

FILED
Court of Appeals
Division II
State of Washington
1/28/2019 4:50 PM

NO. 51874-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANDREW HIEB,

Appellant.

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

The Honorable Bryan Chushcoff, Judge

BRIEF OF APPELLANT

ERIC J. NIELSEN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignmnet of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	10
PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT DENIED HIEB A FAIR TRIAL	10
D. <u>CONCLUSION</u>	211

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Cross</u> 180 Wn.2d 664, 327 P.3d 660 (2014).....	11
<u>In re Pers. Restraint of Glasmann</u> 175 Wn.2d 696, 286 P.3d 673 (2012).....	10, 19, 20
<u>State v. Bautista–Caldera</u> 56 Wn.App. 186, 783 P.2d 116 (1989).....	17
<u>State v. Belgarde</u> 110 Wn.2d 504, 755 P.2d 174 (1988).....	16
<u>State v. Bennett</u> 161 Wn.2d 303, 165 P.3d 1241 (2007).....	13
<u>State v. Claflin</u> 38 Wn. App. 847, 690 P.2d 1186 (1984).....	10
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	10
<u>State v. Dhaliwal</u> 150 Wn.2d 559, 79 P.3d 432 (2003).....	12
<u>State v. Emery</u> 174 Wn.2d 741, 278 P.3d 653 (2012).....	14
<u>State v. Evans</u> 163 Wn. App. 635, 260 P.3d 934 (2011).....	15
<u>State v. Feely</u> 192 Wn. App. 751, 368 P.3d 514 <u>review denied</u> , 185 Wn.2d 1042, 377 P.3d 762 (2016)	14, 15
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	21

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Gaff</u> 90 Wn. App. 834, 954 P.2d 943 (1998).....	11
<u>State v. Guizzotti</u> 60 Wn. App. 289, 803 P.2d 808 <u>review denied</u> , 116 Wn.2d 1026, 812 P.2d 102 (1991).....	16
<u>State v. Johnson</u> 158 Wn. App. 677, 243 P.3d 936 (2010).....	14
<u>State v. Kroll</u> 87 Wn.2d 829, 558 P.2d 173 (1977).....	10
<u>State v. Lindsay</u> 180 Wn.2d 423, 326 P.3d 125 (2014).....	10, 18, 21
<u>State v. Monday</u> 171 Wn.2d 667, 257 P.3d 551 (2011).....	12
<u>State v. Pierce</u> 169 Wn. App. 533, 280 P.3d 1158 (2012).....	11, 16
<u>State v. Powell</u> 62 Wn.App. 914, 816 P.2d 86 (1991) <u>review denied</u> , 118 Wn.2d 1013, 824 P.2d 491 (1992)	17
<u>State v. Ramos</u> 164 Wn. App. 327, 263 P.3d 1268 8 (2011).....	12, 17
<u>State v. Smiley</u> 195 Wn.App. 185, 379 P.3d 149 (2016).....	17
<u>State v. Thierry</u> 190 Wn.App. 680, 360 P.3d 940 (2015) <u>review denied</u> , 185 Wn.2d 1015, 368 P.3d 171 (2016)	17
<u>State v. Thorgerson</u> 172 Wn.2d 438, 258 P.3d 43 (2011).....	20

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Walker</u> 164 Wn. App. 724, 265 P.3d 191 (2011).....	20
<u>State v. Warren</u> 165 Wn.2d 17, 195 P.3d 940 (2008).....	10
 <u>FEDERAL CASES</u>	
<u>Berger v. United States</u> 295 U.S. 78, 55 S. Ct. 629, 79 L.Ed. 1314 (1935).....	21
<u>Bruno v. Rushen</u> 721 F.2d 1193 (9th Cir. 1983)	18
<u>Greer v. Miller</u> 483 U.S. 756, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987).....	10
<u>Hawthorne v. United States</u> 476 A.2d 164 (D.C.1984)	11
<u>In re Winship</u> 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	13
<u>United States v. Carter</u> 236 F.3d 777 (6th Cir. 2001)	20
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
U.S. Const. amend. XIV	10
Wash. Const. art. I, § 3.....	10

A. ASSIGNMENT OF ERROR

Prosecutorial misconduct during closing argument violated appellant's due process right to a fair trial.

