

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

IN RE THE PERSONAL) NO. 44751-7-II
RESTRAINT PETITION OF) RESPONSE TO
MARK J. GOSSETT) PERSONAL RESTRAINT
PETITION

Comes now Jon Tunheim, Prosecuting Attorney in and for Thurston County, State of Washington, by and through Carol La Verne, Deputy Prosecuting Attorney, and files its response to petitioner's personal restraint petition pursuant to RAP 16.9.

I. BASIS OF CURRENT RESTRICTIONS ON LIBERTY

Mark J. Gossett is currently in the custody of the Washington Department of Corrections, serving a term of 245 months following his conviction by a jury for two counts of second degree rape of a child and two counts of second degree child molestation. CP184, 188.¹

II. STATEMENT OF PROCEEDINGS

Gossett appealed his convictions, which were affirmed by the Court of Appeals. The substantive and procedural facts of the case are contained in that opinion, a copy of which is attached as Appendix

¹ This court has on its own motion transferred the record from the direct appeal, COA No. 40845-7-II, to this PRP.

A. The Supreme Court denied Gossett's petition for review. State v. Gossett, 174 Wn.2d 1018, 282 P.3d 96 (2012). He now brings a timely personal restraint petition (PRP).

III. RESPONSE TO ISSUES RAISED

1. Standard of review for personal restraint petitions.

"Personal restraint petitions are not a substitute for direct review." In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 817, 177 P.3d 675 (2008). Collateral attacks on convictions, whether based on constitutional or non-constitutional grounds, are limited, but not so limited as to prevent the consideration of serious and potentially valid claims. In re Pers. Restraint of Cook, 114 Wn.2d 802, 809, 792 P.2d 506 (1990). A petitioner claiming purported constitutional error must demonstrate actual prejudice from the error before a court will consider the merits. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328-30, 823 P.2d 492 (1992) (applying this threshold standard to deny relief for a constitutional error that would be per se prejudicial error on appeal).

On direct appeal, the burden is on the State to establish beyond a reasonable doubt that any error of constitutional dimensions is harmless. . . . On collateral review, we shift the burden to the petitioner to establish that the error was not harmless.

In re Pers. Restraint of Hagler, 97 Wn.2d 818, 825-26, 650 P.2d 1103 (1982). “However, if some other showing of prejudice is required by the law underlying the petitioner’s claim of constitutional error, the petitioner must make the requisite showing of prejudice.” State v. Sandoval, 171 Wn.2d 163, 168, 249 P.3d 1015 (2011).

A petitioner claiming non-constitutional error must “establish that the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice.” In re Pers. Restraint of Fleming, 129 Wn.2d 529, 532-34, 919 P.2d 66 (1996) (applying this threshold standard to deny relief for an error that would require reversal on direct appeal).

2. This petition should be denied because the issues of prosecutorial misconduct and ineffective assistance of trial counsel were raised and rejected on appeal.

Chapter 10.73 RCW sets out a number of procedural barriers to collateral attacks such as personal restraint petitions. Likewise, courts have imposed limitations on collateral attacks purposely and for good reasons. To be entitled to relief in a personal restraint petition, as opposed to a direct appeal, a petitioner can only obtain

relief from restraint that is unlawful for the limited reasons set forth in the rules defining the procedure. RAP 16.4(c); Cook, 114 Wn.2d at 809.

A petitioner in a personal restraint petition is prohibited from renewing an issue that was raised and rejected on direct appeal unless the interests of justice require re-litigation of that issue. In re Pers. Restraint of Yates, 177 Wn.2d 1, 17, 296 P.2d 872 (2013). The interests of justice are served by reconsidering a ground for relief if there has been an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. Id. (quoting In re Pers. Restraint of Stenson, 142 Wn.2d 710, 720, 16 P.3d 1 (2001)).

Appellate counsel raised issues of prosecutorial misconduct and ineffective assistance of trial counsel on direct appeal, which were subsequently rejected. Appellant's Opening Brief at 6-9, 9-10²; State v. Gossett, Appendix A. Gossett offers as justification for failure to raise crucial arguments the ineffective assistance his appellate counsel. Petition at 23-24. He argues that the interests of justice would be served by reconsideration of the "prosecutorial misconduct"

2 Petitioner's Opening Brief on Direct Appeal, No. 40845-7-II.

and “ineffective assistance of [trial] counsel” claims. Petition at 21-23. More specifically, Gossett asserts the following as grounds³ for reconsideration: the “restrict[ion of appellate counsel’s] argument [of] the prosecutorial misconduct . . . to a single statement made by the prosecutor in closing argument” and basing the ineffective assistance of trial counsel argument on “trial counsel’s failure to object” to that statement, amounting to ineffective assistance of appellate counsel. Petition at 21-23.

