IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. EZEQUIEL APOLO-ALBINO, Appellant.	)))))))))))	No. 65147-1-I DIVISION ONE UNPUBLISHED FILED: July 25, 2011

Cox, J. — A person who is convicted of a crime and claims ineffective assistance of counsel must show that his or her counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the claimant's right to a fair trial.[1] The absence of a showing of either of these factors is fatal to the claim.[2] Here, Ezequiel Apolo-Albino fails in his burden to establish one or both of these factors for each of his claims of

[1] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[2] Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007 (2007).

ineffective assistance of counsel. Moreover, his claims of cumulative error are unpersuasive. We affirm.

The Department of Health and Human Services (DSHS) removed seven-year-old B.G. and nine-year-old D.G. from their biological mother's home due to neglect. B.G. was placed with foster parent Sarah Anderson and D.G. was placed with foster parent Sharon Cormier.

Their biological father, Apolo,[3] received visitation rights. Visitations initially occurred at Cormier's home but were later moved to a local school where Cormier taught Taekwondo classes. Apolo did not have a driver's license, so his daughter, Maria Juarez, took him to each visitation.

D.G. and B.G. separately disclosed to Anderson and Cormier that Apolo molested them, and Cormier notified child protective services. The State charged Apolo with two counts of first degree child molestation.

At trial, the State presented evidence that Apolo molested both girls during the Taekwondo visitations. The State's witnesses included both victims, both foster parents, a child interview specialist with the King County Prosecutor's office, a DSHS social worker, and a police officer. The court also admitted a videotaped interview of B.G. by the child interview specialist.

Apolo's attorney, Micheal Danko, presented testimony by Juarez that no abuse occurred. Apolo also testified in his own defense, denying any inappropriate behavior. A jury convicted Apolo on both counts.

[3] We adopt the naming convention used by the appellant.

Apolo moved for a continuance and asked the court to appoint him new counsel based on an irreconcilable breakdown in communications with Danko. The court permitted Danko to withdraw and appointed substitute counsel. Substitute counsel moved for a new trial, arguing that substantial justice was not done because Danko was ineffective for various reasons. The court denied the motion and imposed an indeterminate concurrent sentence of 89 months to life on each count.

Apolo appeals.

INEFFECTIVE ASSISTANCE OF COUNSEL

Apolo argues that he was denied effective assistance of counsel. We disagree.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial.[4] The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[5] To show prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the outcome at

[4] Strickland, 466 U.S. at 687; McFarland, 127 Wn.2d at 334-35.

[5] McFarland, 127 Wn.2d at 336.

trial would have been different.[6] If one of the two prongs of the test is absent, we need not inquire further.[7]

Ineffective assistance of counsel is "a mixed question of law and fact."[8] "Because claims of ineffective assistance of counsel present mixed questions of law and fact, we review them de novo."[9] But, we review claims of ineffective assistance of counsel addressed by the trial court in a motion for a new trial for an abuse of discretion.[10] A decision is an abuse of discretion if it is outside the range of acceptable choices given the facts and the applicable legal standard.[11]

Apolo alleges eight instances of ineffective assistance of counsel and we address each, in turn, below. None of them rise to the level of ineffective assistance, and the trial court did not abuse its discretion in denying Apolo's motion for a new trial on this basis.

Impeachment Testimony

Apolo contends that he was denied effective assistance of counsel

---

[6] In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

[7] Strickland, 466 U.S. at 697; Foster, 140 Wn. App. at 273.

[8] Strickland, 466 U.S. at 698.

[9] In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

[10] State v. Dawkins, 71 Wn. App. 902, 907, 863 P.2d 124 (1993) (citing State v. Blight, 150 Wash. 475, 478, 273 P. 751 (1929)).

[11] In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citing State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

because Danko's failure to understand the procedure for impeachment under Evidence Rule (ER) 613(b) fell below an objective standard of reasonableness. He argues that this deficient performance was prejudicial because he was unable to impeach the trial testimony of B.G. and D.G. We agree that Apolo has established that Danko's performance was deficient. But the failure to establish that Danko's deficient performance was prejudicial is fatal to the ineffective assistance of counsel claim.

