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Division III
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No. 37228-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC RAY STALFORD,

Appellant.

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

The Honorable Judge Cameron Mitchell

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The State committed misconduct in its closing argument that was prejudicial and incurable by vouching for the credibility of R.D.H.
2. The judgment and sentence contains errors that should be corrected: it lists an incorrect date for each crime and an incorrect date of sentence for each prior conviction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the State committed misconduct in its closing argument that was prejudicial and incurable by vouching for the credibility of R.D.H.

Issue 2: Whether the judgment and sentence contains errors that should be corrected: it lists an incorrect date for each crime and an incorrect date of sentence for each prior conviction.

C. STATEMENT OF THE CASE

In October 2014, D.G. meet Eric Ray Stalford online. (RP¹ 545-546).

D.G. had one son, R.D.H., who was almost five years old at the time. (RP 546).

In July 2015, the three moved in together in an apartment in Kennewick. (RP 547-548, 569-570, 702). In October 2015, D.G. and Mr. Stalford got married. (RP 548, 702). In March 2017, D.G. and Mr. Stalford had a son together. (RP 548, 550).

R.D.H.'s biological father was incarcerated, and R.D.H. had not seen him since 2012. (RP 544, 568-569). R.D.H. called Mr. Stalford "dad," and D.G.

¹ The Report of Proceedings consists of eight volumes, reported by five different court reporters. References to "RP" herein refer to the four consecutively paginated volumes containing a pretrial management hearing and the jury trial, reported by Renee Munoz. References to "Sentencing RP" herein refer to the single volume containing a motion hearing, omnibus hearing, and sentencing hearing, reported by Cheryl Pelletier.

thought the two had a great bond, and Mr. Stalford “loved him as if he was his own.” (RP 551-552, 703-704).

In March 2018, while D.G. was given her younger son a bath, R.D.H. looked into the bathroom and noticed something on the toilet seat. (RP 555-556). D.G. believed it was vaginal discharge she had unknowingly left on the toilet seat. (RP 555-556). R.D.H., who was eight years old at the time, stated “[e]w, gross. That looks like semen.” (RP 556). D.G. had not spoken to R.D.H. about semen, so she asked him where he had learned the term. (RP 556-558). R.D.H. told her he learned the term from Mr. Stalford. (RP 558).

D.G. then asked R.D.H. if anything had happened to him. (RP 558). According to D.G., R.D.H. told her Mr. Stalford had “flipped my weiner” and that Mr. Stalford “would pull his hand over to his private parts and make him touch his weiner.” (RP 558-559, 735).

Mr. Stalford was working out of town at the time. (RP 561). D.G. called him on the phone, and asked him if what R.D.H. had told her was true. (RP 561-562). Mr. Stalford told D.G. that is not something he would do, and “[t]hat’s not what dads do to sons[.]” (RP 562).

D.G. then called her church pastor on the phone. (RP 562-563, 568-569, 611, 623-624, 631-632). The next day, D.G. took R.D.H. to their church, and D.G., R.D.H., the pastor, and the pastor’s wife spoke about the alleged contact

between him and Mr. Stalford. (RP 563-564, 588-592, 612-615, 624-628, 632-633, 636-637, 738-739).

D.G. reported the alleged contact between Mr. Stalford and R.D.H. to the police. (RP 564, 593-594, 630, 642-646). The police arranged for a child forensic interview of R.D.H. (RP 565-566, 649-651). Mari Murstig interviewed R.D.H., and the interview was audio and video recorded. (RP 650, 690-692, 736, 739; Pl.'s Ex. 7). In the interview, R.D.H. stated that Mr. Stalford put his mouth "on his potty" three times. (Pl.'s Ex. 7). R.D.H. also stated Mr. Stalford put R.D.H.'s hand "on his potty," while Mr. Stalford's put his hand on R.D.H.'s "potty" five times. (Pl.'s Ex. 7).

