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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

NO. 34212-0-II

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

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STATE OF WASHINGTON, Respondent

v.

BENJAMIN PATRICK CLOSE, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE DIANE M. WOOLARD  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 03-1-02471-6

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

I. STATEMENT OF THE CASE..... 1

II. RESPONSE TO ASSIGNMENT OF ERROR #1 ..... 1

III. RESPONSE TO ISSUE #2 ..... 3

    A. PROSECUTORIAL MISCONDUCT ..... 4

    B. COMMENT ON DEFENDANT’S RIGHT OF SILENCE ..... 8

    C. INEFFECTIVE ASSISTANCE OF COUNSEL ..... 10

IV. CONCLUSION..... 11

## TABLE OF AUTHORITIES

### Cases

|   |      |
|---|------|
| <u>State v. Brown</u> , 132 Wn.2d 529, 561, 940 P.2d 546 (1997).....  | 6    |
| <u>State v. Cain</u> , 28 Wn.App 461, 464-65, 624 P.2d 732 (1981) .....   | 2, 3 |
| <u>State v. Deal</u> , 128 Wn.2d 693, 703, 911 P.2d 996 (1996) .....  | 2    |
| <u>State v. Hendrickson</u> , 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) .....  | 10   |
| <u>State v. Lewis</u> , 130 Wn.2d 700, 705, 927 P.2d 235 (1996) .....   | 9    |
| <u>State v. Mak</u> , 105 Wn.2d 692, 701, 718, P.2d 407 (1986) .....  | 7    |
| <u>State v. Roberts</u> , 142 Wn.2d 471, 522, 14 P.3d 713 (2000) .....  | 6, 7 |
| <u>State v. Rodriguez</u> , 103 Wn.App. 693, 702-703, 14 P.3d 157 (2000),<br>aff'd, 146 Wn.2d 260, 45 P.3d 541 (2002) .....         | 6    |
| <u>State v. Romero</u> , 113 Wn.App. 779, 791-792, 54 P.3d 1255 (2002).....   | 10   |
| <u>State v. Sweet</u> , 138 Wn.2d 466, 481, 980 P.2d 1223 (1999) .....  | 9    |
| <u>State v. Theroff</u> , 95 Wn.2d 385, 389, 622 P.2d 1240 (1980).....  | 2    |
| <u>State v. Tili</u> , 139 Wn.2d 107, 127-28, 985 P.2d 365 (1999).....  | 3    |
| <u>State v. Woods</u> , 143 Wn.2d 561, 591, 23 P.3d 1046,<br>cert.denied, 534 U.S. 964, 151 L.Ed.2d 285, 122 S.Ct. 374 (2001) ..... | 3    |

### Constitutional Provisions

|                          |   |
|--------------------------|---|
| Const. art. IV, §16..... | 2 |
|--------------------------|---|

I. STATEMENT OF THE CASE

The respondent accepts the appellant's statement of the case except as contradicted by the report of proceedings and/or the arguments of counsel contained herein.

II. RESPONSE TO ASSIGNMENT OF ERROR #1

THE TRIAL COURT COMMITTED NO ERROR IN ITS JURY INSTRUCTIONS.

Appellant argues that the trial court commented on the evidence when it gave instruction number 10. While this instruction defined penetration consistent with WPIC 45.01, (given as instruction #7, CP 38), the trial court added the following language as instruction #10:

A finger can be an "object" for the purpose of the definition of sexual intercourse.

CP at 41

According to the testimony of the victim, Connie McGarry, the defendant had woken her up sometime during the night and had penetrated her vagina with his finger and tongue. RP 45-46. The following day from the event, the victim went to a girlfriend's house and disclosed the same event and the following week told her own mother Bobbie McGarry of the digital penetration. RP 50, 84-85. Several months later, when the victim went to the doctor to be examined on this, the victim did not admit to the

digital penetration of her vagina. RP 157. On direct and cross, the victim indicated she hadn't understood the doctor's questioning on that issue. RP 59, 68.

The state proposed instruction number 10 and provided authority as State v. Cain, 28 Wn.App. 462 (1981) RP 211-213. Defense objected, arguing that the instruction was improper as it was "the court trying to coax them [the jury] towards a guilty plea". RP 213 (clarification added). The court overruled the objection noting that State v. Cain was acceptable case law and was a correct statement of the law. RP 214.

Instructions satisfy the requirements of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). However a trial court is forbidden from commenting on the evidence presented at trial. Const. art. IV, §16. "An impermissible comment is one which conveys to the jury a judge's personal attitudes towards the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question." State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). But an instruction that merely

accurately states relevant law is not a comment on the evidence. State v. Woods, 143 Wn.2d 561, 591, 23 P.3d 1046, cert.denied, 534 U.S. 964, 151 L.Ed.2d 285, 122 S.Ct. 374 (2001).

