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67779-9

NO. 67779-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JUAN PABLO GIRON-CLAROS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY YU

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A video tape that has been admitted into evidence may be taken along with the technological means to play it if, in the discretion of the court, the exhibit bears directly on the charge and is not unduly prejudicial. Undue prejudice is found if the replaying of the exhibit is likely to cause the jurors to have an emotional response that would overcome rational thought. At trial, a video tape of a child victim interview was admitted into evidence and given to the jury at the outset of deliberations. A playback machine was provided at the jury's request over the defense objection concerning overemphasis of the evidence. Has Giron-Claros waived a challenge of undue prejudice when he objected on other grounds? If not, has Giron-Claros failed to establish that the trial court abused its discretion?

2. A prosecutor's arguments are not improper if they are a pertinent reply to acts or statements of defense counsel or if they are an appropriate attack on the defense theory of the case. At trial, the defense theory was that the victim's reports of rape and molestation were the result of improper suggestion by others. In closing argument, defense counsel made an improper missing witness argument and argued the defense theory absent any

evidence of the theory. In response, the prosecutor argued that the defense could have called the witness if he had relevant testimony and could have called an expert to testify about the theory of “implanted memory.” Were these statements proper when taken in the context of the defense closing argument, the prosecutor’s entire argument and the jury instructions?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Giron-Claros was charged with one count of Rape of a Child in the First Degree- Domestic Violence and three counts of Child Molestation in the First Degree- Domestic Violence. CP 8-10. The jury returned verdicts of guilty on the three counts of molestation but acquitted Giron-Claros of the rape charge. CP 64-67.

2. SUBSTANTIVE FACTS

Theresa Martinez-Flores (Flores) and her five-year-old son O.F. began renting a bedroom in defendant Juan Pablo Giron-

Claros's apartment on October 22, 2010. 6RP 51-52.¹ Flores and O.F. both called Giron-Claros by the name "Pablo." 6RP 51. Flores and O.F. are Spanish speakers who were interviewed and testified using Spanish language interpreters. In the two months they lived with him, O.F. would often go into Giron-Claros's bedroom to play with Giron-Claros's Xbox video game console. 6RP 58. On one occasion, after noticing that the door had been closed, Flores asked O.F. if Giron-Claros had ever touched him, which O.F. denied. 6RP 61-62. Flores also noticed that the bedroom door was sometimes locked but was not initially concerned because Giron-Claros's girlfriend's daughter visited often. 6RP 61-62. On December 15, 2010, before Flores went to work, O.F. asked to stay home with Giron-Claros instead of staying with a babysitter. 6RP 64. Flores agreed. 6RP 64.

The next day, when Flores asked O.F. about the previous evening, O.F. told Flores, "Pablo wants me touch his penis all the time." 6RP 65. O.F. explained that Giron-Claros liked O.F. to

¹ The Verbatim Report of Proceedings consists of fourteen volumes, referred to as follows: 1RP (6/21/2011), 2RP (6/23/2011), 3RP (7/5/2011), 4RP (7/6/2011), 5RP (7/11/2011), 6RP (7/12/2011), 7RP (7/13/2011- morning), 8RP (7/13/2011- afternoon), 9RP (7/14/2011), 10RP (7/19/2011), 11RP (7/20/2011), 12RP (7/21/2011), 13RP (7/22/2011) and 14RP (9/16/2011).

touch his penis because it would get hard. 6RP 65-66. O.F. said that he did not like to touch Giron-Claros's pubic hair. 6RP 66. O.F. also told Flores that Giron-Claros touched O.F.'s penis but that it did not get hard. 6RP 66. Flores took O.F. to a police station to report what had happened. 6RP 79. O.F. told police that Giron-Claros had touched his penis and "little tail." 6RP 80. Flores explained that O.F. calls his anus his "little tail." 6RP 81. Flores and O.F. moved out of Giron-Claros's apartment that night. 6RP 82.

