102159-3

Supreme Court No. (to be set)
Court of Appeals No. 56445-9-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

WILLIAM LEROY BURCH, III,
Appellant.

PETITION FOR REVIEW BY THE APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY
THE HONORABLE JENNIFER SNIDER, JUDGE

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I. IDENTITY OF PETITIONER

William Burch, Appellant, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II.

II. COURT OF APPEALS DECISION

Mr. Burch seeks review of the unpublished decision of the Court of Appeals, Division II, issued on May 9, 2023, attached. App. at 1-15. Division II declined to reconsider this decision in an order dated June 6, 2023. App. at 16.

III. ISSUES PRESENTED FOR REVIEW

Should this Court grant review and reverse when:

1. Division II contradicted its own precedent regarding prosecutorial misconduct?

2. Prosecutorial misconduct deprived Mr. Burch of a fair trial?

3. Division II misapplied the test for ineffective assistance when counsel fails to object?

IV. STATEMENT OF THE CASE

This case arises from allegations of sexual abuse by D.S.D.B. and T.C.L.B., adopted daughters of Debra and William Burch. CP 1-7. D.S.D.B. alleged that Mr. Burch abused her for years when she was a teenager. 10/5/21 VRP at 259-60. T.C.L.B. alleged that Mr. Burch groped her on several occasions. *Id*. at 197.

In October 2018, D.S.D.B. disclosed to Debra[1] that Mr. Burch sexually abused her as an adolescent. 10/5/21 VRP at 151. Debra asked for "physical proof", i.e. a description of Mr. Burch's penis. Ex. 5. D.S.D.B. incorrectly described Mr. Burch as uncircumcised, and Debra corrected her. *Id*. D.S.D.B. changed her description, texting, "I meant that sorry". *Id*.

Debra called her divorce attorney, then the police. 10/4/21 VRP at 50. Both D.S.D.B. and T.C.L.B. were interviewed by a forensic interviewer working with law enforcement. 10/5/21

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[1] For clarity, this petition will refer to Ms. Debra Burch as "Debra" rather than "Ms. Burch". No disrespect is intended.

VRP at 103, 110. T.C.L.B. told police that she disclosed abuse to her counselor at Family Solutions. 10/4/21 VRP at 81. Police followed up, but this turned out to be false. *Id*. Neither girl reported abuse to their counselors when they were in therapy. 10/4/21 VRP at 81; 10/5/21 VRP at 209, 277. D.S.D.B. stopped going to therapy in her teens and did not attend as an adult. 10/5/21 VRP at 277.

The State charged Mr. Burch with sexually abusing D.S.D.B. and T.C.L.B. CP 17-20. This case initially went to trial in January 2020. 1/6/20 VRP at 6. However, this proceeding resulted in a mistrial. 1/9/20 VRP at 665. Mr. Burch's attorney withdrew, and he was appointed a new attorney. *Id*. at 668. A second trial before the same judge was held in October 2021. 10/4/21 VRP at 45.

At the first trial, the court made numerous evidentiary rulings. 1/6/20 VRP at 11-44. Specifically, the court prohibited Mr. Burch from cross-examining D.S.D.B. and T.C.L.B. about prior instances of lying or stealing. 1/6/20 VRP at 15, 24. At the

second trial, Mr. Burch's attorney conceded that this ruling was "res judicata". 9/20/21 VRP at 18; 10/1/21 VRP at 29. He did not challenge the court's ruling, did not preserve an objection, and did not seek to cross-examine the State's witnesses about these matters. *Id*.

Between the first and second trials, D.S.D.B. changed her testimony about when exactly Mr. Burch started touching her. 1/7/20 VRP at 254; 10/5/21 VRP at 238, 240. However, she consistently testified that Mr. Burch raped her for the first time the summer after she turned 14, at a beach house in Long Beach. 10/5/21 VRP at 241, 243. She said that Mr. Burch raped her at night, in the room where the entire family was sleeping nearby. *Id*. at 243-44. After this, she said that Mr. Burch frequently raped her vaginally, orally, and anally. *Id*. at 248. She described graphic details and said that she was frequently in pain during and after these incidents. *Id*. at 249-50, 253.

A church friend, Brenda Johnston, also testified. 10/5/21 VRP at 122. She said that Mr. Burch confided in her that

D.S.D.B. and T.C.L.B. lied, stole, and could not be trusted. *Id*. at 127. She said that he told her that "one day you might hear something that's going to be really bad" and "you shouldn't believe it". *Id*.

Mr. Burch testified at the second trial. 10/6/21 VRP at 311. He denied inappropriately touching his daughters. *Id*. at 356. Mr. Burch said that D.S.D.B. had behavioral problems in high school, and that the adopted children were jealous of the biological children in the family. *Id*. at 332-33, 350-51. T.C.L.B. and Debra also testified about sibling rivalry and resentment. 10/5/21 VRP at 174, 190, 203.

Lisa Wolff, an occupational therapist who worked with D.S.D.B. and T.C.L.B., also testified at the second trial. 10/7/21 VRP at 467. Ms. Wolff said that both girls were treated for Reactive Attachment Disorder (RAD) and associated symptomology. *Id*. at 468-69. Ms. Wolff testified that RAD "is a trauma-based disorder" that leads to maladaptive behavior such as lying, stealing, breaking rules, and trying to manipulate and

control others. *Id*. at 472-73. Ms. Wolff opined that D.S.D.B. and T.C.L.B. displayed symptoms consistent with their RAD diagnoses. *Id*. at 470.

The jury convicted Mr. Burch of the counts pertaining to D.S.D.B. but acquitted him of the counts pertaining to T.C.L.B. 10/8/21 VRP at 573-74. The court sentenced Mr. Burch to the mandatory minimum term of confinement, 300 months incarceration. 11/19/21 VRP at 595; CP 299-300.

