NO. 45379-7

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALFRED JAMES THIERRY, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley Rumbaugh

No. 12-1-03862-9

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Whether defendant has failed to meet his burden of showing prosecutorial misconduct and that any error could not have been cured by an instruction to the jury? 1

2. Whether this Court should remand to the trial court to modify Conditions 13, 16, 25 and 27 of Appendix H in the judgment and sentence so they comply with RCW 9.94A.703 and case law? 1

B. STATEMENT OF THE CASE. 1

1. Procedure 1

2. Facts 2

C. ARGUMENT 11

1. DEFENDANT HAS FAILED TO SHOW ANY EVIDENCE OF PROSECUTORIAL MISCONDUCT OR THAT HE SUFFERED PREJUDICE THAT COULD NOT HAVE BEEN CURED BY AN INSTRUCTION TO THE JURY. 11

2. THIS COURT SHOULD REMAND WITH ORDERS TO MODIFY SEVERAL COMMUNITY CUSTODY CONDITIONS IN APPENDIX H 33

D. CONCLUSION. 41

Table of Authorities

State Cases

City of Seattle v. Eze, 111 Wn.2d 22, 27, 759 P.2d 366 (1988)................36

Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)..........................21

State v. Acevedo, 159 Wn. App. 221, 231, 248 P.3d 526 (2010)........33, 36

State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008)...................33, 36

State v. Bautista-Caldera, 56 Wn. App. 186, 783 P.2d 116 (1989), *review denied*, 114 Wn.2d 1011 (1990) 18

State v. Belgrade, 110 Wn.2d 504, 755 P.2d 174 (1988)....................22, 23

State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993)........................30

State v. Binkin, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), (*overruled on other grounds by* ***State v. Kilgore***, 147 Wn.2d 288, 53 P.3d 974 (2002))...12

State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005) 27

State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988)......31

State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988) 31

State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992) 36

State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991) 25

State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967) 12

State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996)....................24

State v. Emery, 174 Wn.2d 741, 761, 278 P.3d 653 (2012)................20, 24

State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).....................30

State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105 (1995) 12

State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)................12

State v. Gregory, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006).....12, 25, 26

State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)..........30

State v. Johnson, 180 Wn. App. 318, 327 P.3d 704 (2014) 37

State v. Jones, 71 Wn. App. 798, 808, P.2d 85 (1993).....13, 18, 24, 26, 27

State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007).................28

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991)........................31

State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985).................11

State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)...........31

State v. Miller 110 Wn. App. 283, 284, 40 P.3d 692, *review denied*, 147 Wn.2d 1011, 56 P.3d 565 (2002)..25

State v. Monday, 171 Wn.2d 667, 679, 257 P.3d 551 (2011).......21, 22, 23

State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008)........33, 38

State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013 (1992)..18, 19

State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), *overruled on other grounds by* ***State v. Valencia***, 169 Wn.2d 782, 239 P.3d 1059 (2010) 35

State v. Russell, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) 12, 13

State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) 11, 12, 20

State v. Swan, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990) 21

State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) 30

State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011) 20

State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied,* 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009)...........13, 23

State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006)......................20

State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)..............................11

State v. White, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied,* 123 Wn.2d 1004 (1994)..31

State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007)........................23

State v. Zimmer, 146 Wn. App. 405, 413, 190 P.3d 121 (2008)...35, 38, 40

Federal and Other Jurisdictions

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).....................30

Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986)..29

Portuondo v. Agard, 529 U.S. 61, 69, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000)..25

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..30, 31, 32

United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984)..29

United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988)...31

Constitutional Provisions

Sixth Amendment..29

U.S. Const., amend XIV..36

Wash. Const. art I, §3...36

Statutes

RCW 69.41.030 34

RCW 9.94A.701 33

RCW 9.94A.703 .... 1, 33

RCW 9.94A.703(1)-(3) 33

RCW 9.94A.703(2) 34

RCW 9.94A.703(2)(c) 34

RCW 9.94A.703(3)(b) 35

RCW 9.94A.703(3)(f) 35, 38, 39, 40

RCW 9.94A.704(2)(a) 39

A. <u>ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR</u>.

1. Whether defendant has failed to meet his burden of showing prosecutorial misconduct and that any error could not have been cured by an instruction to the jury?

2. Whether this Court should remand to the trial court to modify Conditions 13, 16, 25 and 27 of Appendix H in the judgment and sentence so they comply with RCW 9.94A.703 and case law?

B. <u>STATEMENT OF THE CASE</u>.

1. Procedure

On October 12, 2012, the Pierce County Prosecutor's Office charged ALFRED JAMES THIERRY, JR., hereinafter "defendant," with four counts of rape of a child in the first degree, and two counts of child molestation in the first degree. CP 1-4. All six counts contained the aggravating factor that they involved a particularly vulnerable victim. CP 1-4. On February 1, 2013, the State filed an amended information adding to all counts the aggravating factors of being domestic violence incidents and involving an abuse of trust. CP 18-21. A second amended

information was filed during the trial amending the dates during which some of the incidents took place. CP 111-114; 13RP[1] 8.

At the conclusion of the trial, the jury found defendant guilty of all counts and found the presence of each of the aggravating factors which were alleged, and that all counts were domestic violence related. 17RP 2-9; CP 157-180. On September 20, 2013, the court sentenced defendant to 318 months to life on the rape of a child convictions, and 198 months to life on the child molestation convictions. SRP 11-13; CP 181-197. The court also imposed several community custody related conditions. CP 220-222. Defendant filed a timely notice of appeal. CP 210.

2. Facts

Nine year old J.T. was raised and adopted by his biological mother's sister, Mujaahidah Sayfullah, whom he calls "mom" and has lived with since he was three days old. 12RP 114-115. Since J.T. was the age of four, Ms. Sayfullah had allowed J.T.'s father, the defendant, to have weekend visits with J.T. where J.T. would stay the night at defendant's home. 12RP 119. For the most part, J.T. enjoyed the visits with his father, but if he did not want to go, Ms. Sayfullah would not make him. 12RP 121-122.

