IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY JAMES GREENE, Appellant.	No. 38741-7-II UNPUBLISHED OPINION

Van Deren, J. — Anthony James Greene appeals his convictions for communication with a minor for an immoral purpose, first degree child molestation, and two counts of second degree child rape. He argues that he is entitled to a new trial because the trial court abused its discretion when it admitted a statement he made to a detective asking about possible consequences of the crimes and when it allowed his wife, who was the victim's mother, to testify that Greene bargained with her for sex. Greene further argues that (1) the prosecutor committed misconduct, (2) the trial court abused its discretion in denying Greene's motion for a new trial, (3) his counsel was ineffective, and (4) cumulative error deprived him of a fair trial. Finding no error, we affirm.

FACTS

Greene married ELL's[1] mother in December 2004, and they had a son together in June 2005. Tensions began to run high between ELL, her mother, and Greene; and ELL asked to move out in March or April 2006.[2] On December 4, 2006, a school counselor reported to Child Protective Services that Greene had sexually assaulted ELL in March and April.

Cowlitz County Sheriff's Office Detective Ronald Broyles investigated the incidents; he met with Greene and informed Greene of his *Miranda*[3] rights. During the interview, Greene agreed to participate in a computerized voice stress analysis (CVSA). After administering the test, Broyles confronted Greene and told him that he did not believe that Greene had responded truthfully. Broyles's report stated in part:

> I told him that I believed he wanted to do the right thing and tell me the truth. When I said this, I observed Greene shaking his head "yes". I told Greene that I was sure he wanted to get some counseling for this, so it would not happen again to another child. He told me, "I'm not saying I did anything, but what would happen if I had done this"?

Clerk's Papers (CP) at 100. In July 2007, the State charged Greene with communication with a minor for immoral purposes, second degree child molestation, and two counts of second degree child rape.

Before trial, Greene moved to exclude any statements "in the context of or connected with" the CVSA. CP at 16. Greene and the State agreed that the CVSA results would not be

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[1] As the victim was 13 years old at the time of the incident, we use initials to protect her privacy.

[2] Greene testified that ELL expressed a desire to move out sometime in late February or early March.

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

introduced trial. The trial court ruled that any reference to the CVSA and any statement inextricably linked to the CVSA were inadmissible. The trial court also ruled that any statement made before, during, or after the CVSA, which did not refer to the CVSA, was generally admissible.

But the trial court ruled that (1) most of Broyles's statements made after the CVSA would not be admissible because the testimony was inextricably linked to the CVSA and (2) only Greene's statement, "'I'm not saying I did anything, but what would happen if I had done this?'" was admissible because it "was in response to a question regarding getting some counseling. I don't think that implicates the CVSA. I don't think -- that the Defendant is in a position of having to bring in the CVSA with that. Everything else, I think, does." CP at 100; Report of Proceedings (RP) (July 9, 2008) at 43. When the State asked for clarification about the admissibility of the detective's statement, "'I told Greene that I was . . . sure he wanted to get some counseling for this so it would not happen again to another child," CP at 100, the trial court stated:

> That question can't come in, because it does involve . . . the opinion, "I was sure he wanted to get some counseling for this," but the statement, "I'm not saying I did anything, but . . . what would happen if I had done this?" does not implicate the CVSA, and that statement can come in.

RP (July 9, 2008) at 45 (internal quotation marks omitted) (quoting CP at 100). The trial court reiterated that everything before the CVSA was admissible except for a question to Greene about his telling the truth.

During the State's direct examination, Broyles testified:

> [State:] Did you tell him that you thought he should get counseling?
> [Broyles:] Yes.
> [State:] And how did he respond to you saying that?

> [Broyles:] He shook his head "yes."
> . . . .
> [State:] Did you bring up any consequences statements? That's what I'm referring to.
> [Broyles:] . . . [H]e says, "I'm not saying that I did this, but if I had done it, what would happen to me?"

RP (July 14, 2008) at 92. Greene's attorney did not object to the State's question about counseling even though the trial court had expressly ruled that the question about counseling was not admissible. But following cross-examination, Greene moved for a mistrial because the detective misrepresented Greene's response to the detective's suggestion of counseling.

