No. 96060-7
COA No. 77738-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN O'KEITH RITCH,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR CLARK COUNTY

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Brian Ritch asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Brian O'Keith Ritch*, No. 77738-6-I (June 11, 2018). A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

Under the Due Process Clauses of the Washington and United States Constitutions, a defendant is guaranteed the right to a fair trial. Prosecutorial misconduct in closing argument, which prejudices the defendant, violates that right to a fair trial and requires reversal of the convictions. Here, the prosecutor vouched for the veracity of its primary witness, and argued facts not in evidence. Is a significant question of law under the United States and/or Washington Constitutions involved, where there was a substantial likelihood that the misconduct affected the jury's verdict, thus requiring reversal of Mr. Ritch's convictions?

D. STATEMENT OF THE CASE

Mr. Ritch is the father of 12 year old H.R. RP 232-35. H.R. lived with her mother, Michelle Fritzner, and step-father. Mr. Ritch and Ms. Fritzner were never married but lived together from 2000 to 2010. RP 325-26. H.R. was born in 2004. RP 326.

After Mr. Ritch and Ms. Fritzner separated, Mr. Ritch cared for H.R. everyday after school and every other weekend. RP 238. H.R. unilaterally ended this arrangement in 2013 based upon her perception of Mr. Ritch's anger issues. RP 236.

According to H.R., Mr. Ritch began showing her pornographic magazines when she was six years old. RP 265. Mr. Ritch began touching H.R. when she was nine years old. *Id.* H.R. disclosed Mr. Ritch's inappropriate behavior to her mother and following a police investigation, Mr. Ritch was charged with one count of first degree child rape and four counts of first degree child molestation. CP 61-64; RP 266. Attached to each of the counts were sentence aggravators for an abuse of trust and an ongoing pattern of sexual abuse. CP 61-64.

In closing arguments, the prosecutor stated:

> I simply have to prove to you beyond a reasonable doubt that what we are alleging happened at the hands of this defendant actually did happen beyond a reasonable doubt. Which means that if you have *an abiding belief in*

> *the truth of the facts* that you heard from the testimony here, then you can be satisfied.

6/15/2016RP 562 (emphasis added). Mr. Ritch did not object to this comment. Continuing the argument:

> Apparently judging by the yawning on the stand sleepiness is a response that [H.R.] experiences in response to stress and in response to the fact she'd been up most of the night until roughly 4:00 a.m. trying to hold on until she could tell her mom, but she didn't make it. She fell asleep.
>
> MR. PASCOE: Your Honor, I move to strike the last (inaudible). I don't think it was testified to.
>
> THE COURT: On what basis?
>
> MR. PASCOE: I just don't -- I believe she spoke about 4:00 a.m. I don't believe that was testified to.
>
> THE COURT: Again I'll remind the jury that anything that the attorneys are saying are not evidence. The evidence is based on the testimony that was presented and the exhibits that were heard.
>
> To that extent, that the question goes to a particular timing as to what was involved or not, I will go ahead and strike that portion as to the time itself, Ms. Culver, but otherwise go ahead.

6/15/2016RP 564-65.

The jury subsequently found Mr. Ritch guilty as charged and he was sentenced to an exceptional sentence of 336 months to life. CP 119-24, 135-44; 163-64.

The Court of Appeals ruled that any misconduct by the prosecutor could have been cured by a jury instruction. Decision at 3-6.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

The prosecutor's misconduct during closing argument was so prejudicial, reversal of Mr. Ritch's convictions is required.

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 3 and article I, section 22 of the Washington Constitution guarantee the right to a fair trial. *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). Prosecutorial misconduct may "so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

Prosecutors represent the State as quasi-judicial officers and they have a "duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant." *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). "A '[f]air trial' certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused." *State v. Monday*, 171 Wn.2d 667, 677, 257

P.3d 551 (2011) (alteration in original), *quoting State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

To establish that the prosecutor committed misconduct during closing argument, the defendant must prove the prosecutor's remarks were both improper and prejudicial. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015); *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

The Court of Appeals ruled that, in light of Mr. Ritch's failure to object, any misconduct on the part of the prosecutor could have been cured by a jury instruction. Where a defendant does not object to portions of the prosecutor's argument, he is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). In making this determination, the "focus [is] 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. The defendant must show that (1) no curative instruction would have

eliminated the prejudicial effect, and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *Emery*, 174 Wn.2d at 760-61.

