IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. AMBROGINO GIOVANNI FANELLI, Appellant.	No. 37309-2-II UNPUBLISHED OPINION

Houghton, P.J. — Ambrogino Fanelli appeals his conviction for first degree child rape, arguing that the trial court denied him his constitutional right to cross-examine witnesses, the prosecutor committed misconduct, he received ineffective assistance of counsel, and cumulative error denied him a fair trial. Because certain statements made in closing argument amounted to prosecutorial misconduct and because Fanelli received ineffective assistance of counsel, we reverse and remand.

FACTS

Ian Wood and Amber Fanelli[1] are H.W.'s parents. H.W. was born on October 4, 2001. Ian and Amber separated 14 months after H.W.'s birth. In April 2004, Amber voluntarily gave primary custody to Ian, and Amber had visitation with H.W. every other week. Fanelli, H.W.'s stepfather, married Amber in August 2005. Robin Wood, H.W.'s stepmother, married Ian in

[1] We refer to some parties by their first names for clarity, intending no disrespect.

December 2002.

In late March or early April 2006, H.W. told her father, Ian, that Fanelli had choked her. When Ian inquired further, H.W. said that Fanelli had choked her with his "weenie." Report of Proceedings (RP) (Dec. 18, 2007) at 74. H.W. said that if she is not a good girl, then Fanelli takes her to have private talks in the bedroom. H.W. also said that Fanelli told her that if she told anyone, she would not see her mother again.

Ian did not immediately report this information to the authorities because he wanted to be as informed as possible about the allegations. A few days after H.W. first disclosed what had happened to Ian, she came to him again with more details. Ian went to the authorities on April 22.

Cowlitz County Sheriff's Office detectives conducted two interviews with H.W. Detective Pat Schallert conducted the first interview on May 4, 2006. H.W. conveyed in explicit detail how Fanelli had sexually abused her. H.W. also drew pictures for Schallert in order to show what Fanelli had done to her. Schallert conducted a second interview on May 11, so that a prosecutor could attend, ask questions, and determine the child's credibility.

By amended information, the State charged Fanelli with first degree child rape. RCW 9A.44.073. The trial court conducted a *Ryan* [2] hearing on October 6.

On cross-examination at the *Ryan* hearing, H.W. described watching Harry Potter, Hell Boy, and Edward Scissorhands movies. Defense counsel also questioned H.W. about prior statements that Fanelli had a spider voice, that he was a spider when he exposed himself to her,

[2] *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984) (established nine factors for the trial court to consider when determining whether child hearsay statements are reliable).

and that Fanelli turned into a crab and would hurt her with his crab claws.

The trial court found H.W. to be competent and that she was able to understand the difference between dreams and reality. The trial court also determined that H.W.'s statements made to others, including those to Ian and Robin, were admissible.

H.W. testified at trial and again described in detail how Fanelli had sexually abused her. The State attempted to ask H.W. about her dreams in light of her statements during the *Ryan* hearing, but the trial court sustained Fanelli's objection. On cross-examination, Fanelli asked, "[W]ere there times when [Fanelli] turned in to [sic] or talked like a spider; do you remember that?" RP (Dec. 18, 2007) at 53. The State objected and the parties discussed something unclear from the record in a sidebar. After the sidebar, the trial court did not issue a ruling on the record for the State's objection. Fanelli asked H.W. a few additional unrelated questions and ended his cross-examination.

Several other witnesses testified at trial. Amber testified and admitted to lying at the October 2006 *Ryan* hearing when she said that Fanelli was never alone with H.W. Amber said the reason for this was that Fanelli's mother told her that if she did not protect Fanelli, she would lose her other child.

Schallert testified and reiterated the information that H.W. had shared about the sexual abuse when he interviewed her. On cross-examination, Fanelli questioned Schallert about asking H.W. what she thought should happen to Fanelli for his actions. H.W. had told Schallert that Fanelli "should go down." RP (Dec. 19, 2007) at 100. Fanelli asked if Schallert thought that was unusual for a child to say, but the State objected and Schallert never answered.

During closing argument, the State discussed Fanelli's mom's "plan" to convince Amber to lie to protect Fanelli. RP (Dec. 20, 2007) at 28. Fanelli then argued in his closing that it was unusual for H.W. to say that Fanelli "should go down." RP (Dec. 20, 2007) at 36. The State responded that what H.W. actually said was "[Fanelli] must go down, he must go to heaven." RP (Dec. 20, 2007) at 48. The additional language about heaven was not in evidence.

The jury found Fanelli guilty. He appeals.