Several days later, O.F. was interviewed by child interview specialist Carolyn Webster. 8RP 48, 71. The interview was video recorded. Ex. 6.² O.F. reported that he touched Giron-Claros's penis and that it would get hard when he touched it. Ex. 6. O.F. demonstrated how he would touch O.F.'s penis using both of his hands. Ex. 6. O.F. said that Giron-Claros's penis had hairs on it. Ex. 6. Webster asked if anything came out of Giron-Claros's penis. Ex. 6. O.F. said something about pee coming out but the interpreter did not understand his entire answer. Ex. 6. When the

² Giron-Claros refers to Exhibit 6 in his opening brief but failed to designate it for review. As the exhibit is necessary for the court to determine whether the jury's ability to view it in deliberations was unduly prejudicial, the State has designated it in its August 14, 2012 supplemental designation.

question was repeated O.F. answered no. Ex. 6. O.F. also told Webster that Giron-Claros had touched O.F.'s penis and bottom with his hands. Ex. 6. O.F. said that it hurt when Giron-Claros touched his bottom but that O.F. moved away quickly when that happened. Ex. 6. O.F. said that these incidents happened lots of times. Ex. 6.

O.F. was then taken to the Harborview Center for Sexual Assault and was seen by Dr. Rebecca Wiester, a physician who specializes in examining child victims of sexual assault. 8RP 5-10. O.F. reported that Giron-Claros made O.F. touch his penis and that it got hard. 8RP 19. O.F. said he stopped when he touched Giron-Claros's pubic hair. Id. O.F. said that Pablo touched him in the front and in the back (referring to his penis and anus). 8RP 18. O.F. said that these incidents happened many times. 8RP 31. Dr. Wiester testified that O.F. looked very uncomfortable when disclosing the abuse. 8RP 19. At trial, during cross-examination defense counsel asked Dr. Wiester if she was "familiar with the implanted memory literature." 8RP 37. Dr. Wiester responded in the affirmative. Id. On redirect examination Dr. Wiester testified

that she had no concerns that O.F.'s account was the product of implanted memory.³ 8RP 37-38.

In his interviews, O.F. was inconsistent about whether these incidents happened in the bedroom or the bathroom, but at trial he testified that the bedroom and the bathroom were the same room. 7RP 69-70. Flores explained at trial that Giron-Claros had his own bedroom with an internal bathroom. 6RP 86. Flores testified at trial that O.F. told her after his interview with Carolyn Webster that Giron-Claros had put his mouth on O.F.'s penis and he did or wanted to put his penis inside O.F.'s anus. 6RP 85-86. Months later O.F. disclosed to Flores that Giron-Claros had put his penis inside O.F.'s anus. 6RP 86.

At trial, the court admitted a DVD containing the video recording of O.F.'s interview with child interview specialist Webster under the child hearsay exception. 8RP 73. The DVD was among all of the admitted exhibits provided to the jury at the start of jury deliberations. 11RP 45. During jury deliberations the jury informed the court that they wanted to watch the video and asked for the

³ On appeal, Giron-Claros notes that defense counsel objected to the question posed in redirect examination but his objection was overruled. App. Br. at 5 n.2. However, Giron-Claros's summary is factually misleading as defense counsel raised the subject of "implanted memory" on cross-examination and thus opened the door to the doctor's opinion on this issue. 8RP 37.

necessary equipment. CP 60. The court addressed the request with the parties in open court outside the presence of the jury. 11RP 47. When informed of the jury's request, defense counsel objected to the court giving the jury playback equipment, arguing that the jury's viewing of the tape would overemphasize the evidence. 11RP 47, 49. Overruling the objection, the court provided playback equipment to the jury and noted that the entire exhibit had been admitted. Id. The court held that it was "not the Court's business to inquire whether or not they view it once, twice, 25 times or just a portion." 11RP 50. The court further noted that the video should not be treated any differently than photos or documents that had been admitted and provided to the jury, which the jury could view or read as it wished. 11RP 50-51.

C. ARGUMENT

1. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT GAVE THE JURY PLAYBACK EQUIPMENT FOR AN ADMITTED VIDEO EXHIBIT DURING JURY DELIBERATIONS.

Giron-Claros claims that the trial court erred in providing playback equipment that allowed the jury to view an admitted video exhibit during deliberations. Giron-Claros's claim fails as the video

recording was an exhibit admitted into evidence that jurors were entitled to review as they saw fit. Further, Giron-Claros claims that any repetition placed undue emphasis on the evidence and is thus unduly prejudicial. In making this assertion, Giron-Claros incorrectly conflates the analysis used to consider allowing a jury to re-watch trial testimony with the analysis used to consider the appropriateness of a jury's access to admitted exhibits.

a. Giron-Claros Waived His Claim Of Undue Prejudice By Failing To Raise It Below.