The State argued that the detective's mistaken testimony was not ill intentioned and suggested that Broyles retake the stand. After a discussion on the record about possible remedies, Greene and his attorney conferred and agreed on a correction to the testimony. Greene and his attorney conferred again at a break and, afterward, explained a more detailed resolution that they proposed:

> I talked to my client about this, and what he wants to do is this: To fix this problem, he wants us to essentially go back and track what Detective Broyles put in his report. And, specifically what I'm referring to, and the Court has it in front of it, essentially elicit that the one time [Greene] shook his head "yes" was in response to the Detective's statement that he believed he wanted to do the right thing and tell the truth.
>
> And, then, immediately following that is when, basically, we'll just leave it at this, that when he mentioned the idea of counseling, just counseling, period, that the defendant did not shake his head at that point, but rather made a statement, "I'm not saying I did anything, but what would happen if I had done this?" without waiving our previous objection to that statement itself, but we're mindful of the Court's ruling.

RP (July 14, 2008) at 105 (internal quotation marks omitted) (quoting CP at 100).

The trial court asked, "Well, there's a previous objection during the 3.5 as to the relevance of it, but in terms of the Motion for Mistrial . . . and the assessment of prejudice, are you agreeing

that this will fix that issue?" to which Greene's attorney responded, "If we do it along the lines that I just outline[d], Your Honor." RP (July 14, 2008) at 105-06. The State agreed that Greene could write out the questions for Broyles and accepted a draft of questions and answers from Greene that they agreed would correct the problematic testimony. Based on the State's acceptance of the "one-page transcript" that Greene and his attorney drafted and gave to the State, Greene withdrew his request for a mistrial ruling based on Broyles's mistaken testimony about Greene's answer. RP (July 14, 2008) at 107-08.

The testimony then proceeded.

> [State]: Detective Broyles, when you mentioned counseling to the Defendant, did he nod his head "yes"?
> [Broyles]: No.
> [State]: Did he nod his head "yes" before this?
> [Broyles]: Yes.
> [State]: What was that in response to?
> [Broyles]: That was in response to me making the statement that he wanted to do the right thing and tell me the truth.
> [State]: When you testified earlier that he nodded his head when you mentioned counseling, was that a mistake on your part?
> [Broyles]: Yes.

RP (July 14, 2008) at 109.

After trial, Greene moved for arrest of judgment and a new trial based, in part, on a new argument that the trial court improperly allowed admission of Broyles's testimony about counseling, characterizing it as both (1) improper opinion testimony and (2) prohibited by the ruling on the motion in limine. The trial court recognized that it had granted Greene's motion in limine to prohibit Broyles's testimony about suggesting Greene receive counseling. Nevertheless, it reconsidered its earlier decision and analyzed the alleged opinion testimony under *Demery*: [4]

[4] *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001).

> (1) The type of witness involved: The witness is a police officer.
> (2) The specific nature of the testimony: The testimony was not the in-court expression of opinion during live testimony by the detective as [to] the Defendant's guilt[ ]. The testimony related to the pretrial interview process and as such the statement does not carry "any special aura of reliability."
> (3) The nature of the charges: The charges involve allegations of rape, child molestation, and communication with a minor for immoral purpose.
> (4) The type of defense: The defendant denied the allegations and the specific events.
> (5) The other evidence before the trier of fact: The case turned primarily on the credibility of the victim and the Defendant as to the specific acts of sexual contact.

CP at 153. The trial court denied the motion for a new trial following the verdict because Greene did not (1) object or move for a mistrial based on Broyles's expression of an opinion of guilt, (2) request a curative instruction when the testimony was elicited, or (3) show any prejudice or that the trial's outcome would have differed.

Greene further argued that the trial court should not have allowed Broyles to testify about Greene's question about the consequences of the charges. The trial court also denied Greene's mistrial motion because Greene's question about possible punishment if he was guilty "was not inextricably linked to the CVSA, and it wasn't unfair to allow Detective Broyles to testify to [Greene]'s inquiry." CP at 153-54.

At trial, ELL testified that in October 2005, Greene took her hunting alone.[5] On the drive home, he put on a compact disc (CD) by a standup comedian known for bawdy songs and racy humor. The CD included monologues about genitalia, masturbation, and sex. According to ELL, the CD prompted Greene to discuss masturbation and to give ELL, then 13 years old, tips about

[5] Greene testified that he and ELL went "road hunting" with a group of people, but that they travelled alone in his truck. RP (July 14, 2008) at 128.

how to masturbate. Greene also told ELL that "he enjoyed having sex with [ELL's] mom, and [ELL] was a younger, hotter version of [her] mom" and that "he could tell that [ELL] was aroused because females give off a scent, and [ELL] was giving off that scent."[6] RP (July 9, 2008) at 134-35.