Following the child forensic interview of R.D.H., Mr. Stalford spoke with the police. (RP 651). They made another appointment to meet one week later. (RP 651-652). Instead of attending this meeting, Mr. Stalford left the area, first taking a flight to Salt Lake City. (RP 565-567, 651-657, 659-663, 674-680; Pl.'s Exs. 2, 3, 4, 5). He was later located in Oregon. (RP 656-657).

The State charged Mr. Stalford with one count of first degree rape of a child and two counts of first degree child molestation, and alleged two aggravating circumstances for each count, pattern of sexual abuse and abuse of trust. (CP 36-39). The State also provided notice, for each count, of its intent to seek a sentence of life in prison without the possibility of early release. (CP 37-

38). The State alleged the crimes occurred “during the time intervening between the 21st day of December 2013, and the 2nd day of May, 2018[.]” (CP 37-38).

The case proceeded to a jury trial. (RP 133-819).

At trial, witnesses testified consistent with the facts stated above. (RP 542-758). Following a hearing held outside the presence of the jury D.G., D.G.’s pastor, the pastor’s wife, and Ms. Murstig were allowed to testify to hearsay statements made to the by R.D.H. (RP 17-132). Ms. Murstig did not testify directly to the statements R.D.H. made to her; instead, the State played a video of the child forensic interview for the jury, and the video was admitted as an exhibit. (RP 683-696; Pl.’s Ex. 7).

R.D.H. testified at trial. (RP 698-739). He testified Mr. Stalford “would just put his hand on my - - my private parts, and I would put my hand on his.” (RP 708-709, 713, 716, 718). He testified Mr. Stalford put his mouth “[o]n my weiner” in three different rooms of the apartment, one time in each room. (RP 705-706, 709, 714, 718-719).

Defense investigator Shane Morlan testified for the defense. (RP 748-749, 755-758). He testified that during an interview held a few months prior to trial, he asked R.D.H. a question about Mr. Stalford’s mouth, as follows:

[Defense counsel:] And what did you ask?

[Mr. Morlan:] I asked -- I phrased it, "When you were speaking with [Ms. Murstig], she had mentioned something happened about mouths," and I said, "Can you explain that

[Defense counsel:] And what was [R.D.H.]'s response?
[Mr. Morlan:] His response was something to the effect of,
"No, nothing happened with mouths. Just normal kissing
like son and dad."

(RP 756-757).

The jury was instructed it had to find each crime occurred "between the
21st day of December, 2013, and the 2nd day of May, 2018." (CP 215-217; RP
767-770).

In its closing argument, the State argued:

You are the judges of the credibility of the witnesses, okay? And
I'm gonna argue to you that [R.D.H.] is a credible witness, okay?
...
I argue to you that [R.D.H.] was credible.

(RP 784 –785).

The State further argued:

Remember how [R.D.H.] told you, "He put his hand on there, and I
would pull it away," and his dad would get mad. Yeah. How do
you know that? How do you know that your dad would get mad if
you pulled your hand away? Just makin' that out of thin cloth - -
or maybe that's not the right term, but just making that out of thin
air? No. That happened. That's why he knows that. Because he
lived it.

...
[R.D.H.] said, "I told him that it felt good, but I didn't mean it. I
just didn't want to hurt his feelings." Whoa. You can't make that
up.

...
How about the opportunity of the witness to observe or know the
things he talked about? Remember when he would say, "He would
come in my room before work," and his dad, "Do you want to
cuddle or do you want to do something else?" Sometimes they
would cuddle, but sometimes he would say, "Let's do something
else, just to get him out of my face." I mean, makin' that detail up?

No. That's what an eight-year-old boy would say. Credible.
Credible.

...

I don't know, ladies and gentlemen. Were there any adults who have an interest in him being dishonest? I mean, when you think about it, kid's tellin' the truth, kid's lyin', or maybe some adult's gettin' this kid to lie. Any adults around him that want to sink this guy (indicating)? That are like, "Okay, [R.D.H.]. You know, you gotta go in there and you gotta say X, Y, Z, P, D, Q, because this guy's gotta go down. So, this is why and this is why."

No. Everybody -- nothing like that came out. Nothing. He loves his dad. He lost his dad also, and he understands that, and he understood it from the very beginning. How would an eight-year old come up with all of this? It's impossible. Impossible.

