

62071-1

62071-7

83357-5

NO. 62071-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH J. THORGERSON,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 MAR 16 11:21

BRIEF OF RESPONDENT

JANICE E. ELLIS
Prosecuting Attorney

THOMAS M. CURTIS
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

I. ISSUES..... 1

II. STATEMENT OF THE CASE 2

 A. THE MOLESTING OF THE VICTIM..... 2

 B. REPORTING THE MOLESTATION..... 4

 C. THE TRIAL..... 6

 1. Opening Statements..... 6

 2. Testimony..... 7

 3. Closing Argument And Rebuttal..... 13

 4. Motions For Arrest Of Judgment And A New Trial..... 17

III. ARGUMENT 18

 A. SUMMARY OF ARGUMENT..... 18

 B. IF THERE WAS ANY ERROR IN THE OPENING STATEMENT,
 THE ERROR WAS NOT PRESERVED FOR APPEAL..... 19

 C. THERE WAS NO MISCONDUCT IN THE CROSS-
 EXAMINATION OF DEFENDANT..... 22

 D. THE STATE'S CLOSING ARGUMENT WAS A FAIR COMMENT
 ON THE EVIDENCE..... 23

 E. THE COMMENTS MADE DURING THE STATE'S REBUTTAL
 ARGUMENT WERE EITHER REASONABLE INFERENCES FROM
 THE EVIDENCE OR MADE IN RESPONSE TO DEFENDANT'S
 ARGUMENT..... 26

 F. DEFENDANT HAS NOT DEMONSTRATED THAT COUNSEL'S
 PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF
 COMPETENCE..... 28

G. THERE WAS NO CUMULATIVE ERROR.	30
IV. CONCLUSION.....	31

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Boehning</u> , 127 Wn. App. 511, 111 P.3d 899 (2005) ..	24, 29
<u>State v. Bozovich</u> , 145 Wash. 227, 259 P. 395 (1927).....	22, 23
<u>State v. Claflin</u> , 38 Wn. App. 847, 690 P.2d 1186 (1984).....	20
<u>State v. Clark</u> , 48 Wn. App. 850, 743 P.2d 822 (1987)	21, 25
<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991)	24
<u>State v. Jones</u> , 144 Wn. App. 284, 183 P.3d 307 (2008)	22, 23
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995) ...	29, 30
<u>State v. Miles</u> , 139 Wn. App. 879, 162 P.3d 1169 (2007)	25
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	19
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984)	26, 27
<u>State v. Reeder</u> , 46 Wn.2d 888, 285 P.2d 884 (1955)	21
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994)	28
<u>State v. Stevens</u> , 58 Wn. App. 478, 794 P.2d 38 (1990).....	30

I. ISSUES

1. The prosecutor stated during his opening statement that it will be difficult for the victim to testify about the abuse and certain evidence would not be presented. Was error, if any, waived by defendant's failure to object?

2. Where the defendant has presented substantial evidence that he provided for the victim, coached her, and encouraged her in sports, was it misconduct for the prosecutor to ask defendant what such evidence had to do with the issues in the trial?

3. Where the victim testified that her statements to various people before trial were all consistent with her testimony, was it misconduct for the prosecutor to infer that the statements were consistent?

4. In closing, the defendant argued that persons who had not testified were supporting him. In rebuttal, the State characterized this as "slight of hand." If misconduct, was any error waived by the defendant's failure to object?

5. Where the school counselor testified that she told the victim's brother about her reporting requirements, was it misconduct for the prosecutor to infer the counselor would have

testified that she made sure that students were aware of her reporting requirements?

6. Was the performance of defendant's counsel deficient where defendant has not shown from the record that objections counsel did not make were likely to have been sustained?