Giron-Claros likely conflates these issues on appeal in an attempt to mask the fact that he has waived the issue for appellate review. Under RAP 2.5(a)(3), the court may not consider an issue raised for the first time on appeal unless it involves a "manifest error affecting a constitutional right." See State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). While Giron-Claros objected to the playback equipment being provided to the jury on the ground of undue emphasis, he did not argue below that there was a danger of undue prejudice. Thus, Giron-Claros did not preserve the claim he now presents on appeal. As the issue in this case involves the admission of an exhibit, where the standard is undue prejudice,

Giron-Claros waived this issue as he objected on different grounds. See State v. Mason, 160 Wn.2d 910, 933, 162 P.3d 396 (2007) (holding that an objection to the admission of evidence on one ground did not preserve a claim on appeal based on different grounds).

b. Giron-Claros Has Failed To Show He Was Unduly Prejudiced By The Jury's Access To Exhibit 6.

Nevertheless, Giron-Claros cannot prevail on a claim of abuse of discretion as he fails to show that the replaying of the tapes was unduly prejudicial. CrR 6.15(e) provides that when the jury retires for deliberation, it "*shall* take with it the instructions given, all exhibits received in evidence and a verdict form or forms" (emphasis added). Neither Washington's rules of evidence nor its superior court rules specifically address a jury's access to playback equipment during deliberations. However, exhibits taken into the jury room may generally be used as the jury sees fit. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

Accordingly, Washington courts have consistently held that the jury can take into deliberation audio or video tapes that have been admitted into evidence along with the technological means to play

them. State v. Gregory, 158 Wn.2d 759, 847-48, 147 P.3d 1201 (2006); State v. Elmore, 139 Wn.2d 250, 294-96, 985 P.2d 289 (1999); State v. Castellanos, 132 Wn.2d 94, 935 P.2d 1353 (1997).

In discussing this issue, the supreme court has held that a jury may have access to an audio tape exhibit during deliberations if, in the discretion of the court, the exhibit bears directly on the charge and is not unduly prejudicial. Castellanos, 132 Wn.2d at 98, (citing State v. Frazier, 99 Wn.2d 180, 189, 661 P.2d 126 (1983)). The court likewise noted that a trial court's decision to allow access to a recorded exhibit and playback equipment will not be disturbed on review absent a showing of abuse of discretion. Id. at 97. The court explained that an abuse of discretion occurs "only when *no reasonable person would take the view adopted by the trial court.*" Id. (emphasis added).

The court rejected Giron-Claros's argument that a jury's unrestricted access to video and audio recordings during deliberations places undue emphasis on the evidence. Gregory, 158 Wn.2d at 848, citing Elmore, 139 Wn.2d at 295; Castellanos, 132 Wn.2d at 102. Thus, in determining whether or not the trial court abused its discretion, appellate courts instead look to whether jury's ability to replay the evidence without limitation was unduly

prejudicial. Id. The correct test for prejudice under this analysis is not undue emphasis, but whether such evidence is likely to stimulate an emotional response rather than a rational decision. Castellanos, 132 Wn.2d at 100.

On appeal, Giron-Claros simply asserts that the playing of the video tape *could* invoke an emotional response because of the victim's age and the nature of the allegations. App. Br. at 14. However, there is nothing in the record to support this blanket assertion. Throughout the approximately 40-minute interview, O.F. presents as an antsy 5-year-old who would rather color than answer questions. Ex. 6. He expresses no sympathetic emotions such as sadness or fear during the interview; rather, O.F. expresses that he is annoyed with the length of the interview and appears more and more disinterested as the interview proceeds. Ex. 6.

In Elmore, the court admitted Elmore's recorded confession and gave the jury the admitted exhibit and a playback machine for use during deliberations. Elmore, 139 Wn.2d at 296. Elmore confessed to detectives that he had molested his 14-year-old step daughter when she was 5 years old. Id. at 260, 285. He explained that after arguing with the girl when she had missed her bus he

drove her to a secluded dirt road where he forcibly removed her clothes and raped her despite her crying and pleading for him to stop. Id. After the rape, Elmore described in graphic detail how he brutally strangled, tortured, suffocated and beat the girl to death. Id.

