No. 33576-3-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent

vs.

ROY E. COOLEY,

Appellant

RESPONSE TO APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Page

Cases

Constitutional Provisions

I. IDENTITY OF RESPONDENT:

The State of Washington was the Plaintiff in the Superior Court, and is Respondent herein. The State is represented by the Kittitas County Prosecutor's Office.

II. STATEMENT OF RELIEF SOUGHT:

The State is asking this Court to affirm the decisions of the Superior Court and uphold the Appellant's Conviction and Sentence.

III. RESPONSE TO ISSUES PRESENTED FOR REVIEW:

A. The mother's testimony describing the basis for her actions was not improper vouching and did not violate the defendant's right to a trial by jury.

B. The testimony of the officer regarding the charging process did not amount to a judicial comment on the evidence.

C. There were no acts of prosecutorial misconduct.

D. Defense counsel's performance was not deficient, but even if the Court were to conclude that it was, there was no resulting prejudice as there is no showing that the trial outcome would have been different.

IV. STATEMENT OF THE CASE:

On August 27, 2014, Randi Lowery, 27, reported to the Kittitas County Sheriff's Office that her son, R.B. (DOB: 09/14/2007), 6, told her that her ex-boyfriend, Roy Cooley (DOB: 04/30/1979), sexually assaulted him. Kittitas County Sheriff's Deputy Christopher Whitsett took the report. RP, 305 – 306.

Ms. Lowery said she was giving her son a bath and talking to him about "good touch and bad touch," when R.B. told her, "Daddy made me put my mouth on his hoo-hoo." Ms. Lowery explained that "hoo-hoo" was her son's term for penis. Ms. Lowery said she told R.B. that he should not make-up stories about serious issues. However, she said, her son insisted it happened. She said he asked her to promise that she would not tell anyone. Ms. Lowery said R.B. thought of Mr. Cooley as his father, loved him, and told her that he did not want Mr. Cooley to get into trouble. RP, 138 – 143; RP, 150 – 151.

Ms. Lowery said she had lived with Mr. Cooley in Thorp Washington for the last 3 years until she broke up with him and moved out of the residence on June 23, 2014. Ms. Lowery advised that Mr. Cooley was unemployed, for the majority of the time they lived together, while she worked. She said Mr. Cooley frequently

cared for her children and his 10-year-old daughter from a prior relationship. RP, 128 – 132.

Ms. Lowery said she waited a few weeks to report the incident because she did not want to jump to conclusions. She said she wanted to determine for herself whether the incident happened, fully aware of the serious implications of her son's allegations. During the intervening weeks, Ms. Lowery said she spoke to her son two or three times about his disclosure. She said her son maintained the incident happened, and told her to go ask Mr. Cooley about it. Mr. Cooley denied the allegation, and when he learned of the denial, RB began crying. RP, 143 – 147. Faced with these circumstances, Ms. Lowery eventually notified law enforcement (the Kittitas County Sheriff's Office) after considering what do for some period of time. Thereafter, when Ms. Lowery took RB for the forensic interview, she told him he would be talking to someone about what happened. RP, 152 – 153.

On August 29, 2014, Deputy Whitsett arranged for Child Forensic Interviewer Lisa Larrabee to interview R.B. at the Ellensburg Children Protective Services (CPS) office. RP, 307 – 308. Ms. Lowery brought her son to the interview. Ms. Larrabee

conducted the interview in a room specially designed for child forensic interviews. The interview was audio-visually recorded.

Prior to the interview, Ms. Lowery spoke to her son seated in a chair with Ms. Larrabee sitting across from him. Ms. Lowery provided her son comfort and gave him a kiss before leaving the interview room. RP, 261. Ms. Larrabee shut the door, sat down, and had barely introduced herself before R.B. told her: "Once, my Daddy . . . my Daddy . . . he made me put my mouth on his hoo-hoo." RP, 255 – 256.

An audio and video recording of the interview was admitted as an exhibit and published to the jury. RP, 257 – 258. (The DVD is referred to as PLA 6 in the record, CP, 106; but as P-3 in the RP, at 212.) Ms. Larrabee asked R.B. what a boy does with his "hoo-hoo." "Peeing," answered R.B., and in the trial he would eventually testify in essentially the same manner. RP, 110. "But he didn't pee in my mouth." Ms. Larrabee asked if he had another name for his "hoo-hoo," R.B. said he also called it his "private." He then told Ms. Larrabee that the incident happened, one night, while he lay in his bed awake. He explained that he slept in "double-beds" with his younger brother. R.B. slept on the top

bunk. His younger brother slept on the bottom bunk. PLA Ex. 6. R.B. also testified to these facts. RP, 106.