In the middle of March, Greene found a note ELL had written to a friend. ELL testified that the note was for a girl friend and contained profanity. When Greene found the note, he asked if ELL had written it. When ELL said that her friend wrote the note, Greene suggested showing it to ELL's mother. ELL confessed that she wrote the note and begged Greene not to show the note to her mother. According to ELL, they then had a conversation wherein Greene agreed he would not show the note to ELL's mother if he could fondle her breasts for two minutes.[7] ELL testified that Greene fondled her breasts while she stood and cried. Greene then gave ELL the note,[8] which she destroyed. ELL did not tell anyone about Greene's conduct at this time, but she later asked to move in with her father.

On April 17, ELL asked Greene for a ride to a baseball game in Castle Rock. According to ELL, Greene bargained with her and she offered him digital penetration of her vagina.[9]

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[6] Greene testified that he took the CD out at ELL's prompting and exited the truck to urinate but that he did not discuss sex or masturbation with ELL.

[7] ELL also testified that Greene had a hard-to-describe expression on his face when he propositioned her. ELL's mother testified that when he bargained, Greene would "[g]et a sly little look in his eyes and -- kind of half smile." RP (July 11, 2008) at 212.

[8] Greene testified that he merely returned the note to her with a warning that she lied to him and that he did not want to see a similar note again.

[9] Greene testified that he engaged in no sexual bargaining or contact; he took ELL to the game, and they left the game early because there was a verbal altercation that Greene believed could turn physical.

According to ELL, Greene penetrated her with his finger and she saw his face, "He had his tongue partially sticking out of his mouth and his eyes rolled in the back of his head, with his eyelids and eyelashes fluttering."[10] RP (July 9, 2008) at 162-63. ELL testified that during the week after April 17 Greene repeatedly asked to fondle her breasts in the mornings before he left for work.

In the last incident, on April 24, ELL asked to ride along with Greene to Castle Rock so that she could visit a friend. ELL testified that the bargaining began again: Greene asked, "'How bad do you want to go?' . . . Well, I was on my period and I told him that, and he said, 'That's okay,' and I was like, 'Are you sure?' and he said, 'Yes.'" RP (July 9, 2008) at 169-70. ELL sat down on a couch and Greene penetrated her with his finger; afterward, they discovered a small spot of blood on the couch and tried to remove it.[11]

After moving to her father's home in July, ELL told her cousin about Greene's conduct.[12] This cousin encouraged ELL to tell ELL's aunt, which ELL eventually did.[13] ELL testified that

[10] ELL did not describe this facial description to a police investigator who questioned her.

[11] Greene testified that no sexual abuse occurred: ELL wanted a ride to break up with her boy friend, and he took her because he already had an errand to run near Castle Rock.

[12] The cousin's recollection varied slightly from ELL's account.

[13] ELL's "aunt," who is actually her second cousin, testified that ELL told her in early August. The aunt's account varied slightly from ELL's account: For example, the aunt said that the letter came from a boy friend; that Greene found it while searching ELL's bedroom; and that Greene suggested digital penetration. According to Greene, the letter was a love letter from ELL to the Castle Rock boy friend. This discovery by Greene created a problem for ELL because Greene and ELL's mother restricted her contact either with boys or with that particular boy friend. A police investigator, who had asked ELL for a list of people ELL had told, testified that ELL did not say that she had told her cousin and aunt.

she also told two girl friends[14] and a boy friend about the abuse during the summer.[15] Once school started, she told a new boy friend in September, and she told a third girl friend in November.

On December 1, ELL and her mother got into a fight about trouble at school. In the presence of a babysitter, ELL's mother said that if ELL did not improve her school performance, ELL would have to move back in with her and Greene. ELL became distressed and talked privately with the babysitter. She told the babysitter about Greene's conduct toward her and the babysitter promised not to say anything until ELL left her mother's house two days later. The babysitter told her husband, a work acquaintance and "relatively close" friend of Greene, who telephoned Greene to ask him to come to their house the evening ELL returned to her father's. RP (July 11, 2008) at 38. The babysitter's husband gave Greene an ultimatum to tell ELL's mother, within 24 hours, about ELL's general allegations of inappropriate touching or molestation. Greene did so.

