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NO. 37065-8-III

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

CARMELO HERNANDEZ SIERRA,

Appellant.

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BRIEF OF APPELLANT,  
CARMELO HERNANDEZ SIERRA

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRANT COUNTY  
THE HONORABLE DAVID G. ESTUDILLO, JUDGE

---

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## I. INTRODUCTION

In September 2018, Carmelo Hernandez Sierra was charged with raping his 14-year-old stepdaughter, N.M. A few months later, N.M.'s mother applied for a U visa, a federal program that grants legal resident status to victims of crimes who help law enforcement. She fulfilled the requirements of her U visa application by testifying at trial. Mr. Hernandez Sierra attempted to cross-examine N.M. and her mother about the U visa application. The trial court permitted questioning of N.M.'s mother but found the connection to N.M. too attenuated.

At trial, Mr. Hernandez Sierra testified in his defense. The prosecuting attorney repeatedly argued that he was coached by his attorney. In rebuttal closing, the prosecutor argued that "all of us" have an "abiding belief" in the "innocence of children." The prosecutor also argued that N.M. "probably will never trust men again," and "will have to live with this every day until she lays her head down on her pillow to die."

This Court should reverse for three reasons. First, the trial court erred by prohibiting Mr. Hernandez Sierra from cross-examining N.M. about her mother's U visa application. Second, the prosecutor committed prejudicial misconduct that could not be cured by an instruction. Third, Mr. Hernandez Sierra's trial attorney provided ineffective assistance of counsel by failing to object to the state's rebuttal closing argument.

## **II. ASSIGNMENTS OF ERROR**

Assignment of Error 1: The trial court erred by refusing to allow Mr. Hernandez Sierra to cross-examine the state's key witness, N.M., about her motivation to testify in order to help her mother secure a U visa.

Assignment of Error 2: The prosecutor committed misconduct by repeatedly disparaging defense counsel and arguing that counsel coached or scripted Mr. Hernandez Sierra's testimony.

Assignment of Error 3: The prosecutor committed misconduct by repeatedly inflaming the jury, misstating the reasonable doubt standard, and undermining the presumption of innocence.

Assignment of Error 4: Mr. Hernandez Sierra's attorney provided ineffective assistance by failing to object to the prosecutor's rebuttal closing argument.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Did the trial court violate Mr. Hernandez Sierra's constitutional right to present a defense by prohibiting him from cross-examining the state's key witness about her motivation to testify?

Issue 2: Did the prosecuting attorney commit prejudicial misconduct, burdening Mr. Hernandez Sierra's constitutional rights to counsel and to testify, by repeatedly disparaging defense counsel and arguing that his testimony was coached?

Issue 3: Did the prosecuting attorney commit prejudicial misconduct, violating Mr. Hernandez Sierra's constitutional right to due process, by inflaming the jury and misstating the reasonable doubt standard?

Issue 4: Did Mr. Hernandez Sierra's trial counsel perform deficiently, prejudicing Mr. Hernandez Sierra, by failing to object to the state's rebuttal closing argument?

#### **IV. STATEMENT OF THE CASE**

In September 2018, Carmelo Hernandez Sierra was married to Corina Carreon. 6/3/19 RP 187. They had one child together, a four-year-old daughter. 6/3/19 RP 67. Ms. Carreon also had two children from a prior relationship: a daughter, fourteen-year-old N.M., and a son, eight-year-old B.M. 6/3/19 RP 63-64. The family resided together in a two-level home in Quincy, WA. 6/3/19 RP 66-67, 87.

The children were citizens, but Ms. Carreon was not. 6/3/19 RP 64, 67, 165. About a year before, in about September 2017, Mr. Hernandez Sierra reported that he and his wife traveled to Wenatchee, WA to meet with an immigration attorney. 5/30/19 RP 75, 78-79. There they learned about the U visa program, which creates a path to legal residency for qualifying victims of crime who assist law enforcement. 5/30/19 RP 75. According to Mr. Hernandez Sierra, after this meeting he, Ms. Carreon, and N.M. joked that they could assault one another and apply for U visas. *Id.*

Ms. Carreon denied that this meeting with an attorney ever occurred. 5/30/19 RP 74-75. According to Ms. Carreon, she and Mr. Hernandez Sierra traveled to Wenatchee to meet with an attorney years earlier regarding a DUI charge against him. 5/30/19 RP 81-82. Ms. Carreon applied for a U visa in February 2019. 5/30/19 RP 81.

Prior to September 2018, Mr. Hernandez Sierra and N.M. had a fine, if not especially close, relationship. 6/3/19 RP 67. N.M. did not feel that he treated her like his daughter and did not consider him her father. 6/3/19 RP 68, 78. She did not like it when Mr. Hernandez Sierra told her to do chores, and they had occasional arguments. 6/3/19 RP 78-79. N.M. felt that Mr. Hernandez Sierra favored his biological daughter over her and her brother. 6/3/19 RP 80.

On September 21, 2018, Mr. Hernandez Sierra woke up at about midnight to go to work. 6/5/19 RP 378. He worked in the fields as a tractor driver and sprayer. 6/5/19 RP 377. He returned home from work for a lunch break around 11:30AM. 6/5/19 RP 380. At the home were N.M. and his four-year-old daughter. *Id.* The day before, September 20, 2018, N.M. had injured her ankle playing soccer. 6/3/19 RP 81. She stayed home from school on the 21st and was on the couch when Mr. Hernandez Sierra got home. 6/3/19 RP 81; 6/5/19 RP 380.

At this point, Mr. Hernandez Sierra's and N.M.'s versions of events diverge. According to Mr. Hernandez Sierra, N.M. initiated a sexual encounter between the two of them. 6/5/19 RP 391. He reported that N.M. went upstairs to his room, laid on his bed, and called him upstairs. 6/5/19 RP 384. Mr. Hernandez Sierra initially went upstairs but went back down because he had to get back to work soon and was feeding his daughter lunch. 6/5/19 RP 387. He reported that N.M. asked him to shave her and threatened to accuse him of abuse if he refused. 6/5/19 RP 384-85. N.M. called to him again and he went back upstairs. 6/5/19 RP 389. He laid down on the bed with N.M. and she straddled him. 6/5/19 RP 389-91. Mr. Hernandez Sierra said that N.M. rubbed against him until he ejaculated between her legs. 6/5/19 RP 393-94. He knew that this was wrong because he was much older than N.M. 6/5/19 RP 403.

According to N.M., the encounter went differently. She reported that Mr. Hernandez Sierra came home for lunch and went into the kitchen with his daughter. 6/3/19 RP 91. Then he came to the couch, lifted N.M., and started pulling or pushing her up the stairs. 6/3/19 RP 99-100, 149. N.M. and Mr. Hernandez Sierra are both similar height and weight, about five feet tall and 170 pounds. 6/3/19 RP 147; 6/5/19 RP 400. N.M. reported that she was confused and did not understand what was happening. 6/3/19

RP 103. She said that Mr. Hernandez Sierra told her “this is what you get” for having an injured ankle. 6/3/19 RP 100.

