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A. ASSIGNMENT OF ERROR

I. MR. IHRIG RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

I. MR. IHRIG WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO OBJECT TO REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT.

C. STATEMENT OF THE CASE

Louis Ihrig was an engineering student at Clark College back in 2007. RP II, p. 212. He and his wife, Christina, have three children, Austin, Harmony, and Brett. RP II, p. 210. Louis and Christina were friends with Sarah Bush and Jason Petris, who were the parents of C.L.P. and Lilly Petris. RP I, p. 93-94.

C.L.P. and her sister would occasionally go over to Louis and Christina's house and play with their three children, who were of similar age. RP I, p. 63-64. C.L.P.'s sister is three years younger than she. RP I, p. 62. When C.L.P. was about six, she and her sister spent the night at Christina and Louis' house while her parents went Christmas shopping. RP I, 65, 99. She slept in Harmony's bedroom (Louis and Christina's daughter) along with Harmony. RP I, p. 65. C.L.P. woke up in the middle of the night and went into Louis and Christina's bedroom, crawling into their bed and resting between them as they slept. RP I, p. 65, 66. C.L.P.

testified that she awoke in the middle of the night to find Louis touching her vagina with his finger, and that the touching was inside her vagina. RP I, p. 66-69. She thought it lasted for a minute or two. RP I, p. 69. Christina was asleep during all of this. RP I, p. 69.

C.L.P. testified that after Louis removed his finger he got up and went into the living room. RP I, p. 73. C.L.P. followed Louis out to the living room and asked him for a drink of water. RP I, p. 73-74. Although she was tired and wanted to go back to sleep, she laid down on the living room couch while Louis fell asleep on the floor. RP I, p. 74. She woke up again after falling asleep and Louis turned on a movie for her to watch and went back to sleep. RP I, p. 75. She and her sister were picked up later that day. RP I, p. 78.

Christina woke up when C.L.P. came to her room and invited her to come into bed with her and Louis. RP I, p. 149. She fell back asleep and didn't wake up again until Louis told her he was going to the living room to sleep. RP I, p. 149. Louis had no recollection of C.L.P. coming into his bed. RP II, p. 214. He woke up when he heard Lilly, C.L.P.'s little sister, crying at his bedroom door. RP II, p. 215. At that time, he realized that C.L.P. was in his bed. RP II, p. 215. He became aware at that time that he was touching C.L.P. in her pelvic region, but denied that he digitally penetrated her. RP II, p. 216-17.

The State charged Louis with rape of a child in the first degree.

CP 1. At trial, the prosecutor made the following statements during closing argument:

Little girls, little kids should be able to trust that if something scary wakes them up in the middle of the night, they have a safe place to go. Little girls should be able to believe that when something scares them, there's something that can comfort them....

RP II, p. 252. The prosecutor continued:

And so you heard she climbed into that bed and lay there between two adults, two adults she trusted and she believed would protect her, and she drifted off into sleep. And that should have been the end of the story. She should have woken up that morning and gone about her day and been any other six-year-old and now any other seven-year-old. That's not what happened...Instead, that six-year-old girl woke up to an adult man's hands on her vagina.

RP II, p. 253. The prosecutor continued, talking about C.L.P.'s testimony that she recalled that the movie Louis put in was Narnia:

That's—I think that that's an incredible fact for anyone to remember, let alone a child.

RP II, p. 260. The prosecutor continued:

We also have in this case her behavior. Now, behavior and demeanor is something that is interesting in kids because kids can't fake that. They can't—if they're going to make up a story and tell you a story, they may think to make it up, but they can't think to think, I should act in a certain way afterwards, I should be really clingy to my grandma and not let her out of my sight because people will believe me...That's not the mentality that kids are capable of.

RP II, p. 261. Regarding C.L.P.'s clingy behavior after the alleged incident, the prosecutor said "I think, you know, that's normal behavior for this kid who's had something traumatic happen to her..." RP II, p. 262. Regarding C.L.P. not wanting to return to Louis and Christina's house after the alleged incident, the Prosecutor said:

But why would this child suddenly hate going over to a place that she liked to go? Again, even if a kid made up a story, how would you make up the behavior? They can't do that, they're not sophisticated enough to do that.