R.B. said he was laying in his bed when his "Daddy" came into his room and said "You're in big trouble, mister" before making him "put my mouth on his hoo-hoo." R.B. said he climbed down the ladder from his top bunk, at Mr. Cooley's beckoning, while his younger brother slept on the bunk below. PLA Ex. 4; PLA Ex. 6. R. B. also testified to these facts. He drew a picture during the interview of the bunk bed which was admitted at trial as PLA Ex. 4. RP, 107 – 108; 111 – 112.

R.B. said Mr. Cooley then told him: "Ok, let's just get this over with." He said he thought he was going to be spanked because he could not get to sleep that night. He said "(s)ometimes I get spankings, but that never happened to me before." That night, said R.B., "(h)e actually didn't give me (a) spanking. He actually gave the . . . he did the hoo-hoo thing." PLA Ex. 6.

Ms. Larrabee asked R.B. to "tell (her) everything he did with his hoo-hoo," R.B. looked down and said, in a soft voice, "(h)e just. . . he just . . he said, 'no biting, no biting." He explained that Mr. Cooley then "wiggled it around." Ms. Larrabee asked "Then what?" R.B. answered, "That's it." PLA Ex. 6.

Ms. Larrabee asked R.B. if "Daddy" had another name. "He's not my Daddy anymore," answered R.B.. He told Ms. Larrabee that Mr. Cooley also goes by the name "Dusty," a nickname for Roy Cooley. Ms. Larrabee asked R.B. to tell her how he much he liked Mr. Cooley when he was his "Daddy." "I loved him very much. I didn't know he was gonna do that, though." PLA Ex. 6. R.B. testified to these facts during the trial. RP 113 – 114.

R.B. began fidgeting in his seat, at which time, Ms. Larrabee asked him how he was feeling. "He used to be my Dad . . . but I still miss him." R.B. said he was concerned for his "sister," Mr. Cooley's 10-year-old daughter: "I don't want her getting hurt too . . . I don't want her getting the germs on her." PLA Ex. 6.

Ms. Larrabee returned to what happened prior to the assault. She asked him to tell her everything Mr. Cooley said. R.B. said when Mr. Cooley told him, "Let's get this over with," he was "scared." But R.B. explained: "He's my Dad and I have to listen to him, and . . . because he said 'Go down the stairs.' And then I had to go down the stairs." R.B. then pantomimed climbing down a ladder. PLA Ex. 6. R.B. gave a similar description of events in his trial testimony. RP, 107.

Ms. Larrabee asked R.B. where he went after he climbed down the ladder: "On the floor. I had to kneel down." R.B. then stood up from his interview chair and demonstrated. He knelt down on both of his knees, saying, "Like that." When Ms. Larrabee asked R.B. what Mr. Cooley did with his pants, R.B. said Mr. Cooley unzipped them before pulling off both his pants and underpants and laying them on the floor nearby. PLA Ex. 6. R.B.'s trial testimony was similar. RP, 108.

Ms. Larrabee asked R.B. what Mr. Cooley did with his hands when he had his "hoo-hoo" R.B.'s mouth. R.B. explained that Mr. Cooley "(g)rabb(ed) me . . . on the shoulders," gesturing to his shoulders with his hands. "What was he doing with his hands on your shoulders?" asked Ms. Larrabee. "Grabbing. So I . . . and making sure I don't move," answered R.B.. PLA Ex. 6.

Ms. Larrabee asked R.B. to tell her everything Mr. Cooley did with his hips and legs while his "hoo-hoo" was in R.B.'s mouth. R.B. said Mr. Cooley was "being . . . like this" while bending his knees and slightly thrusting his hips forward. He again pantomimed the shoulder-grabbing. Ms. Larrabee asked R.B. to tell her how he moved, R.B. slightly squatted, placed his hands

forward, and swayed slightly at the hips saying: "Like this - - to move his hoo-hoo around." PLA Ex. 6.