When they got upstairs, N.M. reported that Mr. Hernandez Sierra pushed her on the bed. 6/3/19 RP 107. He then started performing oral sex on her. 6/3/19 RP 112. After that, N.M. said that Mr. Hernandez Sierra flipped her over, held her down, and tried to insert his penis in her vagina and rectum. 6/3/19 RP 114, 117. She reported that he used spit as a lubricant. 6/3/19 RP 116-17. Eventually, he gave up on intercourse and rubbed his penis between her legs until he ejaculated. 6/3/19 RP 119. At some point, N.M. said, she started screaming. 6/3/19 RP 118. N.M. reported that her younger sister came upstairs and started banging on the bedroom door. 6/3/19 RP 119.

According to N.M., Mr. Hernandez Sierra wiped himself and her off with a shirt and got dressed. 6/3/19 RP 120, 122. She pulled on her clothes and went to the bathroom to cry. 6/3/19 RP 124-25. Before leaving to go back to work, N.M. said that Mr. Hernandez Sierra repeatedly told her to stop crying. 6/3/19 RP 123-24, 126. He told her not to tell her mother because Ms. Carreon would kill them both and kick them out of the house. 6/3/19 RP 128, 134-35.

After Mr. Hernandez Sierra left, N.M. called her mother at work and told her to come home right away. 6/3/19 RP 134. When Ms. Carreon got

home, N.M. said something to the effect of your husband tried to rape me. *Id.* Ms. Carreon immediately took N.M. to the hospital, first in Quincy and then in Wenatchee. 6/3/19 RP 134, 136.

At the hospital, N.M. was interviewed by a sexual assault nurse, Susan LaChapelle. 6/3/19 RP 216. Ms. LaChapelle reported that N.M. disclosed the events described above. 6/3/19 RP 216-18. Based on this disclosure, Ms. LaChapelle called the police. 6/3/19 RP 228. She also examined N.M. and took swabs from places on her body, including between her legs. 6/3/19 RP 226. Ms. LaChapelle did not observe any bruising or injuries on N.M. 6/3/19 RP 224.

Police began investigating N.M.'s allegations. Sergeant Julie Fuller met with both N.M. and her mother. 6/4/19 RP 173. She obtained a warrant to search the family home. 6/4/19 RP 167, 172. Officers did not notice any injuries to N.M. 6/4/19 RP 222; 6/5/19 RP 342. At the house, police collected bedding, blankets, and items of clothing. 6/4/19 RP 200. Police also obtained buccal swabs from N.M. and from Mr. Hernandez Sierra. 6/4/19 RP 210. They sent the items collected, the buccal swabs, and the samples from N.M.'s examination by Ms. LaChapelle to a Washington State Patrol (WSP) lab. 6/4/19 RP 183, 210.

The WSP lab tested the buccal swabs and the swabs of N.M. but did not test the other items. 6/4/19 RP 271. The swabs from N.M.'s buttocks

and perineum contained sperm. 6/4/19 RP 281. The lab technician amplified the DNA from the perineal sample only. 6/4/19 RP 284. This sample contained DNA from two sources, N.M. and a male source. 6/4/19 RP 295. The male component matched Mr. Hernandez Sierra, meaning that it was 24 octillion times more likely to belong to him than to a random male person. 6/4/19 RP 295-96.

The perineal sample also contained human amylase. 6/4/19 RP 293. Amylase is a protein found in various bodily fluids, including saliva, sweat, feces, urine, sperm, and vaginal secretions. 6/4/19 RP 233, 292. It is found in higher concentrations in saliva. 6/4/19 RP 292. The test for amylase is presumptive; it does not test for concentration. 6/4/19 RP 238, 249. The forensic scientist could not offer an opinion as to whether the amylase in the perineal sample came from saliva or from a different bodily fluid. 6/4/19 RP 307.

Mr. Hernandez Sierra was arrested and charged with rape, rape of a child, witness intimidation, and lesser-included charges. CP 1-2. Before trial, in February 2019, N.M.'s mother applied for a U visa. 5/30/19 RP 81. N.M.'s mother, Ms. Carreon, testified at trial. 6/3/19 RP 160. She testified that she understood her "responsibility to cooperate with the prosecutor's office or law enforcement and provide information to assist in the

prosecution of Mr. Hernandez as part of your responsibility with that U visa application.” 6/3/19 RP 194-95.

Before trial, Mr. Hernandez Sierra filed a motion to cross-examine N.M. and her mother about the U visa application. CP 190-98. He argued that both witnesses had a motive to fabricate or embellish allegations against him to create a situation where Ms. Carreon could apply for a U visa. *Id.* The trial court allowed Mr. Hernandez Sierra to question Ms. Carreon about the U visa but prohibited him from raising this evidence when cross-examining N.M. 6/3/19 RP 27. The court found that the connection between N.M. and the U visa was too attenuated, and that questions about it would prejudice N.M. 6/3/19 RP 26. The court did not describe what specific prejudice N.M. would experience, especially given that she is a U.S. citizen. *Id.*

Trial took place in May and June, 2019. CP 220-33. At trial, N.M., Ms. Carreon, and Mr. Hernandez Sierra all testified. *Id.* N.M.’s testimony differed from her mother’s on some points. For example, N.M. testified that she slept on the couch the night before the incident due to her injured ankle. 6/3/19 RP 84-85. Her mother and Mr. Hernandez Sierra both testified that N.M. slept upstairs in her room that night. 6/3/19 RP 172; 6/5/19 RP 378.

Mr. Hernandez Sierra and Ms. Carreon both testified through interpreters. 6/3/19 RP 160; 6/5/19 RP 376. Mr. Hernandez Sierra has a

second-grade education and does not speak English. 6/5/19 RP 442. During his testimony, the prosecutor repeatedly attempted to ask Mr. Hernandez Sierra whether he met with his attorney to prepare scripted answers. 6/5/19 RP 421-22. Defense counsel objected, and the trial court sustained those objections. *Id.* In rebuttal closing argument, the prosecutor revisited this assertion. He argued to the jury that defense counsel “was leading [Mr. Hernandez Sierra] the whole way,” and Mr. Hernandez Sierra “followed the script” planned out by his attorney. 6/6/19 RP 547-48.

In rebuttal closing argument, the prosecutor also commented on the reasonable doubt standard. Referencing the reasonable doubt instruction, he told the jury that an “example of an abiding belief” is the belief that “all of us” have in the “innocence of children.” 6/6/19 RP 551. He then moved on to the alleged victim, N.M. The prosecutor described the “devastation” she experienced, including that she “probably will never trust men again” and “will have to live with this every day until she lays her head down on her pillow to die.” 6/6/19 RP 556.

The prosecutor concluded his rebuttal closing argument with a creative description of the jury’s role. 6/6/19 RP 558-59. He told a story about a young man, an old man, and a bird. *Id.* The young man holds the bird and asks the old man if the bird is alive or dead. *Id.* Regardless of his answer, the young man plans to make the old man look foolish by either

releasing the live bird or by killing it and revealing a dead bird. *Id.* The old man replies that the bird “is in your hands.” 6/6/19 RP 559. The prosecutor urged the jury that, like the bird in the story, this case “is in your hands.” 6/6/19 RP 559-60.

The jury convicted Mr. Hernandez Sierra of rape in the second degree, rape of a child in the third degree, indecent liberties, and witness tampering. 6/7/19 RP 103. The jury also found that Mr. Hernandez Sierra and N.M. were part of the same household or family, that N.M. was under the age of 15 at the time of the events, and Mr. Hernandez Sierra urged her to withhold testimony or withhold information from law enforcement. 6/7/19 RP 104-05.