7. Where there is no misconduct by the prosecutor, can there be cumulative errors warranting a new trial?

II. STATEMENT OF THE CASE

A. THE MOLESTING OF THE VICTIM.

When Danielle Thorgerson, the victim, was about 6 or 7 years old, defendant, Danielle's step-father, sat on the couch next to her, pulled a blanket over them, then attempted to pull her hand over and place it on his penis. She resisted, so he stopped. 5/20 RP 15-17. A couple of weeks later, defendant tried again. This time, he succeeded in having Danielle touch him, but she balled up her fist. She didn't know what was happening, but "It just didn't feel right." Defendant rubbed the victim's hand back and forth over his sweat pants for about 15 minutes. 5/20 RP 18-19, 21, 3 CP ____¹.

About two weeks later, defendant again sat on the couch with Danielle. This time, he pulled her hand under his sweat pants,

but over his underwear. Defendant again rubbed the victim's hand back and forth over his penis. 5/20 RP 20-21. Defendant continued having the victim touch him under his sweat pants but over his underwear at least once a month for about two years. 5/20 RP 23.

After defendant and his family moved to Snohomish County from King County, defendant again sat next to Danielle on the couch, covered them with a blanket, and pulled her hand over to touch his penis. Danielle was then just starting the fourth grade. This time, defendant pulled her hand under his underwear so that she was touching his skin. The victim again balled up her fist. Defendant then let go of her hand and left the room. A few minutes later he returned and apologized to Danielle. 5/20 RP 25-26.

About two weeks later, defendant again tried to have Danielle touch him, but she said "No" and went to her room. Defendant was "really mean" to the victim after that. 5/20 RP 27.

For the next two years, defendant continued to ask Danielle to touch him, but she refused. When she was in the sixth grade, she got "sick of it," and decided if she did what defendant wanted,

¹ The State has designated the Affidavit of Probable Cause as part of the Clerk's Papers. It has not yet been paginated.

he would leave her alone and stop being mean to her. This time, when defendant grabbed her hand, she wrapped her hand around defendant's penis and "gave him a hand job until he ejaculated." 5/20 RP 27. Defendant continued doing this until Danielle "finally put a stop to it." 5/20 RP 31.

When Danielle got to seventh grade, she told defendant that she wasn't going to touch him any more, and that she was going to tell her mother. Danielle was not forced to touch defendant again. 5/20 RP 33.

B. REPORTING THE MOLESTATION.

When she was 17, Danielle had her first serious boy friend. After they had been dating for about 8 months, she told him defendant had been "forcing her to touch him." 5/20 RP 132. Danielle "burst into tears" when she told her boy friend. 5/20 RP 131. The boy friend told Danielle that she should tell her best friend about what had been done to her. The best friend's mother was a Seattle police officer. 5/20 RP 132-33.

Danielle did tell her best friend that defendant "made her touch his genitals." 5/20 RP 153. When she told her, Danielle was "choked up." By that, the friend meant that "she looked down a lot, and she kind of stuttered, and she started to cry." 5/20 RP 147-48.

The best friend advised Danielle to tell a school counselor or the friend's mother. 5/20 RP 148. About a week later, Danielle told her friend that she had told the school counselor. 5/20 RP 150.

After telling her boy friend and best friend, Danielle told her brother that defendant had molested her. Danielle's brother told her to tell the school counselor. 5/21 RP 10.

Shortly after that conversation, the brother talked to the school counselor. He asked her what information she could keep confidential, and what information she had to report. 5/21 RP 33. After that, the brother brought Danielle to the counselor's office. The counselor remembered Danielle telling her that defendant "not only forced her to masturbate him but also touched her genitalia." 5/21 RP 107. The counselor was present when Danielle was interviewed by the police. The counselor thought she told the police "what she told me." 5/21 RP 125-26.

After Danielle made her disclosure to the counselor, the counselor called the Department of Social and Health Services (DSHS) and the police. 5/21 RP 36-37. The officer interviewed Danielle, her brother, and the counselor. He also took written statements from them. 5/20 RP 54, 5/21 RP 16, 37. The officer summarized the disclosures as:

Danielle said during those five years, [defendant] would attempt to put his hand down the front of her pants. Danielle said even though every time she would say no, he would still try. Danielle said [defendant] was never successful and would just walk off and get mad at her for not obeying him.

