Supreme Court No. 100024-3
Division III, No. 37228-6-III

IN THE
SUPREME COURT
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC RAY STALFORD,

Petitioner

PETITION FOR REVIEW FOLLOWING
APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Judge Cameron Mitchell

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Eric Ray Stalford asks this Court to accept review of Court of Appeals' decision that affirmed his convictions for one count of first degree rape of a child and two counts of first degree child molestation.

B. DECISION FOR WHICH REVIEW IS SOUGHT

The Court of Appeals, Division III, unpublished opinion, filed on July 1, 2021. A copy of this opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

Issue 1: Whether this Court should accept review under RAP 13.4(b)(1) and (b)(2), because the State committed misconduct in its closing argument that was prejudicial and incurable by vouching for the credibility of R.D.H.

D. STATEMENT OF THE CASE

In October 2014, D.G. meet Eric Ray Stalford online. (RP[1] 545-546). D.G. had one son, R.D.H., who was almost five years old at the time. (RP 546). In July 2015, the three moved in together in an apartment in Kennewick. (RP 547-548, 569-570, 702). In October 2015, D.G. and Mr. Stalford got married. (RP 548, 702). In March 2017, D.G. and Mr. Stalford had a son together. (RP 548, 550).

R.D.H.'s biological father was incarcerated, and R.D.H. had not seen him since 2012. (RP 544, 568-569). R.D.H. called Mr. Stalford "dad," and D.G. thought the two had a great bond, and Mr. Stalford "loved him as if he was his own." (RP 551-552, 703-704).

[1] The Report of Proceedings consists of eight volumes, reported by five different court reporters. References to "RP" herein refer to the four consecutively paginated volumes containing a pretrial management hearing and the jury trial, reported by Renee Munoz. References to "Sentencing RP" herein refer to the single volume containing a motion hearing, omnibus hearing, and sentencing hearing, reported by Cheryl Pelletier.

In March 2018, while D.G. was given her younger son a bath, R.D.H. looked into the bathroom and noticed something on the toilet seat. (RP 555-556). D.G. believed it was vaginal discharge she had unknowingly left on the toilet seat. (RP 555-556). R.D.H., who was eight years old at the time, stated "[e]w, gross. That looks like semen." (RP 556). D.G. had not spoken to R.D.H. about semen, so she asked him where he had learned the term. (RP 556-558). R.D.H. told her he learned the term from Mr. Stalford. (RP 558).

D.G. then asked R.D.H. if anything had happened to him. (RP 558). According to D.G., R.D.H. told her Mr. Stalford had "flipped my weiner" and that Mr. Stalford "would pull his hand over to his private parts and make him touch his weiner." (RP 558-559, 735).

Mr. Stalford was working out of town at the time. (RP 561). D.G. called him on the phone, and asked him if what R.D.H. had told her was true. (RP 561-562). Mr. Stalford told D.G. that is not something he would do, and "[t]hat's not what dads do to sons[.]" (RP 562).

D.G. then called her church pastor on the phone. (RP 562-563, 568-569, 611, 623-624, 631-632). The next day, D.G. took R.D.H. to their church, and D.G., R.D.H., the pastor, and the pastor's wife spoke about the alleged contact between him and Mr. Stalford. (RP 563-564, 588-592, 612-615, 624-628, 632-633, 636-637, 738-739).

D.G. reported the alleged contact between Mr. Stalford and R.D.H. to the police. (RP 564, 593-594, 630, 642-646). The police arranged for a child forensic interview of R.D.H. (RP 565-566, 649-651). Mari Murstig interviewed R.D.H., and

the interview was audio and video recorded. (RP 650, 690-692, 736, 739; Pl.'s Ex. 7). In the interview, R.D.H. stated that Mr. Stalford put his mouth "on his potty" three times. (Pl.'s Ex. 7). R.D.H. also stated Mr. Stalford put R.D.H.'s hand "on his potty," while Mr. Stalford's put his hand on R.D.H.'s "potty" five times. (Pl.'s Ex. 7).

