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67174-0

No. 67174-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JONAS I. HERNANDEZ,

Appellant.

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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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence was presented to prove beyond a reasonable doubt Mr. Hernandez had sexual contact with J.R., an essential element of child molestation in the first degree.

2. Prosecutorial misconduct in closing and rebuttal argument deprived Mr. Hernandez of a fair trial.

3. The prosecutor improperly shifted the burden of proof by arguing that to believe the defense, the jury had to find the officer was “dead wrong,” and “in order for you to accept Defense’s version, you have to accept their witnesses’ testimony, and the problem is their witnesses’ testimony is not credible.”

4. The prosecutor improperly misstated the evidence by repeatedly stating that a State witness and numerous defense witnesses conspired to coordinate their testimony.

5. The prosecutor improperly vouched for the credibility of State witnesses.

6. The prosecutor improperly disparaged the role of attorneys by stating that the complaining witness had to testify in court sitting in a courtroom with “big, scary attorneys.”

7. Defense counsel was ineffective for failing to object to the prosecutor’s improper and prejudicial argument that shifted the

burden of proof, misstated the evidence, vouched for the credibility of State witnesses, and disparaged the role of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OR ERROR

1. The due process provisions of the Fourteenth Amendment to the United States Constitution and of Article I, section 3 of the Washington Constitution require the State to prove beyond a reasonable doubt every essential element of the crime charged. An essential element of the crime of child molestation in the first degree is sexual contact. Where, as here, the alleged contact was over a complainant's clothing, the State is required to establish the contact was for the purpose of sexual gratification. In the absence of evidence to establish sexual gratification, was Mr. Hernandez's right to due process violated when he was convicted of child molestation in the first degree? (Assignment of Error 1)

2. The due process provisions of the Fourteenth Amendment to the United States Constitution and of Article I, section 3 of the Washington Constitution also require a prosecutor to seek a verdict based on reason and free of prejudice. Was Mr. Hernandez's right to due process violated by prejudicial prosecutorial misconduct where the prosecutor improperly shifted the burden of proof, repeatedly misstated the evidence, vouched for

the credibility of State witnesses, and disparaged the role of attorneys? (Assignments of Error 2, 3, 4, 5, 6)

3. Defense counsel provides ineffective assistance when she fails to object to prejudicial prosecutorial misconduct for which no legitimate strategic or tactical reason exists. Was Mr. Hernandez's right to effective assistance of counsel violated when there was no legitimate strategic or tactical reason not to object to the prosecutor's improper and prejudicial comments that shifted the burden of proof, misstated the evidence, vouched for the credibility of State witnesses, and disparaged the role of counsel? (Assignment of Error 7)

C. STATEMENT OF THE CASE

Jonas I. Hernandez lived with his married sister and her husband, Gabriel Cruz and Victor Coronado, their ten year-old daughter, I.P., and his unmarried sister, Daniela Cruz.¹ 3/17/11 RP 63-65, 124. He shared a bedroom with Daniela and I.P. 3/15/11 RP 138; 3/17/11 RP 65-66, 127. I.P. slept in the top bed of a bunk bed, Daniela slept in the bottom bed, and Mr. Hernandez slept in a single bed on the other side of the room. 3/15/11 RP 138; 3/17/11

¹Because Gabriel Cruz and Daniela Cruz shared the same last name, they will be referred to by first name to avoid confusion. No disrespect is intended.

RP 66, 127, 129. Usually, either Daniela or Mr. Hernandez checked I.P.'s covers before going to sleep. 3/17/11 RP 71, 74.

On December 11, 2010, Mr. Hernandez and his family celebrated his nineteenth birthday by going out to eat and then returning home for cake and drinks. 3/17/11 RP 75, 135. Also present were Daniela's fiancé, Noe Cisneros, and I.P.'s friend and next door neighbor, eleven year-old J.R., who was sleeping over. 3/15/11 RP 10, 134; 3/16/11 RP 147-48, 152; 3/17/11 RP 30, 74, 79-80.

Shortly after 10:00 p.m., I.P. changed into pajamas, J.R. changed into calf-length sweat pants and a tee shirt, and they went to bed. 3/15/11 RP 49, 61, 138. They shared the top bunk bed, which was against a wall and reached by a ladder. 3/15/11 RP 138. J.R. slept near the wall and I.P. slept near the ladder. 3/15/11 RP 139. The bed was covered with one large comforter and two smaller blankets. 3/15/11 RP 50-51.

