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STATE OF WASHINGTON

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COA NO. 62071-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KENNETH JOHN THORGERSON,

Appellant.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George N. Bowden, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Kenneth Thorgerson, defendant and appellant below, hereby petitions the Supreme Court to review the decision identified in Part B, below.

B. COURT OF APPEALS OPINION

Petitioner seeks review, pursuant to RAP 13.4(b), of the unpublished Court of Appeals opinion in State v. Thorgerson, COA No. 62071-1-I (filed June 8, 2009).¹

C. ISSUES PRESENTED FOR REVIEW

1. Is it improper for a prosecutor to urge the jury to infer, because defense counsel did not demonstrate inconsistencies in the witness's out-of-court statements, that all such statements were consistent and so the witness was credible?

2. Is it improper for a prosecutor to cross-examine a defendant about why his lawyer asked him and other witnesses questions, rather than about the substance of the direct examination?

3. Is it improper for a prosecutor, by explicit plan, to fail to object to evidence he considered irrelevant, then cross-examine the

¹ A copy of the slip opinion is attached as an appendix to this Petition.

defendant about why his lawyer presented such irrelevant evidence, then argue to the jury that the entire defense is "bogus," "desperation," and "sleight of hand" because the evidence was irrelevant?

4. When the prosecutor began in opening statement describing to the jury that evidence rules prevented him from presenting some evidence, argued in closing the jury could infer facts from witnesses who worked in the prosecutor's office but did not testify, and admitted he failed to ask a question but urged the jury to infer what the witness would have answered if he had asked it, did cumulative misconduct deny the defendant a fair trial?

5. Did prosecutorial misconduct deny defendant due process? U.S. Const., amend. 14; Const., art. I, § 3.

6. Was defense counsel ineffective for failing to object to some of this misconduct? U.S. Const., amends. 6, 14; Const., art. I, § 22.

D. STATEMENT OF THE CASE²

1. OVERVIEW

This trial involved allegations from a seventeen-year-old daughter that her stepfather forced her to touch his penis when she was young. The stepfather denied any sexual contact. There was no physical evidence nor evidence from other eyewitnesses. The case turned on the credibility of these two people.

The prosecutor said he worried about an acquittal because people don't want to believe child abuse occurs. RPS 11.³ He later explained his intentional strategy to permit the defense to admit "a flood of irrelevant testimony" without objection, and then to argue to the jury the evidence was not relevant and was a "sleight of hand" by defense counsel. CP 76-77.⁴

² These facts are a summary of the relevant facts for purposes of this Petition. A more detailed statement is found in the Brief of Appellant at 3-21.

³ The trial transcripts are designated as "RP" with the volume noted: I (5/19/08), II (5/20/08), or III (5/21/08). The sentencing transcript of 7/17/08, is denoted "RPS."

⁴ "The 'sleight of hand' argument also pertained to the flood of irrelevant testimony presented by the defense in an effort to portray

2. PROSECUTOR'S OPENING STATEMENT

In opening, the prosecutor told the jury:

That man compelled Danielle Thorgerson to massage his penis, to caress him for his sexual pleasure. Right through the point of ejaculation. She'll tell you all about that if she's able. No doubt it will be difficult. But I expect her to tell you what he did.

RPI 158-59.

She's got a boyfriend about this time; his name is Jon Westlake. She confides in him what had happened. And he generally wouldn't be able to testify to -- about everything that's said in that conversation because the rules don't allow it. But I do expect that he'll testify the nature or the demeanor of that conversation, and he'll tell you it's a pretty sad one.

RPI 161.

3. TESTIMONY & CROSS-EXAMINATION

In fact, Danielle had no emotional difficulty testifying. Age 19 at trial, she rambled at some length about conflicts with her parents over money and her wish for more independence. Only after the prosecutor led her with questions about talking to "the police and other people" and "what this trial

the Defendant as a man of good character. It was a tactical decision of the prosecution to allow a great deal of such evidence, in lieu of objecting, to allow for such a 'sleight of hand' argument." State's Response to Defense Motions for Arrest of Judgment and for New Trial at 4-5.

is about" did she bring her attention to the alleged abuse. RPII 11-14.

Danielle admitted she frequently lied throughout her teenaged years. The boyfriend was the first person she told that her stepfather had molested her. She then told her best friend, then her younger brother, who urged her to tell the school counselor. At the same time, her brother told the school counselor his stepfather had physically abused him -- which he later admitted was a lie. RPII 46-49, 62, 77-82, 89-90; RPIII 6-10, 16-29, 46, 83-84, 107-08.