Mr. Hernandez Sierra was sentenced on August 19, 2019. 8/19/19 RP 564. At sentencing, the parties and the trial court agreed that the convictions for rape and rape of a child merged, and Mr. Hernandez Sierra should only be sentenced for the greater offense. 8/19/19 RP 565-6. The parties also agreed that the trial court had little discretion in this case due to the enhancements found by the jury. 8/19/19 RP 571-72. Mr. Hernandez Sierra was sentenced to an indeterminate sentence, 300 months to life, for rape and indecent liberties, and to 12 months for witness tampering, all served concurrently. 8/19/19 RP 573-74. He appeals. CP 620-41.

## V. ARGUMENT

This Court should reverse for three reasons. First, the trial court violated Mr. Hernandez Sierra's constitutional right to present a defense by prohibiting cross-examination of the state's key witness, N.M., about her mother's U visa application. Second, the prosecutor committed prejudicial misconduct by repeatedly disparaging defense counsel, mischaracterizing the reasonable doubt standard, undermining the presumption of innocence, and appealing to jurors' passions and prejudices. Third, Mr. Hernandez Sierra's counsel provided ineffective assistance by failing to object to the prosecutor's rebuttal closing argument.

### **A. The Trial Court Violated Mr. Hernandez Sierra's Constitutional Right to Present a Defense by Prohibiting him from Cross-Examining N.M. About her Mother's U Visa Application.**

At trial, the state presented testimony from only one direct witness: the alleged victim, N.M. Mr. Hernandez Sierra attempted to cross-examine N.M. about her motivation to testify. As a result of N.M.'s allegations, her mother had the opportunity to testify against Mr. Hernandez Sierra and thus apply for a U visa. Without N.M.'s testimony, the state would have no case, her mother would be unable to testify, and her mother would not be able to maintain her U visa application. The trial court denied Mr. Hernandez Sierra's motion in part and refused to let him raise this evidence when cross-examining N.M.

By shielding the state’s key witness, the trial court erred and violated Mr. Hernandez Sierra’s constitutional right to present a defense. Washington courts apply a two-step standard of review to evaluate a trial court’s evidentiary rulings. *State v. Clark*, 187 Wn.2d 641, 648-56, 389 P.3d 462 (2017); *State v. Arndt*, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019). First, appellate courts review evidentiary rulings for an abuse of discretion. *Clark*, 187 Wn.2d at 648-56; *Arndt*, 194 Wn.2d at 797-98. Abuse of discretion occurs when, considering the purposes of the trial court’s discretion, it is exercised on untenable grounds or for untenable reasons. *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990). Second, appellate courts review de novo whether those evidentiary rulings violated the accused’s Sixth Amendment rights. *Clark*, 187 Wn.2d at 648-56; *Arndt*, 194 Wn.2d at 797-98.

**1. The right to present a defense includes the right to cross-examine witnesses about their motives and credibility.**

Mr. Hernandez Sierra had a right to present a full defense, which included fully cross-examining the state’s witnesses. “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). An accused’s right to present a defense, including the right to cross-examine

witnesses, is essential to our system of jurisprudence. *Id.* “The right to confront and cross-examine adverse witnesses is [also] guaranteed by both the federal and state constitutions.” *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)).

Cross-examination is “the principal means by which the believability of a witness and the truth of his testimony are tested.” *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Its purpose is to ensure that “the prosecution’s case survive[s] the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Through cross-examination, the accused can expose a witness’s bias, prejudice, or ulterior motive to testify. *Davis*, 415 U.S. at 316.

The ability to cross-examine is especially critical when the state’s case rests on the credibility of a key witness. “Demonstrating bias on the part of the key witness has long been deemed an important element of a defendant’s right to present a defense.” *State v. Bedada*, \_\_ P.3d \_\_, 2020 WL 2315785, \*9 (Wn. Ct. App. May 11, 2020) (citing *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937 (2009)). An accused “enjoys more latitude to expose the bias of a key witness.” *Fisher*, 165 Wn.2d at 752.

It is reversible error for a court to reduce the defendant's "trial defense to shallow cross-examinations of the State's witnesses." *State v. Ortuno-Perez*, 196 Wn. App. 771, 775, 385 P.3d 218 (2016). While the right to present a defense is not absolute, the defendant need only establish that the evidence he seeks to introduce is minimally relevant. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Evidence is relevant if it tends to "make the existence of any fact of consequence more probable or less probable than it would be without the evidence." *Darden*, 145 Wn.2d at 624; ER 401. If relevant, the burden is on the state to show that the evidence is prejudicial and must be excluded. *Darden*, 145 Wn.2d at 622. For highly probative evidence, "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

**2. The trial court erred and abused its discretion by prohibiting Mr. Hernandez Sierra from questioning N.M. about her mother's U visa application.**

Here, Mr. Hernandez Sierra sought to cross-examine N.M. about her about her mother's application for a U visa. "A U visa grants temporary legal resident status to a person who is the victim of a qualifying crime and who helps law enforcement investigate or prosecute that crime." *State v. Romero-Ochoa*, 193 Wn.2d 341, 344, 440 P.3d 994 (2019). A parent of an alleged victim may apply for a U visa as an "indirect victim," so long as the

parent also assists law enforcement. Dep't of Homeland Security, *U Visa Law Enforcement Certification Resource Guide*, 13, [https://www.dhs.gov/xlibrary/assets/dhs\\_u\\_vis\\_a\\_certification\\_guide.pdf](https://www.dhs.gov/xlibrary/assets/dhs_u_vis_a_certification_guide.pdf) (last visited May 14, 2020).

Evidence of immigration status may be admitted according to the procedures set forth in ER 413(a). This rule provides:

(a) Criminal Cases; Evidence Generally Inadmissible. In any criminal matter, evidence of a party's or a witness's immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the criminal offense with which the defendant is charged, or to show bias or prejudice of a witness pursuant to ER 607. The following procedure shall apply prior to any such proposed uses of immigration status evidence to show bias or prejudice of a witness:

(1) A written pretrial motion shall be made that includes an offer of proof of the relevancy of the proposed evidence.

(2) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.

(3) If the court finds that the offer of proof is sufficient, the court shall order a hearing outside the presence of the jury.

(4) ***The court may admit evidence of immigration status to show bias or prejudice if it finds the evidence is reliable and relevant, and that its probative value outweighs the prejudicial nature of evidence of immigration status.***

(5) Nothing in this section shall be construed to exclude evidence that would result in the violation of a defendant's constitutional rights.

ER 413(a) (emphasis added). A limiting instruction may mitigate whatever prejudice may otherwise result from admitting this evidence. *Bedada*, \_\_\_ P.3d \_\_\_, 2020 WL 2315785 at \*6.

Mr. Hernandez Sierra followed the procedures set forth in ER 413 and filed a motion to question both N.M. and her mother. CP 190-98. N.M. is a U.S. citizen, but her mother, Ms. Carreon, is not. 6/3/19 RP 64, 165. Ms. Carreon assisted law enforcement in this case and applied for a U visa on that basis. 6/3/19 RP 194. Mr. Hernandez Sierra reasoned that both Ms. Carreon and N.M. had a reason to embellish their testimony in order to bolster Ms. Carreon's U visa application. He asserted that he and Ms. Carreon spoke to an immigration attorney about a year before the events in this case. 5/30/19 RP 75, 78-79. After this meeting, Mr. Hernandez Sierra alleged that he, Ms. Carreon, and N.M. joked that they could assault one another and apply for U visas. 5/30/19 RP 75.