Ms. Larrabee asked R.B. to draw a picture of Mr. Cooley's "hoo-hoo." R.B. drew a picture of two people, one taller than the other. What appear to be a pair of pants and another object are off to the side of the drawing. R.B. identified the larger person as Mr. Cooley and the smaller person as himself. At the bottom of the larger person's torso is a large horizontal protuberance covered in short pen marks, consistent with pubic hair. The small person faces the larger person with the face of the smaller person right around the end of the hairy protuberance. R.B. explained to Ms. Larrabee that the circles represented his mouth on Mr. Cooley's "hoo-hoo." He said the pants and the other object represented Mr. Cooley's pants and underwear lying on the floor nearby. PLA Ex. 6. At trial, R.B. identified the drawing as being that of a cactus, and that it represented how he felt when he drew the picture. RP, 112 – 113.

Ms. Larrabee asked R.B. if Mr. Cooley told him about whether he should or should not talk about the incident. R.B. said Mr. Cooley said nothing about what had happened. R.B. said he

told his mother "I don't want him to go to jail because I have a big heart. I love everybody." PLA Ex. 6.

Ms. Larrabee asked R.B. what it felt like when Mr. Cooley put his "hoo-hoo" in his mouth. R.B. said "(i)t felt like I was getting sick . . . like, dizzy." He then made a gesture and revolting noise. He told Ms. Larrabee, with obvious disgust, "(h)e just gave me germs." PLA Ex. 6.

R.B. said the incident occurred "a long time ago" when he, his mother, and brother lived with Mr. Cooley when he didn't have a teacher, when he didn't go to school, and when the weather was "hot." But he could not provide a specific date. He said they lived with Mr. Cooley in a greenhouse with a black roof. PLA Ex. 6.

R.B. said that this had never happened to him before. He had never seen Mr. Cooley do it to anyone else. He said that he told his mother first because she "doesn't want me getting hurt." PLA Ex. 6.

R.B. said his mother told him that she confronted Mr. Cooley about the incident. He said his mother told him that Mr. Cooley said: "No, I didn't do that." R.B. said his mother told him: "He said he didn't do it." Ms. Larrabee asked R.B. what he thought about that. He paused. Then said: "I think about it . . .

that it was a lie. So, he did not want her to tell the cops so he could get arrested. I don't want him getting arrested either." R.B. said his mother told him that he could no longer talk to Mr. Cooley anymore. But he said he told her: "Oh come on Mama, please? I wanna give him a hug." PLA Ex. 6.

When Ms. Larrabee asked R.B. if he had any questions for her, R.B. said: "I'm worried about him . . . going into jail." "Why?" asked Ms. Larrabee. "Because that's a bad thing, for kids . . . that's really bad. And I don't want him to be hurt," answered R.B.. PLA Ex. 6.

Ms. Larrabee asked R.B. if anyone told him what to say for the interview. R.B. said when he asked his mother if he was going to talk to a person about the "hoo-hoo thing," his mother said "yes." "Did she say anything else about that?" asked Ms. Larrabee. "Nope just that," he answered but then said his mother told him, "You should make sure that you always tell the truth. This is serious." PLA Ex. 6.

Following the interview, police arrested Mr. Cooley at his residence, after a brief stand-off. Once Mr. Cooley was incarcerated at the Kittitas County Jail, he asked to speak to Deputy Whitsett. Post Miranda, Mr. Cooley corroborated that Ms.

Lowery and her two sons lived with him from August 22, 2011 to June 23, 2014 when he "kicked her out" of the house. RP, 314 – 323. Mr. Cooley admitted to being the primary caretaker of Ms. Lowery's two children including R.B. He told Deputy Whitsett that he once caught R.B. watching a pornographic video he and his mother had made, which might explain the account. RP, 323 – 326.

Deputy Whitsett asked Mr. Cooley why he thought R.B. would draw the picture that would eventually be admitted as PLA 3. "R.B. never knelt in front of me for any reason," replied Mr. Cooley. "Oh, is he kneeling?" asked Deputy Whitsett. "I couldn't tell." The interview ended. RP, 328 – 329.

At trial, the State of Washington first called R.B. to the witness stand. Following his testimony, the State of Washington called R.B's mother Randi Lowery. Ms. Lowery testified that she "didn't believe it" when her son disclosed.

> Q: "Ms. Lowery, when your son told you that, what was your reaction?"
> A: "I didn't believe it. I couldn't – I just --"
> Q: "You didn't believe it.?"
> A: "No."
> Q: "Why not?"
> A: "I never thought I was going to hear that come out of my son's mouth. I didn't - - it just took me completely by surprise. I didn't know what to think, really. RP, 141.