Ken Thorgerson testified he never had sexual contact of any kind with Danielle. RPIII 113, 121.

In response to defense counsel's questions, all four members of the Thorgerson family testified to Ken's many activities with the children, his commitment to Danielle's softball, and his financial commitment to providing for his children. The state did not object to any of this questioning. RPII 56-62; RPIII 20, 67-68, 74-76, 115-18.

On cross-examination, the prosecutor asked Mr. Thorgerson:

Q There's been a lot of testimony about a lot of good things you've done for your children, correct?

A Correct.

Q If a father had done all those things for a daughter but still molested her, in your mind, would those things make up for that?

A No.

MR. NAKKOUR: Objection, Your Honor. **Improper.** It's inflammatory.

THE COURT: Overruled.

BY MR. HUNTER:

Q Was the answer no?

A No.

Q So regardless of whether or not a father does all these things, it doesn't change a thing if he, in fact, molested his daughter, is that -- would you agree with that statement?

A I would agree.

Q **So what does all that have to do with this trial** other than trying to make you look good?

A Who is trying to make me look good?

Q Well, if you paid for her clothes and you paid for her car insurance and all the things you did do, I'm not talking about things that she wanted you to do but you couldn't. **All the things you did do, what does that have to do with her allegation against you?**

A That's just me being a father to my child.

Q Right. **Does it have anything to do with this trial?**

A Absolutely not.

Q **So why have we heard so much of it?**

A Because that's the type of person that I am.

RPIII 150-52.

4. PROSECUTOR'S CLOSING ARGUMENT

The prosecutor argued to the jury:

It's a very simple basic question that you have to decide to determine the outcome of this case.

And that is, is there any credible, reasonable explanation that's supported by the evidence to doubt what Danielle said? **Look at it this way: If it didn't happen, why is she saying it did? Start from that perspective. If it didn't happen, why is she saying it did?**

RPIII 164.

What this case is about is justice, and it tests our justice system because you can't just say, look, she says one thing, he says another. There's no way to find beyond a reasonable doubt. If anybody amongst you is tempted to do that, I'm counting on the rest of you to say, whoa, whoa, whoa. Let's look at this. **Because if it didn't happen, why is she saying it did?**

RPIII 166.

Look, if you believe her, you must find him guilty unless there is a reason to doubt her based on the evidence in the case. So don't say we believe her but.

RPIII 168.

Danielle ... went on to tell the **full truth**. Now, it's not just he said, she said. I did submit it that way to you up to this point, but it's not. Now, there's no video, but there is the letter and there is the statement to Detective Wells. **And the explanation you got for both was bogus. Absolutely bogus.** Now, I can't submit them to you and say there is no other possible explanation. I can't. **But when the defense tries to sell an explanation to you that doesn't make sense, you know it's not truthful. And if there was a reasonable explanation for those items and that statement, you**

would have gotten an explanation that makes sense. You would have got the truthful explanation.

So even though it's not a smoking gun for me to present it to you, when you look at what the defense tried to do with it, it really is. Why are they trying to make you think things are not the way they really are? That's desperation.

RPIII 171-72.

So here's the other thing about Danielle's testimony if that's -- that's really the only significant contradiction that the defense pointed out. We did make a point of asking her about all of the people she's talked to. So think about that. She told her boyfriend, she told a girlfriend, she told her brother, she told the school counselor, she told Deputy Eastep, she talked briefly to a detective. She wrote a written statement on it to the deputy. She talked to a nurse. She's talked to people in my office and an advocate. Others. So we're already past 10.

How many times was the defense able to say, well, isn't it true you told the nurse this? So you never got to hear all the statements. That's why I never got to ask the boyfriend what did she say to you? We were able to describe about the emotion, the demeanor, the timing, things of that nature? But you didn't get the statement that she says to her from me because there's hearsay rules. The defense brought some out or if they thought there was contradiction, they were allowed to ask about that. So out of all these versions, all these people she's talked to over a year, how many times did the defense grind out a contradiction? None.

How does somebody do that? How does this bad liar tell it 10 or more times over a year with a conspiracy involving three other young people and nothing

breaks down? You know how that works?
It's the truth.

RPIIII 174-75.

In rebuttal, the prosecutor argued:

The entire defense is sleight of hand. Look over here, but don't pay attention to there. Pay attention to relatives that didn't testify that have nothing to do with the case. They know her tells. Don't pay attention to the evidence.

