

No. 39930-0-II

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

STATE OF WASHINGTON,  
Respondent,  
v.  
MICHAEL DAMIS  
Appellant.

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STATE OF WASHINGTON  
COURT OF APPEALS  
BY                       
IDENTITY

FILED  
COURT OF APPEALS

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Anne Hirsch, Judge  
Cause No. 08-1-01860-5

BRIEF OF RESPONDENT

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*How enforce?*

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

- I. Whether the prosecutor improperly commented on the lack of defense evidence and vouched for the credibility of the State's witnesses.
- II. Whether the trial court was proper in admitting C.M.'s statements to Martha Miller as excited utterances; and if not, was the error harmless.
- III. Whether defense counsel was ineffective for failing to object to inadmissible hearsay testimony and the prosecutor's comments regarding the lack of defense witnesses.

B. STATEMENT OF THE CASE.

C.M., age 13, lived with her father, Vern, and his girlfriend, Rita, prior to moving in with Michael Damis sometime around September or December of 2007. (RP 61, 65-66) Rita is Mr. Damis's daughter. (RP 59) On June 9, 2008, Mr. Damis dropped C.M. off at her Aunt Martha Miller's house to spend the night so that she could attend her sister, Brianne's, graduation the next day. (RP 79) Brianne lived with Aunt Martha, rather than her father, Vern. (RP 61) Upon arriving at Martha Miller's home, Martha's husband drove Brianne and C.M. to Martha's work, so she could take the girls to get their hair cut for Brianne's graduation. (RP 79) When the girls arrived at Martha's work, Martha drove them 5-6 miles to the hair salon. (RP 79) Brianne sat in the chair to get her hair cut, while Martha and C.M. sat on a bench a few feet away.

(RP 79-80) Martha, noticing something was wrong with C.M., asked C.M. if there was anything bothering her and told C.M. that she should not be afraid to talk to her. (RP 80)

At trial, Ms. Miller testified that during this time, C.M. was “very pale, really sad face” with a “very soft voice, very whisper-type tone, sad, sad, soft spoken,” with “her hands laid together . . . and kind of fidgety,” “definitely upset,” and then “she broke down in hysterical crying.” (RP 80-82, 86) When asked what C.M. told Martha that day at the hair salon, defense counsel raised a hearsay objection. (RP 82) The jury exited and after hearing argument from both parties, the judge determined that C.M.’s statements to Martha Miller were admissible as “excited utterances.” (RP 83-87) After the jury returned, Martha testified that C.M. broke down hysterically crying and disclosed to Martha that Michael Damis had been sexually molesting C.M. (RP 88) Martha testified that C.M. told her that Damis had been touching her breasts for five to thirty minutes every day and that C.M. was afraid to tell her father, Vern, because he would not believe her and he would be very angry. (RP 88-89) Martha also testified that a few hours after C.M. disclosed the abuse; Martha caught C.M. cutting herself with razor blades and confiscated them. (RP 99-100)

Martha Miller also testified that before C.M. disclosed the abuse, she had suspicions that something bad was happening to C.M. and spoke to a counselor at her work about her suspicions. (RP 63, 126, 127-28) Martha noted that C.M. was emotionally isolated after moving in with Damis and “always had a very sad, pale face, doesn’t smile a lot, doesn’t like to be around people, sad all the time. Very isolated and enclosed within herself. She’s not outgoing and bubbly like she used to be.” (RP 63)

At trial, Detective Kolb testified that he interviewed both Martha Miller and C.M. separately. (RP 33-34) Detective Kolb told the jury that during the interview C.M. said Mr. Damis fondled her breasts, under her bra, daily. (RP 33) C.M. Told Detective Kolb that Damis threatened to take away her phone privileges if she did not allow him to touch her. (RP 33) Defense counsel raised a hearsay objection, which was sustained. (RP 33) Detective Kolb did not testify as to what Martha Miller said to him in her interview, but did indicate that what Martha told him matched what C.M. had told him. (RP 35)

C.M. testified that after a few weeks of living with Damis, he bought her a cell phone with a plan that carried 500 texts per month. (RP 174) C.M. testified that after she went over the allotted

amount of 500 texts, Damis turned her phone off. (RP 178) Shortly after, Damis asked C.M. if she wanted more texts and she said “that would be awesome.” (RP 178) Damis then told C.M. that she would have to “pay a price” by letting him touch her breasts. (RP 178-79) C.M. testified that Damis would touch her breasts multiple times every day. (RP 179) C.M. said that she would sit in either the spinning chair or on her bed and Damis would touch under her bra for five to thirty minutes. (RP 183-84)

After all the evidence was presented, the judge gave the following instructions:

- 1) The lawyer’s statements were not evidence;
- 2) The jury must disregard any statement or argument not supported by the evidence;
- 3) Damis was presumed innocent and that presumption continued throughout the trial unless the jury found the presumption overcome by the entire burden of proving its case;
- 4) The State bore the entire burden of proving its case;
- 5) Damis bore no burden to prove reasonable doubt; and
- 6) The jury could not use the fact that Damis had not testified to infer guilt or to prejudice him in any way.