Gossett cannot avoid the prohibition of renewing issues already raised and rejected on direct appeal “. . . by supporting a previous ground for relief with different factual allegations or with different legal arguments.” Yates, 177 Wn.2d at 17; In re Pers. Restraint of Davis, 152 Wn.2d 647, 670-672, 101 P.3d 1 (2004) (Supporting a previous ground for relief with different factual allegations does not create “new issues” which may be relitigated.). Here, Gossett supports his argument for prosecutorial misconduct, by way of an ineffective

3 A “ground” is defined as a distinct legal basis for granting relief. In the Matter of the Personal Restraint of Taylor, 105 Wn.2d 683, 688, 717 P.2d 755 (1986) (overruled on other grounds in In re Personal Restraint of Nichols, 171 Wn.2d 370, 156 P.3d 1131 (2011)).

assistance of counsel claim, with different portions of the prosecutor's argument than those challenged on direct appeal. Petition at 8-11. That is insufficient to justify relitigating these claims.

3. Gossett has not shown ineffective assistance of appellate counsel.

Gossett seeks to avoid the prohibition against relitigating issues already raised and rejected on the merits by claiming ineffective assistance of appellate counsel. A convicted criminal has the right to effective assistance of counsel on his first appeal of right. In re Pers. Restraint of Dalluge, 152 Wn.2d 772, 787, 100 P.3d 279 (2009) (*overruled in part on other grounds*, State v. Posey, 174 Wn.2d 131, 272 P.3d 840, 844 (2012)). The standard for evaluating the performance of appellate counsel is the same as that set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Id. at 788. A defendant must overcome the presumption of effective representation and demonstrate (1) that his lawyers' performance was so deficient that he was deprived of "counsel" for Sixth Amendment purposes and (2) that there is a reasonable probability that the deficient performance prejudiced his defense. Strickland, 466 U.S. at 687. The reviewing court need not address

both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). An appellate court reviews a claim of ineffective assistance of counsel de novo based on the entire record below. State v. Pittman, 134 Wn. App. 376, 384, 166 P.3d 720 (2006)

In order to establish ineffective assistance of counsel, the defendant must prove that appellate counsel failed to raise issues which had merit and that he was actually prejudiced by the failure to raise, or adequately raise, the issues. Dalluge, 152 Wn.2d at 787. It is not ineffective assistance of counsel to fail to raise all nonfrivolous issues on appeal; “the exercise of independent judgment in deciding what issues may lead to success is the heart of the appellate attorney’s role.”

Gossett bases his claim of ineffective assistance of appellate counsel on the grounds that counsel “restricted his argument to a single one line statement . . . [from] over 38 transcribed pages of argument, replete with misconduct” (prosecutorial misconduct) and “ignored the 404(b) and 608 evidence” (ineffective assistance of trial counsel). Petition at 24. However, appellate counsel’s decision

about which issues to raise on appeal may be viewed as strategic, “not requir[ing] to raise every possible non-frivolous issue” Monroe v. Phelps, 825 F.Supp.2d 520, 530 (2011); See also Smith v. Robbins, 528 U.S. 259, 272, 120 S.Ct. 746, 145 L. Ed. 2d 756 (2000); Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L. Ed. 2d 987 (1983). In Jones v. Barnes, the Court stated that “there can hardly be any question about the importance of having the appellate advocate examine the record with a view to select[] the most promising issues for review. This has assumed greater importance in an era when oral argument is strictly limited in most courts. . . .” Jones, 463 U.S. at 752-753. Accordingly, appellate counsel acts “well within the bounds of objectively reasonable professional norms by winnowing out weaker arguments on appeal and focusing on one central issue if possible” Monroe, 825 F.Supp.2d at 530 (internal cites omitted). Beginning with the presumption that the appellate counsel was effective, the court should not “second guess reasonable professional judgments.” Grey v. Henderson, 788 F.Supp. 683, 690

(1991). Appellate counsel's decision to exclude presumably weaker arguments⁴ (the other alleged instances of prosecutorial misconduct and ineffective assistance of trial counsel regarding admission of 404(b) and 608 evidence and failure to object) is a strategic decision which does not automatically warrant a finding that Gossett was inadequately or ineffectively represented. Grey, 788 F.Supp. at 690. The exclusion of weaker arguments does not result in deficient performance that falls below an object standard of reasonableness based on consideration of all the circumstances. In re the Pers. Restraint of Theders, 130 Wn. App. 422, 434, 123 P.3d 489 (2005).

Given the presumption of effective assistance, and the deference given to strategic decisions, Gossett fails to demonstrate either deficient performance or prejudice. To show prejudice, he must establish a likelihood that the appellate court would have found merit in his arguments and reversed his conviction. The court's opinion

⁴ "A brief that raises every colorable issue runs the risk of burying good arguments. . . ." Jones, 463 U.S. at 753.

regarding the issues counsel did raise does not lead to that conclusion. See Appendix A at 4-6, 9-12. Gossett raised issues of prosecutorial misconduct in his Statement of Additional Grounds, none of which persuaded the court to reverse.

4. Gossett has not met the burden required to demonstrate prosecutorial misconduct. The arguments were not designed to appeal to the passion and prejudice of the jury, and the evidence was properly admitted under 404(b).