Following the child forensic interview of R.D.H., Mr. Stalford spoke with the police. (RP 651). They made another appointment to meet one week later. (RP 651-652). Instead of attending this meeting, Mr. Stalford left the area, first taking a flight to Salt Lake City. (RP 565-567, 651-657, 659-663, 674-680; Pl.'s Exs. 2, 3, 4, 5). He was later located in Oregon. (RP 656-657).

The State charged Mr. Stalford with one count of first degree rape of a child and two counts of first degree child molestation, and alleged two aggravating circumstances for each count, pattern of sexual abuse and abuse of trust. (CP 36-39). The case proceeded to a jury trial. (RP 133-819).

At trial, witnesses testified consistent with the facts stated above. (RP 542-758). Following a hearing held outside the presence of the jury D.G., D.G.'s pastor, the pastor's wife, and Ms. Murstig were allowed to testify to hearsay statements made to the by R.D.H. (RP 17-132). Ms. Murstig did not testify directly to the statements R.D.H. made to her; instead, the State played a video of the child forensic interview for the jury, and the video was admitted as an exhibit. (RP 683-696; Pl.'s Ex. 7).

R.D.H. testified at trial. (RP 698-739). He testified Mr. Stalford "would just put his hand on my - - my private parts, and I would put my hand on his." (RP 708-

709, 713, 716, 718). He testified Mr. Stalford put his mouth "[o]n my weiner" in three different rooms of the apartment, one time in each room. (RP 705-706, 709, 714, 718-719).

Defense investigator Shane Morlan testified for the defense. (RP 748-749, 755-758). He testified that during an interview held a few months prior to trial, he asked R.D.H. a question about Mr. Stalford's mouth, as follows:

> [Defense counsel:] And what did you ask?
> [Mr. Morlan:] I asked -- I phrased it, "When you were speaking with [Ms. Murstig], she had mentioned something happened about mouths," and I said, "Can you explain that to me? Could you tell me more about that?"
> [Defense counsel:] And what was [R.D.H.]'s response?
> [Mr. Morlan:] His response was something to the effect of, "No, nothing happened with mouths. Just normal kissing like son and dad."

(RP 756-757).

In its closing argument, the State argued:

> You are the judges of the credibility of the witnesses, okay? And I'm gonna argue to you that [R.D.H.] is a credible witness, okay?
> . . .
> I argue to you that [R.D.H.] was credible.

(RP 784 –785).

The State further argued:

> Remember how [R.D.H.] told you, "He put his hand on there, and I would pull it away," and his dad would get mad. Yeah. How do you know that? How do you know that your dad would get mad if you pulled your hand away? Just makin' that out of thin cloth - - or maybe that's not the right term, but just making that out of thin air? No. That happened. That's why he knows that. Because he lived it.
> . . .
> [R.D.H.] said, "I told him that it felt good, but I didn't mean it. I just didn't want to hurt his feelings." Whoa. You can't make that up.
> . . .

> How about the opportunity of the witness to observe or know the things he talked about? Remember when he would say, "He would come in my room before work," and his dad, "Do you want to cuddle or do you want to do something else?" Sometimes they would cuddle, but sometimes he would say, "Let's do something else, just to get him out of my face." I mean, makin' that detail up? No. That's what an eight-year-old boy would say. Credible. Credible.
> . . .
> I don't know, ladies and gentlemen. Were there any adults who have an interest in him being dishonest? I mean, when you think about it, kid's tellin' the truth, kid's lyin', or maybe some adult's gettin' this kid to lie. Any adults around him that want to sink this guy (indicating)? That are like, "Okay, [R.D.H.]. You know, you gotta go in there and you gotta say X, Y, Z, P, D, Q, because this guy's gotta go down. So, this is why and this is why."
> No. Everybody -- nothing like that came out. Nothing. He loves his dad. He lost his dad also, and he understands that, and he understood it from the very beginning. How would an eight-year old come up with all of this? It's impossible. Impossible.
> . . .
> And when [R.D.H.'s] mom asked, he told the truth. He told the truth.
> . . .
> Remember where it happened. The campouts. He called it "our special time". You can't make that up. His room. Their room. Places that they could be alone. Think about where [R.D.H.] describes it happening. It makes sense in light of all the other evidence that you've heard. Remember that he wanted to keep baby out of the room. Remember that he would -- that [R.D.H.] told you, "He wanted me to go check on mom to see if she was asleep so we could have our special time." How do you make that up
> unless it happened to you? You can't. You cannot. Because that's exactly what his dad told him. And he remembers getting up and going to check if his mother was asleep.