(RP 290, CP 37, 40, 42)

In closing the defense attacked the State's case, arguing that the State's investigation was incomplete. (RP 310) Damis's defense employed the missing witness doctrine arguing the State failed to call certain witnesses including: Aleta, Rita, Vern, Brandon, Brianna, and C.M.'s foster family. (RP 310) In closing the defense said:

What didn't [Detective Kolb] do? Didn't talk to the father, the father of the kid, the one that has custody. Never talked with the father. He never talked to Rita, the pseudo mother. . . . Didn't talk to Brandon, her brother that lives there with them. Didn't talk to Brianna, the sister. Didn't talk to any other family members other than Aunt Martha.

(RP 310)

What was the excuse from Detective Kolb when I asked him point blank why didn't you get ahold of these people? In a sex child investigation, don't you want to talk to the people around her? Too many cases? Too big of caseloads? That was his answer to you of why he did not do his job. And you can't whitewash it any better than that. Too many – too big a caseload to conduct a better investigation.

(RP 315)

And nobody ever asked and it never come [sic] before you if [the defendant] is still married to his wife. That's never even been brought out in this trial if an ex-wife or wife was ever present during any of this, Aleta. We don't even know if they live together 'cause nobody ever brought it out.

(RP 322)

Where do we get a lack of evidence here for you? No proper investigation. Too overload. What should they have done? CPS, counselor, mental health. They could have called one of us. They could have took her to one. Who didn't testify here? . . . Family members who saw anything wrong. We didn't hear from one person except Aunt Martha. . . . Where is Brandon, Brianna, the father [Vern], Rita? All they had to do was subpoena these people. They could question them. They didn't even ask them any questions. . . . You don't think they're important to you people? These are the ones that were around Grandpa Mike, [the defendant] C.M., Brianna, Brandon, all the other people. These are the people that watched him interact with all these children and things and people. They didn't subpoena one of them. That's their job. I don't have to. It's not my job. I'm not supposed to. It's their job . . . . What about the people she is now trying to live with? . . . I didn't see any of them.

(RP 326-27)

In rebuttal the prosecutor explained that the State failed to call Vern and Rita because their testimony would be unfavorable to the State's case, noting:

Why didn't we hear from Vern? Why didn't we hear from Rita? Well, the State has got the magical power to subpoena Jesus Christ himself. We put him on the stand and he's got to talk. Well, the State actually has the ethical obligation not to put on perjured testimony. We can't put on people who are going to get up there ---

Objection, sustained.

What's Dad gonna say? I'm a crappy dad. I isolated my kid. I kept her from the only family that loved her. I made sure that she stayed home with my girlfriend, the one person that loathes her. I made her go live with a child molester. He's not gonna tell you that. No way. He's not gonna tell you that. Is Rita gonna get up on the stand and say well, I'm the best little thing that ever happened to this kid? My dad is wonderful. He would never do that. Well, that's probably what she would say, right? The point is they add nothing to the story.

Defense counsel said well, he's got no obligation. He said it right. Defense has zero obligation. The entire burden is on the State to prove the case. There is no obligation whatsoever to put on any testimony whatsoever, and there's even an instruction that tells you that you cannot use it against him or prejudice this defendant in any way because he didn't testify. Your right, you can't do that. But what did he tell you? Oh, I've got two witnesses, Vern and Rita. Where are they? You know why the State didn't put them on.

(RP 331-32) The jury convicted Damis of two counts of Child Molestation in the Second Degree. (CP 3-16) The court sentenced Damis and he timely appealed. (CP 3-16, 17-31).

## C. ARGUMENT.

### I. The State did not commit prosecutorial misconduct.

On appeal, a criminal defendant has the initial burden of establishing prosecutorial misconduct by showing that a prosecutor's conduct was improper and prejudicial. State v. French, 101 Wn. App. 380, 386, 4 P.3d 857, 860 (2000). Courts

review a prosecutor's allegedly improper remarks in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." French, 101 Wn. App. at 385 (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) cert. denied, 120 S. Ct. 285 (1999)). In the context of closing arguments, the prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." State v. Gentry, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995).

- a) The State did not commit prosecutorial misconduct by commenting on the lack of defense evidence.

"A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt." State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). In some instances it is improper for a prosecutor to comment on the defendant's failure to call a witness at trial. State v. Blair, 117 Wn.2d 479, 491, 816 P.2d 718, 724 (1991). However, even if a prosecutor makes improper comments, reversal is not warranted unless the defendant was prejudiced by such comments. See State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005) (In order to establish prosecutorial misconduct, the

defendant must show that the prosecutor's conduct was improper and the improper conduct prejudiced his right to a fair trial). Additionally, even if prejudice can be shown, reversal is not required if the prosecutor's comments were a pertinent reply to provocation by defense counsel. State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984); State v. Dixon, 150 Wn. App. 46, 61, 207 P.3d 459, 467 (2009).