RPIIII 195-96. He continued:

If that doesn't do it, think of this, Mrs. Carson -- I should have asked her this. My mistake. If you find that's a reason to acquit, go for it, I guess. But Mrs. Carson would have told her herself, based on the testimony you heard, she makes sure the kids know what she has to do.

MR. NAKKOUR: I'm going to object, Your Honor. Assumes facts not in evidence at this point in time.

THE COURT: Well, I think that she did testify that she had to make a report, as I recall. Am I misinterpreting the evidence?

Ladies and gentlemen, you'll have to trust your own memories of what the witnesses have testified to on the stand. **I'll overrule the objection.**

RPIIII 196-97.

5. VERDICT

The jury found Mr. Thorgerson guilty as charged of all four counts. CP 45-48. The court denied a motion for new trial based on prosecutorial misconduct. CP 20-21.

The experienced judge candidly observed from the evidence presented "the jury could have convicted or could have acquitted." RPS 25.

I could not tell and would not have hazarded a guess as to what the jury would do with the evidence with their consideration and their discussion of that evidence.

RPS 27. The court sentenced Mr. Thorgerson to 149 months, the bottom of the standard range for these crimes. RPS 24; CP 4-19.

E. GROUNDNS FOR REVIEW AND ARGUMENT

1. THE COURT OF APPEALS DECISION CONFLICTS WITH ANOTHER DECISION OF THE COURT OF APPEALS. RAP 13.4(b)(2).

The facts of this case substantially mirror those of State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005).

- (1) As here, in Boehning the allegations were of abuse that reportedly had happened several years earlier. Id. at 514-15.
- (2) As here, there was no evidence the abuse occurred except the complaining witness's testimony. Id. at 515-17.
- (3) As here, the defendant testified and denied the accusations. Id. at 516-17.
- (4) As here, the state presented witnesses to whom the complaining witness had reported the alleged abuse. Id. at 515-16.
- (5) As here, defense counsel had the opportunity to cross-examine the

complaining witness about her previous statements to others. Id. at 520.

- (6) As here, the prosecutor argued to the jury that because the defense failed to establish the complaining witness's various reports of abuse were inconsistent, "the jury could infer that each of H.R.'s statements was consistent and that she was a credible witness." Id. at 517.

In its decision here, the Court of Appeals concluded Boehning was reversed because the prosecutor improperly referred to three counts that had been dismissed. Slip Op. at 11. That was one of the examples of misconduct in that case. 127 Wn. App. at 513. But the Boehning court also found other improper argument that warranted reversal.

a. Vouching

Defense counsel had the opportunity to cross her on any of her previous statements ... to Carey Price, to Detective Holladay, to Diana Tomlinson, to himself, and he did so, remember? He asked some questions about prior stuff.

But he never pointed out that she told a different story to these other individuals. The only reasonable inference is she didn't tell a different story to these other individuals, because he would do his job and he would bring it up.

The State can't bring up hearsay, but he can bring up any inconsistent statements, and there were no inconsistent statements, and that's why you didn't hear them. So she has been very consistent.

...

Again, common sense goes back to thinking ... why would she make this up. She has no reason to make it up. She has no one to get in trouble, she has nothing to get out of trouble ... and Diana's talking to her about it and asking her about it, and then she tells in detail information that happened to her, and she tells this to Diana Tomlinson.

And then she comes and she talks to you. And there wasn't anything brought up that she told a different story to Diana Tomlinson. If she had told a different story to Diana Tomlinson about the touching, you would have heard about it, because Defense counsel would bring up something if it was different. So the reasonable inference, when she spoke to Diana Tomlinson, she told her the same thing she told you.

Boehning at 520-21 (court's emphases). "These remarks were highly prejudicial and constitute flagrant misconduct." Id. at 521. This case involved precisely the same misconduct.

The prosecutor also impermissibly bolstered the victim's credibility by arguing that her prior statements, which were (1) plainly hearsay, (2) not admissible ..., and (3) not admitted were consistent with her trial testimony. The prosecutor based this argument on the fact that the defense counsel did not impeach the victim with any prior inconsistent statements to witnesses.

Boehning, 127 Wn. App. at 514 (emphases added).⁵

⁵ See also United States v. Roberts, 618 F.2d 530, 533-34 (9th Cir. 1980) (prosecutor improperly vouches by indicating information not presented to the jury supports the witness's testimony; plain error reviewable even without

In this case, as in Boehning, the prosecutor vouched for Danielle's credibility by implying he knew personally what other statements she had made, although the jury did not hear them. The jury should believe her because he and "people in [his] office," who did not testify, knew what she had said and believed her.