Issue Pertaining to Assignment of Error

Appellant, Andrew Hieb, was charged with multiple counts of sexually abusing a child. The State's case rested solely on the testimony of the complaining witness. Hieb's reasonable doubt defense was supported by (1) evidence that impeached the complaining witnesses' testimony; (2) the lack of any corroborating evidence; and (3) the State's failure to adequately investigate the allegations. In her closing argument the prosecuting attorney committed misconduct in a variety of ways, including, improper appeals to the jury to balance Hieb's rights with the rights of the complaining witness, suggesting that the jury would be guilty of blaming the complaining witness for the sexual abuse if it did not convict Hieb, and misstating the evidence and the reasonable doubt standard. In this case did the cumulative effect of the prosecutor's improper and prejudicial statements deprive Hieb of his right to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Andrew Hieb with two counts of first degree child rape (Counts I and IV), one count of attempted first degree rape (Count III), one count of first degree child molestation (Count II) and one count of second degree child molestation (Count V) against D.O. CP 36-38.

Hieb was also charged with one count of first degree child molestation against D.W. (Count VI). CP 38-39. That charge was severed from the charges against D.O. RP 375.¹

A jury returned guilty verdicts on the charges against D.O. (Counts I through V). CP 72-77. Following the verdicts Hieb pleaded guilty to an amended complaint charging him with second degree child molestation against D.W. (Count VI). CP 80-89; RP 1107-1119. Hieb was sentenced to concurrent sentences on all counts to a total of 264 months to life. CP 120. Hieb appeals. CP 134.

2. Substantive Facts

Carol Orcutt is D.O.'s mother. RP 684. Orcutt also has a granddaughter, D.W. Id. Sometime before D.O. started elementary

¹ RP refers to the verbatim report of proceedings of the hearings and trial, which are sequentially paginated. 1RP refers to the verbatim report of proceedings of the January 18, 2018 hearing.

school, D.O.'s father, Michael Hassenger, stopped living with Orcutt and D.O. RP 685-687. D.O., who was 16 years old at the time of trial, has lived primarily with her grandmother, who the family calls Oma, since she has been 11 years old. She started living with her grandmother because she was having a difficult time getting ready for school and it was thought that living with her grandmother would help. RP 487, 496-497, 498.

Orcutt and Hieb have lived in the same neighborhood since they were children and have known each other for 45 years. RP 693-694. The two went to school together and Orcutt considered Hieb like a brother. RP 694, 697. Hieb lived in his parent's home with his girlfriend, Gina Hendrix. On the same property there is a shed and a trailer. RP 695-696. The home is about three blocks from Orcutt's home. RP 695. Oma, Orcutt's mother, too lives about three or four blocks from Orcutt. RP 496-497, 498.

Hieb helped Orcutt whenever she needed something, including giving her rides to her mother's home. RP 697, 730. Orcutt would see Hieb two or five times a week, spend holidays with him, and Orcutt and Hendrix made arts and crafts together. RP 695, 697.

D.O. testified that when she lived with Orcutt she frequently saw Hieb mostly at Orcutt's house but occasionally at Hieb's house. RP 503-504. D.O. would play with Hieb and she considered him part of her

family. D.O. also helped Hieb with chores but stopped when she was in the ninth grade. RP 505-506. D.O. testified to several incidents when she was in elementary school and living with Orcutt that were the basis of the charges against Hieb.

D.O. recalled a time when she was riding with Hieb in Hieb's blue Saturn. She recalled that Hieb stopped the car and put his penis in her mouth. D.O. did not remember how long they had been in the car, where they were when Hieb stopped the car, where the two were going, if Hieb said anything to her or if he ejaculated. RP 512-515. D.O. did not know what time of the year the incident occurred. RP 574. She did remember that was the only time she was ever in the car with Hieb. RP 516. D.O. did not tell police, her mother, or the forensic interviewer, about the incident because she claimed she did not remember it until defense counsel interviewed her shortly before trial. RP 578.

Another encounter that D.O. said she remembered occurred was when D.O. and Hieb were in Orcutt's living room. D.O. said she sat on Hieb's penis, and Hieb had an erection and was bouncing up and down. RP 516-517. D.O. remembered they were both naked, but she did not remember how they become undressed or how she ended up sitting on his penis. RP 516-517. She did not remember how the incident began, how it

ended or if Hieb said anything to her. RP 518, 586. Again, she did not remember at what time of the year it happened. RP 580-581.