5/21 RP 111.

In addition to her boy friend, best friend, brother, school counselor, and the police, Danielle also disclosed the molestation to the prosecutor, "some doctors of some sort," and the victim's advocate. 5/20 RP 95-97. To the best of Danielle's knowledge, her disclosures to all these people was consistent. 5/20 RP 98.

C. THE TRIAL.

1. Opening Statements.

Before the parties made their opening statements, the court instructed the jury:

I caution you that the remarks that the lawyers make, their statements and argument throughout the trial are intended to help you understand the evidence and apply the law. The remarks or arguments or opening statements of the lawyers are not evidence, and you should disregard any comment or remark by the attorneys which are not supported by the evidence as it's brought into court.

5/19 RP 150.

The State in its opening statement outlined the crimes charged. The State then said, "[Danielle]ll tell you all about it if

she's able. No doubt it will be difficult. But I expect her to tell you what he did. And that's the basis of the charge in this case, the charges." There was no objection. 1/19 RP 158-59.

The State then told the jury that the victim first disclosed the molestation to her boy friend. The State said, "And he generally wouldn't be able to testify to – about everything that's said in the conversation because the rules don't allow it. But I do expect that he'll testify the nature or the demeanor of that conversation[.]" There was no objection. 5/19 RP 161.

Defendant then made his opening statement. He told the jury defendant was going to testify. 5/19 RP 167. Defendant then said, "So how do you, as a 17-year-old girl, get out from under the thumb of your father? Well, you come up with a story. And that's what happened in this case." 5/19 RP 168. Defendant went on to say, "[The victim's mother]'s going to tell you that Danielle was so disappointed in what she had done that she said, I shouldn't have lied. . . . She lied because she wanted a relationship with a boyfriend." 5/19 RP 169.

2. Testimony.

Danielle testified about how defendant forced her to touch his penis as described above. She also described reporting the

molestation to her boyfriend, best friend, brother, school counselor, and the police.

Danielle testified that she had a notebook. When she looked in it after she had disclosed the molestation, she found a note written by defendant. 5/20 RP 38. The note read:

Dearest Danielle, I told you that I love you a lot, but I don't think you'll ever realize just how much. There is nothing I would not do for you. I just want you to know how I truly feel and to let you – and hope nothing ever has to change as long as your feelings don't and as long as you don't mind, it never will. So please let me say I love you. Daddy.

5/20 RP 40-41.

Some of the words in the note were "bolded." Read from top to bottom, left to right, the bolded words said, "I want you to change your mind, please." Danielle thought the message refers to sexual contact between her and defendant. 5/20 RP 41.

When asked if she had made up the incidents to get defendant in trouble, Danielle answered "No." 5/20 RP 54-55.

During cross-examination, Danielle was asked about telling other people the facts of the molestation. She testified that in addition to the people she mentioned in her direct testimony, she had told the prosecutor, some doctors, and the victim's advocate. 5/20 RP 95-97. Defendant asked, "And you've told your story now

numerous, numerous times." Danielle answered "Yes." Defendant then asked, "And to the best of your knowledge, it stayed consistent the entire time." Danielle again answered "Yes." 5/20 RP 98.

Danielle was cross-examined extensively about defendant's involvement in her playing softball and other family activities. 5/20 RP 57-61, 63-68, 90. She was also cross-examined about her relationship with her boy friend. Defendant then asked:

Isn't it true that both [the boy friend] and you came up with this story so that you could get out from under the rules your father and mother had in place and so that you and he could spend more time together?

5/20 RP 88. Danielle answered "No." Id.

Later in the cross-examination, defendant asked Danielle to look at her statement. After she read part of the statement, the following colloquy occurred:

Q Isn't it true that you indicated in that statement that you wrote a couple of years ago or year and a half ago it indicates that you actually were forced to massage his penis the very first time?

A Yes.

