

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

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN RITCH,

Appellant.

---

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

The Honorable Derek J. Vanderwood

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BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

In a trial for inappropriate sexual conduct with his minor daughter, Brian Ritch was subject to repeated instances of prosecutorial misconduct during closing argument. Mr. Ritch is entitled to reversal of his convictions and remand for a new trial.

B. ASSIGNMENT OF ERROR

The prosecutor's vouching for the truthfulness of a witness and arguing facts that were not admitted into evidence violated Mr. Ritch's constitutionally protected rights to due process and a fair trial.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Under the Due Process Clauses of the Washington and United States Constitutions, a defendant is guaranteed the right to a fair trial. Prosecutorial misconduct in closing argument, which prejudices the defendant, violates that right to a fair trial and requires reversal of the convictions. Over Mr. Ritch's objection, the prosecutor vouched for the veracity of its primary witness, and argued facts not in evidence. Was there a substantial likelihood that this misconduct affected the jury's verdict, thus requiring reversal of Mr. Ritch's convictions?

#### D. STATEMENT OF THE CASE

Mr. Ritch is the father of 12 year old H.R. RP 232-35. H.R. lived with her mother, Michelle Fritzner, and step-father. Mr. Ritch and Ms. Fritzner were never married but lived together from 2000 to 2010. RP 325-26. H.R. was born in 2004. RP 326.

After Mr. Ritch and Ms. Fritzner separated, Mr. Ritch cared for H.R. everyday after school and every other weekend. RP 238. H.R. unilaterally ended this arrangement in 2013 based upon her perception of Mr. Ritch's anger issues. RP 236.

According to H.R., Mr. Ritch began showing her pornographic magazines when she was six years old. RP 265. Mr. Ritch began touching H.R. when she was nine years old. *Id.* H.R. disclosed Mr. Ritch's inappropriate behavior to her mother and following a police investigation, Mr. Ritch was charged with one count of first degree child rape and four counts of first degree child molestation. CP 61-64; RP 266. Attached to each of the counts were sentence aggravators for an abuse of trust and an ongoing pattern of sexual abuse. CP 61-64.

In closing arguments, the prosecutor stated:

I simply have to prove to you beyond a reasonable doubt that what we are alleging happened at the hands of this defendant actually did happen beyond a reasonable doubt. Which means that if you have *an abiding belief in*

*the truth of the facts* that you heard from the testimony here, then you can be satisfied.

6/15/2016RP 562 (emphasis added). Mr. Ritch did not object to this comment. Continuing the argument:

Apparently judging by the yawning on the stand sleepiness is a response that [H.R.] experiences in response to stress and in response to the fact she'd been up most of the night until roughly 4:00 a.m. trying to hold on until she could tell her mom, but she didn't make it. She fell asleep.

MR. PASCOE: Your Honor, I move to strike the last (inaudible). I don't think it was testified to.

THE COURT: On what basis?

MR. PASCOE: I just don't -- I believe she spoke about 4:00 a.m. I don't believe that was testified to.

THE COURT: Again I'll remind the jury that anything that the attorneys are saying are not evidence. The evidence is based on the testimony that was presented and the exhibits that were heard.

To that extent, that the question goes to a particular timing as to what was involved or not, I will go ahead and strike that portion as to the time itself, Ms. Culver, but otherwise go ahead.

6/15/2016RP 564-65.

The jury subsequently found Mr. Ritch guilty as charged and he was sentenced to an exceptional sentence of 336 months to life. CP 119-24, 135-44; 163-64.

## E. ARGUMENT

### **The prosecutor's misconduct during closing argument was so prejudicial, reversal of Mr. Ritch's convictions is required.**

1. *Prosecutorial misconduct violates a defendant's constitutionally protected right to a fair trial.*

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 3 and article I, section 22 of the Washington Constitution guarantee the right to a fair trial. *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). Prosecutors represent the State as quasi-judicial officers and they have a “duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant.” *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). “A “[f]air trial” certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused.” *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original), *quoting State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

The prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence," appellate courts must exercise care to insure that prosecutorial comments have not unfairly "exploited the Government's prestige in the eyes of the jury." *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereign whose interest "is not that it shall win a case, but that justice shall be done," his or her improper suggestions "are apt to carry much weight against the accused when they should properly carry none." *Berger*, 295 U.S. at 88.

To establish that the prosecutor committed misconduct during closing argument, the defendant must prove the prosecutor's remarks were both improper and prejudicial. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015); *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

Since he timely objected to some of the misconduct, Mr. Ritch was not required to request a curative instruction. *Allen*, 182 Wn.2d at 375; *State v. Classen*, 143 Wn.App. 45, 64, 176 P.3d 582 (2008).

- a. The prosecutor improperly argued facts that were not admitted into evidence.

It is improper for a prosecutor to argue to the jury facts that were not admitted as evidence during the trial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704-05, 286 P.3d 673 (2012); *Thorgerson*, 172 Wn.2d at 443. It is particularly improper to bolster a witness's credibility at closing argument with facts not in evidence. *State v. Jones*, 144 Wn.App. 284, 293-94, 183 P.3d 307 (2008).

The "long-standing rule" is that "consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced." *State v. Pete*, 152 Wn.2d 546, 555 n. 4, 98 P.3d 803

(2004), *quoting State v. Rinkes*, 70 Wn.2d 854, 862, 425 P.2d 658 (1967) (emphasis omitted).

The improper and inappropriate emphasis here was H.R.'s yawning during her testimony which the prosecutor characterized as a character trait H.R. possesses in response to stress, primarily the stress of waiting until the morning to disclose to her mother Mr. Ritch's inappropriate touching. Unfortunately for the State, it failed to present any evidence to support this theory. There was no evidence presented, anecdotal or expert, on which to base the prosecutor's claim. The argument was plainly erroneous.

b. The prosecutor impermissibly vouched for the credibility of H.R.

