# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br>Respondent and Cross-Appellant,<br><br>v.<br><br>LEONARD EVERETT COLEMAN,<br>Appellant and Cross-Respondent. | No. 41871-1-II<br><br>UNPUBLISHED OPINION |

Van Deren, J. — Leonard Everett Coleman appeals his convictions on five counts of second degree child molestation, asserting that (1) the trial court's failure to provide adequate accommodation of his hearing impairment denied him his state and federal constitutional rights to be present, (2) the trial court violated his and the public's right to an open and public trial by conducting an *in camera* hearing to select jury instructions without first conducting a *Bone-Club*[1] analysis, and (3) sufficient evidence did not support his convictions. Coleman also asserts that his defense counsel was ineffective because he did not seek further accommodation of Coleman's hearing impairment, did not oppose the State's motion to exclude evidence of Coleman's good character, and did not present evidence of Coleman's good character at trial. The State cross-appeals, asserting the trial court erred by suppressing statements that Coleman made to police.

[1] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

We affirm.

## FACTS

In June 2009, Coleman invited Lonnie Faubion and her six-year-old daughter to live with him in Randle, Washington, after Faubion told him that she was struggling to support her daughter in Arkansas. Coleman, who was then 66 years old, had known Faubion since she was 14 years old, i.e., over 20 years. In October 2009, Faubion needed someone to watch her daughter while she was at work. Coleman occasionally baby-sat for Faubion's daughter but, because Coleman did not want to baby-sit on a regular basis, Faubion hired 13-year-old PMR[2] to baby-sit in November 2009.

PMR is the daughter of Diane Fryer and Bill Rose. When PMR was born, Fryer and Rose lived near Coleman and considered him a family friend. When Fryer and Rose separated in 2004, PMR moved with Fryer to California. PMR moved back to Washington to live with her father in February 2008.

In March or April of 2010, during a telephone conversation between PMR and her mother, Fryer asked PMR about the status of her baby-sitting job. PMR responded that she quit baby-sitting because Coleman was touching her inappropriately, but PMR did not go into detail about Coleman's inappropriate touching.

Sometime later, Fryer contacted Toni Nelson, a social worker who lived in the same area as PMR. Fryer asked Nelson about reporting PMR's allegations and Nelson suggested that Fryer contact law enforcement, but Fryer indicated she could not contact the police because she lived in California. Fryer called Nelson several times over the next month to discuss reporting PMR's

[2] We refer only to the victim's initials to protect her privacy.

allegations. Nelson did not contact PMR about the allegations and did not initially contact law enforcement officers because her office's procedures require the victim to contact Nelson directly before she may become involved in the case. PMR did eventually contact Nelson and the two met in June 2010. After meeting with PMR to discuss the allegations against Coleman, Nelson contacted the police.

On June 5, 2010, Lewis County Sheriff's Office Detective Jeffrey Humphrey interviewed Nelson, PMR and PMR's parents. The next day, Humphrey and Lewis County Sheriff's Office Police Sergeant Alan Stull spoke with Coleman's son, Brian Coleman, at Brian's home. Humphrey also spoke with Brian's girlfriend, Destiny Kambich, and Kambich's daughter, who also had baby-sat for Faubion. After completing their interviews at Brian's home, Humphrey and Nelson drove to Coleman's home, five to seven minutes from Brian's home. During this time, Brian called Coleman and told him that the officers "were coming to talk to [Coleman] about touching [PMR's] breasts." Report of Proceedings (RP) (Jan. 26, 2011) at 149.

As the officers walked toward Coleman's front door, Coleman came out to his front porch. Coleman responded affirmatively when Humphrey asked Coleman if Faubion and Faubion's daughter lived with him. Humphrey then asked Coleman if Coleman knew why the officers were at his residence, to which Coleman responded, "[Y]es, he did, and that he did it." RP (Jan. 26, 2011) at 102. Humphrey asked Coleman, "'What did you do?'" and Coleman responded, "'I touched [PMR's] breast.'" RP (Jan. 26, 2011) at 102. The officers arrested Coleman and the State charged him with five counts of second degree child molestation.