(RP 787-789, 792-793, 796).

Defense counsel did not object to the State's closing arguments. (RP 774-801).

Also during its closing argument, the State showed 28 powerpoint slides to the jury. (Pl.'s Ex. 8). 11 of these slides contained the heading "[R.D.H.] = Credible." (Pl.'s Ex. 8). The body of each of these slides contained bullet points the

State used during its closing argument to discuss the credibility of R.D.H. (Pl.'s Ex. 8). One bullet point stated: "A 8 kid – come up with this?" (Pl.'s Ex. 8).

The jury found Mr. Stalford guilty as charged. (CP 240, 243, 246). The jury also found the existence of both aggravating factors for each count. (CP 241-242, 244-245, 247-248). The trial court sentenced Mr. Stalford to life in prison without the possibility of early release. (CP 287-322; Sentencing RP 25).

Mr. Stalford appealed. (CP 327). The Court of Appeals affirmed Mr. Stalford's convictions, but remanded the case to the trial court to correct scrivener's errors challenged by Mr. Stalford in his opening brief. *See* Appendix A. Mr. Stalford now seeks review by this Court, of one of the issues raised in his opening brief to the Court of Appeals (Issue 1).

E. ARGUMENT

A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Issue 1: Whether this Court should accept review under RAP 13.4(b)(1) and (b)(2) because the State committed misconduct in its closing argument that was prejudicial and incurable by vouching for the credibility of R.D.H.

Review by this Court is merited because the Court of Appeals' decision conflicts with decisions of this Court addressing the prosecutor improperly vouching for a witness' credibility. *See State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010); *State v. Thorgerson*, 172 Wn.2d 438, 462, 258 P.3d 43 (2011); *State v. Dhaliwal*, 150 Wn.2d 559, 577–78, 79 P.3d 432 (2003); RAP 13.4(b)(1).

Review by this Court is also merited because the Court of Appeals' decision conflicts with a decision of the Court of Appeals addressing the prosecutor improperly vouching for a witness' credibility. *See State v. Ramos*, 164 Wn. App. 327, 341 n.4, 263 P.3d 1268 (2011); RAP 13.4(b)(2).

The State committed misconduct in its closing argument that was prejudicial and incurable by vouching for the credibility of R.D.H. During its closing argument, the State vouched several times for R.D.H.'s credibility. The State expressed its personal opinion of the credibility of R.D.H., by its verbal statements to the jury and by showing the jury 11 powerpoint slides with the heading "[R.D.H.]" = Credible" and a bullet point stating: "A 8 kid – come up with this?" The State also told the jury R.D.H. was telling the truth. Where the key issue for the jury at trial was whether to believe R.D.H., the vouching created an uncurable prejudice, and Mr. Stalford should be granted a new trial.

"To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." *Thorgerson*, 172 Wn.2d

at 442 (internal quotation marks omitted) (*quoting State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)); *see also State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012) (when raising prosecutorial misconduct, the appellant "must first show that the prosecutor's statements are improper."); *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994) (stating "[a]llegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.").