Ms. Lowery went on to testify that she encouraged both her children to call Mr. Cooley "Daddy" because they had been together for so long, "he was there and was in that father role for them." RP, 142. She testified that she did not immediately call law enforcement. She testified that she told her son that he was making a "a very serious . . . claim" and asked him if it was "sure." RP, 143 – 144. She said her son told her: "Go ask Dad." RP, 144.

The next day, she testified, she drove to Mr. Cooley's residence and told him what her son had told her: "I just jumped into it and just said, 'This is what R.B. said." She testified that she did not accuse Mr. Cooley of doing what her son had told her the appellant had done. RP, 145. She testified that the appellant told her that he could not believe that she would even ask him that question. RP, 146.

Ms. Lowery testified that after her conversation with Mr. Cooley she relayed what he had said to her son who "started crying." RP, 147. The mother testified that she still did not report her son's disclosure for a "week or so after that." RP 148. The prosecutor asked why. RP, 149. "Just trying to make sure that I wasn't going to mess up anybody's life . . . without being sure… " RP, 149.

The prosecutor then asked Ms. Lowery of what she needed to be sure, to which the mother stated: "Without knowing that what I was going – I don't know. That knowing that what my son was saying was the truth. I was just trying to --." The prosecutor then asked if she believed her son after her second conversation with her son. "I did. I did when I saw him crying and stuff." But then she went on to testify: "I didn't want to believe it." RP, 149.

The mother testified that even though after she saw her son crying she reported the matter to law enforcement, she still waited a week. RP, 149. She went on to testify that she had a lot on her mind and ultimately "knew that I had to at least go and tell the police what my son had said and see where it went from there." RP 150. Ms. Lowery also testified that it was very complicated because her son "didn't want him to get in trouble . . . (because) (h)e cared about him a lot and he loved him and looked up to him." RP, 151.

On cross-examination, appellant's trial attorney questioned the timing of the mother's report and how many times she spoke to her son. On re-direct, the prosecutor asked:

> Q: "Did you want to report to law enforcement what your son reported to you?"
> A: "No."

Q: "Why not?
A: "I didn't want to ruin somebody's life without being a hundred percent sure that it has happened." RP, 195.

Mr. Cooley was convicted by the jury of one count of Rape of a Child in the First Degree, with findings as to two aggravating circumstances alleging that the defendant knew or should have known that the victim of the current offenses was particularly vulnerable or incapable of resistance, and the defendant used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offense. RP, 798 – 802. He was sentenced on June 30, 2015. RP, 833 – 842.

V. ARGUMENT:

A. The mother did not offer an opinion as to the credibility of her son and thus indirectly violate Appellant's right to a Jury Trial.

The mother's testimony can hardly be considered an opinion as to whether her son was telling the truth. First, her testimony revealed that she was overly cautious and reserved considering that her son had just disclosed to her that he had been raped by her ex-boyfriend of several years, with whom she had just

broken up. She vacillated between doubting and believing her own son.

Second, the prosecutor did not solicit testimony from the mother about what she "believed." The mother volunteered that she "didn't believe it" which ultimately prompted the prosecutor to ask if she ever came to a point when she did believe her son, since the mother had admitted that she did not immediately report the disclosure to law enforcement. Clearly, the prosecutor was aware of the evidentiary impact of a delayed disclosure and the motive which could be impugned on the mother for failing to immediately disclose. Defense counsel thoroughly cross examined the mother on her timeline of disclosure.

However, assuming without conceding an argument can be made that the mother's testimony constituted an "opinion" on whether her son was telling the truth, the error was harmless. The appellant cannot demonstrate that the mother's "opinion" had "practical and identifiable consequences" in leading the jury to find the defendant guilty. If anything, the mother's testimony, arguably, only offered an outline of the case, considering all the motives that could be impugned to her. Her testimony certainly

cannot reasonably be argued to be the testimony which convinced the jury.

The child accuser's mother had just ended her relationship with the appellant. If anybody had a motive to exaggerate and/or fabricate, it would be her. And yet, the mother testified that she did not immediately report her son's disclosure to law enforcement because she had her own doubts and did not believe this was a crime the appellant was capable of committing. Arguably, the mother's testimony was "exculpatory."

Clearly, as in any such case, the child's testimony (as the accuser) was the critical evidence the jury had to weigh before reaching its verdict, particularly after the appellant chose to take the witness stand. The evidence most likely to be important to the jury in a case such as this one will always be the accuser's testimony. Therefore, when the appellant chose to take the witness stand and testify on his own behalf, the jury was presented the best possible opportunity to assess both sides before reaching its verdict.

