

NO. 49243-1-II

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

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STATE OF WASHINGTON, Respondent

v.

BRIAN O'KEITH RITCH, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01905-8

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BRIEF OF RESPONDENT

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## RESPONSE TO ASSIGNMENT OF ERROR

### I. The prosecutor did not commit misconduct.

#### STATEMENT OF THE CASE

Brian O'Keith Ritch (hereafter 'Ritch') was charged by information with Rape of a Child in the First Degree, Domestic Violence, and four counts of Child Molestation in the First Degree, Domestic Violence, for acts of sexual abuse that he committed against his daughter, H.R. CP 1-7; 62-64. The State also plead multiple aggravating factors, including that the crime was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time, and that the defendant used a position of trust to facilitate the commission of the crimes. CP 62-64.

At trial, the evidence showed that H.R. was born January 30, 2004. RP 232. At the time of trial, H.R. was 12 years old and lived with her mom, Michelle Fritzner, and her step-father, Joshua Seager. RP 232-33. Ritch is H.R.'s father. RP 235-36. Ritch lived with his mother, H.R.'s grandmother. RP 237. H.R. was a good student, getting mostly A's; she loves math, and never got into any fights at school nor was she ever sent to the principal's office. RP 303-04. H.R. has never been married. RP 466.

H.R.'s mother, Ms. Fritzner, and her father, Ritch, were never married, but they lived together from 2000 until 2006, and again from 2009 until 2010. RP 327-28. After H.R.'s parents split up, Ritch would pick H.R. up from school and keep her until her mother got off of work; H.R. also had visitation with Ritch on Wednesdays and every other weekend. RP 238, 327-28. At some point in February 2014, H.R. decided she no longer wanted to see her father, so she stopped seeing him. RP 333.

Ms. Fritzner testified that in late August or early September 2015 she came home for lunch one day to see H.R. and when she arrived H.R. was in tears. RP 330. H.R. told her mom that she had lied to her previously when her mom had asked her if anyone had ever touched her in any way. RP 330. Ms. Fritzner was shocked, but she let H.R. tell her everything she wanted to say. RP 330. H.R. was hysterically crying during this conversation. RP 331. Ms. Fritzner then told her daughter they would need to call the police. RP 330. Ms. Fritzner left H.R. with her parents (H.R.'s grandparents) and finished her work day. RP 330. When Ms. Fritzner got off work later that day she talked to H.R. and they called 911. RP 331. It took some time to coordinate with the detectives who were assigned to investigate the case, but eventually H.R. was interviewed by police, as was Ms. Fritzner. RP 337-38.

Officer Scotland Hammond of the Vancouver Police Department responded to a 911 call Ms. Fritzner made in August 2015. RP 170. Officer Hammond made arrangements to meet Ms. Fritzner at a precinct and he interviewed her about what she knew regarding the abuse. RP 171. After meeting with Ms. Fritzner, Officer Hammond referred the case to detectives at the Children's Justice Center. RP 172.

Detective Dustin Goudschaal is a detective at the Children's Justice Center. RP 179. He was assigned to investigate this case on August 21, 2015. RP 181. Det. Goudschaal worked to contact Ms. Fritzner to arrange for H.R. to be interviewed. RP 183-84. On September 16, 2015, H.R. was interviewed by a forensic interviewer, Kim Christly. RP 184. Det. Goudschaal witnessed the interview through a one-way mirror in an adjacent room. RP 185.

Other detectives from the Children's Justice Center executed a search warrant on Ritch's house in October 2015. RP 197. The house was located at 14003 NE 42<sup>nd</sup> Street in Vancouver, Clark County, Washington. RP 212. Numerous photographs were taken of Ritch's house and were admitted into evidence at trial. RP 198-200.

At trial, H.R. described many incidents of sexual abuse that occurred over several years at the hands of her father. She described an incident when Ritch touched her with his penis when she was about nine

years old. RP 246. Ritch used his penis to touch H.R. “between [her] thighs.” RP 246. While he did this, his penis would “slip up” to H.R.’s vagina, and Ritch would move his body back and forth. RP 247-48. Ritch used his hands to rub H.R. on her vagina and chest. RP 249. Ritch started shaking, and he “got all sweaty, and then he stopped.” RP 249. H.R. testified that when this happened she saw Ritch’s “sperm” that was “milky” in color. RP 249. Ritch would then use a towel to wipe up the “sperm.” RP 250. This type of incident occurred multiple times. RP 250.

H.R. described incidents wherein Ritch had her touch his penis. RP 251. H.R. would rub his penis “up and down” with her hand. RP 251.