The state opposed Mr. Hernandez Sierra's motion, arguing that the evidence of bias was too speculative. 5/30/19 RP 83. The state argued that the U visa evidence was "extremely prejudicial" and "prejudicial to the victim," N.M., but did not explain how or why. 5/30/19 RP 83; 6/3/19 RP 16. The state also argued that the U visa evidence was actually prejudicial against Mr. Hernandez Sierra because N.M.'s mother, Ms. Carreon, would

testify that they visited a criminal attorney regarding his DUI charge, not an immigration attorney. 5/30/19 RP 81-82.

The trial court granted Mr. Hernandez Sierra's motion in part. 6/3/19 RP 27. The court ruled that he could cross-examine Ms. Carreon about her immigration status and U visa application but prohibited him from questioning N.M. about these matters. *Id.* The court did not believe N.M. was sufficiently versed in immigration law to fabricate these allegations. 6/3/19 RP 24. The court found that this evidence was "speculative" and "remote," and that "any minimal relevance at this point is outweighed by the prejudice against the victim," N.M. 6/3/19 RP 26.

The trial court reasoned that any benefit to N.M. was remote because the alleged meeting with the attorney occurred a year before N.M.'s allegations, there was no evidence of animosity between Mr. Hernandez Sierra and N.M. before these allegations, and Ms. Carreon was not in removal proceedings or facing deportation. 6/3/19 RP 24-25. The court also found the evidence speculative because there was "not really a connection" between N.M.'s "testimony and the mother's U visa application." 6/3/19 RP 26. Ms. Carreon's U visa application depended on her own testimony, not the testimony of her daughter. *Id.* Even if N.M. believed that she needed to testify, she did not need to fabricate forcible compulsion: a crime occurred even under Mr. Hernandez Sierra's version

of events because N.M. could not consent to sexual activity due to her age.  
6/3/19 RP 17-18, 25.

The trial court erred and abused its discretion because the U visa evidence was relevant to N.M.'s credibility, and the state failed to establish prejudice. The threshold to admit relevant evidence is very low; even minimally relevant evidence is admissible. *Darden*, 145 Wn.2d at 621. If evidence is "relevant, the burden is on the State to show that the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Id.* at 622. The state's interest must also "be balanced against the defendant's need for the information sought," and excluded only "if the State's interest outweighs the defendant's need." *Id.*

This case resembles a recently-published Division I decision, *State v. Bedada*, \_\_\_ P.3d \_\_\_, 2020 WL 2315785. In that case, the defendant faced charges arising from a series of alleged domestic violence incidents against his wife. \_\_\_ P.3d \_\_\_, 2020 WL 2315785 at \*1. The defendant and his wife, Rahel Haile, moved together from Ethiopia and had children in the United States. *Id.* Haile was now a citizen, but the defendant was not. *Id.* Haile told other people that she wished the defendant would get deported so that she and her children could get away from him. *Id.* at \*9. The trial court refused to allow the defendant to question Haile about his immigration status or deportation. *Id.* at \*3. On appeal, the Court reversed, holding that

the trial court abused its discretion by prohibiting the defendant from cross-examining the state's key witness and "revealing a motive for her to fabricate her testimony." *Id.* at \*1, \*9.

The Court in *Bedada* found the defendant's evidence relevant because "evidence of a motive to fabricate on the part of Haile—whose testimony was the principal evidence supporting every charge against Bedada—could affect a fact finder's analysis as to whether the facts alleged by Haile were true." *Id.* at \*7. Similarly, in this case, the U visa evidence was relevant to show N.M.'s potential motivation to embellish her allegations. Without N.M.'s allegations, the case would not exist, and her mother would not have the opportunity to testify or apply for a U visa.

This was not a "remote" or "speculative" benefit for N.M. N.M.'s mother, her loved one and caretaker, now has a path to legal resident status. That path would not exist without N.M.'s allegations. That path could also disappear if N.M. refused to testify. N.M. was the state's key witness; without her testimony, the state would likely have to drop charges against Mr. Hernandez Sierra, and N.M.'s mother would not have the opportunity to testify.

Moreover, it was not necessary to conclude that N.M. fabricated all of the allegations in order to undermine her credibility. Courts have already acknowledged that "the U visa incentive structure could lead a witness

merely to ‘embellish’ allegations rather than fabricate them out of thin air.” *Romero-Ochoa*, 193 Wn.2d at 362; *see also Romero-Perez v. Commonwealth*, 492 S.W.3d 902, 906-07 (Ky. Ct. App. 2016) (“Even if the victim did not outright fabricate the allegations against the defendant, the structure of the [U visa] program could cause a victim to embellish her testimony in the hopes of being as ‘helpful’ as possible to the prosecution.”).

To exclude relevant evidence, the state must prove prejudice. In *Bedada*, the trial court erred by accepting uncritically the state’s allegation of prejudice. The Court found it “significant” that the state “did not identify, with any particularity, the prejudice [it] would encounter beyond a generalized concern of immigration as a sensitive political issue.” *Bedada*, \_\_ P.3d \_\_, 2020 WL 2315785 at \*7. The state’s argument was undermined by the fact that immigration came up in other ways during the trial, including in voir dire, to assess potential bias; during testimony; and in the court’s instructions to the jury regarding prejudice. *Id.* The Court concluded that “by itself, such generalized prejudice does not necessarily result in an unfair trial,” particularly when this alleged prejudice could be addressed with a limiting instruction. *Id.* at 7-8.

Like in *Bedada*, neither the state nor the trial court in this case identified specifically what prejudice would result from this cross-examination. 5/30/19 RP 83; 6/3/19 RP 16, 26. The state alleged, and the

court found, prejudice to N.M., but did not explain what that looked like. *Id.* Washington courts have recognized that evidence of a witness's undocumented status can be prejudicial and distract jurors from the important matters submitted for their determination. *See, e.g., State v. Avendano-Lopez*, 79 Wn. App. 706, 718, 904 P.2d 324 (1995) (holding that “appeals to nationality or other prejudices are highly improper in a court of justice, and evidence as to the race, color, or nationality of a person whose act is in question is generally irrelevant and inadmissible if introduced for such a purpose”). However, in this case N.M. was not undocumented, she was a citizen, and the trial court permitted cross-examination of her mother regarding the U visa application.

Even if some prejudice could result, the trial court erred because it “did not address the availability, desirability, or effectiveness of a limiting instruction at all.” *Bedada*, \_\_ P.3d \_\_, 2020 WL 2315785 at \*8. In fact, the greatest potential for prejudice was against the defendant himself, as noted by the state. Raising the U visa issue could open the door to testimony about Mr. Hernandez Sierra's DUI charge. However, “[i]mplicit in the Sixth Amendment is a criminal defendant's right to control his defense.” *State v. Wiebe*, 195 Wn. App. 252, 259, 377 P.3d 290 (2016) (citing *State v. Jones*, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983)). If the introduction of evidence of this evidence “raised a possibility of bias against him,” Mr.