...

And when [R.D.H.'s] mom asked, he told the truth. He told the truth.

...

Remember where it happened. The campouts. He called it "our special time". You can't make that up. His room. Their room. Places that they could be alone. Think about where [R.D.H.] describes it happening. It makes sense in light of all the other evidence that you've heard. Remember that he wanted to keep baby out of the room. Remember that he would -- that [R.D.H.] told you, "He wanted me to go check on mom to see if she was asleep so we could have our special time." How do you make that up unless it happened to you? You can't. You cannot. Because that's exactly what his dad told him. And he remembers getting up and going to check if his mother was asleep.

(RP 787-789, 792-793, 796).

Defense counsel did not object to the State's closing arguments. (RP 774-801).

Also during its closing argument, the State showed 28 powerpoint slides to the jury. (Pl.'s Ex. 8). 11 of these slides contained the heading "[R.D.H.] = Credible." (Pl.'s Ex. 8). The body of each of these slides contained bullet points the State used during its closing argument to discuss the credibility of R.D.H.

(Pl.'s Ex. 8). One bullet point stated: "A 8 kid – come up with this?" (Pl.'s Ex. 8).

The jury found Mr. Stalford guilty as charged. (CP 240, 243, 246). The jury also found the existence of both aggravating factors for each count. (CP 241-242, 244-245, 247-248).

At sentencing, the State filed certified copies of documents relevant to Mr. Stalford's prior convictions from Oregon, including two judgment of conviction and sentence documents, both entered on March 9, 1999. (CP 298-312; Sentencing RP 11-12).

The trial court sentenced Mr. Stalford to life in prison without the possibility of early release:

So the court, as it's been indicated, has really only one option and that is to sentence Mr. Stalford to life in prison. Without the possibility of parole on each of Counts 1, two and three. The court will do so.

(CP 287-322; Sentencing RP 25).

The judgment and sentence lists the date of each crime as 12/21/2013. (CP 287-288). The judgment and sentence lists Mr. Stalford's criminal history as follows:

2.2 Criminal History (RCW 9.94A.525):

	<i>Crime</i>	<i>Date of Crime</i>	<i>Date of Sentence</i>	<i>Sentencing Court (County & State)</i>	<i>A or J Adult, Juv.</i>	<i>Type of Crime</i>	<i>DV* Yes</i>
1	ATTEMPTED SEXUAL ABUSE IN THE FIRST DEGREE	1994	9/10/1998	LINN COUNTY, OR	A	SEX	
2	SEXUAL ABUSE IN THE FIRST DEGREE	1995	9/10/1998	LINN COUNTY, OR	A	SEX	
3	SEXUAL ABUSE IN THE FIRST DEGREE	1998	9/10/1998	LINN COUNTY, OR	A	SEX	
4	SEXUAL ABUSE IN THE FIRST DEGREE	1998	9/10/1998	LINN COUNTY, OR	A	SEX	
5	FAILURE TO APPEAR IN THE FIRST DEGREE	1998	1998	LINN COUNTY, OR	A	SEX	
6							

(CP 289).

Mr. Stalford appealed. (CP 327).

D. ARGUMENT

Issue 1: Whether the State committed misconduct in its closing argument that was prejudicial and incurable by vouching for the credibility of R.D.H.

During its closing argument, the State vouched several times for R.D.H.'s credibility. The State expressed its personal opinion of the credibility of R.D.H., by its verbal statements to the jury and by showing the jury 11 powerpoint slides with the heading "[R.D.H.] = Credible" and a bullet point stating: "A 8 kid – come up with this?" The State also told the jury R.D.H. was telling the truth. Where the key issue for the jury at trial was whether to believe R.D.H., the vouching created an incurable prejudice, and Mr. Stalford should be granted a new trial.

"To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Thorgerson*,

172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (*quoting State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)); *see also State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012) (when raising prosecutorial misconduct, the appellant “must first show that the prosecutor's statements are improper.”); *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994) (stating “[a]llegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.”).