In *Glasmann*, the defendant was charged with assault, robbery and kidnapping. He did not deny culpability, rather he argued he was guilty of only lesser included offenses. This Court reversed the defendant's convictions based upon the misconduct of the prosecutor in closing argument despite the fact the defendant did not object to the misconduct, finding a substantial likelihood the misconduct affected the jury's verdict. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 712-14, 286 P.3d 673 (2012).

> Considering the entire record and circumstances of this case, there is a substantial likelihood that this misconduct affected the jury verdict. The principal disputed matter at trial was whether Glasmann was guilty of lesser offenses rather than those charged, and this largely turned on whether the requisite mental element was established for each offense. More fundamentally, the jury was required to conclude that the evidence established Glasmann's guilt of each offense beyond a reasonable doubt.

Glasmann, 175 Wn2d at 714. The same is true here.

Here, as in *Glasmann*, "'the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial

effect.'" *Id.* (alteration in original), *quoting State v. Walker*, 164 Wn.App. 724, 737, 265 P.3d 191, 198 (2011). The prosecutor argued facts not in evidence, improperly bolstered the credibility of its primary witness and urged the jury to determine the truth of the facts. The fact the trial court sustained Mr. Ritch's objections to some of the misconduct did not remedy the error as the misconduct was so pervasive that no instruction could remedy the prejudice.

This Court should grant review, find that the decision in *Glasmann* controls the outcome here, reverse Mr. Ritch's convictions and remand for a new trial.

F. CONCLUSION

For the reasons stated, Mr. Ritch asks this Court to grant review of his petition and reverse his convictions and remand for a new trial

DATED this 6th day of July 2018.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 77738-6-I
v.	)	DIVISION ONE
BRIAN O'KEITH RITCH, Appellant.	)	UNPUBLISHED OPINION
	)	FILED: June 11, 2018

SPEARMAN, J. — To prevail on a claim of prosecutorial misconduct where a defendant did not object at trial, the defendant must establish that the prosecutor's comments were so flagrant that the resulting prejudice could not have been cured through instruction to the jury. Brian O'Keith Ritch challenges his conviction, arguing that the prosecutor's comments during closing argument were improper and prejudicial. But any impropriety in the comments could have been cured through instruction. We affirm.

FACTS

Ritch was tried on charges of child rape and child molestation. Ritch's daughter, H.R., testified to repeated incidents of abuse occurring over several years. She described in detail incidents that occurred when she was nine and ten years old. The jury convicted Ritch as charged. He appeals.

DISCUSSION

Ritch asserts that the prosecutor committed reversible misconduct during closing argument. To prevail on a claim of prosecutorial misconduct, a defendant must generally establish that the prosecutor's comments were both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Where the defendant did not object to the allegedly improper comments at trial, he must meet a heightened standard. In that case, the defendant must show that the misconduct was so flagrant and prejudicial that it could not have been cured by instruction. Id.

Ritch first objects that the prosecutor bolstered H.R.'s credibility and argued facts outside the record. A prosecutor has wide latitude to argue inferences from the evidence during closing argument. Fisher, 165 Wn.2d at 747. A prosecutor may not, however, argue facts not in evidence. Id. Likewise, a prosecutor may not vouch for a witness's credibility, as by expressing a personal belief in the witness's veracity. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). We review a prosecutor's comments during closing argument in the context of the entire argument. Fisher, 165 Wn.2d at 747.

H.R. was twelve years old at the time of trial. After testifying to the abuse, she stated that she did not tell anyone at the time because Ritch told her not to and because she was scared it was her fault. H.R. testified that she eventually disclosed the abuse because she was so sad. She said that one night, about a year before trial, she had been crying all night. She tried to stay awake to talk to her mother in the morning before she left for work. But, H.R. stated, she fell

asleep and did not wake up until after her mother had left. Id. at 269. She described the next day as "just a sad day." Verbatim Report of Proceedings (VRP) at 268. H.R. testified that, when her mother came home for lunch, she tried to tell her about the abuse but could not. Her mother asked what was wrong and then, H.R. stated, she told her.

At times during her testimony, H.R. spoke inaudibly, needed to take breaks, and needed tissues. She also yawned and appeared sleepy. She stated that she was tired from talking.

In closing argument, the prosecutor recounted H.R.'s testimony concerning the day she disclosed the abuse:

> And so when I asked her why – how did you finally decide to tell, she said it was just too sad. I don't even remember anything about that day except it was just a really sad day. I couldn't sleep. And I was crying and crying. And I thought I might stay up long enough that I could tell my mom first thing in the morning, but I didn't make it.
>
> Apparently judging by the yawning on the stand sleepiness is a response that [H.R] experiences in response to stress and in response to the fact she'd been up most of the night until roughly 4:00 a.m. trying to hold on until she could tell her mom, but she didn't make it. She fell asleep.