Mr. Burch appealed. CP 315. The Court of Appeals, Division II, reversed his incest convictions with prejudice and remanded for resentencing. App. at 14. Otherwise, the Court disagreed with his arguments and affirmed. App. at 14. The Court declined to reconsider its decision. App. at 16. Mr. Burch seeks review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Mr. Burch respectfully requests that the Washington Supreme Court grant review and reverse the Court of Appeals, Division II. This Court grants review under four circumstances:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Here, review is appropriate under sections (2), (3), and (4).

This Court should grant review and reverse for two reasons. First, the prosecutor in this case committed misconduct that was repeated, pervasive, and incurable by an instruction. Division II's decision that no misconduct occurred contradicts a prior decision from the same Court. RAP 13.4(b)(2).

Additionally, this misconduct impacted Mr. Burch's constitutional right to a fair trial. RAP 13.4(b)(3).

Second, this Court should grant review and clarify the standard for ineffective assistance of counsel. RAP 13.4(b)(3), (4). When the trial court clearly errs in an evidentiary ruling, failing to challenge or preserve an objection amounts to ineffective assistance.

A. The Prosecutor Repeatedly Committed Prejudicial Misconduct During Closing Arguments.

Division II in this case concluded that the State did not commit prosecutorial misconduct. App. at 7-8. This Court should grant review and reverse.

1. Division II's decision conflicts with its own precedent.

Review is appropriate because Division II contradicted its own precedent in *State v. Pierce*, 169 Wn. App. 533, 283 P.3d 1158 (2012). RAP 13.4(b)(2). The prosecutor in this case repeatedly described D.S.D.B. as "a perfect victim from Burch's perspective". RP (Oct. 7, 2021) at 508, 538-39. This argument

inflamed the jury by placing the prosecutor "into the *defendant's* shoes" and explaining what he must have been thinking. *See Pierce*, 169 Wn. App. at 554 (emphasis in original). Division II erred by concluding that "these statements were not improper." App. at 11.

A prosecutor "has a special duty in trial to act impartially in the interests of justice and not as a 'heated partisan.'" *State v. Stith*, 71 Wn. App. 14, 18, 856 P.2d 415 (1993) (quoting *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984)). It is a fundamental principle in our criminal justice system that a jury convict a defendant only with the evidence presented at trial. *See State v. Miles*, 139 Wn. App. 879, 886, 162 P.3d 1169 (2007). Arguments that are "calculated to appeal to the jury's passion and prejudice" are improper. *Id*; *see also State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

In *Pierce*, Division II held that the prosecutor committed prejudicial misconduct, incurable by an instruction, by "appealing to the passion and prejudice of the jury." 169 Wn.

App. at 551. Specifically, the Court disapproved of "the prosecutor's argument as to Pierce's thought process before the crimes." *Id*. at 553. "[I]f it is improper for the prosecutor to step into the victim's shoes and become his representative, it is *far more improper* for the prosecutor to step into the *defendant's* shoes during rebuttal and, in effect, become the *defendant's* representative." *Id*. at 554 (emphasis in original). This argument "served no purpose but to inflame the jury's prejudice against Pierce." *Id*.

Here, the prosecutor repeatedly described D.S.D.B. as "the perfect victim". App. at 10-11. Division II concluded that these arguments were proper because they were from Mr. Burch's "perspective":

> Considered as a whole, these comments reflected reasonable inferences from the evidence. ***The prosecutor was arguing that DB was a perfect victim from Burch's perspective*** because nobody would believe her due to her background and the fact that she got in trouble. We conclude that these statements were not improper.

App. at 11 (emphasis added).

Here, like in *Pierce*, the prosecutor told the jury her opinion of Mr. Burch's "thought process before the crimes." 169 Wn. App. at 553. This argument was "improper" because the prosecutor stepped "into the defendant's shoes" and became "in effect, become the defendant's representative." *Id*. at 554. The prosecutor also did this repeatedly, reinforcing this inflammatory theme in the jury's mind. *Id*. at 556 ("repeated improper comments" were prejudicial enough to have "a substantial likelihood of affecting the verdict").

In *Pierce*, Division II concluded that the prosecutor "could have properly argued" inferences from the evidence but instead "went beyond" this to "effectively testify[] about what particular thoughts Pierce must have had in his head". *Id*. at 554-55. That is what happened in this case, as well. Some witnesses testified about Mr. Burch's views on D.S.D.B. and T.C.L.B.'s credibility. *See* RP (Oct. 5, 2021) at 122, 240. The prosecutor could have argued inferences from this testimony. Instead, she argued "from Burch's perspective" that D.S.D.B. was the "perfect victim".

App. at 11. This argument was improper. *See Pierce*, 169 Wn. App. at 554-55. This Court should grant review and reverse because Division II's conclusion directly contradicts *Pierce*. RAP 13.4(b)(2).

2. The prosecutor's misconduct deprived Mr. Burch of a fair trial.

This Court should also grant review and reverse because the prosecutor's misconduct denied Mr. Burch a fair trial. RAP 13.4(b)(3); *see State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). In order to prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Both requirements are met here.

The prosecutor made numerous statements that amounted to misconduct in this case. As explained above, she placed herself in Mr. Burch's shoes and told the jury what he must have

been thinking. She also inflamed the jury, expressed her personal opinion, and bolstered D.S.D.B.'s testimony.

a. The prosecutor repeatedly committed misconduct.

Washington law recognizes that prosecutors may not improperly bolster a witness's credibility. *Stith*, 71 Wn. App. at 21. In closing arguments, a prosecutor may only "comment on a witness's veracity as long as a personal opinion is not expressed and as long as the comments are not intended to incite the passion of the jury." *Id*.

Here, the prosecutor repeatedly attempted to inflame the jury. She told the jury that D.S.D.B. was credible because she "broke down" on the stand and "it would take a world-class actress to pull some of that off." 10/7/21 VRP at 533. She stated that it was "easy to see what [D.S.D.B. was] depressed about, because every week her dad was using her as his own private sex doll." *Id*. at 526. As discussed above, she repeatedly described D.S.D.B. as "the perfect victim". *Id*. at 508, 538-39.