Thus he bolstered her testimony with inferences that the state had other information that the jury could not hear, but that it should rely on anyway, to believe Danielle was telling the truth.

b. Shifting burden of proof

Additionally, the prosecutor committed misconduct by repeatedly arguing that, because Boehning had failed to establish that H.R.'s out-of-court statements about the abuse were inconsistent with her testimony at trial, the jury could infer that H.R.'s hearsay statements were consistent with her trial testimony and that she was a credible witness. In so doing, the prosecutor improperly argued that Boehning, not the State carried the burden of production to present evidence regarding H.R.'s credibility.

Boehning at 523.

objection); Lawn v. United States, 335 U.S. 339, 359-60 n.15, 78 S. Ct. 311, 2 L. Ed. 2d 321 (1958).

This argument improperly shifted the burden of proof to the defense: if the defense didn't prove inconsistencies, **the law** says you can believe Danielle. Boehning, 127 Wn. App. at 523. The Court of Appeals concluded "the thrust" of the argument was not to shift the burden, that the prosecutor argued "the evidence at trial" supported an inference that she was consistent and credible. Slip Op. at 8.

The prosecutor may not have intended to shift the burden of proof, but "the evidence at trial" he referred to meant evidence the defense had failed to present. The **effect**, as the Court of Appeals held in Boehning, is to shift the burden of proof.

This case is no different. The state also shifted the burden by arguing the jury was to "Start from that perspective. If it didn't happen, why is she saying it did?" This urged a presumption of guilt, not a presumption of innocence.

As in Boehning, the prosecutor's argument conveyed that Mr. Thorgerson, not the state, carried the burden of producing evidence regarding his stepdaughter's credibility. Boehning, 127 Wn.

App. at 523. The Court of Appeals opinion on this point conflicts with Boehning. Slip Op. at 9-10.

c. Going Beyond Necessary Response

[E]ven if improper, a prosecutor's remarks that are in direct response to a defense argument are not grounds for reversal as long as the remarks do not "go beyond what is necessary to respond to the defense and must not bring before the jury matters not in the record or be so prejudicial that an instruction cannot cure them."

State v. Dixon, ___ Wn. App. ___, 207 P.3d 459, 465 (2009) (reversed for prosecutorial misconduct; adequate response was no evidence; instead argued defendant should have called a witness).

The state claimed the prosecutor's argument was appropriate because defense counsel asked Danielle whether she had been consistent every time she told someone. Danielle responded she had been consistent. RPII 92-99; Resp. Br. at 23-24.

From this evidence, the prosecutor properly could have argued Danielle's out-of-court statements were all consistent **because she said they were**. That was within the evidence. That's not what he argued.

Instead the prosecutor called on the jury to rely on evidence he could not and did not present - - the contents of Danielle's statements to others. He then went further to expound on people Danielle had told, going beyond even the list defense counsel had reviewed with her. He went yet further to explain she had spoken to people **in his office**, not otherwise identified. RPIII 174-75.

Even the Court of Appeals agreed

To the extent that the deputy prosecutor referred to matters that were outside the record, the comments were improper.

Slip Op. at 8. It concluded a curative instruction would have "cut off" any further discussion, and so it didn't warrant reversal.

d. Flagrant and Ill-Intentioned

As in Boehning, the argument in this case was flagrant and ill-intentioned. It warrants reversal even without an objection below. This record shows the prosecutor knew precisely how the hearsay rules limited what he could present. He actually set up the argument in his opening statement, telling the jury about the hearsay rules's limits. RPI 161. It was improper to argue credibility from the

effect of the evidence rules and evidence not presented.

e. Prejudice

Appellant is entitled to a new trial if "there is a substantial likelihood that the prosecuting attorney's misconduct affected the jury." State v. Fisher, 165 Wn.2d 727, 749, 202 P.3d 937 (2009).

In this case, the jury's verdict turned almost entirely upon the credibility of the complaining witness and the defendant. There were no witnesses or physical evidence to corroborate H.R.'s testimony about the abuse; Tomlinson, Officer Holladay, and Price testified only that H.R. had disclosed the fact of abuse. And the evidence arguably supported either party's version of events. We cannot conclude that a rational jury probably would have returned the same verdict without the prosecutor's improper remarks.

Boehning, 127 Wn. App. at 523.

