IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT WAYNE WILLIAMS, Appellant.	No. 37321-1-II UNPUBLISHED OPINION

Armstrong, J. — Robert Wayne Williams appeals his convictions of three counts of first degree child molestation and one count of second degree child molestation. Williams argues the trial court erred in admitting evidence of prior molestations under the "common scheme" exception. He also argues that his counsel ineffectively represented him by (1) stipulating to a "common scheme," (2) calling a damaging witness, and (3) failing to object to (a) irrelevant testimony, (b) testimony and argument implicating Williams's exercise of his right to remain silent, and (c) the prosecutor's mischaracterization of the burden of proof during closing argument. In a statement of additional grounds, Williams argues the jury's integrity was compromised when juror notes were temporarily lost by the court and when a juror informed the court that she recognized the name of a witness who was never called. Finding no reversible error, we affirm.

FACTS

In August 1999, 13-year-old A.W. and her sister, 22-year-old J.P., reported to the police that their stepfather, Robert Williams, had molested them. Shortly thereafter, the State charged Williams with three counts of first degree child molestation and one count of second degree child molestation, all naming A.W. as the victim.

A. Motion to Admit Prior Bad Acts

Before trial, the State moved to admit evidence that Williams had molested J.P. under the "common scheme or plan" exception to ER 404(b). At a hearing on the motion, J.P. testified that Williams first inappropriately touched her when she was 12 or 13 years old, shortly after Williams began dating her mother, Rebekah, and moved in with the family. The family was watching a movie together, and J.P. and Williams were lying on the couch with a blanket covering them. Near the end of the movie, Williams began touching J.P.'s chest and groin area while everyone else slept. Williams "squeezed" her groin area over her clothing, and he touched her chest area under her clothing in a "massaging" motion. 5 Report of Proceedings (RP) at 88-89. J.P. was 15 years old when Williams next molested her. Again, they were lying together on a couch watching television when Williams touched her chest.

Over the next year, about five more incidents occurred. J.P. moved out of her parents' house for nine months when she was 16 years old, and when she moved back in, Williams again molested her. Once, while J.P. was in bed, Williams came in wearing only a robe that was open so she could see that he was naked. He climbed into her bed, grabbed and rubbed her chest, "touched [her] wherever he felt like it," and put her hand on his erect penis. 5 RP at 97. When

J.P. was 18 years old, an incident occurred at Williams's cousin's house. Williams had been teaching her boxing, after which they laid down on the couch and he touched her chest and groin. The last incident was when J.P. was 22 years old. J.P. went out drinking with Williams, and then came back to her parents' house to spend the night on the couch. Williams brought her a blanket and began touching her with more "skin-on-skin contact" than other incidents, including touching her vagina and kissing her mouth. 5 RP at 100.

After J.P. finished testifying, the State summarized A.W.'s expected testimony, pointing out the similarities of her experiences with J.P.'s:

> [A.W.] indicates that the abuse was initiated on the couch in the home, that it then went to her bedroom in her bed, eventually to Mr. Williams'[s] bed, that Mr. Williams desensitized her by wearing a robe with no clothes underneath it, that the acts themselves were very similar, began with groping, kissing, he placed her hand on his erect penis.

5 RP at 104-05.

Defense counsel told the court that he had interviewed A.W. and agreed with the State that her disclosures were consistent with J.P.'s descriptions. Counsel stated:

> I am not going to dispute what counsel said. I did interview the alleged victim in this case. What [A.W.] did indicate to me during the interview was that these acts began while on a davenport, much like this witness testified, and kind of progressed into the bedroom of the alleged victim. So I can't argue that fact.

5 RP at 106. Defense counsel instead focused on whether the probative value of J.P.'s testimony outweighed its prejudicial effect, a necessary finding under ER 404(b).

In unchallenged findings of fact, the trial court found that J.P.'s testimony was credible and that it established her abuse by a preponderance of the evidence. The trial court noted that "[Williams] stipulated that . . . [A.W.] disclosed the same pattern of abuse at the hands of Mr.