Before trial, the State moved to admit statements Coleman made to police officers. At the CrR 3.5 hearing, Stull testified that he and Humphrey spoke with Coleman for approximately 10

minutes before reading Coleman his *Miranda*[3] rights and taking his taped statements. Stull admitted that during the 10 minute conversation preceding Coleman's *Miranda* advisement, the officers asked Coleman potentially incriminating questions. Stull also testified that the officers had an additional 10 minute conversation with Coleman after Coleman gave his taped statement and after the officers arrested and handcuffed him. Specifically, Stull testified that the officers questioned Coleman about how his taped statement differed from what he had told the officers during the first 10 minute conversation, and that Coleman responded, "'I can't give you an answer.'" RP (Jan. 7, 2011) at 22. Stull did not testify about how Coleman's pre-*Miranda* statement differed from his taped post-*Miranda* statement, and Stull admitted that neither he nor Humphrey indicated in their police reports that Coleman had given inconsistent statements.

Humphrey testified at the CrR 3.5 hearing consistently with Stull's testimony. During Humphrey's testimony, the trial court admitted, over defense objection, a transcript of Coleman's taped statement, which had not been reviewed for accuracy nor had it been prepared by any witnesses at the CrR 3.5 hearing; the State did not offer the audio recording of Coleman's taped statement. Coleman did not testify at the CrR 3.5 hearing.

The trial court ruled that only Coleman's statement, "I did it," was admissible at trial, reasoning:

> But beyond [Coleman's statement that, "I did it"], I'm not ready to rule that anything is admissible, including anything that was done on tape, because I have no way of knowing whether or not Mr. Coleman's — number 1, I don't know that the statements were inculpatory, because I don't know what [the] statements were. Secondly, I don't know, based upon the fact that I don't know what the questions were that were asked and the answers that were given whether the questions were designed to be incriminatory and result in answers that were incriminatory on the part of Mr. Coleman by the deputies and under circumstances where the deputies should have [*Mirandized*] him.

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

> I also don't know, with respect [to] whatever is in the taped statement assuming for the sake of argument the taped statement started out with, let me read you your rights, you have the right to remain silent, etc[etera], that's good, but on the other hand it may very well be that the statements made on tape were statements — or questions that were asked and statements that were made, which would directly relate and flow from whatever it was Mr. Coleman told the officers subsequent to his statement of "I did it." I don't know what those statements were. I don't know whether we're in a fruit of the poisonous tree circumstance or not, so as I read Rule 3.5 the statements are not admissible, unless we have a hearing out of the presence of the jury [to] make a determination that the statements are admissible.
>
> I can't find that the statements are admissible, because I don't know what the statements were, so the "I did it" statement comes in. That's all that comes in.

RP (Jan. 21, 2011) at 58-59.

In announcing its oral ruling, the trial court noted that the parties could revisit the suppression issue at trial, before a different trial court judge.

When the trial began before another judge, the parties discussed the earlier trial court's suppression ruling. The trial court indicated that it would admit as evidence Coleman's statement "I did it" as well as Coleman's statement that he had touched PMR's breast. RP (Jan. 25, 2011) at 77-78.

At trial, Coleman's defense counsel indicated that Coleman has a hearing impairment, stating:

> The only other thing I would ask is when the prosecutor is directing his questions to the witnesses, if we can insure [sic] that they are speaking into the microphone, he's very hard of hearing. His hearing aids actually don't help in this room. The hearing assist device helps a little bit more.

