NO. 92514-3

THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER,

v.

ALFRED JAMES THIERRY JR., RESPONDENT

Court of Appeals Cause No. 45379-7-II
Appeal from the Superior Court of Pierce County
The Honorable Stanley Rumbaugh

No. 12-1-03862-9

PETITION FOR REVIEW

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Rules and Regulations

Other Authorities

A. IDENTITY OF PETITIONER.

The State of Washington, respondent below, asks this Court to accept review of the Court of Appeals, Division II decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION.

The State of Washington now seeks review of the part published opinion, filed on October 20, 2015, in State v. Thierry, COA No. 45379-7-II. *See* Appendix A. The State respectfully requests that this Court review the Court of Appeals' decision reversing defendant's convictions for four counts of first degree child rape and two counts of first degree child molestation after finding the prosecutor committed misconduct after a single objection during the prosecutor's rebuttal which the trial court did not find objectionable. The Court of Appeals held that the prosecutor's comment invited the jury to decide the case on an improper basis and that such misconduct likely affected the verdict. This petition is timely and review is appropriate under RAP 13.4(a), (b)(1) and (b)(2).

C. ISSUE PRESENTED FOR REVIEW.

1. Did the Court of Appeals fail to follow numerous decisions of this Court that require application of different standards of review for

showing an improper argument depending on whether the claimed error was properly preserved in the trial court?

D. STATEMENT OF THE CASE.

Defendant went to trial on charges of four counts of first degree child rape and two counts of first degree child molestation, based on conduct against his son, J.T. CP 111-114. The relevant facts included the following:

J.T. resided with his mother's sister, Mujaahidah Sayfullah, whom he calls "mom," but had occasional weekend visits with his father, the defendant. 12RP[1] 114-15, 119. On October 8, 2012, J.T. described to Ms. Sayfullah two characters in a book where one stood behind the other as "humping." 12RP 124. After asking him where he learned that, J.T. told Ms. Sayfullah "I can't really tell you because, if I do, I'll never see my dad again." 12RP 124. After being reassured it was ok, J.T. told Ms. Sayfullah that his father had put his penis inside J.T.'s bottom. 12RP 124, 148.

[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

The next day, J.T. was examined by pediatric nurse practitioner Tracy Lin and he told her his father had put his penis inside J.T.'s bottom more than once when he was four, six, and eight years old. 13RP 104, 111, 114. J.T. was also interviewed by child forensic interviewer Keri Arnold-Harms and he described to her how his father "humped" him "many times" at different locations since the age of four. 13RP 17-18; Plaintiff's Exhibit 1. He described in detail his father putting his penis in his bottom on multiple occasions and how his father referred to it as "humping." Plaintiff's Exhibit 1. He also described specific occasions where his father touched his penis by "petting it" and they had to touch penises like a "high-five." Plaintiff's Exhibit 1. J.T. said his father told him "I did not mean to do this" and not to tell anyone or his dad would go away for a long time. Plaintiff's Exhibit 1. A recording of that interview was played for the jury during the trial. Plaintiff's Exhibit 1.

J.T. began seeing mental health therapist Amber Bradford and they discussed the abuse by his father. 13RP 74, 85. That abuse 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. During their sessions, Ms. Bradford used flashcards with words on them as a therapeutic tool to help assist J.T. talk about his emotions. 13RP 79-82. She also assisted J.T. in making an illustrated book called a trauma

narrative to help him cope with the abuse. 13RP 75. J.T. would write and draw in the book, as well as tell Ms. Bradford what to write or draw in it for him. 13RP 75.

Ms. Sayfullah, Ms. Lin, Ms. Arnold-Harms, and Ms. Bradford all testified about their interactions with J.T. during the trial. J.T. also described the numerous instances of sexual abuse during the trial, but had difficulty recalling specific dates and the timing of some events. 11RP 66-80; 12RP 77-87, 92-94. J.T. recalled one occasion when he got in trouble for looking at animals mating on the computer. 11RP 93; 12RP 105, 108-110. Ms. Sayfullah believed it had been on the television, J.T. did not get in trouble and said she used the incident to talk to him about sex education. 12RP 132-33. J.T. also testified he had asked to live with his father the previous summer. 12RP 87, 100-104.

Defendant testified and denied any sexual abuse had occurred. 14RP 100. He claimed he may have touched J.T.'s penis once while wiping his bottom and said J.T. would frequently walk in on him while he was urinating. 14RP 93-95. Defendant described one incident when they were in bed together where J.T. touched defendant's penis and defendant told him not to do that. 14RP 95-98. Defendant also described another incident where his penis may have "grazed" J.T.'s bottom when he was

kneeling behind him on a bed trying to show him a squirrel out the window. 14RP 99-100.