Williams." Clerk's Papers (CP) at 68. The trial court independently reviewed the evidence and found that Williams (1) began abusing each girl while sitting with them on the couch, (2) exposed himself to each child while wearing a robe, (3) touched the girls both under and over their clothing on their chests and vaginas, and (4) placed each girl's hand on his erect penis. The court ruled that the State had established a common scheme or plan and that the probative value of the evidence outweighed any prejudicial effect. The court concluded that evidence of J.P.'s molestations was admissible, explaining that it would instruct the jury that:

> Evidence has been introduced in this case on the subject of the defendant's conduct towards [J.P.] for the limited purpose of determining whether or not it proves the existence of a common scheme or plan. You must not consider this evidence for any other purpose.

CP at 27, 69.

B. Trial Testimony

A.W. testified that when she was in kindergarten, Williams was usually the only person home when she came back from school. They frequently watched television in the afternoon together, lying on the couch with her lying on top of him. A.W. often fell asleep, and when she awakened, her "head [was] above his pelvic area" even though she fell asleep with her head near his shoulders. 6 RP at 154. After a few months, Williams began touching A.W. between her legs and on her chest underneath her clothes. About a year later, the touching became more frequent, with "a little bit more affection" and "more of a flirtatious thing where a hug would turn into his hand on my bottom." 6 RP at 158.

After another two years, Williams began exposing himself to A.W. His bedroom adjoined the living room, and he would masturbate on his bed in plain view of the living room where she

was watching television; sometimes he made eye contact with her while he masturbated. He would then walk around the house with his robe open and "his testicles and penis hanging out." 6 RP at 160-61. When A.W. was about 10 years old, Williams began to "insert his fingers" into her vagina and "kiss below the waist." 6 RP at 164. He developed a "routine" in the early morning when Rebekah went to work of carrying A.W. from her bedroom to his, putting her in his bed, and stripping their clothes off. 6 RP at 167. While lying next to A.W., Williams would masturbate, sometimes touch her, attempt to perform oral sex on her, or place her hand on his penis. He would then shower while A.W. got ready for the day.

According to A.W., Williams also molested her when they were riding in the car by resting his hand on her inner thigh or putting his hand under her pants. On one occasion, when Williams tucked A.W. into bed at her grandmother's house, he unzipped his pants to expose himself to her and then "chuckled and said, 'We have got to quit doing this.'" 6 RP at 177.

This behavior continued until early August 1999, when A.W. spent the weekend with J.P. J.P. confronted A.W., asking, "If there was anything out of the usual . . . that probably isn't – isn't-smiled-upon-type of thing" about Williams. 6 RP at 179. A.W. disclosed the abuse, and J.P. then admitted that she had had "run-ins" with Williams as well. 6 RP at 180. J.P. said she would tell Rebekah, their mother, about it and "see what happened next." 6 RP at 180. Rebekah was upset when J.P. confronted her and sent A.W. home with J.P. so Rebekah and Williams could "figure[] out what they were going to do." 6 RP at 184. A few days later, Rebekah went to the Department of Social and Health Services (DSHS) and relinquished her parental rights over A.W. to J.P. She and Williams then left town without telling J.P. or A.W., and the sisters reported the

abuse to the police.

During A.W.'s testimony, the prosecutor asked who else lived with J.P. after Rebekah and Williams disappeared. A.W. said that her cousin Lindsey had lived with them for a short time. When the prosecutor asked why, defense counsel objected that the evidence was irrelevant, but the trial court overruled the objection, noting that counsel could renew the objection. A.W. testified that Lindsey had been taken away from her own parents and placed with Rebekah and Williams until a foster family could be found. The following exchange ensued:

> Q: How did she end up with . . . you and your sister.
> A: She – [J.P.] said she's not going to leave her behind. I think that she stayed – initially, she did stay after the confrontation for a couple of days and my – somebody in my family went back and got her because they didn't want her staying there alone not knowing what was going on in that house.
> Q: So when you say 'they got her,' they got her from where?
> A: They got her from [Williams's] house.
> Q: So at the time of all of this happening, were they the primary caregiver of this little girl?
> A: Yes.
> Q: How old was Lindsey?
> A: Four, maybe five.
> Q: And how long had your mother and Mr. Williams been providing care to this little girl?
> A: A very short period of time. A month or two.