The mother's testimony offered a modest amount of background and context to what happened but should not be expected to be given much credence by jurors even if she had

offered an opinion for the simple reason: she is the child's mother. Most of us will expect a parent in a case such as this to have strong views because the well-being of their child is so important to a parent. The resulting bias on the part of a parent borders on intuitively obvious, and explaining Ms. Lowery's otherwise inexplicable delay is necessary. This stands in stark contrast to a police officer or a physician offering an opinion as to whether a witness is telling the truth because the jury may be inclined to lend more weight to the opinions of presumptively objective authority figures.

Appellant cites *State v. Sutherby*, 138 W.App. 609, 158 P.3d 91 (2007) to argue that the mother's "opinion" that her son was telling the truth was something it was not. In *Sutherby*, the mother testified that her daughter made "half-smiles" when she lied but did not when she accused *Sutherby* of raping her. First, aside from the absurdity of such logic, this case is easily distinguished from *Sutherby* because the mother was not offering the jury her point blank opinion about her son's veracity as opposed to testifying as to the point she finally believed him enough to make a police report. Likewise, neither *State v. Carlson*, 80 Wn. App. 116 (1995) nor *State v. Alexander*, 64 Wn. App. 147

(1992), apply to the facts of the instant case. In both of those, the opinion testimony of expert witnesses was on the ultimate fact of the sexual assault at issue in those cases. There are other similar fact patterns discussed in *Carlson*, at 123 – 130. That is not at all similar to the testimony here, in which the mother is explaining her delay in contacting law enforcement.

If anything, a jury would want to know why a mother would not immediately disclose that her child reported to being raped. In this case, the mother was not opining on R.B.'s credibility; she was explaining the basis of her own conduct. She simply testified about the point she felt comfortable reporting her son's disclosure to law enforcement because she was very concerned about the implications associated with such an accusation. She even testified, at one point, that she knew she had to "at least" report the matter to law enforcement "and see where it went," even if she had her doubts. Therefore, it was abundantly clear that the mother was conflicted and pained in spite of her testimony that she only reported the matter once she felt her son was telling the truth, even if she still questioned whether he was telling the truth.

The mother testified as to the level of certainty she needed to reach before reporting the matter to law enforcement because she clearly "didn't want to ruin somebody's life without being a hundred percent sure that it has happened."

Notwithstanding the mother's testimony, her son (the principal accuser) testified and the appellant testified, thereby giving the jury the best evidence to determine whose testimony was more credible: the child or the appellant. In addition, as argued below, the appellant's position that the prosecutor used his closing statement to bolster the mother's credibility further by going so far as to personally vouch for her credibility is shown to be categorically untrue and totally taken out of context.

This is critical to the court's analysis because clearly the Appellant's principal arguments rest on the mother's "opinion" about whether her son was telling the truth and the prosecutor's own "opinion" about whether the mother was telling the truth. The truth is that the appellant takes both out of context in an effort to create issues out of whole cloth. Defense counsel at the trial understood this, and thus did not make the pointless objection. He had heard Ms. Lowery's testimony on direct examination, and conducted appropriate and vigorous cross examination. Even

assuming an objection would have made a difference, it was not made, and is thus waived. *Carlson*, at 129 (citation omitted).

B. The testimony of the officer about his understanding of the charging process did not amount to a judicial comment on the evidence.

Under article IV, section 16 of the Washington Constitution, *a judge* is prohibited from conveying to the jury his or her personal opinion about the merits of the case or from instructing the jury that a fact at issue has been established. *State v. Hartzell*, 156 Wn. App. 918, 938, 237 P. 3d 928 (2010)(emphasis added). A comment on the evidence occurs only if the court's attitude toward the merits of the case or the court's evaluation relative to a disputed issue is inferable from the statement. *State v. Hansen*, 46 Wn. App. 292, 200, 730 P.2d 706 (1986). "A judge need not expressly convey his or her personal feelings on an element of the offense; it is sufficient if they are merely implied." *State v. Jackman*, 156 Wn. 2d 736, 744, 132 P. 3d 136 (2006). Generally, "the touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the

jury." *State v. Brush*, 183 Wn. 2d 550, 565 – 66, 353 P. 3d 213 (2015).