ANALYSIS

Right to Cross-examine Witnesses

Fanelli first contends that the trial court improperly curtailed his right to a fair trial and his right to confrontation. Specifically, he asserts that the trial court improperly limited his cross-examination of H.W. and Ian. We disagree.

The United States and Washington constitutions guarantee defendants the right to confront and cross-examine adverse witnesses. U.S. Const. amend. VI; Wash. Const. art. I, § 22; *State v. McDaniel*, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996). The trial court exercises its discretion in determining the scope of cross-examination. *State v. Dixon*, 159 Wn.2d 65, 75, 147 P.3d 991 (2006). We reverse only if the trial court abuses this discretion; it does so when it bases its decision on untenable or unreasonable grounds. *Dixon*, 159 Wn.2d at 75-76.

The trial court may deny cross-examination where the evidence sought is vague, argumentative, or speculative. *State v. Darden*, 145 Wn.2d 612, 620-21, 41 P.3d 1189 (2002). The more essential the witness is to the State's case, the more latitude the trial court should give to the defense to explore fundamental elements, such as motive, bias, credibility, or foundation.

Darden, 145 Wn.2d at 619.

Cross-examination of H.W.

Fanelli argues that the trial court improperly limited his cross-examination of H.W. The State counters that this issue is not properly before us because the trial court did not explicitly curtail Fanelli's cross-examination.

On cross-examination, Fanelli asked H.W., "[W]ere there times when [Fanelli] turned in to [sic] or talked like a spider; do you remember that?" RP (Dec. 18, 2007) at 53. The State objected and the parties discussed something off the record in a sidebar. But the trial court failed to sustain the objection or make a ruling on the record and Fanelli continued with questioning unrelated to his first question. Thus, the record is insufficient for us to reach the issue and Fanelli's argument fails.[3]

Cross-examination of Ian Wood

Fanelli also argues that the trial court improperly limited his cross-examination of Ian when it sustained the State's objection after Fanelli asked, "[W]as there a reason, in your mind, to wonder if what [H.W.] was saying was true?" and "You testified prior that [H.W.] does, in fact, lie sometimes; correct?" RP (Dec. 18, 2007) at 95. Generally, no witness, lay or expert, may testify as to his or her opinion about the credibility of a witness. *City of Seattle v. Heatley*, 70 Wn. App. 573, 577-78, 854 P.2d 658 (1993). But numerous factors determine whether witness statements are permissible opinion testimony, such as " 'the type of witness involved, . . . the specific nature of the testimony, . . . the nature of the charges, . . . the type of defense, . . . and the other evidence before the trier of fact.' " *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d

[3] The proper procedure for raising a claim based on matters outside of the record is a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

1278 (2001) (quoting *Heatley*, 70 Wn. App at 579).

Fanelli suggests three reasons for why his assertion is correct. First, H.W. was only four years old at the time of the disclosure and there was no physical or testimonial evidence to corroborate her claim. Second, Ian was H.W.'s custodial parent and in a unique position to know whether H.W. had a propensity to lie. And third, the State opened the door to this testimony. In listing these reasons, however, Fanelli fails to cite any authority for his argument that the trial court improperly sustained the State's objections here and his argument fails. RAP 10.3(a)(6). Thus, Fanelli's argument fails.

Prosecutorial Misconduct

Fanelli next contends that the State committed misconduct when it (1) elicited improper testimony on Fanelli's truthfulness; (2) questioned Fanelli about his failure to seek out Taylor once he learned H.W. accused him of sexually abusing her; (3) commented on Fanelli's right to confrontation in discussing H.W.'s reactions on the stand to Fanelli's presence; and (4) referred to evidence outside the record to bolster H.W.'s credibility. On the argument that the State improperly referred to evidence outside the record, we agree.[4]

A defendant alleging prosecutorial misconduct must show the prosecuting attorney's conduct was both improper and prejudicial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists if there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the

[4] Because we reverse and remand, in part, on this basis, we do not consider Fanelli's other prosecutorial misconduct arguments.

evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

"Defense counsel's failure to object to the misconduct at trial constitutes waiver on appeal unless the misconduct is 'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' incurable by a jury instruction." *Fisher*, 165 Wn.2d at 747 (quoting *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)) (internal quotation marks omitted).

Fanelli argues that the State committed misconduct when it alluded to evidence outside the record in its closing argument to bolster H.W.'s credibility. This issue relates to a question Fanelli asked Detective Schallert at trial: "[W]hen you asked what should happen to [Fanelli], her response was, 'He should go down'? Do you think that's kind of an unusual thing for a four-year old to say?" RP (Dec. 19, 2007) at 100. The State objected to this question, which the trial court sustained.