6 RP at 192-93. Defense counsel did not renew his objection during this testimony.

Officer Ryan Boyle testified that he stopped Williams for a traffic infraction and arrested him on the outstanding warrant. Boyle advised Williams of his *Miranda*[1] rights and Williams acknowledged that he understood. While driving to the jail, Williams stated that he thought his daughters might be upset with him because of "something to do with . . . having a belly pie[r]cing and tattoo." 7 RP at 385, 387-88. Boyle asked Williams what he meant by that and Williams

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

responded that "he didn't want to talk about it." 7 RP at 390. When Boyle asked Williams if he would admit that his name was the actual name on the arrest warrant, Williams said that "[h]e didn't want to go further on that." 7 RP at 390. When Boyle informed Rebekah that he would be arresting Williams on an outstanding warrant, Rebekah said the warrant was probably the result of an incident with her daughters and that Williams was a black male. Rebekah later denied making these statements.

Rebekah testified that her daughter J.P. "is dead to me." 9 RP at 524; 10 RP at 634. She also admitted abandoning both daughters after A.W. disclosed the abuse. According to Rebekah, Williams was sometimes alone with the girls.

C. Jury Notes

During the trial, a judicial assistant mistakenly put the jurors' notes in a recycle bin. Upon discovering this error, the parties agreed to the trial judge's suggested process for locating the notes. The judicial assistant then collected the recycle bin with 14 sets of notes inside. The trial judge asked each juror to put something in writing so the judicial assistant could match the writing sample to a note. Only the judicial assistant looked at the notes during this procedure; each juror then reviewed his or her packet of notes and confirmed it belonged to the juror.

D. Juror Relationship with Witness

During a recess in the defense case, Juror No. 7 informed the court that she recognized a potential prosecution witness who had been speaking with the attorneys. She explained that she had "informal social contacts" with the potential witness "[o]nce every few months." 11 RP at 880. The trial judge asked her:

> Q: There's nothing about this fact that you think might influence your

> consideration of this case in any way, because you might recognize someone who may be connected to this case?
>
> A: No, but I'm afraid that the decision that the jury makes might change the relationship that we have.
>
> Q: Do you think that because of that, you don't think that you could be a fair and impartial juror on this case?
>
> A: I am not sure.

11 RP at 880-81. The trial judge permitted both parties to ask Juror No. 7 follow-up questions; the State declined to question her. The trial judge concluded by asking Juror No. 7: "[Y]ou can set that all aside, go back there and do your job as a juror? Can you do that?" 11 RP at 882. Juror No. 7 responded, "Yes." 11 RP at 882. The State never called the witness in question.

E. Prosecutor's Closing Argument

In closing argument, the State argued Williams used his position as a father to molest A.W. The State added that when A.W. disclosed the abuse to her family, Williams had "a chance to say, 'This didn't happen.' He doesn't do that. He acted like a cow[ar]d. He abandoned those little girls and left. He didn't do anything." 11 RP at 921. The State then concluded, "Twelve of you would have to believe that [A.W.] made this up, all twelve of you who decide the case, to find [Williams] not guilty." 11 RP at 931.

Defense counsel then recharacterized the burden of proof for the jury, stating each juror had to say, "I am convinced that [Williams] did these things beyond a reasonable doubt." 11 RP at 934. Counsel also noted that Rebekah "was harsh" when she "turn[ed] her back on her children," but he argued that the jury did not have to approve of Williams's and Rebekah's conduct to acquit Williams. 11 RP at 942-43, 946.

The jury convicted Williams as charged on all four counts.

ANALYSIS

I. ER 404(b) Evidence

A. Prior Bad Acts

Williams argues that the trial court erred in admitting evidence of his past abuse of J.P. under the "common scheme or plan" exception to ER 404(b) because the acts were not "substantially similar" to the acts against A.W. He also contends the trial court did not thoroughly analyze the four elements set forth in *State v. DeVincentis*, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003).