According to D.O. there was another incident that also occurred at Orcutt's house. D.O. was in her bedroom on the floor naked and on her back. Hieb rubbed and licked her vagina and then rubbed his penis against her vagina until he ejaculated. RP 525-526. D.O. did not know how she became naked nor did she remember any other details. RP 585-586.

On yet another occasion D.O. said both she and Hieb were naked on a couch in Orcutt's house. She remembered that she was on her back and Hieb was on top of her. RP 518, 521. D.O. recalled that Hieb attempted to put his penis in her vagina, then at some point he flipped her over and attempted to put his penis in her butt. Id. D.O. did not believe Hieb succeeded in penetrating her with his penis. RP 519. Hieb also touched her breasts, rubbed her vagina and more than once put his finger inside her. RP 521. D.O. did not know how she and Hieb became naked, when the incident occurred, how the incident began, or how it ended. RP 520, 585-586.

D.O. also testified that once when her father was still living with her and Orcutt, she was at Hieb's house and he told his girlfriend, Hendrix, that he was going to take D.O. home. Instead, Hieb took her to the shed on Hieb's property. Hieb blew up an air mattress that they laid on

and he rubbed her vagina and put his penis in her mouth. RP 522-523. D.O. recalled she was naked and Hieb had his pants down. RP 522. Hieb stopped when they heard the voices of her father and Hendrix. She then dressed and Hieb took her home. RP 523-24. She did not recall any other details.

According to D.O., her last sexual encounter with Hieb was about three years earlier, when she was 13 years old. RP 537. D.O. and Hieb were in Hieb's garage where Hieb was showing her his brother's car. Hieb reached around D.O. from behind, grabbed her breasts and commented they had gotten big. RP 507-509. D.O. said that was the last time she had contact with Hieb. RP 509. D.O. admitted, however, that when she was 15 years old, she asked Hendrix and Hieb if they would print photographs of her taken at her 10th grade homecoming. RP 551.

D.O. also admitted when she later spoke to Jennifer Schooler, a child forensic interviewer who she saw after she made her allegations against Hieb, that she told Schooler she did not remember where she was when Hieb put his penis in her mouth and she was not sure if she had a clear memory of anything that happened with Hieb. RP 591-593. She also told Schooler she could not remember any specific time when Hieb put his fingers inside her. RP 593-594. Although D.O. could not remember anything specific that Hieb said to her during the incidents,

anything specific that Hieb said to her during the incidents, during her trial testimony recalled that Hieb told her not to tell her mother. RP 529.

D.O. had almost no contact with her father after he moved out of the family home. Shortly after she made the allegations against Hieb, she was given her father's phone number and has had contact with him almost daily. RP 559, 658-659, 687.

D.O. also said that she spoke to her friends about what happened with Hieb. RP 544, 606. And, that she told her female adult cousin, Frankie, but she asked Frankie not to tell anyone because she believed the abuse was her fault. RP 608, 659. A few months after she spoke to Frankie, D.O. told her mother, Orcutt, that Hieb touched her. She made the disclosure when Orcutt picked D.O. at Oma's house to take her to the school bus stop. RP 530, 608. D.O. said that when Orcutt was driving her to the bus stop Orcutt told D.O. something had happened between Hieb and D.W, Orcutt's granddaughter and D.O.'s niece. RP 531. D.O. said she was worried the same things that happened to her would happen to D.W. and that was why she told Orcutt that Hieb touched her. RP 532.

Orcutt testified that on October 9, 2016, she spoke with Michelle Reddekopp, D.W.'s other grandmother. Reddekopp told Orcutt there was an allegation regarding D.W. and Hieb. RP 722-723. The next morning Orcutt went to her mother's house to pick up D.O. and drive her to the bus

stop. Orcutt said she asked D.O. if Hieb had ever touched her and D.O. told Orcutt that he had. RP 724. D.O. then went to school and when she returned home to Oma's house, Orcutt called police. RP 533, 726-727.

