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

STATE OF WASHINGTON,	)	No. 61424-0-I
Appellant,	)	
v.	)	UNPUBLISHED OPINION
DARKIM ROWE,	)	
Respondent.	)	
	)	FILED: October 26, 2009

Schindler, C.J. — A jury convicted Darkim Rowe of one count of rape of a child in the first degree of 11-year-old D.W. The defense theory at trial was that the rape did not occur, and D.W. lied to avoid getting in trouble with her mother. On cross examination, Rowe's attorney elicited testimony from D.W.'s mother that she would be angry if D.W. lied to her about what occurred with Rowe. On redirect, D.W.'s mother said D.W. was candid and did not lie. For the first time on appeal, Rowe argues that the mother's improper opinion testimony is manifest constitutional error that requires reversal. In the alternative, Rowe argues that his attorney provided ineffective assistance of counsel by failing to object to the mother's testimony on redirect. Because Rowe's attorney opened the door to the mother's testimony on redirect and there was a legitimate strategic reason for not objecting to the mother's testimony, we

reject Rowe's arguments. We also reject Rowe's claim that the King County Local General Rule that allows the jury venire to be drawn from a jury assignment area instead of King County as a whole, violates Article I, Section 22 of the Washington State Constitution. In State v. Lanciloti, 165 Wn.2d 661, 663, 201 P.3d 323 (2009), the Washington Supreme Court recently considered and rejected this argument. However, because the sexual deviancy evaluation condition in the judgment and sentence requires correction, we remand. In all other respects, we affirm.

FACTS

In 2006, Lamont Rowe moved in with Codi Hart and her four daughters, C.W., age 16, C.W., age 13, D.W., age 11, and S.W., age 6. Lamont Rowe's 18-year-old son Darkim Rowe (Rowe) lived with Lamont Hart and her daughters for about four months. Thereafter, Rowe moved into an apartment in the same neighborhood with his girlfriend Camille Sattelberg.

Hart's daughters spent time with Rowe and Camille at the apartment. D.W. and S.W. were closest to Rowe and Camille and occasionally stayed overnight. When the girls visited Rowe and Camille, they played computer games and watched television with Rowe.

D.W. spent the night at the apartment on July 31, 2006. D.W. said that when she and Rowe were "play fighting" in the bedroom, Rowe pulled D.W.'s underwear to one side and took a picture with the camera on his phone.

Around midnight, D.W. went into Rowe and Camille's bedroom to sleep. Camille was already in the bedroom, asleep on the floor. D.W. lay down on the floor

next to Camille. D.W. was on her side with her legs pulled up when Rowe came into the bedroom. D.W. said that Rowe lay down next to her and spread her legs apart with his leg. Rowe then put his fingers in D.W.'s vagina and moved them in and out. D.W. said she did not know what to do, so she pretended to be asleep. In the morning, D.W. left and went back home.

About a week later, D.W. told her best friend what had happened. D.W.'s friend urged her to tell her mother and her sisters. Sometime around August 18, D.W. wrote a note to her sister C.W. about what had happened. C.W. showed her other sister the note. They both told D.W. that she should tell their mother. D.W. insisted on waiting until Hart returned from her planned trip with Lamont to Mexico. D.W. said that she did not want to ruin her mother's vacation.

Although Rowe usually stayed with the girls when Hart went out of town, the girls said they did not want Rowe to stay with them and asked their mother if Rowe's aunt could stay with them instead. Hart and Lamont left on August 22 and returned from Mexico on the 27th.

Because C.W. lost the first note, D.W. wrote a second note to give to Hart. On September 1, C.W. gave the note to Hart. After Hart read the note describing what had happened, Hart took D.W. to the Harborview emergency room.

D.W. met separately with a doctor and a social worker. D.W. told the doctor that on the evening of July 31, Rowe pulled her underwear to the side and took a picture with his camera phone. D.W. also told the doctor that she was sleeping on the floor in Rowe's bedroom when he came in, separated her legs, and "put his fingers in

me" for what "seemed like a long time." D.W. said that Rowe had touched her before by "touching her butt when he hugged her." D.W. told the doctor she had flashbacks and nightmares. D.W.'s account to the social worker was the same except that she also told the social worker that when Rowe put his fingers in her vagina, "it hurt very badly."

The State charged Rowe with one count of rape of a child in the first degree. The defense theory at trial was that D.W. was not credible. The State called D.W.'s sisters, Hart, the doctor and social worker, D.W., Camille, Rowe's cousin J.L., and the detective who arrested Rowe to testify at trial. D.W.'s sisters testified about their relationship with Rowe, and how D.W. told them what had happened.