Q And that's not true, is it?

A No.

Q And so your testimony here today is completely different than the story you told [the counselor] back in . . . November of '05."

A '06.

Q November of '06. So you lied again, right.

A Yes.

Q Isn't it true that this is all a big lie so that you could get away from your father?

A No.

5/20 RP 99-100.

Defendant asked Danielle if the note she found said "I don't want you to quit playing softball. You an all star. You got the [sic.] keep at it." Danielle answered "I believe if it was for softball, the note would have hinted something towards softball." 5/20 RP 105.

In re-direct, the State asked Danielle if the statement in the second paragraph of her statement to the police described "the first incident where the defendant had you actually touch him sexually, correct?" Danielle responded "Yes." The State then asked if that paragraph was a lie, as Danielle had agreed when questioned by defendant. Danielle answered that it was not a lie. 5/20 RP 124.

The next witness was Danielle's first boy friend, the one she made the first disclosure to. He described her during the disclosure as "extremely emotional." The boy friend testified that Danielle "described it as him forcing her to touch him. There. Sorry." 5/20 RP 132.

Danielle's best friend testified that when she disclosed that defendant "made her touch his genitals," she was "choked up." 5/20 RP 147, 153. The best friend also testified that when Danielle told her that she had disclosed to the counselor, "She kind of seemed embarrassed or, you know, just kind of afraid to let everything come out." 5/20 RP 150.

Danielle's brother testified that after she disclosed she had been molested, he told her she needed to "talk to somebody about it." 5/21 RP 10. The first time the brother heard the details of the molestation was when Danielle told the counselor. 5/21 RP 26.

The school counselor testified that she was seeing Danielle's brother as part of a "credit retrieval program." During some of her sessions, the brother talked about issues at home. 5/21 RP 32-33. On the day before the disclosure, the brother was seeing the counselor alone when he asked "what [the counselor] have to keep confidential and what [the counselor] have to report." 5/21 RP 33. The next day, Danielle and her brother came in together to see the counselor. He sat next to her while she disclosed the molestation. 5/21 RP 34. After the disclosure, the counselor contacted DSHS and the police. 5/21 RP 36.

The counselor was recalled by defendant. The counselor testified that Danielle told her that defendant "not only forced her to masturbate him but also touched her genitalia." The counselor was present when Danielle talked to the police. Nothing Danielle told the police seemed different to the counselor than what Danielle had told her. 5/21 RP 126.

Defendant testified that he had "absolutely not" molested his daughter. He said her claims that he forced her to masturbate him were not true. 5/21 RP 113. When defendant and his wife were going to meet the police officer, defendant said, "What's next? Danielle's going to accuse me of molesting her." Defendant testified that he said that out of exasperation. 5/21 RP 145.

During cross-examination, the State asked defendant "If a father had done all those things [defendant had done] for his daughter but still molested her, in your mind, would those things make up for that?" Defendant objected that the question was inflammatory. The objection was overruled. 5/21 RP 150-51. Defendant then said that the things he had done for Danielle had nothing to do with the trial. The State asked, "So why have we heard so much of it?" Defendant responded, "Because that's the type of person that I am." 5/21 RP 151-52.

3. Closing Argument And Rebuttal.

The State argued that Danielle "according to the defense, made up this allegation to bring all this trouble upon herself solely to get out from under her father's thumb. That is not a reasonable explanation in light of all the evidence[.]" 5/21 RP 163. The State then argued:

[I]s 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? And you'll no doubt hear many alternative theories that you should, according to the defense, probably consider is reasonable doubt. And you're going to have to look at each of those theories and decide is it reasonable? And does the evidence support that suggestion? I suggest to you that is can't pass that test.

5/21 RP 164-65.

The State also argued "Look, if you believe her, you must find him guilty unless there is a reason to doubt her based on the evidence in this case." 5/21 RP 168.

Later, the State argued:

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 gotten the truthful explanation.

5/21 RP 171-72.