Even if this court does consider the merits of Gossett's claims, the petition should still be dismissed.

A defendant must first establish the prosecutorial misconduct and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Dhaliwal, 150 Wn.2d at 578. The failure to object during trial constitutes a waiver of prosecutorial

misconduct unless the statements are “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.”⁵ Dhaliwal, 150 Wn.2d at 578; State v. Sakellis, 164 Wn. App. 170, 183-186, 269 P.3d 1029 (2011) *review denied*, 176 Wn.2d 1004, 297 P.3d 68 (2013). The absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to a[defendant] in the context of the trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Here, trial counsel failed to object, and Gossett has failed to sufficiently establish, that the statements are “so flagrant and ill-intentioned that [they] caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.”

5 The burden is on the petitioner to establish that the misconduct resulted in prejudice that “had a substantial likelihood of affecting the jury verdict,” and no curative instruction would have obviated the prejudicial effect on the jury. Sakellis, 164 Wn. App. at 184.

Sakellis, 164 Wn. App. at 184; In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Notwithstanding Gossett's contention that "[i]f there ever was an example of misconduct more pervasive, flagrant and ill-intentioned that an instruction would not have cured the prejudice, it is here . . . ," the statements Gossett presents as the alleged misconduct are simply not ". . . flagrant and ill-intentioned. . . ." Petition at 14.

Gossett cites to Glasmann, which found prosecutorial misconduct in closing arguments. 175 Wn.2d at 701. In Glasmann, the prosecutor used PowerPoint with the defendant's booking photograph accompanied by phrases "calculated to influence the jury's assessment of [the defendant's] guilt and veracity." Glasmann, 175 Wn.2d at 701-702. That court concluded that the "multiple ways in which the prosecutor attempted to improperly sway the jury and the powerful visual medium he employed," combined with his closing argument, created such prejudice that a curative instruction would have been pointless. Glasmann, 175 Wn.2d at 708.

Even if the prosecutor's statements were error, the statements alone were not "flagrant and ill-intentioned," that a curative instruction

could not have neutralized any prejudicial effect . The jury was instructed that the remarks of the attorneys was not evidence.⁶ Defense counsel reminded it of that fact.⁷

Unlike Glasmann, the prosecutor did not express a personal opinion as to guilt, but consistently referred to the evidence that substantiated the charged crimes. Generally, a prosecutor has wide latitude in arguing inferences from the evidence. Spokane County v. Bates, 96 Wn. App. 893, 901, 982 P.2d 642 (1999). Greater latitude, is given in closing argument than in cross examination. State v. Rivers, 96 Wn. App. 672, 675, 981 P.2d 16 (1999). It is not misconduct to argue facts in evidence and suggest reasonable inferences from them, unless he unmistakably expresses a personal opinion, there is no error. Bates, 96 Wn. App. at 901.

6 Jury Instruction No. 1 contained the following language: "The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and exhibits." CP 139. Such instruction likely minimized any prejudicial effect the alleged improper statements may have had.

7 Trial counsel, during his closing, stated that "it is important . . . for you to remember that the lawyers' statements are not evidence. The evidence is testimony and the exhibits." RP 1458:18-21.

Gossett's argument that the "misconduct also included improper use of ER 404(b) and 608 evidence" also fails because the prosecutor, prior to the start of trial, identified evidence regarding domestic violence in the Gossett home sought to bring into trial.⁸ RP 59:19-25, 60-64:1-7. More specifically, the prosecutor stated:

". . . [What] I'm specifically talking about is Linda Gossett repeatedly beating all the children, specifically Alisha Gossett and the other children that were adopted, and that [Gossett] had beaten the other children, including Alisha Gossett and Tristen Gossett, who was eventually removed from their home by DSHS, and his adoption was reversed because of the beatings, and he has a conviction from it as well in 2007."

RP 60: 9-17. There were no objections to the testimony elicited during trial regarding Tristen Gossett and the circumstances surrounding his departure from the Gossett home, which permitted the prosecutor to argue the facts and make reasonable inferences

⁸ Trial counsel stated that he would object to evidence that the prosecutor attempts to get in if it is objectionable for some other reason (not on the basis of it being ER 404(b) evidence), such as hearsay or "anything like that." RP 61: 22-25. Moreover, trial counsel stated that ". . . in terms of it being a prior bad act, I don't object to that." RP 62:1-2.

during closing.⁹ Thus, considering the great latitude that the prosecutor has, and in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions, there was no prosecutorial misconduct.

5. Gossett has not demonstrated that trial counsel's performance was deficient and that the deficient performance prejudiced him.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation," but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; See Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in

9 RP 12-24, 215-16, 284, 336: 337, 459, 460,; 903, 1212, 1261-62.

the particular case.” Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Strickland, 466 U.S. at 696.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). As when considering the performance of appellate counsel, there is great judicial deference to counsel’s performance and the analysis begins with a strong presumption that counsel was effective. Id. at 687.

