

No. 47392-5-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH A. PEEBLES, JR.

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 13-1-03732-9

OPENING BRIEF OF APPELLANT

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Table of Contents

TABLE OF AUTHORITIES..... ii

I. ASSIGNMENTS OF ERROR.....1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....2

III. STATEMENT OF THE CASE3

 A. Procedural History.....3

 B. Facts3

IV. ARGUMENT5

V. CONCLUSION17

TABLE OF AUTHORITIES

Cases

<u>In re the Pers. Restraint of Glasmann</u> , 175 Wn.2d 696, 286 P.3d 673, 675 (2012).....	10, 11, 12
<u>State v. Alexander</u> , 64 Wn.App. 147, 154, 822 P.2d 1250 (1992).....	16
<u>State v. Allen</u> , 161 Wn.App. 727, 746, 255 P.3d 784, <i>review granted</i> , 172 Wn.2d 1014 (2011).....	8
<u>State v. Badda</u> , 63 Wn.2d 176, 183, 385 P.2d 859 (1963)	16
<u>State v. Baeza</u> , 100 Wn.2d 487, 488, 670 P.2d 646 (1983).....	5
<u>State v. Brett</u> , 126 Wn.2d 136, 175, 892 P.2d 29 (1995)	8
<u>State v. Bridge</u> , 91 Wn.App. 98, 966 P.2d 418 (1998).....	6
<u>State v. Coe</u> , 101 Wn.2d 772, 789, 684 P.2d 668 (1984).....	16
<u>State v. Denton</u> , 58 Wn.App. 251, 257, 792 P.2d 537 (1990).....	8
<u>State v. Easter</u> , 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).....	7
<u>State v. Echevarria</u> , 71 Wn. App. 595, 597, 860 P.2d 420 (1993).....	7
<u>State v. Foster</u> , 140 Wn. App. 266, 273, 166 P.3d 726, <i>review denied</i> , 162 Wn.2d 1007 (2007).....	13
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	5
<u>State v. Guloy</u> , 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)	16
<u>State v. Halstien</u> , 122 Wn.2d 109, 127, 857 P.2d 270 (1993).....	16
<u>State v. Horton</u> , 116 Wn.App. 909, 921, 68 P.3d 1145 (2003)	8
<u>State v. McFarland</u> , 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).....	13, 14
<u>State v. McKenzie</u> , 157 Wn.2d 44, 52, 134 P.3d 221 (2006).....	7
<u>State v. Tharp</u> , 96 Wn.2d 591, 599, 637 P.2d 961 (1981).....	16
<u>State v. Weisberg</u> , 65 Wn.App. 721, 724, 829 P.2d 252 (1992)	5, 6
<u>State v. Wheelchel</u> , 115 Wn.2d 708, 728, 801 P.2d 948 (1990).....	16
<u>Strickland v. Washington</u> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	13, 14
<u>United States v. Edwards</u> , 154 F.3d 915, 921 (9 th Cir. 1998).....	8
<u>United States v. Roberts</u> , 618 F.2d 530, 533 (9 th Cir. 1980)	7

Other Authorities

<i>American Bar Association Standards for Criminal Justice</i>	11
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Rules

RPC 3.7.....	8
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I. ASSIGNMENTS OF ERROR

1. Insufficient evidence of all material elements existed to prove the offense beyond a reasonable doubt.
2. The prosecutor committed misconduct in the closing argument that denied Mr. Peebles his Constitutional right to a fair trial.
3. Defense counsel was ineffective when counsel failed to object to the prosecutor's improper remarks made during closing argument.
4. The prosecutor committed misconduct when the State introduced DNA evidence into the trial that the Court previously excluded.
5. Defense counsel was ineffective when counsel failed to request a mistrial after the prosecutor introduced DNA evidence that the court previously excluded.
6. The cumulative effect of the trial errors denied Mr. Peebles a fair trial.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the evidence presented was sufficient to prove all elements beyond a reasonable doubt when insufficient evidence existed to prove that any touching was done for purposes of sexual gratification? (Assignments of Error #1)
2. Whether the prosecutor committed misconduct during closing argument when the prosecutor commented on the credibility of both the complaining witness and Mr. Peebles, and the defense Mr. Peebles raised, thereby denying Mr. Peebles his Constitutional right to a fair trial? (Assignments of Error #2, 3)
3. Whether defense counsel was ineffective when counsel failed to object to the prosecutor's closing argument where the prosecutor's improper comments denied Mr. Peebles a fair trial? (Assignments of Error #2, 3)
4. Whether the prosecutor committed misconduct when the prosecutor referred to DNA evidence that the trial court previously excluded as being prejudicial to Mr. Peebles' defense? (Assignments of Error #4, 5)
5. Whether defense counsel was ineffective when counsel failed to request a mistrial when the prosecutor referred to previously excluded DNA evidence when the introduction of said evidence violated Mr. Peebles' right to a fair trial? (Assignments of Error #4, 5)
6. Whether the cumulative effect of the prosecutor's misconduct prejudiced Mr. Peebles' Constitutional right to a fair trial? (Assignments of Error #6)