These were not arguments based on the evidence presented at trial. No one testified about being used as a "sex doll." Describing D.S.D.B. this way served only to inflame the jury. *See Pierce*, 169 Wn. App. at 555. Similarly, telling the jury that D.S.D.B. must be truthful or else she is a "world-class actress" was a "comment on a witness's veracity" that expressed "a personal opinion" and was "intended to incite the passion of the jury." *Stith*, 71 Wn. App. at 21.

The prosecutor used these inflammatory arguments to bolster and vouch for the State's witnesses. In addition to the "world-class actress" comment, the prosecutor repeatedly expressed her personal opinion to the jury. She told the jury that she thought there was an ongoing pattern of sexual abuse. 10/7/21 VRP at 522 ("That, I think, shows very clearly that there was [an ongoing pattern]."). She opined that, "the defendant's theories or the defendant's testimony is not credible" and "there is no reasonable motive that you can point to." *Id*. at 523. She stated her opinion that, "Defendant's testimony was not credible.

[D.S.D.B.]'s was." *Id*. at 532. She told the jury that if D.S.D.B. was a "sophisticated liar" she would make up a more believable story about the beach house incident. *Id*. at 538. The prosecutor told the jury that they should believe D.S.D.B.'s testimony, "Because it's true, and she's just telling you what happened to her." *Id*.

These comments expressed the prosecutor's "personal belief as to the veracity of the witness" and amounted to misconduct. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Combined with her inflammatory arguments, these comments "served no purpose but to appeal to the jury's sympathy" and were "not relevant" to the question of guilt. *Pierce*, 169 Wn. App. at 555. Instead, these comments amounted to misconduct by urging the jury to convict for improper reasons. *Id*.

b. The prosecutor's misconduct prejudiced Mr. Burch.

The prosecutor's misconduct prejudiced Mr. Burch. Prejudice requires showing a substantial likelihood that the misconduct affected the jury verdict. *Ish*, 170 Wn.2d at 195.

A defendant cannot establish prejudice where a curative instruction could have corrected any error. *State v. Corbett*, 158 Wn. App. 576, 594, 242 P.3d 52 (2010). However, "the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011). Additionally, arguments that have an "inflammatory effect" on the jury are generally not curable by an instruction. *State v. Emery*, 174 Wn.2d 741, 763, 278 P.3d 653 (2012).

Mr. Burch's attorney objected to many, but not all, of the prosecutor's inappropriate comments. On three occasions, defense counsel objected to the prosecutor stating her own

opinion and bolstering the State's witnesses. 10/7/21 VRP at 523, 532, 533. All three times, the trial court sustained these objections. *Id*. Defense counsel also objected to the prosecutor's "sex doll" comment, but the court overruled this objection. 10/7/21 VRP at 526-27. Defense counsel did not object to other vouching and opinion statements. 10/7/21 VRP at 522, 538.

The cumulative effect of these comments prejudiced Mr. Burch because there is a substantial likelihood that this misconduct affected the jury's verdict. *Emery*, 174 Wn.2d at 760. The central issue in this case was D.S.D.B.'s credibility. There was no physical evidence in this case. No other witness directly saw any incidents of Mr. Burch sexually abusing D.S.D.B. That credibility determination is inseparable from the prosecutor's misconduct in this case.

The jury believed D.S.D.B. after the prosecutor vouched for her and expressed her opinion that D.S.D.B. was credible. 10/7/21 VRP at 532. The jury believed D.S.D.B. after the prosecutor characterized her as "the perfect victim" and stated

that she would have to be a "world-class actress" to fabricate her testimony. *Id*. at 533, 538-39. The jury believed D.S.D.B. after the prosecutor used inflammatory language like "sex doll" to describe her treatment. *Id*. at 526. Her testimony was the basis for these convictions, and her testimony was bolstered by repeated, pervasive misconduct.

This repetition requires reversal even under the heightened standard applicable to misconduct without objection. *See State v. Lindsay*, 180 Wn.2d 423, 433, 326 P.3d 125 (2014) (due to repeated misconduct, "[e]ven under the more stringent standard for determining prejudice, the results would be the same"). When the defendant fails to object, reversal is still required if the "cumulative effect" of misconduct "was so pervasive that it could not have been cured by an instruction." *In re Pers. Restraint of Glasmann*, 174 Wn.2d 696, 707, 286 P.3d 673 (2012). Here, the prosecutor repeatedly committed misconduct, all centered around bolstering D.S.D.B.'s testimony. That cumulative effect resulted in prejudice regardless of any curative

instruction. This Court should grant review and reverse. RAP 13.4(b)(3).

B. Mr. Burch Received Ineffective Assistance of Counsel When his Attorney Failed to Challenge the Court's Prior Erroneous Evidentiary Ruling.

This Court should also grant review in order to clarify the standard for ineffective assistance of counsel when an attorney fails to object. Here, there was a mistrial, followed by a second trial. At the first trial, the court ruled that Mr. Burch could not cross-examine the alleged victims about their prior instances of lying and stealing. As explained below, this ruling was incorrect as a matter of law.

At the second trial, Mr. Burch's attorney incorrectly stated that the court's evidentiary ruling was res judicata. Defense counsel did not object to this prior ruling and did not attempt to impeach the State's witnesses with evidence about prior misconduct.

On appeal, Mr. Burch argued that counsel was ineffective. Division II disagreed because there was "no indication in the

record that the trial court" would have "reconsidered its prior ruling." App. at 14. Division II erred because appellate courts must apply an objective, not a subjective, standard. This Court should grant review, clarify the ineffective assistance standard, and reverse. RAP 13.4(b)(3), (4).

1. The trial court's evidentiary ruling in the first trial was legally incorrect.

The court at the first trial prohibited Mr. Burch from cross-examining D.S.D.B. and T.C.L.B. about specific instances of lying and stealing. 1/6/20 VRP at 24-25. The court erred and abused its discretion because these topics were proper subjects for cross-examination under ER 608.