Although D.O. testified she had not seen Hieb after the incident in the garage three years earlier, Orcutt testified that she and D.O. went to dinner at Hieb's house one week before D.O. spoke to Orcutt about Hieb. RP 732. Orcutt could not recall D.O. spending time alone with Hieb, other than once ten years earlier when Hieb babysat D.O. while Orcutt went to a casino to celebrate her mother's birthday. RP700-701, 739-740. Orcutt testified that the times when she was not with her, D.O. was taken care of by her father. RP 748. Orcutt also testified D.O. has never gone to Hieb's home by herself. RP 751.

Deputy Brain Greiman responded to Orcutt's call to police and met with D.O., Orcutt and Orcutt's mother. RP 441-442. Greiman asked D.O. a series of questions. RP 455. She was specifically asked if Hieb ever ejaculated and contrary to her testimony at trial (RP 525-526), D.O. told Greiman she could not remember. RP 456. D.O. herself testified she did mention anything to Greiman about the incident in the Saturn nor did she mention to Greiman any details about any of the sexual assaults she testified occurred. RP 534, 576.

Detective Jessica Whitehead was assigned to investigate D.O.'s allegations. RP 766-767. She arranged for D.O. to be interviewed by Schooler and she observed the interview through a two-way mirror. RP 768-769, 912. Schooler interviewed D.O. on October 20, 2016. RP 874, 898. Following the interview Schooler referred D.O. for a medical exam and told Orcutt to have D.O. examined. RP 885, 927, 938. D.O. was never examined. RP 771, 928.

After Schooler's interview Whitehead arrested Hieb. RP 778. Whitehead's investigation following Schooler's interview with D.O. consisted of speaking with Orcutt. RP 778. Whitehead did not try to contact D.O.'s father, the friends D.O. said she told what happened between her and Hieb, or D.O.'s cousin Frankie. RP 787-789. Whitehead did not search the locations where D.O. alleged the sexual encounters with Hieb occurred. RP 789.

Schooler was permitted to testify that a child may delay disclosing abuse for several reasons. She opined those reasons are that a child may not have known the abuse was wrong, the child is perhaps worried someone will get into trouble, the child is too embarrassed to say anything, or the abuser told the child not to tell anyone. RP 872.

C. ARGUMENT

PROSECUTORIAL MISCONDUCT DURING CLOSING
ARGUMENT DENIED HIEB A FAIR TRIAL

Prosecutorial misconduct can violate the due process right to a fair trial. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. In this case, the prosecutor committed multiple instances of misconduct throughout closing argument. The cumulative effect of that misconduct denied Hieb his right to a fair trial, requiring reversal of the convictions.

A prosecutor has a duty to “ensure a verdict free of prejudice and based on reason.” State v. Kroll, 87 Wn.2d 829, 835-36, 558 P.2d 173 (1977); State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). A prosecutor breaches that duty and reversal of a conviction is required if a prosecutor's comments are improper and prejudicial. State v. Lindsay, 180 Wn.2d 423, 431, 326 P.3d 125 (2014) (citing State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008)).

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, he or she must seek convictions based only on probative evidence and sound reason. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). "A prosecutor may

not properly invite the jury to decide any case based on emotional appeals." State v. Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). Emotional appeals that include arguments intended to provoke fear, anger, a desire for revenge, or which are irrelevant, irrational, or inflammatory are improper appeals to the jury's passion or prejudice. In re Pers. Restraint of Cross, 180 Wn.2d 664, 724, 327 P.3d 660 (2014).

One such improper emotional appeal is when the prosecutor "steps into the victim's shoes and becomes the victim's representative." State v. Pierce, 169 Wn. App. 533, 554, 280 P.3d 1158 (2012). Where a prosecutor uses the first person singular rhetorical device, it has "the dual effect of placing the prosecutor in the victim's shoes and turning the prosecutor into [the victim's] personal representative." Id. (citing, Hawthorne v. United States, 476 A.2d 164,172 (D.C.1984)). That is what happened here.

The prosecuting attorney began her closing argument by impermissibly assuming the role of D.O. and thereby becoming her personal representative.

MS. KOOIMAN: Thank you, Your Honor. "When it happened, I didn't understand what he was doing to me. I didn't understand the gravity --"

MR. TOLZIN: Objection, Your Honor. At this time, counsel is speaking in the first person. She is playing to the prejudice and the passions of the jury. This is inappropriate.