If the defendant fails to properly object to the misconduct, "a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered." *State v. O'Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (internal quotation marks omitted) (*quoting State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)). "Under this heightened standard, the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). "Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id*. at 762.

"It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness." *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008); *see also Dhaliwal*, 150 Wn.2d at 577–78. Improper vouching for a witness' credibility occurs "if a prosecutor expresses his or her personal belief as to the

veracity of the witness . . . ." *Ish*, 170 Wn.2d at 196; *see also Thorgerson*, 172 Wn.2d at 462 (stating the same).

A prosecutor also improperly vouches for the credibility of a witness by stating a witness is telling the truth. *Ramos*, 164 Wn. App. at 341 n.4 (finding the prosecutor improperly vouched for the credibility of witnesses by arguing they "were just telling you what they saw and they are not being anything less than 100 percent candid"). "Whether a witness has testified truthfully is entirely for the jury to determine." *Ish*, 170 Wn.2d at 196 (citing *United States v. Brooks*, 508 F.3d 1205, 1210 (9th Cir. 2007)). "A prosecutor owes a defendant a duty to ensure the right to a fair trial is not violated." *Ramos*, 164 Wn. App. at 333 (citing *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011)).

Prejudicial error occurs when it is clear the prosecutor is expressing a personal view rather than arguing an inference from the evidence. *State v. McKenzie*, 157 Wn.2d 44, 54, 134 Wn.2d 221 (2006); *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

As noted above, the State made the following comments during its closing argument:

> Just makin' that out of thin cloth - - or maybe that's not the right term, *but just making that out of thin air? No. That happened.* That's why he knows that. Because he lived it.
> . . .
> [R.D.H.] said, "I told him that it felt good, but I didn't mean it. I just didn't want to hurt his feelings." Whoa. *You can't make that up.*
> . . .
> How about the opportunity of the witness to observe or know the things he talked about? Remember when he would say, "He would come in my room before work," and his dad, "Do you want to cuddle or do you want to do something else?" Sometimes they would cuddle, but sometimes he would say, "Let's do something else, just to get him

> out of my face." *I mean, makin' that detail up? No. That's what an eight-year-old boy would say. Credible. Credible.*
> . . .
> How would an eight-year old come up with all of this? *It's impossible. Impossible.*
> . . .
> And when [R.D.H.'s] mom asked, he told the truth. *He told the truth.*
> . . .
> Remember where it happened. The campouts. He called it "our special time". *You can't make that up.* His room. Their room. Places that they could be alone. Think about where [R.D.H.] describes it happening. It makes sense in light of all the other evidence that you've heard. Remember that he wanted to keep baby out of the room. Remember that he would -- that [R.D.H.] told you, "He wanted me to go check on mom to see if she was asleep so we could have our special time." *How do you make that up unless it happened to you? You can't. You cannot.* Because that's exactly what his dad told him. And he remembers getting up and going to check if his mother was asleep.

(RP 787-789, 792-793, 796) (emphasis added).

These statements were improper and constituted misconduct because they were expressions of the State's personal belief as to the credibility of R.D.H. *See Warren*, 165 Wn.2d at 30; *Ish*, 170 Wn.2d at 196. Telling the jury several times that you cannot make this up, and that it impossible for R.D.H. to make his up, was the State's personal opinion regarding the credibility of R.D.H. The State was not inquiring as to whether R.D.H. *could* make this up, but rather, definitively stating, six separate times, that this is not something that could be made up. *Cf. State v. Teters*, No. 49357-8-II, 2015 WL 4627884, *7 (Wash. Ct. App. Feb. 20, 2019) (prosecutor's statement in closing asking the jurors to ask themselves why the victim would "make this up" was proper, because it is not misconduct to urge the jury to consider the evidence of motives of the parties); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1,

2013, as nonbinding authority). This conduct was improper. The State was not arguing an interference from the evidence, but rather, expressing a personal opinion regarding the credibility of R.D.H. *See McKenzie*, 157 Wn.2d at 54.