During closing arguments, the State argued to the jury that despite the lack of physical evidence, J.T.'s testimony was evidence which if they believed was credible, was sufficient to prove the case beyond a reasonable doubt. 15RP 94-95. In explaining this, she described the differences between direct and circumstantial evidence, how the law treats them equally and that the jury could convict based solely on J.T.'s testimony if they believed it to be credible evidence as the law does not require anything more. 15RP 88-90. To further emphasize that point, she explained how if the law did in fact require more, "the State could never prosecute any of these types of cases" where the only evidence before the jury was the word of a child. 15RP 89-90. She made three comments during her closing argument referencing this argument. 15RP 89-90, 93, 107. Defense counsel did not object to any of them.

Defense counsel's closing argument centered on the theory that J.T. made up the allegations of sexual abuse by his father after he was confronted for saying the word humping and seeing the animals mating on the computer as a way to "explain those words away." 16RP 6-7. She argued that J.T. was a child influenced and positively reinforced by the adults after telling these stories which perpetuated the false allegations

against defendant. 16RP 7-15. She supported this argument with the inconsistencies about time in J.T.'s testimony, the differences in J.T. and Ms. Sayfullah's testimonies, the use of flashcards by Ms. Bradford and the trauma narrative book having been partially written by Ms. Bradford. 16RP 7, 9-13, 15-16.

In rebuttal argument, the prosecutor argued:

> [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 17. Defense counsel objected saying the comment 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, and that 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. After closing arguments had concluded and the jury had left the room, defense counsel wanted to clarify what she had objected to in

the State's rebuttal saying that she felt the prosecutor's argument that prosecutor's "might as well stop prosecuting these cases" went over the line in fueling the passion and prejudice of the jury. 16RP 31. The court responded that he appreciated the comments, the jury had been instructed it was argument, he did not think it went over the line and he felt the case was extremely well argued and presented. 16RP 31.

The jury convicted defendant of all counts and he was sentenced 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. Defendant appealed and the Court of Appeals reversed his convictions in an opinion filed October 20, 2015. Appendix A. The State now seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. CONTRARY TO DECISIONS OF THIS COURT, THE COURT OF APPEALS FAILED TO APPLY DIFFERING STANDARDS OF REVIEW TO PRESERVED CLAIMS OF PROSECUTORIAL MISCONDUCT VERSES UNPRESERVED CLAIMS OF PROSECUTORIAL MISCONDUCT.

In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. ***State v. Thorgerson***, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Once a defendant establishes that a prosecutor's statements are

improper, the court assesses whether the defendant was prejudiced under one of two standards of review. 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. *Id.*; ***State v. Ish***, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); ***State v. Dhaliwal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

If the defendant did not object at trial, the defendant 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. ***Thorgerson***, 172 Wn.2d at 443; ***State v. Stenson***, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). 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." ***Thorgerson***, 172 Wn.2d at 442-43; ***State v. Emery***, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

In numerous cases, the Supreme Court has repeatedly discussed defense counsel's duty to object to allegedly improper arguments by prosecutors in closings. *See* ***State v. Emery***, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012) ("If either counsel indulges in any improper remarks during closing argument, the other must interpose an objection at the time they are made. This is to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks.")

(*quoting* 13 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4505, at 295 (3d. ed. 2004)); *See also* ***State v. Dunaway***, 109 Wn.2d 207, 221, 743 P.2d 1237 (1987); ***State v. Belgarde***, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); ***State v. Copeland***, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996); ***State v. Walker***, 182 Wn.2d 463, 477, 341 P.3d 976 (2015). The reason for this is to prevent counsel from making additional improper remarks and to prevent potential abuse of the appellate process. ***State v. Weber***, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006) (were a party not required to object, a party "'could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.'" (*quoting* ***State v. Sullivan***, 69 Wn. App. 167, 173, 847 P.2d 953 (1993))).

> On this issue, this Court has declared and routinely reiterated:
>
> > If misconduct occurs, the trial court must be promptly asked to correct it. Counsel 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)(*citing* ***Agranoff v. Morton***, 54 Wn.2d 341, 346, 340 P.2d 811 (1959)); *see also* ***State v. Beard***, 74 Wn.2d 335, 340, 444 P.2d 651 (1968); ***State v. Williams***, 96 Wn.2d 215, 226, 634 P.2d 868 (1981); ***State v. Russell***, 125 Wn.2d 24, 93, 882 P.2d 747 (1994); ***State v. Emery***, 174 Wn.2d 741, 762, 278 P.3d 653

(2012). It is this recognizable interest in allowing the trial court an opportunity to cure any alleged error and attempt to prevent abuse at the appellate level which has led the Court to adopt the differing standards of review in their analysis of claims of prosecutorial misconduct.