On December 4, ELL's mother took ELL out of school, brought her home, and recorded a discussion with her. ELL repeated some of her allegations but, as the discussion continued, at her mother's prompting, ELL denied that the incidents occurred. When ELL returned to school,

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[14] One of the girl friends testified that ELL told her about the incidents around the beginning of November and that ELL did not tell the second friend, the witness did. Eventually, ELL directly told this second friend. A civilian investigator testified that ELL said that she had told this second friend on December 4 but confirmed that ELL told the first friend at the end of September or beginning of October.

[15] The boy friend from Castle Rock testified that when she told him about Greene's conduct, she became "hazy" or "distant." RP (July 10, 2008) at 140-41. ELL told him that the incidents happened in exchange for Greene allowing her "to do things, go places." RP (July 10, 2008) at 145.

she told two of her friends, who already knew about the incidents, about the interview and that she had told her mother that the allegations were not true. These students then told a school counselor ELL confirmed the allegations to the school counselor, the school counselor reported the allegations to Child Protective Services and spoke to a police officer, and a civilian investigator interviewed ELL.

ELL's aunt and mother testified at trial, corroborating ELL's story. ELL had told her aunt about Greene's facial expression. A year later, the aunt told ELL's mother and she described ELL's mother's reaction: "She instantly had goosebumps up her arms and she started bawling." RP (July 11, 2008) at 97. ELL's mother testified that Greene gets a certain look "[w]hen he gets close to having an orgasm[.] [H]e closes his eyes a little bit; opens his mouth; sticks out his tongue just a little bit; his eyes start to flutter; and his eyes roll."[16] RP (July 11, 2008) at 210-11. ELL's mother also testified, over objection, that Greene bargained with her for sex. Greene objected to the relevance of the testimony, an objection that the trial court overruled after a discussion off the record.

Greene's theory was that ELL made false allegations to break up his marriage to her mother and that his wife turned on him in the months after he rejected her plan for reconciling with ELL. ELL's friends testified that they had the impression that she did not like Greene and did not want him to be with her mother. Because Greene refused to have any further contact with ELL, ELL's mother eventually left Greene.

Greene called ELL's credibility into question based on her inconsistent statements and because she was unable to tell the truth; the trial court agreed that ELL's credibility was at issue.

[16] Greene denied that he made these facial expressions.

Later, during closing arguments, Greene framed the issue for the jury as one of ELL's credibility: "It's very easy to see why that tape was made, when you think about the credibility -- the lack of credibility of [ELL]." RP (July 15, 2008) at 176.

The jury convicted Greene of all four charges.

Greene appeals.

ANALYSIS

I. Admission of Testimony at Trial

Greene first argues that the trial court abused its discretion when it admitted Greene's post-CVSA question to Broyles about the consequences if Greene had committed the alleged acts and when it admitted testimony from Greene's wife that he bargained with her for sex.

A. Standard of Review

We reverse a trial court's rulings on the admissibility of evidence only upon a showing of manifest abuse of discretion. *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992). A trial court abuses its discretion when it adopts a view "no reasonable person would take." *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

To preserve evidentiary challenges for appellate review, a party must state a specific objection to the evidence's admission. ER 103(a)(1); *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). But we may consider manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). An error is "manifest" when it is "unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed." *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). "An appellant who claims manifest constitutional error must show that the outcome likely would have

been different, but for the error." *State v. Jones*, 117 Wn. App. 221, 232, 70 P.3d 171 (2003). Showing prejudice thus makes the constitutional error "manifest." *McFarland*, 127 Wn.2d at 333.

B. Greene's Question of Broyles

Greene argues that his question to Broyles following the CVSA procedure about the potential consequences of the crime was "inextricably linked to the CVSA results" and that the trial court erroneously ruled that the statement was admissible. Br. of Appellant at 13.