To impeach a witness with a prior inconsistent statement under ER 613(b), the witness must be given an opportunity to admit or deny the statement and to explain it.[12] If the witness is not asked about the statement during direct or cross-examination, impeachment may still be accomplished at a later point so long as arrangements are made for the witness to be recalled.[13]

Here, Danko wanted to impeach the testimony of B.G. and D.G. with testimony from defense investigator Leigh Hearon. Hearon interviewed both girls before trial and was prepared to testify that there were inconsistencies in what they told her and what they originally told the State. She apparently provided a summary of these alleged inconsistencies to Danko in a chart. During the State's case at trial, Danko decided not to cross-examine the girls.

---

[12] ER 613(b) states: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require."

[13] State v. Horton, 116 Wn. App. 909, 915-16, 68 P.3d 1145 (2003) (quoting Roger C. Park, et al., Evidence Law 536-37 (1998)).

Likewise, he did not reserve the right to recall them later.

After the State rested, the prosecutor told the court that he would object to any testimony by Hearon that was outside the scope of B.G.'s and D.G.'s trial testimony. In response, Danko argued that the jury was entitled to hear about the girls' inconsistent statements because they went to issues of credibility and consistency. He stated that he made the tactical choice not to cross-examine the girls because he did not want to appear to attack them before the jury.

The court held that Hearon could testify, but only as to statements made to her by B.G. and D.G. that were inconsistent with testimony the jury actually heard from them. After this ruling, Danko excused Hearon, and she never testified about the interviews with these complaining witnesses.

Apolo has demonstrated deficient performance by Danko. The record indicates that Danko failed to understand and properly apply ER 613(b). Whether it was a legitimate trial strategy to decide not to examine the girls is distinct from whether Danko provided deficient performance by failing to understand and apply ER 613(b). Although there was a strategic reason for not cross-examining the girls, his belief that the court would admit evidence of their alleged inconsistent statements without complying with ER 613(b) was not a legitimate trial strategy. Thus, the question is whether this deficient performance was sufficiently prejudicial to have affected the outcome of the trial.

Apolo fails to demonstrate that the trial's outcome would have been different had Danko understood and properly applied ER 613(b). We note that

the evidence in support of the State's case came from the complaining witnesses, their respective care givers, a child interview specialist, and others. We also note that Apolo does not challenge the sufficiency of this evidence to convict. Indeed, the evidence is overwhelming in support of these convictions.

We also note that this record contains no description of the alleged inconsistencies that Hearon identified. While that failure may be attributed to Danko's failure to make a record below, the nature of the alleged inconsistencies is critical in determining what effect the impeachment evidence would have had on the trial. In sum, Apolo has failed to bear his burden to show that Danko's deficient performance in this respect prejudicially affected his right to a fair trial.

Apolo argues that Danko's failure to impeach B.G. and D.G. forced him to testify. Before the trial court limited Hearon's testimony, Apolo was not going to take the stand. But after Danko excused Hearon, Apolo decided to testify.

Under the Fifth Amendment privilege against self-incrimination, a defendant has a constitutional right not to testify.[14] "Only the defendant has the authority to decide whether or not to testify."[15] Nevertheless, Apolo's decision to testify does not, on this record, show prejudice to his right to a fair trial. Significantly, he fails to cite any persuasive case authority to support this novel theory. Accordingly, we reject this prejudice argument as unpersuasive. There is no showing of ineffective assistance of counsel on this basis.

---

[14] U.S. Const. amend. V.

[15] State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999) (citing State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996)).

Failure to Investigate

Apolo argues that Danko was ineffective because he failed to investigate whether B.G. and D.G. were biased. We disagree.