Sometime after 1:00 a.m., Gabriel and Mr. Coronado went to bed and Mr. Cisnero went home. 3/17/11 RP 42, 80. Mr. Hernandez and Daniela stayed up listening to music until around 2:30 a.m. 3/17/11 RP 86-88. Mr. Hernandez was somewhat affected by the drinks. 3/17/11 RP 95-96, 140-41.

Daniela got in bed first and asked Mr. Hernandez to check the girls' covers. 3/17/11 RP 90, 145. According to Daniela, Mr. Hernandez stepped on the bunk bed ladder briefly and then went to his own bed. 3/17/11 RP 91. They talked for several minutes and then went to sleep. 3/17/11 RP 95-97.

According to Mr. Hernandez, he stepped on the ladder to check the girls, as requested by Daniela. 3/17/11 RP 145. The girls were tangled in the blankets and he noticed a light from one of the girls' cellular telephones. 3/17/11 RP 145, 147. He felt around in the dark to straighten the blankets and may have accidentally touched J.R. 3/21/11 RP 16-17, 20, 28-29. He then got down from the ladder, went to his own bed, and talked with Daniela for a few minutes before falling asleep. 3/17/11 RP 148.

I.P. testified that she and J.R. slept through the night. 3/15/11 RP 141. She partially woke up when Daniela and Mr. Hernandez came to bed. 3/15/11 RP 140-143, 153-54. Mr. Hernandez either threw her blanket or tucked it in. 3/15/11 RP 146. She heard Daniela and Mr. Hernandez talking and then fell back asleep. 3/15/11 RP 140-41, 154. The next morning, around 8:20 a.m., the girls woke up. 3/15/11 RP 143. J.R. said she had to go to

church, I.P walked her to the door, and J.R. went home. 3/15/11 RP 144, 155-57.

J.R. testified she was asleep on the far side of the upper bunk when she was awoken by a soft touch on her vaginal area over her clothes. 3/15/11 RP 13-16, 26-30, 54-55. She may have kicked off the covers. 3/15/11 RP 42, 50-51, 61. She pretended to be asleep and the touching continued. 3/15/11 RP 33. The touching was soft, over her clothes, not between her legs, and without penetration. 3/15/11 RP 42, 79. At trial, J.R.'s demonstration of the touching was described by the prosecutor as "[Y]ou're putting your hand on your forearm, and you're kind of raising your knuckles up with pulling your fingers together." 3/15/11 RP 30. Sensing a person on the ladder, J.R. kicked out and "scouted" away. 3/15/11 RP 31. When she kicked, the touching stopped and the person put his upper body and head on the bed. 3/15/11 RP 31-32. According to J.R., this pattern of touching, kicking, and scooting away repeated several times, although she testified variously either that she could not remember how many times and for how long this pattern continued or that the pattern continued five times for five to fifteen minutes. 3/15/11 RP 30, 36, 59-63, 65-66, 82. She reached her cellular telephone, turned it on

for light, and saw Mr. Hernandez with his head on the bed as if asleep. 3/15/11 RP 28, 32. The clock on her telephone indicated it was 3:00 a.m. 3/15/11 RP 28. Mr. Hernandez then got off the ladder and went to his bed on the other side of the room. 3/15/11 36. Throughout all this kicking, I.P. and Daniela remained asleep, and Mr. Hernandez never spoke or made any noise. 3/15/11 RP 32, 34-35, 42.

J.R. immediately woke I.P. and said she wanted to go home. 3/15/11 RP 37. She then called her step-father, Bret Perkins, to unlock the door. 3/15/11 RP 37. I.P. walked her to I.P.'s front door and J.R. walked to her home next door. 3/15/11 RP 37.

J.R. told Mr. Perkins that Mr. Hernandez had touched her inappropriately. 3/15/11 RP 39. Mr. Perkins woke up J.R.'s mother, Sarah Perkins, and J.R. went to sleep in her parent's bedroom. 3/15/11 RP 39, 98, 117. Mr. and Mrs. Perkins went to Mr. Hernandez's house and knocked on the door, but no one answered, so they returned home and called the police at 4:20 a.m. 3/15/11 RP 98-99, 163.