During closing argument, Fanelli suggested that H.W.'s statement to Detective Schallert, that "[Fanelli] should go down" was unusual for a four-year old to say. The State responded to this argument and said, "Defense said [H.W.] said '[Fanelli] must go down.' [But he] [d]idn't tell you also, as Detective Schallert did, '[Fanelli] must go down, he must go to heaven.' Heaven. Heaven's not a bad place, but it is a place people go when they're no longer in your lives." RP (Dec. 20, 2007) at 48. The portion of this statement regarding heaven is not in the record, as the State concedes. In the context of this case, this remark was flagrant and ill-intentioned that no instruction could have cured.[5] Thus, Fanelli's argument prevails.

[5] The dissent disagrees with our conclusion that the "heaven" statements were flagrant and ill-intentioned and suggests that because the State made its argument in rebuttal to Fanelli's

Ineffective Assistance of Counsel

Fanelli next contends that his defense counsel was ineffective for failing to object to the State's questioning of Amber on direct examination as to why she lied at the pretrial *Ryan* hearing and when the State, in its closing argument, implied that Fanelli, together with his mother, engaged in witness tampering. Fanelli essentially argues that the State impermissibly sought to introduce substantive evidence of witness tampering under the guise of impeachment based on Amber's prior inconsistent statements. Again, we agree.

The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. An appellant claiming ineffective assistance of counsel must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel's deficient performance, there is a reasonable probability that the outcome would have differed. *State v. Powell*, 150 Wn. App. 139, 153, 206 P.3d 703 (2009). "A reasonable probability 'is a probability sufficient to undermine confidence in the

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argument, it was not flagrant and ill-intentioned. Dissent at 10-11. But the statements about heaven went far beyond any reasonable rebuttal; the State attempted to completely recharacterize Fanelli's argument and H.W.'s statement by introducing new evidence entirely outside the record.

The dissent also cites examples in the record where Fanelli's defense counsel objected to other statements outside the record. Whether defense counsel demonstrated an ability to object in other instances is not relevant to our analysis. The issue before us simply is whether the State's "heaven" remarks in the context of the whole argument were flagrant and ill-intentioned and they were.

outcome.' " *P*owell, 150 Wn. App. at 153 (internal quotation marks omitted) (quoting *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 930, 158 P.3d 1282 (2007)). We start with a strong presumption of counsel's effectiveness. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Additionally, legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

A party is free to impeach its own witness with prior inconsistent statements. ER 607; ER 613; *State v. Burke*, 163 Wn.2d 204, 219, 181 P.3d 1 (2008). And a party may use such statements to demonstrate the witness's credibility. *State v. Williams*, 79 Wn. App. 21, 26, 902 P.2d 1258 (1995). But prior inconsistent statements may not be used as evidence that the facts contained in the statements are substantively true. *Burke*, 163 Wn.2d at 219.

During the State's direct examination, Amber testified and admitted that she had lied at the October 2006 *Ryan* hearing when she said that Fanelli was never alone with H.W. and that she did so because Fanelli's mother said that if she did not protect Fanelli, she would lose her other child. And during its closing, the State argued, based on Amber's testimony regarding her prior inconsistent statement, that Fanelli's mom's plan failed and that Amber took a huge risk in testifying, which damaged Fanelli's defense. In both instances, the State clearly sought to introduce improper substantive evidence of witness tampering. Fanelli's defense counsel did not object to the State's questioning or its closing argument.

It was not a legitimate trial tactic for Fanelli's counsel to fail to object to this testimony and the resulting closing argument. Because the State's questioning was so clearly improper, it is highly likely that the trial court would have sustained the objection. *State v. Saunders*, 91 Wn.

App. 575, 578, 958 P.2d 364 (1998) (defendant must show that the objection would likely have been sustained). And because the testimony was central to the State's case, the failure to object constituted deficient performance and resulting prejudice.[6] *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (failure to object to improper testimony central to the State's case constitutes deficient performance). Thus, Fanelli's argument prevails.[7]

Reversed and remanded for a new trial.

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.

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Houghton, P.J.

I concur:

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Quinn-Brintnall, J.

[6] The dissent disagrees with our conclusion that prejudice exists here. The dissent also states that "Amber's testimony was not the sole evidence of Fanelli's molestation of H.W." Dissent at 15. But the only evidence against Fanelli stemmed from H.W.'s statements and trial testimony. This is not overwhelming evidence of guilt. Thus, there is a reasonable probability that the outcome would have differed had the substantive evidence of witness tampering, which no doubt further discredited Fanelli to the jury, not been admitted.