Defense counsel has a duty to conduct a reasonable investigation.[16] The defendant alleging ineffective assistance of counsel must show the absence of legitimate strategic or tactical reasons supporting counsel's conduct.[17] A particular decision not to investigate must be assessed for reasonableness, giving deference to defense counsel's judgment.[18]

Here, Al Kitching, Apolo's counsel in his termination of parental rights proceeding, e-mailed Danko approximately two weeks before trial was set to begin. In the e-mail, Kitching explained that "an older brother and sister of the alleged victims have stated, upon hearing of the allegations underlying your case, that they thought their sisters/alleged victims were 'lying.'" The e-mail does not further explain why B.G. and D.G. may have been lying. In any event, Danko did not contact Kitching for more information. In a declaration supporting the motion for new trial, Kitching elaborated:

> [I]t appeared from the discovery I reviewed in the termination of parental rights cases that the timing of the allegations of molestation coincided with the alleged victims expressed preference to be placed with/adopted by an "Uncle Jeff," who the older alleged victim said she "loved" and who she believed "loved"

[16] In re Pers. Restraint of Elmore, 162 Wn.2d 236, 252, 172 P.3d 335 (2007) (citing Strickland, 466 U.S. at 691).

[17] Id. (citing In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002)).

[18] Id. (citing Strickland, 466 U.S. at 691).

> her. The timing was particularly suspect because it was also clear from this discovery that these girls felt that the defendant was too old, too strict and whom they referred to derogatorily [as] "grandpa."[19]

On appeal, Apolo argues that this information could have been used to impeach the testimony of B.G. and D.G. and also to object to the admission of B.G.'s child hearsay testimony.

Danko's decision not to investigate this information fails to show deficient performance. Danko's theory of the case was, in fact, that the girls were mistaken and that Apolo did not molest either of them. In order to support that theory, Danko presented the testimony of Apolo and Juarez denying the abuse. Both were present at the Taekwondo classes where the abuse occurred. There is no evidence in the record that the unidentified brother or sister to whom Kitching refers attended any of the Taekwondo classes. Thus, neither could have had any personal knowledge about the claims. It is a reasonable trial tactic to rely on witnesses with personal knowledge to refute the allegations of abuse rather than speculative testimony from those without personal knowledge. Moreover, any opinion testimony that the child victims were "lying" would have been inadmissible because that would have invaded the province of the jury.[20]

Finally, characterizing the claim as a failure of counsel to show bias that the girls wanted to be adopted, rather than just a failure to investigate whether

---

[19] Clerk's Papers at 54.

[20] State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74 (1991) ("Unquestionably, to ask a witness to express an opinion as to whether or not another witness is lying does invade the province of the jury.").

they were "lying," adds little to Apolo's deficient performance argument. When D.G. and B.G. disclosed Apolo's abuse, they were living with their respective foster mothers. Although they both lived in pre-adopted foster care with Jeff Ivy during trial, nothing in the record suggests that B.G. and D.G. even knew Ivy when they made the allegations. Therefore, Apolo's argument that the girls were biased because they wanted to be adopted by Ivy is not persuasive.

Apolo argues that State v. Jury,[21] State v. Byrd,[22] Blackburn v. Foltz,[23] and Towns v. Smith[24] require reversal. They do not.

In each of those cases, the court held that defense counsel's failure to investigate and interview a critical witness denied the defendant his right to effective assistance of counsel.[25] Here, the brother and sister are not critical witnesses because they had no personal knowledge of the alleged abuse and could not have testified that the children were lying. Therefore, these cases are

[21] 19 Wn. App. 256, 576 P.2d 1302 (1978).

[22] 30 Wn. App. 794, 638 P.2d 601 (1981).

[23] 828 F.2d 1177 (6th Cir. 1987).

[24] 395 F.3d 251 (6th Cir. 2005).

[25] Jury, 19 Wn. App. at 260 (defense counsel failed to interview one of two witnesses at the scene of the crime and failed to secure either witness's attendance at trial); Byrd, 30 Wn. App. at 799 (defense counsel failed to contact a witness provided by the defendant whose testimony would have directly contradicted the prosecuting witness's claim that she did not consent to sexual intercourse with the defendant); Blackburn, 828 F.2d at 1182-83 (defense counsel failed to investigate three potential alibi witnesses identified by the defendant); Towns, 395 F.3d at 253, 259 (defense counsel failed to interview or call as a witness a man that was found in possession of the gun used in the crime for which the defendant was convicted).

not persuasive.

Failure to Object to Hearsay Testimony

Apolo argues that Danko's failure to object to hearsay testimony denied him effective assistance of counsel. We disagree.