In the present case, defense counsel made one objection during rebuttal. The appellate court found that that singular argument by the State was so improper as to warrant reversal of defendant's convictions. In reaching that conclusion, the court below referenced similar arguments made by the State in its closing that did not prompt objections. It then used the State's arguments in those unpreserved claims to bolster their case about why the argument in rebuttal was improper. In other words, the court treated the singular objection made in rebuttal as an umbrella to encompass multiple unpreserved claims and completely ignored the standard which applies to those unpreserved claims.

In a footnote, the opinion reads "Because we resolve the prosecutorial misconduct claim based only on that portion of the prosecutor's closing argument to which Thierry objected before the trial court, our discussion here focuses on the language and context of that particular argument." Opinion at 4, fn 4. Contrary to its assertion that it focuses only on the objected to portion of the argument, the Court of Appeals includes numerous comments by the State which were not objected to in its analyses. Opinion at 4-5, 7. Defense counsel did not object to the State's argument until rebuttal, but prior to that, the State

made three similar comments during its initial closing. Opinion at 4-5. The opinion grouped all these comments together referring to them as a "similar argument," "motif," and "public policy theme." Opinion 4-5, 7.

The opinion even acknowledges it is considering the earlier comments made by the State in its closing as part of its analyses and evaluation of the issue. In responding to the State's argument on appeal that the allegedly improper comment came in rebuttal in response to a statement made by defense counsel in closing, the opinion states:

> the prosecutor, however, made similar statements in her initial closing remarks concerning the burden of proof and the difference between direct and circumstantial evidence, suggesting that this argument was not merely a response to Thierry's challenge to JT's credibility.

Opinion at 11. While acknowledging and using the arguments the State made it its closing to support their opinion, the Court of Appeals completely ignores the fact that none of them were ever objected to.

Defense counsel did not object to them likely because they were not improper arguments. The primary thrust of the State's argument was that if the jury believed J.T.'s testimony, that was enough to satisfy the burden of beyond a reasonable doubt under the law. 15RP 94, 107. The prosecutor argued that the law does not require anything more, such as some form of corroboration, and that these were crimes which were not likely to be committed in front of others. 15RP 89-90, 93, 107. These arguments focused the jury on the decision they had to make with the

evidence that was before them. Defense counsel did not object until the prosecutor's inartfully worded comment during rebuttal where defense counsel clarified she believed that comment "went over the line as far as fueling the passion and prejudice of the jury." 16RP 31.

Despite this, the Court of Appeals opinion claims the improper argument by the State was made and prevalent throughout its initial closing to refute the State's claim on appeal that the allegedly improper argument was in response to the defense closing. The lack of objection should subject those arguments to the heightened standard of review, the opinion fails to even discuss the heightened standard of review. *See* Opinion at 8-10. Instead, the Court of Appeals uses the singular objection to apply the lower standard of review to multiple unpreserved claims and uses proper arguments made by the State to bolster the pervasiveness of a single improper remark. This line of reasoning and analysis is in contrast to numerous opinions of this Court described above.

Furthermore, the failure to appropriately apply the differing standards of review demonstrates the reasons this Court has routinely emphasized their importance. Allowing such a late objection to subject the entire argument to the lower standard of review not only disadvantages the trial court in their ability to cure any error, it unfairly disadvantages the State on appeal. In this case, the State continued to make an argument throughout the entirety of its closing and beginning of its rebuttal as there was no objection to the argument. The objection came during rebuttal

after the argument had already been presented and revisited multiple times with the jury. This deprived the trial court of the ability to efficiently and effectively cure any alleged error with a remedial instruction. It also unfairly manipulates the interests of justice by requiring the State to argue on appeal the extent of the prejudice that such an argument created while applying the lower standard of review. It is synonymous with the life preserver analogy described above ***Jones v. Hogan***, *supra*, and incentivizes defense counsel to object late for strategic reasons. The Court of Appeals' opinion, which uses the late objection to subject the entire argument to the lower standard of review, is a form of abuse that this Court's precedent emphasizing the differing standards of review seeks to protect against.

Additionally, the appellate court gave no consideration to the fact that the trial judge, who heard the manner in which the argument was presented, did not find it objectionable and believed the case was "extremely well argued and presented." Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. ***State v. Brett***, 126 Wn.2d 136, 174, 892 P.2d 29 (1995); ***State v. Lord***, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). This Court has recognized that the trial court is in the best position to judge the impact of a prosecutor's arguments and if there is prejudice to the defendant's right to a fair trial. ***Lord***, 117 Wn.2d at 887, *see also* ***State v. Stenson***, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).