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[1] The verbatim record of proceedings is contained in 18 volumes and will be referred to as follows: 1RP - 11/9/12; 2RP - 2/1/13; 3RP - 3/1/13; 4RP - 3/29/13; 5RP - 4/12/13; 6RP - 6/7/13; 7RP - 6/28/13; 8RP - 7/22/13; 9RP - 7/23/13; 10RP - 7/24/13; 11RP - 7/25/13; 12RP - 7/29/13; 13RP - 7/30/13; 14RP - 7/31/13; 15RP - 8/1/13; 16RP - 8/5/13; 17RP - 8/6/13; SRP - 9/20/13

In October of 2012, J.T. was reading a book out loud in his room and Ms. Sayfullah heard him say the word "humping." 12RP 124. The word was not in the book and when she asked J.T. why he had said that, he pointed to two characters where one stood behind the other and said "they're humping." 12RP 124. When she asked where he learned that from, J.T. got quiet. 12RP 124. Ms. Sayfullah brought J.T. downstairs and asked him if anyone had ever touched him inappropriately. 12RP 124. J.T. said "I can't really tell you because, if I do, I'll never see my dad again." 12RP 124. After reassuring him it was ok, J.T. told Ms. Sayfullah that his father had put his penis inside J.T.'s bottom. 12RP 124, 148.

Ms. Sayfullah said J.T. was scared, embarrassed and withdrawn. 12RP 126. She asked him if he was sure and where his bottom was and J.T. explained it was in his bottom hole. 12RP 126. Ms. Sayfullah got very emotional and cried and was unable to talk with J.T. about it further. 12RP 126. She made an appointment with J.T.'s pediatric nurse practitioner, Tracy Lin, for the next day. 12RP 128.

Tracy Lin, a pediatric nurse practitioner at Pediatrics Northwest, testified that J.T. had been a patient of hers since he was four years old. 13RP 104, 111. On October 9, 2012, she examined J.T. after Ms. Sayfullah brought him in for constipation and concerns of sexual abuse. 13RP 111-112. Over the course of her 20 years as a nurse practitioner, Ms. Lin created a set of non biased non leading questions she asks

children who are suspected to have suffered sexual abuse. 13RP 108. When she asked J.T. those questions, J.T. told her his dad had put his penis inside J.T.'s bottom more than once when he was four, six and eight years old and his dad said he was lonely. 13RP 114.

Ms. Lin did a full physical exam of J.T., but was unable to examine his anus because there was so much fecal matter and stool incontinence surrounding it that she could not see anything. 13RP 115-117. Ms. Lin testified that a history of constipation is one of the differentials they look for in sexual abuse and that that was the first time she had seen J.T. for constipation, but Ms. Sayfullah told her it had been going on for a year or so. 13RP 116-117. After an x-ray of J.T.'s abdominal area was done, Ms. Lin diagnosed him with having constipation and "encropresis" which is stool holding and soiling. 13RP 117-118. She testified she then referred them to the Child Abuse Intervention Department and the police. 13RP 118.

After meeting with Ms. Lin and reporting the incident to the police, Ms. Sayfullah and her husband took J.T. to the Child Advocacy Center. 12RP 129-130; 14RP 5-8. They met with child forensic interviewer Keri Arnold-Harms and Detective Brad Graham. 13RP 17-18. Ms. Arnold-Harms then interviewed J.T. alone and recorded the interview. 13RP 17-18. A video of the interview was played for the jury during the trial. Plaintiffs Exhibit 1. During the interview, after discussing what a truth and a lie are and promising to tell the truth, J.T. told Ms. Arnold-

Harms that he knew what humping was because his father would say it sometimes. Plaintiff's Exhibit 1. J.T. also said his dad "humped" him when he would spend the night with his dad. Plaintiff's Exhibit 1. He said it happened once at his dad's mom's house, "many times" at his dad's old apartment, and had happened once at his dad's wife's, Lorrie Robinson, home. Plaintiff's Exhibit 1.

In the interview, J.T. said that when he would try to sleep and lay on his side, his father would sleep next to him and try to put his penis inside of J.T.'s butt. Plaintiff's Exhibit 1. J.T. said they both slept in their underwear and his dad would remove it. Plaintiff's Exhibit 1. J.T. told Ms. Arnold-Harms that his father's penis went inside his butt hole which is used for pooping. Plaintiff's Exhibit 1. J.T. said that his butt hole felt like he needed to poop when his dad's penis went inside, but it did not hurt. Plaintiff's Exhibit 1. He said that one time when he was four pee came out of his dad's penis when it was inside his butt hole. Plaintiff's Exhibit 1. He also said that a different time after trick or treating at the old apartment when he was four his dad made him get on his knees on the bed and his dad "humped him" from behind like "animal sex." Plaintiff's Exhibit 1.

J.T. described how once when he was four his dad touched his butt and his penis by "petting it" with his hand. Plaintiff's Exhibit 1. J.T. also said that when he was eight his dad touched his penis with J.T.'s penis and it happened more than once. Plaintiff's Exhibit 1. He described how when he was four, he humped his dad and put his penis in his dad's butt hole.

Plaintiff's Exhibit 1. J.T. told Ms. Arnold-Harms that he had to touch penises with his dad like a "high-five." Plaintiff's Exhibit 1. J.T. said his father told him "I did not mean to do this" once when he was four. Plaintiff's Exhibit 1. His father also told him not to tell anyone or J.T. would lose him because his dad would go away for a long time. Plaintiff's Exhibit 1.

J.T. said no one ever saw what was happening because his dad would never do it in front of other people. Plaintiff's Exhibit 1. J.T. described one time when his nephew was also in the room, but said his father covered up his penis with the covers and J.T. moved his hand away when the nephew got in the bed. Plaintiff's Exhibit 1. J.T. said there was some stuff he did not talk about with Ms. Arnold-Harms because he does not want anybody to hear about it because it is very embarrassing for him. Plaintiff's Exhibit 1.

After J.T.'s interview, Detective Graham contacted defendant and arrested him. 13RP 19-20. Detective Graham also attempted to speak with defendant's mother who was reluctant to talk with him. 13RP 23-24. However, based on his conversation with her, he interviewed another adult woman named Lorrie Robinson who was the defendant's girlfriend. 13RP 24.