The State discussed the counselor's testimony that Danielle told her defendant touched her genitals when Danielle testified that he had attempted but not been successful. The State argued that the counselor was mistaken. The State then argued:

[T]hat'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 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 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.

5/21 RP 174-75.

There was no objection to these arguments.

Defendant argued:

[W]e do not have the burden of proof. We did not have to present any evidence. We did not have to put witnesses up. That was not our burden. That was [the State's]. Reasonable explanations, we didn't have to provide reasonable explanations. We did not have to. We wanted to. Here's a man maintaining his innocence.

5/21 RP 182.

The main focus of defendant's argument was that Danielle was lying so that she and her boy friend could spend more time together. 5/21 RP 183-84. He then argued:

It's the defense contention that the reason Danielle went to her brother and went to the school counselor instead of the authorities is because she didn't know that the school counselor was going to be required by law to call the police. She didn't know she was going to have to call the police.

5/21 RP 184.

Later, defendant argued:

Look, Mom and Dad, Grandma, Auntie, these are all people who deal with [Danielle] on a daily basis who get to know her body language her mannerisms, her tells. Remember in voir dire we were talking about a person's tell. What's a person's tell at the poker table? What gives them away as bluffing? Those

parents are in a better position to know that young girl's tells than I am or than you are.

5/21 RP 187-88.

Defendant argued more than once that he was a loving parent in a loving family. 5/21 RP 193, 194. He then asked the jury to find he was not guilty. 5/21 RP 195.

The State started its rebuttal by asking, "So what does a molester look like? Think you can pick him out of a crowd? 5/21 RP 195.

The State continued:

The entire defense is slight 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. 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.

5/21 RP 195-96.

Later, the State argued:

He said Danielle wouldn't know the police would be called. But then later says she sending [her brother] on a fielding expedition. [The brother] went out and got her. If that doesn't do it, think of [the counselor] – I should have asked her this. My mistake. If you find that's a reason to acquit, go for it, I guess. But [the counselor] would have told her herself, based on the

testimony you heard, she makes sure the kids know what she has to do.

5/21 RP 196.

Defendant objected that the argument “assumes facts not in evidence at this point in time.” The court ruled, “Well I think that she did testify that she had to make a report, as I recall.” The court instructed the jury, “Ladies and gentlemen, you’ll have to trust your own memories of what the witnesses have testified to on the stand.” The court overruled the objection. 5/21 RP 196-97.

4. Motions For Arrest Of Judgment And A New Trial.

Defendant filed Motions for Arrest of Judgment and a New Trial. The grounds asserted to arrest the judgment was insufficient evidence. 1 CP 39. The grounds asserted for a new trial were the prosecutor referred to himself “in the first person instead of as the ‘State’ during the State’s closing arguments[.]” and there was “no psychological examination of the alleged victim[.]” 1 CP 42.

In ruling on the Motion for a New Trial, the court asked “[A]ssuming that the prosecutor may have made an impermissible reference to his own opinion, why not object at that time so I could have given a cautionary instruction?” The court ruled that part of the Motion was untimely. 6/17 RP 5. In ruling on the other issue, the court indicated that defendant was asking for a new trial based

on an examination he had not requested before or during the trial. The court denied the motions. 6/17 RP 7, 8.

III. ARGUMENT

A. SUMMARY OF ARGUMENT.

Defendant asserts there was prosecutorial misconduct from the opening statement, through the cross-examination of the defendant, through closing argument, to the rebuttal argument. Most of the asserted errors were not objected to, and are not preserved for appeal. The arguments and rebuttal defendant describes as misconduct were either reasonable inferences from the evidence or invited by defendant.

Since defendant has not shown actual misconduct, rather than possible trial error, a new trial based on cumulative error is not warranted.

Defendant contends that if any error was waived, it was due to ineffective assistance of counsel. The record does not show that counsel's performance fell below any objective standard of performance.