Deciding whether and when to object to the admission of evidence is "a classic example of trial tactics."[26] Only in egregious cases, where the evidence is central to the State's case, will the failure to object constitute deficient performance under this standard.[27]

Here, Anderson testified that she could not attend one of Apolo's visits with the children, so her husband supervised it instead. She explained that afterward, he told her that "Apolo had actually picked up the chair [that he was sitting on], turned it around so that his back was to [her husband], and then had the kids come and sit on his lap."[28] Anderson stated that she became concerned about the children's interaction with Apolo, even though she admitted he could have just felt uncomfortable being watched. Danko did not object.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.[29] Assuming that Anderson's testimony regarding her husband's statement to her was hearsay, Danko may have chosen not to object in order to

---

[26] State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

[27] Id.

[28] Report of Proceedings (Oct. 14, 2009) at 85.

[29] ER 801(c).

avoid focusing attention on the statement. This is a reasonable trial tactic, not deficient performance.

Apolo argues that he was prejudiced because the statement indicated that he engaged in "highly suspicious behavior" and it was the only corroboration of the girls' claims of abuse. This argument is not persuasive.

The jury considered substantial evidence of Apolo's guilt, including B.G. and D.G.'s testimony that he touched them in their private parts. Anderson and Cormier also testified that both girls disclosed the abuse to them. Additionally, Anderson testified that during Taekwondo practice she heard D.G. scream "No" at Apolo and saw D.G. swat his hand away. D.G. told Anderson that Apolo tried to put his arms around her waist and she felt trapped. There was also testimony from the child interview specialist to corroborate the abuse. Given the overwhelming evidence in support of his convictions, Apolo cannot show prejudice.

Failure to Object to Testimony Outside of the "Fact of the Complaint" Hearsay Exception

Apolo argues that he was denied effective assistance of counsel because Danko failed to object to testimony about D.G.'s allegations of abuse that fall outside of the "fact of the complaint" exception to the hearsay rule. We disagree.

In sex offense cases, the "fact of the complaint" hearsay exception allows the State to present evidence that the victim complained to someone after the assault.[30] But, evidence of the details of the complaint, including the identity of

the offender and specifics of the act, is not admissible.[31]

Here, Anderson testified that D.G. disclosed the abuse to her:

> And [D.G.] said at that time that when she would go to the visits with Apolo, that he would force her to sit on his lap, and that he would rub her back and that he would also touch her on her breasts and in her vaginal area.[32]

Anderson's testimony improperly included Apolo's identity and the specific acts that he performed.[33] Assuming, without deciding, that this information was not admissible, Danko may have decided not to object in order to avoid focusing attention on the statement. This is a reasonable trial tactic.[34]

Apolo does not argue that the testimony prejudiced him. In view of the overwhelming evidence in support of the convictions that we already discussed, that would have been a difficult argument to make. Rather, he argues that Anderson's testimony was more detailed than D.G.'s trial testimony and that it improperly bolstered D.G.'s credibility, but he admits that its exclusion likely would not have changed the trial's outcome. Therefore, Apolo also fails to show prejudice.

---

[30] State v. Alexander, 64 Wn. App. 147, 151, 822 P.2d 1250 (1992) (citing State v. Ferguson, 100 Wn.2d 131, 135, 667 P.2d 68 (1983); State v. Murley, 35 Wn.2d 233, 237, 212 P.2d 801 (1949)).

[31] Id. (citing Ferguson, 100 Wn.2d at 135-36).

[32] Report of Proceedings (Oct. 14, 2009) at 103-04.

[33] The State concedes that Anderson's statement that Apolo was the offender should not have been admitted.

[34] Madison, 53 Wn. App. at 763.

Failure to Object to Opinion Testimony

Apolo argues that Danko was ineffective in failing to object to improper opinion testimony. We disagree.