VRP at 564. Ritch objected that there was no testimony referring to 4:00 a.m., stating "I just don't – I believe she spoke about 4:00 a.m. I don't believe that was testified to." Id. at 564-65. The court responded "[t]o that extent, that the question goes to a particular timing as to what was involved or not, I will go ahead and strike that portion as to the time itself." Id. at 565.

On appeal, Ritch argues that the prosecutor's comment that H.R. became sleepy as a response to stress is unsupported by evidence. He argues that this

comment amounted to arguing facts outside the record and improperly bolstering H.R.'s credibility. Ritch asserts that he objected to this comment below and need only meet the lesser standard of showing that the comment was improper and prejudicial.

We disagree. Ritch's objection below was to the time 4:00 a.m. He did not object to the argument that H.R.'s yawning and sleepiness were a response to stress. To prevail, he must show that the comment was not only improper but also so prejudicial that it could not have been cured through instruction. Ritch fails to meet this standard. If there was any impropriety in the prosecutor's comment about H.R.'s yawning and sleepiness, it could have been cured through instruction.

Ritch next argues that the prosecutor misstated the law concerning the jury's role and the State's burden of proof. Under the pattern jury instruction approved by the Supreme Court, juries are instructed that if, after full and fair consideration of the evidence, they "'have an abiding belief in the truth of the charge,'" they are satisfied beyond a reasonable doubt. State v. Boyd, 1 Wn. App.2d 501, 521, 408 P.3d 362 (2017) rev. denied, 190 Wn.2d 1008, 414 P.3d 578 (2018) (quoting WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01 (4th ed. 2018) (emphasis added). In contrast, it is improper to instruct the jury that its role is to "determine the truth" or that its verdict must "speak the truth." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). This is because the jury's role is to determine whether the State has proved the charge beyond a reasonable doubt, not to determine the truth. Id.

In this case, Ritch's theory at trial was that H.R.'s testimony was inconsistent and uncorroborated. The prosecutor, in her closing argument, reminded the jury that it was the sole judge of credibility. After summarizing the testimony supporting each element of the crimes charged, the prosecutor addressed the burden of proof:

> I want to talk to you now about the notion of beyond a reasonable doubt. . .
>
> This is a legal standard, not an impossible standard. It doesn't mean beyond all concept of any doubt that you might create in your own mind. It doesn't mean that you start asking yourself could this have been a masked intruder who came in, and she just got confused? You don't have to reach for outlandish explanations, and I don't have to disprove those.
>
> I simply have to prove to you beyond a reasonable doubt that what we are alleging happened at the hands of this defendant actually did happen beyond a reasonable doubt. Which means that if you have an abiding belief in the truth of the facts that you heard from the testimony here, then you can be satisfied.
>
> Specifically with regard to rape of a child and child molestation charges, the victim's testimony – an alleged victim's testimony need not be corroborated. There is no DNA requirement. There is no physical injury requirement.

VRP at 562-63 (emphasis added). In her final comments, the prosecutor argued:

> [Ritch] said all you need – all the State wants to say is that all you need is a little girl to say so. What you need is for that girl to say so, and then to ask yourselves do I have an abiding belief in the truth of what she said? And if what she said is true, is it a violation of the law as described in these instructions?

Id. at 628.

Ritch contends that, by telling the jury to consider whether it had "an abiding belief in the truth of the facts that you heard from the testimony here," the prosecutor urged the jury to find the truth. VRP at 562. He asserts that this was flagrant misconduct that could not have been cured through instruction. We

disagree. The prosecutor correctly argued that the jury was the sole arbiter of credibility and that H.R.'s testimony alone, if credible, was sufficient to establish each element of the crimes charged. In context, the prosecutor did not urge the jury to find the truth. Any impropriety in referring to "an abiding belief in the truth of the facts," rather than "an abiding belief in the truth of the charge" could have been cured through instruction.

Affirmed.

WE CONCUR:

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

STATE OF WASHINGTON, Respondent, v. BRIAN RITCH, Appellant.	)))))))))	NO.77738-6-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF JULY, 2018, I CAUSED THE ORIGINAL **PETITION FOR REVIEW** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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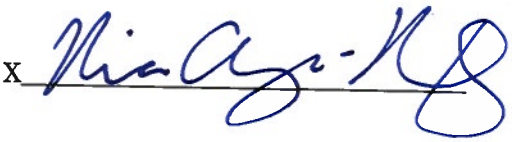
X 

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