Generally, evidence of prior bad acts is inadmissible. *DeVincentis*, 150 Wn.2d at 17. "Evidence of other crimes, wrongs or acts . . . may, however, be admissible for other purposes [other than proving character], such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). The trial court may also admit evidence of a common scheme or plan to prove that the charged conduct actually occurred. *State v. Lough*, 125 Wn.2d 847, 862, 889 P.2d 487 (1995). Evidence of a common scheme or plan is admissible only if (1) the State can show the prior acts by a preponderance of the evidence; (2) the evidence shows a common plan or scheme; (3) the evidence is relevant to prove an element of the crime charged; and (4) the evidence is more probative than prejudicial. *DeVincentis*, 150 Wn.2d at 17 (quoting *Lough*, 125 Wn.2d at 852). We review a trial court's legal interpretation of the evidentiary rule de novo. *DeVincentis*, 150 Wn.2d at 17. If the trial court correctly interpreted the legal standard, we then review its application of the evidentiary rule to the facts of the case for an abuse of discretion. *DeVincentis*, 150 Wn.2d at 17.

1. Similarity Between A.W.'s Allegations and the Prior Acts

Williams contends that the prior incidents of abuse against J.P. were not sufficiently similar to the charged crimes against A.W to show a common scheme or plan.[2]

Williams supports this argument by pointing to the differences in the girls' ages when the abuse began; the number of times he wore an open robe in front of each girl; the manner in which he exercised dominion over A.W. but not J.P. by picking her up and carrying her; his attempt to digitally penetrate only A.W.; and the differing number of times he touched each girl. Williams did not raise this argument during the ER 404(b) hearing, choosing instead to stipulate that the similarities between the girls' abuse were sufficient to show a common scheme or plan. But because Williams claims that his counsel ineffectively represented him by stipulating to a common scheme or plan, we address the question whether the common scheme or plan evidence was admissible. If it was, counsel was not deficient in stipulating to common scheme or plan. *See State v. Nichols*, 161 Wn.2d 1, 14-15, 162 P.3d 1122 (2007) (holding that counsel was not deficient if a challenge to the evidence would have failed).

The *DeVincentis* court found prior acts of child molestation substantially similar to the charged crime and thus admissible to show a common scheme or plan. *DeVincentis*, 150 Wn.2d at 22-24. There, the defendant created a trusting relationship with prepubescent girls, secluded them from others, and desensitized them to nudity by wearing almost no clothing around them. *DeVincentis*, 150 Wn.2d at 22. The court also found evidence admissible to show a plan or scheme to molest in *State v. Baker*, 89 Wn. App. 726, 733-34, 950 P.2d 486 (1997). In that case,

[2] There is no dispute that the State showed the prior acts by a preponderance of the evidence to meet the first element of the common scheme analysis.

eight-year-old N.H., the daughter of Baker's live-in girlfriend, alleged that Baker slept in a bed with her, rubbed her back until she went to sleep, and massaged her vagina with his hand as she awoke. *Baker*, 89 Wn. App. at 733. Baker's biological daughter testified at the ER 404(b) hearing that during visits with Baker from ages seven to eleven, she slept in bed with him; he rubbed her back until she went to sleep, and she awakened with her underwear down and Baker's hand, head, or penis between her legs. *Baker*, 89 Wn. App. at 733. The *Baker* court found the relationships, the ages, the scenarios, and the manner of touching evidence of a design—not a disposition—to molest. *Baker*, 89 Wn. App. at 734.

Here, the trial court relied on Williams's stipulation but also independently reviewed the evidence and found that Williams began abusing each girl (1) while sitting with them on the couch, (2) by exposing himself while wearing a robe, (3) by touching the girls both under and over their clothing on their chests and vaginas, and (4) by placing each girl's hand on his erect penis. We agree that the conduct is sufficiently similar to show a common scheme or plan.

2. Relevance of the Evidence

Williams next argues that the trial court failed to review the relevance of J.P.'s testimony.

The trial court found the evidence relevant to prove an element of the crime charged. Because Williams denied the charges, the existence of a design to commit abuse evidenced by a pattern of past behavior was relevant to prove the crime. *See DeVincentis*, 150 Wn.2d at 17-18 (the evidence of past behavior was probative to show a design to fulfill sexual compulsions); *see also Lough*, 125 Wn.2d at 862 (evidence was relevant to show whether the charged conduct occurred or if it was a fabrication by the victim). The trial court properly analyzed the relevance

of the evidence.