Hart testified that she first learned about what had happened by reading D.W.'s note. On direct examination, the State did not ask Hart any questions that touched on D.W.'s credibility. Rowe's attorney raised the issue of D.W.'s credibility on cross examination. In a series of questions, Rowe's attorney asked Hart whether she would be upset if D.W. lied to her about what had happened with Rowe. Hart asked Rowe's attorney repeatedly to repeat or rephrase the questions and said the questions were confusing. The State objected two different times to the attorney's questions, but the court overruled the objections, stating "I am going to allow it for a while." Eventually, Rowe's attorney elicited testimony from Hart that she would be angry with D.W. if D.W. lied about what happened with Rowe.

Q: But if it didn't really happen, you would not be upset?
A: Can you repeat that or rephrase that?
Q: If it didn't really happen, you would not be upset?
A: Well, that's not even a relevant question to me.

Q: Why not?
A: If it didn't? It doesn't make sense to me.
. . .
Q: If what [D.W.] wrote in that note was not true, would you be upset?
. . .
A: Can you repeat it or rephrase it differently?
Q: Would you be upset if what [D.W.] wrote in that note?
A: Yes, I think I would. I know I would. If she lied, then yeah, definitely, I would be very upset.
Q: You would be upset, would you feel like throwing up?
A: No. I would feel like getting mad at her punishing her somehow for trying to disrupt the home with a lie.

On redirect, the prosecutor sought to clarify why Hart said the questions on cross examination were confusing. Hart responded that she was confused by the questions because she knew that D.W. did not lie.

Q: And with regard to the last few questions was asking you, [sic], I believe he asked you if you would have been mad if you would have found out that [D.W.] hadn't told the truth. Does that sound about like what he asked you?
A: Right.
Q: You said that question didn't make sense, right?
A: Yes (inaudible).
Q: What was it about that question that confused you when he asked you that question?
A: I knew [D.W.] didn't lie, so it was like a non question to me. But I had to think about it to give an answer it [sic] did make sense.
Q: And you indicated you knew that she didn't lie. How did you know that, I mean, you weren't there.
A: Um, once the jury and everybody meets [D.W.], she's a real soft spoken, mild mannered, sensitive, vulnerable person and she just -- that's not her personal. My girls are not like that, period, but especially [D.W.]. She's you know, one of the few that's just real candid and, um, what you see is what you get. She just has never been known to lie about anything.

Rowe's attorney did not object to Hart's testimony.

On recross, Rowe's attorney elicited further testimony from Hart about D.W.'s

credibility. Although Hart said that she can tell when D.W. is upset, she testified that there was absolutely no indication that anything was wrong before she went on vacation to Mexico.

> Q: Codi, what I just heard you say is that you don't believe your daughter [D.W.] lies
> A: Correct.
> Q: And that she's open; is that correct, is that the word you used?
> A: There are times when she is open and there's times when she is with drawn [sic] and I have to pry things out of her to try to get something . . . .
> Q: She's real candid?
> A: . . . . I would say she's, um, I mean, you can see she's the type of person when she is feeling a certain way you can kind of tell.
> Q: What you see is what you get?
> A: When she's angry, you sure do know it. I do, as her mother.
> Q: If you were concerned about [D.W.], would you have gone to Mexico?
> A: Oh no. Not at all.
> . . .
> Q: And when you read the note, you learned that D.W. had said something happened on the end of July?
> A: July 31.
> Q: And until then, you had no indications from D.W. something happened?
> A: No.

Hart testified that until she read the note, she was unaware that anything had happened. Hart said that if she had been concerned about D.W., she would not have gone to Mexico.

During her testimony at trial, D.W. described what occurred on July 31. D.W. also said that there were other times when Rowe gave her a hug and "he'd touch my butt."

Camille testified that she was close to D.W. and S.W. and they frequently came over to the apartment. Camille said that on the night of July 31, when she went into the bedroom, D.W. was already there, asleep on the floor. Camille testified that Rowe came into the bedroom about an hour later, and Camille fell asleep about half an hour after Rowe came in. Camille said that she woke up at 7:00 a.m., when D.W. was leaving the room. The detective who investigated the case testified that when she spoke to Rowe, Rowe denied D.W.'s allegations. But in response to questions about "who he thought could have done this, he told me that maybe his girlfriend, Camille did it."

Rowe's 13-year-old brother E.R. testified for the defense about the night D.W. spent at Rowe's apartment. E.R. said that he also stayed at the apartment that night. E.R. testified that he did not notice any change in D.W. from the beginning of the summer to the end of the summer, and that D.W. did not seem to be afraid of Rowe. Rowe did not testify at trial.