This is also not the only time the Court of Appeals has used a singular objection to apply the lower standard of review while using multiple unpreserved claims of misconduct to bolster their argument for why prosecutorial misconduct occurred. *See* ***In re Parker***, 188 Wn. App. 1061, 2015 WL 4459185 (COA No. 45163-8, SC No. 92194-6 Petition for Review pending). By failing to differentiate between the two standards of review in cases involving claims of alleged prosecutorial misconduct and failing to give deference to the trial court's rulings, the Court of Appeals' opinion disregards this Court's precedent and undermines the policy reasons behind the differing standards of review. It is contrary to several decisions of this Court and is error. This provides a basis for review under RAP 13.4(b)(1).

F. CONCLUSION.

This Court should grant review of the decision below.

DATED: November 19, 2015

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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.

Date Signature

APPENDIX "A"

Part Published Opinion

Filed
Washington State
Court of Appeals
Division Two

October 20, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ALFRED JAMES THIERRY, JR., Appellant.	No. 45379-7-II PART PUBLISHED OPINION

BJORGEN, J. — The State charged Alfred James Thierry Jr. with four counts of first degree child rape and two counts of first degree child molestation, based on conduct against his son, JT.[1] A jury returned guilty verdicts on all counts. Thierry appeals, contending that prosecutorial misconduct in closing argument deprived him of a fair trial and the sentencing court erred in imposing various terms of community custody. Thierry also submits a pro se statement of additional grounds for review, contending among other matters that the trial court should have allowed him to present the testimony of a certain witness and should not have admitted evidence that JT suffered psychological trauma. Because the prosecutor invited the jury to decide the case on an improper basis, and the misconduct likely affected the verdict, we reverse.

[1] Pursuant to General Order 2011-1 of Court of Appeals, Division II, the name of the minor will be indicated with initials.

FACTS

In October 2012, Mujaahidah Sayfullah heard eight-year-old JT, her adopted son,[2] say the word "humping," which she considered "inappropriate." 5 Verbatim Report of Proceedings (VRP) at 123-24. She asked where he had learned that word. When he "got quiet" and "didn't want to talk" about it, Sayfullah asked him if anyone had ever touched him inappropriately. 5 VRP at 123-24. JT eventually disclosed to Sayfullah and her husband that Thierry, JT's biological father, had "placed his penis in [JT's] bottom" when JT had visited Thierry. 5 VRP at 123-24.

Sayfullah took JT to see pediatric nurse practitioner Tracy Lin and related her concerns that JT may have suffered sexual abuse. JT disclosed to Lin that Thierry had put "[h]is penis inside [JT's] bottom . . . [m]ore than once when [JT] was 4 year[s] old, 6 year[s] old and 8 year[s] old." 6 VRP at 114. Lin advised Sayfullah to report the abuse allegation to police, which Sayfullah did.

Keri Arnold-Harms, a child interviewer with the Pierce County Prosecuting Attorney's Office, conducted a video recorded interview with JT. During the interview, JT described several specific instances of sexual abuse. JT stated that these incidents occurred "sometimes when [he] spent the night at [Thierry's] apartment," explaining that it happened "many times" at the apartment, one time at his grandmother's house, and one time at the home of Thierry's "wife," Lorrie Robinson.[3] Ex. 1.

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[2] Sayfullah is the sister of JT's biological mother and has raised him since he was three days old. Thierry did not have formal visitation rights, but occasionally visited or had JT stay overnight with him by mutual agreement with Sayfullah.

[3] Thierry described Robinson at trial as his "fiancee." 7 VRP at 61.

JT began counseling sessions at the Comprehensive Life Resources Children's Advocacy Center with mental health therapist Amber Bradford, to whom he also eventually disclosed that Thierry had sexually abused him. JT also described psychological symptoms to Bradford, such as nightmares, self-blame, and intrusive thoughts about or memories of the abuse. During counseling with JT, Bradford wrote out his story, including descriptions of the abuse, more or less as he told it, although she admitted that many of the words JT used came from "flash[ ]cards" that she provided. 6 VRP at 79-82. Bradford also acknowledged that in counseling sessions she makes no attempt to determine whether a child has truthfully disclosed the abuse, gives the children positive reinforcement when they talk about the abuse, and suggests particular feelings or symptoms that they might be experiencing.