If the defendant fails to properly object to the misconduct, “a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.” *State v. O’Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (internal quotation marks omitted) (*quoting State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)). “Under this heightened standard, the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). “Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 762.

“It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness.” *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008); *see also State v. Dhaliwal*, 150 Wn.2d 559, 577–78, 79 P.3d 432 (2003). Improper vouching for a witness’ credibility occurs “if a prosecutor expresses his or her personal belief as to the veracity of the witness” *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010); *see also Thorgerson*, 172 Wn.2d at 462 (stating the same).

A prosecutor also improperly vouches for the credibility of a witness by stating a witness is telling the truth. *State v. Ramos*, 164 Wn. App. 327, 341 n.4, 263 P.3d 1268 (2011) (finding the prosecutor improperly vouched for the credibility of witnesses by arguing they “were just telling you what they saw and they are not being anything less than 100 percent candid”); *also State v. Christopher*, No. 45694-0-II, 2015 WL 4627884, at *9 (Wash. Ct. App. Aug. 4, 2015) (statement that witness “was under oath and *he was telling truths*” was impermissible vouching) (emphasis in original); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority). “Whether a witness has testified truthfully is entirely for the jury to determine.” *Ish*, 170 Wn.2d at 196 (citing *United States v. Brooks*, 508 F.3d 1205, 1210 (9th Cir. 2007)). “A prosecutor owes a defendant a duty to ensure the right to a fair trial is not violated.” *Ramos*, 164 Wn. App. at 333 (citing *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011)).

Prejudicial error occurs when it is clear the prosecutor is expressing a personal view rather than arguing an inference from the evidence. *State v. McKenzie*, 157 Wn.2d 44, 54, 134 Wn.2d 221 (2006); *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

As noted above, the State made the following comments during its closing argument:

Just makin' that out of thin cloth - - or maybe that's not the right term, *but just making that out of thin air? No. That happened.* That's why he knows that. Because he lived it.

...

[R.D.H.] said, "I told him that it felt good, but I didn't mean it. I just didn't want to hurt his feelings." Whoa. *You can't make that up.*

...

How about the opportunity of the witness to observe or know the things he talked about? Remember when he would say, "He would come in my room before work," and his dad, "Do you want to cuddle or do you want to do something else?" Sometimes they would cuddle, but sometimes he would say, "Let's do something else, just to get him out of my face." *I mean, makin' that detail up? No. That's what an eight-year-old boy would say. Credible. Credible.*

...

How would an eight-year old come up with all of this? *It's impossible. Impossible.*

...

And when [R.D.H.'s] mom asked, he told the truth. *He told the truth.*

...

Remember where it happened. The campouts. He called it "our special time". *You can't make that up.* His room. Their room. Places that they could be alone. Think about where [R.D.H.] describes it happening. It makes sense in light of all the other evidence that you've heard. Remember that he wanted to keep baby out of the room. Remember that he would -- that [R.D.H.] told

you, "He wanted me to go check on mom to see if she was asleep so we could have our special time." *How do you make that up unless it happened to you? You can't. You cannot.* Because that's exactly what his dad told him. And he remembers getting up and going to check if his mother was asleep.

(RP 787-789, 792-793, 796) (emphasis added).

These statements were improper and constituted misconduct because they were expressions of the State's personal belief as to the credibility of R.D.H. *See Warren*, 165 Wn.2d at 30; *Ish*, 170 Wn.2d at 196. Telling the jury several times that you cannot make this up, and that it impossible for R.D.H. to make his up, was the State's personal opinion regarding the credibility of R.D.H. The State was not inquiring as to whether R.D.H. *could* make this up, but rather, definitively stating, six separate times, that this is not something that could be made up. *Cf. State v. Teters*, No. 49357-8-II, 2015 WL 4627884, *7 (Wash. Ct. App. Feb. 20, 2019) (prosecutor's statement in closing asking the jurors to ask themselves why the victim would "make this up" was proper, because it is not misconduct to urge the jury to consider the evidence of motives of the parties); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority). This conduct was improper. The State was not arguing an interference from the evidence, but rather, expressing a personal opinion regarding the credibility of R.D.H. *See McKenzie*, 157 Wn.2d at 54.