III. STATEMENT OF THE CASE

A. Procedural History

On September 30, 2013, the State charged Mr. Peebles with one count of Child Molestation in the First Degree against A.P., a minor child, for an event that occurred on or about July 16, 2013. CP 1. Pre-trial motions and trial were held from July 9-17, 2014. During the pre-trial motions, the court granted the defense motion in limine precluding the state from introducing any DNA evidence obtained from A.P.'s underwear. On July 18, 2014, the jury returned a guilty verdict to one count of Child Molestation in the First Degree. CP 87. On August 22, 2014, the court sentenced Mr. Peebles to 58 months within the Department of Corrections. CP 90. This appeal follows.

B. Facts

On July 16, 2013, Mr. Peebles went to the home of his long-time friend, Jeremy Parrish, to pick up his mail. RP 306:11-12. While there, he started drinking a home-brewed beer that had a significantly high alcohol content. RP 307:11-23; 308:5-18. Although Mr. Peebles only intended to be at Mr. Parrish's home for a short time, he stayed longer when Mr. Parrish offered to cook him dinner, and, after he began drinking beer, he decided to spend the night. RP 309:4-5, 330:1-7. After eating dinner, the next thing Mr. Peebles recalls was waking up the next morning in bed in his home. RP 309:12-20. Mr. Peebles still felt intoxicated and also realized he had injured his forearm and elbow. RP 310:2-6. Mr. Peebles had no recollection of what happened the evening before. RP 310:10-11.

Later that morning, Mr. Peebles sent Mr. Parrish a text message asking him how he arrived home. RP 311:12-15. During a subsequent phone call, Mr. Parrish informed Mr. Peebles of the sexual abuse allegations his daughter, A.P., had made, which left Mr. Peebles in shock as he had no memory of the event. RP 315:13-18. Mr. Peebles had no intention of engaging in sexual contact with A.P., RP 315:24-316:1, and he had no memory of having any contact with A.P. after she went to bed that night. RP 316:2-4. The last memory that Mr. Peebles had of the evening was eating dinner in the kitchen. RP 337:4-9.

A.P. testified that she went to bed at about 9:30 that evening. After she fell asleep, she felt someone beside her, and recognized it was Mr. Peebles. RP 114:3-6. Mr. Peebles' hand touched her in uncomfortable places, like her bottom and below her hip. RP 115:24-116:3. After the touching, A.P. moved over in her bed, but she didn't say anything to Mr. Peebles and he didn't say anything to her. RP 118:2-9. A.P. awoke a second time and Mr. Peebles' hand was in the same place it was before. RP 118:10-14. Mr. Peebles' hand remained stationary during the event. RP 119:1-2. During the second event, neither Mr. Peebles nor A.P. said anything. RP 121:5-9. A.P. moved his hand again, got up and went to tell her father what happened. RP 118:20-21.

After A.P. spoke to her father, Mr. Parrish contacted Mr. Peebles, and asked him whether he had entered A.P.'s room. Mr. Peebles was passed out and incoherent. RP 216:20-22. Mr. Parrish then drove Mr. Peebles home. RP 217:2-17. During the ride home, Mr. Peebles slept. RP 218:3-5. When Mr. Parrish dropped Mr. Peebles off at his home, he was unsteady on his feet. RP 218:15-17.