3. Prejudice and Probative Balance

Williams further contends that even if the prior acts did show a common scheme or plan, the prejudicial effect of the evidence outweighs its probative value.

Evidence of a common scheme or plan is subject to an ER 403 balancing test. *State v. Sexsmith*, 138 Wn. App. 497, 505, 157 P.3d 901 (2007). Under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Kennealy*, ____ Wn. App. ____, 214 P.3d 200, 213-14 (2009). When the other acts are uncharged offenses, they must have substantial probative value. *Lough*, 125 Wn.2d at 863. We review a trial court's balancing of probative value against prejudice for abuse of discretion. *Lough*, 125 Wn.2d at 863.

When the allegation is child sexual abuse, evidence of prior similar acts creates a likelihood that the jury will convict based solely upon character. *State v. Krause*, 82 Wn. App. 688, 696, 919 P.2d 123 (1996). On the other hand, prior similar acts of sexual abuse are generally "very probative of a common scheme or plan," and the "need for such proof is unusually great in child sex abuse cases." *Krause*, 82 Wn. App. at 696. The evidence has considerable probative value because of the secrecy of the act, the victim's vulnerability, the absence of physical evidence, and the public's opprobrium with such an accusation. *Krause*, 82 Wn. App. at 696; *see also Sexsmith*, 138 Wn. App. at 506.

In *Lough*, the court considered three factors in affirming the trial court's conclusion that evidence of the defendant's prior bad acts was more probative than prejudicial. *Lough*, 125

Wn.2d at 863-64. First, the evidence showed the defendant had followed the same design or plan on a number of occasions. *Lough*, 125 Wn.2d at 864. Second, the evidence was necessary because the defendant had drugged his victims and rendered them unable to clearly remember the events in question. *Lough*, 125 Wn.2d at 864. Third, the trial court gave a limiting instruction to ensure the evidence would not be used to prove the defendant's bad character. *Lough*, 125 Wn.2d at 864.

The trial court found that evidence of Williams's prior bad acts was more probative than prejudicial. The court reached this conclusion in light of "the age of the victim[], the need for the evidence, the secrecy surrounding sex abuse offenses, the vulnerability of the victim, the absence of physical proof of the crime, the degree of public opprobrium associated with the accusation." 6 RP at 117. The trial court further explained that it would instruct the jury of the limited purpose for which it could use J.P's testimony. We conclude that the trial court properly weighed probative value against possible prejudice and, thus, did not abuse its discretion in admitting the evidence.

II. Effective Assistance of Counsel

Williams contends that counsel ineffectively represented him by (1) stipulating to evidence of a common scheme of abuse; (2) failing to object to irrelevant testimony; (3) failing to object to comments on Williams's exercise of his right to remain silent; and (4) calling a damaging witness to testify for the defense. Because we have already concluded that counsel was not ineffective in stipulating to a common scheme, we need not discuss that argument further.

To establish that his counsel ineffectively represented him, Williams must show that (1) his

attorney's performance was so deficient that it "fell below an objective standard of reasonableness" and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). To show prejudice, Williams must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. If either element of ineffective assistance of counsel has not been established, we need not address the other. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). We presume that trial counsel effectively represented Williams. *Brockob*, 159 Wn.2d at 345.

A. Failure to Object

1. Testimony regarding Lindsey

Williams contends that trial counsel should have objected to irrelevant and improper testimony regarding Lindsey, A.W.'s cousin.

Only in "egregious circumstances," on testimony central to the State's case, will the failure to object constitute ineffective assistance. *State v. Neidigh*, 78 Wn. App. 71, 77, 895 P.2d 423 (1995). If the failure to object could have been a legitimate trial tactic, we will not find counsel ineffective for that failure. *Neidigh*, 78 Wn. App. at 77. To demonstrate that counsel was ineffective for failing to object, the defendant must show (1) an absence of legitimate strategic or tactical reasons for failing to object; (2) that the trial court would have sustained an objection; and (3) that the result of the trial would have been different had the objection been sustained. *See State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, Williams argues that the testimony regarding Lindsey was irrelevant and, thus, counsel should have objected to it. Counsel did object to the testimony but the trial court overruled the objection, noting that counsel could renew the objection. Williams's contention centers around the following exchange between the prosecutor and A.W.:

> Q: How did [Lindsey] end up with you?
> A: With my sister?
> Q: With you and your sister?
> A: She-my sister said she's not going to leave her behind. I think that she stayed- initially, she did stay after the confrontation for a couple of days and my-somebody in my family went back and got her because they didn't want her staying there alone not knowing what was going on in that house.
> Q: So when you say "they got her," they got her from where?
> A: They got her from [Williams's] house.
> Q: So at the time of all of this happening, were they the primary caregiver of this little girl?