Counsel’s failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974). Gossett contends that the trial counsel’s failure to object to ER 404(b), ER 608, and the alleged prosecutorial misconduct during closing

argument constitutes ineffective assistance of trial counsel. Petition at 16-20. The absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to a[defendant] in the context of the trial.” State v. Swan, 114 Wn.2d at 661.

A defendant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Consider the motion before the court by the prosecution to bring in 404(b) evidence. RP 59: 19-25, 60-64: 1-7. Trial counsel’s decision to permit the prosecutor to bring in the evidence for one purpose, which he believes the court will allow, and object on other grounds (for example, hearsay) can be identified as a legitimate trial strategy or tactic. RP 61-62. Similarly, trial counsel’s decision to rebut the prosecutor’s statements during his own closing, rather than make repeated objections and possibly alienate the jury, can also be identified as a legitimate strategy or tactic. For example, the following statements to the jury during defense closing addressed the statements Gossett now challenges:

“This case is not about Tristen. Mark Gossett is not on trial for Tristen. Whatever happened then, that case is over and done with. So no matter what you believe about Tristen, and Mark and Linda’s treatment of Tristen, really has nothing to do with this case. Linda is not on trial here.”

RP 1461.

“How many times did we hear in the [prosecutor’s closing] . . . how Linda was beating Alisha. . . . Linda is not on trial. Maybe you think she should be. I don’t know that. Maybe you think she’s the worst parent and both of them are the worst parents in the world, but that’s not the issue here.”

RP 1461.

“Counsel made the comment, past behavior is the best predictor of future behavior. But using corporal punishment or perhaps two lengthy timeout’s and isolations, how is that a predictor of sexual abuse? Because that’s the issue here. Their church is not on trial here.”

RP 1461.

Accordingly, trial counsel’s reservation of objections to the prosecutor’s alleged improper statements made during trial to his own closing argument can reasonably be considered a legitimate strategy or tactic, precluding Gossett from relying on the failure to object as a basis for the ineffective assistance of trial counsel claim.

Finally, Gossett has not shown prejudice, that is, that the outcome of the trial would have been different had his attorney made the objections he now advocates. A reviewing court first determines whether the challenged comments were in fact improper. If so, then the court considers whether there was a “substantial likelihood” that the jury was affected by the comments. Both the Sixth Amendment and Const. art. 1, § 22 grant defendants the right to trial by an impartial jury, but that does not include the right to an error-free trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A conviction will be reversed only if improper argument prejudiced the defendant. There is no prejudice unless the outcome of the trial is affected. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

A trial attorney makes constant tactical decisions during a trial, and much depends on the way the witnesses present themselves and the way counsel perceives the way the jury is affected by the evidence. Sex offense trials are particularly difficult, and a defense attorney would understandably be reluctant to appear to be interfering with the presentation of the evidence. That his tactical choices may

have not resulted in an acquittal is not the issue. The issue is whether his performance met the test of Strickland. In this instance, it did.

IV. CONCLUSION

Because the issues Gossett raises in this PRP were addressed on direct appeal, albeit supported by different argument, this court should not address his claims. However, should the court reach the merits, he has failed to show ineffective assistance of counsel or prosecutorial misconduct. The State respectfully asks this court to deny and dismiss his petition.

RESPECTFULLY SUBMITTED this 17th day of June, 2013.

JON TUNHEIM
Prosecuting Attorney



CAROL LA VERNE, WSBA#19229
Deputy Prosecuting Attorney

APPENDIX A

FILED
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 40845-7-II

Respondent,

v.

MARK GOSSETT,

UNPUBLISHED OPINION

Appellant.

PENOYAR, C.J. — Mark Gossett appeals his convictions of two counts of second degree child rape (domestic violence)¹ and two counts of second degree child molestation (domestic violence).² He argues that the prosecutor committed misconduct during closing argument by arguing that the case came down to whether the jury believed the alleged victim, AG, and that he received ineffective assistance of counsel when his attorney failed to object to the prosecutor's argument. Gossett also contends that the trial court erred in admitting AG's statements to her "surrogate grandfather" under the excited utterance exception to the hearsay rule. Additionally, he asserts that the community custody condition prohibiting him from possessing or viewing pornographic materials is unconstitutionally vague. Finally, he raises numerous claims in his statement of additional grounds (SAG).³ Because the community custody condition is unconstitutionally vague, we remand for resentencing. Otherwise, we affirm.

¹ In violation of RCW 9A.44.076 and RCW 10.99.020(5).

² In violation of RCW 9A.44.086 and RCW 10.99.020(5).

³ RAP 10.10.

FACTS

In June 2000, AG and her biological sister, SG, were placed as foster children in Mark and Linda Gossett's home. In December 2001, the Gossetts adopted the sisters. According to AG, life at the Gossetts' home changed dramatically after the adoption. The Gossetts were strict and used corporal punishment to discipline AG.