On October 12, 2012, J.T. was examined by pediatric nurse practitioner Michelle Breland at the Child Abuse Intervention Department at Mary Bridge Children's Hospital. 14RP 11, 18. She performed a

physical exam and physically found J.T. to be "generally normal." 14RP 22. Ms. Breland testified that it is very unusual to find physical injuries on the anus given that it is meant to stretch with stools and has a good blood supply which helps it heal very quickly. 14RP 22-23. She also testified that internal injuries are also equally as rare and it is possible for there to be anal penetration with no injury. 14RP 23-24. Ms. Breland said that constipation and encopresis sometimes accompanies sexual abuse because a child may experience minor injuries which make it painful to defecate so they hold their stool and become constipated. 14RP 24. She and child forensic interviewer Keri Arnold-Harms both testified about delayed disclosure and how it is very common for children to delay in reporting abuse for months or even years because of fear based reasons. 12RP 20-22; 14RP 14-15.

J.T. began seeing mental health therapist Amber Bradford once a week at the "safe house" in October of 2012. 12RP 131; 13RP 62. During his sessions, J.T. made an illustrated book called a trauma narrative which described his father abusing him and how it made him feel. 13RP 74-75. Ms. Bradford would write things J.T. told her to write in them as well as skills he was learning to help him cope with the abuse. 13RP 75. During the sessions they also discussed how J.T. felt bad for his dad and thought his dad was lonely so J.T. felt like he was somehow responsible for filling that need. 13RP 84. J.T. also discussed nightmares he had and how he felt like the abuse was his fault because he had let it go on for so long.

13RP 84. Ms. Bradford testified that J.T. talked to her about the abuse from his father, which included his father having anal sex with him, mutual masturbation between the two, and how his father made J.T. simulate anal sex with him. 13RP 85. J.T. stopped seeing Ms. Bradford in April of 2013 after he successfully completed counseling. 13RP 83.

J.T. testified during the trial that when he was four and five years old, he would occasionally spend the night at his father's, the defendant, house to visit with him. 11RP 57, 61, 66-69. He testified that at least five times during those visits while he was laying in bed watching TV, the defendant put his body part for "peeing" inside J.T.'s body part for "pooping". 11RP 66-72, 82. He testified that defendant did the same thing to him when he was 8 years old and was visiting defendant at the defendant's girlfriend's home. 11RP 73.

J.T. also stated that defendant touched his body part that is used for peeing under his underwear and made J.T. touch the defendant's same body part earlier that year while J.T. was at his grandma's house. 11RP 74-75, 78-80. During that incident, defendant told J.T. that if he told anyone, defendant would go away for a long time. 11RP 80. J.T. is not married to defendant and defendant's date of birth is December 14, 1963. 11RP 86; 12RP 135; 13RP 21.

J.T. testified that he enjoyed his visits with his father and at one point, asked if he could live with him. 11RP 62; 12RP 82. J.T. also described how he had constipation and stomach issues and how the

defendant would help him wipe his butt because he didn't know how to do it correctly himself. 12RP 100-101. He described how one time at his mom's when he was in kindergarten he got in trouble after looking at animals mating on the computer. 11RP 93; 12RP 105, 108-110.

Ms. Sayfullah testified that the counseling sessions had helped J.T. a lot and that he had recently completed counseling. 12RP 132. She also testified that J.T.'s constipation issues have since tapered out although he still has to drink Plum Smart and eat a high fiber diet. 12RP 132. She described a time when J.T. was five or six and saw animals mating while watching Animal Planet and asked her what they were doing. 12RP 132. Ms. Sayfullah said she explained and talked to him about sex education. 12RP 132. She said she had never caught J.T. looking at anything related to sex on his computer and that his laptop had child protections on it. 12RP 133.

Defendant's girlfriend, Lorrie Robinson, testified that defendant had lived with her for the past four years. 14RP 30. She said when J.T. came to stay the night, he slept in a spare bedroom while she and defendant slept in her room. 14RP 34. She said during all the times J.T. came to visit, there was never a time when defendant was alone with J.T. 14RP 35-37. Ms. Robinson testified that the year before, J.T. had asked to live with them. 14RP 40-41.

Defendant chose to testify during the trial. 14RP 60. He stated the only times that he touched J.T.'s butt were to help him wipe as J.T. would

not wipe well enough after going to the bathroom and then would pull on his pants. 14RP 91-92. Defendant said there was a few times when he took J.T. to the bathroom and showed him how to wipe properly and how to urinate when he was little. 14RP 93-94. Defendant denied ever touching J.T.'s penis on purpose and said he might have touched it while wiping him. 14RP 94. He also said that J.T. saw his penis when he was urinating and J.T. would walk in on him in the bathroom. 14RP 95.

Defendant testified that his penis may have indirectly come near J.T.'s butt one time after they went trick or treating and slept in the same bed. 14RP 95-96. He said that he woke up and J.T. was "exploring on me" meaning touching his penis and trying to drive it like a gearshift. 14RP 97-98. Defendant told J.T. not to do that and if he ever wanted to see him again, he would not do that. 14RP 98. J.T. followed defendant into the bathroom and defendant said he had to tell J.T. to leave. 14RP 98. Defendant said that when he came out of the bathroom, J.T. and his younger nephew were on the bed looking at a squirrel. 14RP 99. Defendant could not see the squirrel so he got on the bed and that's how they ended up on the bed on their knees. 14RP 99. He said his penis may have "grazed" J.T. because he was behind him trying to direct him to where the squirrel was. 14RP 99-100. Defendant denied ever touching his son in a sexual way. 14RP 100. Defendant was also cross examined about his inability to recall his employment schedule and periods he claimed to be receiving unemployment. 15RP 44-57.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW ANY EVIDENCE OF PROSECUTORIAL MISCONDUCT OR THAT HE SUFFERED PREJUDICE THAT COULD NOT HAVE BEEN CURED BY AN INSTRUCTION TO THE JURY.

"Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." ***State v. Stenson***, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). The trial court is in the best position to determine whether misconduct or improper argument prejudiced the defendant. *See* ***Stenson,*** 132 Wn.2d at 718.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. ***State v. Manthie***, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (*citing* ***State v. Weekly***, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. ***Stenson***, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. ***State v. Binkin***, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), (*overruled on other grounds by* ***State v. Kilgore***, 147 Wn.2d 288, 53 P.3d 974 (2002)). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." ***Stenson***, 132 Wn.2d at 719, (*citing* ***State v. Gentry***, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. ***State v. Russell***, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994), (*citing* ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." ***Russell***, 125 Wn.2d at 86, (*citing* ***State v. Dennison***, 72 Wn.2d 842, 849, 435 P.2d 526 (1967)).