RP (Jan. 25, 2011) at 85. The trial court then instructed Coleman, "[I]f there's any time you can't hear, raise your hand and get my attention." RP (Jan. 25, 2011) at 85. During the course of the trial, Coleman did not indicate that he had difficultly hearing the proceedings until he took the

stand to testify, at which point the following exchange took place:

> [Defense counsel]: Leonard, are you a little hard of hearing?
> [Coleman]: Deaf in one ear and can't hear out of the other.
> [Defense counsel]: Do you wear hearing aids?
> [Coleman]: In my pocket most of the time, but yes.
> [Defense counsel]: Are they not helping you in this courtroom today?
> [Coleman]: No, they do not. It picks up all noises and makes them kind of muffled, everything is kind of distorted.
> [Defense counsel]: Does the hearing assistance device help you a little bit?
> [Coleman]: It's basically the same thing. It magnifies everything.
> [Defense counsel]: Have you had any problems hearing anything that's been going on the last two days?
> . . . .
> [Coleman]: I missed quite a bit, but. . .
> [Defense counsel]: But I'm here listening for you.
> [Coleman]: Yes.

RP (Jan. 26, 2011) at 138-39.

PMR testified that, after she baby-sat for Faubion three or four times, Coleman touched her breasts or vagina over her clothes at least 15 to 20 times. PMR stated that the first time she remembered Coleman inappropriately touching her was when she was sitting on his couch watching television and he started putting his hands between her legs. PMR also testified about an incident where Coleman came up behind her and grabbed her breasts when she was in his kitchen cooking breakfast. PMR stated that when Coleman grabbed her breasts, she slapped him with a spatula.

PMR testified about two incidents when Coleman touched her in his truck. PMR stated that after her first two times baby-sitting, Coleman asked her to drive his truck to her home. She said that when she drove Coleman's truck to her home, Coleman would "slowly ease his hand over onto my legs" and would touch her "inner thighs." RP (Jan. 26, 2011) at 38. PMR testified that the second time Coleman touched her in his truck she hit him on the hand with her phone.

She also testified that Coleman did not say anything when he touched her or after she asked him to stop touching her, but that he once told her, "'Even if I did ever have sex with you I couldn't get you pregnant because I've been castrated.'" RP (Jan. 26, 2011) at 45.

Coleman testified that he inadvertently touched PMR's breasts once when he gave her a hug from behind. Coleman denied that he let PMR drive his truck. During cross-examination, the State moved to impeach Coleman with alleged statements he made to police officers pre-*Miranda* and post-*Miranda* that the trial court previously refused to rule on following the CrR 3.5 hearing, leaving the issues for future resolution at trial. The State sought to admit Coleman's pre-*Miranda* admissions that he touched PMR's breasts five or six times and that he knew it was wrong. The State also sought to admit Coleman's pre-*Miranda* statement, "'I'm an old man and she's a young girl,'" which the State contended Coleman made in response to Stull's question about why he had touched PMR's breasts. RP (Jan. 26, 2011) at 159. Finally, the State sought to admit Coleman's post-*Miranda* taped statement that he inadvertently touched PMR's breasts once, a statement consistent with Coleman's trial testimony. The trial court ruled that the State's proposed impeachment evidence was admissible if Coleman denied that he made those statements.

After the trial court's evidentiary ruling, the State asked Coleman whether he had admitted to police that he touched PMR's breast five or six times. Coleman responded that he told officers that he hugged PMR five or six times but that he told the officers that he only inadvertently touched her breasts once. Coleman admitted that he told the officers that it was wrong to touch PMR's breasts, explaining that he had "hit her boobs pretty good" when he hugged her. RP (Jan. 26, 2011) at 165. When the State asked Coleman whether he told officers "that the reason [he] touched [PMR's] breasts was because [he was] an old man and she[ wa]s a young girl," Coleman

responded that he may have made the statement but that he was unsure. RP (Jan. 26, 2011) at 167. During defense counsel's redirect, Coleman clarified that his statement "'I'm an old man and she's a young girl'" was in response to Stull asking him whether his inadvertent touching of PMR's breasts excited Coleman. RP (Jan. 26, 2011) at 159.