H.R. also described incidents wherein Ritch would touch her with a vibrator, which she described as a “sex toy.” RP 257-58. She described the vibrator as “pink, and it was, like, a fishing line worm thing at the tip of it. Then it was, like, all jelly.” RP 259. Ritch used the vibrator to molest H.R. by turning it on, and touching H.R. on the vagina with it. RP 259. Ritch moved the vibrator around on her vagina. RP 260. Ritch told H.R. that her “mom used to love it,” referring to the vibrator. RP 260. Ms. Fritzner confirmed that she and Ritch had used sex toys during their relationship, but that this was not something she had ever discussed with H.R. RP 344.

Ritch also touched H.R. on her vagina with his tongue. RP 261. This occurred on Ritch's bed, while H.R. was lying down. RP 263.

The last incident of sexual touching that H.R. could remember happened when she was about 10 years old. RP 240. Ritch put on a "porno," laid down with H.R. and touched her. RP 240. H.R. explained that the "porno" was a porn video. RP 241. This happened in his bedroom. RP 240. Ritch told H.R. to take off her pants and underwear. RP 241-42. Ritch then used his fingers to touch H.R. on her vagina. RP 243-44. He touched her for approximately 10 to 20 minutes, the length of the porn video. RP 243-44. Ritch's touch made H.R. feel uncomfortable, both physically and emotionally. RP 244.

Ritch told H.R. not to tell anybody about what happened. RP 265. H.R.'s mom had asked H.R. previously if anything had happened with Ritch, but H.R. told her that nothing had because Ritch had told her not to tell anybody. RP 267. About a year prior to trial, H.R. finally told her mother what had been happening with her father. RP 268. The day H.R. told her mom had been a "sad day." RP 268. H.R. was up all night crying; she tried to stay up all night to see if she could tell her mom, but H.R. ended up falling asleep and her mom was at work in the morning. RP 268-69. H.R. was scared to tell about the abuse because she was afraid that she was the one who had made the abuse happen. RP 268. When her mom

came home on her lunch break, H.R. told her what happened with Ritch. RP 269. H.R.'s mom and both grandmothers had previously asked H.R. about whether Ritch touched her inappropriately, and H.R. always told them he had not. RP 273-74.

It was clear during H.R.'s testimony that she was crying and upset. *See* RP 242, 261. H.R. also yawned at some point during her testimony; she explained she was yawning because she was tired from talking. RP 316.

H.R.'s mom observed changes in H.R.'s demeanor between the last time she saw her father in February 2014 and the time H.R. disclosed the abuse. RP 340. H.R. stopped being comfortable changing her clothes in front of anybody, she became more quiet and withdrawn, and spent more time alone in her bedroom. RP 340-41. H.R.'s grades also dropped significantly in sixth grade. RP 341.

During the State's closing argument, the prosecutor argued:

I want to talk to you now about the notion of beyond a reasonable doubt, and I want to bring that back to some discussion we had in jury selection about whether or not the measurement of that is 100 percent and why it isn't 100 percent, because there is not really anything that most people will commit to knowing with 100 percent certainty.

This is a legal standard, not an impossible standard. It doesn't mean beyond all concept of any doubt that you might create in your own mind. It doesn't mean that you start asking yourself could this have been a masked intruder

who came in, and she just got confused? You don't have to reach for outlandish explanations, and I don't have to disprove those.

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.

Specifically with regard to rape of a child and child molestation charges, the victim's testimony – an alleged victim's testimony need not be corroborated. There is no DNA requirement. There is no physical injury requirement.

RP 562-63. The prosecutor also discussed H.R.'s disclosure, and how it did not occur in order to get her away from Ritch's house, but that she did not disclose until a year and a half after she stopped seeing her father. RP 563. The prosecutor argued:

And so when I asked her why – how did you finally decide to tell, she said it was just too sad. I don't even remember anything about that day except it was just a really sad day. I couldn't sleep. And I was crying and crying. And I thought I might stay up long enough that I could tell my mom first thing in the morning, but I didn't make it.

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.

RP 564. At that point in the prosecutor's argument, defense objected on the basis that H.R. had not testified about 4:00 a.m. RP 564-65. The trial

court instructed the jury that “anything 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...” RP 564-65.

The prosecutor then immediately stated:

Okay. So she endeavors to stay up all night. She says she doesn't make it. She falls asleep, and by time she wakes back up, her mother has gone off to work because her mom hasn't known anything about any of this as it's been happening, not from the time she started dropping her daughter off there to be watched, not through the time her daughter said I don't want to go anymore. And her mother remains ignorant to all of this as she goes off to work that morning.