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. ***State v. Gregory***, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). An error only

arises if the prosecutor clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence. ***State v. Warren***, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied,* 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). A prosecutor may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. ***State v. Jones***, 71 Wn. App. 798, 808, P.2d 85 (1993). A prosecutor is allowed to argue that the evidence does not support a defense theory. ***Russell***, 125 Wn.2d at 87. The prosecutor is entitled to make a fair response to the arguments of defense counsel. ***Russell***, 125 Wn.2d at 87.

a. The Prosecutor's Statements were Not Improper Appeals to the Passion and Prejudice of the Jury as they Related to J.T.'s Credibility and were Made in Response to Defense Counsel's Closing Argument.

Defendant contends that the prosecutor in the present case committed misconduct in her rebuttal by appealing to the passion and prejudice of the jury when she argued the following:

> [Defense counsel] says "[i]t's a good thing to tell kids, 'Tell someone if you've been abused. You're not going to get in trouble.'" She said, "It's a good thing to make sure that they know that they can tell when this has happened to them." That statement contradicts everything that she just stood up here and argued to you about. How is it a good thing when basically the crux of her argument is, "They aren't going to be believed. Children can't be believed. There's never any other physical evidence. We can't believe what they say because they make up stories," so how is it a good thing to tell them that they should tell somebody because we're

> going to bring them in here to court to have a defense attorney say, "You can't believe them."
>
> [Defense counsel] wants you to basically disregard everything that [J.T.] has said between what he told his mom, between what he told Ms. Arnold-Harms, between when he told his primary care provider Ms. Lin and what he told Amber Bradford. "Just disregard all of that because he's a child, because he was 8 when he said these things and because he was 9 when he was on the stand. Nothing he said is credible so just disregard it all." *If that argument has any merit, then the State may as well just give up prosecuting these cases, and the law might as well say that "The word of a child is not enough."*

16RP 16-17 (emphasis added). During the trial, defense counsel objected to the italicized comment on the grounds the State was fueling the passion and prejudice of the jury. 16RP 17. The court overruled the objection and the prosecutor continued:

> But, like I said on Thursday, those instructions which are the law as it stands right now tells you that you don't need anything else, that the word of a child, in fact, is sufficient, that it is enough, and you know what? No 8-year-old who turns 9 and then comes on the stand is going to have a consistent recount of everything that happened.

16RP 17-18. When the court reviews the prosecutor's comments in the context of both parties' arguments, it is evident that the prosecutor's statements were not improper as they were discussing J.T.'s credibility and were a counterargument to defense counsel's closing argument.

Defense counsel's theory of the case and closing argument questioned J.T.'s credibility and suggested that J.T. was making up the abuse as a cover story for when he was confronted by his mother about

using the words "humping" and "kissing." 16RP 6-7. Defense counsel argued that when Ms. Sayfullah questioned J.T. about the book, when he was examined by the pediatric nurse practitioners Ms. Lin and Ms. Breland, when he was interviewed by Ms. Arnold-Harms and when he was counseled by Ms. Bradford, the adults created suggestive environments which fueled J.T.'s imagination and contributed to this made up story of abuse by his father. 16RP 6-13. At one point, defense counsel argued to the jury, "[t]hat's not what happened, and that's not what [his mother] said happened, but [J.T.] has weaved this into the fabric of his story, and because he is a child, nobody is going to pick on him for it. We're going to congratulate him for being so forthcoming, for telling it all." 16RP 13. In essence, defendant's theory of the case was that J.T. was a child the jury should not believe because he had made up the story about the abuse to keep himself from getting into trouble.

It was in response to this theory of the case and defense counsel's argument that J.T. was not credible that the prosecutor made the comments defendant objected to and argues in his brief were improper. However, the prosecutor's statements were not improper emotional appeals to the passion and prejudice of the jury when looked at in the context of the entirety of both parties' closing arguments. The prosecutor's comments came in rebuttal and were directly in response to defense counsel's argument to remind the jury that the law does not require more than the word of a child as defense counsel was suggesting in her

argument. In fact, the prosecutor specifically references defense counsel's argument multiple times in the dialogue preceding the comment defense counsel objects to. *See* 16RP 16-17. Even after the objection, the prosecutor reiterated that the law in the instructions tells the jury what evidence to rely on and that if they find J.T. credible, that is enough. *See* 16RP 17-18.

The trial court also understood that the prosecutor's comments were made in response to defense counsel's argument when the objection was discussed after the jury had returned to their room to begin deliberations. Defense counsel clarified what she had been objecting to and the court stated that while he appreciated defense counsel's clarification, he did not believe the State went over the line and thought the case was extremely well argued. 16RP 31. He also reiterated that the jury is instructed that argument is argument and that the jury had been instructed that the attorney's statements are arguments. 16RP 31. Thus, defense counsel not only objected to the comment at the time it was made and was overruled, but even when it was brought to the court's attention at the conclusion of closings and after further reflection, the court still felt it was proper argument and declined to take any remedial action.

Defendant also cites numerous other instances of prosecutorial misconduct in his brief, quoting over 15 statements the prosecutor made during her closing and rebuttal which were not objected to by defense counsel. He argues they were all also improper as they appealed to the

passion and prejudice of the jury. Yet again, a review of the record shows these comments were further arguments by the prosecutor regarding J.T.'s credibility and explanations about the standards of evidence which the court instructs the jury on. Not only were they not improper, they did not rise to the standard of flagrant and ill-intentioned as required for reversal involving statements which were not objected to.

Many of the quoted statements specifically discussed how J.T. had no reason or motive to lie about the abuse and reminded the jury they were allowed to draw reasonable inferences based on the evidence that was presented to them, in this case, primarily J.T.'s testimony. *See e.g.* "No one testified for you that they watched any of these acts happen. That would be direct evidence of the acts themselves, but that is not required, and, if it were, the State could never prosecute any of these types of cases. You can and you must make those reasonable inferences that this instruction is telling you that you can make." 15RP 89-90; *See also* 15RP 89; 98-99; 16RP 25, 27-28. The prosecutor's comments were explaining direct versus circumstantial evidence and how the jury is allowed to draw reasonable inferences from that evidence. The fact that she explained that if the law required more, the State would never be able to prosecute many cases which rely only on witness' testimony was not an appeal to the passion or prejudice of the jury; it was an effort to explain to the jury what the instructions say the law is and how they are to apply it to the evidence

in the case. Like the comment that was objected to, none of the comments by the State that were not objected to were improper.