In January 2008, after getting into an argument with Linda,⁴ AG moved in with Jennifer Myrick, a woman she had met at the Gossetts' church. In June 2008, AG told Myrick and Myrick's best friend, Roberta Vandervort, while she "was very, very upset," that Gossett had sexually abused her and that she "couldn't handle holding the secret any longer." Report of Proceedings (RP) at 121-22. AG told Myrick and Vandervort that the sexual abuse began around the time she was in eighth grade and before she received her orthodontic head gear.

In July 2008, AG met with Thurston County Deputy Sheriff Kurt Rinkel and told him that Gossett began touching her in eighth grade. AG turned 14 in November of her eighth grade year. AG also told Sergeant Evans⁵, on two occasions, that the sexual abuse started when she was 14 years old. On November 20, 2008, the State charged Gossett with two counts of second degree child rape (domestic violence) and two counts of second degree child molestation (domestic violence).⁶

⁴ This opinion refers to Linda Gossett by her first name and Mark Gossett as "Gossett" to avoid confusion. We intend no disrespect.

⁵ Officer Evans's first name is not in the record.

⁶ The State later amended the information to charge Gossett with one count of intimidating a current or prospective witness (domestic violence), in violation of RCW 9A.72.110(1)(a) and RCW 10.99.020(5). The trial court severed the charge from the information.

At trial, David Glidewell, AG's "surrogate grandfather," testified that in June 2008, AG told him, while she was "[s]ad, nervous, [and] almost in tears," that she had left home because Gossett had sexually assaulted her "and gotten into bed with her." RP at 207, 220-21. Glidewell also testified that AG "mentioned that it was non-penetrating and that she got knocked off on the floor." RP at 222. Over defense counsel's objection, the trial court admitted AG's statements under the excited utterance exception to the hearsay rule.

AG testified that Gossett kissed her for the first time when she was in seventh grade, in 2002, before she had head gear. She also testified that in 2003, before she turned 14, he started inserting his fingers into her vagina and that the sexual abuse lasted until she moved out of the Gossetts' home in January 2008. At trial, AG stated that Gossett never touched her inappropriately in front of other people and had told her that if his wife found out, AG's "life would be a living hell." RP at 303.

Gossett testified at trial and denied having sexually abused AG. According to SG, AG had difficulty adjusting to the Gossetts' rules. SG never saw Gossett act inappropriately with AG.

During closing argument, the prosecutor stated:

Ladies and gentlemen, there's a lot of components to this whole trial. And what it comes down to are the elements. The elements of nine and ten, the to-convicts. It comes down to whether or not you really believe [AG]. Her story makes sense. It fits together with all of the things that are going on by other witnesses that testified for the defendant himself. It's confirmed by that.

RP at 1456. Defense counsel did not object.

The jury found Gossett guilty of all four counts. As a condition of community custody, the trial court ordered Gossett to comply with the following condition: "Do not possess or peruse pornographic materials unless given prior approval by your sexual deviancy treatment

specialist and/or community corrections officer. Pornographic materials are to be defined by the therapist and/or assigned community corrections officer[.]” Clerk’s Papers (CP) at 196. Gossett appeals.

ANALYSIS

I. PROSECUTORIAL MISCONDUCT

First, Gossett argues that the prosecutor committed misconduct during closing argument by arguing, “It comes down to whether or not you really believe [AG].” RP at 1456. Gossett contends that this statement improperly shifted the burden of proof and presented the jury with a false choice. We disagree.

To obtain reversal on the basis of prosecutorial misconduct, Gossett must show (1) the impropriety of the prosecutor’s comments and (2) their prejudicial effect. *See State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Because Gossett failed to object to the prosecutor’s misconduct at trial, we ascertain whether the prosecutor’s misconduct was so flagrant and ill-intentioned that it caused an “enduring and resulting prejudice” incurable by a jury instruction. *See State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)). This standard of review requires the defendant to establish that (1) the misconduct resulted in prejudice that “had a substantial likelihood of affecting the jury verdict” and (2) no curative instruction would have obviated the prejudicial effect on the jury. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). We review allegedly improper arguments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the trial court’s instructions. *Russell*, 125 Wn.2d at 85-86.

In *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), the prosecutor improperly argued that in order to find the defendant not guilty, the jury had to find that the victim lied or was mistaken. Division One of this court held that the prosecutor committed misconduct because the argument misstated the law and improperly shifted the burden of proof. *Fleming*, 83 Wn. App. at 213. Here, the prosecutor said that the jury could convict if it believed AG. The prosecutor did not imply that in order to acquit, the jury had to believe that AG was lying. This argument does not shift the burden of proof from the State to the defendant.