The general rule is that witnesses are to state facts, and not to express inferences or opinions.[35] It is improper for a witness to testify about the guilt or innocence of the defendant or about the credibility of another witness.[36] Such opinion testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury.[37]

Here, Anderson testified that she and Cormier changed the location of Apolo's visits from Cormier's home to Taekwondo practice. She explained that Apolo often arrived at Cormier's home early and sat outside the house waiting for the kids. Anderson stated that it "was kind of creepy" so they moved the visits to a place "where there would be more people around." Danko did not object.

Anderson's opinion that Apolo was "creepy" is not inadmissible opinion testimony because it is not a comment on the defendant's guilt or another witness's credibility. Thus, it is unlikely the court would have sustained an objection even if one had been made on this basis. Additionally, Danko may

---

[35] Id. at 760 (citing State v. Dukich, 131 Wash. 50, 228 P. 1019 (1924)).

[36] State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992); State v. Sutherby, 138 Wn. App. 609, 617, 158 P.3d 91 (2007) (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

[37] Sutherby, 138 Wn. App. at 617 (citing Demery, 144 Wn.2d at 759).

have chosen not to object in order to avoid focusing attention on the statement. This is a reasonable trial tactic, not deficient performance.

But, even if Danko's conduct was somehow unreasonable, Apolo does not argue that the trial would have turned out differently had the statement been excluded. Given the evidence presented by the State, it is unlikely that its exclusion would have affected the proceeding. Therefore, Apolo does not meet his burden to show prejudice.

Failure to Move for a Mistrial

Apolo argues that Danko's failure to move for a mistrial after the jury heard uncharged allegations that he abused another child denied him effective assistance of counsel. We disagree.

ER 404(b) prohibits a court from admitting evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity with that character.[38]

Here, the State presented a video interview between B.G. and Carolyn Webster, the child interview specialist, in which B.G. describes how Apolo abused her. In the transcript of the video, B.G. tells Webster that Apolo also touched D.G. and her younger sister. When Webster asked B.G. how she knew that Apolo touched the younger sister, B.G. stated that she heard her sister screaming so she knew that "he's doing that." Webster clarified if B.G. actually

[38] State v. Foxhoven, 161 Wn.2d 168, 174-75, 163 P.3d 786 (2007).

saw the abuse:

> Carolyn Webster: . . . Now have you ever seen dad do that to [your younger sister] or you just know because she's screaming or . . .
>
> [B.G.]: I know that she's screaming.[39]

After the jury was excused, the trial court was concerned about B.G.'s uncharged allegations that Apolo also abused her younger sister. The trial court asked both attorneys whether it would be appropriate to offer a curative instruction. Danko stated that he would consider the issue.

The next day, the court again asked Danko if he wanted a curative instruction and Danko asked for more time to consider the issue. The court agreed to ask Danko later in the day. At the end of the day, the court asked Danko if he intended to propose a curative instruction. Danko replied that he had been focused on other things, but would let the court know in the morning.

The next morning, Danko provided an instruction to the court. He explained why he did not ask for it immediately after the video was played:

> Obviously, I didn't raise it immediately, and my reason for not raising it immediately was to call undue attention to it.[40]

The trial court then gave an oral curative instruction to the jury:

> The Jury may recall that during the video interview between Carolyn Webster and [B.G.], [B.G.] made reference to possible touching by the Defendant of her little sister . . . .
>
> You are instructed that you are not to consider any testimony or reference to alleged abuse of any other child. You

[39] Ex. 7 at 24.

[40] Report of Proceedings (Oct. 22, 2009) at 8.

> should consider only the allegations of abuse of [B.G.] and [D.G.].[41]

The video was played again for the jury during deliberations. It does not appear that the curative instruction was repeated.

As described by Danko, his decision not to immediately ask for a curative instruction was a tactical decision not to call attention to the statement. But, Apolo does not challenge Danko's failure to object or immediately request a limiting instruction—he challenges Danko's failure to move for a mistrial.

Danko's decision did not fall below an objective level of reasonableness for two reasons. First, as described below, it is unlikely that the court would have granted a mistrial. And second, Danko's decision not to move for a mistrial would have been a reasonable trial tactic if he did not want to call undue attention to the statement in the event the court denied the motion.