RP 565.

In her final remarks, the prosecutor told the jury:

Mr. Pascoe said all you need – all the State wants to say is that all you need is a little girl to say so. What you need is for that girl to say so, and then to ask yourselves do I have an abiding belief in the truth of what she said? And if what she said is true, is it a violation of the law as described in these instructions?

RP 628.

The jury returned verdicts of guilty on all five counts, and found all aggravators had been committed. CP 119-24; 135-44. The jury also found that Ritch and H.R. were members of the same family or household.

CP 124. The trial court sentenced Ritch to an exceptional sentence above the standard range of 336 months to life for each count. CP 163. This appeal timely follows.

## ARGUMENT

### I. The prosecutor did not commit misconduct.

Ritch argues that the prosecutor committed misconduct during closing argument by arguing facts not in evidence, improperly bolstered the victim's credibility, and argued that the jury must find the truth. Ritch further argues this misconduct was prejudicial and there was a substantial likelihood the misconduct affected the jury's verdict. The prosecutor did not commit any misconduct, let alone misconduct that affected the jury's verdict. Ritch's claim fails and this Court should affirm his convictions.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained-of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*,

164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor’s comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

*Davenport*, 100 Wn.2d at 762-63.

Ritch argues he objected at trial court to the prosecutor's argument regarding H.R.'s yawning and the improper vouching for her credibility. However, Ritch did not object to these arguments on those grounds. Ritch clearly objected only to the prosecutor's portrayal of H.R. staying awake until approximately 4 a.m. RP 564-65. The trial court also clearly understood the objection to only be about the 4:00 a.m. comment, as the trial court said to the extent 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..." RP 565. Ritch did not object to the prosecutor's discussion of H.R. yawning, either during H.R.'s direct testimony or closing arguments, and Ritch did not object on the grounds of improper bolstering

or vouching for the credibility of a witness. Therefore, this court should analyze all of Ritch's prosecutorial misconduct claims under the standard of flagrant or ill-intentioned misconduct as he did not object at trial.

A defendant's failure to object to potential misconduct at trial waives his challenge to the misconduct unless no curative instruction would have obviated the prejudicial effect on the jury and the misconduct caused prejudice that had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). The main focus of this Court's analysis on a prosecutorial misconduct claim when the defendant did not object at trial is whether the potential prejudice could have been cured by an instruction. *Id.* at 762.

Ritch cannot show that the prosecutor's statements constituted misconduct which denied him a fair trial. Ritch argues that the prosecutor improperly bolstered the victim's credibility by arguing that she got tired and yawned as a sign of stress fails. A prosecutor has wide latitude to argue reasonable inferences from the evidence. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011) (citing *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991) and *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009)). A prosecutor also has wide latitude to comment on witness credibility based on the evidence presented at trial. *State v. Lewis*, 156 Wn.App. 230, 240, 233 P.3d 891 (2010). The prosecutor's arguments

here amount to permissible and appropriate argument on the credibility of a witness and her behavior, and argued reasonable inferences from the evidence presented at trial.

Furthermore, the prosecutor's statements in no way communicated an opinion by the State regarding the victim's credibility, nor did the statements in any way discuss that based on this fatigue or yawning, the victim should be seen as more credible. Given that a prosecutor has "wide latitude" to argue reasonable inferences from the evidence and comment on witness credibility, it is clear that the State's arguments here were proper. Instead of focusing on snippets of argument taken out of context, this Court looks to the entire argument to determine whether the prosecutor's argument was improper or vouched for a witness's credibility. *State v. Jackson*, 150 Wn.App. 877, 884, 209 P.3d 553 (2009). In *Jackson*, the prosecutor argued a police officer's "testimony was accurate and true" during his closing argument. *Id.* This Court found the prosecutor did not vouch for the officer's credibility, but rather argued that the "evidence (and reasonable inferences from the evidence) could support the jury's conclusion that the officers were credible...." *Id.* at 884-85.

At trial here, the prosecutor discussed the evidence presented at trial, discussed why certain witnesses were or were not credible, and why the evidence presented by the State was persuasive. As in *Jackson, supra*,

the prosecutor did not vouch for the victim's credibility, nor did he express a personal opinion on her credibility. *See Jackson*, 150 Wn.App. at 885 (citing to *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). An objection at trial would not have been sustained, nor would the fact of objecting or an instruction to disregard have changed the outcome of the trial.