Although the results of forensic examinations, such as polygraph examinations, are generally inadmissible without a stipulation, "statements made during the examination" may be admissible. *State v. Rupe*, 101 Wn.2d 664, 677-80, 683 P.2d 571 (1984); *State v. Renfro*, 96 Wn.2d 902, 905, 639 P.2d 737 (1982); *see Wyrick v. Fields*, 459 U.S. 42, 48 n.*, 103 S. Ct. 394, 74 L. Ed. 2d 214 (1982). As the United States Supreme Court has noted, "Although the results of the polygraph examination might not have been admissible evidence, the statements . . . made in response to questioning during the course of the polygraph examination surely would have been." *Wyrick*, 459 U.S. at 48 n.*.

Broyles properly advised Greene of his *Miranda* rights before he administered the CVSA. Greene's statements were generally admissible, subject to the trial court's discretion. Here, the trial court allowed the State to elicit Greene's response to Broyles's questioning while shielding Greene from the prejudice he could have suffered had the jury learned the results of the CVSA examination. Thus, we hold that the trial court did not abuse its discretion when it admitted Greene's question about the potential consequences associated with the crimes, an inquiry not related to the CVSA test that did not convey any information to the jury about the CVSA test.

C. Testimony That Greene Bargained for Sex with His Wife

Greene also argues that ELL's mother's testimony that Greene bargained for sex was not relevant and, therefore, was inadmissible. Even if relevant, Greene argues that the evidence was inadmissible because the State introduced the testimony to prove habit, bolster ELL's testimony, and attack Greene's character. Greene contends that the testimony cannot establish habit under ER 406 and that the trial court did not weigh its admission under ER 404(b) as a prior bad act.

The State argues that Greene did not adequately preserve the issue for appeal because it was relevant evidence and Greene did not object to its admission on other specific grounds. Greene contends that the trial court abused its discretion because no ground supports its decision to admit the testimony and, thus, he preserved the issue for appeal when he objected solely on the basis of relevance. An error in admission of evidence under ER 404(b) is preserved for appellate review when there is an objection based on prejudice, but an ER 404(b) error is not preserved for review where the objection is on the grounds of relevance. *State v. Mason*, 160 Wn.2d 910, 933-34 & n.6, 162 P.3d 396 (2007), *abrogated in part on other grounds by Giles v. California*, 554 U.S. ___, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008). Thus, we review the trial court's admission based only on Greene's challenge to the relevance of this evidence.

"Relevant evidence" tends to "make the existence of any fact . . . of consequence to the determination of the action more or less probable than it would be without [it]." ER 401. Irrelevant evidence is not admissible. ER 402. Here, ELL's mother's description of Greene's bargaining for sex was relevant because it tended to corroborate ELL's credibility, especially her credibility in relating uniquely similar sexual advances and responses by Greene, which Greene attacked. Under the rules of evidence and our case law, "'in the absence of an attack upon

credibility[,] no sustaining evidence is allowed.'" *State v. Bourgeois*, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997) (alteration in original) (quoting 1 McCormick on Evidence § 47, at 172 (John W. Strong ed., 4th ed. 1992)). But "[c]ases involving crimes against children generally put in issue the credibility of the complaining witness, especially if the defendant denies the acts charged and the child asserts their commission. An attack on the credibility of these witnesses, however slight, may justify corroborating evidence." *State v. Petrich*, 101 Wn.2d 566, 575, 683 P.2d 173 (1984), *overruled in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988).

Division One of our court allowed the introduction of extrinsic evidence the State offered to corroborate a child victim's testimony. *State v. Warren*, 134 Wn. App. 44, 59, 138 P.3d 1081 (2006), *aff'd* 165 Wn.2d 17, 195 P.3d 940 (2008), *cert. denied* 559 U.S. ___, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). Similar to the facts here, in *Warren*, "[t]he defense theory was that [the child victim was]not truthful or credible. Warren argued that [the child] alleged sexual abuse because she did not want Warren to return home after the domestic violence incident with her mother." 134 Wn. App. at 51. The child testified during cross-examination that "she saw [a] penis pump in Warren's briefcase but Warren did not show it to her or show her how it worked." *Warren*, 134 Wn. App. at 59. But the child had told a detective "about a 'penis pump' when describing how Warren showed her pornographic video covers and explained sexual intercourse. [The child] told the detectives what a penis pump looked like and about its use." *Warren*, 134 Wn. App. at 59. The trial court admitted this evidence that Warren "owned a 'penis pump.'" *Warren*, 134 Wn. App. at 59. On appeal, Division One rejected Warren's argument that the "evidence was not relevant and should have been excluded," holding that the trial court did not

abuse its discretion when it allowed a detective to testify about the victim's initial statements to the detective. *Warren*, 134 Wn. App. at 59. Division One also noted that what the victim described was relevant and contradictory cross-examination testimony from the victim went "to the weight of the evidence, not its admissibility." *Warren*, 134 Wn. App. at 59.