Hernandez Sierra “was entitled to shoulder that burden in order to effectively confront his primary accuser.” *Bedada*, \_\_ P.3d \_\_, 2020 WL 2315785 at \*8.

This case also resembles *Bedada* because immigration status, and specifically U visas, came up at other points in the trial. The parties discussed how they would address immigration status and prejudice with potential jurors during voir dire. 5/30/19 RP 95, 97-98, 108. The trial court’s instructions specifically addressed conscious and unconscious bias due to ethnicity. 6/5/19 RP 452. The court also permitted questioning of N.M.’s mother, Ms. Carreon, about her U visa application. 6/3/19 RP 188-89, 194, 197. If these potentially prejudicial issues could be addressed in voir dire, jury instructions, and examination of other witnesses, then the court could have mitigated any potential prejudice during cross-examination of N.M. as well. *See Bedada*, \_\_ P.3d \_\_, 2020 WL 2315785 at \*8.

The trial court primarily relied on *State v. Fisher*, 165 Wn.2d 927, to conclude that N.M. could not be cross-examined about her mother’s U visa application, but this case is distinguishable. 6/3/19 RP 20-23. In *Fisher*, the defendant was charged with molesting and abusing his children. 165 Wn.2d at 733. The allegations arose years after his divorce from the mother, Judy Ward. *Id.* At trial, the defendant sought to cross-examine

Ward about the financial details of their divorce. *Id.* at 739. The trial court permitted cross-examination about the contentious nature of the divorce and about Ward’s continued ill-will towards Fisher but drew the line at intricate financial details. *Id.* at 739, 753. On appeal, the Court upheld the trial court’s decision, noting that Ward was “not a key witness” and “the jury was apprised of the specific reasons why Ward’s testimony might be biased.” *Id.* at 753.

Here, unlike in *Fisher*, N.M. was the state’s key witness. It was thus critical for Mr. Hernandez Sierra to fully cross-examine her and expose any potential bias. *See Fisher*, 165 Wn.2d at 752 (“A defendant enjoys more latitude to expose the bias of a key witness.”). Moreover, the court in *Fisher* permitted cross-examination about the witness’s potential bias and the source of that bias; the court just limited the financial details the defendant could raise. Here, the court prohibited all questions to N.M. about the U visa application.

The trial court’s decision in this case effectively sheltered N.M. from cross-examination about her motives and bias. Her mother derived a clear benefit from N.M.’s allegations, but Mr. Hernandez Sierra did not have the opportunity to cross-examine N.M. about that benefit. The court’s decision improperly bolstered the state’s case and violated Mr. Hernandez Sierra’s constitutional right to present a defense.

**3. The trial court’s decision to prevent cross-examination of N.M. regarding her mother’s U visa application was not harmless error.**

The trial court’s error in this case was not harmless. An error is harmless and not grounds for reversal if the appellate court is assured beyond a reasonable doubt that the jury would have reached the same verdict without the error. *Jones*, 168 Wn.2d at 724. “Relevant considerations include the properly admitted direct and circumstantial evidence (i.e., the strength of the State’s case and the plausibility of the defense theory) and the overall significance of the erroneously admitted or excluded evidence in this context (e.g., whether it was cumulative or corroborated, or consistent with the defense theory).” *Romero-Ochoa*, 193 Wn.2d at 348.

In *Romero-Ochoa*, the Washington Supreme Court concluded that excluded impeachment evidence was harmless and thus not grounds for reversal. *Id.* at 363. In that case, the defendant was charged with raping an acquaintance in her home. *Id.* at 344, 351. The alleged victim screamed, ran out into the street, and attempted to knock on her neighbor’s doors before the defendant dragged her back in the house. *Id.* at 350-51. Multiple neighbors testified that they heard the victim, saw the victim or the defendant, and called the police. *Id.* at 352-53. Police arrived shortly after and immediately arrested the defendant. *Id.* at 351. The victim was

examined by medical professionals and had multiple bruises and injuries. *Id.* at 354. At trial, the defendant in *Romero-Ochoa* sought to cross-examine the victim about her application for a U visa, filed as a result of the charges. *Id.* at 344. The trial court excluded this evidence. *Id.* The Court of Appeals reversed, holding that the trial court abused its discretion. *Id.*

The Washington Supreme Court reversed the Court of Appeals based on harmless error. *Id.* at 363. The Court found that the evidence against the defendant was overwhelming:

As detailed below, 13 separate witnesses corroborated the victim's account of her attack. These witnesses included neighbors who heard the attack and witnessed the victim trying to escape, first responders who saw the victim run out of her house half naked and crying, detectives and technicians who gathered crime scene and forensic evidence, and medical personnel who treated the victim and documented her injuries and physiological indicators of stress. The only witness for the defense was Romero-Ochoa, who admitted to sexual intercourse with the victim but said it was consensual, the result of a chance encounter with a former secret lover. The victim's sister took the stand to rebut numerous aspects of Romero-Ochoa's story.

*Id.* at 349. In light of this evidence, the exclusion of the U visa was harmless. *Id.* at 363. The Court noted that "in this case, the difference between the State's and the defendant's theories was not plausibly a matter of embellishment." *Id.* The Court concluded "beyond a reasonable doubt that cross-examination on the victim's U visa application would not have resulted in a different verdict." *Id.*

Here, unlike in *Romero-Ochoa*, the evidence against Mr. Hernandez Sierra was not overwhelming. The only evidence of forcible compulsion was N.M.'s testimony. N.M. did not have bruises or injuries. No other witnesses for the state testified about the alleged assault itself—no one saw the parties struggle, heard screaming, or saw N.M. trying to escape. The witnesses who corroborated N.M.'s version of events, her mother and Ms. LaChapelle, reiterated what N.M. told them. The forensic evidence was either equivocal or it corroborated both N.M.'s and Mr. Hernandez Sierra's accounts.

This evidence is not sufficient to conclude, beyond a reasonable doubt, that the jury would convict Mr. Hernandez Sierra regardless of N.M.'s impeachment. N.M. was the central witness in this case. Mr. Hernandez Sierra sought to cross-examine her about evidence suggesting a significant motive to embellish her accusations. Due to N.M.'s allegations, her mother had the opportunity to testify for the state and apply for a U visa to obtain legal residency. Mr. Hernandez Sierra should have been allowed to question N.M. about this evidence, and the error was not harmless beyond a reasonable doubt.

**B. The Prosecutor Committed Repeated Prejudicial Misconduct, Violating Mr. Hernandez Sierra's Constitutional Rights.**

This Court also must reverse due to prosecutorial misconduct. The prosecutor in this case repeatedly disparaged defense counsel, alleged that counsel provided “answers” to his client, and argued that Mr. Hernandez Sierra’s testimony was scripted. 6/5/19 RP 421-22; 6/6/19 RP 547-48. The prosecutor also bolstered N.M.’s testimony and diminished the reasonable doubt standard by arguing that “all of us” have an “abiding belief” in the “innocence of children.” 6/6/19 RP 551. The prosecutor misstated the jury’s role by telling jurors that the case “is in your hands.” 6/6/19 RP 559-60. Finally, the prosecutor urged the jury to convict based on passion and prejudice by stating, that N.M. “probably will never trust men again” and will live with this “until she lays her head down on her pillow to die.” 6/6/19 RP 556.