Despite the nature of the crime, the young age of the victim and the gruesome details contained in the confession, the supreme court found that there was no evidence that the content of the tapes caused such an emotional response in the jury as to overpower reason. Id. at 296.⁴ As the rape and murder of a 14-year-old was described in much more graphic detail than O.F.'s descriptions of being molested, Giron-Claros has failed to show how the jury's ability to exercise reason was overcome due to its access to Exhibit 6.

On appeal, Giron-Claros attempts to distinguish these cases in two ways. First, Giron-Claros claims that Frazier, Castellanos and Elmore are distinct because they involved audio rather than video tapes. App. Br. at 15. However, the supreme court has held

⁴ Giron-Claros states that Castellanos pointed out that Elmore did not claim the evidence was likely to stimulate an emotional response. App. Br. at 14. This is impossible as Elmore was decided two years after Castellanos and incorrect as Elmore contains a lengthy discussion on this issue. State v. Elmore, 139 Wn.2d at 296.

that there is no distinction between audio and video tapes admitted as exhibits under this analysis. State v. Gregory, 158 Wn.2d 759, 848, 147 P.3d 1201 (2006).

Second, Giron-Claros erroneously asserts that Frazier, Castellanos and Elmore involved recordings of the criminal act itself. App. Br. at 14. This claim is inaccurate with regard to Frazier and Elmore. In both, the recordings at issue were recorded police interviews of the defendant. Elmore, 139 Wn.2d at 296; Frazier, 99 Wn.2d at 187-88. In each case, the supreme court noted that the recordings were admitted exhibits and held that it was not an abuse of discretion for the jury to be permitted to hear them repeatedly. Elmore, supra; Frazier, supra. Moreover, Washington courts examining this issue do not distinguish between recordings of interviews and recordings of the crime itself but rather distinguish between exhibits and trial testimony. Castellanos, 132 Wn.2d at 102. As the above-cited cases permit trial courts to give jurors access to recorded exhibits absent undue prejudice, and are controlling authority here, Giron-Claros has not shown an abuse of discretion.

Giron-Claros's reliance on Koontz and Binder is misplaced. State v. Koontz, 145 Wn.2d 650, 41 P.3d 475 (2002); United States

v. Binder, 769 F.2d 595 (9th Cir. 1985), overruled in part by United States v. Morales, 108 F.3d 1031, 1035 (9th Cir 1997). In Koontz, the supreme court addressed whether and under what circumstances a jury may review videotaped trial testimony during its deliberations. The court noted that replaying trial testimony is disfavored because of the danger of undue emphasis on the repeated testimony. Koontz, 145 Wn.2d at 654-55. The court found the trial court abused its discretion by not imposing sufficient precautions to limit the overemphasizing of repeated trial testimony. Id. at 660. In United States v. Binder, the 9th Circuit likewise held that it was an abuse of discretion to allow the jury to review videotaped trial testimony of child victims because of such undue emphasis. Binder, supra.

Both Koontz and Binder address the replaying of videotaped trial testimony during deliberations rather than the replaying of admitted exhibits. Koontz, 145 Wn.2d at 658; Binder, 769 F.2d 598. Notably, the supreme court distinguished the standard for exhibits (undue prejudice) from that of trial testimony (undue emphasis) and held that replaying trial testimony under the

circumstances of the case improperly emphasized the evidence.⁵ Id. at 659. As the concern of undue emphasis does not pertain to exhibits admitted into evidence, Giron-Claros cannot show that the court abused its discretion in providing the jury with a playback machine to view an admitted exhibit.

2. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.

Giron-Claros claims that the deputy prosecutor improperly shifted the burden of proof on two occasions during her rebuttal argument. His claim is without merit as the prosecutor's arguments were in direct response to those made by the defense in closing argument.

The defense theory, as argued in closing, was that O.F. had never been molested by Giron-Claros and that the claimed memories were the result of information suggested to him by

⁵ The supreme court's holding in Koontz is also limited to the particularly concerning facts of the presentation of the video. The video consisted of a series of camera perspectives, with camera focus moving between the witness, the attorneys, the defendant, and the trial judge. State v. Koontz, 154 Wn.2d at 652. It also included views of the defendant sitting at the defense table alone while no witness was testifying. Id. During witness testimony, it also showed the defendant even when defense counsel was silent. Id. at 652-53. Because of these views the court expressed significant concern that the shifting perspectives created a very different perspective than the original live testimony (where jurors would normally shift their focus between only the witness testifying and the examining attorney).

others. 11RP 20-23. In closing, defense counsel twice referred to the State's failure to call Flores's boyfriend, Hiyell.⁶ 11RP 25, 28.