A: Yes.

6 RP at 192-93.

But counsel may well have tactically decided to not renew an objection to avoid emphasizing the testimony. *See In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (decision not to object can be legitimate trial strategy). In any event, Williams has not shown prejudice. We are satisfied that in light of A.W.'s testimony, J.P.'s testimony, and the evidence that Williams fled the jurisdiction, the jury would have reached the same result without the evidence about Lindsey.

2. Comments on Silence

Williams faults his counsel for failing to object to Officer Boyle's testimony about Williams's refusal to answer several questions and to the prosecutor's closing arguments suggesting Williams was guilty because he did not proclaim his innocence.

Both the United States and Washington Constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to remain silent. U.S. Const. amend. V; Wash. Const. art. I, § 9. In either pre-arrest or post-arrest situations, every person has the right to remain silent, and the State cannot use such silence as substantive evidence of guilt. *State v. Easter*, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996); *State v. Evans*, 129 Wn. App. 211, 225, 118 P.3d 419 (2005), *rev'd on other grounds*, 159 Wn.2d 402, 150 P.3d 105 (2007). Accordingly, the State cannot elicit comments from a witness that are related to a defendant's silence or make such comments during closing arguments to infer guilt. *Easter*, 130 Wn.2d at 236.

In support of this argument, Williams apparently relies on the following exchange between the prosecutor and Officer Boyle:[3]

> Q: Once you arrested Mr. Williams, did he make any statements with regard to the underlying charges on the warrant?
> A: Yes, I believe that he did.
> Q: What did he say?
> A: That was in transit from the arresting point to the Buckley Jail. And at that point he made reference to he [sic] thought that . . . with his stepdaughters having a belly piecing [sic] and tattoo, which I didn't understand what that had to do with it.

7 RP at 385. Later, the prosecutor returned to what Williams said during transit to the jail:

> Q: I want to go back now to the point where Mr. Williams was in your car and you were transporting him. You indicated that he made a statement about tattoos and belly piercings.
> A: Correct.
> Q: Did you follow up on that remark with Mr. Williams?
> A: I asked him what he meant by that.
> Q: Did he respond?
> A: No, he did not.
> Q: When you got back to the station, did you ask him about the date of birth that he had provided you for the year 1957?
> A: Yes, I did. I would like to correct. He did respond with the last question, just said that he didn't want to talk about it.
> Q: With regard to his date of birth, did you inquire further about why he had given you the date of birth of '57?
> A: I asked him if he would admit his name and date of birth was the actual name that I had received from the warrants.
> Q: What, if anything, did he say?
> A: He didn't want to go further on that.

7 RP at 390.

Generally, a police witness cannot testify that the defendant refused to answer questions. *State v. Lewis*, 130 Wn.2d 700, 705-06, 927 P.2d 235 (1996). But, when a defendant does not

[3] Williams does not cite to the record to support his argument that defense counsel should have objected to Officer Boyle's comment on his silence, but he does reference this testimony in the statement of facts portion of his opening brief.

remain silent and instead talks to police, the State may comment on what he does *not* say. *State v. Clark*, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) (defendant spoke with police and gave conflicting accounts).

Williams chose not to remain silent during the ride with Officer Boyle. Rather, he initiated the conversation with the officer. The officer's statements that "he didn't want to talk about it" and "[h]e didn't want to go further on that" are simply descriptions of Williams's inadequate answers. 11 RP at 391. Officer Boyle did not directly or impliedly testify that Williams exercised his right to remain silent; nor did he suggest that the jury could infer guilt from his silence. Even if we considered counsel deficient for failing to object during Officer Boyle's testimony, Williams fails to show prejudice. We are satisfied beyond a reasonable doubt that the trial result would have been the same absent this testimony.