RP II, p. 263. In response to defense counsel's argument that Christina's failure to wake up provided a reason to doubt C.L.P.'s account of what happened, the prosecutor said: "This woman sleeps hard, she didn't wake up. I think it's absolutely understandable that this happened." RP II, p. 285.

The jury returned a verdict of guilty. CP 15. Mr. Ihrig was sentenced to life in prison. CP 21. This timely appeal followed. CP 29.

D. ARGUMENT

I. MR. IHRIG WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO OBJECT TO REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT.

The prosecutor made several statements during closing argument that constituted misconduct. First, the prosecutor improperly appealed to the emotion of the jury by arguing that they should convict Mr. Ihrig had

violated the rights of little girls to feel safe and to be able to trust adults.

This argument improperly pitted the jury (in particular, jurors with children) against Mr. Ihrig and asked them to act on behalf of society at large.

Appeals by the prosecutor to the jury's passions and prejudice are inappropriate. *See, e.g., State v. Belgarde*, 110 Wash.2d 504, 507, 755 P.2d 174 (1988). The prosecutor has a duty to seek a fair trial. *State v. Suarez-Bravo*, 72 Wash.App. 359, 367, 864 P.2d 426 (1994). "In the interests of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason." *Id.* at 368, 864 P.2d 426. It is improper for a prosecutor to make statements that are calculated to align the jury with the prosecutor and against the defendant. *See State v. Reed*, 102 Wash.2d 140, 146-47, 684 P.2d 699 (1984) (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899)).

State v. Barajas, 143 Wash.App. 24, 39, 177 P.3d 106 (2007). Here, the prosecutor appealed to the emotions of the jury rather than their reason in making this argument. Defense counsel should have objected.

Second, the prosecutor committed misconduct by repeatedly injecting her personal opinion about the evidence and arguing inferences from the evidence for which there was no foundation. The prosecutor told the jury it was her opinion that C.L.P. was truthful because she remembered which movie she watched when she was on the couch, stating "That's—I think that that's an incredible fact for anyone to remember, let alone a child." The Supreme Court has held: "It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. *State*

v. *Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008), citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Defense counsel should have objected to this improper vouching by the prosecutor.

The prosecutor continued injecting her personal opinion when she broadly stated, without any foundation, her opinion that children are incapable of fabricating. In addition to being empirically ludicrous, these statements were improper because there was no expert testimony on the “sophistication” of children, and this was not a proper inference from the evidence. Defense counsel clearly should have objected to these remarks.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel’s performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

An attorney is deficient if his performance falls below a minimum objective standard of reasonableness. “Representation of a criminal

defendant entails certain basic duties...Among those duties, defense counsel must employ 'such skill and knowledge as will render the trial a reliable adversarial testing process.'" *State v. Lopez*, 107 Wn.App. 270, 275, 27 P.3d 237(2001), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984).

Here, counsel was deficient for the reasons set forth above. The prejudice to Mr. Ihrig flows from the fact that there was not substantial evidence against him. The case rested entirely on the veracity of C.L.P., whose credibility was improperly bolstered by the prosecutor. The fact that Christina Ihrig did not wake up during this alleged incident arguably suggests it didn't happen. C.L.P.'s action in following Mr. Ihrig to the living room after the alleged incident and remaining there with him throughout the night were arguably inconsistent with her allegation of rape. Notwithstanding that corroboration is not legally required, there was none in this case, either by way of witnesses or physical evidence. Mr. Ihrig was prejudiced by counsel's deficient performance and he should be granted a new trial.

E. CONCLUSION

Mr. Ihrig received ineffective assistance of counsel and should be granted a new trial.

RESPECTFULLY SUBMITTED this 8th day of February, 2010.


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DIVISION II

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STATE OF WASHINGTON

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DEPUTY

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

STATE OF WASHINGTON,

Respondent,

vs.

LOUIS G. IHRIG,

Appellant.

) Court of Appeals No. 39584-3-II

) Clark County No. 09-1-00034-4

) AFFIDAVIT OF MAILING

ANNE M. CRUSER, being sworn on oath, states that on the 8th day of February,

2010, affiant placed a properly stamped envelope in the mails of the United States

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