The prosecutor began rebuttal argument by reminding the jury that the standard of proof beyond a reasonable doubt was a high burden placed on the State but one that should be embraced as it protects all defendants. The prosecutor then discussed the burden of proof in the context of the defense closing argument and defense case in chief. The portion of the rebuttal argument at issue on appeal was as follows:

Now it's the State's burden ...to prove every single element of every crime charged in order for you to find the defendant guilty. And the defendant has the opportunity to either sit at the table and remain silent or he can choose to present a case. In this case he chose to present evidence, to testify himself, to present evidence of another witness. And so when they choose to put on that case, we look at their case with the same critical eye that we do all of the State's evidence. He's not presumed to be truthful. You get to evaluate his testimony and the testimony of Veronica with the same critical eye that you evaluate any of the State's witnesses. The defendant also can have any witness appear at no cost to him. So when Defense Counsel says where is Hiyell, where is the roommate, they had the opportunity to present that too.

[Defense objects and claims improper burden shifting, court overrules]

⁶ During Flores's testimony Hiyell is referred to as "Jaell." 6RP 47-48.

Now remember, these are crimes that happened in secret. They happened behind a closed door. The defendant's not going to touch [O.F.] sexually in front of any of these people. So are they witnesses? No, they're not. Defense counsel keeps bringing up the notion of an implanted memory. There was no evidence during this trial of an implanted memory, of a mistaken memory or anything of the sort. There is no evidence to support that whatsoever. The defendant could have brought an expert to testify to that issue.

[Defense counsel objects and claims improper argument, court overrules]

And that expert could have been made to appear at no cost to him. There is no evidence of an implanted memory.

11RP 38-40.

Prosecutors are granted wide latitude in closing argument to draw reasonable inferences from the evidence. Allegedly improper arguments must be viewed in "the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given." State v. Gregory, 158 Wn.2d 759, 810, 147 P.3d 1201, 1228 (2006) (quoting State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995)). The prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel. Russell, 125 Wn.2d at 87. Further, comments

that might otherwise be considered improper are not grounds for reversal “if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” State v. Weber, 159 Wn.2d 252, 276-77, 149 P.3d 646 (2006) (quoting Russell, 125 Wn.2d at 86).

Appellate courts review trial court rulings on prosecutorial misconduct for abuse of discretion. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). A defendant’s prosecutorial misconduct claim fails on appeal even if objected to the alleged misconduct at trial but fails to demonstrate that the misconduct had a substantial likelihood of affecting the verdict. State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009).

Giron-Claros alleges the State shifted the burden of proof by commenting on the failure of the defense to call a civilian witness. Neither side called Hiyell, the boyfriend of O.F.’s mother, as a witness. In closing, on two occasions defense counsel questioned why Hiyell had not been called by the State to testify. 11RP 25, 28. When there was no indication that Hiyell could provide relevant testimony or that he was particularly available to only the State, this was an obvious attempt to improperly infer that the State was

hiding something by not calling him. In rebuttal, the prosecutor noted that defense could have called Hiyell and that Hiyell was not a witness to the crimes as the abuse happened in secret. 11RP 39-40. As this was a direct response to defense counsel's attempt to draw an improper missing witness inference, it does not constitute misconduct. See State v. French, 101 Wn. App. 380, 389, 4 P.3d 857 (2000) (finding prosecutor's statement "if you wanted to hear from the other officers, fine, the defense can call them as well as we can," to be pertinent response to an improper missing witness argument made by defense counsel).

Likewise, Giron-Claros alleges that the State shifted the burden of proof by commenting on the defense failure to call an expert witness. In closing argument, defense counsel argued that the molestation and rape by Giron-Claros were not true memories of O.F. but rather suggested to him. 11RP 20-23. In rebuttal, the prosecutor responded directly to the defense argument and noted that there was no evidence in front of the jury suggesting that O.F.'s memory was implanted by suggestion. 11RP 38-40.