As in Boehning and Fisher, this case turned on the credibility of two witnesses. The trial judge could not predict how a jury would decide. Any prosecutorial misconduct affecting how the jury should determine credibility created a "substantial likelihood" of affecting the jury. Even the misconduct the Court of Appeals acknowledged, Slip Op. at 4 & 8, requires reversal in such a case.

Certainly the cumulative effect of the misconduct affected the verdict. It requires reversal.

2. THIS COURT'S SUPERVISORY AUTHORITY OVER THE STATE'S TRIAL COURTS AND INTERMEDIATE APPELLATE COURTS REQUIRES REVIEW OF THIS CASE. RAP 13.4(b)(4).

This Court exercises inherent supervisory powers over lower courts to see that they maintain sound judicial practice. State v. Bennett, 161 Wn.2d 303, 305, 165 P.3d 1241 (2007). Thus it has reversed convictions for prosecutorial misconduct that did not necessarily violate the constitution. See, e.g., State v. Fisher, supra (reversing for prosecutorial misconduct an unpublished opinion from Division III).

Despite precedent, even with clear published decisions such as Boehning two years before this trial, the prosecutor intentionally planned his improper arguments and strategies. He intentionally chose not to object to evidence he considered irrelevant, and then to ask the defendant improper argumentative⁶ questions about his lawyer's trial

⁶ Even the Court of Appeals acknowledged these questions were argumentative "to some extent." Slip Op. at 5.

strategy rather than facts within his knowledge. He did so intending to argue the jury should not believe the defense case because counsel used "sleight of hand," i.e., deception. If this one individual did it with appellate approval, other prosecutors will eagerly adopt the same approach.

The Court of Appeals agreed it is improper for the state to impugn defense counsel; nonetheless, it found this argument was not improper. Slip Op. at 9. This conclusion conflicts with State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993) (remarks disparaging defense counsel are improper); State v. Gonzalez, 111 Wn. App. 276, 283, 45 P.3d 205 (2002) (improper to impugn defense counsel); Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983), cert. denied, 469 U.S. 920 (1984).

Furthermore, the prosecutor's admission that he planned this tactic and argument demonstrates how flagrant and ill-intentioned the misconduct was. It calls for this Court's review and reversal.

3. THE CASE PRESENTS SIGNIFICANT ISSUES UNDER THE UNITED STATES AND STATE CONSTITUTIONS. RAP 13.4(b)(3).

Prosecutorial misconduct can deny due process and a fair trial. U.S. Const., amend. 14; Const., art. 1, § 3; Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935);⁷ Bruno v. Rushen, supra.

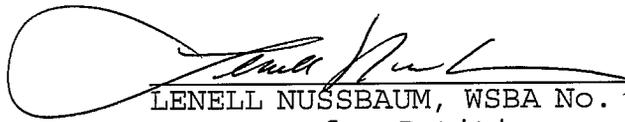
Trial counsel's failure to object to flagrant prosecutorial misconduct denies a defendant the right to effective assistance of counsel. U.S. Const., amends. 6, 14; Const., art. I, § 22; Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Boehning, supra, 127 Wn. App. at 525.

These constitutional issues were decided incorrectly by the Court of Appeals and require this Court's attention, decision and correction.

F. CONCLUSION

This Court should grant review and reverse the convictions.

DATED this 6th day of July, 2009.


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Attorney for Petitioner

⁷ A prosecutor has a special obligation to avoid "improper suggestions, insinuations, and especially assertions of personal knowledge." Berger, 295 U.S. at 88.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 62071-1-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
KENNETH J. THORGERSON,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>June 8, 2009</u>
)	

Cox, J. — In order to establish prosecutorial misconduct, the defendant must show both improper conduct and resulting prejudice. Kenneth Thorgerson's claim of prosecutorial misconduct fails because the challenged comments, when viewed in context, are either not misconduct or so minimally prejudicial that there is no likelihood they affected the jury's verdict. Accordingly, we affirm his convictions for three counts of first degree child molestation and one count of second degree child molestation.

The State charged Kenneth Thorgerson with three counts of first degree child molestation and one count of second degree child molestation. D.T., who was 19 at the time of trial, testified that when she was about 6 or 7, Thorgerson began attempting to place her hand on his penis. Over time, Thorgerson, who was D.T.'s step-father, progressed from having her touch him over his sweat pants to touching him over his underwear. When D.T. was starting fourth grade, Thorgerson succeeded in forcing her to touch his penis.