At the first trial, the State filed a motion in limine to limit cross-examination of D.S.D.B. and T.C.L.B.:

> [T]he State moves to preclude the defense from cross-examining the victims about past instances of conduct, to include instances of lying, cheating, stealing, or making a false report.

CP 345. Mr. Burch opposed this motion. 1/6/20 VRP at 16, 18. His attorney sought to question D.S.D.B. about instances where

she "allegedly [took] money from the household," which was "actually one of the reasons why she left the home." *Id*. at 16. Counsel also wanted to ask D.S.D.B. about her allegedly "tenuous relationship with the truth" where she "can't stop herself" from lying, and "when she starts a lie, she can't turn back." *Id*. at 18.

The State countered that there had to be a "nexus between allegedly taking money" and "saying that her father was raping her", otherwise "defense is simply trying to make the jury think this person is untrustworthy and not credible because of one instance of taking – supposedly taking money." 1/6/20 VRP at 16-17. The State argued that Mr. Burch could ask if D.S.D.B. lied about the allegations of sexual abuse but could not ask about other instances of dishonesty. *Id*. at 19.

The trial court agreed with the State and excluded this evidence. 1/6/20 VRP at 24-25. This issue was addressed again the next day, before T.C.L.B. and D.S.D.B. testified. 1/7/20 VRP at 98. Again, the trial court excluded questioning these witnesses

about specific instances of lying and stealing. *Id*. Despite this ruling, defense counsel asked T.C.L.B. if she "ever [stole] money from the cupboards". *Id*. at 180. The prosecutor objected, and the trial court sustained the objection. *Id*.

ER 404 bars propensity evidence that attempts to show how a person acted on a particular occasion. ER 404(a). However, an exception permits propensity-based "[e]vidence of the character of a witness, as provided in [ER] 607, 608, and 609." ER 404(a)(3).

ER 608 allows cross-examination about specific instances of conduct that are "probative of truthfulness or untruthfulness":

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

ER 608(b). Appellate courts review a decision to "exclude evidence under ER 608(b) for an abuse of discretion and reverse 'only if no reasonable person would have decided the matter as the trial court did.'" *State v. Lile*, 188 Wn.2d 766, 783, 398 P.3d 1052 (2017) (quoting *State v. O'Connor*, 155 Wn.2d 335, 351, 119 P.3d 806 (2005)).

"Failing to allow cross-examination of a state's witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment." *State v. Clark*, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001) (citing *State v. York*, 28 Wn. App. 33, 621 P.2d 784 (1980)). This is because, "A criminal defendant's right to cross-examine witnesses against him is a fundamental constitutional right." *York*, 28 Wn. App. at 36. For this reason, "a criminal defendant is given extra latitude in cross-examination to show motive or credibility, especially when the particular prosecution witness is essential to the state's case." *Id*. This is particularly true where the State is able to argue at closing, "without

controversion," that the witness is truthful. *State v. McSorley*, 128 Wn. App. 598, 613, 116 P.3d 431 (2005) (as a result of exclusion, prosecutor argued that the witness "tells the truth"); *see also*, *York* 28 Wn. App. at 35 (as a result of exclusion, prosecutor argued that there was "no reason at all to doubt" witness's testimony).

Here, the trial court erred and abused its discretion by prohibiting cross-examination about specific instances of lying and stealing. D.S.D.B. and T.C.L.B., like the witnesses in *Clark* and *York*, were "crucial" witnesses who were "essential to the State's case". *Clark*, 143 Wn.2d at 766; *York*, 28 Wn. App. at 36. Also, like in *McSorley* and *York*, the State was able to argue in closing that there was no reason to doubt their testimony. 10/7/21 VRP at 527 ("what in the world is the reason behind this for either [T.C.L.B.] or [D.S.D.B.]?").

Prior instances of untruthfulness, including lying and stealing, undermined the State's credibility argument. Evidence about how and why D.S.D.B. left home provided a motive for

her to fabricate allegations about Mr. Burch. This evidence was admissible because it was "probative" and "concern[ed] the witness' character for truthfulness or untruthfulness". ER 608(b). Mr. Burch had a constitutional right to cross-examine the State's witnesses about this specific conduct. *See York*, 28 Wn. App. at 36 (cross-examination is a "fundamental constitutional right"). The trial court abused its discretion by excluding this evidence. *Id*. (holding that "to allow the defendant no cross-examination into an important area is an abuse of discretion").

2. Defense counsel performed deficiently by failing to challenge the trial court's erroneous evidentiary ruling.

At the second trial, the State argued that its "motion in limine at the first trial were [sic] to exclude all of these instances of lying or stealing that are not connected to this trial, and that was granted." 9/20/21 VRP at 12. Mr. Burch's defense attorney conceded that the court's evidentiary rulings from the mistrial were "res judicata" at the second trial. *Id*. at 18; 10/1/21 VRP at

29. On appeal, the parties and Division II all agree that this was an incorrect statement of law. App. at 14; *State v. Nelson*, 108 Wn. App. 918, 925-26, 33 P.3d 419 (2001) (res judicata inapplicable because an evidentiary ruling is not a final judgment).

Defense counsel at the second trial did not challenge the court's prior evidentiary ruling, did not preserve an objection to this ruling, and did not attempt to cross-examine the State's witnesses about prior instances of lying or stealing. This amounted to deficient performance because, as explained above, the trial court's ruling was erroneous and an abuse of discretion. Division II erred by excusing this deficient performance based on its assessment that the trial court would again issue the same ruling.

A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Defense counsel is ineffective where (1) the attorney's

performance was deficient and (2) the deficiency prejudiced the defendant. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

To prove that a failure to object amounted to deficient performance, a defendant must show: "[1] that not objecting fell below prevailing professional norms, [2] that the proposed objection would likely have been sustained, and [3] that the result of the trial would have been different" had counsel objected. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

Here, Division II held that defense counsel did not need to object because "[i]t is reasonable to conclude that arguing the same evidentiary issue in front of the same judge would result in the same outcome." App. at 14. Essentially, the Court held that the trial court would not change its mind, so defense counsel did not need to object. This amounts to a holding that defense counsel does not need to preserve an objection to erroneous rulings.