In this case, the prosecutor did not commit misconduct by commenting on the lack of defense witnesses because the defendant was not prejudiced. Furthermore, even if the defendant was prejudiced, reversal is not required because the comment was a pertinent response to provocation by defense counsel.

- 1) The correct test to determine whether the defendant was prejudiced by the State's comment is the "incurable prejudice test," not that of "constitutional harmless error."

Improper prosecution argument that directly violates a constitutional right "is subject to the stricter standard of constitutional harmless error." French, 101 Wn. App. at 386 (quoting State v. Traweck, 43 Wn. App. 99, 108, 715 P.2d 1148 (1986)). That is, the court must reverse unless it is convinced beyond a reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt. Traweck, 43 Wn. App.

at 108 (citing State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985)). However, if the improper conduct does not directly touch upon a constitutional right and the defendant fails to object at trial, the “incurable prejudice test” is utilized. State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209, 213 (1991). As such, reversal will be required only if the conduct is so flagrant and ill-intentioned that it causes enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. See Barrow, 60 Wn. App. at 876.

When a prosecutor improperly remarks on a defendant’s failure to testify, it directly violates his Fifth Amendment privilege against self-incrimination and courts apply the “harmless error test.” French, 101 Wn. App. at 386 (citing Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229 (1965)). Whereas, a comment regarding the defendant’s failure to call witnesses does not infringe on the defendant’s constitutional rights; therefore, the lesser standard is applied. See id. at 389 (“The absence of a duty to call witnesses is not a specific constitutional right.”) Rather “it is a judicially developed corollary of the State’s burden to prove each element of the crime charged beyond a reasonable doubt.” See id.; see also State v. Gregory, 158 Wn.2d 759, 846, 147 P.3d 1201, 1247 (2006)

(where the Supreme Court applied the incurable prejudice test, rather than the constitutional harmless error test when the prosecutor commented on the defense's missing witnesses).

Here, Damis challenges the State's comments regarding Damis's failure to call as witnesses his daughter, Rita; and her boyfriend Vern. (RP 331-32) (Appellant's Brief 6-7, 9). Thus, contrary to Damis's contention, the harmless error standard should not be applied because "the absence of a duty to call witnesses is not a specific constitutional right." French, 101 Wn. App. at 386; Gregory, 158 Wn.2d at 846; (Appellant's Brief 9). Furthermore, Damis admits that he failed to raise a proper objection. (Appellant's Brief 9 n.3) Thus, the appropriate standard for this Court to employ is the "incurable prejudice standard." See Barrow, 60 Wn. App. at 876.

- 2) Damis was not prejudiced because the prosecutor's comment was not so flagrant and ill-intentioned that a curative instruction could not remedy the effects of the comment.

Under the "incurable prejudice standard," reversal is not required unless the prosecutor's improper comments were "so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice." Id. at 876. It is the defendant's

burden to prove incurable prejudice resulted from the prosecutor's comments. French, 101 Wn. App. at 386.

In this case, Damis challenges the following comment made in closing by the prosecutor:

Defense counsel said well, he's got no obligation. He said it right. Defense has zero obligation. The entire burden is on the State to prove the case. There is no obligation whatsoever to put on any testimony whatsoever, and there's even an instruction that tells you that you cannot use it against him or prejudice this defendant in any way because he didn't testify. Your right, you can't do that. But what did he tell you? Oh, I've got two witnesses, Vern and Rita. Where are they? You know why the State didn't put them on.

(RP 332) (emphasis added)

This comment was neither flagrant, nor ill-intentioned and was curable by instruction. The comment was made in isolation, rather than a pattern of attacks. Defense counsel never objected, nor requested a curative instruction. (CP 332) Had Damis objected, the court would have been able to properly admonish the jury. Gregory, 158 Wn.2d at 846. Furthermore, just before the prosecutor referenced the missing witnesses, she reminded the jury that the State alone carried the burden of proving the case and that the defense had no obligation to put on testimony. (CP 332)

The jury instructions also reinforced the proper burden of proof and instructed the jury that counsel's arguments were not evidence. Traweek, 43 Wn. App. at 108 ("the jury instructions negated the prejudicial effect of the improper remarks"). (RP 290, CP 40) The trial court specifically instructed the jury that (1) the lawyer's statements were not evidence, (2) the jury must disregard any statement or argument not supported by the evidence, (3) Damis was presumed innocent and that presumption continued throughout the trial unless the jury found the presumption overcome by the State's evidence beyond a reasonable doubt, (4) the State bore the entire burden of proving its case, (5) Damis bore no burden to prove reasonable doubt, and (6) the jury could not use the fact that Damis had not testified to infer guilt or to prejudice him in any way. (CP 37, 40, 42) The jury is presumed to follow the court's instructions. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

Furthermore, the State's comment regarding Damis's missing witnesses, Rita and Vern, could not have prejudiced Damis because the prosecutor had already told the jury that these witnesses were adverse to the State's case. (RP 332) If anything,

the prosecutor's comment assisted Damis. Thus, Damis was not prejudiced by the prosecutor's comment.