1. Pretrial Procedure

The State charged Thierry with four counts of first degree child rape and two counts of first degree child molestation. Thierry pled not guilty and proceeded to trial.

The trial court held a hearing under RCW 9A.44.120 and ER 803 on the admissibility of child hearsay testimony concerning statements JT made to Sayfullah, Lin, Arnold-Harms, nurse Michelle Breland, and Bradford. The court ruled the testimony admissible, including the recording of JT's interview with Arnold-Harms.

2. Trial Testimony

At trial, the State's witnesses testified to the facts as described above. The trial court admitted the video recording of JT's interview with Arnold-Harms into evidence, and it was shown to the jury.

JT testified, generally describing the abuse consistently with his prior statements, except as to the timing and dates of specific incidents. His testimony concerning the timing of various events was internally inconsistent and differed in some respects from his previous statements.

On cross examination, defense counsel elicited testimony from JT that, shortly before he told Sayfullah about the abuse, he had asked Thierry if he could go to live with Thierry and Robinson, but Thierry refused. Robinson testified on Thierry's behalf, stating that JT was very happy to visit Thierry, was reluctant to leave, and often talked about wanting to move in with Thierry.

Thierry testified on his own behalf and denied the sexual abuse accusations. He described one incident, however, in which he woke up and JT was touching Thierry's penis. Thierry testified that he responded by saying, "What the hell? . . . Man, do not do that. If you ever want to see me again, that will not happen." 7 VRP at 98. He testified that, later that morning, he and JT and another male relative, one year younger than JT, were kneeling on the bed looking out the window at a squirrel and that Thierry's penis "might have grazed the back of" JT. 7 VRP at 96. Thierry could not think of any reason why JT would accuse him, but stated that he had a conversation with JT about living together, but had decided against it.

3. Closing Argument, Verdict, and Sentence[4]

After a few preliminary remarks, the deputy prosecutor's closing argument turned to an explanation of direct versus circumstantial evidence. This explanation included the following:

> None of you were present when these acts occurred. 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.*

[4] Because we resolve the prosecutorial misconduct claim based only on that portion of the prosecutor's closing argument to which Thierry objected before the trial court, our discussion here focuses on the language and context of that particular argument.

8 VRP at 89-90 (emphasis added). She made a similar argument shortly thereafter, in a discussion of the sufficiency of the State's evidence:

> Did [Thierry] rape and molest his son [JT]? Yes, he did. The evidence tells you that he did. What's the evidence? [JT] is the evidence, and he is all that is required for you to find [Thierry] guilty of these crimes. If the law required more, if the law required anything, something, anything beyond the testimony of a child, the child's words, [JT's] words, those instructions would tell you that, and there is no instruction that says you need something else. And, again, *if that was required, the State could rarely, if ever, prosecute these types of crimes* because people don't rape children in front of other people and often because children wait to tell.

8 VRP at 93 (emphasis added). She again returned to this motif near the end of her initial closing remarks, in discussing the burden of proof:

> Now I want to talk just briefly about the standard of beyond a reasonable doubt. You don't need to know all of the pieces. You don't need to have all of the information or have all of the answers. If that were necessary, first of all, the standard would be beyond all doubt possible, but *if that were necessary, once again, the State would not be able to prosecute any of these crimes* or really any crime, actually, because how can you all as jurors who are selected from the community know nothing about any of the people involved, and certainly yourselves were not present for any act or crime that was committed, how can you know with 100 percent certainty?

8 VRP at 106-07 (emphasis added).

Thierry did not object to any of these arguments during the deputy prosecutor's initial remarks. In her closing argument, defense counsel suggested that JT may have initially accused Thierry because Sayfullah and her husband "confronted" JT about using words "in a household in which those words are not used," and JT "need[ed] to explain those words away." 9 VRP at 6. She then sought to exploit inconsistencies in JT's statements about when specific instances of abuse occurred and differences between his statements and those of Sayfullah and other witnesses to undermine his credibility.

Defense counsel also offered other possible explanations for why JT might have falsely accused Thierry. First, she argued that JT may have continued making allegations in his counseling sessions because he received positive feedback from Bradford, who suggested particular words to use with her flashcards. She also suggested that JT's anger and disappointment at not getting to live with Thierry may have motivated the accusations.

Defense counsel then continued her efforts to rehabilitate Thierry's credibility, making the following argument:

> You know, something terrible did happen in this case, and that's the story and these accusations. It's a good thing to tell kids who may have been abused, "You didn't do anything wrong. You're not going to get in trouble." It's a good thing to positively reinforce kids, but it's a very terrible thing when you help them to create the worse [sic] story any of us can imagine, that Al can imagine, with his own son, and how do you fight it? How do you prove that something did not happen? Well, you can't, but if you're willing to get up there on the witness stand, even though you have the right to remain silent, and face the lawyers trying to pin you down, your thought processes are going to come out. "I racked my brain. This is something that happened way back when." He didn't have to tell you that, but he did because the man is totally without guile and he just wanted the truth out.