When Mr. Parrish was interviewed by Deputy Smith of the Pierce County Sheriff's Department, he provided a written statement and informed Deputy Smith that both he and Mr. Peebles were drinking alcohol and that Mr. Peebles became noticeably intoxicated prior to the incident. RP 170:23-25; 290:16-21, 291:4-8. With respect to the touching, Mr. Parrish indicated that A.P. told him that her pants had been pulled down one time, RP 291:17-22, but A.P. stated that she had not been touched on her private parts. RP 292: 5-15. At trial, Mr. Parrish testified that A.P. told him that Mr. Peebles crawled into the bed, pulled her pants down twice, but nothing else occurred. RP 214:19-215:5.

When A.P.'s mother talked with her about the event, A.P. indicated that Mr. Peebles had entered her room, pulled her pants down twice, and placed his hand on her butt. RP 155:20-156:4.

IV. ARGUMENT

A. INSUFFICIENT EVIDENCE EXISTS TO ESTABLISH THAT ANY TOUCHING BY MR. PEEBLES WAS FOR SEXUAL GRATIFICATION.

As this court is aware, due process requires the state to prove its case beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). When challenging the sufficiency of evidence, this court must determine:

"whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

State v. Weisberg, 65 Wn.App. 721, 724, 829 P.2d 252 (1992). See also State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

In Weisberg, Division II of the Court of Appeals reversed a jury's conviction when the state produced insufficient evidence of forcible compulsion in a rape case. There, testimony failed to establish that the defendant either suggested or threatened harm to the alleged victim if she did not comply with his request to engage in sexual intercourse. Based upon the evidence, which the court presumed to be true, the court found that the evidence was insufficient to support a finding of guilt.

Here, the testimony at trial established that the State failed to prove, beyond a reasonable doubt, that Mr. Peebles touched A.P. for purposes of sexual gratification. Although A.P. gave various statements and testimony regarding how she was touched, the evidence presented was insufficient to prove that any touching done by Mr. Peebles was for his sexual gratification.

Further, no forensic medical evidence supported a finding of an improper touching, and such evidence, frankly, was not relevant for any purpose. See, generally, RP 244:4-262:5.

Importantly, when the evidence presented is consistent with both an inculpatory hypothesis and exculpatory hypothesis, then such evidence is insufficient to support a conviction. See State v. Bridge, 91 Wn.App. 98, 966 P.2d 418 (1998). There, the court reversed a conviction based upon fingerprint evidence because such evidence was insufficient to establish the defendant's guilt beyond a reasonable doubt. Bridge, 91 Wn.App. at 100.

Here, and as set forth above and viewing the evidence in the light most favorable to the State, the evidence presented is consistent with both an

inculpatory and exculpatory hypothesis. Under such circumstances, such evidence is insufficient to support a conviction. Accordingly, and based upon both the evidence and lack of evidence of a touching for purposes of sexual gratification, Mr. Peebles respectfully urges this court to find that insufficient evidence exists to support the verdict. As such, Mr. Peebles' conviction should be reversed.

B. MR. PEEBLES WAS DENIED A FAIR TRIAL BECAUSE OF PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT.

Prosecutorial misconduct denies a defendant the right to a fair trial and necessitates a new trial if there is a substantial likelihood that the comments affected the verdict. State v. Echevarria, 71 Wn. App. 595, 597, 860 P.2d 420 (1993). If the misconduct implicates the constitutional rights of the defendant, however, reversal is required unless the error is harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). A defendant claiming prosecutorial misconduct must establish the impropriety of the state's comments and their prejudicial effect. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

It is well established that "the prosecutor has a special obligation to avoid 'improper suggestions, insinuations, and especially assertions of personal knowledge.'" United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980)(quoting Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629 (1935)). It is improper for a prosecutor to personally vouch for or against a witness's credibility for truthfulness. State v. Brett, 126 Wn.2d 136, 175, 892

P.2d 29 (1995). Indeed, numerous Washington cases have found misconduct where the prosecutor improperly vouched for a witness or made an explicit statement of personal opinion as to a witness's credibility. See, e.g., State v. Allen, 161 Wn.App. 727, 746, 255 P.3d 784, *review granted*, 172 Wn.2d 1014 (2011); State v. Horton, 116 Wn.App. 909, 921, 68 P.3d 1145 (2003).