THE COURT: Overruled.
You may proceed.

MS. KOOIMAN: Thank you.

"I didn't understand the gravity of what was happening to me. I trusted him. I didn't want to make my mom mad. I thought it was my fault."

MR. TOLZIN: Objection.

THE COURT: Objection is overruled.

MS. KOOIMAN: "He stopped when I told him to stop."

RP 995.

Prosecutors are also forbidden from stating a personal belief as to the credibility of witnesses. State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011); State v. Dhaliwal, 150 Wn.2d 559, 577–78, 79 P.3d 432 (2003); State v. Ramos, 164 Wn. App. 327, 341 n. 4, 263 P.3d 1268 8 (2011) (prosecutor improperly stated personal belief in credibility of witness in arguing "the truth of the matter is [the police witnesses] were just telling you what they saw and they are not being anything less than 100 percent candid."). The prosecutor later told jurors that D.O. was credible and that "She told the truth." RP 1002. The defense objection was again overruled. Id.

The prosecutor's comments impermissibly conveyed that she was D.O.'s personal representative and impermissibly conveyed her personal belief in D.O.'s credibility.

In her rebuttal, the prosecutor doubled-down. She appealed to the jury to make its decision based on emotion. She also misstated the evidence and the reasonable doubt standard.

The prosecutor told jurors “What is before you is justice that is due the accused is also due the accuser.” RP 1082. When Hieb’s objection was again overruled the prosecutor continued by telling jurors, “When you look at that [justice to the accuser], you look at what does the victim, [D.O.], experience in this? And you consider everything carefully. You consider what she went through and what she was able to tell you.” RP 1083.

Later, the prosecutor told the jury, “You are always going to want more [evidence].” And, “I submit to you that the State has proven beyond a reasonable doubt that he is guilty -- do you have enough to be confident in that decision? If you have enough to be confident in that decision, then we have proven it beyond a reasonable doubt.” RP 1087.

The presumption of innocence and corresponding burden of proof beyond a reasonable doubt are the “bedrock[s] upon which [our] criminal justice system stands.” State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); accord In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). “[T]he State acts improperly when it mischaracterizes the standard [burden 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, review denied, 185 Wn.2d 1042, 377 P.3d

762 (2016) (citing Johnson, 158 Wn. App. At 684). To mislead the jury regarding these fundamental principles is prejudicial because it reduces the State's burden of proof and undermines a defendant's rights to due process. State v. Johnson, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010).

Telling the jury that it needed to balance Hieb's rights with the rights of the victim was a gross misstatement of the law. The sole role of the jury is to determine whether the State has proved every element of the charged offenses beyond a reasonable doubt. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). The prosecutor's suggestion that the jury needed to "balance" its reasonable doubt determination by considering the "justice" "due the accuser" was an improper misstatement of the law.

The prosecutor's appeal to jurors to consider what D.O. experienced and "went through" compounded the misstated the reasonable doubt standard by inviting the jury to decide the case on its emotional response. The prosecutor plucked the strings of emotion and passion in suggesting to the jury that it should convict Hieb based on what D.O. experienced and "went through" and not on a reasoned analysis of the evidence or lack of evidence. Whether D.O. suffered an emotional impact from the crimes for which Hieb stood accused has no proper role to play and is not part of the reasonable doubt standard.

The prosecutor's other statement, that the jurors would always want more evidence but if they were confident in their decision then the State met the reasonable doubt standard, improperly minimized that standard. See Feely 192 Wn. App. at 752 (it is improper for a prosecutor addressing the reasonable doubt standard in closing argument to trivialize or minimize the State's burden). A person can be confident about a decision, but that confidence can be based on faith, feeling, intuition or other personal reasons instead of an abiding belief based on evidence and reason. Moreover, telling the jury that it would always want more evidence aggravated the argument by improperly suggesting it should disregard the weaknesses in the State's case. See State v. Evans, 163 Wn. App. 635, 645, 260 P.3d 934 (2011) (by telling the jury it was always going to wish it had more evidence, the prosecutor aggravated the erroneous truth-seeking argument by suggesting that the jurors disregard weaknesses in the State's case).