This Court should grant review and clarify that when counsel fails to object, appellate courts must apply an objective standard. Division II is correct that the trial court in this case likely would have issued the same evidentiary ruling. However, the question is whether the objection ***should*** have been sustained, not whether it actually would have been sustained by this particular judge.

Here, Mr. Burch's defense was harmed in the first trial when the court erroneously limited cross-examination of the State's witnesses. His defense was harmed in the second trial when counsel failed to challenge this error or preserve objection to this ruling. The fact that the trial court would likely err again is not an excuse; is the basis for the objection in the first place. Incorrectly conceding this ruling as "res judicata" served no legitimate strategic purpose. *See Kyllo*, 166 Wn.2d at 869 (counsel's misunderstanding of applicable law "did not constitute legitimate trial strategy or tactics"). This Court should grant review and reverse. RAP 13.4(b)(3), (4).

3. Counsel's deficient performance prejudiced Mr. Burch.

Defense counsel's performance also prejudiced Mr. Burch. To show prejudice, the defendant must "prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862.

Conceding that the court's prior evidentiary ruling was res judicata reflected a misunderstanding of the law. Due to this misunderstanding, defense counsel failed to challenge the court's erroneous prior rulings. As a result, counsel did not even attempt to cross-examine the State's key witnesses about prior instances of lying and stealing. Specifically, Mr. Burch's attorney in the first trial sought to question D.S.D.B. about stealing money, which allegedly was the reason she left home—not because she was being abused. 1/6/20 VRP at 16. This prior instance of stealing undercut D.S.D.B.'s version of events and provided a different motive for her resentment of Mr. Burch.

D.S.D.B. and T.C.L.B. were the State's most important witnesses. Again, there was no physical evidence in this case. The State's case rested entirely on these witnesses' credibility. Due to counsel's deficient performance, Mr. Burch lost a valuable opportunity to question the credibility of these witnesses. There is a reasonable probability that the outcome of this case would be different had counsel cross-examined these witnesses about evidence "concerning [their] character for truthfulness or untruthfulness." ER 608(b). This Court should grant review and reverse because Mr. Burch received ineffective assistance of counsel. RAP 13.4(b)(3), (4).

VI. CONCLUSION

Mr. Burch respectfully requests that the Washington Supreme Court grant review and reverse the Court of Appeals.

Pursuant to RAP 18.17, this document is proportionately spaced using Times New Roman 14-point font and contains 4812

words, excluding the caption, signature blocks, appendix, and certificates (word count by Microsoft Word).

RESPECTFULLY SUBMITTED on July 6, 2023.

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

May 9, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM LEROY BURCH, III, Appellant.	No. 56445-9-II UNPUBLISHED OPINION

MAXA, J. – William Burch appeals his convictions of two counts of second degree rape, two counts of third degree child rape, and two counts of first degree incest. The convictions arose out of a disclosure that Burch's adopted daughter DB made when she was 21 years old. DB told her mother that Burch had raped her from the time she was 14 years old until she was 18 years old.

We hold that (1) as the State concedes, the State failed to prove an additional element included in the to-convict instruction for first degree incest and therefore those convictions must be dismissed; (2) Burch's prosecutorial misconduct claims regarding statements made in closing argument fail; and (3) Burch did not receive ineffective assistance of counsel when defense counsel failed to seek reconsideration of the cross-examination ruling. Accordingly, we reverse Burch's first degree incest convictions and remand for the trial court to dismiss those convictions with prejudice and for resentencing, but we affirm Burch's remaining convictions.

FACTS

Background

Burch and Debra Burch were married for 28 years. They have five children together – the oldest and youngest are their biological children and the middle three are adopted.

In October 2018, DB – the oldest adopted child, who was then 21 – disclosed to Debra[1] that Burch had raped her from the time she was 14 years old until she was 18 years old. TB – one of the younger adopted children – had also made allegations about Burch groping her.

The State charged Burch with six counts that listed DB as the victim: two counts of second degree rape, two counts of third degree child rape, and two counts of first degree incest. The State charged Burch with two counts that listed TB as the victim: one count of second degree incest and indecent liberties with forcible compulsion.

Trial Court Proceedings

Burch went to trial in January 2020, but a mistrial was ordered as a result of conflict between Burch and his counsel. Before trial, the State had brought a motion in limine to "exclude instances of conduct by the victims related to their character for truthfulness." Report of Proceedings (RP) (Jan. 6, 2020) at 15. Burch opposed the motion and told the court that he wanted to cross-examine DB about specific instances where she stole money from the household. Burch stated to the trial court,

> [T]here are some instances where [DB], one of the alleged victims, allegedly takes money from the household, and it was an issue, and that was actually one of the reasons why she left the home. And so it might come up that she was not -- in fact, I think the mom brings it up, or brought it up in her interview, that she's -- she doesn't have a good reputation for truthfulness.

[1] We refer to Debra by first name to avoid confusion. No disrespect is intended.

RP (Jan. 6, 2020) at 16. Burch explained that his theory was that DB was a troubled youth and that his position was that DB was not being truthful. The court granted the State's motion.

Burch's second trial, with new defense counsel, took place in October 2021. When discussing motions in limine, defense counsel did not ask to cross-examine DB about stealing money. The trial court noted that they had "an extensive discussion about that previously." RP (Sept. 20, 2021) at 18. Defense counsel responded that those issues "were specifically ruled on by this Court. And as far as I'm concerned that's all res judicata, that's already been decided." RP (Sept. 20, 2021) at 18.

The evidence consisted mostly of witness testimony, including testimony from DB, TB, Debra, and Burch. DB testified that beginning when she was 14 years old, Burch raped her at least once or twice a week until she left home at age 18. He raped her vaginally, anally, and orally. Burch forced DB into various positions when he raped her. The rapes caused DB pain, and she hurt all the time. Burch repeatedly forced his penis down DB's throat so far that she would choke and could not breathe. The first time Burch raped DB anally it was painful and there was blood everywhere. Burch never did anything to make the rapes less painful.