Williams contends defense counsel should have objected during two sections of the prosecutor's closing argument:

> [Williams's] molestation began, innocently enough, kind of feeling it out, and it progressed in a sexual nature and got more severe all the way until the end; but when that little girl got enough guts to tell her sister, this is what he's doing to me, she blows the whistle on him, what does he do? He has a chance to say, "This didn't happen." He doesn't do that. He acted like a cow[ar]d. He abandoned those little girls and left. He didn't do anything.
> . . .
> How about Mr. Williams'[s] story? Was he interested in the truth? He dropped everything when she told him that they were going to go to the police and left. Never confronts, never stands up, just leaves. He doesn't even ask the little girl, who is there, who he has access to, "Why are you making these things up?" He just leaves.

11 RP at 921-30.

The State generally is barred from showing that the defendant remained silent when being

questioned by "law enforcement officer[s] or other representative[s] of the State." *Easter*, 130 Wn.2d at 241. Here, the State did not point to Williams's silence during questioning by law enforcement officers but focused on the victims' confrontation with him and his decision to flee the state in response to A.W.'s accusations. This was not a comment on Williams's Fifth Amendment right to remain silent. *See State v. Lounsbery*, 74 Wn.2d 659, 662, 445 P.2d 1017 (1968) (the State may show the defendant's pre-arrest reactions to accusations made by persons not connected with the State). The Fifth Amendment does not prevent testimony of a defendant's pre-arrest silence in response to accusations by someone other than a police officer. *See also United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998) (the Fifth Amendment protection against self-incrimination is not violated by testimony of a defendant's pre-arrest silence in response to accusations of criminal activity made by a private employer); *People v. Preston*, 9 Cal. 3d 308, 314, 508 P.2d 300, 107 Cal. Rptr. 300 (1973) (statements made by defendant in a private conversation, in a private home, with only nonpolice present did not violate the defendant's Fifth Amendment privilege of silence); *State v. McAlvain*, 104 Ariz. 445, 447, 454 P.2d 987 (1969) (State did not violate defendant's Fifth Amendment right to silence by eliciting testimony of defendant's pre-arrest silence when accused by a person not associated with law enforcement) (citing *State v. Lounsbery*, 74 Wn.2d 659, 445 P.2d 1017 (1968)).

Because the prosecutor did not improperly comment on Williams's right to remain silent, there was no "egregious circumstance" that warranted an objection. *See Davis*, 152 Wn.2d at 717 (lawyers do not commonly object during closing argument "'absent egregious misstatements'") (quoting *United States v. Necochea*, 986 F.2d 1273, 1281 (9th Cir. 1983)).

Williams's trial counsel's failure to object to these statements was not deficient representation.

Williams also argues that defense counsel should have moved for a mistrial based on the improper testimony and argument on Williams's exercise of his right to remain silent. But because Williams has failed to establish that the State improperly commented on his right to silence, he also fails to show the rationale for such a motion. *See State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (mistrial appropriate when trial irregularity so prejudices defendant that new trial required). Accordingly, defense counsel was not obligated to move for a mistrial.

3. Burden of Proof

Williams faults his trial counsel for not objecting to the State's characterization of the burden of proof. Williams claims the following statement by the prosecutor was improper:

> Ladies and gentleman, what Ashleigh told you happened, happened [sic]. If you believe her side of the story, then he's guilty. Twelve of you would have to believe that she made this up, all twelve of you who decide the case, to find him not guilty. She didn't make this up. If you believe what she told you, then he's guilty of all four counts.

11 RP at 931. Because Williams fails to cite any authority to support this claim of error, we decline to address the matter. RAP 10.3(a)(6); *State v. Farmer*, 116 Wn.2d 414, 432, 805 P.2d 200 (1991).

B. Calling Rebekah as a Witness

Williams argues that defense counsel was ineffective when he elicited damaging testimony from Rebekah, Williams's wife.