The prosecutor's argument also vouched for the credibility of H.R., the State's primary witness.

It is improper for a prosecutor to personally vouch for a witness's credibility. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996); *State v. Jackson*, 150 Wn.App. 877, 883, 209 P.3d 553 (2009). A prosecutor is guilty of improperly vouching when she expresses her personal belief regarding the veracity of the witness. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). *See also State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940

(2008) (“It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness.”). Whether a witness has testified truthfully is entirely for the jury to determine. *Ish*, 170 Wn.2d at 196.

In claiming H.R.’s reaction to stress was yawning without any support in the record, the prosecutor bolstered H.R.’s credibility. Excusing H.R.’s behavior on the stand had the effect of rendering her more sympathetic and thus, more credible. This argument by the prosecutor was error as well.

c. The prosecutor improperly argued the jury must find the “truth.”

The jury’s role is not to solve the case, but rather to determine whether the prosecution has proved its case beyond a reasonable doubt. *Emery*, 174 Wn.2d at 760. Therefore, it is improper for a prosecutor to characterize the jury’s role as finding the “truth” of the events at trial. *Id.* A Court has held it improper for a prosecutor to argue that the jury must “get to the truth,” *State v. Evans*, 163 Wn.App. 635, 644, 260 P.3d 934 (2011), or “declare the truth.” *State v. Anderson*, 153 Wn.App. 417, 429, 220 P.3d 1273 (2009).

Here, instead of arguing consistent with the Court’s Instruction which asked the jury if it had an abiding belief *in the truth of the charge*, the prosecutor changed this statement to an abiding belief *in*

*the facts*. CP 99; 6/15/2016RP 562. This difference is critical. In the instruction, the jury is urged to have an abiding belief in the case, which is the same as whether the State has proven the case beyond a reasonable doubt. In the prosecutor's argument, the jury is urged to have an abiding belief in the facts, which is tantamount to declaring the truth in the facts of the case. This latter argument is improper as it is not the jury's duty to find the truth. *Emery*, 174 Wn.2d at 760.

2. *The misconduct was prejudicial and there is a substantial likelihood that it affected the jury's verdict.*

Since Mr. Ritch objected to the misconduct here, he need only show that the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *Allen*, 182 Wn.2d at 375; *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

"[D]eciding whether a prosecuting attorney commit[ed] prejudicial misconduct 'is not a matter of whether there is sufficient evidence to justify upholding the verdicts.'" *Allen*, 182 Wn.2d at 376, quoting *Glasmann*, 175 Wn.2d at 711. "Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict." *Glasmann*, 175 Wn.2d at 711.

Here, there was a substantial likelihood the misconduct affected the jury's verdict. Since the State lacked any physical evidence to

support H.R.'s claims, the prosecution of Mr. Ritch rested on H.R.'s testimony, making her credibility paramount. By improperly and inappropriately excusing H.R.'s behavior, the State rendered her more credible and made it more likely the jury would believe her, leading inexorably to Mr. Ritch's conviction. Mr. Ritch was prejudiced by the prosecutor's improper argument.

The prosecutor's misconduct rendered Mr. Ritch's trial unfair. In light of the nature of the prosecutor's argument, there was a substantial likelihood the misconduct affected the jury's verdict. This Court should reverse Mr. Ritch's convictions and remand for a new trial.

3. *The argument to which Mr. Ritch did not object was so flagrant and ill-intentioned that his convictions must be reversed.*

Where a defendant does not object to portions of the prosecutor's argument, he is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *Emery*, 174 Wn.2d at 760-61. In making this determination, the "focus [is] less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.* at

762. The defendant must show that (1) no curative instruction would have eliminated the prejudicial effect, and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *Emery*, 174 Wn.2d at 760-61.

In *Glasmann*, the defendant was charged with assault, robbery and kidnapping. He did not deny culpability, rather he argued he was guilty of only lesser included offenses. The Supreme Court reversed the defendant's convictions based upon the misconduct of the prosecutor in closing argument despite the fact the defendant did not object to the misconduct, finding a substantial likelihood the misconduct affected the jury's verdict. 175 Wn.2d at 712-14.

Considering the entire record and circumstances of this case, there is a substantial likelihood that this misconduct affected the jury verdict. The principal disputed matter at trial was whether Glasmann was guilty of lesser offenses rather than those charged, and this largely turned on whether the requisite mental element was established for each offense. More fundamentally, the jury was required to conclude that the evidence established Glasmann's guilt of each offense beyond a reasonable doubt.

*Glasmann*, 175 Wn2d at 714. The same is true here.

In addition, the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect. *Case*,

49 Wn.2d at 73; *State v. Walker*, 164 Wn.App. 724, 737, 265 P.3d 191, 198 (2011).

Here, as in *Glasmann*, ““the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.’ ” *Id.* (alteration in original), *quoting Walker*, 164 Wn.App. at 737. Here, the prosecutor argued facts not in evidence, improperly bolstered the credibility of its primary witness and urged the jury to determine the truth of the facts. The fact the trial court sustained Mr. Ritch’s objections to some of the misconduct did not remedy the error as the misconduct was so pervasive that no instruction could remedy the prejudice. Mr. Ritch is entitled to a new trial.

F. CONCLUSION

For the reasons stated, Mr. Ritch asks this Court to reverse his convictions.

DATED this 24<sup>th</sup> day of April 2017.

Respectfully submitted,

*s/Thomas M. Kummerow*

\_\_\_\_\_  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 49243-1-II
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	)	
BRIAN RITCH,	)	
	)	
Appellant.	)	

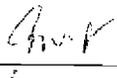
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