9 VRP at 14. The State objected that defense counsel was vouching for a witness, and the judge instructed the jury that they would be "the sole determiners of who is telling the truth and who isn't, not Counsel and not" the judge. 9 VRP at 14.

Defense counsel then briefly returned to the topic of inconsistencies in JT's statements and his possible motives to lie. Finally, she concluded her argument by suggesting that JT may be "punishing [Thierry] in some way and doesn't really understand the import of what he's saying," arguing that JT's "story has way too many inconsistencies and things that cannot be explained," and urging the jury to return not guilty verdicts. 9 VRP at 16.

The prosecutor began her rebuttal by addressing defense counsel's statement, made in the context of discussing Bradford's testimony, that adults should tell children who may have suffered abuse that they did not do anything wrong and are not in trouble:

> [Defense counsel] says, "It'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.*"

9 VRP at 16-17 (emphasis added). The prosecutor continued in this vein, returning to her public policy theme:

> [Defense counsel] wants you to basically disregard everything that [JT] has said between what he told [Sayfullah], 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."*

9 VRP at 17 (emphasis added). At that point Thierry objected that the prosecutor was "fueling the passion and prejudice of the jury,"[5] to which the prosecutor responded that hers was "[n]o worse than Defense Counsel's argument." 9 VRP at 17. The court overruled the objection and permitted the prosecutor to continue.

[5] After closing argument, defense counsel clarified outside the presence of the jury that she specifically objected to the prosecutor's argument that, if the jury accepted the defense theory, "we might as well stop prosecuting cases," which she thought "went over the line as far as fueling the passion and prejudice of the jury." 9 VRP at 31. The court disagreed.

The jury returned guilty verdicts on all counts. The sentencing court imposed community custody for life in the event Thierry is ever released, with numerous conditions. Thierry appeals.

ANALYSIS

In the published portion of this opinion, we hold that the prosecutor committed prejudicial misconduct which had a substantial likelihood of affecting the verdict, and we reverse Thierry's convictions on that ground. In the unpublished portion, we decline to resolve his other challenges, although we briefly discuss certain of them.

I. PROSECUTORIAL MISCONDUCT

Thierry contends that several of the remarks the deputy prosecutor made in closing argument merit reversal. He alternatively contends that the cumulative effect of the improper statements denied him a fair trial. We agree with Thierry that the deputy prosecutor's argument on JT's credibility was improper and that it had a substantial likelihood of affecting the verdict.

1. Standard of Review

Prosecutors act as quasi-judicial officers who "represent[] the people and presumptively act[] with impartiality in the interest of justice," and therefore "must subdue courtroom zeal for the sake of fairness to the defendant." *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). Prosecutors "owe[] a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Thus, although prosecutors enjoy "wide latitude to argue reasonable inferences from the evidence," they "must 'seek convictions based only on probative evidence and sound reason.'" *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (quoting *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)), *petition for cert. filed*, No. 15-36 (July 9, 2015).

As a general matter, to prevail on a prosecutorial misconduct claim a defendant must show that the prosecutor's conduct was both improper and prejudicial "in the context of the record and all of the circumstances of the trial." *Glasmann*, 175 Wn.2d at 704. "Allegedly 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." *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

To establish prejudice sufficient to require reversal, a defendant who timely objected to the challenged conduct in the trial court must "show a substantial likelihood that the misconduct affected the jury verdict." *Glasmann*, 175 Wn.2d at 704. Even plainly improper remarks from a prosecutor do not merit 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.

2. Appeal to Passion or Prejudice

A. The Argument Was Improper

It is improper for prosecutors to "'use arguments calculated to inflame the passions or prejudices of the jury.'" *Glasmann*, 175 Wn.2d at 704 (quoting AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, std. 3-5.8(c) (2d ed. 1980)). Argument that "exhorts the jury to send a message to society about the general problem of child sexual abuse" qualifies as such an improper emotional appeal. *State v. Bautista-Caldera*, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (emphasis omitted). We have similarly held that a prosecutor improperly appealed to passion and prejudice by arguing "that the jury should convict in order to protect the community [from drug dealing]." *State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011) (discussing *United States v. Solivan*, 937 F.2d 1146 (6th Cir. 1991)).