These were not the prosecutor's only improper comments. The prosecutor also told jurors that "Defense counsel makes the comments about the shortcomings of the law enforcement investigation. I submit to you that those shortcomings don't change what happened to [D.O.]. [D.O.] has been blamed for the defendant's actions by him telling her that it is her fault. She is the one in trouble." RP 1086. Hieb again objected because

there was no evidence that he told her it was her fault, or she was the one in trouble. Id. The court, however, did not admonish the prosecutor but merely reminded the jury that counsel's statements were not evidence. The prosecutor apparently viewed that as a license to continue in the same vein because she went on to argue, "In shifting the spotlight to law enforcement and the potential shortcomings, the defense is essentially asking you to blame her again for what law enforcement..." but before she could finish the sentence Hieb again objected and the court told the jury to disregard. RP1086-1087. Nonetheless, the prosecutor continued down the same road and told the jury "[D.O.] shouldn't pay for law enforcement's potential shortcomings." RP 1087.

A prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record. State v. Pierce, 169 Wn. App. at 553. "This rule is closely related to the rule against pure appeals to passion and prejudice because appeals to the jury's passion and prejudice are often based on matters outside the record." Id. The prosecutor violated both these rules.

The prosecutor's comments were a clear misstatement of the evidence. There was no evidence that Hieb told D.O. anything was her fault, that he blamed her, or that she would be in trouble for the crimes Hieb stood accused of. D.O. testified Hieb only told her not to tell her

mother. RP 529. The prosecutor coupled that misstatement with the pure emotional appeal that if the jury determined the evidence was insufficient to convict Hieb because police failed to adequately investigate the case, they (jurors) would be telling D.O. it was her fault that she was sexually abused. The statements had no other purpose than to impermissibly send the jury the message that if it did not convict Hieb based on solely on D.O.'s credibility despite any doubts about her veracity or the lack of evidence they would suffer the guilt of blaming D.O. for being abused.

Further, prosecutors may not urge jurors to convict in order to protect community values. Ramos, 164 Wn. App. at 333. Courts have consistently held that in sex abuse cases that turn on the credibility of the testimony of a child witness, it is an improper appeal to the passion and prejudice of jurors for the prosecutor to suggest that if they did not rely on the testimony of the child it would send the message that society cannot protect children from abuse.² The prosecutor's comments here went even further in inflaming the jury's passion and prejudice than in those cases

² See State v. Smiley, 195 Wn.App. 185, 194, 379 P.3d 149 (2016) (prosecutor argued if corroborating evidence is required society could not prosecute child abusers); State v. Thierry, 190 Wn.App. 680, 690-691, 360 P.3d 940 (2015) review denied, 185 Wn.2d 1015, 368 P.3d 171 (2016) (prosecutor argued if the defendant's lack of credibility argument had any merit, then the State might as well give up prosecuting child sex abuse cases); State v. Powell, 62 Wn.App. 914, 918 n. 4, 816 P.2d 86 (1991) review denied, 118 Wn.2d 1013, 824 P.2d 491 (1992) (where prosecutor argued the refusal to believe children would result in declaring open season on children); and State v. Bautista-Caldera, 56 Wn.App. 186, 195, 783 P.2d 116 (1989) (prosecutor argued the jury should let the victim and children know "that you're ready to believe them and enforce the law on their behalf").

where prosecutors urged jurors to convict in order to protect community values. The prosecutor urged jurors to convict or forever be saddled with guilt for blaming D.O. for being sexually abused. In sum, the prosecutor provided jurors with the false dilemma of either convicting Hieb based on D.O.'s impeached and uncorroborated testimony or becoming accomplices to the crimes D.O. accused Hieb of committing.

The statements also impermissibly maligned the integrity of defense counsel. Our Supreme Court has held “a prosecutor must not impugn the role or integrity of defense counsel.” State v. Lindsay, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). “Prosecutorial statements that malign defense counsel can severely damage an accused’s opportunity to present his or her case and are therefore impermissible.” Id. at 432 (citing Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (per curiam)).