Defendant argues that this case is similar to several other cases where courts have found prosecutorial misconduct occurred when the prosecutor emotionally appealed to the jury by telling them to send a message to society about the general problem of child sexual abuse. *See* ***State v. Powell***, 62 Wn. App. 914, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013 (1992); ***State v. Jones***, 71 Wn. App. 798, 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018 (1994); ***State v. Bautista-Caldera***, 56 Wn. App. 186, 783 P.2d 116 (1989), *review denied*, 114 Wn.2d 1011 (1990). Specifically, defendant argues that this case is similar to ***Powell*** where the court found the prosecutor committed misconduct in her closing argument by effectively telling the jury that "a not guilty verdict would send a message that children who reported sexual abuse would not be believed, thereby 'declaring open season on children.' " ***Powell***, 62 Wn. App. at 918. In that case, the prosecutor stated:

> But, ladies and gentlemen, what happens when we refuse to believe the children when we tell them, yes, if something happens you're supposed to tell? And then when they do, in fact, tell something has happened to them, what do we do? We don't believe them. We refuse to believe them. What does that tell the kids? What does that tell the children? It tells them it's fine. Yeah. You can go ahead and tell, but don't expect us to do anything because if it's an adult, we're sure as heck going to believe the adult more than we believe the child. I mean, we know adults don't lie; but, yeah, we know kids lie in things of that sort. Is that what we're going to be telling these kids here? Isn't that what we're telling

> them with regard to this? Are we opening -- or having -- declaring open season on children to say: Hey, it's all right. You can go ahead and touch kids and everything because--

Powell, 62 Wn. App. at 918, n.4. In ***Powell***, and many of the other cases where the court has found errors, the prosecutor is asking the jury to act and do something to correct a generalized societal problem by rendering their verdict. They are effectively telling the jury not to convict defendant based on the evidence, but to convict him to send a message to society or out of an emotional appeal.

In contrast, the prosecutor in the present case never tells the jury to send a message to society or asks that they render a guilty verdict out of the need to comment on something. The prosecutor consistently reiterates that the jury's role is to follow the court's instructions on the law and base their decision on the evidence that has been presented as it applies to that law. The comments defendant argues are improper are further explanations to the jury of the type of evidence that is before them and what the law says about that evidence. They were also specifically in response to defense counsel's attack on J.T.'s credibility and arguments about the lack of direct evidence the State presented in its case. None of the prosecutor's comments in the present case ever ask the jury to decide their verdict on emotional grounds or to send a message to society as has routinely previously been held improper.

b. Even if the Court were to Find Such Comments were Improper, Defendant Fails to Show that there is a Substantial Likelihood that the Misconduct Affected the Jury's Verdict.

Even if the court were to find that such comments were improper, they were not so prejudicial as to constitute reversal in the present case. If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. ***Stenson***, 132 Wn.2d. at 718-19. If the defendant does not object to the alleged misconduct at trial, the issue is deemed waived unless the misconduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." ***State v. Weber***, 159 Wn.2d 252, 270, 149 P.3d 646 (2006)(*citing* ***Stenson***, 132 Wn.2d at 719). Under that 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." ***State v. Emery***, 174 Wn.2d 741, 761, 278 P.3d 653 (2012)(*quoting* ***State v. Thorgerson***, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

In this case, defendant is unable to show that the prosecutor's improper comments were so prejudicial as to constitute reversal. While

defendant cites over 15 instances of what he now argues was prosecutorial misconduct in his brief, during the trial he failed to object to all but one of them. Failure to object or move for mistrial at the time of the argument "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." ***State v. Swan***, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990); *see also* ***State v. Monday***, 171 Wn.2d 667, 679, 257 P.3d 551 (2011). Such inaction suggests that at the time they were spoken not even defense counsel felt the comments were improper, let alone prejudicial to defendant.

Further, courts have routinely cautioned defendants that "[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." ***Jones v. Hogan***, 56 Wn.2d 23, 27, 351 P.2d 153 (1960). Had defense counsel truly felt that any of the prosecutor's other comments constituted misconduct, she would have objected to them as she did in rebuttal. None of those comments can be considered so flagrant and ill-intentioned and evincing an enduring and resulting prejudice that could not have been cured by an instruction thus necessitating reversal, especially when defense counsel did not see it necessary to object to them during the trial.

The only instance in which defendant did object to the prosecutor's comments occurred at the beginning of the prosecutor's rebuttal argument. 16 RP 16-17. In that instance, even if the court were to find the

prosecutor's comments were improper, defendant cannot show that there was a substantial likelihood it affected the jury's verdict. In cases where courts have found such misconduct requires reversal as no curative instruction could "unring the bell," the improper remarks by the prosecutor have overwhelmingly appealed to the passion and the prejudice of the jury so as to overshadow any consideration of the actual evidence in the case.

For example, in ***State v. Belgrade***, 110 Wn.2d 504, 755 P.2d 174 (1988), the Washington Supreme Court reversed Belgrade's conviction after it found the prosecutor's inflammatory comments were a deliberate appeal to the jury's passion and prejudice, encouraging it to render a verdict based on the defendant's associations with "a deadly group of madmen" and "butchers" rather than on the evidence. Similarly, in ***State v. Monday***, 171 Wn.2d 667, 257 P.3d 551 (2011), the Washington Supreme Court reversed Monday's conviction after finding the prosecutor committed egregious racial misconduct and resorted to racist arguments in order to achieve a conviction based on racial bias rather than on evidence in a fair and impartial trial.

In contrast, the prosecutor's comments in the present case were direct counterarguments to defense counsel's closing argument and were made in an attempt to explain to the jury how direct and circumstantial evidence applied to the State's case. The prosecutor's comments in no way attempted to overshadow a conviction based on the evidence in the case in favor of appealing to some underlying passion or prejudice of the jury as

in ***Belgrade*** and ***Monday***. Rather, while it may have admittedly been worded better, the prosecutor was attempting to reiterate to the jury what the instructions tell them the law requires them to consider in evaluating the evidence. Such an argument does not rise to the level that there is a substantial likelihood the comments affected the jury's verdict.