Further, where a prosecutor explicitly or implicitly communicates his or her personal knowledge about the underlying facts of a case, he or she will be deemed to have vouched for or against the credibility of a witness.

United States v. Edwards, 154 F.3d 915, 921 (9th Cir. 1998). Assertions of personal knowledge run afoul of the advocate – witness rule, which prohibits attorneys from testifying in cases they are litigating. Id.; see also, RPC 3.7 cmt. 1 (recognizing that “[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party”). Lawyers are not permitted to impart to the jury personal knowledge about an issue in the case under the guise of either direct or cross examination – or during argument – when such information is not otherwise admissible in evidence. State v. Denton, 58 Wn.App. 251, 257, 792 P.2d 537 (1990)(*citing* State v. Yoakum, 37 Wn.2d 137, 222 P.2d 181 (1950)).

Here, during closing argument, the prosecutor made the following inappropriate remarks:

- “What does alcohol not do? It does not make a criminal act not criminal. Claims of alcoholic blackout are self-reported. They obviously have an insensitive, and they’re seeking to avoid

responsibility for their deviant behavior. This claim of alcoholic blackout is a farce. Being drunk is one thing. What he's claiming is something entirely different, that after two beers he blacks out, can't remember anything. That's just ridiculous, ladies and gentlemen. It's the claim" – RP 377:5-14.

- Mr. Girard: "I'd object to that characterization, Your Honor." RP 377:15-16.
- The Court: "It's argument, Counsel. Your objection is noted for the record." RP 377:17-18.
- Ms. Williams: "The defendant's claim and his version is ridiculous, and it's not supported by the evidence in any single way." RP 377:19-21.

During rebuttal, the prosecutor made the following inappropriate remarks, which were not objected to:

- "So at the end of this, ladies and gentlemen, do you have an abiding belief in the truth of this charge? Do you have an abiding believe that A.P. telling the truth? Do you have an abiding belief that when A.P. sat on the stand on Tuesday and she looked at you and told you what happened to her, did you believe her? *And there's no reason not to.*" RP 378:8-14.
- "He has that ability to understand those instructions, to get out of Dodge after he's been caught and to feign intoxication because he's trying to avoid criminal responsibility, just like he did yesterday when he testified and this morning when he testified. Because he's trying to evade criminal responsibility for what he did to Alexis." RP 393:13-19.
- "Mr. Girard said – was discussing a scheme, this scheme that he had that he concocted and how that that was sort of a silly idea. Well, frankly, the defendant's scheme almost worked. If it wasn't for Angelita Bio, we wouldn't be here.

Jeremy Parrish wasn't going to call law enforcement. He didn't call law enforcement. Ms. Bio called law enforcement. So quite frankly, the defendant's scheme, it almost worked. And it almost worked because of the 20-year relationship he has with a man who is like his brother." RP 393:20-394:4.

- "Voluntary intoxication, this is the defendant's attempt just to evade justice." RP 397:1-2.

RP 377:5-21, 378:8-14, 393:13-394:4; 397:1-2.

The State's claim that Mr. Peebles "claim and version is ridiculous" specifically relates to Mr. Peebles' credibility and was clearly improper. Further, the prosecutor did this twice and the court failed to take any remedial action, thus empowering the prosecutor's flagrant remarks. Further, the prosecutor vouched for A.P.'s credibility, and impugned Mr. Peebles' credibility and the defense raised throughout the closing argument, which is improper.

It is well-established that a prosecutor simply cannot vouch for or against a witness's credibility. The evidence in this case was marginal, and when the prosecutor committed misconduct during closing argument, it is impossible to conclude that the prosecutor's conduct did not influence the jury. This is especially true where the entirety of the state's case hinged on the credibility of both A.P. and Mr. Peebles. By commenting on Mr. Peebles' credibility, the prosecutor represented herself as a witness. That is improper. Therefore, respectfully, reversal is required.

In In re the Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673, 675 (2012) our Supreme Court stated:

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 22 of the Washington State Constitution. Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. “A “[f]air trial” certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.”