The State recalled Stull and asked him if Coleman told him that "it happened approximately five or six times," to which Stull responded that Coleman said, "[I]t happened more than three." RP (Jan. 26, 2011) at 169. Stull further testified that he asked Coleman whether "this excited him," and that Coleman responded that "he was an old man and she was a young woman." RP (Jan. 26, 2011) at 170. The State also recalled Humphrey, who testified consistently with Stull.

At the close of the evidence, the trial court met with counsel in chambers to discuss the jury instructions. The jury returned verdicts finding Coleman guilty of five counts of second degree child molestation. The jury also returned special verdicts on each count, finding that Coleman used his position of trust or confidence to facilitate his crimes, and that Coleman's crimes were part of an ongoing pattern of sexual abuse of the same victim under the age of 18 manifested by multiple incidents over a prolonged period of time.

At sentencing, Coleman presented 33 letters from members of his community attesting to his truthfulness and good reputation in the community. The State presented testimony from Fryer and a statement from Rose. The State requested that the trial court impose an exceptional sentence based on the jury's finding of aggravating factors and based on Coleman's high offender score resulting in some of his offences going unpunished.[4] The trial court sentenced Coleman to

[4] Although Coleman had no previous criminal history, his offender score for each of his five second degree child molestation convictions is 12.

the high end of the standard range, 116 months, with each count to run concurrently. Coleman appeals.

ANALYSIS

I. Right To Be Present

Coleman first contends that the trial court violated his right to appear and defend in person under article I, section 22 of our state constitution and his right to be present under the Sixth and Fourteenth Amendments to the United States Constitution by failing to provide him with adequate accommodation for his hearing impairment at trial. Because the record on appeal fails to show that Coleman's right to be present during his criminal trial was violated by the trial court's alleged failure to adequately accommodate his hearing impairment, this claim fails.

Under the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment, a criminal defendant has a constitutional right to be present during all critical stages of criminal proceedings. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). Article I, section 22 of our state constitution provides that an "accused shall have the right to appear and defend in person."[5] We review allegations of constitutional violations de novo. *State v. Vance*, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010).

As an initial matter, the State argues that we should decline to address whether the trial

[5] Although our Supreme Court has indicated in other contexts that a defendant's rights under article I, section 22 are not coextensive with a defendant's rights under the Sixth Amendment, Coleman does not assert in this appeal that article I, section 22 offers greater protection of his right to be present than does the Sixth Amendment. *See, e.g., State v. Martin*, 171 Wn.2d 521, 528-33, 252 P.3d 872 (2011). Because Coleman has not asked us to consider whether article I, section 22 provides greater protections of his right to be present than does the Sixth Amendment, we interpret the protections under our state constitution and federal constitution coextensively for purposes of this appeal. *State v. Lee*, 135 Wn.2d 369, 387, 957 P.2d 741 (1998).

court violated Coleman's right to be present because Coleman raises the issue for the first time on appeal. Coleman responds that we may address his contention for the first time on review because he alleges a manifest error affecting a constitutional right. Generally, we will not review claims of error that were not presented to the trial court, but an exception exists where the claim of error constitutes a "manifest error affecting a constitutional right." RAP 2.5(a)(3).

Three tests are involved in analyzing whether an issue raised for the first time on appeal can benefit from RAP 2.5(a)(3)'s manifest constitutional error exception. *State v. Grimes*, 165 Wn. App. 172, 185, 267 P.3d 454 (2011), *petition for review filed*, No. 86869-7 (Wash. Jan. 3, 2012). First, the defendant bears the burden of showing that the alleged error was "'truly of constitutional dimension.'" *Grimes*, 165 Wn. App. at 185-86 (quoting *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). Second, the defendant must show that the alleged error was "'manifest.'" *Grimes*, 165 Wn. App. at 186 (quoting *O'Hara*, 167 Wn.2d at 98). It is not sufficient for the defendant to "simply assert that an error occurred at trial and label the error 'constitutional'; instead, he must identify an error of constitutional magnitude and show how the alleged error actually affected his rights at trial." *Grimes*, 165 Wn. App. at 186. Finally, once a defendant meets this requisite showing, the burden then shifts to the State to prove the error was harmless beyond a reasonable doubt. *Grimes*, 165 Wn. App. at 186.