The State also expressed its personal opinion of the credibility of R.D.H. by showing the jury 11 powerpoint slides containing the heading "[R.D.H.] = Credible." (Pl.'s Ex. 8). Over one-third of the State's powerpoint slides during closing argument contained this header. (Pl.'s Ex. 8). Further, a bullet point on one of these 11 powerpoint slides stated: "A 8 kid – come up with this?" (Pl.'s Ex. 8). Like the statements during closing, this bullet point reiterated the State's argument that R.D.H. could not make up the alleged events, and was the State's personal opinion regarding the credibility of R.D.H.

The State also improperly vouched for the credibility of R.D.H. by stating R.D.H. "told the truth." *See Ramos*, 164 Wn. App. at 341 n.4; *see also* RP 793.

The improper vouching that occurred here prejudiced the Mr. Stalford's right to a fair trial by encroaching upon the jury's decision-making authority. *See Ish*, 170 Wn.2d at 196.

While defense counsel did not object to the prosecutor's improper statements, no curative instruction would have neutralized the comments the prosecutor made to the jury, both in its statements and in its powerpoint slides. (RP 787-789, 792-793, 796; Pl.'s Ex. 8). The key issue as trial for the jury was whether to believe R.D.H. The primary evidence against Mr. Stalford were statements by R.D.H., directly and through admitted hearsay testimony. Under these circumstances, the prejudice from repeatedly stating that R.D.H. was telling the truth and viewing the visual, "[R.D.H.]

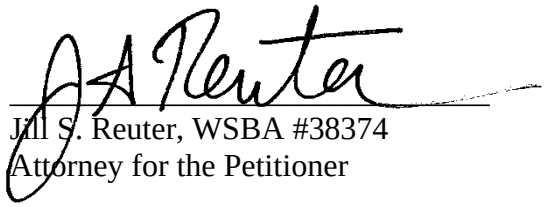
= Credible," for over one-third of the State's powerpoint presentation, could not be cured by an instruction.

The State committed misconduct in its closing arguments that was prejudicial and incurable, by vouching for the credibility of R.D.H. This Court should reverse Mr. Stalford's convictions and remand for a new trial.

F. CONCLUSION

For the reasons stated herein, Mr. Stalford respectfully requests that this Court grant review pursuant to 13.4(b)(1) and (b)(2).

Respectfully submitted this 27th day of August, 2021



Jill S. Reuter, WSBA #38374
Attorney for the Petitioner

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Plaintiff/Respondent	)	COA No. 37228-6-III
vs.	)	Benton County No. 18-1-00731-7
ERIC RAY STALFORD Defendant/Appellant	)	PROOF OF SERVICE

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on August 27, 2021, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the attached Petition for Review to:

Eric Ray Stalford, DOC No. 418929
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

Having obtained prior permission from the Okanogan County Prosecutor's Office, I also served the Respondent State of Washington at prosecuting@co.benton.wa.us using the Washington State Appellate Courts' Portal.

Dated this 27th day of August, 2021.

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APPENDIX A

FILED
JULY 1, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. ERIC RAY STALFORD, Appellant.	)))))))))	No. 37228-6-III UNPUBLISHED OPINION

PENNELL, C.J. — Eric Ray Stalford appeals his convictions for first degree rape of a child and first degree child molestation. We affirm Mr. Stalford's convictions, but remand to correct scrivener's errors on the judgment and sentence form.

FACTS

Eric Ray Stalford was charged with one count of first degree child rape and two counts of first degree child molestation based on the information that a stepson, R.H., reported to his mother, church pastors, and a forensic investigator. Each count alleged the acts occurred between December 21, 2013, and May 2, 2018.

R.H. was born in December 2009. He was nine and a half years old when he testified at trial. The State successfully admitted R.H.'s child hearsay statements into evidence.