Moreover, the burden is on the defendant to show incurable prejudice. French, 101 Wn. App. at 386. Here, Damis has improperly relied on the constitutional harmless error standard where prejudice is presumed; and therefore, has failed to provide any substantive argument as to why the prosecutor's comment was flagrant, ill-intentioned, and caused an incurable prejudicial effect. (Appellant's Brief 9) In light of these reasons, Damis was not prejudiced.

3) Even if the defendant was prejudiced, reversal is not required because the prosecutor's comment was a pertinent response to provocation by defense counsel.

Even improper and prejudicial prosecutorial comments do not require reversal if provoked, unless they exceed a pertinent reply. Davenport, 100 Wn.2d at 760; Dixon, 150 Wn. App. at 61. A prosecutor is provoked when the defense improperly utilizes the "missing witness doctrine" against the State. See French, 101 Wn. App. at 388-9. The missing witness doctrine allows a party to comment on a party's failure to call a witness when calling the witness would produce evidence that would logically and naturally support his or her case. Id. at 388-89 (citing State v. Frazier, 55

Wn. App. 204, 211-12, 777 P.2d 2 (1989)). However, a defendant may not raise the doctrine when the missing evidence is unimportant or cumulative. Id.; see also Dixon, 150 Wn. App. at 55. In addition, the doctrine applies only if the witness's absence is not satisfactorily explained. Dixon, 150 Wn. App. at 55. Lastly, the doctrine applies only if the missing witness is particularly under the control of the party rather than being equally available to both parties. Id.

This question of availability does not mean that the witness is in court or is subject to the subpoena power. Blair, 117 Wn.2d at 490.

For a witness to be "available" to one party to an action, there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging.

State v. Davis, 73 Wn.2d 271, 277, 438 P.2d 185, 188 (1968). The rationale for this requirement is that a party will likely call as a witness one who is bound to him by ties of affection or interest unless the testimony will be adverse, and that a party with a close connection to a potential witness will be more likely to determine in

advance what the testimony would be. Id. (quoting 5 A.L.R.2d 893, 895-96 (1949)).

In French, the defense attorney pointed out that the State had failed to call as witnesses four police officers who responded to the crime scene. 101 Wn. App. at 388, 384. In closing, the defense attorney said, “there’s something going on here that you don’t understand and the State has not proven. They dropped the ball on it. . . . They haven’t called the witnesses and it’s not my duty to do that.” Id. at 388. In rebuttal the prosecutor argued that, “[i]f you wanted to hear from the other officers, fine, the defense can call them as well as we can.” Id.

The court determined that the missing witness doctrine was an improper argument by defense counsel because both parties could have called the officers and their testimony was cumulative. Id. at 389. The court then held that by arguing this improper theory against the State, the prosecutor was provoked to respond and the response “did not exceed a pertinent reply.” Id. at 390.

Just as in French, the defense attorney in this case provoked the prosecutor’s comments by improperly asserting the “missing witness doctrine.” In closing the defense said:

What didn't [Detective Kolb] do? Didn't talk to the father, the father of the kid, the one that has custody. Never talked with the father. He never talked to Rita, the pseudo mother. . . . Didn't talk to Brandon, her brother that lives there with them. Didn't talk to Brianna, the sister. Didn't talk to any other family members other than Aunt Martha.

(RP 310)

What was the excuse from Detective Kolb when I asked him point blank why didn't you get ahold of these people? In a sex child investigation, don't you want to talk to the people around her? Too many cases? Too big of caseloads? That was his answer to you of why he did not do his job. And you can't whitewash it any better than that. Too many – too big a caseload to conduct a better investigation.

(RP 315)

And nobody ever asked and it never come [sic] before you if [the defendant] is still married to his wife. That's never even been brought out in this trial if an ex-wife or wife was ever present during any of this, Aleta. We don't even know if they live together 'cause nobody ever brought it out.

(RP 322)

Where do we get a lack of evidence here for you? No proper investigation. Too overload. What should they have done? CPS, counselor, mental health. They could have called one of us. They could have took her to one. Who didn't testify here? . . . Family members who saw anything wrong. We didn't hear from one person except Aunt Martha. . . . Where is Brandon, Brianna, the father [Vern], Rita? All they had to do was subpoena these people. They could question them. They didn't even ask them any questions. . . . You don't think they're important to you

people? These are the ones that were around Grandpa Mike, [the defendant] C.M., Brianna, Brandon, all the other people. These are the people that watched him interact with all these children and things and people. They didn't subpoena one of them. That's their job. I don't have to. It's not my job. I'm not supposed to. It's their job . . . . What about the people she is now trying to live with? . . . I didn't see any of them.