The State's direct examination of DB involved the prosecutor asking DB to describe in detail when and where Burch raped her and what body parts were involved. Defense counsel's cross-examination of DB focused on the number of interviews she had given, the details of her daily routine when she was in high school, and her previous counseling sessions.

Incest Jury Instructions

Jury instruction 21 stated, "A person commits the crime of incest in the first degree when he engages in sexual intercourse with a person whom he knows to be related to him, as an

ancestor, descendant, brother, or sister of either the whole or the half blood." Clerk's Papers (CP) at 206. And jury instruction 22 stated, "Descendant means any child of the defendant. A descendant also includes any stepchild or adopted child of the defendant who is under eighteen years of age." CP at 207.

However, the to-convict instructions for both counts of first degree incest stated that in order to convict Burch, the jury had to find beyond a reasonable doubt that DB was related to Burch "either legitimately or illegitimately as a daughter *of either the whole or the half blood*." CP at 208-09 (emphasis added).

If the jury found Burch guilty of third degree child rape and first degree incest, then they had to determine "[w]hether the crime was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time" and "[w]hether the defendant used his position of trust or confidence to facilitate the commission of the crime." CP at 216-17, 220-21.

Closing Argument

During closing argument, the prosecutor discussed DB's lack of motive to lie. The prosecutor stated,

> [DB] hasn't lived in that house in years. She hadn't lived in that house for three years before she disclosed. What is she getting out of this? *A really fun time being picked upon on the stand talking about her body parts?* Talking about her anus bleeding at the hands of her dad? Is that the kind of sought attention that she wants? You heard no reasonable motive for this. None whatsoever, and that is relevant.

RP (Oct. 7, 2021) at 528 (emphasis added). Burch did not object.

When trying to convince the jury that DB and TB were not lying just to get a reaction out of Burch and to get something they wanted, the prosecutor stated,

> They have absolutely no relationship with William Burch at this point and they haven't for years. Presumably their reaction has come. The reaction came on October 18th, 2018. If that was a lie, it could have ended there. *Why sit through hours of interviews, being poked apart?* For what?

RP (Oct. 7, 2021) at 529-30 (emphasis added). Burch did not object.

The prosecutor stated three times that DB was "the perfect victim" because she was a child from a rough background and nobody would believe her. RP (Oct. 7, 2021) 508, 538. Burch did not object to any of those statements.

The prosecutor described to the jury how DB's change in behavior once she entered high school corroborated her story. The prosecutor stated, "Well, it's easy to see what she'd be depressed about, because every week her dad was *using her as his own private sex doll*." RP (Oct. 7, 2021) at 526 (emphasis added). Burch objected and the trial court overruled the objection.

When discussing DB's credibility, the prosecutor stated that "[s]ome of those moments in which she broke down, it's important to think of, *because it would take a world-class actress to pull some of that off*." RP (Oct. 7, 2021) at 532 (emphasis added). Burch objected and the trial court asked the jury to step out of the courtroom before listening to the attorney's arguments. The court admonished the prosecutor, stating that "it's walking a fine line and at this point in the case and where this case has gone, I don't think you want to go." RP (Oct. 7, 2021) at 535. However, the court did not rule on the objection.

While explaining to the jury why the State proved its case beyond a reasonable doubt, the prosecutor stated that "the defendant's theories or the defendant's testimony [was] not credible" and "there is no reasonable motive that you can point to." RP (Oct. 7, 2021) at 523. Burch objected and the trial court sustained the objection. The prosecutor stated again that the

"[d]efendant's testimony was not credible. [DB's] was." RP (Oct. 7, 2021) at 532. Burch objected and the trial court sustained the objection. Finally, the prosecutor argued that DB would have to be a "sophisticated liar" in order to make up the story about the first time Burch raped her at the family beach house. RP (Oct. 7, 2021) at 538. And that the story wasn't "tighter . . . [b]ecause it's true, and she's just telling you what happened to her." RP (Oct. 7, 2021) at 538. Burch did not object to those statements.

The prosecutor also stated that the jury would have to determine whether there was an ongoing pattern of sexual abuse. The prosecutor then stated, "That, I think, shows very clearly that there was." RP (Oct. 7, 2021) at 522. Burch did not object.

Verdict

The jury found Burch not guilty of indecent liberties with forcible compulsion and second degree incest – the two charges relating to TB. But the jury found Burch guilty of all the charges relating to DB. The jury also returned special verdicts of aggravating circumstances – an ongoing pattern of sexual abuse of the same victim under the age of 18 and using a position of trust or confidence to facilitate the crime – for both counts of third degree child rape and both counts of first degree incest. The jury found the same aggravating circumstances along with the victim being under the age of 15 at the time of the offense for both counts of second degree rape.

Burch appeals his convictions.

ANALYSIS

A. BURDEN OF PROOF ON INCEST CHARGES

Burch argues, and the State concedes, that sufficient evidence did not support his two convictions of first degree incest. We agree.

RCW 9A.64.020(1)(a) states,

> A person is guilty of incest in the first degree if he or she engages in sexual intercourse with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.

Descendants include adopted children that are under the age of 18. RCW 9A.64.020(3)(a).

However, jury instructions 23 and 24 stated that in order to convict Burch of first degree incest, the State had to prove beyond a reasonable doubt "[t]hat [DB] was related to [Burch] either legitimately or illegitimately as a daughter of either the whole or the half blood." CP at 208-09. The law of the case doctrine provides that jury instructions not objected to are treated as the properly applicable law. *State v. Anderson*, 198 Wn.2d 672, 678, 498 P.3d 903 (2021). Therefore, " 'the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the "to convict" instruction.' " *Id.* at 679 (quoting *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998)).