[7] We note that Fanelli's argument here would have also prevailed had he raised it on prosecutorial misconduct grounds.

Hunt, J. (dissenting) – I respectfully dissent from the majority's holding that ineffective assistance of counsel and the State's improper reference to evidence outside the record require reversal of Fanelli's child molestation conviction. I would affirm.

I. Rebuttal "Heaven" Argument—No Objection;

Not Ill-Intentioned; No Prejudice

As the majority notes, Fanelli neither objected to nor requested curative instructions for those portions of the State's closing arguments that he now asserts as grounds for reversal. As the majority also aptly notes, the law is clear that in the absence of such objection and curative instruction request, we do not reverse unless the alleged prosecutorial misconduct was "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' incurable by a jury instruction." Majority at 7, citing *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). In my view, this standard has not been met here.

With all due respect to my colleagues, neither the record nor the law supports the majority's conclusion that the prosecutor's remark about "heaven"[8] was so "flagrant and ill-intentioned that no instruction could have cured" it. Majority at 7. First, the prosecutor made this argument in rebuttal, only *after* Fanelli's closing argument reference to H.W.'s statement that Fanelli "should go down" (albeit without the "heaven" reference), suggesting that other adults had influenced or coached the child victim, H.W. Report of Proceedings (RP) (Dec. 20, 2007) at 36. We have held in other cases that a prosecutor's remarks are not "flagrant and ill-intentioned"

[8] The prosecutor's rebuttal argument comment about "heaven" was as follows: "Defense . . . didn't tell you also, as Detective Schallert did, 'Gio must go down, he must go to heaven.' . . . Heaven's not a bad place." RP (Dec. 20, 2007) at 48.

when made to rebut the defendant's inviting a response to a particular subject. *See*, *e.g.*, *State v. Wright*, 97 Wash. 304, 308, 166 P. 645 (1917) (ordinarily improper remarks of prosecuting attorney are not grounds for reversal if provoked by and in reply to defense counsel's statement); *accord State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967)[9]; *State v. LaPorte*, 58 Wn.2d 816, 822, 365 P.2d 24 (1961).

That the State added the relatively inconsequential "heaven" reference, which was not in the record, does not transform the State's rebuttal argument into reversible "flagrant and ill-intentioned" prosecutorial misconduct, especially where nothing in the record suggests that a curative instruction would not have ameliorated any potential prejudice flowing from this comment. Although the majority holds that no instruction could have cured the prosecutor's "flagrant and ill-intentioned" remark, it does not articulate the nature of any prejudice or how the remark likely affected the jury's verdict in the context of the entire case.

On the contrary, as we have often noted, we presume that the jury follows the court's instructions. *State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998) (citing *Hizey v.*

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[9] I acknowledge that the prosecutor cannot "'bring before the jury extraneous matters not in the record.'" *Dennison*, 72 Wn.2d at 849 (quoting *State v. Wright*, 97 Wash. 304, 308, 166 P. 645 (1917)). This principle has generally applied in contexts involving substantive comments such as the prosecutor's improper opinion testimony, not to relatively innocuous remarks that are improper solely because they refer to a minor matter outside the record. Furthermore, in order to constitute reversible error, such remarks must be shown to have prejudiced the defendant's case; in other words, I can find no "per se" rule that a prosecutor's rebuttal comment about a minor matter outside the record automatically requires reversal, without regard to the extent to which this comment may or may not have been prejudicial. On the contrary, we must determine whether the comment was so prejudicial that an instruction would not have cured any prejudice. *State v. Sargent*, 40 Wn. App. 340, 345, 698 P.2d 598 (1985), (prosecutor in closing argument called attention to defendant's failure to testify, thus violating Sargent's constitutional right to remain silent and prejudicing his case). Such is not the case here.

Carpenter, 119 Wn.2d 251, 269-70, 830 P.2d 646 (1992); *State v. Imhoff*, 78 Wn. App. 349, 351, 898 P.2d 852 (1995)). The majority does not explain, nor can I discern, why this principle would not have applied here had Fanelli requested a curative instruction, as he did for other remarks during the State's closing argument.[10]

Second, as I have just noted, at several points during the State's rebuttal argument, including immediately before the comment at issue here, Fanelli objected to various other comments, including other comments that related to matters outside the record. In those instances, the trial court sustained the objections and admonished the jury to disregard the State's comments. *See*, *e.g.*, RP (Dec. 20, 2007) at 46[11] and 48.[12] But when the State resumed rebuttal

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[10] In contrast, see, for example, the following conclusion in *Dennison*, where the defendant did object and the trial court did give a curative instruction: "Any prejudicial effect of the prosecuting attorney's statement was very effectively dealt with by the court's direction to the jury and by the court's admonition to counsel. The incident does not require the granting of a new trial." *Dennison*, 72 Wn.2d at 849. This conclusion in *Dennison* is premised, in part, on the Supreme Court's determination that the prosecutor's remark was not "flagrant and ill-intentioned," unlike the determination the majority reaches here, with which I respectfully disagree.