B. IF THERE WAS ANY ERROR IN THE OPENING STATEMENT, THE ERROR WAS NOT PRESERVED FOR APPEAL.

In its opening statement, the State informed the jury, without objection, that testifying would be difficult for the victim. Defendant claims this was an expression of personal belief and an improper “gratuitous injection of emotion[.]” Brief of Appellant 32-33. The statement was the State’s reasonable expectation of the testimony that would be presented and the manner in which it would be presented. This is not a statement of personal belief. If such comment was improper, any error was waived.

The trial was about a young woman’s serial molestation over a period of years by the man she thought was her father. The first persons the victim had disclosed the molestation to were going to testify that the victim was emotionally distraught during the disclosures. One witness was also going to testify that the victim described talking to the school counselor about the abuse “She kind of seemed embarrassed or, you know, just kind of afraid to let everything come out.” 5/20 RP 150. The comment that it would be difficult for the victim to testify was proper. See State v. Pirtle, 127 Wn.2d 628, 689, 904 P.2d 245 (1995) (arguments that evoke an

emotional response are appropriate so long as they are restricted to the circumstances of the crime).

Defendant relies on State v. Clafin, 38 Wn. App. 847, 690 P.2d 1186 (1984), to support the contention that the State's comment was error. This reliance is misplaced.

In Clafin, the defendant had been convicted of multiple rapes. In closing, the prosecutor, over objection, read a poem written by the victim of a rape totally unrelated to the charges that described the emotional impact of rape "utilizing vivid and highly inflammatory imagery." The Court of Appeals reversed, finding that reading the poem was "nothing but an appeal to the jury's passion and prejudice." Clafin, 38 Wn. App. at 850.

The comment in opening that it would be difficult for the victim to testify was nothing like the argument in Clafin. It was not inflammatory, and it was specific to this case.

The State also informed the jury in opening that the content of certain statements the witnesses had made to the police would not be admitted into evidence. Again, there was no objection.

Defendant asserts "It was completely improper to begin the trial by suggesting to the jury evidence that would NOT be presented." Brief of Appellant 34 (emphasis in the original).

Defendant then cites State v. Reeder, 46 Wn.2d 888, 285 P.2d 884 (1955), to support this assertion. Reeder provides no such support.

In Reeder, in closing argument, the State argued that the defendant had threatened his first wife with a gun. The evidence was that he did not threaten her. The State also referred to the divorce complaint that had been excluded to argue that the threat had been proved. The Supreme Court disapproved of using evidence that had been excluded to impeach the credibility of the defendant in argument. Reeder, 46 Wn.2d at 892.

Here, the State knew the witnesses would be shown their statements to the police and asked questions about them. It was not improper to let the jury know in advance that the entire content of those statements would not be in evidence. This is nothing like the use of excluded evidence closing condemned in Reeder.

Defendant has not shown that any of the State's comments in its opening statement were error. Should this Court find that there was some impropriety, since defendant did not object, any error was waived. Improper argument error is waived unless it is deemed the error was flagrant and ill intentioned. State v. Clark, 48 Wn. App. 850, 865 n. 3, 743 P.2d 822 (1987). Defendant does not assert the comments in the State's opening statement were flagrant

or ill intentioned. There is no basis for this Court to make such a finding. This error, if it was error, was waived.

C. THERE WAS NO MISCONDUCT IN THE CROSS-EXAMINATION OF DEFENDANT.

Defendant claims that the prosecution cross-examination of him was “completely improper.” Brief of Appellant 36. Defendant relies on State v. Jones, 144 Wn. App. 284, 183 P.3d 307 (2008), and State v. Bozovich, 145 Wash. 227, 259 P. 395 (1927), to support his claim. The cross-examinations in Jones and Bozovich are too dissimilar for this Court to use the reasoning of those opinions.

In Jones, the State could not locate a confidential informant at the time of trial. The defendant asked an officer if there was a warrant out for the confidential informant. In re-direct, the prosecutor “seized the opportunity to admit otherwise clearly inadmissible and inflammatory hearsay evidence” that the informant was afraid of the defendant and that’s why he was not available. Jones, 144 Wn. App. at 295.