The respondent respectfully submits that the trial court's addition to WPIC 45.01 in instruction #10 was a correct statement of the law. State v. Cain, 28 Wn.App 461, 464-65, 624 P.2d 732 (1981). The wording in the instruction (does not indicate how the court felt about the victim's testimony. It merely informed the jury of the appropriate rule of law applicable to the facts of this case. State v. Tili, 139 Wn.2d 107, 127-28, 985 P.2d 365 (1999). The respondent submits there was no instructional error.

### III. RESPONSE TO ISSUE #2

THERE WAS NO PROSECUTORIAL MISCONDUCT, NO COMMENTS ON THE DEFENDANT'S RIGHT TO SILENCE, AND NO INEFFECTIVENESS OF COUNSEL.

The appellant argues that the trial defense lawyer provided ineffective assistance in that he did not object at trial to what appellant believes was (1) prosecutorial misconduct of vouching for a witness's veracity and (2) soliciting comment from a witness on the defendant's right to remain silent. The respondent disputes all these arguments as being without merit.

A. PROSECUTORIAL MISCONDUCT

Appellant asserts that the prosecuting attorney engaged in prosecutorial misconduct by improperly vouching for the credibility of the state's witness during questioning of that witness.

At trial the primary state's witness was the victim, Connie McGarry. She was just 17, was a senior in high school and was having to discuss in front of a jury a sexual assault with her step-dad's best-friend when she was age 14. That assault, after her mother's wedding reception, involved digital penetration of her vagina and oral sex upon her vagina. RP 36-60.

Appellant's first claim of such misconduct occurred with the following question posed to the victim:

QUESTION: Connie, I know this is tough for you, but I'm going to ask you to speak up. You have a very soft voice. Can you tell me how old you are right now?

RP 36

Appellant's counsel suggests that such a question implies that the prosecutor believes the victim and, by asking this question, in this manner is vouching for the credibility of the victim. And yet the actual full transcript of this witness's testimony shows that she had an exceeding soft voice. On numerous occasions, either the prosecutor or the judge had to repeatedly ask her to speak up or repeat her answer, once because a juror

raised his hand as being unable to hear her testimony. RP 39, 43, 46, 58, 60. The prosecutor's question, "Connie, I know this is tough for you, but I'm going to ask you to speak up. You have a very soft voice" is a reference to her volume and not her credibility. The remaining portion of the prosecutor's question was: "Can you tell me how old you are right now?" is hardly a critical question of credibility for the jury.

Again, the appellant argues that the prosecutor was attempting to send secret signals of believability of the victim when he asked:

QUESTION: I'm sorry to have to ask you, Connie, but I have to ask some more specifics about what happened when you say you felt him touch you, where did you feel him touch you?

ANSWER: My vagina.

RP 39

As shown by the facts of the event testified to by this witness, her age and her clearly low volume of speech, it was obvious that this witness was indeed having a tough time responding to such intimate personal questions. Nothing in the question conveys a belief in the truthfulness of her testimony.

Counsel then tries to bootleg a suggestion that the prosecutor elicited opinion testimony on the issue of guilt based upon the testimony of the victim's mother and the responding officer that since they were

unsure if the defendant would return to the home of the victim, that the victim was taken to her fathers temporarily. RP 91, 207-208.

Again, each of these answers were not opinions on the evidence of guilt, but response to the prior testimony of the victim. She had come home after the allegations of abuse had been made to her parents, the defendant had been told to leave the residence, and then she had been surprised to find the defendant at her house when she was alone. As a result, she had then run away from home, fearing the return of the defendant. RP 53-57, 87-91. Thus these statements were not opinions on guilt, but statements of fact as to why the child was removed temporarily from the house.

On reviewing a prosecutorial misconduct claim, the defense bears the burden of establishing the impropriety of the comment and the prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); State v. Rodriguez, 103 Wn.App. 693, 702-703, 14 P.3d 157 (2000), aff'd, 146 Wn.2d 260, 45 P.3d 541 (2002). Prevailing on a prosecutorial misconduct claim requires finding both improper conduct and prejudicial effect. State v. Roberts, 142 Wn.2d 471, 522, 14 P.3d 713 (2000).

Prejudicial effect requires finding a substantial likelihood that the misconduct affected the jury's verdict. Roberts, 142 Wn.2d at 533 (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). Factors the court reviews in determining prejudicial effect include: (1) the seriousness of the irregularity; (2) whether the statement at issue was cumulative evidence; (3) whether the jurors were properly instructed to disregard the remarks of counsel not supported by the evidence; and (4) whether the prejudice was so grievous that nothing short of a new trial could remedy the error. State v. Mak, 105 Wn.2d 692, 701, 718, P.2d 407 (1986).