The right to a fair trial is a fundamental liberty secured by the United State and Washington Constitutions. U.S. Const. amend.s VI, XIV; Wash. Const. art. I, § 22; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). 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). In order to prevail on a claim of prosecutorial

misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Both requirements are met here.

**1. The prosecutor repeatedly committed misconduct.**

The prosecutor made numerous statements that amounted to misconduct in this case. He disparaged defense counsel, misstated the reasonable doubt standard, bolstered N.M.'s testimony, and undermined the presumption of innocence.

**a. The prosecutor committed misconduct by disparaging defense counsel.**

The prosecutor in this case repeatedly disparaged defense counsel, both during testimony and during rebuttal closing argument. A prosecutor is a quasi-judicial officer, obligated to seek verdicts based on reason, not prejudice. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). It is serious prosecutorial misconduct to personally attack defense counsel, impugn counsel's character, or disparage defense lawyers as a means of convincing jurors to convict the defendant. *Thorgerson*, 172 Wn.2d at 451; *State v. Negrete*, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993). "Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." *State v. Lindsay*, 180 Wn.2d 423, 432, 326 P.3d 125 (2014).

Here, the prosecutor disparaged defense counsel in two ways. First, he repeatedly stated or implied that counsel coached Mr. Hernandez Sierra's testimony. When cross-examining Mr. Hernandez Sierra, the prosecutor asked twice whether he got "answers" from, or went "over his testimony" with, his attorney:

And before you came into court today to testify, you had an opportunity to go over your – the questions with Mr. Chadwick and get answers – and have him ask you questions and you give him answers; isn't that right?

...

Before you had – before you came into court today, you had an opportunity to speak with your attorney and go over your testimony before you testified; isn't that right?

6/5/19 RP 421-22. Both times, defense counsel objected, and the objections were sustained. *Id.*

During rebuttal closing argument, the prosecutor again argued that defense counsel coached Mr. Hernandez Sierra:

If you recall when Mr. Chadwick was asking his – Mr. Hernandez questions, he was leading him the whole way. Didn't you do this, didn't you do that, didn't you do this? It wasn't Mr. Hernandez spontaneously telling his story spontaneously, that he did on his own, ***he followed the script that Mr. Chadwick had worked out.***

6/6/19 RP 547-48 (emphasis added). Defense counsel did not renew his objection to these statements in closing argument. *Id.*

It is misconduct for an attorney to coach a witness's testimony on the stand or to supplement the witness's own memory with information

provided by counsel. *State v. Little*, 57 Wn.2d 516, 521, 358 P.2d 120 (1961); *State v. McCreven*, 170 Wn. App. 444, 474-475, 284 P.3d 793 (2012). By arguing that defense counsel supplied “answers,” went over testimony, and “worked out” a “script,” the prosecutor explicitly accused defense counsel of misconduct.

The prosecutor’s argument also burdened Mr. Hernandez Sierra’s constitutional rights to assistance of counsel and to testify on his own behalf. “The State can take no action which will unnecessarily ‘chill’ or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right.” *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984).

The right to counsel is guaranteed by both the Sixth Amendment and article 1, section 22 of the Washington Constitution. Assistance of counsel includes preparing the defendant for trial and testifying. *See Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir.1998) (counsel deficient for failing to adequately prepare client to testify). By attempting to use these discussions against Mr. Hernandez Sierra, the state penalized the exercise of this constitutional right. *See State v. Espey*, 184 Wn. App. 360, 367-368, 336 P.3d 1178 (2014) (improper comment on exercise of right to counsel where prosecutor argued defendant's meetings with attorneys helped him formulate story for police).

Article 1, section 22 also guarantees every criminal defendant the right to testify in his own behalf. The state violates this right by raising suggestions of tailoring without a specific showing that tailoring has occurred. *State v. Wallin*, 166 Wn. App. 364, 376-377, 269 P.3d 1072 (2012). *Wallin* involved speculative claims the defendant tailored his testimony to evidence he heard during trial. 166 Wn. App. at 366-367. However, it is no less an infringement on the constitutional right to testify when the state suggests that the defendant's testimony has been coached or is a "script" from defense counsel.

Second, the prosecutor committed misconduct and disparaged defense counsel by his descriptions of counsel during rebuttal closing argument. The prosecutor described defense counsel's tone as "very troubling":

I noted one thing I wanted to say at the outset, which was Mr. Chadwick made a number of comments and kind of joked about things. That's very troubling.

6/6/19 RP 545. He also described counsel as "unreasonable":

These jury instructions – as Mr. Chadwick said, I can make room for some of the things that he said. Some of the things he said were reasonable. A lot of things he said here were unreasonable.

6/6/19 RP 550-51. Defense counsel did not object to any of these statements. 6/6/19 RP 545, 550-51.

These statements resemble other comments or arguments found to be prosecutorial misconduct. *See Thorgerson*, 172 Wn.2d at 450-452 (misconduct to describe presentation of case as “bogus” and to accuse counsel of using “sleight of hand,” which implies clever deception); *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008) (misconduct to describe defense counsel’s argument as a “classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing”); *Lindsay*, 180 Wn.2d at 433-434 (misconduct to refer to defense counsel’s arguments in closing as a “crook,” which implies deception and dishonesty). The prosecutors repeated attempts to disparage defense counsel amounted to misconduct in this case as well.

**b. The prosecutor’s “innocence of children” argument was misconduct.**

The prosecutor also committed misconduct by mischaracterized the reasonable doubt standard. 6/6/19 RP 551. The trial court in this case correctly instructed the jurors that if “you have abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.” *Id.* In rebuttal closing argument, the prosecutor referenced this instruction, stating “Abiding belief. That’s Instruction No. 4.” 6/6/19 RP 551. He then twisted this instruction to bolster N.M.’s testimony:

An example of an abiding belief would be – an abiding belief that all of us would have would be in the innocence of children, which is not a phase that they’re going through, that they’re innocent.

*Id.* This “innocence of children” comment was a clear reference to N.M., the only child witness in this case.

Due process requires the state to bear the burden of proof beyond a reasonable doubt. *In re Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012) (citing *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970)). Arguments “that shift or misstate the State’s burden to prove the defendant’s guilt beyond a reasonable doubt constitute misconduct.” *Id.*; see also *Glasmann*, 175 Wn.2d at 713 (“Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant’s guilt beyond a reasonable doubt.”).

Telling the jury that we all have an “abiding belief” in the “innocence of children” undermined the reasonable doubt standard. This argument analogized the reasonable doubt standard to a supposedly universal “example” from everyday life, something Washington courts have repeatedly held is misconduct. See, e.g., *Lindsay*, 180 Wn.2d at 437 (holding it was misconduct to compare the reasonable doubt standard to jigsaw puzzles or crosswalks); *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) (holding that the prosecutor’s comments discussing

the reasonable doubt standard in the context of everyday decision making were improper because they minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the state has met its burden).