During summation, the prosecutor focused their argument on R.H.'s credibility. The framework of the prosecutor's argument followed the court's instruction to the jury on credibility. The instruction read as follows:

> You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

Clerk's Papers at 200-01.

Relevant portions of the prosecutor's argument are reproduced below, with emphasis given to the portions at issue on appeal:

> You are the judges of the credibility of the witnesses, okay? And I'm gonna argue to you that [R.H.] is a credible witness, okay? The judge has told you—and you get all these instructions back there (indicating), but the judge told you there's some things that you can look at when you are judging the credibility of a witness.
>
> If you believe that witness, what things can you take into consideration? The opportunity of the witness to observe or know the things he or she testifies about. I like to call that "you know it 'cause you lived it." The ability of the witness to observe accurately. Could they see? Was it dark? Was it light? Were they drunk? Were they high?
>
> The quality of a witness's memory while testifying. You can take that into consideration. Absolutely. The manner of a witness while

testifying. Comin' in here and sellin' somebody down the road. Oh, yeah, I got a—I got a manner about it. Any personal interest a witness might have in the outcome. A personal interest in the outcome of this case. If the witness has a personal interest.

Any bias or prejudice the witness may have shown. Do they have a motive to come in here and lie? Do they have a motive? You can take that into consideration. And the reasonableness of the witness's statements in the context of all the other evidence that was given to you.

Does their testimony seem reasonable? Is it reasonable in light of everything else you've been given in this case? *Absolutely, and I argue to you that [R.H.] was credible.*

So, let's go through a few of these things. The opportunity of a witness to observe or know the things he testifies about. *He knows because he lived it.* Eight-year-old child. Where did this happen? It happened in dark rooms. Did he ever see the penis? Maybe he didn't.

. . . .

The shaking of the penis. Shaking penis? What? Shaking the penis. Yeah, shaking it like this (indicating). Shaking it. Huh. What could that be? Well, if you're an eight-year-old little boy or if you're a nine-year-old little boy, that's how you're gonna describe it. And how can you describe it that way? Because that's what he lived through. *You cannot describe it like that unless you've lived it, and this kid lived it.*

. . . .

Remember how he told you, "He put my hand on there, and I would pull it away," and his dad would get mad. Yeah. How do you know that? How do you know that your dad would get mad if you pulled your hand away? Just makin' that out of thin cloth—or maybe that's not the right term, but just making that out of thin air? No. *That happened. That's why he knows that. Because he lived it.*

. . . .

How about the opportunity of the witness to observe or know the things he talked about? Remember when he would say, "He would come in my room before work," and his dad, "Do you want to cuddle or do you want to do something else?" Sometimes they would cuddle, but sometimes he would say, "Let's do something else, just to get him out of my face."

I mean, makin' that detail up? No. That's what an eight-year-old boy would say. Credible. Credible.

What about the ability of him to observe accurately? Remember, this happened when they were alone. Arguably most of it happened at night. When it was dark. When it was quiet. When it was just the two of them. Laying. Alone. And he gives you sensory memory, because that's how he remembers it.

. . . .

How about the quality of his memory while testifying? What do you think that number is right there (indicating): 484? It's 484 days have passed since he told his mom. Think about that. That's a long, long time in the life of a little boy.

Is he talking about this all the time? Huh-uh. Doesn't want to talk about it. Is he talkin' about it with everybody at school? No. He's not talking about it. Think about that. 484 days, and all of a sudden, "Come on up here. Let's talk about it in front of everybody here."

. . . .

What about his manner while testifying. Did that look fun to you? Was he just making this all up to get attention like you learned about? Oh, you know, he just wants a bunch of attention. He just wants to come in here and talk about this all the time, and talk about it with everybody. All you all are lookin' at him. All the people in the courtroom were lookin' at him.

. . . .

Was there any personal interest that the witness may have in the outcome? Was there any motive brought out for this kid to be dishonest to you? Anything? I mean, I'm—I'm trying to wrack my brain. Oh. That's right. That's right. He was upset about his little brother being born so he's making this up about his dad. So—okay. I'm not sure where that goes.