Furthermore, Apolo cannot show prejudice because he cannot show that the court would have granted the motion. In considering whether to grant a new trial, the court must consider (1) the seriousness of the trial irregularity, (2) whether it involved cumulative evidence, and (3) whether the irregularity could be cured by an instruction.[42]

B.G.'s allegation of the abuse of another child was serious and not cumulative. Therefore, the issue is whether it could be cured by an instruction.

---

[41] Id. at 44.

[42] State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172 (1992).

Apolo relies solely on State v. Copeland[43] to argue that it could not.

In Copeland, the prosecutor improperly cross-examined a critical witness about the nature of a prior conviction in a deliberate attempt to negatively influence the jury's perception of the witness.[44] But, the supreme court held that this conduct was properly cured by the court's instruction to the jury to disregard the statement because a jury is presumed to follow the court's instructions.[45] Here, B.G.'s statement, while prejudicial, was not intentionally solicited by the prosecutor and was just one statement in a video lasting approximately 30 minutes. Nothing in Copeland suggests that the curative instruction given by the trial court was inadequate to cure this prejudice, therefore it is not persuasive.

Moreover, it is unlikely that the trial court would have granted a motion for a mistrial, even if Danko made one. In denying Apolo's motion for a new trial, the trial court stated that even if Danko had objected to B.G.'s statement of additional abuse, "it would [have] result[ed] in the same action the Court did take"—issuing a curative instruction. Because the jury is presumed to obey the court's rulings and disregard improper evidence,[46] we conclude that the jury followed the court's instruction and did not consider B.G.'s statement in finding Apolo guilty. In sum, Apolo has not met his burden to prove he was prejudiced.[47]

---

[43] 130 Wn.2d 244, 284, 922 P.2d 1304 (1996).

[44] Id. at 284-85.

[45] Id. at 285.

[46] State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990).

[47] State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (courts may

Closing Argument

Apolo argues that Danko was ineffective when he conceded during closing statements that B.G. and D.G. had been "harmed" but did not identify another suspect. We disagree.

Where the evidence of guilt on a particular count is substantial and there is no reason to suppose that any juror doubts it, conceding guilt on that count in closing can be a sound trial tactic.[48] This approach may help win the jury's confidence, preserve the defendant's credibility, and lead the jury toward leniency by conceding that the defendant is guilty of a lesser charge.[49] If the concession is a matter of trial strategy, it is not ineffective representation.[50]

Here, Danko did not admit Apolo's guilt during closing argument. He argued that Juarez was always present at the visitations and never witnessed any abuse. It was permissible to suggest that it was possible someone else abused B.G. and D.G. or that someone planted a seed in their minds that they were abused:

> . . . There is no question in any of our minds that these two children have been seriously harmed, no question.
>
> But, the question is, is it their father?[51]

---

assume that where no authority is cited, counsel has found none after search).

[48] State v. Silva, 106 Wn. App. 586, 596, 24 P.3d 477 (2001) (quoting Underwood v. Clark, 939 F.2d 473, 474 (7th Cir.1991)).

[49] Id. at 596 n.37 (quoting Underwood, 939 F.2d at 474).

[50] Id. at 599.

[51] Report of Proceedings (Oct. 22, 2009) at 100-01.

Danko argued that Apolo cares about his family and tried his best to stay in contact with them. In conclusion, he reiterated that Apolo's testimony was credible and honest and that the jury should find him not guilty.

Danko's statements do not amount to a concession of guilt on either count of child molestation. His admission that it was obvious that B.G. and D.G. were "harmed" was likely a tactical concession designed to win the jury's favor. Furthermore, his argument that Juarez did not witness any abuse and that Apolo's testimony was credible support his overall theory that Apolo did not abuse either girl. Therefore, Danko's statements during closing argument did not fall below an objective level of reasonableness.

Also, Apolo has not shown a reasonable probability that, had Danko not conceded that B.G. and D.G. suffered "harm," his trial outcome would have differed. As noted above, the evidence that Apolo abused B.G. and D.G. was strong. The jury likely would have reached the same verdict even without Danko's statement. Therefore, there is no showing of prejudice.

Apolo argues that Danko's concession of guilt obviated the need for the State to prove each element beyond a reasonable doubt. Because Danko did not concede Apolo's guilt on any of the charges, we reject this argument.