To support his argument that the prosecutor improperly presented the jury with a false choice, Gossett relies on *State v. Miles*, 139 Wn. App. 879, 162 P.3d 1169 (2007). In *Miles*, the prosecutor told the jury that because the defense and the State had presented two conflicting versions of events “if one is true, the other cannot be” and “[i]n this case you have no choice because you have two conflicting versions of events. One is not being candid with you.” 139 Wn. App. at 889-90. We held that the prosecutor’s argument constituted misconduct because it presented the jurors with a false choice: they could find the defendant not guilty only if they believed his evidence. *Miles*, 139 Wn. App. at 890. We reasoned that the jury did not have to believe the defendant to acquit him; it “only had to entertain a reasonable doubt as to the State’s case.” *Miles*, 139 Wn. App. at 890.

This case is distinguishable from *Miles*. Here, the prosecutor did not present the jury with a false choice. The State merely argued that AG’s credibility should be central to the jury’s consideration of the case. This argument implied that if the jurors believed AG, they should convict. It also implied that if they disbelieved AG, they should acquit. But this argument did not imply that disbelieving AG would be the only way for the jury to find reasonable doubt. Specifically, unlike in *Fleming* and *Miles*, the prosecutor’s argument here did not imply what the

jury should do if it had a reasonable doubt about AG's testimony. Because the prosecutor did not make improper remarks, no prosecutorial misconduct occurred.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, Gossett asserts that he received ineffective assistance of counsel when defense counsel failed to object to this same portion of the prosecutor's closing argument. To prevail on a claim of ineffective assistance of counsel, Gossett must show both that (1) "counsel's performance was deficient" and (2) the deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). As we discussed above, the prosecutor did not make improper statements. Accordingly, defense counsel's failure to object to the statements did not constitute deficient performance and Gossett's claim of ineffective assistance of counsel fails.

III. EXCITED UTTERANCE

Gossett further argues that the trial court erred when it admitted Glidewell's testimony that AG told Glidewell that she had left home because Gossett had sexually assaulted her. The State concedes that the trial court erred in admitting the statement but contends that the error was harmless. We accept the State's concession but conclude that the error was harmless.

We review a trial court's decision to admit a hearsay statement as an excited utterance for an abuse of discretion. *State v. Young*, 160 Wn.2d 799, 805, 161 P.3d 967 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Stenson*, 132 Wn.2d at 701.

The hearsay rule generally excludes an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c); ER 802. But a hearsay statement may be admitted if it is an excited utterance. ER 803(a)(2). For hearsay to qualify as an excited utterance, three

requirements must be met: (1) a startling event or condition must have occurred; (2) the declarant must have made the statement while under the stress of the startling event; and (3) the statement must relate to the startling event or condition. *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

The declarant must make the statement while still “under the influence of external physical shock” and without “time to calm down enough to make a calculated statement based on self interest.” *Hardy*, 133 Wn.2d at 714. Although the passage of time between the startling event and the declarant’s statement is a factor to consider in determining whether the statement is an excited utterance, it is not dispositive. *State v. Strauss*, 119 Wn.2d 401, 416-17, 832 P.2d 78 (1992). AG’s statements to Glidewell occurred months after she had moved out of the Gossett home. AG disclosed the abuse to Myrick and Vandervort before she spoke with Glidewell. Because AG was not under the stress of the startling event, we accept the State’s concession that the trial court erred in admitting this testimony.

But an evidentiary error is harmless if there is no reasonable probability that the error affected the trial’s outcome. *State v. Templeton*, 148 Wn.2d 193, 220, 59 P.3d 632 (2002). The State asserts that the error was harmless because

[AG] testified for more than six hours at trial. She was cross-examined extensively and described her abuse by [Gossett] in detail. There is simply no chance that the statements related by Glidewell had any significant effect on the jury’s determination of credibility or its decision to convict. [Glidewell] merely related the fact of the sexual assaults and the detail that they were non-penetrating. There was no information that the jury did not get from [AG].

Resp’t’s Br. at 9-10 (internal citation omitted). Indeed, AG testified extensively at trial and was subject to cross-examination. Her testimony was consistent with the statements she made to Myrick and Vandervort, and Gossett does not challenge the admission of Myrick’s and

Vandervort's testimony regarding AG's statements. Glidewell's testimony was of minor significance relative to the record as a whole and did not contain information that was not otherwise introduced through other witnesses. Accordingly, we hold that the improper admission of Glidewell's testimony was harmless error.

IV. COMMUNITY CUSTODY CONDITION

Next, Gossett asserts that the community custody condition prohibiting him from possessing or viewing pornographic materials is unconstitutionally vague. The State concedes this issue. We accept the State's concession.

In *State v. Bahl*, 164 Wn.2d 739, 758, 193 P.3d 678 (2008), our Supreme Court held that a community custody condition prohibiting the defendant from accessing or possessing pornographic materials as directed by his supervising community corrections officer was unconstitutionally vague. The court reasoned, "The fact that the condition provides that Bahl's community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." *Bahl*, 164 Wn.2d at 758.

As a condition of community custody, the trial court ordered Gossett to comply with the following condition, "Do not possess or peruse pornographic materials unless given prior approval by your sexual deviancy treatment specialist and/or community corrections officer. Pornographic materials are to be defined by the therapist and/or assigned community corrections officer[.]" CP at 196. In light of the Supreme Court's decision in *Bahl*, we accept the State's concession and remand for resentencing.