Ritch further argues the prosecutor committed misconduct by misstating the law and reducing the State's burden of proof. Specifically, Ritch claims the prosecutor committed misconduct by improperly arguing the meaning of an "abiding belief." The prosecutor properly argued the standard of proof, and Ritch cannot show he was prejudiced by this argument.

Ritch claims the following portion of the prosecutor's closing argument misstated the law:

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.

RP 562. Ritch argues this portion of the prosecutor's argument improperly charged the jury with finding the truth. Though it is improper for a prosecutor to argue to the jury that it should declare the truth with its

verdict, or that its role is to find the truth, that is not the substance of the prosecutor's argument below. When the state charges a defendant with crimes that can be proven solely based on the testimony of one witness, one witness who testifies to facts, if the jury believes that witness and believes the facts testified to by that witness, then the jury is satisfied beyond a reasonable doubt.

“[A]n abiding belief in the truth of the charge’ connotes both duration and the strength and certainty of a conviction.” *State v. Osman*, 192 Wn.App. 355, 375, 366 P.3d 956 (2016). A prosecutor acts improperly by “trivializ[ing] and ultimately fail[ing] to convey the gravity of the State’s burden and the jury’s role in assessing the State’s case against the defendant.” *State v. Johnson*, 158 Wn.App. 677, 684, 243 P.3d 936 (2010) (quoting *State v. Anderson*, 153 Wn.App. 417, 431, 220 P.3d 1273 (2009)). A prosecutor must not “mischaracterize[] the standard [of proof] as requiring anything less than an abiding belief that the evidence presented establishes the defendant’s guilt beyond a reasonable doubt. *State v. Feely*, 192 Wn.App. 751, 762, 368 P.3d 514 (2016) (citing to *Pirtle*, 127 Wn.2d at 657-58 and *Osman*, 192 Wn.App. at 368-69). This Court would review a prosecutor’s claimed improper remarks “within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” *State v.*

*Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998)).

In instructing the jury on the reasonable doubt standard, the trial court stated, “[a] reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.” CP 99. The court’s instructions properly informed the jury of the State’s burden of proof. Juries are presumed to follow the court’s instructions. *State v. Dye*, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). Though the prosecutor stated that if the jury is satisfied in the “truth of the facts” then it is satisfied beyond a reasonable doubt, it is clear from the entire context of the closing arguments, and the prosecutor’s discussion of its burden of proof, that the state did not trivialize or reduce its burden of proof in its closing argument, nor did it improperly charge the jury with finding the truth. The state never uttered the words that the jury should “speak the truth” or “declare the truth,” nor did it make any other arguments which insinuated to the jury that it should speak, declare, or deliver the truth of this case. The prosecutor argued to

the jury that the victim was credible, that her testimony fulfilled the elements of the crimes charged, and that if the jury believed the truth of what the victim said, then they could be satisfied beyond a reasonable doubt. That is a fair and accurate argument of the law and the state's burden in this case. The prosecutor urged the jury to convict based on the evidence it presented, and not, as Ritch alleges, in order to speak the truth or find the truth. Ritch cannot show the prosecutor acted improperly.

Furthermore, Ritch cannot show that these two brief statements he complains of had such an impact on the trial that had the prosecutor not made these statements the result of the trial would have been different. When alleged errors during a prosecutor's argument went unobjected-to at trial, a defendant must show that no curative instruction would have obviated the prejudicial effect of the comments, and that the misconduct caused prejudice that had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). The first comment Ritch complains of, that the prosecutor stated "truth of the facts" instead of "truth of the charge" could easily have been cured by an instruction to the jury reminding them of what the court had already instructed them, that if they had an abiding belief in the truth of the charge that they were convinced beyond a reasonable doubt. CP 99. Ritch's second complaint regarding the prosecutor's comments on H.R. yawning

and stress likewise would easily have been cured by an instruction to the jury to disregard. Even if the statements the prosecutor made were improper, they were not so flagrant and ill-intentioned so as to have denied Ritch a fair trial. He received a fair trial. The prosecutor's arguments were proper, and no potential misstatements made changed the outcome of the trial.

#### CONCLUSION

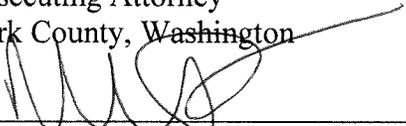
Ritch cannot show that prosecutorial misconduct denied him a fair trial. His convictions should be affirmed.

DATED this 23 day of June, 2017.

Respectfully submitted:

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## Transmittal Information

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