I don't know, ladies and gentlemen. Were there any adults who have an interest in him being dishonest? I mean, when you think about it, kid's tellin' the truth, kid's lyin', or maybe some adult's gettin' this kid to lie. Any adults around him that want to sink this guy (indicating)? That are like, "Okay, [R.H.] You know, you gotta go in there and you gotta say X, Y, Z, P, D, Q, because this guy's gotta go down. So, this is why and this is why."

No. Everybody—nothing like that came out. Nothing. He loves his dad. He lost his dad also, and he understands that, and he understood it from

the very beginning. *How would an eight-year old come up with all of this? It's impossible. Impossible.*

Was any bias or prejudice shown? Does he hate his dad? Did he want his dad to get in trouble? Did any of that come out? Huh-uh.

How about the reasonableness of his testimony in light of everything else that you heard in this case? Okay. So, not just him, but what else you've learned? They didn't have a great sex life after the kid was born. Now, don't get me wrong. Every marriage that has a bad sex life does not mean that this happens. I'm not saying that this is the smoking gun. Don't—don't—but it's a little piece of something, and it does make sense because the sexual abuse started after [R.H.'s brother] was born. Something to think about. Just a little piece of the puzzle.

Is it reasonable how it came out? It was spontaneous. "That looks like semen." Complete spontaneous disclosure. Completely spontaneous. No one's questioning him. Spontaneous. And then mom began to ask how her eight-year-old child knows about semen, and that's how this all came out. It was spontaneous.

And when his mom asked, he told the truth. He told the truth. He also told several important people in his life. Told Pastor Mel. Okay. Now, if you're a little eight-year-old boy in Sunday school and you're actin' up with Jacob—and I forget the other kid—what happens? You go see Pastor Mel.

. . . .

Pastor Mel was an authoritative figure in this little boy's life. Pastor Mel also knew the defendant. Pastor Mel talked to this kid, and before he talked to this kid he told him, "You are not in any trouble. Your mom has told me you're not gonna get in any trouble. I just need to know that you are telling the truth."

. . . .

And I also want you to think about the type of abuse he endured. Does that make sense? Does it make sense that you would begin to trust a child, get him to gain your trust, and that abuse starts slowly with touching on the outside of the clothes? Yeah. Of course that makes sense.

. . . .

Remember where it happened. The campouts. He called it "our special time." *You can't make that up.* His room. Their room. Places that

> they could be alone. Think about where [R.H.] describes it happening. *It makes sense in light of all the other evidence that you've heard.*
>
> Remember that he wanted to keep baby out of the room. Remember that he would—that [R.H.] told you, "He wanted me to go check on mom to see if she was asleep so we could have our special time." *How do you make that up unless it happened to you? You can't. You cannot. Because that's exactly what his dad told him.* And he remembers getting up and going to check if his mother was asleep.
>
> . . . .
>
> Remember when he—"Hey, [R.H.]. You ever lie?" "Yep, I've lied." How truthful is that? Yeah, he's lied. "What was—[R.H.], tell me about one of your lies?" "Well, one time I took four Skittles when I was supposed to take two." That's it? Okay. Lied?
>
> . . . .
>
> One thing about this kid is he's a rule follower. "We're not supposed to talk about the case. You know, we're not supposed to talk." This is a rule-follower kid. *Yeah, kids fib, but eventually they end up tellin' the truth.*

4 Report of Proceedings (Aug. 30, 2019) at 784-87, 789-98 (emphasis added).

The prosecutor used a PowerPoint presentation to accompany summation. A section of the presentation was entitled "CREDIBILITY." Ex. 8 at 10. Within this section there were 11 slides, each with the heading, "[R.H.] = Credible." *Id*. at 11-21. Below each of the headings was a bullet point, quoting a portion of the court's instruction on credibility. For example, the first of the eleven slides had the bullet point: "The opportunity of the witness to observe or know the things he testifies about." *Id.* at 11. Below the bullet point on each slide was a list of facts or issues in support of the

applicable language from the instruction on credibility. For example, regarding a witness's opportunity to observe or know things, the slide contained the following list:

- Was it dark in those rooms? See penis?
- What did he know? Sensory memory Gross, sticky itchy, hairy [. . .]
- Body positions [. . .] Down there [. . .] I'm up here
- Shaking the penis—used his hand to show
- Blanket on the floor
- Remember his arm in his bedroom
- Pulled his hand away—Dad would get mad
- Left his hand there—then it got wet. How? from dad

Id.

Mr. Stalford never objected to the State's argument or its PowerPoint slides. The jury convicted Mr. Stalford as charged. He timely appeals.

ANALYSIS

Prosecutorial misconduct

Mr. Stalford contends the prosecutor committed misconduct in summation by vouching for R.H.'s credibility. Because there was no objection, relief turns on whether the prosecutor's comments were so flagrant and ill intentioned that they could not be adequately addressed by a curative instruction. *State v. Korum*, 157 Wn.2d 614, 650, 141 P.3d 13 (2006) (plurality opinion). Here, the standard is not met.

It is important to clarify what vouching is and what it is not. Vouching occurs when a prosecutor provides personal assurances about the credibility of a witness or the

merits of a case. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (plurality opinion). It can also happen when the prosecutor suggests information outside the record supports its theory of the case. *Id*. The prohibition on vouching does not prevent the prosecutor from arguing their case. The prosecutor can argue a witness's credibility, including explaining why a witness should or should not be believed. Especially when there is no objection at trial, relief based on improper vouching is unwarranted unless it is "'clear and unmistakable'" that a prosecutor is inserting their personal opinion into the case. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (quoting *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)).

Viewed in context, the prosecutor's arguments in Mr. Stalford's case were presented as reasons for why the jury should find R.H. credible; the prosecutor was not expressing a personal belief. The prosecutor's assertion that it was "impossible" for R.H. to make up his version of events, for instance, was based on the evidence that R.H., as an eight-year-old at the time he reported the abuse, had no personal interest in lying about Mr. Stalford. The prosecutor linked this statement to R.H.'s frequent expressions of (1) fear about losing his biological father and (2) love for his stepfather during the time of the abuse. Arguing it was "impossible" for R.H. to lie about the abuse under those circumstances was an overstatement if taken literally, but not misconduct.

Our review of the prosecutor's PowerPoint presentation shows it was also properly presented as argument, not an expression of opinion. Each slide containing the heading "[R.H.] = Credible" listed evidence supporting R.H.'s credibility. The slides did not amount to vouching.

While some of the prosecutor's words could be viewed as vouching if viewed in isolation, context made the purpose clear. The fact that Mr. Stalford's attorney did not object bolsters our conclusion that the prosecutor made no clear and unmistakable statements of personal opinion. There was no misconduct, let alone misconduct sufficient to warrant reversal under the applicable standard of review.

Scrivener's error in judgment and sentence

The parties agree Mr. Stalford's judgment and sentence contains several scrivener's errors regarding the dates of his current offenses and the sentencing date for several of his prior offenses. They also agree these errors should be corrected on remand. We accept this concession. *See State v. Coombes*, 191 Wn. App. 241, 255, 361 P.3d 270 (2015).

CONCLUSION

The convictions are affirmed. This matter is remanded for correction of scrivener's errors in the judgment and sentence.[1]

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, C.J.

WE CONCUR:

Siddoway, J.

Fearing, J.

[1] The jury found Eric Stalford committed the current offenses between December 21, 2013 and May 2, 2018. The date of entry of the judgment of conviction and sentence for each of the prior Oregon convictions was March 9, 1999.

NICHOLS AND REUTER, PLLC / EASTERN WASHINGTON APPELLATE LAW

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