The State concedes that Coleman's claimed error affects a constitutional right, but asserts that the alleged error is not manifest and thus, not reviewable for the first time on appeal because Coleman cannot show how the error affected his rights at trial. We agree with the State.

At the beginning of trial, the trial court asked Coleman about his hearing impairment, provided Coleman with a hearing assistance device, and instructed Coleman to notify it if he had

trouble hearing the proceedings. At no point during the trial did Coleman notify the trial court that he could not hear the proceedings. Then, when Coleman took the stand to testify, his counsel asked him if he had any problems hearing the proceedings. Coleman responded that he "missed quite a bit" but then his defense counsel cut him off and stated, "[B]ut I'm here listening for you." RP (Jan. 26, 2011) at 139.

Coleman did not elaborate on what parts of the trial he "missed" due to his hearing impairment when asked by his counsel at trial, and on appeal he does not indicate what portions of the trial he missed. Importantly, there is no indication in the record that he could not follow the proceedings due to his hearing impairment since he at no time notified the trial court that he was having trouble hearing. Absent this showing, we hold that Coleman fails to show a manifest error affecting the outcome of his trial and that the trial court properly addressed his hearing issue in providing a hearing assistance device and instructing Coleman to indicate to the court if he had trouble hearing the proceedings. Thus, this argument is not one that can be raised for the first time on appeal.

II. Right to a Public Trial

Coleman also contends that the trial court violated his and the public's right to an open trial by discussing jury instructions in chambers. Because the record fails to show that the trial court's in-chambers conference regarding jury instructions involved the discussion or resolution of disputed factual or legal issues, we disagree.

We review de novo whether a violation of the public trial right has occurred. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009), *cert. denied*, 131 S. Ct. 160 (2010). Our state constitution and the United States Constitution guarantee both criminal defendants and the

public the right to open and public trials. U.S. Const. amend. VI; Wash. Const. art. I, §§ 10, 22. The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall have the right to a . . . public trial." Similarly, article I, section 22 of our state constitution guarantees, "In criminal prosecutions the accused shall have the right . . . to have a . . . public trial." Additionally, article I, section 10 of our state constitution provides that "[j]ustice in all cases shall be administered openly." The public trial right is not absolute, however, and we have held that a criminal defendant does not have a right to "a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts." *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008).[6]

We recently addressed the issue of whether an in-chambers jury instructions conference violates a defendant's or the public's right to an open trial in *State v. Bennett*, ___ Wn. App. ___, 275 P.3d 1224 (2012). Although we recognized in *Bennett* that jury instruction conferences may involve "discussions beyond purely ministerial or administrative matters" because "disputed facts and evidence may be discussed in an effort to influence the trial court's choice of jury instruction" and "a trial court may be asked to rule on the effect of disputed testimony for the inclusion or exclusion of requested jury instructions," we rejected Bennett's contention that the trial court violated his right to an open trial because the trial court made a record of what occurred in the in-chambers conference that showed only ministerial or administrative actions and the record remaining was inadequate to evaluate Bennett's claim that his or the public's open trial rights

[6] On November 13, 2008, Sadler filed a petition for review of our decision in his case with our Supreme Court. On February 3, 2009, our Supreme Court first stayed consideration of his petition pending its final decisions in *Momah* and *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009). Following issuance of those opinions, on July 9, 2010, our Supreme Court again stayed Sadler's petition for review pending a final decision in *State v. Wise*, 148 Wn. App. 425, 200 P.3d 266 (2009), *review granted*, 170 Wn.2d 1009 (2010).

were abridged. *Bennett*, 275 P.3d at 1229. As we stated in *Bennett*: "In order to obtain effective review of an in-chambers conference, the parties should make an adequate record in the trial court about what transpired during the conference so we can determine whether the conference dealt with purely ministerial issues or involved discussion or resolution of disputed facts." 275 P.3d at 1229.