Utilizing this test: (1) the remarks were casual and not of a direct serious irregularity; (2) the statements of claimed opinion testimony were repetitive of earlier testimonial statements by the victim as to why she ran away and then was taken away; (3) the jurors were properly instructed to disregard the remarks of counsel not supported by the evidence – instruction #1 (WPIC 1.02) CP 41; and (4) the prejudice, if any, was not so grievous that nothing short of a new trial could remedy the “error”.

Respondent respectfully submits that in this case there was no prosecutorial misconduct. The prosecuting attorney did not make any statements of personal opinions about the credibility of the witness nor seek opinion testimony from witnesses as to the guilt of the defendant.

The prosecuting attorney left it to the jury to determine whether the witnesses were telling the truth. There was no prejudicial effect beyond appellant's speculative assumptions.

B. COMMENT ON DEFENDANT'S RIGHT OF SILENCE

Appellant counsel argues that the prosecution elicited testimony from the responding officer that infringed upon the defendant's fifth amendment right to silence.

Appellant alleges this from the following exchange with Officer Dennison:

QUESTION: Did – what's the procedure on allegations of child sexual abuse after you take the initial report?

ANSWER: I would generally make – try to make contact with the – the person that the allegations are against and get a general – a first statement from them, and then refer the – the case to Child Abuse Intervention Center.

QUESTION: And is that the standard protocol on sexual abuse cases –

ANSWER: Yeah.

QUESTION: - of children?

ANSWER: Pretty much. I mean, they're all – they're different individually, but, yeah, overall that's – that's the – what we do.

QUESTION: All right. Once you made that referral to the Child Abuse Center, that was the end of your involvement in – in the case?

ANSWER: Yeah. I made another attempt to contact Ben in this case, and – and that was the end of my involvement in – in the case.

QUESTION: All right.

RP 208-209

The state may not use a defendant's constitutionally permitted silence as substantive evidence of guilt. State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). Thus, a "police witness may not comment on the silence to infer guilt from a refusal to answer questions." Lewis, 130 Wn.2d at 205. Our Supreme Court has reasoned an officer's direct reference to the defendant's silence is not error absent further comment inferring guilt. Lewis, 130 Wn.2d at 705-707. Such a reference is not reversible error unless the defendant can show resulting prejudice. State v. Sweet, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999).

The state respectfully submits that there has been no such evidence of a comment on the defendant's right of silence. Clearly the question was on officer protocol and the end of the officer's involvement on the case. RP 208-209. There was not even an indirect comment on silence. The statement was non-responsive, fleeing and nonjudgmental in nature. The officer did not say that the defendant refused to speak to him, or failed to keep appointments, or implied that his inability to contact him was in any way proof of his guilt. RP 204-209. The state did not exploit the

comment in argument. RP 222-243. All of which suggests that the statement by the officer was of little import in the trial. Even if this comment was error, it was an indirect comment at most, and thus would require a non-constitutional harmless error analysis rather than a constitutional error analysis, with the focus being whether there is a reasonable probability exists the claimed error affected the outcome. State v. Romero, 113 Wn.App. 779, 791-792, 54 P.3d 1255 (2002). In this case there is no reasonable probability that this one comment affected the outcome of the trial.

#### C. INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant argues that his trial counsel's failure to object to, or move to strike, the noted portions of the testimony as described above, violated his right to effective assistance of counsel. In a claim of effectiveness of counsel, the defendant must show deficient performance and prejudice. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The court presumes that the defendant's trial counsel performed properly. Hendrickson, 129 Wn.2d at 77. The defendant also has the burden of showing prejudice. Hendrickson, 129 Wn.2d at 78.

In the present case, appellant makes no showing to overcome the presumption that he received effective assistance of counsel. As noted above, the prosecutor's questions and the witnesses' responses were not

vouching for the witness, improper opinions of guilt or comments on silence. They were not objectionable, and as such counsel's failure to object or move to strike that testimony was not deficient performance. Without a showing of deficient performance, appellant's claim of ineffectiveness of counsel should fail.

IV. CONCLUSION

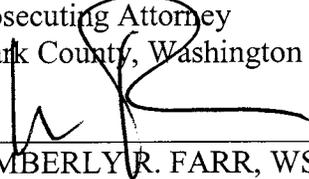
The respondent respectfully submits that no error occurred in the court's instructions to the jury, the prosecutor's questions or the testimony of any of the witnesses. Appellant received the presumed effectiveness of counsel and the jury's determination of guilt should be affirmed.

DATED this 6 day of September, 2006.

Respectfully submitted:

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