Moreover, objecting to the improper conduct, but failing to request a curative instruction, does not warrant reversal if an instruction could have cured the prejudice. ***State v. Warren***, 165 Wn.2d 17, 26, 195 P.3d 940 (2008)(*citing* ***State v. Yates***, 161 Wn.2d 714, 774, 168 P.3d 359 (2007)). Again, defense counsel in the present case objected to the comments at the time they were made, but did not request a curative instruction. Even at the conclusion of the case, defense counsel again brought up her objection and declined to request a curative instruction a second time. Requesting a curative instruction reminding the jury that they are to consider only the evidence that has been presented and the law upon which they had been instructed would have negated any question about the jury considering improper extraneous arguments. Defendant is unable to show that the allegedly improper comments could not have been cured by a curative instruction from the court and thus, fails to show such prejudice necessary to constitute reversal.

c. The Prosecutor Did Not Commit Misconduct as she Did Not Comment on Defendant's Right to Confront his Witnesses.

Defendant also argues in his brief that several of the prosecutor's statements in closing argument were comments on the defendant's constitutional right to jury trial, confrontation and cross-examination. *See* Opening Brief of Appellant, at 30. Specifically, he argues that the prosecutor's discussion about J.T. having to testify in front of the jury and the defendant amounted to the prosecutor arguing that the jury should draw a negative inference from defendant's constitutional right to confrontation. *See* Opening Brief of Appellant, at 30-33. However, a review of the record shows that the prosecutor's statements were discussing J.T.'s credibility, and not intended to comment on the defendant's constitutional right to confrontation.

If alleged misconduct directly violates a constitutional right, courts review the error under the standard of constitutional harmless error. ***State v. Emery***, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). The State bears the burden of showing a constitutional error was harmless. ***State v. Easter***, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

The State may not invite the jury to draw a negative inference from the defendant's exercise of his right to cross-examine witnesses. ***State v. Jones***, 71 Wn. App. 798, 811-812, 863 P.2d 85 (1993). However, both

the United States Supreme Court and the Washington courts have recognized that not all arguments touching upon a defendant's constitutional rights are impermissible comments on the exercise of those rights. ***State v. Gregory***, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006)(*citing* ***Portuondo v. Agard***, 529 U.S. 61, 69, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000)); ***State v. Miller*** 110 Wn. App. 283, 284, 40 P.3d 692, *review denied*, 147 Wn.2d 1011, 56 P.3d 565 (2002). The relevant issue is "whether the prosecutor manifestly intended the remarks to be a comment on that right." ***Gregory,*** 158 Wn.2d at 807 (*quoting* ***State v. Crane***, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). So long as the focus of the questioning or argument "is not upon the exercise of the constitutional right itself," the inquiry or argument does not infringe upon a constitutional right. ***Gregory***, 158 Wn.2d at 807 (*quoting* ***State v. Miller***, 110 Wn. App. 283, 284, 40 P.3d 692, *review denied*, 147 Wn.2d 1011, 56 P.3d 565 (2002)).

In the present case, the prosecutor's comments discussing J.T.'s testimony all related to analyzing his credibility as a witness. The three quotes by the prosecutor that defendant cites in his brief from the prosecutor's closing argument were directly preceded by the prosecutor discussing the instruction about how the jurors are the sole judges of the credibility of the witnesses. *See* Appellant's Opening Brief, at 32; 15RP 97-98. Similarly, the quotes cited by defendant from the prosecutor's rebuttal argument come from when the prosecutor is responding to defense

counsel's arguments about J.T.'s credibility, and the prosecutor specifically references defense counsel's comments in closing about J.T.'s credibility. *See* Appellant's Opening Brief, at 32; 16RP 20-26.

In ***State v. Gregory***, *supra*, the Washington Supreme Court discussed the ***State v. Jones***[2] case where the Court of Appeals found that the defendant's Sixth Amendment rights were violated. ***Gregory***, 158 Wn.2d at 807. In ***Jones***, the prosecutor's cross examination and closing contained comments that the defendant insisted upon staring at the seven-year-old victim as she testified, and that the victim's courtroom contact with Jones was so traumatic that she could not return to court. *Id.* The court held that such statements were improper comments on the defendant's right to confront his accuser and invited the jury to draw a negative inference from the defendant's exercise of his right to confrontation. *Id.* The ***Gregory*** court distinguished the comments in their case from what occurred in ***Jones*** because the prosecutor's arguments in ***Gregory*** focused on the credibility of the victim, versus the credibility of the defendant. Much like what occurred in ***Gregory***, the prosecutor's comments in the present case were focused on J.T.'s credibility, not the defendant's.

Because the prosecutor's statements were comments on J.T.'s credibility, and in no way intended to comment on the defendant's right to

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[2] 71 Wn. App. 798, 863 P.2d 85 (1993).

confrontation, defendant fails to show his constitutional rights were violated and thus, no error occurred.

d. The Prosecutor Did Not Commit Misconduct by Misstating the Evidence and Defendant Fails to Show How Even If She Had, Such Statements Could Not Have Been Cured by an Instruction.

A prosecutor may not make statements that are unsupported by the evidence and prejudice the defendant. ***State v. Boehning***, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). However, a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *Id.* A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct, unless the remark was so "flagrant and ill intentioned" that it causes enduring and resulting prejudice that a curative instruction could not have remedied. ***State v. Jones***, 71 Wn. App. 798, 808, 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018, 881 P.2d 254 (1994).

Defendant argues in his brief that the prosecutor committed misconduct during closing argument by misstating crucial facts about whether J.T. was confronted by his mother about what he saw on animal planet and/or the computer. *See* Opening Brief of Appellant, at 36-37. The question of whether J.T. was confronted by his mother about observing the animals depends on whose testimony was being discussed.

Ms. Sayfullah never testified to confronting or punishing J.T. during or after the incident, and J.T. said that his mother only got mad at him for looking at it. *See* 12RP 103-104, 132-134, 142-143. The only person who used the term "confront" to describe those interactions was defense counsel. The prosecutor did not misstate the evidence; she was stating her recollection of the evidence and inferences based on that recollection.