Here, as in *Bennett*, the record does not reflect whether the trial court's in-chambers conference regarding jury instructions involved any discussion beyond purely ministerial matters. After the State and defense rested, the trial court dismissed the jury for the evening and stated, "All right. I'll give counsel a couple of minutes to talk to people and see you back in chambers for instructions." RP (Jan. 26, 2011) at 188. The following morning, the trial court indicated on the record that an instructions conference had taken place, gave counsel sets of the jury instructions, and asked counsel if they had any objections or exceptions to the jury instructions. Neither the State nor defense counsel indicated any objections or exceptions to the trial court's jury instructions, nor did they point out any disputed factual or legal issues resolved during the in-chambers conference. Accordingly, on this record, we hold that the trial court did not violate Coleman's or the public's right to an open and public trial.

III. Sufficiency of the Evidence

Next, Coleman asserts that sufficient evidence does not support his second degree child molestation convictions because the State failed to present evidence that he touched PMR for the purpose of gratifying sexual desire. We disagree.

Sufficient evidence exists to support a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light

most favorable to the State. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). We may infer specific criminal intent of the accused from conduct that plainly indicates such intent as a matter of logical probability. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

To convict Coleman of second degree child molestation, the State had to prove beyond a reasonable doubt that Coleman had "sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.086. "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). In prosecutions for child molestation where the evidence shows that the accused touched the victim over clothing, the State is required to produce additional evidence to support a finding that the touching was done for the purpose of sexual gratification. *State v. Harstad*, 153 Wn. App. 10, 21, 218 P.3d 624 (2009); *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991).

Here, viewing the evidence in a light most favorable to the State, the State presented sufficient evidence that Coleman touched PMR for the purpose of gratifying sexual desire. In addition to the State's evidence showing that Coleman touched PMR's intimate parts over her

clothing, PMR testified that Coleman touched her intimate parts 15 to 20 times over her clothing even though she repeatedly asked him to stop touching her. This is evidence from which the jury could reasonably infer that Coleman touched PMR to gratify a sexual desire.

This case is thus distinguishable from *Powell*, where the evidence showed that on one occasion the accused made a "fleeting touch" of the alleged victim's intimate parts over her clothing and stopped touching her when the alleged victim told him to stop, and on a second occasion touched the alleged victim's thighs in a manner susceptible of an innocent explanation. 62 Wn. App. at 918.

Additionally here, PMR testified that Coleman told her, "'Even if I did ever have sex with you I couldn't get you pregnant because I've been castrated.'" RP (Jan. 26, 2011) at 45. This statement is also circumstantial evidence from which the jury could reasonably infer that Coleman touched PMR to gratify a sexual desire.[7] Accordingly, we hold that the State presented sufficient evidence to support Coleman's convictions.

IV. Ineffective Assistance of Counsel

Coleman contends that his counsel was ineffective for failing to request adequate accommodation of his hearing impairment. Coleman also contends that his counsel was ineffective for failing to oppose the State's motion in limine to exclude evidence of Coleman's good character and for failing to present evidence of Coleman's good character at trial. We disagree.

We review claims of ineffective assistance of counsel de novo. *State v. Binh Thach*, 126

[7] The State also asserts that Coleman's statement, "'I'm an old man and she's a young girl,'" is additional evidence supporting the jury finding that Coleman touched PMR for the purpose of satisfying his sexual desire. RP (Jan. 26, 2011) at 159. But this statement was admitted at trial as impeachment evidence, not as substantive evidence of Coleman's guilt.