Similarly here, Greene objected solely to the relevance of ELL's mother's testimony that Greene had bargained with her for sex. Just as the evidence of the "penis pump" was relevant in *Warren* to corroborate the testimony of a child victim whose truthfulness and credibility were attacked, so too is the evidence of Greene's prior bargaining for sex relevant to corroborate ELL's testimony. The State did not argue that this testimony showed Greene's character or his propensities. As in *Warren*, the evidence was to corroborate ELL's credibility about his willingness to bargain for sexual favors, which Greene had denied. That Greene may have bargained for sex with ELL's mother tends to make it more probable that ELL was not engaged in the wholesale fabrication that Greene claimed. Greene put the State in the position of trying to restore ELL's credibility through corroboration because the centerpiece of Greene's case focused on undercutting ELL's general credibility for truth telling and her specific credibility about their interactions. Under these circumstances, we hold that the trial court did not abuse its discretion in ruling that the evidence was relevant and admitting it.

II. Denial of the Motion for a New Trial

Greene also argues that the State committed prosecutorial misconduct, entitling him to a new trial, when it elicited evidence that Broyles had suggested Greene receive counseling after the trial court ruled this evidence was not admissible. He also argues that the trial court abused its discretion when it denied his motion for a new trial based on Broyles's testimony because the

counseling question implied Broyles's opinion that Greene was guilty of the charges. We disagree.

Prosecutorial misconduct is grounds for reversal only when the conduct "was both improper and prejudicial in the context of the entire record and circumstances at trial." *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). "Prejudice is established only if there is a substantial likelihood" that the "misconduct affected the jury's verdict." *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). The defendant bears the burden of showing improper conduct that caused prejudice. *Hughes*, 118 Wn. App. at 727. We review the denial of a motion for mistrial under an abuse of discretion standard. *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). We will uphold a trial court's decision to deny a mistrial motion unless the irregularity so tainted the entire proceeding, that when viewed in the context of all the evidence, the defendant was denied a fair trial. *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992).

Here, the prosecutor mistakenly elicited incorrect testimony about Greene's response to Broyles's question about counseling.[17] But Greene also argues that this question about Broyles's suggestion that Greene get counseling improperly introduced Broyles's opinion that Greene was guilty.[18] Although the State violated the trial court's pretrial order, the question about counseling was repeated at Greene's request and according to Greene's direction when Broyles was recalled

[17] Following Broyles's testimony, Greene moved for a mistrial because the testimony was inaccurate. But Greene corrected the inaccurate testimony through an agreed-to exchange between the prosecutor and Broyles, and the trial continued.

[18] Greene did not raise this issue when he moved for a mistrial immediately following Broyles's testimony. Instead, Greene raised this issue—after the jury's verdict—in his motion for arrest of judgment and a new trial. Greene renewed this argument before us.

to clarify his testimony. Greene's counsel agreed that Broyles's additional testimony, according to the script he and Greene wrote out that repeated the counseling question, would cure the initial problem, clarifying that Greene did not agree that he needed counseling. Greene's counsel also agreed that he would withdraw his motion for a mistrial based on prosecutorial misconduct because Greene explained he did not want the additional expense of a new trial. But after trial, Greene moved for arrest of judgment and a new trial, asserting that Broyles's testimony violated the motion in limine and entitled him to a new trial, because the jury could only be left with the impression that Broyles thought Greene was guilty.