For about two years, D.T. refused Thorgerson's requests to touch his

penis. When D.T. was in sixth grade, she finally became "sick" of Thorgerson's persistent attempts and "gave him a hand job until he ejaculated." This continued "all the time" until D.T. finally put a stop to any further touching when she was in seventh grade.

When D.T. was 17, she told her boyfriend about the abuse. She also told her best friend and her brother. Eventually, D.T. told Lisa Carson, her school counselor, who contacted the police and the Department of Social and Health Services. D.T. then gave a statement to the sheriff.

D.T. testified that after she had reported the molestation, she looked in one of her notebooks and found a note from Thorgerson. The note purported to express Thorgerson's love for her, but included certain highlighted words that read "I want you to change your mind, please." D.T. believed that the message referred to sexual contact.

Thorgerson flatly denied having any improper contact with D.T. He maintained that D.T. and her boyfriend had developed a plan to lie about the molestation in order to be able to spend more time together and avoid her father's strict rules. Thorgerson claimed that he wrote the message in D.T.'s notebook in response to D.T.'s plan to quit playing softball.

The jury found Thorgerson guilty as charged. The trial court denied his motion for arrest of judgment and a new trial.

PROSECUTORIAL MISCONDUCT

On appeal, Thorgerson contends that his right to a fair trial was violated when the deputy prosecutor committed misconduct during opening statement,

cross examination, and closing argument. A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial.¹ Prejudice occurs only if “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.”² We review misconduct claims in the context of the total argument, the evidence addressed, the issues in the case, and the jury instructions.³

We note initially that defense counsel failed to object to virtually all of the alleged misconduct. Such errors are therefore waived unless the argument was so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice.⁴

Opening Statement

Thorgerson contends that the deputy prosecutor committed misconduct during opening statement when he told the jury that “[n]o doubt it will be difficult” for D.T. to tell the jury about the charged offenses. He argues that the comment expressed a personal belief and constituted an improper appeal to the jury’s passion and prejudice.

Appeals to the passion or prejudice of jurors are improper.⁵ But the brief, single reference to D.T.’s possible difficulty in testifying about the charges was nothing more than an aside during the deputy prosecutor’s lengthy, specific

¹ State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

² State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

³ State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

⁴ State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

⁵ State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

description of her expected testimony. Viewed in context, the remark was not an improper expression of personal belief or emotional appeal to the jury's sympathies.

Thorgerson also contends that the deputy prosecutor improperly suggested that court rules prevented him from presenting the content of D.T.'s statement to her boyfriend about the abuse:

And he generally wouldn't be able to testify to – about everything that's said in that conversation because the rules don't allow it. But I do expect that he'll testify the nature [sic] or the demeanor of that conversation, and he'll tell you it's a pretty sad one. He'll tell you that he encouraged her to tell someone else, and she did.^[6]

Defense counsel raised no objection.

Viewed in context, the deputy prosecutor's comments focused on the substance and nature of the witnesses' expected testimony at trial, not the content of the excluded evidence. This was consistent with the general purpose of opening statement. We presume that the jury followed the trial court's instruction that opening statements were not evidence.⁷ Under the circumstances, we do not find any likelihood that the comment affected the jury's verdict.⁸

Cross-Examination

Thorgerson contends that the deputy prosecutor committed misconduct in cross-examining him about the many good things he claimed to have done for

⁶ Report of Proceedings (May 19, 2008) at 161.

⁷ State v. Howard, 52 Wn. App. 12, 24, 756 P.2d 1324 (1988).

⁸ See id. (State's assertion during opening statement that a witness would not talk about certain matters because of marital privilege was not prejudicial misconduct).

his children. The trial court overruled defense counsel's objection that the question was "inflammatory," and the testimony continued:

Q So regardless of whether or not a father does all these things, it doesn't change a thing if he, in fact, molested his daughter, is that -- would you agree with that statement?

A I would agree.

Q So what does all that have to do with this trial other than trying to make you look good?

A Who is trying to make me look good?

Q Well, if you paid for her clothes and you paid for her car insurance and all the things you did do, I'm not talking about things that she wanted you to do but you couldn't. All the things you did do, what does that have to do with her allegation against you?

A That's just me being a father to my child.

Q Right. Does it have anything to do with this trial?

A Absolutely not.

Q So why have we heard so much of it?

A Because that's the type of person that I am.^{9]}

Thorgerson argues that the questioning was improper because it sought to demean defense counsel's trial strategy.