Regardless, none of these statements were objected to during trial and defendant fails to show how such comments caused an enduring and resulting prejudice that no curative instruction could have remedied. Further, jurors are presumed to follow the courts instructions on the law. ***State v. Kirkman***, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). Prior to closing arguments, the court instructed the jury not only in written packets, but also by verbally telling them the following:

> The lawyers' remakes, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 124-156, Instruction No. 1; 15RP 72. Regardless of how the prosecutor or defense counsel interpreted what occurred between J.T. and Ms. Sayfullah, the jurors were instructed to rely on their memories and

notes in recalling the testimony. As the law presumes the jurors will do this, defendant is unable to show any prejudice even if the prosecutor had misstated the evidence. Defendant's argument that the prosecutor committed misconduct by misstating the evidence fails not only on its merits, but because defendant is unable to show any enduring and resulting prejudice.

e. Defendant has Failed to Meet his Burden of Showing Defense Counsel's Performance was Deficient for Choosing Not to Object to Testimony which was Not Objectionable.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and

(2) that he or she was prejudiced by the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

> What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that

defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489; ***United States v. Layton***, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. ***State v. Lord***, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. ***State v. McFarland***, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. ***State v. White***, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

At the conclusion of his argument addressing prosecutorial misconduct, defendant briefly argues his counsel was ineffective for

failing to object to the alleged errors involving prosecutorial misconduct. *See* Opening Brief of Appellant, at 37-38. However, as analyzed above, none of the prosecutor's statements can be considered misconduct when looked at in the context of both parties' closing arguments. Failing to object to something that was not misconduct is not ineffective assistance of counsel. Defendant has failed to satisfy the first prong of ***Strickland***.

Defendant further fails to show that but for defense counsel's failure to object, the result of the trial would have been different as required in the second prong of ***Strickland***. He fails to show how counsel's failure to object prejudiced him in such a way that absent the prosecutor's statements in closing, he would not have been convicted. The jurors are the sole judges of the credibility of the witnesses. After evaluating the testimony of J.T., the State's other witnesses and defendant, they chose to disbelieve defendant's version of the events, and found J.T. and the State's witnesses more credible. Defendant does not articulate how, if defense counsel had objected to the prosecutor's alleged misconduct, it would have discredited the jury's evaluation of the State's eight witnesses and lent credibility to defendant's story to the point that it would have resulted in a different verdict. Furthermore, when defense counsel's performance is looked at over the course of the entire record, it is evident defendant received effective assistance. Defendant fails to meet his burden under either prong of ***Strickland*** necessary to show counsel was ineffective.

2. THIS COURT SHOULD REMAND WITH ORDERS TO MODIFY SEVERAL COMMUNITY CUSTODY CONDITIONS IN APPENDIX H.

When a defendant is sentenced under RCW 9.94A.701, the sentencing court must sentence the defendant to community custody. RCW 9.94A.703. As part of the term of community custody, there are certain conditions the court must order the defendant to comply with, and certain conditions the court has discretion to impose upon the defendant. RCW 9.94A.703(1)-(3).

Appellate courts review de novo whether the trial court had statutory authority to impose a community custody condition. ***State v. Acevedo,*** 159 Wn. App. 221, 231, 248 P.3d 526 (2010). If the trial court had statutory authority, the imposition of the community custody decision is reviewed for abuse of discretion. ***State v. Bahl***, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). The Washington Supreme Court has held that issues of vagueness in sentencing potentially fall under such erroneous sentences and warrant review for the first time on appeal. ***Bahl***, 164 Wn.2d at 745. When a trial court imposes an unauthorized condition on community custody, we remedy the error by remanding the issue with instructions to strike the unauthorized condition. ***State v. O'Cain,*** 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

Defendant in the present case challenges four conditions of community custody imposed by the court in Appendix H of his judgment and sentence. Opening Brief of Appellant, at 39-49. Each is addressed individually below.

a. Condition 13 of Appendix H is Authorized by Statute, But the State Agrees it Needs to be Modified in an Order Modifying the Judgment and Sentence.

As part of his term of community custody, the court ordered the defendant to comply with the condition that "[y]ou shall not possess or consume any controlled substances without a valid prescription from a licensed physician." CP 221. One of the waivable conditions the court is authorized to impose upon a defendant under RCW 9.94A.703(2) is to "[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions." RCW 9.94A.703(2)(c).

The State agrees with defendant that there is no statutory authority to limit medications to those prescribed by license physicians only when prescriptions can be lawfully issued by registered nurses, advanced registered nurse practitioners, osteopathic physician assistants, and physician assistants. *See* RCW 69.41.030. As a result, the State agrees that this Court should remand to enter an order correcting the judgment

and sentence wherein the phrase "from a licensed physician" is struck from Condition 13.

b. Condition 16 of Appendix H is Authorized by Statute, But the State Agrees the Term "Vulnerable" Needs to be Clarified in an Order Modifying the Judgment and Sentence.

In Condition 16 in Appendix H of the judgment and sentence the trial court ordered that defendant comply with the following term of community custody: "Do not initiate, or have intentional, physical contact with children under the age of 18 for any reason. Do not have any contact with physically or mentally vulnerable individuals." CP 221. Under RCW 9.94A.703(3)(b), the court has the discretion to order that as part of a defendant's community custody conditions, he "refrain from direct or indirect contact with the victim of the crime or a specified class of individuals." The specified class must bear some relationship to the crime. ***State v. Riles***, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), *overruled on other grounds by* ***State v. Valencia***, 169 Wn.2d 782, 239 P.3d 1059 (2010). The court also has the authority to order the defendant to "[c]omply with any crime related prohibitions." RCW 9.94A.703(3)(f). "A 'crime-related prohibition' is an order prohibiting conduct that directly relates to the circumstances of the crime." ***State v. Zimmer***, 146 Wn. App. 405, 413, 190 P.3d 121 (2008).

In the present case, defendant argues that the condition that he have no contact with physically or mentally vulnerable individuals is unconstitutionally vague as it does not specify who or what "vulnerable" means. The due process doctrine under the state and federal constitutions require that citizens have fair warning of proscribed conduct. ***State v. Bahl***, 164 Wn.2d 739, 752, 193 P.3d 678 (2008)(*citing* Wash. Const. art I, §3; U.S. Const., amend XIV). A sentencing condition is unconstitutionally vague if it does not define the proscribed conduct with sufficient definiteness that ordinary people can understand what is prohibited. ***Bahl***, 164 Wn.2d at 752-753.