Thierry contends that the prosecutor's statement that, if defense counsel's argument concerning JT's credibility "has any merit, . . . the State may as well just give up prosecuting [child sex abuse] cases, and the law might as well say that '[t]he word of a child is not enough'" also qualified as an improper appeal to passion and prejudice. 9 VRP at 16-17. Thierry relies heavily on *State v. Powell*, 62 Wn. App. 914, 816 P.2d 86 (1991), a child molestation case in which we held the following argument improper:

> [W]hat 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? . . . 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. . . . Isn't that what we're telling them with regard to this? Are we . . . declaring open season on children to say: Hey, it's all right. You can go ahead and touch kids and everything.

Powell, 62 Wn. App. at 918 n.4. We held the resulting prejudice incurable and reversed, even though Powell had not requested a remedial instruction in the trial court. *Powell*, 62 Wn. App. at 919.

The argument here is similar to the prosecutor's improper arguments in *Powell* and *Bautista-Caldera*. The prosecutor's message was that if the jury did not believe JT's testimony, and thus by implication acquitted Thierry, "then the State may as well just give up prosecuting these cases, and the law might as well say that [t]he word of a child is not enough." 9 VRP at 16-17 (internal quotation marks omitted). The message, in other words, was that the jury needed to convict Thierry in order to allow reliance on the testimony of victims of child sex abuse and to protect future victims of such abuse. This hyperbole invited the jury to decide the case on an emotional basis, relying on a

threatened impact on other cases, or society in general, rather than on the merits of the State's case.

The State contends that the specific remarks to which Thierry objected "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." Br. of Resp't at 15-16. The State further points out that the prosecutor did not explicitly ask the jury to render a guilty verdict in order to send anyone a message or correct some societal ill, and that she also accurately informed the jury that it should decide the case based on the court's instructions and the evidence presented.

The prosecutor, however, made similar statements in her initial closing remarks concerning the burden of proof and the difference between direct and circumstantial evidence, suggesting that this argument was not merely a response to Thierry's challenge to JT's credibility. More importantly, even if the prosecutor's argument was deemed purely a response to the defendant's argument, defense counsel never suggested that the jury should not believe JT because of his age. Nothing in defense counsel's closing argument, therefore, warranted the prosecutor's message that the State may as well give up prosecuting child sex abuse cases if JT were not believed and Thierry acquitted. Further, that the prosecutor did not explicitly call on the jury to send a message or to protect children does not make the argument any less improper. The implication is clear enough: were the jury to agree with defense counsel, they would put other children in danger. Other remarks that immediately preceded Thierry's objection, furthermore, made the "send a message" implication perfectly clear. 9 VRP at 16-17 ("How is it a good thing [to encourage children to report abuse] when basically the crux of [defense counsel's] argument is, 'They aren't going to be believed. . . . 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.'").

The prosecutor's argument was improper in the context presented. The question remains whether it posed a substantial likelihood of affecting the verdict.

B. The Misconduct Was Prejudicial

Thierry contends that the misconduct posed a risk of affecting the verdict sufficient to merit reversal. This is so, he argues, because the State's case relied almost entirely on JT's statements, which had not remained consistent and contradicted some of Sayfullah's testimony, and the prosecutor's argument invited the jury to credit JT's accusations for improper reasons. We agree.

As discussed, the *Powell* court held a similar argument so prejudicial as to be incurable by remedial instruction. 62 Wn. App. at 919. On the prejudice question, *Thorgerson* is also instructive. The *Thorgerson* court held improper a prosecutor's argument that "[t]he entire defense is sleight of hand" and "bogus" on the ground that it impugned the integrity of defense counsel. 172 Wn.2d at 450-51. The prosecutor made this argument in response to evidence the defense had presented that the defendant cared for his daughter, the alleged victim, which the prosecutor regarded as immaterial. *Thorgerson*, 172 Wn.2d at 450-51.

Although the court "conclude[d] that it was ill-intentioned misconduct," it declined to reverse, in part because the improper argument did not likely affect the outcome and because a curative instruction could have alleviated any prejudice.[6] *Thorgerson*, 172 Wn.2d at 452. In reaching this result, the court relied on the fact that "the victim's testimony was consistent

[6] Thorgerson did not object before the trial court. *Thorgerson*, 172 Wn.2d at 442.

throughout the trial and was consistent with what the witnesses testified she had told them before the trial, with one exception." *Thorgerson*, 172 Wn.2d at 452. The court also discussed the fact that the evidence that the prosecutor's improper argument encouraged the jury to disregard had at best marginal relevance in the case. *Thorgerson*, 172 Wn.2d at 452.