(RP 326-27)

In rebuttal the prosecutor explained that the State failed to call Vern and Rita because their testimony would be unfavorable to the State's case and their testimony was irrelevant, noting:

What's Dad gonna say? I'm a crappy dad. I isolated my kid. I kept her from the only family that loved her. I made sure that she stayed home with my girlfriend, the one person that loathes her. I made her go live with a child molester. He's not gonna tell you that. No way. He's not gonna tell you that. Is Rita gonna get up on the stand and say well, I'm the best little thing that ever happened to this kid? My dad is wonderful. He would never do that. Well, that's probably what she would say, right? The point is they add nothing to the story.

(RP 332)

The prosecutor then went on to say:

Defense counsel said well, he's got no obligation. He said it right. Defense has zero obligation. The entire burden is on the State to prove the case. There is no obligation whatsoever to put on any testimony whatsoever, and there's even an instruction that tells you that you cannot use it against him or prejudice this defendant in any way because he didn't testify.

Your right, you can't do that. But what did he tell you?  
Oh, I've got two witnesses, Vern and Rita. Where are they? You know why the State didn't put them on.

(RP 332)

Thus, just as in French, the defense attorney attempted to argue that evidence was missing and the State failed to prove its case because "they dropped the ball on it." Damis's defense attempted to utilize the missing witness doctrine arguing that the State failed to call as witnesses Aleta, Rita, Vern, Brandon, Brianna, and C.M.'s foster family and noted repeatedly that it was not the defense's duty to do call such witnesses. Just like French, the use of the missing witness doctrine by the defense was improper. During the time C.M. was sexually abused, she did not live with any of these witnesses, nor did she disclose the abuse to any of them. (RP 174-175, 208) Therefore, any testimony from them would likely be unimportant or cumulative. Furthermore, C.M. had already testified that Rita and her father, Vern, would not believe her. (RP 93, 209, 214-15) Thus, C.M.'s testimony explains the witnesses' absence from trial and shows that Rita and Vern were not "under the control of the State or C.M." See Dixon, 150 Wn. App. at 55 (the doctrine applies only if the witness's absence is

not satisfactorily explained and if the missing witness is particularly under the control of the party).

Because the defense improperly asserted the “missing witness doctrine,” the prosecutor was provoked to respond. See French, 101 Wn. App. at 388-9. The prosecutor responded only as necessary to refute the defense’s accusations noting that: 1) the detective’s investigation was not shoddy; 2) Vern and Rita were not called as the State’s witnesses because they were hostile to the State’s position and had no relevant information; and 3) just like in French, if the defense wanted to hear from other witnesses they could have called them. As such, the prosecutor’s response was provoked and “did not exceed a pertinent reply.” Id. at 390. In light of Damis having opened the door and invited the prosecutor’s remark, Damis cannot show that this remark was “so flagrant and ill-intentioned” that a curative instruction would not have neutralized the alleged prejudice. Barrow, 60 Wn. App. at 876.

b) The State did not vouch for the credibility of the State’s witnesses.

It is improper for a prosecutor to state a personal belief as to the credibility of a witness. Warren, 165 Wn.2d at 30. However, the prosecutor may argue an inference of credibility based on the

evidence. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Thus, a prosecutor's comments regarding the credibility of witnesses will not be improper unless it is "clear and unmistakable" that counsel is expressing a personal opinion and not arguing an inference from the evidence. Brett, 126 Wn.2d at 175 (quoting State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)).

For example, In State v. Sargent, the prosecutor said, "I believe Jerry Lee Brown. I believe him when he tells us that he talked to the defendant. . . . I believe him when he said that his wife was once beaten . . . ." 40 Wn. App. at 343. In State v. Traweek, the prosecutor said that he "knew" the defendants committed the crime. 43 Wn. App. at 107. In both of these cases, the prosecutor's comments were improper because it was clear and unmistakable that counsel was expressing his own personal opinion and not arguing an inference from the evidence.

Here, Damis argues that the prosecutor committed misconduct by stating that "the State actually has the ethical obligation not to put on perjured testimony." (Appellant's Brief 10 (citing RP 331)) Specifically, Damis contends that the prosecutor improperly vouched for the credibility of all of the state's witnesses. (Appellant's Brief 10) However, Damis misrepresents the

prosecutor's comment. Reading the prosecutor's comment in context, it is clear that her comment regarding "not putting on perjured testimony," was not an expression of her personal opinion regarding the credibility of the State's witnesses. The prosecutor was not vouching that all of the State's witnesses testified truthfully. Rather, the prosecutor was merely saying that she cannot call a witness to testify when she knows they will be untruthful. Furthermore, the prosecutor was commenting about Vern and Rita; two people who were not even called as witnesses for either party at trial. Therefore, the prosecutor's comments were not improper.