There is no question that the officer's testimony is unfortunate, and apparently reflects a flawed understanding of parts of the process of bringing a defendant before a Court. RP, 670 – 678. However, there is a huge distance between a judicial comment on the evidence, and unfortunate testimony by a witness. Here, there was no judicial comment at all. The trial judge made no comment at all during the officer's testimony except to sustain two objections made by defense counsel and to address a third objection by ensuring that no objectionable testimony was offered. Further, Appellant's argument that the testimony was deliberately sought by the (trial) prosecutor (see *Br. Of App.* at 38) is badly flawed. As anyone who has suffered through the experience knows, there are events that sometimes occur in trial that were not planned or expected. Among them is a witness whose testimony is of some aberrant nature such as here, when the questions should have resulted in substantially different answers. The testimony that actually resulted cannot be attributed to the Court or the prosecutor, and this claim of error is without merit.

C. There were no acts of prosecutorial misconduct.

Appellant makes multiple questionable allegations of prosecutorial misconduct. In one, Appellant takes one snippet of the transcript, in which the prosecutor, in closing, state's - "I believe her . . . " - to shamelessly argue that the prosecutor committed "flagrant prosecutorial misconduct" But the appellant takes these three words standing alone completely and totally out of context with what the prosecutor actually told the jury.

What the prosecutor stated *was* (including proper punctuation and context):

> "If we go on the defense theory, part one, of 'it's Randi,' that's what you have to believe (quotation marks added). Or do we have the 'bathroom scene' which the doctor concedes, 'yeah, it's a common scene' (quotation marks added). Yeah. And the child - - 'Hey, I've got something to tell you (quotation marks added). .' In context with what's happening in the bathroom – according to Randi Lowery, she's in there (underlining added). She's bathing him. She doesn't know the date herself exactly. And Ryan grabs his testicles and she sees him. He's kind of grabbing it, and she's like, 'Hey, you know, those are yours. We don't do that' (quotation marks added). **I believe her testimony** (emphasis added) - - you know, 'That's just for you. You don't show that to people' (quotation marks added). 'Mom, I've got something to tell you. ' 'Okay' (quotation marks added). And we get our statement."

RP 750-751.

Clearly, any fair and objective reading of the entirety of the prosecutor's remarks, inserting proper quotation marks and other punctuation, makes it abundantly clear that the prosecutor was summarizing what he "believe(d)" the mother's testimony "was" during the trial which is categorically different than stating: I believe her testimony.

One could conclude that there are words missing, such as "was" between "I believe her testimony" and "you know" in the above quoted material. Likewise, it appears that the transcript is missing the verb "says" when the prosecutor is recapping the 'bathroom scene:" "And the child **–(says) -** 'Hey, I've got something to tell you.' Whether that error is a result of transcription, or the reality that most if not all of us sometimes misspeak in minor ways, words are missing that actually show the correct context.

The prosecutor even tells the jury that he is summarizing the mother's testimony "… in context with what is happening in the bathroom – *according to Randi Lowery* (emphasis added)." The prosecutor ends that portion of his argument with: "And we

get our statement," obviously referring to what the victim told his mother. Clearly, the prosecutor was referring to his recall of "her testimony", not that he "believ(ed) her testimony."

Allegations of prosecutorial misconduct are reviewed for abuse of discretion. *State v. Stenson,* 132 Wn.2d 668, 718, 940 P.2d 1239 (1997); *State v. Ish*, 170 Wn.2d 189 (2010). To prevail on a claim of prosecutorial misconduct, the defense must show that the comments were improper and that they were prejudicial. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008)*; State v. Ish*, 170 Wn.2d 189, 195 – 196 (2010). It is misconduct for a prosecutor to express personal belief as to the credibility of a witness. *State v. Warren*, 165 Wn.2d at 30. If the defendant proves the conduct was improper, the prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Stenson,* at 718-719 (citing *State v. Brett*, 126 Wn.2d 136, 75, 892 P.2d 29 (1995)) (vacated on other grounds).

A defendant's failure to object to a prosecuting attorney's purported improper remark constitutes a waiver of such 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*, 719 (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995).

The court should review the prosecutor's remarks in the context of the entire trial. *Warren*, 165 Wn.2d at 27. (In analyzing prejudice, a court does not look at a prosecutor's improper comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury). Here, there were no improper comments when reviewed under the standards actually applicable to the comments. Even if one were to conclude for some reason that any of the comments complained of were in fact improper, any such error (not misconduct, as it is so often incorrectly labeled) is harmless, just as in *Ish. Ish*, at 200 – 201.