The decision to call a witness is generally a matter of legitimate trial tactics and will not support a claim that counsel ineffectively represented the defendant. *In re Davis*, 152 Wn.2d at

742. Williams could overcome the presumption of counsel's competence by showing that counsel failed to reasonably investigate his possible defenses, adequately prepare for trial, or subpoena a necessary witness. *In re Davis*, 152 Wn.2d at 742. But the record contains no such showing.

Williams relies on *State v. Saunders*, 91 Wn. App. 575, for the proposition that Rebekah's damaging testimony was not supported by a legitimate strategic or tactical reason for offering the evidence. Williams's reliance on *Saunders* is misplaced. In *Saunders*, the court found defense counsel ineffective for asking Saunders about his prior conviction. *Saunders*, 91 Wn. App. at 580. Here, defense counsel called Rebekah to provide critical testimony in which she took full responsibility for abandoning the children and leaving the State of Washington. Rebekah testified that when she told Williams "I was leaving. I have nothing here," he responded to her, "Well, you're my wife. . . If you're going, I'll go with you." 10 RP at 630. Rebekah's testimony corroborated Williams's story that he didn't leave the state because of A.W.'s disclosure of the abuse.

Defense counsel's decision to call Rebekah to the stand was not deficient; this ineffective assistance claim fails.

III. Cumulative Error

Williams argues that the cumulative effect of the trial errors materially affected the outcome of his trial. Under the cumulative error doctrine, a defendant is entitled to a new trial when several errors, though individually not reversible, cumulatively produced a trial that was fundamentally unfair. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the

defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). Because Williams has failed to demonstrate a pattern of significant errors, his cumulative error claim fails.

IV. Statement of Additional Grounds (SAG)

A. Juror's Notes

Williams claims that his trial was compromised because the juror notes were temporarily lost during trial.

Williams must make a strong, affirmative showing of jury misconduct to overcome the longstanding policy favoring "'stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.'" *State v. Pete*, 152 Wn.2d 546, 552, 98 P.3d 803 (2004) (quoting *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994)).

During the trial, a judicial assistant looking for notepads to use in another jury trial recycled the juror notes for this case. Upon discovering this error, the trial judge suggested a process to relocate the notes, which had been placed in a recycle bin. The parties agreed to the process. The judicial assistant then collected the recycle bin with 14 different sets of notes inside. The trial judge asked each juror individually to put something in writing to the judicial assistant to help her identify the individual's notes. The judicial assistant was the only person who reviewed the notes; each juror reviewed his or her packet of notes and confirmed that it belonged to the juror.

Because Williams agreed to this process, he cannot now claim that it was flawed.

B. Juror Friendship with Witness

Williams argues that the trial court erred in not excusing a juror.

Dismissal of a juror is governed by RCW 2.36.110, which states: "It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has

manifested unfitness as a juror by reason of bias . . . ." RCW 2.36.110. We review the trial court's decision on whether to dismiss a juror for a manifest abuse of discretion. *See State v. Grenning*, 142 Wn. App. 518, 540, 174 P.3d 706 (2008) (citing *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991)).

During the defense case, Juror No. 7 informed the court that she recognized a potential prosecution witness. The juror explained that she had "informal social contacts" with the potential witness "once every few months." 11 RP at 880. The trial judge then questioned the juror, concluding with: "You can set that all aside, go back there and do your job as a juror? Can you do that?" 11 RP at 882. Juror No. 7 responded, "Yes." 11 RP at 882. Neither party objected to the juror's continuing service, and the State never called the witness in question. 11 RP at 878.

Williams has failed to demonstrate juror misconduct. The trial court questioned the juror and then offered the State and defense counsel the opportunity to question the juror. Although the juror's first answers to the court were equivocal, her final answer was that she could set aside her relationship with the potential witness and be fair. *See State v. Rempel*, 53 Wn. App. 799, 803-04, 770 P.2d 1058 (1989), *rev'd on other grounds*, 114 Wn.2d 77, 785 P.2d 1134 (1990) (holding trial court did not abuse its discretion when it allowed a juror, who stated she was acquainted with the victim, to remain on the jury). More importantly, the State never called the witness with whom the juror had a relationship. Thus, Williams cannot show prejudice from Juror No. 7 remaining on the jury.

Affirmed.

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.

Armstrong, J.

We concur:

Hunt, J.

Penoyar, A.C.J.