Here, Thierry did timely object, to no avail, so the efficacy of a curative instruction is not at issue. In contrast to *Thorgerson*, the prosecutor's improper argument went to the key issue in the case: whether the jury should believe JT's accusations. In further contrast, the inconsistencies among JT's statements, and between those statements and Sayfullah's testimony, open a realistic possibility that the jury may have disbelieved JT's accusations absent the improper argument.

In addition, by framing her remarks as a response to defense counsel's argument, the prosecutor misrepresented that argument in a way that exacerbated the prejudice flowing from the misconduct. The prosecutor described the "crux" of defense counsel's argument as follows: "Children can't be believed. . . . We can't believe what they say because they make up stories." 9 VRP at 16. She went on to assert that defense counsel "wants you to basically disregard everything that [JT] has said . . . 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." 9 VRP at 17.

As noted, defense counsel never suggested that the jury should not believe JT because of his age. Thierry's attorney based her impeachment entirely on specific inconsistencies in JT's statements, possible motives to lie suggested by evidence in the record, and JT's testimony that he liked to write stories. Thierry's attorney certainly never argued, as the prosecutor claimed, that the jury should not credit JT's testimony simply "because he's a child." 9 VRP at 17.

The tactic of misrepresenting defense counsel's argument in rebuttal, effectively creating a straw man easily destroyed in the minds of the jury, does not comport with the prosecutor's duty to "seek convictions based only on probative evidence and sound reason." *Casteneda-Perez*, 61 Wn. App. at 363. "Because the jury will normally place great confidence in the faithful execution of the obligations of a prosecuting attorney, [a prosecutor's] improper insinuations or suggestions are apt to carry more weight against a defendant." *Solivan*, 937 F.2d at 1150.

The outcome of the case depended entirely on whether the jury chose to believe JT's accusations or Thierry's denial. The prosecutor's remarks created a substantial risk that the jury decided to credit JT's testimony for improper reasons. The prosecutor's remarks exacerbated that risk by misrepresenting defense counsel's argument so as to unfairly undermine Thierry's defense.

We hold that the improper argument to which Thierry timely objected requires reversal of his convictions. Resolving the prosecutorial misconduct claim on this ground, we decline to consider Thierry's other challenges to the prosecutor's closing argument.

CONCLUSION

The prosecutor's argument about JT's credibility was improper and had a substantial likelihood of affecting the verdict. Therefore, we reverse Thierry's convictions and remand for further proceedings.

A majority of the panel has determined that the remainder of this opinion lacks precedential value and will not be printed in the Washington Appellate Reports. The remainder of this opinion will be filed for public record in accord with RCW 2.06.040, and it is so ordered.

II. THIERRY'S REMAINING CLAIMS

We decline to address Thierry's claims regarding certain conditions of community custody. Because the State largely concedes the impropriety of the challenged provisions, the issues appear unlikely to arise should Thierry be resentenced on remand.

We also decline to address the claims raised in Thierry's statement of additional grounds for review, which largely rely on matters outside the record or are too vague and conclusory to merit consideration. We note only that Thierry failed to preserve his challenge to Bradford's testimony regarding JT's trauma symptoms, as well as his claim that the trial court should have allowed him to present the testimony of Linesa, Lorrie's daughter.

According to *State v. Hamilton*, "[e]ven if a defendant objects to the introduction of evidence at trial, he or she 'may assign evidentiary error on appeal only on a specific ground made at trial.'" 179 Wn. App. 870, 878, 320 P.3d 142 (2014) (quoting *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)). Thierry objected to Bradford's testimony generally on the ground that she did not qualify as an expert, not based on any specific ground involving the substance of the trauma testimony. We thus decline to reach the claim under RAP 2.5.

With respect to the testimony of Linesa, nothing in the record suggests that Thierry sought to offer it. "The purpose underlying issue preservation rules is to encourage the efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." *Hamilton*, 179 Wn. App. at 878. Thierry cannot now be heard to complain about the absence of a witness whose testimony he never sought to offer in the trial court. If Thierry alleges that he did seek to obtain Linesa's testimony,[7] the claim relies on

[7] The statement of additional grounds for review is ambiguous on this point. Statement of Additional Grounds at 3 ("I feel Lorrie Robinson's Daughter Linesa Robinson should have been able to testify in the case.").

matters outside the record. We decline to address it further. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); RAP 2.5.

Bjorgen, J.
BJORGEN, J.

We concur:

Johanson, C.J.
JOHANSON, C.J.

Sutton, J.
SUTTON, J.

PIERCE COUNTY PROSECUTOR

November 19, 2015 - 2:13 PM

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