While it is improper to imply that the defense has a duty to present evidence, the State may comment on the absence of certain evidence if persons other than the defendant could have

testified regarding that evidence. State v. Jackson, 150 Wn. App. 877, 887, 209 P.3d 553, rev. denied, 167 Wn.2d 1007 (2009) (citing State v. Ashby, 77 Wn.2d 33, 37-38, 459 P.2d 403 (1969)). When a defendant attempts to establish a particular theory of the case, the State is entitled to attack the adequacy of the proof and point out weaknesses and inconsistencies, including the lack of testimony which would be integral to the defendant's theory. State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114, rev. denied, 115 Wn.2d 1014 (1990).

In Contreras, the defendant was charged with assault. Contreras's defense was an alibi; he claimed that at the time of the assault he was with a friend at a racetrack. Contreras, 57 Wn. App. at 472. During closing argument, the State commented on the defendant's failure to call this friend. Id. at 473. This Court held that the State is entitled to point out weaknesses and inconsistencies in a defendant's case, including the lack of testimony which would be integral in supporting the defendant's theory. Id. at 476.

Here, as in Contreras, the State validly drew attention to the defense theory's shortcomings, the lack of any testimony supporting the accusation that O.F. reported acts of rape and

molestation because they were suggested to him. In fact, the only testimony defense elicited about the theory of memory implantation was the affirmative response that Dr. Wiester gave when asked on cross-examination if she was “familiar with the implanted memory literature.” 8RP 37. On redirect examination Dr. Wiester testified that she had no concerns that O.F.’s account was inaccurately mistaken for implanted memory. 8RP 37-38. Likewise, on direct examination child interview specialist Webster testified that when she is building a rapport with the child and attempting to determine their understanding of telling the truth she makes sure to not “implant” ideas into the child’s head. 9RP 24.

Moreover, the trial court had properly instructed the jury that closing remarks were not evidence, that the State had the burden of proof, and that Giron-Claros was presumed innocent. CP 34-39. Also, the State prefaced its entire rebuttal argument with remarks reminding the jury that the State bears the burden of proof. 11RP 38-39. For these reasons, when taken in the context provided by the evidence and jury instructions, the State’s rebuttal statements did not constitute error. See Gregory, 158 Wn.2d at 810.

The prosecutor’s statements here are in no way analogous to the two cases pointed out by Giron-Claros. In State v.

Cleveland, 58 Wn. App. 634, 794 P.2d 546 (1990), rev. denied, 115 Wn.2d 1029 (1991), cert. denied, 499 U.S. 948 (1991), the prosecutor improperly suggested that the defense would have presented favorable evidence if such evidence existed. Unlike the State's argument here, the argument in that case was not tied to the weaknesses in the defense theory but rather suggested that the defense had a duty to prove his innocence. Likewise, in State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), the court found that the prosecutor's repeated misstatements regarding not giving the defendant "the benefit of the doubt" were improper (although cured by the court's instruction). Id. at 25. Here, the prosecutor prefaced her entire rebuttal argument with a correct statement of the law. 11RP 38-40.

Even assuming, *arguendo*, that the prosecutor's statements here were improper, Giron-Claros has failed to show the alleged misconduct had a substantial likelihood of affecting the verdict where the jury was instructed properly, there was overwhelming evidence of the molestation based on the consistent reports, the defendant testified and denied making even benign statements to police, and there was an absence of any basis to reasonably question the reliability of the State's witnesses. Furthermore, as

the jury acquitted Giron-Claros on one of the charged counts, it is apparent that, despite any allegedly improper argument, the jury understood that they had a duty to acquit if the State had not met its burden of proof beyond a reasonable doubt.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Giron-Claros's convictions.

DATED this 16 day of August, 2012.

Respectfully submitted,

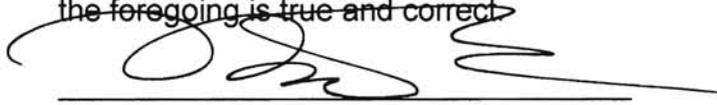
DANIEL T. SATTERBERG
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By: 
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jared B. Steed, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JUAN PABLO GIRON CLAROS, Cause No. 67779-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that ~~the foregoing is true and correct~~



Name
Done in Seattle, Washington

08-16-12
Date