[11] In response to defense counsel's closing argument characterization of the victim's testimony, in particular his statement that there was an "elephant in the room," the State argued in rebuttal: "She [H.W.] was scared. That was the first time that he [Fanelli] has been that close to her in years," in reference to the child victim's being in the courtroom with the defendant during the trial. RP (Dec. 20, 2007) at 46. Defense counsel objected: "That's not in evidence, Your Honor, I object to that." RP (Dec. 20, 2007) at 46. To which the trial court responded: "Sustained. Disregard the latter—the last comment." RP (Dec. 20, 2007) at 46.

[12] In response to defense counsel's closing argument characterization of the victim's testimony, in particular her having described "Petrie" as "a bird and a man" who "looks like a witch," the State argued in rebuttal: "Petrie is a character in the Land Before Time, as some parents might know, and he's a bird." RP (Dec. 20, 2007) at 48. Again, defense counsel objected: "Object to argument not in evidence, Your Honor." RP (Dec. 20, 2007) at 48. To which the trial court responded: "The jury is responsible for recalling the testimony and the evidence and deciding the facts." RP (Dec. 20, 2007) at 48.

argument, defense counsel did not similarly object to the "heaven" comment. Nor did defense counsel request and obtain a curative instruction.

We presume that defense counsel provided effective assistance.[13] Here, defense counsel amply demonstrated his ability to object to closing argument reference to matters outside the record. Thus, in light of defense counsel's demonstrated ability to object in these circumstances, nothing in the record suggests that his withholding an objection at this point was not a matter of trial strategy.

Moreover, there is no support for the majority's conclusion that a curative instruction would not have ameliorated the "heaven" comment, as it did with the previous comments, especially in light of the other evidence of Fanelli's guilt, including the victim's consistent and credible explanations about how he had sexually molested her. I respectfully disagree with the majority's conclusion that there was a substantial likelihood that this comment affected the jury's verdict. If Fanelli had objected, the trial court would have given a curative instruction similar to the one it gave when Fanelli posed a similar "outside the record" objection: "The jury is responsible for recalling the testimony and the evidence and deciding the facts." RP (Dec. 20, 2007) at 48. The jury then would have presumably followed the trial court's instructions not to consider the "heaven" comment, which, even if prejudicial, would not have affected the jury's verdict.

II. Lying; Witness Tampering—No Showing of Prejudice

For purposes of this dissent, I agree with the majority's conclusion that defense counsel's

[13] *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

performance was deficient in failing to object to (1) the State's questioning of Amber about why she had lied at the pretrial hearing, and (2) the State's closing argument implication that Fanelli and his mother had engaged in witness tampering. But I strongly disagree with the majority's unsupported conclusion that this failure prejudiced Fanelli. On the contrary, although the majority asserts that "the testimony was central to the State's case," Majority at 9, the record does not show that "but for counsel's deficient performance, there is a reasonable probability that the outcome would have differed." *State v. Powell*, 150 Wn. App. 139, 153, 206 P.3d 703 (2009). Majority at 8. I would hold that Fanelli does not meet the second, prejudice prong of the ineffective assistance of counsel test.[14]

Although Amber's testimony was central to the State's case, nothing in the record impugns the key portions in which she described H.S.'s reactions to Fanelli and descriptions of how he had sexually molested her. Furthermore, Amber's testimony was not the sole evidence of Fanelli's molestation of H.W. Independent of Amber's testimony, H.W.'s father, Ian, testified that H.W. had told him (1) Fanelli choked her with his "weenie," RP (Dec. 18, 2007) at 73-74; (2) if she was not a "good girl," then Fanelli would take her to have private talks in the bedroom, RP (Dec. 18, 2007) at 74; and (3) Fanelli told her that if she told anyone, she would not see her mother again.

Furthermore, H.W. testified at trial, subject to cross examination, and described in detail how Fanelli had sexually abused her. H.W. had also told Detective Pat Shallert in explicit detail how Fanelli had sexually abused her; she also drew pictures to show Shallert what Fanelli had

[14] *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

done to her. In light of this independent evidence that Fanelli sexually molested H.W., there is

no reasonable probability that the outcome of the trial would have differed had defense counsel objected to the challenged portions of Amber's testimony and the State's closing argument.

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Hunt, J.