Washington law also recognizes that a prosecutor "has a special duty in trial to act impartially in the interests of justice and not as a 'heated partisan.'" *State v. Stith*, 71 Wn. App. 14, 18, 856 P.2d 415 (1993) (quoting *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984)). Arguments that are "calculated to appeal to the jury's passion and prejudice" are improper. *Id.* Prosecutors also may not improperly bolster a witness's credibility. *Id.* at 21. In closing arguments, a prosecutor may only comment on a witness's veracity if those comments "are not intended to incite the passion of the jury." *Id.*

The state's "innocence of children" argument improperly vouched for N.M.'s testimony and inflamed the jury. The argument tied the reasonable doubt standard to a presumption in the state's favor: that all children, including N.M., are "innocent" and thus virtuous, pure, and honest. It said that we all know children are innocent, so surely N.M. could not lie or exaggerate her testimony. This bolstering encouraged the jury to believe N.M. not because of her testimony, her demeanor, or corroborating evidence, but because she was an innocent child. By raising this argument,

the prosecutor improperly vouched for N.M. and appealed to the passions and prejudices of the jury.

- c. **The prosecutor’s statements that N.M. will “never trust men again” and “will have to live with this until she lays her dead down on her pillow to die” were misconduct.**

The prosecutor also appealed to the juror’s passion instead of reason with his “lay down to die” argument. The prosecutor described the “devastation” N.M. experienced as a result of the events of this case. 6/6/19 RP 556. He specifically stated that she “probably will never trust men again” and “will have to live with this every day until she *lays her head down on her pillow to die.*” *Id.* (emphasis added).

A prosecutor engages in misconduct when he appeals to the passions and prejudice of the jury to secure a conviction. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Additionally, it is a fundamental principle in our criminal justice system that a jury convict a defendant only with the evidence presented at trial. *See State v. Miles*, 139 Wn. App. 879, 886, 162 P.3d 1169 (2007), *referencing State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950). Although a prosecutor has wide latitude to persuade the jury based on the evidence, it is misconduct to urge the jury to decide a case based on evidence not presented at trial. *State v. Pierce*, 169 Wn. App. 533, 553, 283 P.3d 1158 (2012).

In *State v. Pierce*, Division II held that the prosecutor committed prejudicial misconduct, incurable by an instruction, by “appealing to the passion and prejudice of the jury.” *Id.* at 551, 556. In that case, the defendant was charged with murder. *Id.* at 540. In rebuttal closing argument, the prosecutor argued that “[n]ever in their wildest dreams . . . or in their wildest nightmare” would the victims have expected to be murdered on the day of the crime. *Id.* at 555. The prosecutor made “assertions about the [victims’] future plans” and “invited the jury to imagine themselves in the [victims’] shoes.” *Id.* The Court held that these arguments were an “improper appeal to passion and prejudice” because they “served no purpose but to appeal to the jury’s sympathy” and were “not relevant to Pierce’s guilt.” *Id.*

Here, N.M. did not testify that she was “devastated.” She did not testify that she would never trust men again. Even granting some leeway to argue that a crime like this would be traumatic, it was absolutely prejudicial to argue that N.M. will “live with this every day until she lays her head down on her pillow to die.” Like in *Pierce*, these statements were irrelevant to Mr. Hernandez Sierra’s guilt and served no purpose beyond appealing to the jury’s sympathy. 169 Wn. App. at 555. They encouraged the jury to convict in order to avenge N.M., not based on the evidence presented at trial. These statements were “calculated to inflame the passions or

prejudices of the jury” and were thus misconduct. *Glasmann*, 175 Wn.2d at 704 (internal quotations omitted).

**d. The prosecutor committed misconduct by telling the jury that the case “is in their hands.”**

The prosecutor concluded his rebuttal closing argument with a story about a bird. The point of the story is that the bird is in the hands of the person holding it; that person decides whether the bird lives or dies. 6/6/19 RP 558-59. The prosecutor told the jury that, like the bird in the story, this case “is in your hands.” 6/6/19 RP 559-60. This statement was misconduct because it misrepresented the jury’s role, implied that it was the jury’s duty to “solve” the case, and undermined Mr. Hernandez Sierra’s presumption of innocence.

Washington courts have repeatedly held that it is misconduct for prosecutors to misrepresent the role of the jury in a criminal trial. For example, it is misconduct to tell the jury that its role is to “declare” or “speak the truth.” *See Lindsay*, 180 Wn.2d at 437 (“Telling the jury that its job is to ‘speak the truth,’ or some variation thereof, misstates the burden of proof and is improper.”); *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (“We hold that the prosecutor’s truth statements are improper. The jury’s job is not to determine the truth of what happened; a jury therefore does not ‘speak the truth’ or ‘declare the truth.’”) (citing *Anderson*, 153 Wn.

App. at 429). It is also misconduct to tell jurors that they must “fill in the blank” and articulate reasonable doubt in order to acquit. *Emery*, 174 Wn.2d at 759-60 (“We hold that the State’s fill-in-the-blank argument is improper. The argument . . . improperly implies that the jury must be able to articulate its reasonable doubt by filling in the blank.”); *State v. Walker*, 164 Wn. App. 724, 731, 265 P.3d 191 (2011) (holding that the prosecutor’s “fill-in-the-blank” argument “improperly suggested that Walker had to provide a reason for the jury to find him not guilty”).

In *State v. Anderson*, the prosecutor made both “fill-in-the-blank” and “declare the truth” arguments. 153 Wn. App. at 429, 431. Division II explained that “a jury’s job is not to ‘solve’ a case” or to “declare what happened on the day in question.” *Id.* at 429. Instead, the jury’s only duty is to “determine whether the State has proved its allegations against a defendant beyond a reasonable doubt.” *Id.*

Here, like in *Anderson*, the prosecutor misstated the role of the jury by arguing that the case was in their hands. The jury was not responsible for the outcome of the case, beyond determining whether the state met its burden of proof beyond a reasonable doubt. This was the jury’s only responsibility and implying otherwise undercut Mr. Hernandez Sierra’s presumption of innocence.

**2. The prosecutor's misconduct prejudiced Mr. Hernandez Sierra and could not be corrected by an instruction.**

The prosecutor's misconduct also prejudiced Mr. Hernandez Sierra, requiring reversal. Prejudice requires showing a substantial likelihood that the misconduct affected the jury verdict. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). A defendant cannot establish prejudice where a curative instruction could have cured any error. *State v. Corbett*, 158 Wn. App. 576, 594, 242 P.3d 52 (2010). However, "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." *Walker*, 164 Wn. App. at 737.

Here, defense counsel objected during Mr. Hernandez Sierra's testimony when the prosecutor asked if he was coached by his attorney. 6/5/19 RP 421-22. Counsel did not renew this objection when the prosecutor made a similar argument during closing; defense counsel did not object to any part of the state's rebuttal closing argument.