Allowing a witness to opine as to the defendant's guilt "'invad[es] the exclusive province of the [jury]'" and can be an error of constitutional magnitude. *Demery*, 144 Wn.2d at 759 (second alteration in original) (internal quotation marks omitted) (quoting *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)); *State v. Jones*, 71 Wn. App. 798, 813, 863 P.2d 85 (1993). "'[O]pinion testimony'" is "'based on one's belief or idea rather than on direct knowledge of the facts at issue.'" *Demery*, 144 Wn.2d at 760 (quoting Black's Law Dictionary 1486 (7th ed. 1999)). In determining whether witness statements are impermissible opinion testimony, the court considers numerous factors, including the "(1) 'the type of witness involved,' (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense, and' (5) 'the other evidence before the trier of fact.'" *Demery* 144 Wn.2d at 759 (quoting *Heatley*, 70 Wn. App. at 579). An officer's testimony often carries a special aura of reliability and trustworthiness and may be particularly prejudicial. *Demery*, 144 Wn.2d at 760 n.4. But where a witness does not expressly state his belief regarding the guilt or veracity of another witness, there is no manifest constitutional error. *See Jones*, 71 Wn. App. at 813; *State v.*

Madison, 53 Wn. App. 754, 760-63, 770 P.2d 662 (1989).

Broyles is a law enforcement officer and the case turned on Greene's denial of allegations of child rape and molestation. The evidence at trial required the jury to determine ELL's and Greene's credibility. Here, the State asked Broyles about his questioning of Greene during a precharge interview. He was asked,"Did you tell [Greene] that you thought he should get counseling?" Broyles initially answered, "Yes," and, when asked how Greene responded, Broyles said that Greene "shook his head 'yes.'" RP (July 14, 2008) at 92. But to correct the record before the jury, Greene wrote out a script for Broyle's redirect examination that the State followed. The State asked Broyles if Greene nodded "yes" to the mention of counseling. RP (July 14, 2008) at 109. Broyles testified that he had made a mistake when he earlier testified that Greene nodded his head "yes" when asked about whether he wanted counseling; he corrected his testimony to say that Greene had nodded his head "no" to counseling but had nodded his head "yes" to Broyles's question about wanting to tell the truth. RP (July 14, 2008) at 109.

This testimony about what occurred in the pretrial interview does not contain an express indication that Broyles thought Greene had committed the alleged acts or that he was untruthful. In fact, the reiteration of their conversation emphasized that Greene indicated that he wanted to tell Broyles the truth. Thus, it is not improper opinion testimony. And Broyles's acknowledged mistake in his testimony should have undermined any aura of reliability or trustworthiness the jury may have attached to Broyles and his view that Greene would benefit from counseling. We hold that the trial court's admission of Broyles's testimony did not deny Greene a fair trial; thus, the trial court did not abuse its discretion in denying his motion for a new trial.

III. Ineffective Assistance of Counsel

Greene also argues that his counsel was ineffective for failing to object to, or request, a limiting instruction after the State questioned Broyles about counseling for Greene. In fact, Greene's counsel moved for a mistrial based on Broyles's testimony about counseling. Then, after Greene conferred with his counsel, rather than request a limiting instruction, Greene and his attorney scripted what amounted to a retraction of Broyles's answer to the question, emphasizing that Greene wanted to tell Broyles the truth. Under these circumstances, Greene's appeal on the basis of ineffective counsel is not well taken.

Moreover, we hold that his arguments about Broyles's testimony concerning counseling do not constitute improper opinion testimony and his challenge to the testimony fails. And even assuming his attorney's performance was deficient, Greene fails to establish prejudice, i.e., that there is a reasonable probability that, but for his attorney's failure to follow some other path in relation to the statement about counseling, the outcome of the trial would have differed. *See Strickland v. Washington*, 466 U.S. 668, 693-94, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Greene's personal involvement in approving the language for Broyles's subsequent testimony to correct the record, which the State and Broyles followed, further undermines Greene's arguments. We hold that Greene fails to demonstrate that his counsel was ineffective.

IV. Cumulative Error

Greene argues that the issues he raises combine to warrant relief, even if each issue individually is not error sufficient to sustain his request for relief. "Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless." *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). But this doctrine "is limited to instances

when there have been several trial errors that . . . when combined may deny a defendant a fair trial." *Greiff*, 141 Wn.2d 929. Here, we hold that the trial court did not abuse its discretion, counsel was not ineffective, and, thus, there was no error. Where there is no error, "there can be no cumulative error." *In re Det. of Law*, 146 Wn. App. 28, 42, 204 P.3d 230 (2008), *review denied*, 165 Wn.2d 1028 (2009).

We affirm Greene's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

I concur:

Hunt, J.

Bridgewater, J.