V. STATEMENT OF ADDITIONAL GROUNDS

A. Prosecutorial Misconduct

1. False Statements

In his SAG, Gossett argues that the prosecutor made false statements to the jury in her closing argument. Specifically, Gossett contends that the prosecutor lied when she stated:

And if you just sat and talked with [AG], she'd tell you, I know the marked event, I know the event it all started, and it was with the head gear. Counsel wants you to believe the head gear, it's later, it's in the picture, it's 2004 and five. Well, if you listen to the testimony, we know she got her head gear installed 5-14 of '02. Right? She's 12 years old. She has it continuously, and it was permanently installed, where she couldn't take it off in October of '04. That's when those pictures are from.

RP at 1513. Gossett contends that the prosecutor altered AG's testimony because AG testified, during cross-examination, that the sexual abuse began when she was in eighth grade.

Because Gossett was charged with second degree child rape, the State had to prove AG's age. *See* RCW 9A.44.076(1) ("A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim."). AG received head gear in 2002, but her head gear was not put on permanently until 2004. AG testified that Gossett kissed her for the first time when she was in seventh grade, in 2002, before she had head gear. AG testified that in 2003, before she turned 14, Gossett started touching her vagina. The prosecutor properly argued, based on AG's testimony, that AG had testified that the sexual abuse began before she had head gear and that, while she did not have permanent head gear until 2004, she first received head gear in 2002 at the age of 12. No misconduct occurred.

2. Impeachment

Gossett next asserts that the “prosecutor used impeachment as a guise for submitting to the jury substantive evidence that otherwise was unavailable.” SAG at 8. We disagree.

Specifically, Gossett contends that the trial court erred in allowing the State, over defense counsel’s objection, to ask Linda if a Cascade Boys Ranch employee had described “your family as a dysfunctional, over-restrictive environment?” SAG at 8. Even if the trial court erred in allowing the State to ask this question, any error was harmless. The prosecutor impeached Linda multiple times, without objection, with the same question, asking, “[The principal, nurse, and counselor at the Tenino School District] felt it was your home environment that was so restrictive that [the Gossetts’ foster child, TG,] couldn’t function; is that right?” RP at 1218. The prosecutor also asked Linda, without objection, “[I]t was believed during this time that you were scapegoating and isolating [TG], blaming him for his problems; is that right?” RP at 1219. The impeachment evidence Gossett challenges came in, without objection, through other questions. There is no reasonable probability that its admission affected the trial’s outcome.

Gossett cites several other portions of the record to support his argument that improper impeachment evidence was introduced at trial. But Gossett did not object to the prosecutor’s impeachment of Linda at trial. The rules of evidence require a party to object to evidence in order to preserve a challenge for appeal. ER 103(a)(1). Appellate courts generally will not review claims of error that were not presented to the trial court. RAP 2.5(a). Gossett does not argue that the alleged errors are of constitutional magnitude. We conclude that this issue has not been preserved for appeal.

3. Witness Credibility

Gossett further asserts that the prosecutor improperly expressed her personal belief as to the credibility of witnesses. We disagree.

“Although it is improper for a prosecutor to vouch for a witness’s credibility, a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence.” *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010) (footnote omitted). Closing argument does not constitute improper vouching “unless it is clear that the prosecutor is not arguing an inference from the evidence, but instead is expressing a personal opinion about credibility.” *Lewis*, 156 Wn. App. at 240 (citing *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008)). “[P]rosecutorial remarks, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel, are a pertinent reply to his or her arguments, and are not so prejudicial that a curative instruction would be ineffective.” *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

Gossett asserts that the prosecutor improperly commented on the testimony of defense witness Carol Benek, a counselor at Tenino High School, by stating, “Well, and Carol Benek. You know, Carol Benek, bless her heart, I think she’s probably a really nice lady. She just had it wrong, folks.” RP at 1517. Benek testified that, after speaking with AG, her impression was that AG and her sister, SG, had been sexually abused by their biological father and had received counseling for it.⁷ AG testified that her biological father never sexually abused her. Here, the prosecutor merely commented on Benek’s credibility based on AG’s testimony that her biological father never sexually abused her.

⁷ We note that the prosecutor did not object to Benek’s testimony.

Gossett further contends that the following statements constituted misconduct:

Now, counsel talked about all these giant inconsistencies and said, well, we've heard that she told a whole different story to Sergeant Evans. Did anybody hear from Sergeant Evans? Did he testify? No, he didn't. We know exactly what she told him, but I'd submit if it was glaringly different, we'd hear a lot more about it, and we didn't.

RP at 1515.

[Defense counsel s]aid, well, why didn't you tell? You were surrounded by State Patrol. Well, who is living in this little chalet on the property, this one-room hut, that apparently all of Washington State Patrol loves to rent from them? These people, well, one of them, [Richard] Wiley, we assume or we hear, is this commissioned officer. Where's Wiley? We didn't hear from him.