In closing, the State made no reference to Hart's testimony that D.W. did not lie. Rowe's attorney argued that D.W. did not want to tell Hart about what allegedly occurred because the rape did not happen. The defense argued that D.W. did not tell the truth when she wrote the notes to her sisters. Rowe's attorney also emphasized that according to Hart's testimony, if Hart had known what happened, she would not have gone to Mexico. Rowe's attorney argued that D.W.'s behavior changed after Hart's trip, not before.

The defense also asserted that because D.W.'s friend and sisters were

pressuring her to tell her mother, she had to maintain her story, and she knew her mother would punish her if she found out that she lied about what happened. The defense also suggested that D.W. was asleep and could have dreamed about what she occurred, or she was coached.

The jury found Rowe guilty of rape of a child in the first degree. Rowe filed a motion to set aside the verdict and for a new trial, arguing that the composition of the jury violated his constitutional rights because the jury venire was not drawn from the entire county. The court denied Rowe's motion and sentenced Rowe to an indeterminate sentence of 100 months to life.

ANALYSIS

Opinion Testimony

For the first time on appeal, Rowe asserts that the mother's improper opinion testimony regarding D.W.'s credibility constitutes manifest constitutional error that requires reversal. The admission of opinion testimony may be manifest error affecting a constitutional right that a defendant can raise for the first time on appeal. State v. Saunders, 120 Wn. App. 800, 811, 86 P.3d 232 (2004); RAP 2.5(a)(3). However, the exception under RAP 2.5(a)(3) for manifest constitutional error is a "'narrow one.'" State v. Kirkman, 159 Wn.2d 918, 934, 155 P.3d 125 (2007). To establish manifest constitutional error, the defendant must establish actual prejudice. In determining whether a claimed error is manifest, we view the claimed error in the context of the record as a whole, rather than in isolation. A manifest error is "unmistakable, evident or indisputable." State v. Burke, 163 Wn.2d 204, 224, 181 P.3d 1 (2008) (quoting

State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

As a general rule, it is improper for a witness to testify to a personal belief as to the credibility of a witness. Asking a witness to express an opinion as to whether another witness is lying invades the province of the jury.[1] State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74 (1991). Consequently, a mother's opinion testimony about her child's credibility in a rape case is inadmissible. State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996). While the State appears to concede that Hart's testimony was error of a constitutional magnitude, to the extent the State concedes error, we reject the State's concession.

Under the well established "open door" doctrine, the trial court has the discretion to admit otherwise inadmissible evidence when the opposing party raises a material issue. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). "[O]nce a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence elicited on cross examination." Berg, 147 Wn. App. at 939. The supreme court explained the rationale for the opening the door doctrine in State v. Gefeller, 76 Wn.2d 449, 458 P.2d 17 (1969).

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

[1] "The role of the jury is to be held 'inviolate' under Washington's constitution. The right to have factual questions decided by the jury is crucial to the right to trial by jury." Montgomery, 163 Wn.2d at 590 (citing U.S. Const. amend. VII; Wash. Const. art. I, §§ 21, 22).

> but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Gefeller, 76 Wn.2d at 455.

Thus, a party may open the door during the questioning of a witness to otherwise inadmissible evidence. State v. Korum, 157 Wn.2d 614, 646, 141 P.3d 13 (2006). Moreover, "[u]nder the invited error doctrine, a party may not set up error at trial and then complain about the error on appeal." State v. Korum, 157 Wn.2d at 646.[2]

Here, the mother's testimony that Rowe asserts constitutes constitutional manifest error, was in response to a series of confusing questions by Rowe's attorney in support of the defense theory that D.W. was not credible and her mother would be angry with her if she lied about what happened with Rowe. On redirect, the prosecutor asked Hart why she told the defense attorney that the questions he was asking were not relevant and didn't make sense. In response, Hart said "I knew [D.W.] didn't lie, so it was a non question to me. But I had to think about it to give an answer it [sic] did make sense." The prosecutor then asked "And you indicated you

[2] In his statement of additional authorities, Rowe appears to rely on State v. Jones, 144 Wn. App. 284, 183 P.3d 307 (2008) to draw a distinction between the open door doctrine and invited error. However, Jones is inapposite because it addresses prosecutorial misconduct, which neither party raises here. In addition, our supreme court does not appear to draw such a this bright line distinction. See, e.g., State v. Korum, 157 Wn.2d at 646; State v. Recuenco, 154 Wn.2d 156, 163, 110 P.3d 188 (2005) ("The invited error doctrine prevents parties from benefiting from an error they caused at trial regardless of whether it was done intentionally or unintentionally.") reversed on other grounds in Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006); State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996) ("The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal" (internal quotes omitted)).

knew that she didn't lie. How do you know that, I mean, you weren't there." Hart said that D.W. was candid and "has never been known to lie about anything." Because Rowe's attorney opened the door to this testimony, the mother's otherwise improper testimony was admissible. On redirect, the State was permitted to explain, clarify, or contradict the evidence elicited by the defense on cross examination. Berg, 147 Wn. App. at 939.