Furthermore, the sustaining of an objection may itself be sufficient to dispel prejudicial impact of a prosecutor's statement. State v. Aguilar, 77 Wn. App. 596, 602, 892 P.2d 1091 (1995). If defense counsel failed to request a curative instruction, the court is not required to reverse. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Here, Damis objected to the comment, the court sustained the objection, and Damis made no request for a further curative instruction. (RP 332) Thus, any resulting prejudice was dispelled and there is no basis for reversal.

- II. The trial court properly admitted C.M.'s statements to Martha Miller as excited utterances; however, even if the court erred, the error was harmless.

A trial court's decision to admit a hearsay statement as an excited utterance is reviewed for abuse of discretion. State v. Ohlson, 162 Wn.2d 1, 7-8, 168 P.3d 1273, 1275 (2007) (citing State v. Woods, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001)). In other words, a trial court's decision will not be reversed unless the appellate court believes that "no reasonable judge would have made the same ruling." Woods, 143 Wn.2d at 595-96.

ER 803(a)(2) indicates that a hearsay statement is not excluded if it is an excited utterance "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." To meet the excited utterance exception to the hearsay rule, the following three requirements must be satisfied: (1) a startling event or condition must have occurred, (2) the declarant must have made the statement while under the stress or excitement of the startling event or condition, and (3) the statement must relate to the startling event or condition. Ohlson, 162 Wn.2d at 8 (citing Woods, 143 Wn.2d at 597).

Here, Damis contends that the trial court erroneously admitted C.M.'s hearsay statements to Martha Miller as excited

utterances. (Appellant's Brief 13) Specifically, Damis argues that C.M.'s statements, disclosing the sexual abuse to Martha Miller, were not made while under the stress or excitement of the startling event or condition because the "sexual misconduct . . . had . . . commenced months earlier." (Appellant's Brief 13)

In evaluating the second requirement, the trial court should consider the passage of time between the startling event and the utterance, but the passage of time alone is not dispositive. State v. Strauss, 119 Wn.2d 401, 416-17, 832 P.2d 78, 86 (1992). Other considerations include the declarant's emotional state and whether the declarant had an opportunity to reflect on the event and fabricate a story. State v. Briscoeray, 95 Wn. App. 167, 173-74, 974 P.2d 912, 916 (1999). The statement need not be completely spontaneous and may be in response to a question. Johnston v. Ohls, 76 Wn.2d 398, 406, 457 P.2d 194 (1969).

In State v. Thomas, the trial court did not err in determining that statements made after a 6 to 7-hour time span qualified as excited utterances. 46 Wn. App. 280, 284, 730 P.2d 117 (1986), aff'd, 110 Wn.2d 859, 757 P.2d 512 (1988). In Thomas, a 14-year old girl was raped by her friend's father while spending the night. Id. at 282. The next day the victim left the perpetrator's home,

walked to a different friend's house and called her mother to tell her she had been raped the day before. Id. The trial court admitted the statements as excited utterances noting that the child was still crying and upset when she called her mother. Id. at 284-85. The court also noted that the child's responses were not the product of leading questions. Id.; see also State v. Flett, 40 Wn. App. 277, 699 P.2d 774 (1985) (where statements made 7 hours after a rape were properly admitted as an excited utterance because of the declarant's "continuing stress" between the time of rape and the statement).

The record reflects that the trial court did not abuse its discretion in this case. C.M.'s statements to Ms. Miller meet all three requirements necessary to constitute "excited utterances." The first and third requirements are met here because the underlying sexual assault clearly constituted a startling event and C.M.'s statements related to the assault. The second element is also met because C.M. remained under the stress caused by the underlying assault when she made her initial disclosure to Martha Miller.

At trial, Ms. Miller described C.M.'s demeanor during her disclosure as "very pale, really sad face" with a "very soft voice,

very whisper-type tone, sad, sad, soft spoken,” with “her hands laid together . . . and kind of fidgety,” “definitely upset,” “she broke down in hysterical crying.” (RP 80-82, 86)

Further, although the sexual assault had “commenced months earlier” as Damis indicated, the assault was ongoing for months and occurred multiple times each day. (RP 175, 178-79) At trial, C.M. testified that the last time Damis assaulted her was the same day C.M. went to Martha’s house and disclosed the abuse. (RP 187) Thus, although it is not clear exactly how much time passed between the last time Damis molested C.M. and the time she disclosed to Aunt Martha, it is quite likely, that Damis molested C.M. on the same day C.M. disclosed to her aunt, or at most, sometime within the 24 hours preceding her disclosure. Therefore, the trial court did not abuse its discretion when admitting C.M.’s statements as excited utterances. However, even if the court erred, such error would be harmless.