Deputy Nathan Alanis responded to the Perkins' home shortly after 8:00 a.m. and interviewed J.R. and Mr. Hernandez. 3/15/11 RP 165-67. Mr. Hernandez stated that J.R. was playing

with her cellular telephone and he may have accidentally touched her while he was checking on the girls' covers. 3/15/11 RP 170-71, 176-77; 3/16/11 RP 66, 70-71. By oversight, Deputy Alanis never interviewed either Daniela or I.P. 3/16/11 RP 55, 57.

Mr. Hernandez was charged and convicted of child molestation in the first degree, in violation of RCW 9A.44.083. CP 24, 62-63. He now appeals. CP 49.

D. ARGUMENT

1. INSUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT FINDING BEYOND A REASONABLE DOUBT THAT MR. HERNANDEZ COMMITTED CHILD MOLESTATION IN THE FIRST DEGREE.

a. The State was required to produce sufficient evidence to prove beyond a reasonable doubt every essential element of the crime of child molestation in the first degree. The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Bunker, 169 Wn.2d 571, 585, 238 P.3d 487 (2010). A criminal defendant's fundamental right to due process is violated when a verdict is based upon insufficient evidence. Winship, 397 U.S. at 358; U.S. Const. amend. XIV; Wash. Const. art. I, sec. 3;

City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

Evidence is sufficient to support a conviction only if, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 628, 61 L.Ed.2d 560 (1970).

b. The State presented insufficient evidence to establish Mr. Hernandez had sexual contact with J.R., an essential element of the crime of child molestation in the first degree. RCW 9A.44.083(1) provides:

A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen years to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.010(2) provides:

“Sexual contact” means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

The sufficiency of evidence to establish “sexual contact” depends on the totality of the facts and circumstances. State v. Harstad, 153 Wn. App. 10, 21, 218 P.3d 624 (2009). Where, as

here, the touching occurred over clothing, the State must present additional evidence that the touching was for the purpose of sexual gratification. State v. Veliz, 76 Wn. App. 775, 778, 888 P.2d 189 (1995).

The additional evidence is insufficient when the touching occurred while a related adult was performing a caretaking function.

Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification.

State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1992).

The additional evidence is also insufficient where the touching was fleeting, inadvertent, or subject to innocent explanation. For example, in Powell, the Court reversed the defendant's conviction for child molestation in the first degree, which was based on allegations that he had sexual contact with the fourth-grade daughter of a friend on two occasions, once when he touched her "front" and "bottom" as he helped her off his lap, and again when he touched both her thighs while they were in his truck. 62 Wn. App. at 917. The Court found this evidence insufficient, and ruled:

[I]n those cases in which the evidence shows touching through clothing, or touching of intimate

parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification.

...
Here, the evidence of Mr. Powell's purpose in both touchings is equivocal. According to Windy, while she was sitting on his lap he hugged her about the chest and later touched her bottom while lifting her off his lap. The record suggests it was a fleeting touch. The evidence he touched her underpanties "in the front part [sic]." She did not remember how he touched her. She said, "Hey. Stop it." and he said, "Oops" and stopped. His touching her thighs, which occurred in his truck is also susceptible of innocent explanation. She was clothed on each occasion and the touch was on the outside of her clothes. No threats, bribes, or requests not to tell were made.

62 Wn. App. at 917-18.

Also, the additional evidence of sexual gratification must be unequivocal. In State v. Price, this Court affirmed the defendant's conviction for child molestation in the first degree, based on a four year-old girl's allegations that the defendant pinched her vagina over her clothes, and the mother's observation that the girl's vaginal area was bright red and swollen. 127 Wn. App. 193, 196, 110 P.3d 1171 (2005). This Court ruled:

Here, the evidence shows that the touching was neither fleeting nor inadvertent. R.I.T. informed her mother that Price had not simply touched her but had rubbed her vagina. And even assuming that the rubbing took place over R.I.T.'s clothing, it was of sufficient duration to cause redness and swelling that

was still visible after [the mother] had picked R.I.T. up from day care and taken her home.

127 Wn. App. at 202.

Similarly, in State v. Whisenhunt, the court affirmed the defendant's conviction for child molestation in the first degree, which was based on the testimony of a five year-old girl that on three separate occasions the defendant sat in a seat ahead of her on a bus, reached his arm over the seat, and touched her "privates." 96 Wn. App. 18, 20, 980 P.2d 232 (1999). The Court noted, "Unlike in Powell, this touching was not equivocal or fleeting in the sense the purpose of the contact was not open to innocent explanation." 96 Wn. App. at 24. See also State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990) (sufficient additional evidence of sexual gratification where defendant placed the child on his lap and rubbed the zipper area of the child's pants for prolonged period on two separate occasions and on a third occasion, the defendant put his hand down the child's pants and fondled him); Harstad, 153 Wn. App. at 22-23 (sufficient additional evidence of sexual gratification when defendant reached under child's blanket while she was alone, rubbed child's inner thigh over her clothing, and breathed heavily).

None of the above indicia of sexual gratification are present in the instant case. Rather, the evidence established only that the touching was inadvertent, equivocal, innocently and reasonably explained, and occurred while Mr. Hernandez was performing the caretaking function of straightening the tangled covers. As Mr. Hernandez explained, he may have accidentally touched J.R. while he was feeling around in the dark to straighten the covers for his niece, I.P. 3/17/11 145, 147; 3/21/11 RP 20, 28-29. In contrast to Whisenhunt, the contact was innocently and reasonably explained. There was no physical evidence of prolonged rubbing, as in Price, no evidence of heavy breathing or that J.R. was alone, as in Harstad, no evidence the touching occurred on separate occasions, as in Camarillo, and no evidence of threats, bribes, or requests not to tell, as referenced in Powell. The totality of facts and circumstances establish that, regardless of J.R.'s alarm, Mr. Hernandez, a young man unaccustomed to drinking alcohol, fumbled clumsily while trying to rearrange his niece's tangled covers.

c. The proper remedy is reversal of the conviction.

Mr. Hernandez's conviction for child molestation in the first degree was based on insufficient evidence of "sexual contact." A

conviction based on insufficient evidence cannot stand. State v. Enlow, 143 Wn. App. 463, 469, 178 P.3d 366 (2008). To retry Mr. Hernandez for the same conduct would violate the prohibition against double jeopardy. Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1979); State v. Smith, 155 Wn.2d 496, 505, 120 P.3d 559 (2005). In the absence of sufficient evidence to establish the essential element of “sexual contact,” his conviction for child molestation in the first degree must be reversed and the charge dismissed.

2. FLAGRANT AND ILL-INTENTIONED
PROSECUTORIAL MISCONDUCT
DEPRIVED MR. HERNANDEZ OF HIS
CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

a. The issue of prosecutorial misconduct may be raised for the first time on appeal. Prosecutors, as quasi-judicial officers, have a special duty to seek a verdict free of prejudice and based on the evidence. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). The special duty is based on a prosecutor’s obligation to afford an accused a fair and impartial trial. State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978); U.S. Const. amend. V, XIV; Wash. Const. Art. I, sec. 3. “Defendants are among the people the prosecutor represents. The prosecutor owes

a duty to defendants to see that their rights to a constitutionally fair trial are not violated.” State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Where a prosecutor violates that duty, prosecutorial misconduct “may deprive a defendant of a fair trial. And only a fair trial is a constitutional trial.” Charlton, 90 Wn.2d at 665; accord State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

As Justice Sutherland wrote over seventy five years ago:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

The defense bears the burden of establishing the prosecutor’s conduct was both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.2d 43 (2011). The

misconduct is viewed “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

A claim of prosecutorial misconduct in closing argument may be raised for the first time on appeal when the misconduct was so “flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (citations omitted); accord State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). Prosecutorial misconduct during argument is flagrant and ill-intentioned when, inter alia, prior case law has clearly condemned the remarks. See State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996).

“When no objection is raised, the issue is whether there was a substantial likelihood the prosecutor’s comments affected the verdict.” State v. Belgarde, 110 Wn.2d 504, 508, 775 P.2d 174 (1988). Where the misconduct specifically impinges on a fundamental constitutional right, it may be a manifest error that is properly before the court for the first time on appellate review,

regardless of the absence of an objection. Fleming, 83 Wn. App. at 216.

b. The prosecutor's repeated misconduct in closing and rebuttal argument violated Mr. Hernandez's right to a fair trial.

i. The prosecutor improperly undermined the presumption of innocence and shifted the burden of proof. In closing argument, the prosecutor stated:

[W]hen you hear everything that went in and all of the evidence in this case, there's only one version of it that's true, and that version is [J.R.]'s.

3/21/11 RP 86. In rebuttal argument, the prosecutor stated:

Their entire case rests on you accepting their version of the events, not the State's version of events.

3/21/11 RP 109. Shortly thereafter, the prosecutor repeated this theme, and stated:

[I]n order for you to accept Defense's version, you have to accept their witnesses' testimony, and the problem is their witnesses' testimony is not credible.

3/21/11 RP 117. And again:

[I]f you accept their version of the events, then Deputy Alanis is just dead wrong.

3/21/11 RP 119. These statements were improper.

First, these arguments mischaracterized the theory of the defense. In actuality, the defense argued that J.R. misinterpreted

the touching, the touching was accidental, and the investigation was flawed for failure to interview Daniela and I.P. See 3/21/11 RP 87-88, 96-97, 106-07. The defense did not argue that the touching did not occur or that the deputy was wrong.

Second, the prosecutor's argument clearly implied that the jury could acquit only if it believed the defense theory of the case. A prosecutor undermines the constitutionally protected presumption of innocence and improperly shifts the burden of proof by arguing that to acquit the defendant, the jury must find the State's witnesses are lying or incorrect. "[I]t is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." Fleming, 83 Wn. App. at 213; accord State v. Castaneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991) ("it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying."). Similarly, it is misconduct to argue that to believe the defense, the jury must disbelieve the State's witnesses. State v. Jackson, 150 Wn. App. 877, 888, 209 P.3d 553 (2009); State v. Riley, 69 Wn. App. 349, 351-52, 848 P.2d 1288 (1993).

Third, the prosecutor's argument implied that the jury needed to determine the "truth." But, it is misconduct to imply that

the jury needs to determine the truth. “A jury’s job is not to “solve” a case. ... Rather, the jury’s duty is to determine whether the State has proved its allegations against the defendant beyond a reasonable doubt.” State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009); accord, State v. Walker, No. 39420-1-II, 2011 WL 5345265, at *4 (Div. 2, Nov. 8, 2011).

The prosecutor’s arguments misstated the law, misrepresented both the role of the jury and the burden of proof, and are “unmistakably misconduct.” See State v. Fiallo-Lopez, 78 Wn. App. 717, 730, 899 P.2d 1294 (1995).

ii. The prosecutor improperly misstated the evidence. In closing argument, the prosecutor stated:

And while you’re listening to the Defense’s version of the events, ask yourself is it consistent with the evidence that has been shown? Did somebody have to think about what it is that they were going to say before they got up here and said it? Did they have to come up with different timelines? Did they have to talk to each other about it? Did they have to come up with some reason why things didn’t go down exactly the way they supposedly did?

3/21/11 RP 86. The prosecutor repeated this theme in rebuttal argument:

[T]hey’ve been talking. They’ve talked about how the timeline fits and changed the timeline to make them fit.

3/21/11 RP 117. And yet again:

The Defense witnesses have talked to each other, they've clearly coordinated with each other, and they've clearly figured out their timelines to make this work.

3/21/11 RP 119.

Presumably, this argument was based on Daniela's responses to the prosecutor's questioning on cross-examination regarding whether she had discussed the incident with her family.

THE COURT: The question is: "And did you guys discuss what happened the night before."

A (By the interpreter) In the morning or when? When did –

Q The rest of the day?

A (By the interpreter) Yes.

Q And since that day, you've continued to talk about it; is that right?

A (By the interpreter) Yes.

Q You've gone over the time frames over and over and over again?

A (By the interpreter) No.

Q Have you talked to Noe about the time frames?

A (By the interpreter) Yes.

Q And you've talked to him all the way up to until the last couple of days; is that right?

A (By the interpreter) Yes.

Q You talked to him about the times that he left and the times that you went to bed since Detective Martin was at your house on March 7th; is that right?

A (By the interpreter) Yeah. We have been making comments about that, whether he remembers the times or not.

3/17/11 RP 115-16.

On re-direct, Daniela testified:

Q Daniela, in talking about the events of December 11th with your family, why was the family talking about it?

A (By the interpreter) About the 11th? Did you ask?

Q Yeah. About the night of the 11th and the 12th.

A (By the interpreter) Well, we were talking about that we had gone to the restaurant and remembering what we had done on the 11th.

Q So you're kind of telling me what you were talking about. Why were you discussing it as a family?

A (By the interpreter) We were remember what we had done on the 11th.

Q Trying to just help yourself remember?

A (By the interpreter) Yes.

3/17/11 RP 115-16, 117-18.

A prosecutor commits misconduct when he or she misleads the jury by misstating the evidence. State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808 (1991). Here, contrary to the prosecutor's argument, as demonstrated by the record, Daniela did not testify directly or implicitly that Mr. Hernandez's family "changed the timeline" or conspired to "coordinate with each other." Rather, she merely acknowledged that the family discussed the situation. As a matter of common sense, the arrest of a close family member for child molestation would be a topic of discussion for any family.

iii. The prosecutor improperly vouched

for the credibility of State witnesses. In closing argument, the prosecutor stated:

What reason would [J.R.] have to say this? Why would she say all of this if it wasn't true?

3/21/11 RP 84. In rebuttal argument, the prosecutor stated:

Deputy Alanis was honest here today, wasn't he? Don't you find him credible? Do you see any reason in the world to believe that Deputy Alanis is not telling the truth?

3/21/11 RP 119. By contrast, in rebuttal argument, the prosecutor variously described defense witnesses as "not dependable," "incredible," and "not reliable." 3/21/11 RP 111, 113, 117. He also argued that the testimony of one of his witnesses was "inconsistency after inconsistency," and that one or two missing screws to the bunk bed, which was assembled in the courtroom by defense witnesses and introduced into evidence, were "conveniently left out" and "magically they're not here when it gets here to the courtroom." 3/21/11 RP 111, 114.

A prosecutor may not vouch for the credibility of any witness, either expressly or implicitly. State v. Sargent, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985). This prohibition is designed to guard against the prosecutor from intruding into the jury's prerogative to

make credibility determinations. Unites States v. Young, 470 U.S. 1, 18, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Here, the prosecutor's repeated statements that two State witnesses were credible, contrary to the defense witnesses, were improper vouching and encroached on the exclusive province of the jury.

iv. The prosecutor improperly disparaged the role of counsel. In closing argument, the prosecutor stated:

She's sitting in a courtroom with a group of adults watching her every move. She's got a judge, she's got a court reporter, she's got a court clerk, she's got big, scary attorneys, she's got police officer and she has members of the public in the courtroom.

3/21/11 RP 84.

It is well-settled that a prosecutor commits misconduct when he or she disparages or categorizes defense counsel in any way. State v. Reed, 102 Wn.2d 140, 145-47, 684 P.2d 699 (1984). In context, here, the prosecutor was clearly referring to the defendant's cross-examination of J.R. This argument improperly disparaged defense counsel and was a direct comment on Mr. Hernandez's constitutional right to representation and to cross-examination.

c. The repeated instances of misconduct were
flagrant, ill-intentioned, and prejudicial, requiring reversal.

Prosecutorial misconduct is prejudicial and requires reversal where there is a substantial likelihood the misconduct affected the verdict. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

Misconduct is flagrant when the impropriety of the conduct has been previously settled by case law. Fleming, 83 Wn. App. at 214. Also, the cumulative effect of repeated instances of misconduct may be so flagrant that no curative instruction could erase the combined impact. Walker, 2011 WL 5345265, at *6.

Here, the prosecutor's misconduct was flagrant. The impropriety of shifting the burden of proof, of misstating the evidence, of vouching for the credibility of State witnesses, and of disparaging the role of counsel is well-settled. Fleming, 83 Wn. App. at 213; Guizzotti, 60 Wn. App. at 296; Sargent, 40 Wn. App. at 343-44; Reed, 102 Wn.2d at 145-47.

The misconduct was also prejudicial. The trial judge acknowledged the weakness of the evidence of guilt.

If I were to view the evidence in a light most favorable to the defense, I would, quite frankly, grant the motion for the reasons set forth in the memorandum submitted by [defense counsel]. The circumstances here are somewhat atypical with another adult

present in the room in the lower bunk when the touching occurred. And so it is certainly possible that if there was a touching, that it was an accidental touching in the course of the defendant moving blankets around which was the thrust of the defense case.

4/26/11 RP 9. As noted by this Court, “[T]rained and experienced prosecutor’s presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels those tactics are necessary to sway the jury in a close case.” Fleming, 83 Wn. App. at 215 (quoting defense counsel’s brief).

Given the combination of the flagrant and prejudicial misconduct and the weak evidence, there is a substantial likelihood that the prosecutorial misconduct affected the verdict. Reversal is required.

d. To the extent a curative instruction may have neutralized the prejudice from the prosecutor’s improper comments, defense counsel was ineffective for failing to make a timely objection. The State may claim that the issue of prosecutorial misconduct is waived because defense counsel did not object to the prosecutor’s improper comments. To the extent that this Court may find Mr. Hernandez needed to object to preserve this issue,

Mr. Hernandez argues in the alternative that his attorney was ineffective for failing to object to the improper comments.

A criminal defendant has the constitutional right to effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, sec. 22; Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 1052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must establish (1) counsel's performance was deficient, and (2) the deficient performance was prejudicial to the defense. Strickland, 466 U.S. at 687; State v. Brousseau, 172 Wn.2d 331, 352, 259 P.3d 209 (2011). The Strickland test was adopted in Washington to "ensure fair and impartial trial." State v. Garrett, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). A claim of ineffective assistance of counsel presents a mixed question of law and fact that is reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

i. Defense counsel's failure to object to the prosecutor's improper comments was objectively unreasonable.

To establish the first prong of the Strickland test, a defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the

circumstances.” Thomas, 109 Wn.2d at 229-30; accord State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). Defense counsel’s performance will not be considered ineffective if it can be characterized as a legitimate trial strategy or tactic. Id. at 229-30. However, even tactical or strategic decisions must be reasonable. Wiggins v. Smith, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

As discussed above, the prosecutor repeatedly committed misconduct in closing argument and rebuttal argument. He improperly shifted the burden of proof, misstated the evidence, vouched for the credibility of State witnesses, and disparaged the role of defense counsel, all in violation of a prosecutor’s well-settled duty to afford an accused a fair and impartial trial. In light of the defense theory that J.R. simply misinterpreted the touch, there was no conceivable strategic or tactical reason not to object.

ii. Defense counsel’s failure to object to the prosecutor’s improper comments was prejudicial. To establish the second prong of the Strickland test, a defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Strickland, 466 U.S. at 693. Rather, he need only show “that there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. Id.

Here, again, the additional evidence of sexual gratification was very weak. As the trial judge said, dismissal of the charges was justified viewing the evidence in the light most favorable to the defense. 4/26/11 RP 9. This not a case where the evidence was so "overwhelming" that counsel's deficient performance did not undermine confidence in the outcome. See e.g., State v. Hendrickson, 129 Wn.2d 61, 80, 917 P.2d 563 (1996) (evidence "powerfully" supported guilt); State v. Coleman, 152 Wn. App. 552, 571, 216 P.3d 479 (2009) (evidence "overwhelmingly" established guilt). Had the jury not been subjected to the multiple instances of prosecutorial misconduct, Mr. Hernandez likely would have been acquitted.

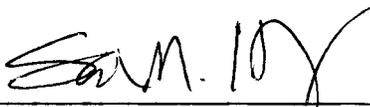
Defense counsel's failure to object to the prosecutor's repeated improper comments was unreasonable under the circumstances and prejudicial to the defense. Reversal is required. See State v. Martinez, 161 Wn. App. 436, 439, 253 P.2d 445 (2001).

E. CONCLUSION

Mr. Hernandez's conviction for child molestation in the first degree was based on insufficient evidence of sexual gratification. In addition, prosecutorial misconduct deprived Mr. Hernandez of a fair trial, free of prejudice, and based on the evidence. For the foregoing reasons, Mr. Hernandez respectfully requests this Court reverse his conviction and dismiss, or, in the alternative, reverse and remand for a new trial.

DATED this 15th day of December 2011.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

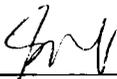
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67174-0-I
)	
JONAS HERNANDEZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF DECEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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