Id. At 677 (internal citations omitted).

The Court in Glassman went on to cite the commentary on the *American Bar Association Standards for Criminal Justice* std. 3-5.8, which holds:

The prosecutor’s argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor’s conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor’s arguments, not only because of the prestige associated with the prosecutor’s office but also because of the fact-finding facilities presumably available to the office.

Glassmann, 286 P.3d at 679 (*quoting American Bar Association Standards for Criminal Justice* std. 3-5.8).

Here, the state made numerous conclusory and improper remarks about Mr. Peebles’ defense and testimony, all of which were poorly masked statements about what the state “believes.” Such conclusions of guilt were improper for numerous reasons. The remarks served as personal testimony from the prosecutor who was acting as a witness; informing the jury of what the state believes. That was improper. That it happened

numerous times only served to tilt the balance of fairness away from Mr. Peebles, thereby denying him his constitutional right to a fair trial from an impartial jury.

Further, the prosecutor's statements served as personal testimony bolstering the credibility of the state's witnesses while disparaging the credibility of Mr. Peebles. That was improper. The jury was the fact-finder and its job was to conclude which witnesses were credible and which were not.

As noted, the prosecutor's office has inherent prestige and presumed "fact-finding facilities" that jurors are aware of as set forth in the ABA comment cited in Glasmann. In other words, jurors see prosecutors as credible. If the prosecutor is allowed to testify as to what he/she believes, the defendant is denied the presumption of innocence and placed in a position of proving the prosecutor's beliefs are wrong.

Finally, the ABA comment also discusses the presumed "fact-finding facilities" of the prosecutor's office. This presumption from the jury that the prosecutor "really knows what happened" tips the balance against the defendant if the prosecutor is allowed to express that belief in trial rather than let the evidence determine guilt.

The jury in Mr. Peebles' case was not presented with any physical evidence of guilt or eyewitness testimony. The case came down solely to the accusations of A.P. versus Mr. Peebles' denial of the accusations. Given that A.P.'s disclosure varied over time, the jury apparently looked

past the inconsistencies and found an “abiding belief” in the truth of the charge. The state received the benefit of having a witness with inherent prestige and inherent fact-finding facilities, i.e., the prosecutor, testify in its closing argument. That was improper.

In a case like Mr. Peebles’ - credibility is paramount. The state should not have been allowed to personally vouch for its witness and disparage Mr. Peebles. Because such improper argument occurred, which the court allowed, the prosecutor committed misconduct and respectfully, reversal is required.

C. MR. PEEBLES’ COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE NUMEROUS INSTANCES OF PROSECUTORIAL MISCONDUCT.

To show ineffective assistance of counsel, a defendant must show that (1) his or her lawyer’s representation was deficient and (2) the deficient performance prejudiced him/her. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Representation is deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs when but for counsel's deficient performance, the proceeding's result would have been different. McFarland, 127 Wn.2d at 335. If a party fails to satisfy one prong, this Court need not consider the other. State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

Courts are highly deferential to counsel's performance, that is, the defendant must overcome the presumption that, under the circumstances,

the challenged action might be considered sound trial strategy. Strickland, 466 U.S. at 689. Tactical decisions cannot form the basis for a claim of ineffective assistance of counsel. McFarland, 127 Wn.2d at 336.

Here, as noted above, the prosecutor made numerous statements vouching for the credibility of the alleged victim and other witnesses. Aside from one objection during the State's opening closing argument, the defense counsel failed to object to any other remark. In a trial where credibility of the witnesses was paramount, to allow the state to effectively testify that the alleged victim was a credible witness was to allow the jury to be swayed in favor of believing her.

There is no basis or reasonable justification to contend that the decision not to object to the prosecutor's numerous remarks made during rebuttal was tactical. Again, credibility was critical in this case. Nothing could be gained by allowing additional evidence and support favoring the credibility of those who testified against Mr. Peebles.

The second prong of the Strickland test requires the defendant to show prejudice – i.e. that the result of the trial would have been different but for the ineffective representation. While this is a somewhat ambiguous and subjective standard, it is clear that in this case the credibility of the witnesses was the determinative factor. There was no physical evidence or eyewitness testimony from others besides the alleged victim to support the charges and her testimony was replete with inconsistencies. Therefore, without independent evidence of guilt, it is

clear that the result of the trial would have been different had counsel objected to each of the instances of misconduct.