An error is harmless and not grounds for reversal if it does not prejudice the defendant. State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). There is no prejudice unless, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” Tharp, 96 Wn.2d at

599. To determine prejudice, we consider the inadmissible evidence against the admissible evidence viewed as a whole. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Damis contends that he was prejudiced by Martha Miller's testimony regarding what C.M. disclosed to her because it "allowed the jury to infer that C.M. made consistent disclosures to Detective Kolb and to Martha Miller [and] [t]he error allowed the jury to infer that these witnesses believed C.M.'s allegations." (Appellant's Brief 14)

As an initial note, the admissibility of C.M.'s statements to Martha Miller has no bearing whatsoever on whether the jury thought that Martha Miller and Detective Kolb believed C.M. Further, even without C.M.'s statements to Martha Miller, the jury could infer that C.M. made consistent disclosures to Detective Kolb and to Martha Miller because Detective Kolb testified as such. (RP 35) At trial, C.M. testified that she told Detective Kolb and Martha Miller about the sexual abuse. (RP 208, 220-21) Detective Kolb testified that he interviewed both C.M. and Martha Miller regarding C.M.'s disclosure of sexual abuse. (RP 31, 33) Detective Kolb also testified that both C.M. and Martha Miller's stories were "very similar." (RP 35) Thus, even without knowing what C.M. said to

Martha Miller, the jury could infer from Detective Kolb's testimony that what C.M. told Detective Kolb was the same as what C.M. told Martha Miller.

Furthermore, the testimony from Martha Miller regarding what C.M. disclosed to her was not the only evidence of Damis's guilt. At trial, Detective Kolb testified that he interviewed C.M. and she identified Damis as the perpetrator. (RP 32) Martha Miller testified that she believed something bad was happening to C.M. and she even spoke to a counselor at her work about her suspicions. (RP 126, 127-28) Ms. Miller also testified that once C.M. began living with Damis C.M. became emotionally isolated, noting that C.M. "always has a very sad, pale face, doesn't smile a lot, doesn't like to be around people, sad all the time. Very isolated and enclosed with herself. She's not outgoing and bubbly like she used to be." (RP 63) Martha Miller also testified that while C.M. was disclosing the sexual abuse C.M. was "very pale, really sad face" with a "very soft voice, very whisper-type tone, sad, sad, soft spoken," with "her hands laid together . . . and kind of fidgety," "definitely upset," "she broke down in hysterical crying then." (RP 80-82, 86) Ms. Miller also testified that on the evening C.M. disclosed the abuse, she caught C.M. cutting herself with razor

blades. (RP 100) Most importantly, C.M. herself testified that Damis molested her on a daily basis in return for cell phone privileges. (RP 175, 178-81) As such, the hearsay statements Damis sought to exclude were already into evidence through C.M.'s in-court, unimpeached testimony and supported by the testimony of Detective Kolb and Martha Miller. Given this evidence, there is not a reasonable probability that the trial outcome would have differed had the trial court excluded C.M.'s hearsay statements.

III. Defense counsel was not ineffective for failing to object.

To establish ineffective assistance of counsel, the two-prong Strickland test must be met. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The defendant must first show that his counsel's performance was deficient. State v. Tarica, 59 Wn. App. 368, 373-74, 798 P.2d 296, 299 (1990), overruled on other grounds, State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). Secondly, the defendant must show that such deficient performance prejudiced the defense. Id. This requires a showing that counsel's errors were so egregious that the defendant was deprived of a fair trial. Id.

Courts apply a strong presumption of reasonableness in scrutinizing whether defense counsel's performance was

ineffective. Id. If defense counsel's conduct can be characterized as legitimate trial strategy or tactics, ineffective assistance of counsel will not be found. Id. The court should make every effort to "eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." In re Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S. Ct. 421, 121 L. Ed. 2d 344 (1992). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 729 P.2d 56 (1986).

On appeal, Damis argues that defense counsel was ineffective for failing to object to Detective Kolb's testimony about his interview with C.M. because the testimony was inadmissible hearsay. (Appellant's Brief 16-17) Damis also alleges his counsel was ineffective by failing to object when the prosecutor commented on the lack of defense witnesses. (Appellant's Brief 18) In both instances Damis's defense counsel was not ineffective.

- a) Defense counsel was not ineffective for failing to object to inadmissible hearsay testimony.