Although the questioning was argumentative to some extent, that is not the basis for Thorgerson's challenge on appeal. Thorgerson relies on State v. Jones¹⁰ for the proposition that the questioning was misconduct. But the issue in Jones involved the State's questioning for the purpose of admitting inadmissible and inflammatory hearsay.¹¹ Here, all of the questions were based on Thorgerson's own testimony. Thorgerson has failed to demonstrate that the cross examination was misconduct.

⁹ Report of Proceedings (May 21, 2008) at 151-52.

¹⁰ 144 Wn. App. 284, 183 P.3d 307 (2008).

¹¹ Id. at 295.

Closing Argument

Thorgerson contends that the deputy prosecutor committed reversible misconduct during closing argument when he again referred to evidence not admitted:

So here's the other thing about [D.T.'s] testimony if that's -- that's really the only significant contradiction that the defense pointed out. We did make a point of asking her about all of the people she's talked to. So think about that. She told her boyfriend, she told a girlfriend, she told her brother, she told the school counselor, she told Deputy Eastep, she talked briefly to a detective. She wrote a written statement on it to the deputy. **She talked to a nurse. She's talked to people in my office and an advocate.** Others. So we're already past 10.

How many times was the defense able to say, well, isn't it true you told the nurse this? So you never got to hear all the statements. That's why I never got to ask the boyfriend what did she say to you? We were able to describe about the emotion, the demeanor, the timing, things of that nature. But you didn't get the statement that she says to her from me because there's hearsay rules. The defense brought some out or if they thought there was a contradiction, they were allowed to ask about that. **So out of all these versions, all these people she's talked to over a year, how many times did the defense grind out a contradiction? None.**

How does somebody do that? How does this bad liar tell it 10 or more times over a year with a conspiracy involving three other young people and nothing breaks down? You know how that works? It's the truth.^[12]

Thorgerson argues that the deputy prosecutor not only once again referred to evidence that was not admitted, but also provided a legal explanation for the absence of that evidence and then suggested the jurors should infer that

¹² Report of Proceedings (May 21, 2008) at 174-75 (emphasis added).

the statements would have been consistent with D.T.'s trial testimony. He also claims that the references to D.T.'s statements to the nurse, advocate, and "people in my office" essentially vouched for D.T.'s credibility and shifted the burden to the defendant to present evidence.

The challenged comments were part of a longer argument addressing what was the only significant contradiction in D.T.'s statements. Lisa Carson, the school counselor, testified that D.T. told her that Thorgerson had touched her genitalia. Carson then recorded that information in her statement. At trial, D.T. testified that she had always prevented Thorgerson's attempts to touch her. D.T.'s trial testimony was consistent with the statement she made to the sheriff on the same day she had talked to Carson.

Defense counsel's failure to raise any objection strongly suggests that the challenged comments did not appear prejudicial in the context of the trial and argument.¹³ The consistency of D.T.'s statements was an issue that the defense itself raised when cross-examining D.T. Defense counsel asked D.T. about all of the people that she had told about the abuse, including doctors (counselors) and her advocate. After defense counsel summarized that D.T. had given her account "numerous, numerous times," D.T. agreed with counsel's statement that "to the best of your knowledge, it stayed consistent the entire time."

To the extent that the deputy prosecutor referred to matters that were

¹³ See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

outside the record, the comments were improper. But a curative instruction could easily have cut off any further discussion of such matters. Moreover, the thrust of the challenged comments and the larger argument was not that the defense had a burden to present evidence, but rather that the evidence at trial, with one exception, supported an inference that D.T.'s statements were consistent, undermining the defense theory that D.T. was a bad liar. We find no impropriety warranting a reversal.

Demeaning Defense Counsel

Thorgerson challenges the following comments during closing argument and rebuttal:

Danielle didn't do that. She went on to tell the full truth. Now, it's not just he said, she said. I did submit it that way to you up to this point, but it's not. Now, there's no video, but there is the letter and there is the statement to Detective Wells. **And the explanation you got for both was bogus. Absolutely bogus.** Now, I can't submit them to you and say there is no other possible explanation. I can't. They're not smoking guns. But when the defense tries to sell an explanation to you that doesn't make sense, you know it's not truthful. And if there was a reasonable explanation for those items and that statement, you would have gotten an explanation that makes sense. You would have got the truthful explanation. So even though it's not a smoking gun for me to present it to you, when you look at what the defense tried to do with it, it really is. Why are they trying to make you think things are not the way they really are? **That's desperation.**^[14]

...