Wn. App. 297, 319, 106 P.3d 782 (2005). To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's performance was deficient and that the deficient performance prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Performance is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334-35. Prejudice results if the outcome of the trial would have been different had defense counsel not rendered deficient performance. *McFarland*, 127 Wn.2d at 337. We strongly presume that counsel is effective and the defendant must show the absence of any legitimate strategic or tactical reason supporting defense counsel's actions. *McFarland*, 127 Wn.2d at 336.

A. Hearing Impairment Accommodation

Coleman asserts that his defense counsel was ineffective for failing to request adequate accommodation of his hearing impairment. As addressed above, the trial record fails to demonstrate that Coleman could not adequately follow the trial proceedings by using the court-provided hearing assistance device. Accordingly, Colman cannot show that his counsel's failure to request additional accommodation constituted deficient performance, nor can he show that the outcome of the trial would have been different had his counsel requested additional accommodation of his hearing impairment.

B. Character Evidence

Coleman also asserts that his counsel was ineffective for failing to oppose the State's motion to exclude evidence of his good character and for failing to present evidence of his good character at trial. We disagree. The State's motion in limine requested that the trial court order

> the Defendant, Defendant's attorney and defense witnesses not to directly or indirectly mention or attempt to convey to the jury any of the matters indicated

> below without first obtaining the permission of the Court, outside the presence and hearing of the jury . . . . [t]hat the defense be precluded from eliciting testimony regarding the defendant's lack of prior criminal history in efforts to show good, or law-abiding character.

Clerk's Papers (CP) at 55-57.

Here, the trial court's order on the State's motion in limine did not preclude defense counsel from introducing character evidence that did not convey Coleman's lack of prior criminal history, and only prohibited defense counsel from presenting evidence of Coleman's lack of prior criminal history "without first obtaining the permission of the [trial c]ourt." CP at 55. Thus, the State's motion in limine did not preclude defense counsel from presenting the character evidence at trial and Coleman's counsel was not ineffective for not opposing the motion.

Coleman appears to rely on the 33 letters of support from the community that were presented at sentencing to argue that his counsel was ineffective for not presenting evidence of his good character at trial. The outcome of Coleman's trial depended in great part on the jury's assessment of his and PMR's credibility, and the evidence of his good character contained in the 33 letters would have tended to support the jury finding his testimony credible. But the record fails to show that his counsel was aware of this character evidence at trial because the letters are dated after the trial concluded.

Even assuming that defense counsel was aware of evidence of Coleman's good character at trial, his counsel's decision not to present evidence of Coleman's good character may have been a tactical decision to prevent the State from presenting rebuttal evidence along the same line. *See State v. Fisher*, 130 Wn. App. 1, 17, 108 P.3d 1262 (2005) ("By relating a personal history supportive of good character, a defendant may be opening the door to rebuttal evidence along the

same line."). Accordingly, we hold that Coleman's counsel did not render ineffective assistance for failing to oppose the State's motion to exclude evidence of Coleman's good character and for failing to present evidence of Coleman's good character at trial.

We affirm Coleman's convictions.

V. State's Cross-Appeal

The State cross-appeals the trial court's ruling that it asserts suppressed certain pre- and post-*Miranda* statements that Coleman had made to police officers, asserting that the trial court erred by suppressing the statements because Coleman was not in custody when he made the suppressed statements to the police. But here, the order regarding the suppression motion left to the trial court the final resolution of admissibility of Coleman's statements to the officers at his home and the trial court did not expressly find that the "practical effect of the order [wa]s to terminate the case," which express finding is required before the State may appeal a suppression ruling in a criminal case. RAP 2.2(b)(2). We hold that because the ruling on the suppression motion was not final and did not effectively terminate the case, the order is not appealable and the State's claims fail.

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.

We concur:

Quinn-Brintnall, J.

Penoyar, J.