Damis contends that his defense was ineffective for failing to object to Detective Kolb's testimony regarding what C.M. told him in

his interview with C.M. (Appellant's Brief 16) Specifically, Damis argues that there was "no legitimate strategic reason to allow the evidence to be admitted, and . . . ." Damis was prejudiced as a result because "the state was able to improperly bolster [C.M.'s] credibility" by emphasizing that she had disclosed the same account to both Detective Kolb and Martha Miller. (Appellant's Brief 17)

However, defense counsel was not ineffective because Damis's attorney did, in fact, object to the hearsay and the objection was sustained. (RP 33)

Because the first prong of the Strickland test is not met, this Court is not required to evaluate whether the defendant was prejudiced by defense counsel's actions. Tarica, 59 Wn. App. at 373 ("A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong."). However, even if Damis could show that his defense was deficient there is no reasonable possibility that a prompt objection or request for a curative instruction would have altered the outcome of the case given the substantial evidence of his guilt. See supra section II at 27-29 (reviewing the admissible evidence supporting a guilty verdict).

b) Defense counsel was not ineffective for failing to object to the prosecutor's comments in closing.

Failure to establish that a prosecutor's comments in closing argument constituted "prosecutorial misconduct" automatically defeats an ineffective assistance of counsel argument based on defense counsel's failure to object to the prosecutor's comments. See State v. Coleman, 152 Wn. App. 552, 571, 216 P.3d 479, 488 (2009) (failure to establish that a prosecutor's comments prejudiced the defendant automatically defeats an ineffective assistance of counsel argument because prejudice is one part of a two-prong test that he must meet).

Damis contends that his trial counsel was ineffective in failing to object to remarks that the prosecutor made in closing. He hinges this argument on a finding that the prosecutor committed misconduct, as discussed supra, section I(A), in commenting during closing arguments on Damis's failure to call Vern and Rita as defense witnesses. (Appellant's Brief 18) However, the prosecutor did not commit misconduct because her comments did not prejudice Damis and were the result of provocation by defense counsel. See supra section I(A). As such, Damis's trial counsel did not have reason to object and was, therefore, not deficient.

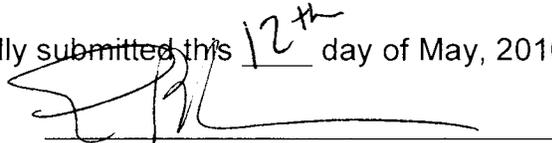
Furthermore, “lawyers do not commonly object during closing statement ‘absent egregious misstatements.’” In re Pers. Restraint of Davis, 152 Wn.2d 647, 717, 101 P.3d 1 (2004) (quoting U.S. v. Necochea, 986 F.2d 1273, 1281 (9th Cir. 1993)). Here, the record shows that Damis’s trial attorney objected to other statements during the prosecutor’s closing argument. (RP 332) Thus, it appears that Damis’s attorney exercised legitimate strategy during closing argument by selectively objecting to the prosecutor’s remarks. Therefore, Damis cannot show that he received ineffective assistance of counsel.

#### D. CONCLUSION.

The State did not commit prosecutorial misconduct by commenting on the lack of defense witnesses because the defendant was not prejudiced and because the comments were the product of provocation by defense counsel. Further, the State did not vouch for the credibility of its witnesses at trial. Additionally, the trial court properly admitted C.M.’s statements to Martha Miller as excited utterances because she was under the stress of the sexual molestation at the time of disclosure. However, even if the trial court erred in admitting the statements, the error was harmless given the additional evidence of Damis’s guilt. Additionally,

defense counsel was not ineffective for failing to object to the admission of improper hearsay evidence because defense counsel did indeed object. Defense was also not ineffective for failing to object to the prosecutor's comments in closing argument because the prosecutor's comments were not improper; thus, there was no reason for defense to object. For the foregoing reasons the State respectfully requests this Court affirm Damis's conviction for two counts of Child Molestation in the Second Degree.

Respectfully submitted this 12<sup>th</sup> day of May, 2010.



Emily Bushaw, WSBA# 41693  
Attorney for Respondent

CERTIFICATE OF SERVICE

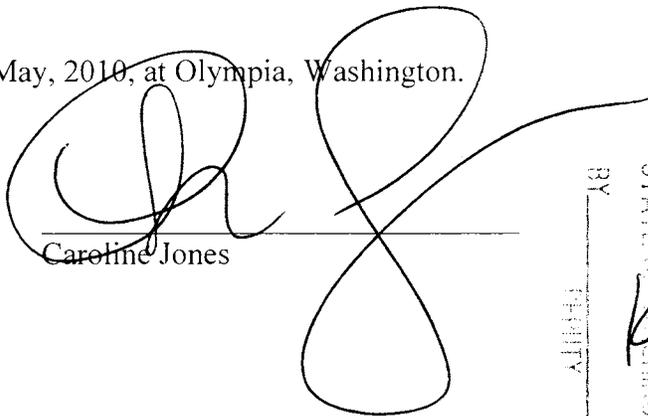
I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

TO: MANEK R. MISTRY  
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OLYMPIA, WA 98501

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 12 day of May, 2010, at Olympia, Washington.

  
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Caroline Jones

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