At no point did the defense counsel make any argument that even suggested he was blaming D.O. Counsel argued that D.O. was not credible and because of that, and the lack of corroborating evidence and the State’s failure to conduct an adequate investigation, the State failed to prove the crimes beyond a reasonable doubt. RP 1055-1056, 1065-1067, 1071 (no medical examination or police contact with other potential witnesses); RP 1069-1071 (police failed to investigate D.O.’s stories). The prosecutor impermissibly maligned defense counsel in twisting

counsel's arguments into Hieb blaming D.O. for the abuse she said he committed.

These comments were not the only time the prosecutor misstated the evidence. D.O. testified to one occasion where she sat on Hieb's penis and to another occasion where Hieb penetrated her digitally multiple times. RP 516-517, 521. One defense reasonable doubt argument was that there was a lack of any corroborating evidence, including any medical evidence, supporting D.O.'s allegations. In her rebuttal, the prosecutor argued, "Who is to say that torn hymen is from the defendant? There is nothing to say that. There's other ways for those things to happen." RP 1080. There was no evidence whatsoever that D.O. suffered a torn hymen, nonetheless the court overruled Hieb's objection to this misstatement of the facts. *Id.* The statements improperly suggested to jurors that D.O.'s hymen was torn, consistent with D.O.'s testimony she was penetrated, despite the feint that there was no evidence Hieb caused the torn hymen.

Reviewing claims of prosecutorial misconduct is not a matter of determining whether the evidence is sufficient to convict. *Glasmann*, 175 Wn.2d at 710. Rather, reversal is required if there is a timely objection to the prosecutor's improper comments and a "substantial likelihood that the misconduct affected the jury verdict." *Id.* at 704; *State v. Thorgerson*, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011).

The State's case rested entirely on D.O.'s credibility. Her credibility was suspect given her inability to recall any details of the alleged abuse, and the inconsistencies between her testimony and the testimony of Orcutt, the police, and the forensic interviewer. Hieb's reasonable doubt defense focused on that, and on the lack of any evidence corroborating D.O.'s testimony and the State's failure to adequately investigate D.O.'s allegations. See RP 1052, 1055 (inadequate investigation); RP 1054, 1067, 1073-1074 (testimony inconsistent with other witnesses' testimony); RP 1059-1063 (D.O. unable to recall any details); RP 1065-1069 (inconsistent testimony and lack of corroboration). Based on the record in this case there was ample evidence for a reasonable juror to harbor a reasonable doubt that Hieb committed the heinous offenses that D.O. said he committed.

The prosecutor's closing argument was littered with improper comments. Their cumulative effect prejudiced Hieb's well-supported reasonable doubt defense. See Glasmann, 286 P.3d at 679 and State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011) (the cumulative effect of misconduct can even overwhelm the power of instruction to cure). That the more egregious comments were made in rebuttal increased their prejudicial effect. Lindsay, 180 Wn.2d at 443; accord United States v. Carter, 236 F.3d 777, 788 (6th Cir. 2001) (finding it significant that the

prosecutor's improper comments occurred during rebuttal argument). There was a substantial likelihood the improper comments affected the jury's verdict.

“Prosecuting attorneys are quasi-judicial officers who 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). While a prosecutor may strike hard blows against the defense, she may not strike foul ones. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935). The prosecutor breached her duty by unfairly crossing the line and striking foul blows. This court should hold that the prosecutor's misconduct deprived Hieb of a fair trial.

D. CONCLUSION

Cumulatively the multiple incidents of misconduct denied Hieb a fair trial. This court should reverse Hieb's convictions and remand for retrial.

DATED this 28th day of January 2019.

Respectfully submitted,
NIELSEN, BROMAN & KOCH, PLLC


ERIC J. NIELSEN, WSBA No. 12773
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

January 28, 2019 - 4:50 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51874-1
Appellate Court Case Title: State of Washington, Respondent v. Andrew F. Hieb, Appellant
Superior Court Case Number: 16-1-04248-3

The following documents have been uploaded:

- 518741_Briefs_20190128164927D2525092_8539.pdf
This File Contains:
Briefs - Appellants
The Original File Name was BOA 51874-1-II.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us

Comments:

Copy mailed to: Andrew Hieb 407047 Coyote Ridge Corrections Center PO Box 769 Connell, WA 99362

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Eric J. Nielsen - Email: nielsene@nwattorney.net (Alternate Email: Sloanej@nwattorney.net)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20190128164927D2525092