There was no mention of "descendant" in the to-convict jury instructions, and the instruction included the additional element that the defendant be related by blood to the victim. Because DB is Burch's adopted daughter and there was no evidence that DB is related to Burch by blood, the State did not prove first degree incest as instructed beyond a reasonable doubt.

Accordingly, we reverse and remand for the trial court to dismiss Burch's two first degree incest convictions with prejudice.

B. PROSECUTORIAL MISCONDUCT

Burch argues that the prosecutor engaged in misconduct during its closing argument by (1) disparaging defense counsel, (2) inflaming the jury, and (3) bolstering the State's witnesses.

We conclude that the prosecutor's statements either were not improper, that Burch cannot show prejudice, or Burch waived his claim by not objecting at trial.

1. Legal Principles

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of all the circumstances of the trial. *State v. Zamora*, 199 Wn.2d 698, 708, 512 P.3d 512 (2022). Our analysis considers "the context of the case, the arguments as a whole, the evidence presented, and the jury instructions." *State v. Slater*, 197 Wn.2d 660, 681, 486 P.3d 873 (2021). To show prejudice, the defendant is required to show a substantial likelihood that the misconduct affected the jury verdict. *Id.*

When the defendant fails to object at trial, a heightened standard of review requires the defendant to show that the conduct was " 'so flagrant and ill intentioned that [a jury] instruction would not have cured the [resulting] prejudice.' " *Zamora*, 199 Wn.2d at 709 (quoting *State v. Loughbom*, 196 Wn.2d 64, 70, 470 P.3d 499 (2020)). "In other words, the defendant who did not object must show the improper conduct resulted in *incurable* prejudice." *Zamora*, 199 Wn.2d at 709.

2. Disparaging Defense Counsel

Burch argues that the prosecutor impugned defense counsel during closing argument when she stated that DB had been "picked upon" and "poked apart." We disagree.

It is improper for a prosecutor to impugn the role or integrity of defense counsel. *State v. Fleeks*, 25 Wn. App. 2d 341, 377, 523 P.3d 220 (2023). Statements that " 'fundamentally

undermine' " the role or integrity of defense counsel constitute misconduct. *Id.* (quoting *State v. Lindsay*, 180 Wn.2d 423, 433, 326 P.3d 125 (2014)).

The Supreme Court in *Lindsay* discussed multiple cases where statements by the prosecution were considered to be impugning defense counsel. *Lindsay*, 180 Wn.2d at 433-34. In all of the cases, the prosecutor specifically and negatively commented on defense counsel and their role in the trial. For example, in *Lindsay*, the prosecutor called defense counsel's argument a "crock." *Id.* In *State v. Negrete*, the prosecutor said that defense counsel was "being paid to twist the words of the witnesses by [the defendant]." 72 Wn. App. 62, 66, 863 P.2d 137 (1993) (emphasis omitted). And in *State v. Thorgerson*, the prosecutor referred to defense counsel's case as "bogus" and "involving 'sleight of hand.' " 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011).

Here, regarding motive, the prosecutor first stated, "What is she getting out of this? *A really fun time being picked upon on the stand talking about her body parts?* Talking about her anus bleeding at the hands of her dad? Is that the kind of sought attention that she wants?" RP (Oct. 7. 2021) at 528 (emphasis added). However, the prosecutor did not mention defense counsel and she was not discussing defense counsel's cross-examination of DB. Instead, it was the prosecutor who asked DB on direct examination about the parts of her body that Burch penetrated. Defense counsel did not ask DB about any of her body parts on cross-examination. We conclude that the prosecutor's statement did not impugn defense counsel.

The prosecutor also stated, "If that was a lie, it could have ended there. *Why sit through hours of interviews, being poked apart?* For what?" RP (Oct. 7. 2021) at 529-30 (emphasis added). But again the prosecutor did not mention defense counsel and she was not commenting on something that was exclusive to the role of defense counsel. DB did not interview only with

the defense; she also interviewed with a forensic detective and a police detective. In fact, it was defense counsel who asked DB on cross-examination about all of the different types of interviews she had. We conclude that the prosecutor's statement did not impugn defense counsel.

Burch also argues that these statements burdened his constitutional right to assistance of counsel and to confront adverse witnesses. But this argument fails because the prosecutor's statements did not impugn defense counsel.

3. Inflaming the Jury

Burch argues that the prosecutor appealed to the jury's passions by (1) calling DB the perfect victim, and (2) stating that Burch used DB as his own private sex doll. We disagree.

A prosecutor cannot use arguments to inflame the jury's passions or prejudices. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). "A prosecutor commits misconduct by asking jurors to convict based on their emotions rather than the evidence." *State v. Lucas-Vicente*, 22 Wn. App. 2d 212, 224, 510 P.3d 1006 (2022). However, the prosecutor is given wide latitude to assert reasonable inferences from the evidence. *Id.*

First, Burch argues that the prosecutor inflamed the jury by describing DB as "the perfect victim." (Oct. 7, 2021) at 508, 538-39. But these statements must be considered in context.

> Nobody's going to believe you. No matter what, no one's going to believe you. They're not going to believe you over me. You're a bad kid. You're going to get in trouble, because I'm the adult and you're the child. [DB] believed those words. She believed those words when William first told her that she might as well keep this quiet, because even if she came forward, no one was going to believe her. She was scared of him. She was a child, and his words carried a lot of weight. *William Burch picked the perfect victim*. He'd take the child that he could control.

RP (Oct. 7, 2021) at 507-08 (emphasis added).

> *William Burch picked the perfect victim*, a quiet, subservient girl from a rough background who he told nobody would believe, and he began a smear campaign against her to accomplish that very goal. *He picked the perfect victim*, and for four years he got away with it.

RP (Oct. 7, 2021) at 538-39 (emphasis added).

Considered as a whole, these comments reflected reasonable inferences from the evidence. The prosecutor was arguing that DB was a perfect victim from Burch's perspective because nobody would believe her due to her background and the fact that she got in trouble. We conclude that these statements were not improper.