Ineffective Assistance of Substitute Counsel

Apolo argues that substitute counsel was ineffective during the hearing on his motion for a new trial because he failed to obtain transcripts of the trial proceedings for the court. We disagree.

Substitute counsel moved for a new trial, pursuant to Criminal Rule (CrR) 7.5(a)(8). Consistent with the provisions of that rule, substitute counsel supported his motion with declarations in lieu of affidavits.[52] During the hearing on Apolo's motion for a new trial, the trial court noted that no transcript of the trial was available for use at the hearing. But it does not appear from our review of the record that the absence of a trial transcript had any effect on the substance of the trial court's ruling denying the claim for a new trial based on alleged ineffective assistance of counsel.

We conclude there was no deficient performance by substitute counsel following the requirements of CrR 7.5(a)(8) and not obtaining a trial transcript to support the motion.

Apolo relies on Blackburn to argue that substitute counsel's failure to procure a transcript falls below an objective standard of reasonableness.[53] That case does not control the outcome here. There, the defendant was convicted of armed robbery after his first trial resulted in a mistrial when the jurors were unable to reach a verdict.[54] At both trials, the victim and sole eyewitness identified the defendant as the perpetrator, but her identification testimony in the

[52] CrR 7.5(a) ("When the motion is based on matters outside the record, the facts shall be shown by affidavit").

[53] Blackburn, 828 F.2d at 1183 (defense counsel ineffective for failing to obtain the transcript of the first trial in order to impeach the victim and key identifying witness at subsequent trial).

[54] Id. at 1179-80.

second trial was inconsistent with her identification testimony at the first trial.[55] During the second trial, defense counsel admitted to the court that the defendant "had no defense . . . ."[56] Even so, he did not procure a transcript of the first trial to impeach the victim with her prior inconsistent statements.[57] The Sixth Circuit held that his conduct was unreasonable because "he failed to pursue the one obvious and only logical means of diminishing [the victim's] identification testimony"—procuring the transcript in order to impeach her.[58]

Here, substitute counsel was not required to provide a transcript of the trial for the motion for a new trial, whereas defense counsel in Blackburn was required to obtain a transcript to impeach the victim at trial. Therefore, unlike Blackburn, substitute counsel did not violate any rules of evidence or civil procedure and his failure to obtain a transcript was not unreasonable. Additionally, because the trial court presided over Apolo's trial, he was familiar with the issues raised in Apolo's motion for a new trial. Apolo cites no authority and there is simply no showing that the court's brief reference during oral argument to the missing transcript somehow makes its absence important.

Because Apolo cannot demonstrate that substitute counsel's actions were unreasonable, we need not address whether he was prejudiced by them.

CUMULATIVE ERROR

---

[55] Id.

[56] Id. at 1183-84.

[57] Id.

[58] Id. at 1184.

Apolo argues that cumulative errors denied him a fair trial. We conclude this doctrine is not applicable to this case.

Under the cumulative error doctrine, a defendant may be denied a fair trial where the combined effect of errors committed by the trial court, none of which standing alone require reversal, prejudices the defendant.[59] It appears that Washington courts have expanded this doctrine to include not only errors of the

court, but also unreasonable conduct by defense counsel.[60]

Here, there is no showing that Apolo was denied a fair trial by cumulative error because Danko committed only one error that constituted deficient performance—his failure to comply with ER 613(b).

We affirm the judgment and sentence.

Cox, J.

[59] State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

[60] See State v. Lewis, 156 Wn. App. 230, 245, 233 P.3d 891 (2010) (holding no cumulative error as a result of trial court errors or defense counsel errors); see also Goldman v. State, 57 So.3d 274, 278 (Fla. Dist. Ct. App. 2011) (reversing defendant's convictions based on the cumulative effect of defense counsel's errors that did not individually satisfy prejudice prong); Malone v. Walls, 538 F.3d 744, 762 (7th Cir. 2008) (remanding to the district court to consider whether defense counsel's cumulative errors prejudiced defendant even though they did not rise to the level of ineffective assistance standing alone).

WE CONCUR: