recipient of the statements didn't recognize the voice.

In this case, Snow's identity as the person Detective Harris was speaking over the telephone with was authenticated by Snow's self-identification combined with circumstantial evidence: evidence that Snow responded to the message left for him and the caller (Snow) indicated he was familiar with the allegations in question. Pursuant to Passovoy and Deaver this evidence was arguably sufficient to support authentication and admission of Snow's statements. Nonetheless, because the trial court initially suppressed Snow's telephone statements after determining the

State had not sufficiently shown such statements were authentic pursuant to ER 901, the State obtained and provided a declaration by Michelle Moritz to further corroborate Snow as the caller Harris spoke to over the telephone. Moritz' declaration confirmed she lent her cell phone to Snow during the time in question. After considering this additional information, the trial court determined within its discretion. Snow's statements were sufficiently authenticated and therefore admissible.

Additionally, contrary to Snow's argument, his trial attorney should not have requested a separate inquiry to determine whether Snow's statements qualified as admissions of a party opponent pursuant to ER 801(d)(2). Passovoy only required a separate inquiry to see if the authenticated statements in that case qualified as admissions by a party opponent under ER 801(d)(2) because there was an issue as to whether the admissions made over the telephone were made by an "agent" of the defendant such that the statement could be admissible as a statement of a party opponent. No such issue is present in this case. Snow made the telephone statements at issue. Therefore, once Snow's statements were sufficiently authenticated as being made by him, these statements were admissible as statements of a party opponent under ER 801(d)(2). Snow's allegations are without merit.

Snow also complains that his trial attorney was deficient because he failed to cross-examine Detective Harris regarding his ability to identify the person he spoke to on the telephone as Snow. Br. of App. 18. Cross-examination is a matter of judgment and strategy. In re Davis, 152 Wn.2d 647, 720 101 P.3d 1 (2004). Appellate courts will not find ineffective assistance of counsel based on trial counsel's decisions during cross-examination if counsel's performance fell within the range of reasonable representation. *Id.* Furthermore, to establish prejudice, Snow must demonstrate the testimony that would have been elicited on cross-examination would have been enough to overcome the evidence of guilt. *Id.*

Snow has not made any effort to meet this burden. Even if Snow's trial attorney had not conceded Harris was talking to Snow and challenged Snow's ability to identify Snow over the telephone, the jury would have heard Snow's telephone admissions anyway and likely, given the abundance of evidence that authenticate Snow's telephone statements, rejected Snow's inference that it wasn't he who spoke to Harris. Moreover, it is clear from the record Snow's trial attorney's strategy was to point out he had little to no access to the child and the child was perhaps projecting his issues, related to custody issues or prior instance of molestation, onto Snow. Under those circumstances, Snow's attorney

reasonably determined, given that Snow's telephone statements were determined to be admissible, not to challenge Harris' ability to identify Snow over the telephone during cross examination. Snow's argument should be rejected.

Next, Snow complains that his attorney was deficient because he asserted on the day of trial, that he had not previously seen the first amended information and consequently asked to have a copy of the information the judge was referring to. Br. of App. at 19. Snow does not argue or demonstrate how he was prejudiced by his trial attorney's alleged deficient conduct. Snow's failure to cite to legal authority and provide reasonable argument in support of his claims is grounds for summarily rejecting his assignment of error. State v. Benn, 120 Wn.2d 631,661, 845 P.2d 289 (1993).

Even if this issue is considered, nothing in the record suggests Snow or his attorney did not fully understand the nature of the charge against Snow or the facts and witnesses involved in this case. Moreover, the record does not reflect Snow or his attorney were surprised when the first amended information was read to the jury, further indicating Snow was not facing a new or different charge. Under these circumstances, Snow has not and cannot sufficiently show he suffered the requisite

prejudice as a result of this alleged deficient conduct that would warrant reversal of his conviction.

Next, Snow contends his trial attorney was ineffective because he pursued strategies not likely to succeed. Br. of App. at 19. According to Snow *all* of his trial attorney's strategies were based on inadmissible evidence or eliciting testimony not supported by evidentiary rules or case law. Br. of App. 20. Snow was therefore prejudiced because his attorney failed to focus on legitimate theories. Snow again fails to cite to authority to support his position, misconstrues the record and Snow's trial attorney's efforts.

Snow's trial attorney reasonably sought to introduce evidence of the alleged victim's reputation for dishonesty in support of Snow's theory that T.B. had a reputation for making things up, had previously disclosed being molested prior to the alleged incident and perhaps projecting his previous molestation experience onto Snow as an easy scapegoat. See, RP 7. The trial court considered Snow's request, initially indicating that given the age of the child, reputation testimony from T.B.'s family may be admissible. See, RP 15. After considering the issue further however, the trial court determined Snow could only bring up T.B.'s reputation for truthfulness during opening if Snow's attorney had a good faith basis to assert T.B.'s reputation at school was one of dishonesty. RP 201. Snow's

attorney reasonably did not present this theory or promise this evidence in opening, presumably because Snow's attorney could not find school personnel willing to testify that T.B. had a reputation within his community for making things up. These circumstances reflect Snow's attorney acted reasonably and reflect that perhaps Snow's attorney struggled to find witnesses, such as school personnel, who were willing to testify to T.B.'s reputation in the community for truthfulness. So alternatively, Snow's attorney tried in novel ways to get this information before the jury. Briefly requesting the trial court allow Snow to have T.B.'s father declared an expert so he could opine on T.B.'s credibility (RP 199) at trial was one attempt. That effort, standing alone, does not constitute ineffective assistance of counsel, particularly where Snow's attorney abandoned the idea and instead sought to obtain admissible evidence from Detective Harris during cross examination regarding T.B.'s father's reaction to the allegation that Snow molested his son. RP 329. Harris confirmed, in support of Snow's defense theory that T.B.'s father acted reluctant upon hearing of T.B.'s disclosure and had reservations as to whether the molestation even occurred. RP 332. This evidence, in addition to Snow's testimony and repeated testimony from T.B.'s mom, father and grandmother, enabled Snow's attorney to reasonably argue in

Snow's defense that T.B. made up the allegations against Snow based on a previous incident where T.B. was molested.

This record reflects therefore that Snow's attorney made reasonable choices and doggedly pursued defense theory he thought would best serve his client in the face of overwhelming evidence against his client. The fact that his attorney at times did not have the requisite authority to support his request, standing alone, in light of the remaining record is insufficient to support Snow's allegations or warrant a new trial.

Finally, Snow contends his attorney was constitutionally ineffective because he failed to provide an adequate record in support of his motion for a new trial. Br. of App. at 21. Specifically, Snow alleges that Snow's attorney failed to have Kathleen Harris testify on cross examination or explain in her post-trial declaration how a phone call from a woman in the community tampered with her testimony. Snow contends that had his attorney presented this information the trial court would have granted Snow's motion. Snow's allegations are speculative in nature and do not warrant further consideration.

During Snow's motion for a new trial, Snow's attorney explained to the trial court from a strategic point of view why he thought Kathleen Baldwin testified differently than he anticipated, and explained why he did not attempt to discredit or impeach her testimony with prior inconsistent

statements when Kathleen Baldwin testified at trial. RP 12. (5/9/12 Motion for New Trial).

It is clear from Snow's trial attorney's post-trial explanation to the trial court that he made a strategic decision to elicit information needed to support Snow's defense when he realized Kathleen Baldwin was testifying differently than he expected without further exposing Snow to incriminating testimony. Limiting a potentially damaging witness testimony is strategic and cannot constitute ineffective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *rev. den.*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).

Moreover, Snow's contention that his trial attorney was ineffective because he failed to have Kathleen Baldwin explain in her post-trial declaration that an alleged phone call from a woman affected her testimony presupposes evidence not in the record. Specifically, that Kathleen Baldwin's testimony was in fact materially affected by a phone call. Nothing in the record supports this allegation. Without going outside the record, this Court cannot say whether Snow's attorney was deficient. The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established below. If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is

through a personal restraint petition. *See*, Washington State Bar Ass'n, Appellate Practice Desk Book §32.2(3)(c), at 32-6 (2nded. 1993) *citing* State v. Byrd, 30 Wn.App. 794, 800, 638 P.2d 601 (1981). Based on the record below, Snow's allegations are without merit.

2. **The alleged prosecutorial misconduct does not warrant a new trial because the prosecutor did not opine on the credibility of the victim during closing but instead permissibly attempted to argue, based on the evidence, that the victim's story was credible. Moreover, the jury was instructed and repeatedly reminded that they alone were the sole judges of credibility.**

Next, Snow argues the prosecutor repeatedly committed misconduct by vouching for the credibility of the victim during closing arguments. *See*, Br. of App. at 22. A close examination of the record reveals the prosecutor did not argue improperly, despite the trial court's ruling. Moreover, any improper argument was cured by the trial court's instruction to the jury following Snow's objection during the prosecutor's argument reminding them that they were the sole judges of credibility.

Where prosecutorial misconduct is claimed, the appellant bears the burden of showing both the impropriety of the conduct and its prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Prejudicial effect is established only if there is a substantial likelihood that the misconduct affected the jury's

verdict. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).

Where a defendant objects on the basis of prosecutorial misconduct, a reviewing court defer to the trial court's ruling on the matter because the “trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial.” State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. den.*, 523 U.S. 1008 (1998); *see also*, State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (court gives deference to the trial court’s ruling on motion for mistrial “because the trial court is in the best position to evaluate whether the prosecutor’s comment prejudiced the defendant”).

Snow’s attorney did not seek a mistrial following the prosecutor’s alleged improper arguments but instead asked that the prosecutor’s argument be struck and that the jury be given a curative instruction. Even though the trial court complied with this request, Snow now asserts the alleged misconduct during closing warrants reversal of his conviction.

A prosecutor’s comments in closing must be viewed in context of the entire closing argument, the issues in the case, the evidence presented and the jury instructions given. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). Although it is improper for a prosecutor to vouch for a witness’s credibility, a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may

comment on witness credibility based on the evidence. State v. Gregory, 158 Wn.2d at 860. Closing arguments do not constitute improper vouching unless it is clear from the record that the prosecutor is not arguing from the evidence, but instead is expressing personal opinion about credibility. State v. Lewis, 156 Wn.App. 230, 233 P.3d 891 (2010).

The record in this case reflects the prosecutor repeatedly reminded the jury during closing that they were the sole judges of credibility of the witnesses. RP 428, 432. The prosecutor also explained with specificity what the jury could consider in determining whether T.B. was credible. See, RP 433. The prosecutor drew an objection when he summarized that based on the evidence, “[T.B.], my argument to you is credible.” RP 436. The trial court sustained Snow’s objection and instructed the jury to disregard the prosecutor’s statement. *Id.* The prosecutor then clarified he was not vouching for any particular witness but was arguing based on the evidence which witness was credible. RP 437. Following two objections, the prosecutor again explained to the jury that they decide credibility and moved on. RP 437.

Let me clarify. I am not vouching for any particular witness. I’m arguing from the evidence, what you should find is credible. But you decide who is credible and who is not credible. Perhaps you find everybody is credible and it’s hard to match the two stories up, of course. You decide who’s credible. My argument to you is based on the evidence T.B. tells a credible story about what happened to him.