The entire defense is sl[e]ight of hand. Look over here, but don't pay attention to there. Pay attention to relatives that didn't testify that have nothing to do with the case. They know her

¹⁴ Report of Proceedings (May 21, 2008) at 171-72 (emphasis added).

tells. Don't pay attention to the evidence. Even though, like I said half a dozen times at least and the judge has instructed you, has ordered you, your verdict has to be based on the evidence. Not on an aunt who you are supposed to believe supports the defendant who knows the complaining witness.^[15]

Thorgerson argues that by using the terms “bogus” and “sleight of hand,” the deputy prosecutor was attempting to demean defense counsel and improperly suggest that the defense was deliberately deceiving the jury. Although the use of such terms may raise improper negative connotations in some situations, we find no misconduct here.

A prosecutor may not impugn the character of the defendant's lawyer or disparage defense lawyers in general as a means to argue the defendant's guilt.¹⁶ But when viewed in its entirety, the deputy prosecutor's argument focused on the specific evidence that was before the jury and suggested that it did not support the defense theory of the case. The remarks did not malign the role of defense counsel in general or disparage Thorgerson's counsel personally. The argument was not improper.¹⁷

Shifting the Burden of Proof

Thorgerson contends the deputy prosecutor committed misconduct by informing the jury that there was “no credible reasonable explanation to doubt

¹⁵ Report of Proceedings (May 21, 2008) at 195-96 (emphasis added).

¹⁶ See State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009).

¹⁷ See State v. Guizzotti, 60 Wn. App. 289, 803 P.2d 808 (1991) (characterization of defense argument as “smoke” was unfortunate but not error).

what [D.T.] said” and “if you believe her, you must find him guilty unless there is a reason to doubt her based on the evidence in the case.” Thorgerson claims that the deputy prosecutor improperly shifted the burden of proof by suggesting there was a presumption that D.T. was telling the truth. This argument distorts the comments.

During closing argument, the prosecutor is afforded considerable latitude to express reasonable inferences based on the evidence and to comment on the apparent credibility of witnesses.¹⁸ Here, it is apparent that the deputy prosecutor properly asked the jury to draw inferences about D.T.’s credibility “based on the evidence in the case.” Thorgerson’s reliance on State v. Miles¹⁹ is misplaced. In Miles, the court held that the deputy prosecutor committed misconduct by arguing that the jury could find the defendant not guilty only if they believed his evidence.²⁰ The challenged argument in this case did not present such a “false choice” to the jury.²¹

Vouching for a Witness

Thorgerson alleges that the deputy prosecutor personally testified and vouched for a witness’s credibility when he referred during rebuttal to the testimony of Lisa Carson, the school counselor:

[Defense counsel] said Danielle wouldn't know the police would be called. But then later says she sending Nick on a fielding

¹⁸ State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

¹⁹ 139 Wn. App. 879, 162 P.3d 1169 (2007).

²⁰ Id. at 890.

²¹ See id.

expedition. Nick went out and got her. If that doesn't do it, think of this, Mrs. Carson -- I should have asked her this. My mistake. If you find that's a reason to acquit, go for it, I guess. But Mrs. Carson would have told her herself, based on the testimony you heard, she makes sure the kids know what she has to do.^[22]

Defense counsel objected that the comments assumed facts not in evidence.

The trial court overruled the objection and instructed the jury to "trust your own memories of what the witnesses have testified to on the stand."

The challenged comments were in response to the defense's argument that D.T. was not aware that Carson would have to tell the authorities about the alleged molestation. Although the deputy prosecutor stated that it was his mistake not to ask Carson about this issue, he then asked the jury to draw an inference that she would have told D.T. "based on the testimony you heard."

That argument was supported by the evidence, including Carson's testimony that she told D.T.'s brother about the reporting requirement before he brought D.T. to talk to her. The deputy prosecutor's comments did not constitute testimony on behalf of the witness, and the trial court did not err in overruling defense counsel's objection.

Thorgerson's attempts to compare the comments in this case to the reversible misconduct in State v. Boehning²³ are not persuasive. Boehning involved outrageously flagrant misconduct, including the deputy prosecutor's reference to three counts of rape that had been dismissed and suggestion that the victim's statements supported those dismissed counts.²⁴ Nothing remotely

²² Report of Proceedings (May 21, 2008) at 196.

²³ 127 Wn. App. 511, 111 P.3d 899 (2005).

²⁴ Id. at 513.