Contrary to Appellant's assertion, the interaction between the prosecutor and Mr. Cooley at trial in this case is not similar to that in *State v. Boehring*, 127 Wn. App. 511, 111 P. 3d 899 (2005). *Br. Of App.* at 42 – 43. All that happened in the trial at issue is that the prosecutor was clarifying that R.B. had no incentive to lie about the events, which is implicitly accepted as a basis for cross-examination in *Boehring*. 127 Wn. App. at 524 – 525. Appellant's argument is again not well founded.

Similarly, the argument based on *State v. Fleming*, 83 Wn. App. 209, 921 P. 2d 1076 (1996) is not sound. First, and very important, Mr. Cooley testified at trial, unlike the co-defendants in *Fleming*. He was already putting forward a vigorous defense including a denial made to the jury. Second, the issue about which the prosecutor was asking was not about presenting evidence to the jury, but to the investigating officer near the time of the arrest. The first reference to Mr. Cooley's shaved crotch was during his testimony. RP, 566.

It is simply incomprehensible that a person arrested for such a serious offense, who has seen the drawing in question (PLA 3) would not take the opportunity to show to an investigating officer any potentially inconsistent physical attribute that might nearly immediately call in to question the basis for the arresting officer's decision. It does not matter what the attribute is – an amputation, scar, tattoo, hirsuteness, or the lack thereof. This is not at all the same, or even similar to, putting such evidence before the jury.

Appellant argues for the first time on appeal that the prosecutor committed misconduct in several ways during cross-examination and closing argument by shifting the burden of proof.

Even assuming without conceding that any portions of the either were improper, Mr. Cooley cannot demonstrate that those comments were flagrant, ill intentioned, and incurable by instruction. Thus, he has failed to preserve these alleged errors for review.

If a defendant fails to object to purported misconduct at trial, he fails to preserve the issue unless he establishes that the misconduct was so flagrant and ill-intentioned that it caused an enduring prejudice that could not have been cured with an instruction to the jury. *State v. Thorgerson*, 172 Wn. 2d 438, 443, 258 P. 3d 43 (2011). The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remark. *State v. Emery*, 174 Wn. 2d 741, 762, 278 P. 3d 653 (2012). In addition, defense (trial) counsel understood what was being said, and knew that there was in fact no basis for objection. By no stretch of the law and imagination could this have been ineffective.

D. Defense counsel's performance was not deficient, but even if the Court were to conclude that it was, there was no resulting prejudice as there is no showing that the trial outcome would have been different.

Defendants are, as Petitioner states, entitled to effective counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). There is a "strong presumption counsel's representation was effective", and the burden is on the defendant to show deficient representation. *State v. McFarland*, 127 Wn. 2d 322, 335 (1995). To prove ineffective assistance of counsel, Petitioner must prove both that that the representation provided was deficient, " … i.e., it fell below an objective standard of reasonableness based on consideration of *all* the circumstances …" and that prejudice resulted, " … i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Thomas*, 109 Wn. 2d 222, 225-226 (1987) (emphasis added); *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The defendant must overcome a strong presumption that counsel's performance was not deficient. *Id.* In assessing performance, "the court must make every effort to eliminate the distorting effects of hindsight." *Id.*, quoting *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.

Id. If either part of the test is not satisfied, the inquiry need go no further. *State v. Mierz*, 127 Wn.2d 460, 470, 901 P.2d 286 (1995).

Mr. Cooley has to show that counsel did not function "… as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that his errors if any were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P. 2d 593 (1998) (citations omitted). This burden cannot be met.

VI. CONCLUSION:

Appellant cannot and did not sustain his burden of proof on any issue. There is thus no basis in law or fact upon which this Court can provide him the relief he seeks, and it should uphold the trial court's decisions and the jury's verdict. The trial may not have been perfect, as there are no perfect trials. It was, however, fair, and that is what the Appellant was entitled to receive – a fair trial. "A judicial system which treats every error as a basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one." *State v. Barry*, 183 Wn. 2d 297, 316 – 317, 352 P. 3d 161 (2015)(citation omitted).

DATED this 25th day of May, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rebecca Schoos, do hereby certify under penalty of perjury that on May 25, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided email service by prior agreement (as indicated), a true and correct copy of the Respondent's Designation of Exhibits:

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