The requirement of sufficient definiteness does not demand impossible standards of specificity or absolute agreement concerning a term's meaning; some amount of imprecision in the language is allowed. ***State v. Coria***, 120 Wn.2d 156, 163, 839 P.2d 890 (1992); *see also* ***City of Seattle v. Eze,*** 111 Wn.2d 22, 27, 759 P.2d 366 (1988)(statute is not unconstitutionally vague merely because person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct). In deciding whether a term is unconstitutionally vague, it is considered in the context in which it is used. ***Bahl***, 164 Wn.2d at 754. The appellate court reviews de novo whether the trial court had statutory authority to impose a community custody condition. ***State v. Acevedo,*** 159 Wn. App. 221, 231, 248 P.3d 526 (2010).

This Court recently addressed the issue of vagueness of the term "vulnerable" in the same community custody condition on another case, ***State v. Johnson***, 180 Wn. App. 318, 327 P.3d 704 (2014). After considering the wide range of terms the definition of "vulnerable" could encompass, this Court held that the use of the term "vulnerable" was inherently subjective and failed to provide the safeguards against arbitrary enforcement required by due process. ***Johnson***, 180 Wn. App. at 327-328. In that case, this Court remanded the case and ordered the trial court to either clarify the meaning of "vulnerable" in the condition so as to comport with their decision, or to strike the portion of the condition stating "Do not have any contact with physically or mentally vulnerable individuals." *Id.* at 329.

Given the analogous case of ***Johnson***, the State concedes that this court should remand to enter an order correcting the judgment and sentence wherein the trial court is ordered to either clarify the meaning of "vulnerable," or to strike the portion of Condition 16 stating "do not have any contact with physically or mentally vulnerable individuals." CP 221.

c. Condition 25 of Appendix H Does Not Relate to the Crime for Which the Defendant was Convicted and This Court Should Remand with Orders to Strike the Condition from Defendant's Judgment and Sentence.[3]

The trial court also ordered defendant to comply with Condition 25 of Appendix H in his judgment and sentence which states:

> You shall not have access to the Internet at any location nor shall you have access to computers unless otherwise approved by the treatment provider and community corrections officer. You are also prohibited from joining or perusing any public social websites (Facebook, MySpace, etc.)

CP 220. Again, under RCW 9.94A.703(3)(f), the court has the authority to order the defendant to "[c]omply with any crime related prohibitions." "A 'crime-related prohibition' is an order prohibiting conduct that directly relates to the circumstances of the crime." ***State v. Zimmer***, 146 Wn. App. 405, 413, 190 P.3d 121 (2008).

Defendant cites ***State v. O'Cain***, 144 Wn. App. 772, 184 P.3d 1262 (2008), in his brief which is directly on point. In that case, there was no evidence to suggest that O'Cain used the internet or accessed the internet before or after he raped his victim or that it contributed in anyway to the crime. This Court held that without such evidence, a prohibition on

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[3] Because the State is conceding that Condition 25 was improperly imposed as it is not a "crime-related prohibition," the State is not discussing defendant's claims that Condition 25 is not statutorily authorized as the issue is moot.

internet usage in a community custody condition was improper as it was not a "crime-related prohibition." Such is the case here. There was no evidence adduced at trial to suggest that defendant used the internet in any way in the perpetration of his crimes. As such, a community custody condition prohibiting defendant from using the internet does not fit within what the trial court is authorized to impose as "crime-related prohibitions" under RCW 9.94A.703(3)(f)[4] in the present case.

This Court should remand and order the trial court to enter an order modifying the judgment and sentence which strikes Condition 25 from Appendix H of defendant's judgment and sentence.

d. Condition 27 of Appendix H Does Not Relate to the Crime for Which the Defendant was Convicted and This Court Should Remand with Orders to Strike the Condition from Defendant's Judgment and Sentence.[5]

The trial court also ordered defendant to comply with Condition 27 of Appendix H in his judgment and sentence which states:

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[4] The court should note however that this does not mean to suggest that such a prohibition against internet usage (or sexually explicit materials as discussed below) will always be improper in defendant's case. Under RCW 9.94A.704(2)(a), the department of corrections has the authority to "establish and modify additional conditions of community custody based upon the risk to community safety." Therefore, such a prohibition against internet usage (or sexually explicit materials as discussed below) could be deemed appropriate at a later time by the department of corrections under other circumstances.

[5] As in the previous section, because the State is conceding that Condition 27 was improperly imposed as it is not a "crime-related prohibition," the State is not discussing defendant's claims that Condition 27 is not statutorily authorized as the issue is moot.

> Do not possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will define sexually explicit material. Do not patronize prostitutes or establishments that promote the commercialization of sex.

CP 220. Again, under RCW 9.94A.703(3)(f), the court has the authority to order the defendant to "[c]omply with any crime related prohibitions." "A 'crime-related prohibition' is an order prohibiting conduct that directly relates to the circumstances of the crime." ***State v. Zimmer***, 146 Wn. App. 405, 413, 190 P.3d 121 (2008).

Much like the analysis in the preceding section, there was no evidence adduced at trial which suggested that sexually explicit materials, prostitutes, or establishments that promote the commercialization of sex were used by defendant or visited by defendant in the perpetration of his crimes. Without such evidence, the State concedes the community custody terms in Condition 27 were improperly ordered by the trial court as they are not "crime-related prohibitions" under RCW 9.94A.703(3)(f) in the present case.

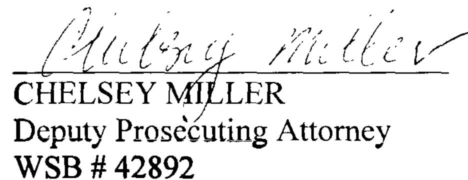
As such, this Court should remand and order the trial court to enter an order modifying the judgment and sentence which strikes Condition 27 from Appendix H of defendant's judgment and sentence.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's convictions, but remand to the trial court with instructions to modify defendant's judgment and sentence, specifically Appendix H, (1) to strike the portion of Condition 13 which states "from a licensed physician"; (2) to strike the portion of Condition 16 which prohibits defendant from having contact with physically or mentally vulnerable individuals, or clarify what the definition of "vulnerable" means in the context of defendant's case; (3) to strike Condition 25's prohibition of access to the internet, computers and use of social media; and (4) to strike Condition 27's prohibition of possessing sexually explicit materials or patronizing establishments that promote the commercialization of sex.

DATED: October 8, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10.8.14

Date Signature

PIERCE COUNTY PROSECUTOR

October 08, 2014 - 4:25 PM

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