Likewise, in Bozovich, the State cross-examined a character witness about specific incidents that happened before the witness knew the defendant or that the witness did not know about. The

State used the cross-examination to get inadmissible evidence of the defendant's prior acts of violence before the jury.

The State did not introduce any inadmissible evidence during cross-examination of defendant. Instead, the prosecutor inquired about things the defendant himself had raised in direct examination. 5/21 RP 150-52. This did not involve inadmissible hearsay or prior bad acts. This is not like Jones and Bozovich at all. There was no error in the cross-examination.

D. THE STATE'S CLOSING ARGUMENT WAS A FAIR COMMENT ON THE EVIDENCE.

Defendant first argues that the State committed misconduct during closing by asking the jury to infer that the victim's statements to witnesses who did not testify were consistent was error. Brief of Appellant 24. Defendant asserts this argument shifted the burden of proof. Brief of Appellant 29-30. The argument was a fair comment on the evidence.

When the victim testified, it was defendant, not the State, who asked her if she had discussed the allegations with doctors or advocates. 5/20 RP 95-97. Defendant then specifically asked the victim if her statements to all those people were consistent. The victim said that they were consistent. 5/20 RP 98. Arguing that no

inconsistent statements had been introduced into evidence was a fair comment on the evidence.

Defendant relies on State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005), to argue that the State's argument was misconduct. Brief of Appellant 24-27. That reliance is misplaced.

In Boehning, the State charged three counts of rape and three counts of child molestation. At the close of the State's evidence, the three rape charges were dismissed. Despite that dismissal, the State referred to those counts in closing argument and said that the victim's out of court statements had proved the counts, but she was not comfortable enough on the stand to testify about them. Boehning, 127 Wn. App. at 513. The Court of Appeals held that "a prosecutor may not make statements that are unsupported by the evidence[.]" Boehning, 127 Wn. App. at 529.

Unlike the argument in Boehning, the State's argument here was supported by the clear testimony of the victim, elicited on cross, that her statements were consistent. "A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury." State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). The argument was a reasonable inference from the evidence.

Defendant also relies on State v. Miles, 139 Wn. App. 879, 162 P.3d 1169 (2007), to argue that the burden was shifted to the defense. Brief of Appellant 29-30. Miles is factually too dissimilar to warrant that reliance.

In Miles, the testimony of the defendant and the victim contradicted each other. The State argued that the jury could acquit the defendant only if they believed his evidence. The Court of Appeals said this was a false choice. “[T]he jury did not have to believe Miles to acquit him; they had only to entertain a reasonable doubt as to the State’s case.” Miles, 139 Wn. App. at 890.

Here, the State did not argue that the jury could only acquit if it found the defendant was credible. In fact, the State emphasized that the jury should find defendant not guilty if it did not believe the victim. 5/21 RP 168. The State never told the jury that it had to believe the defendant’s testimony to acquit him. There was no false choice as was presented in Miles.

Defendant argues that the comments were “mindful, flagrant and ill-intentioned.” Brief of Appellant 39. Defendant must make this showing to have the Court consider this argument, because there was no objection to the argument when it was made. Clark, 48 Wn. App. at 865 n. 3. As discussed above, there was evidence

that supported the inference that the victim's statements were consistent, and there was no false choice presented to the jury. The comments of the State were not "flagrant and ill-intentioned."

E. THE COMMENTS MADE DURING THE STATE'S REBUTTAL ARGUMENT WERE EITHER REASONABLE INFERENCES FROM THE EVIDENCE OR MADE IN RESPONSE TO DEFENDANT'S ARGUMENT.

Defendant asserts the State's argument that the defense was a "slight of hand" was to "demean the role of defense counsel in arguing his theory of the case." Brief of Appellant 31. Defendant relies on State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984) to support his assertions. That reliance is misplaced.