The State also expressed its personal opinion of the credibility of R.D.H. by showing the jury 11 powerpoint slides containing the heading “[R.D.H.] = Credible.” (Pl.’s Ex. 8). Over one-third of the State’s powerpoint slides during closing argument contained this header. (Pl.’s Ex. 8). Further, a bullet point on one of these 11 powerpoint slides stated: “A 8 kid – come up with this?” (Pl.’s Ex. 8). Like the statements during closing, this bullet point reiterated the State’s argument that R.D.H. could not make up the alleged events, and was the State’s personal opinion regarding the credibility of R.D.H.

The State also improperly vouched for the credibility of R.D.H. by stating R.D.H. “told the truth.” *See Ramos*, 164 Wn. App. at 341 n.4; *see also* RP 793.

The improper vouching that occurred here prejudiced the Mr. Stalford’s right to a fair trial by encroaching upon the jury’s decision-making authority. *See Ish*, 170 Wn.2d at 196.

While defense counsel did not object to the prosecutor’s improper statements, no curative instruction would have neutralized the comments the prosecutor made to the jury, both in its statements and in its powerpoint slides. (RP 787-789, 792-793, 796; Pl.’s Ex. 8). The key issue as trial for the jury was whether to believe R.D.H. The primary evidence against Mr. Stalford were statements by R.D.H., directly and through admitted hearsay testimony. Under these circumstances, the prejudice from repeatedly stating that R.D.H. was telling

the truth and viewing the visual, “[R.D.H.] = Credible,” for over one-third of the State’s powerpoint presentation, could not be cured by an instruction.

The State committed misconduct in its closing arguments that was prejudicial and incurable, by vouching for the credibility of R.D.H. This Court should reverse Mr. Stalford’s convictions and remand for a new trial.

Issue 2: Whether the judgment and sentence contains errors that should be corrected: it lists an incorrect date for each crime and an incorrect date of sentence for each prior conviction.

The judgment and sentence contains errors that should be corrected, listing an incorrect date for each crime and an incorrect date of sentence for each prior conviction.

The judgment and sentence lists the date of each crime as 12/21/2013. (CP 287-288). The judgment and sentence lists the date of sentence for Mr. Stalford’s prior sexual abuse convictions from Oregon as 9/10/1998, and it lists 1998 as the date of sentence for his failure to appear conviction from Oregon. (CP 289). However, the jury here found Mr. Stalford committed each crime between December 13, 2013 and May 2, 2018. (CP 37-38, 215-217, 240, 243, 246; RP 767-770). And, the date of sentence of each of Mr. Stalford’s five prior Oregon convictions was March 9, 1999. (CP 305-308, 310-312).

Therefore, this court should remand this case for correction of the judgment and sentence to list the date of each crime as December 13, 2013 – May 2, 2018, and to list the date of sentence for each prior conviction as March 9,

1999. *See, e.g., State v. Makekau*, 194 Wn. App. 407, 421, 378 P.3d 577 (2016) (remand appropriate to correct scrivener’s error in judgment and sentence, incorrectly stating the date the jury returned its verdict); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener’s error in judgment and sentence, incorrectly stating the terms of confinement imposed).

E. CONCLUSION

The case should be reversed and remanded for a new trial because the State committed misconduct in its closing argument that was prejudicial and incurable by vouching for the credibility of R.D.H.

The judgment and sentence should also be corrected to list the correct date for each crime (December 21, 2013 – May 2, 2018) and the correct date of sentence for each prior conviction (March 9, 1999).

Respectfully submitted this 19th day of June, 2020.


Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 37228-6-III
vs.) Benton County No. 18-1-00731-7
)
ERIC RAY STALFORD) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on June 19, 2020, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

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Having obtained prior permission, I also served a copy on the Respondent at prosecuting@co.benton.wa.us using the Washington State Appellate Courts' Portal.

Dated this 19th day of June, 2020.


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