D. THE PROSECUTOR, COMMITTED MISCONDUCT AND THE DEFENSE COUNSEL WAS INEFFECTIVE WHEN THE DNA EVIDENCE WAS INTRODUCED AT TRIAL.

During pre-trial motions in limine, the State sought to introduce DNA evidence obtained from A.P.'s underwear. The defense moved to exclude such testimony based upon its prejudicial effect against Mr. Peebles. RP 27:11-30:8; RP 60:7-62:12. The court granted the defense motion. RP 62:13-68:18.

During the testimony of Deputy Jason Smith, the prosecutor asked the deputy when introducing into evidence A.P.'s underwear, to comment about other items that were contained within the State's exhibit. RP 173:5-174:7. The deputy responded that the evidence was "some sort of test, DNA test" RP 174:6-7.

Clearly, this testimony violated the Court's order on the DNA motion in limine and simply no reason existed for such question to be asked of the deputy when clearly the response would violate the Court's order. Further, defense counsel did not object or seek a mistrial as a result of the DNA evidence and simply wanted to leave the answer it as it was. RP 191:17-24. Respectfully, the prosecutor committed misconduct as any competent and ethical prosecutor would realize that the question asked would elicit testimony precluded by the court, and the failure of the defense counsel to request a mistrial is ineffective as no trial tactic exists

that would make such decision sound. As such, and based upon both the prosecutor's misconduct and the defense counsel's ineffectiveness, Mr. Peebles right to a fair trial was prejudiced.

E. CUMULATIVE ERRORS DENIED MR. PEEBLES A FAIR TRIAL.

Reversal may be required due to the cumulative effects of trial court errors, even if each error standing alone would otherwise be considered harmless. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); State v. Alexander, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992). Error may take one of two forms--constitutional and non-constitutional error. State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).

Constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. Whelchel, at 728; Guloy, at 425. Non-constitutional error requires reversal if, within reasonable probabilities, it materially affected the outcome of the trial. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993); State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

Here, the errors mentioned above unfairly prejudiced Mr. Peebles' right to a fair trial. In addition to insufficient evidence to support a conviction, the prosecutorial misconduct that occurred during closings, the

prosecutorial misconduct that introduced DNA evidence that the court expressly ruled was inadmissible, and the ineffective assistance of counsel, all contributed to deny Mr. Peebles a fair trial.

This was a case where the jury weighed the credibility of the complaining witness and Mr. Peebles. Absent the errors set forth above, Mr. Peebles would have been acquitted. Because it cannot be stated beyond a reasonable doubt that Mr. Peebles' conviction would stand absent the jury receiving, and not receiving, the evidence as outlined above, reversal is required.

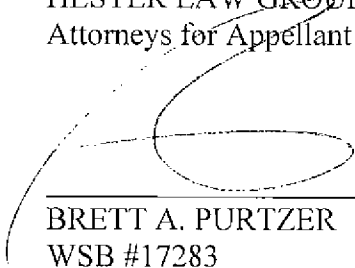
V. CONCLUSION

Based upon the aforementioned, Mr. Peebles respectfully urges, in the alternative, that this Court reverse his conviction for insufficient evidence, or to reverse and remand for a new trial.

DATED this 14th day of May, 2015.

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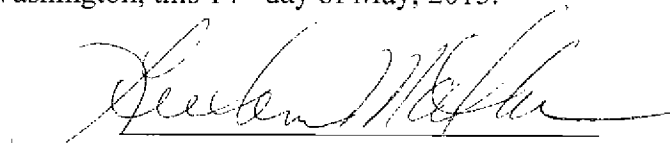
CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the opening brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Kathleen Proctor
Deputy Prosecuting Attorney
930 Tacoma Avenue South, #946
Tacoma, WA 98402

Kenneth Peebles, Jr.
DOC #375898
Washington Correctional Center
P.O. Box 900
Shelton, WA 98584

Signed at Tacoma, Washington, this 14th day of May, 2015.


LEE ANN MATHEWS

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