RP at 1522-23. The prosecutor's arguments were a pertinent reply to defense counsel's arguments. During closing, defense counsel argued to the jury that AG gave inconsistent accounts of the first time Gossett kissed her. Further, defense counsel also attacked AG's credibility during closing on the basis that AG never disclosed the abuse to the Washington State Patrol employees who rented the Gossetts' guest house.⁸ Defense counsel's closing argument invited the prosecutor's arguments. Accordingly, we conclude that no prosecutorial misconduct occurred.

4. False Evidence

Next, Gossett argues that the prosecutor committed misconduct by knowingly eliciting false testimony from AG. At trial, AG and Laura Chase both testified about an incident in which they met at Starbucks. AG testified that Chase was not at Starbucks with anyone. Later, AG testified that she was hesitant to disclose information to Chase, because she had seen the

⁸ Defense counsel argued, "They had two different state patrol people live in the guest house. Now, Mr. Wilton was not a trooper, but Wiley was, had a marked car. Do you think for a moment if she'd gone to any of those people and said my dad is sexually abusing me, that they'd just send her home?" RP at 1489.

Gossetts' car drive past the Starbucks, and AG thought Chase had notified the Gossetts of their meeting. Contrary to Gossett's assertion, this testimony is not contradictory. The record does not support Gossett's argument that the State knowingly introduced false evidence.

B. Expert Testimony

Gossett also asserts that the trial court erred in allowing Kelly Simmons-Jones, a medical social worker, to testify for the State regarding delayed disclosure of child sexual abuse. He asserts that this was profile or syndrome testimony that the trial court should have excluded. He also asserts that the trial court should have excluded Simmons-Jones's testimony on complex trauma. We disagree.

Expert testimony regarding a profile or syndrome of child sexual abuse victims is not admissible to prove the existence of abuse or that the defendant is guilty. *State v. Jones*, 71 Wn. App. 798, 819, 863 P.2d 85 (1993). The trial court ruled that Simmons-Jones could only testify "as to similarities or patterns among children reporting or among people reporting instances of abuse after experiencing complex trauma or sexual abuse as children. . . . [T]his witness cannot testify as to the believability of any witness in this case or the veracity of any statements pertaining to this particular case." RP at 701. Simmons-Jones did not testify that AG fit the profile of a child sex abuse victim. The trial court did not err in admitting her testimony.

Further, Gossett's argument that Simmons-Jones's testimony on complex trauma did not meet the *Frye*⁹ test also fails. "The *Frye* test is an additional tool used by judges when proffered evidence is based upon novel theories and novel techniques or methods." *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 606, 260 P.3d 857 (2011). Simmons-Jones defined "complex trauma" as "kids with varying types of abuse or neglect." RP at 668. After hearing

⁹ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

the offer of proof, the trial court stated, “I did not hear anything come out this morning in testimony that this person would base any testimony on novel theories.” RP at 697. The trial court did not err in concluding that, here, *Frye* did not apply.

C. Sufficiency of the Evidence

Gossett also alleges that, because there was conflicting testimony, “[t]he jury, with the evidence presented, could never have obtained [sic] ‘sufficient certainty’ to convict on any of the charged counts.” SAG at 25. We defer to the fact finder’s resolution of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. O’Neal*, 126 Wn. App. 395, 424, 109 P.3d 429 (2005), *aff’d*, 159 Wn.2d 500, 150 P.3d 1121 (2007). Gossett’s claim fails.

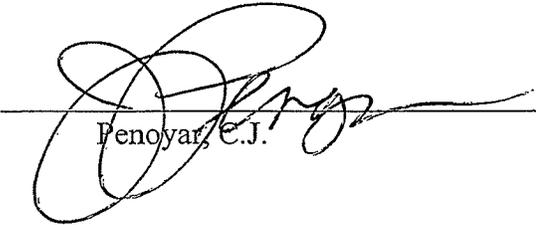
D. Cumulative Error

Finally, Gossett contends that the cumulative error doctrine warrants reversal of his convictions. Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless, when the errors combined denied the defendant a fair trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *State v. Yarbrough*, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009). The trial court did err in admitting AG’s statements to Glidewell under the excited utterance exception, but this error was harmless. The only other error relates to the unconstitutionally vague community custody condition. The two errors combined did not deny Gossett a fair trial.

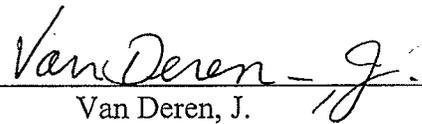
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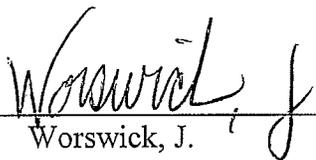
We affirm but remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Penoyar, E.J.

We concur:


Van Deren, J.


Worswick, J.

THURSTON COUNTY PROSECUTOR

June 17, 2013 - 2:31 PM

Transmittal Letter

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