The State did not tell the jury that the defendant was dishonest, underhanded, or trying to deceive the jury. During his closing, defendant argued that members of defendant's family who knew him and the victim could tell that the victim was lying when she said he molested her. These people had either not testified at all, or had testified, but had not said that they knew the victim was lying. The State's comment in rebuttal was that the defense was asking the jury to consider matters that were not in evidence rather than the evidence. That is not disparagement of the role of

counsel. It may be disparagement of the argument, but that is allowed in rebuttal.

In Reed, the defendant was represented by an attorney from out of town. The defense witnesses were doctors from out of town. In closing, the prosecutor expressed his personal opinion of the credibility of the defendant and of his guilt. In addition, he made gratuitous comments about out of town counsel and the expert witnesses that were intended to "align the jury with the prosecutor and against the defendant." Reed, 102 Wn.2d at 145. The comment had nothing to do with the defendant's argument or the evidence.

Here, the comment called the jury's attention to the defendant's improper argument that it should consider opinions that the victim was lying that it had not heard in the evidence. There was no disparagement of counsel.

The other comment that the State made in rebuttal that defendant claims was misconduct was that, if asked, the school counselor would have said that she "makes sure the kids know what she has to do." Defendant asserts that this comment "not only vouched for a witness, but was the prosecutor personally testifying

to what a witness would have said had he asked.” Brief of Appellant 28. This mischaracterizes what the State said.

Defendant argued that the victim told the school counselor because she didn't know the counselor would have to tell the police. 5/21 RP 184. In rebuttal the State said “But [the counselor] would have told [the victim] herself, based on the testimony you heard, she makes sure the kids know what she has to do.” The evidence was that the victim's brother asked the counselor what information she would keep confidential and what she would have to disclose. The counselor gave the brother that information. 5/21 RP 23. The comment was a reasonable inference of what the counselor would have told the victim. It was in direct response to defendant's closing argument. “[A]s an advocate, a prosecuting attorney is entitled to make a fair response to defense counsel's arguments.” State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). There was no misconduct.

F. DEFENDANT HAS NOT DEMONSTRATED THAT COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF COMPETENCE.

Defendant claims that if his counsel's failure to object to arguments he now deems were improper, he received ineffective

assistance of counsel. Brief of Appellant 42. Defendant has not shown counsel was ineffective.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

"The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceeding below." McFarland, 127 Wn.2d at 335. Defendant has failed to carry that burden.

As discussed in detail, the alleged misconduct was not misconduct. Had defendant's counsel objected, there is nothing in the record to suggest those objections had merit or would have been sustained. There is no showing of ineffective assistance of counsel.

Defendant relies on Boehning to argue that "a reasonable defense counsel would recognize this misconduct and object." Brief of Appellant 44. The misconduct in Boehning was to use inadmissible evidence to argue that dismissed charges had been

proved, thus the jury should convict the defendant of the less serious remaining charges. There was nothing in this record remotely approaching this type of error. There was no basis for objecting.

Assuming defendant should have made some objection, to show prejudice, the defendant must show from the record that the objection would have been sustained. McFarland, 127 Wn.2d at 337 n. 4. Defendant concedes that the court would not have sustained the objections or given curative instructions. Brief of Appellant 42. He has failed to demonstrate prejudice.

G. THERE WAS NO CUMULATIVE ERROR.

Defendant claims that “clearly the repeated impropriety which permeated opening, cross-examination, closing and rebuttal arguments, require reversal.” Brief of Appellant 40. Defendant has not shown cumulative error.

Defendant claims the State repeatedly committed improprieties. As discussed above, defendant has not shown any impropriety. When no prejudicial error is shown, as here, cumulative error could not have deprived the defendant of a fair trial. State v. Stevens, 58 Wn. App. 478, 798, 794 P.2d 38 (1990).

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on March 13, 2009.

JANICE E. ELLIS
Snohomish County Prosecuting Attorney

By: 
THOMAS M. CURTIS, WSBA # 24549
Deputy Prosecuting Attorney
Attorney for Respondent