RP 437. It is clear from the record below that the prosecutor, despite the trial court's ruling, was not personally vouching for T.B. during closing arguments. Therefore, Snow cannot demonstrate the prosecutor's committed misconduct that fundamentally affected the fairness of his trial. Particularly, where the court struck at least one of the prosecutor's attempts to reasonably argue the evidence and instructed the jury that they should make credibility determinations themselves. See, RP 437. The jury is presumed to follow the court's instruction. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Snow's allegations of prosecutorial misconduct are without merit and should be rejected

3. **The trial court did not err or violate Snow's right of confrontation by considering a written declaration for purposes of determining whether statements Snow made over the telephone were sufficiently authenticated pursuant to ER 901 or by failing to require a "separate" inquiry to determine if Snow's authenticated statements qualify as statements by a party opponent.**

Finally, Snow contends the trial court deprived him of a fair trial. Br. of App. at 23, 24. Specifically, Snow contends the trial court erred by not engaging in a full analysis under Passovoy v. Nordstrom before permitting the prosecutor to admit statements Snow made over the telephone and that the trial court's consideration of Michelle Moritz' declaration for determining whether Snow's statements were sufficiently

authenticated under ER 901 for admission violated his Sixth Amendment right of confrontation.

As argued previously, Passovoy does not require a full analysis as to whether Snow's statements constitute admissions by a party opponent because the prosecutor was able to authenticate that Snow himself made the telephone statements at issue. In Passovoy, the authenticated statements were made by an employee and therefore, the appellate court noted another hearing was necessary to determine if an agency relationship existed between the caller and Nordstrom such that the caller's statement could be admitted as a statement made by a party opponent. Snow's argument misses the distinction between the facts of Passovoy and the facts in this case. The trial court did not commit error.

Next, Snow argues the trial court violated Snow's Sixth Amendment right to confrontation by considering Moritz' declaration pre-trial when determining whether Snow's telephone statements were sufficiently authenticated to be admissible at trial. Moritz' declaration was not offered or admitted at trial but offered preliminarily for authentication purposes only. The rules of evidence do not apply to such preliminary determinations. *See*, ER 104(a). Evidence which would be inadmissible at trial may be considered preliminarily in determining admissibility of challenged evidence. *See*, State v. Jones, 50 Wn.App. 709,

750 P.2d 281 (1988). The question of corroboration, in this case to authenticate it was Snow on the telephone making statements to Detective Harris, goes to the preliminary question of admissibility, rather than proof of the charge. Snow's right to confrontation are not violated by the consideration by the trial court of such supporting evidence, particularly since this declaration was not admitted as substantive evidence at trial. *Id.*; *see also*, Melendez –Diaz v. Massachusetts, 507 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (the confrontation clause not violated by persons whose testimony may only be relevant for chain of custody or authenticity purposes). Snow fails to sufficiently explain how the trial court's consideration of Moritz' declaration for purposes of determining authenticity and admissibility of Snow's statements violates his right to confrontation. Snow's argument should be rejected.

In conclusion, Snow contends his conviction should be reversed due to cumulative errors below. Br. of App. at 25. Where there are trial errors that standing alone may not warrant reversal, the combined affect of such errors may deprive a defendant of a fair trial. State v. Greiff, 141 Wn.2d 910, 922, 10 P.3d 390 (2000). The cumulative error doctrine does not apply in this case however because there weren't successive cumulative errors. Refer to Br. of App. at 19. Furthermore, Snow has not

and cannot demonstrate any alleged error materially affected the verdict given the strength of the evidence against him. Snow's claim should fail.

E. CONCLUSION

For the foregoing reasons, the State respectfully requests that Snow's conviction for one count of child molestation in the first degree be affirmed.

Respectfully submitted this 15 day of May, 2012

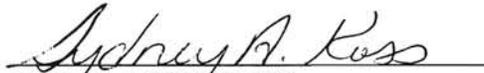


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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this Certificate is attached to this Court and Appellant's attorney, Cassandra Lopez De Arriaga, addressed as follows:

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Everett, WA 98201-5817



LEGAL ASSISTANT



DATE