Reversal is required, even without defense objection, when a prosecutor's misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. *Fisher*, 165 Wn.2d at 747. "In other words, if the misconduct cannot be remedied and is material to the outcome of the trial, the defendant has been denied his due process right to

a fair trial.” *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

In evaluating claims of prosecutorial misconduct, it “is not a matter of determining whether there is sufficient evidence to convict the defendant.” *Glasmann*, 175 Wn.2d at 710. Instead, “[t]he issue is whether the comments deliberately appealed to the jury’s passion and prejudice and encouraged the jury to base the verdict on the improper argument ‘rather than properly admitted evidence.’” *Id.* at 711 (quoting *State v. Furman*, 122 Wn.2d 440, 468-69, 858 P.2d 1092 (1993)). Put another way, “[t]he focus must be on the misconduct and its impact, not on the evidence that was properly admitted.” *Id.*

Here, the prosecutor committed numerous instances of misconduct. He repeatedly questioned Mr. Hernandez Sierra about conversations with his attorney, burdening his constitutional rights to counsel and to testify. He repeatedly disparaged defense counsel, arguing that counsel supplied “answers” and a “script” for Mr. Hernandez Sierra’s testimony. 6/5/19 RP 421-22; 6/6/19 RP 547-48. This argument was especially egregious because it appeared planned. In *Thorgerson*, the Court concluded that the prosecutor committed “ill-intentioned misconduct” because he “planned” an improper argument “in advance” by “refrain[ing] from objecting to defense evidence” during testimony, then using that evidence to raise an

improper argument in closing. 172 Wn.2d at 451-52. Similarly, in this case the prosecutor refrained from objecting to leading questions, then used those leading questions to argue that defense counsel coached and scripted Mr. Hernandez Sierra's testimony. 6/5/19 RP 421-22; 6/6/19 RP 547-48.

The prosecutor also repeatedly made arguments that undermined the reasonable doubt standard and Mr. Hernandez Sierra's presumption of innocence. In a similar case, *State v. Johnson*, Division II held that the prosecutor's misconduct was "flagrant and ill-intentioned and incurable by a trial court's instruction in response to a defense objection." 158 Wn. App. 677, 685, 243 P.3d 936 (2010). The Court held that "a misstatement about the law and the presumption of innocence due a defendant, the 'bedrock upon which [our] criminal justice system stands,' constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *Id.* at 685-86 (citing *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); *Anderson*, 153 Wn. App. at 432).

Here, the prosecutor turned the reasonable doubt standard on its head by arguing that "all of us" have an "abiding belief" in the "innocence of children." 6/6/19 RP 551. This not only misstated the reasonable doubt standard, it bolstered the only child witness—the alleged victim, N.M. The prosecutor also mischaracterized the jurors' role, arguing that the case was in their hands. This erroneously placed the responsibility for "solving" the

case on the jury, when in reality the jury's only responsibility was to determine if the state proved its case beyond a reasonable doubt. Like in *Johnson*, this misconduct constituted "great prejudice," incurable by instruction, because it undermined the "presumption of innocence due a defendant." 158 Wn. App at 685-86.

Finally, the prosecutor repeatedly appealed to jurors' passion and prejudice instead of their reason. In *State v. Pierce*, Division II held that similar statements "caused prejudice incurable by a jury instruction." 169 Wn. App. at 556 (where prosecutor argued (1) the defendant's "thought process before the crimes," (2) a "fabricated and inflammatory account" of the murders, and (3) what the victims thought and felt during the crime). The Court found that the prosecutor's "repeated improper comments" were "highly inflammatory" and were outside the scope of the evidence. *Id.* The statements also "focused on how shocking and unexpected the crimes were and invited the jury to imagine themselves in the position of being murdered in their own homes." *Id.* Under these circumstances, the Court held that "we are compelled to conclude that the prosecutor's improper comments had a substantial likelihood of affecting the verdict." *Id.*

Here, similar to *Pierce*, the prosecutor invited the jury to imagine the "devastation" this case caused to the victim, N.M. 6/6/19 RP 556. The prosecutor supplied the jury with fabricated examples, including that she

“probably will never trust men again,” and that she “will have to live with this every day until she lays her head down on her pillow to die.” *Id.* These statements urged the jury to convict because of what N.M. has been through—in order to avenge N.M.—not because of the evidence in the case. They were irrelevant, inflammatory, and had a substantial likelihood of affecting the jury verdict. *See Pierce*, 169 Wn. App. at 556. This Court should reverse.

**C. Trial Counsel was Ineffective by Failing to Object to the State’s Rebuttal Closing Argument.**

Even if an instruction could have cured the prejudice caused by the prosecutor’s misconduct, this Court should reverse because Mr. Hernandez Sierra’s trial counsel failed to object to the state’s rebuttal closing. This failure deprived Mr. Hernandez Sierra of his right to effective assistance of counsel.

Defendants have the right to effective assistance of counsel at every critical stage of a criminal proceeding. U.S. Const. amend. VI; Wash. Const. art. I, § 22; *Cronic*, 466 U.S. at 654; *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Closing argument is a “critical stage” of a criminal proceeding. *People v. Luu*, 813 P.2d 826, 828 (Colo.

App. 1991), aff'd, 841 P.2d 271 (Colo. 1992) (citing *Larson v. Tansy*, 911 F.2d 392 (10th Cir.1990)).

A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. Both requirements are met here.

**1. Trial counsel performed deficiently.**

Mr. Hernandez Sierra's trial counsel performed deficiently by failing to object to the state's rebuttal closing argument. Generally, defense counsel's failure to object during closing will not constitute deficient performance because lawyers "do not commonly object during closing argument 'absent egregious misstatements.'" *In re Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004) (quoting *United States v. Necochea*, 986 F.2d 1273, 1281 (9th Cir.1993)). However, "this does not mean that all failures to object are decidedly reasonable under *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance." *In re Cross*, 180 Wn.2d 664, 721, 327 P.3d 660 (2014) (quoting *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1105

(1995)), abrogated on other grounds by *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018).

Here, as explained above, the prosecutor repeatedly and egregiously misstated the reasonable doubt standard, disparaged defense counsel, argued that Mr. Hernandez Sierra was coached, and inflamed the jury. Defense counsel failed to object, letting the prosecutor's misconduct stand in the minds of the jurors. The state's misconduct violated Mr. Hernandez Sierra's rights to counsel, to testify, and to due process. The prosecutor's remarks were clearly improper and warranted objection by defense counsel. Defense counsel's failure to do so amounted to deficient performance. *See Cross* 180 Wn.2d at 721; *Gentry*, 125 Wn.2d at 643-44.

## **2. Counsel's deficient performance prejudiced Mr. Hernandez Sierra.**

Counsel's failure to object also prejudiced Mr. Hernandez Sierra. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A "reasonable probability" is lower than a preponderance but more than a "conceivable effect on the outcome." *Strickland*, 466 U.S. at 693-94. It exists when there is a probability "sufficient to undermine confidence in the outcome." *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

Here, the prosecutor's misconduct reversed the burden of proof and undermined Mr. Hernandez Sierra's presumption of innocence. These misstatements of the law needed to be brought to the attention of the jurors and corrected by the court, but that opportunity passed when counsel failed to object. Absent the prosecutor's misstatement of law, there is a strong possibility that the jury could have reached a different verdict. This Court must reverse because Mr. Hernandez Sierra received ineffective assistance of counsel.

## VI. CONCLUSION

For the foregoing reasons, Mr. Hernandez Sierra respectfully requests that this Court reverse his conviction and remand for a new trial.

RESPECTFULLY SUBMITTED this 14th day of May, 2020.



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No. 37065-8-III

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On May 14, 2020, I electronically filed a true and correct copy of the Brief of Appellant, Carmelo Hernandez Sierra, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division III. I also served said document as indicated below:

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( X ) via email to:  
gdano@grantcountywa.gov

Carmelo Hernandez Sierra  
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( X ) via U.S. mail

SIGNED in Tacoma, Washington, this 14th day of May, 2020.



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