Rowe relies on Jerrels, 83 Wn. App. at 503, and Saunders, 120 Wn. App. at 800, to argue that the testimony was reversible constitutional error. Because the defense in those cases did not open the door to otherwise inadmissible opinion, Jerrels and Saunders are distinguishable. In Jerrels, the prosecutor asked the victims' mother three times whether she believed her children were telling the truth. Jerrels, 83 Wn. App. at 506-507. Because the questions were highly prejudicial and the effect was cumulative, we held that the prosecutor committed misconduct and reversed. Jerrels, 83 Wn. App. at 508. And in Saunders, although the police officer stated that Saunders's answers to questions weren't always truthful, the court concluded that there was overwhelming untainted evidence that Saunders was guilty of murder, rape, robbery, and kidnapping. Saunders, 120 Wn. App. at 813.

In sum, because Rowe's attorney opened the door to Hart's testimony about her daughter's credibility, Rowe cannot establish manifest constitutional error.

Ineffective Assistance of Counsel

As an alternative ground for reversal, Rowe asserts that his attorney provided ineffective assistance of counsel by failing to object to Hart's testimony. To establish

ineffective assistance of counsel, Rowe must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); In re Detention of T.A.H.-L., 123 Wn. App. 172, 97 P.3d 767 (2004). Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). If a defendant fails to satisfy either part of the test, we need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

There is a strong presumption that counsel's representation was effective, and courts should avoid the distorting effects of hindsight. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); In re Pers. Restraint of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). An attorney's performance is not deficient if it can be characterized as legitimate trial strategy or tactics. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). "The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

Because questioning Hart regarding D.W.'s credibility can be characterized as a strategic and tactical decision, Rowe's attorney did not err in failing to object to Hart's testimony on redirect. The primary defense theory was that D.W. was not credible and she lied about what had happened with Rowe to avoid getting in trouble with her mother. Rowe's attorney asked Hart questions about D.W.'s credibility to emphasize that Hart believed she knew when her daughter was lying, and did not

observe any change in D.W.'s behavior before her trip to Mexico. The attorney also elicited testimony from Hart and Rowe's brother E.R. that D.W.'s behavior did not change after spending the night at Rowe's apartment. Rowe's attorney used Hart's testimony on redirect to his advantage by highlighting the fact that Hart "had no indications from D.W. something had happened" until after she returned from Mexico. The attorney's decision to not object to Hart's testimony on redirect can be characterized as a legitimate trial strategy. We conclude that Rowe did not receive ineffective assistance of counsel.

Jury Venire

Rowe asserts that because the Washington Constitution guarantees "[i]n all criminal prosecutions, the accused shall have the right . . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed," the jury venire drawn from the South Jury Assignment Area violates his rights under art. I, § 22 of the Washington Constitution.

The Washington Supreme Court recently considered and rejected this same argument in Lanciloti, 165 Wn.2d at 663. RCW 2.36.055 and King County Local General Rule 18 allow King County to divide the jury source list "into jury assignment areas that consist of registered voters and licensed drivers and identicard holders residing in each jury assignment area." Lanciloti, 165 Wn.2d at 667. In Lanciloti, the court held that "the legislature was within its power to authorize counties with two superior courthouses to divide themselves into two districts." Lanciloti, 165 Wn.2d at 671.

Community Custody Condition

Rowe asserts that we should remand to correct the sexual deviancy evaluation condition of community custody in the judgment and sentence. In its oral ruling, the court stated that Rowe must obtain a sexual deviancy evaluation 30 days after release and participate in any recommended treatment but only if he is found amenable to treatment. However, the judgment and sentence states that Rowe must "get sex offender deviancy evaluation w/in 30 days of release by state certified treatment provider = only if found amenable to treatment." The State concedes the judgment and sentence misstates the court's oral decision and we should remand to correct the community custody condition. We accept the State's concession.

We remand to correct the sexual deviancy evaluation condition in the judgment and sentence. In all other respects, we affirm.

Schindler, C.J.

WE CONCUR:

Dwyer, A.C.J.

Ajid, J.