Second, Burch argues that it was improper for the prosecutor to state that Burch was using DB "as his own private sex doll." RP (Oct. 7, 2021) at 526.

As the State acknowledges, in some cases the use of a term like "sex doll" would be improper. But here, the evidence supports this descriptive term. DB testified that Burch raped her regularly and repeatedly – vaginally, anally, and orally. DB stated that the rapes often caused her physical pain, caused her to choke and have difficulty breathing, and at times caused her to bleed. Burch in fact used DB like an inanimate sex doll, and the prosecutor's use of this analogy reflected a reasonable inference from the evidence. We conclude that this statement was not improper.

4. Bolstering State's Witnesses

Burch argues that the prosecutor improperly bolstered the State's witnesses by (1) stating that DB would have to be a world class actress if she was not telling the truth, (2) giving personal opinions regarding the credibility of DB and Burch, and (3) giving an opinion that there was an ongoing pattern of sexual abuse.

A prosecutor commits misconduct when they state a personal belief as to the credibility of a witness. *Lucas-Vicente*, 22 Wn. App. 2d at 225. However, a prosecutor may address witness credibility based on reasonable inferences from the evidence. *Id.* For example, a prosecutor may argue that the defendant is not telling the truth if the prosecutor refers to evidence or inferences supporting that argument. *State v. Copeland*, 130 Wn.2d 244, 290-91, 922 P.2d 1304 (1996).

First, Burch argues that the prosecutor committed misconduct by suggesting that DB was credible because she broke down on the stand and "it would take a world class actress to pull some of that off." RP (Oct. 7, 2021) at 532. Burch objected to this statement, and the trial court seemed to agree that the statement reflected the prosecutor's personal opinion. Although the court removed the jury to discuss the issue, the court did not rule on the objection.

But even if the prosecutor's statement expressed a personal opinion regarding DB's credibility, Burch cannot show prejudice. The prosecutor did not elaborate on this comment and moved on to another subject following the objection. Burch cannot show that there is a substantial likelihood that the statement affected the jury verdict. *See Slater*, 197 Wn.2d at 681.

Second, Burch argues that it was improper when the prosecutor stated that (1) "the defendant's theories or the defendant's testimony [was] not credible" and "there is no reasonable motive that you can point to," RP (Oct. 7, 2021) at 523; and (2) the "[d]efendant's testimony was not credible" and that "[DB's] was." RP (Oct. 7, 2021) at 532. But the trial court sustained Burch's objections to these statements, and there is no indication that they prejudiced him.

Third, Burch argues that the prosecutor expressed a personal opinion of DB's credibility by telling the jury, "[I]f you're a big liar, if you're a really sophisticated liar who can develop

this level of lie, why wouldn't she have made that tighter? . . . Because it's true, and she's just telling you what happened to her." RP (Oct. 7, 2021) at 538. However, Burch did not object to this statement. And Burch cannot show that the statement was flagrant and ill-intentioned or that a jury instruction could not have cured any prejudice. *See Zamora*, 199 Wn.2d at 709.

Fourth, Burch argues that the prosecutor expressed a personal opinion by stating, "You'll also have to determine if you find him guilty of either, of any of these counts whether there was an ongoing pattern of sexual abuse. That, I think, shows very clearly that there was." RP (Oct. 7, 2021) at 522. But again Burch did not object, and he cannot show that the statement was flagrant and ill-intentioned or that a jury instruction could not have cured any prejudice. *See Zamora*, 199 Wn.2d at 709.

5. Cumulative Misconduct

Burch argues that the cumulative effect of the improper conduct affected the jury's verdict. The cumulative effect of repeated prosecutorial misconduct may require reversal under certain circumstances. *See Glasmann*, 175 Wn.2d at 707. But we conclude that those circumstances are not present here.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Burch argues that he received ineffective assistance of counsel when defense counsel at the second trial failed to ask the trial court to reconsider its ruling in the first regarding cross-examination about DB stealing money. We disagree.[2]

[2] Burch also argues that the trial court erred at the first trial when it prohibited the cross-examination of DB about stealing money from the household. But evidentiary rulings from a trial that results in a mistrial cannot be appealed following a second trial.

To prevail on an ineffective assistance claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced them. *State v. Clark*, 17 Wn. App. 2d 794, 798, 487 P.3d 549 (2021), *review denied*, 198 Wn.2d 1033 (2022). Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* at 799. We strongly presume counsel's performance was reasonable. *Id.*

Where counsel's failure to make a motion is the basis for a claim of ineffective assistance, the defendant must show that the motion would have been granted. *State v. Scabbyrobe*, 16 Wn. App. 2d 870, 874, 482 P.3d 301, *review denied*, 197 Wn.2d 1024 (2021).

Here, as the State concedes, defense counsel incorrectly stated that the prior evidentiary ruling was res judicata. *See State v. Nelson*, 108 Wn. App. 918, 925-26, 33 P.3d 419 (2001) (res judicata inapplicable because an evidentiary ruling is not a final judgment). But his failure to request reconsideration was deficient only if the trial court would have reconsidered its prior ruling. *See Clark*, 17 Wn. App. 2d at 799; *Scabbyrobe*, 16 Wn. App. 2d at 874. There is no indication in the record that the trial court would have done so. It is reasonable to conclude that arguing the same evidentiary issue in front of the same judge would result in the same outcome. Accordingly, we hold that Burch did not receive ineffective assistance of counsel.

CONCLUSION

We reverse Burch's two first degree incest convictions and remand for the trial court to dismiss those convictions with prejudice and for resentencing, but we affirm Burch's remaining convictions.

No. 56445-9-II

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, P.J.

We concur:

LEE, J.

PRICE, J.

Filed
Washington State
Court of Appeals
Division Two

June 6, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM LEROY BURCH, III, Appellant.	No. 56445-9-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant William Burch moves for reconsideration of the court's May 9, 2023 unpublished opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Lee, Price

FOR THE COURT:

Maxa, J.

MAXA, P.J.

Supreme Court No. (to be set)
Court of Appeals No. 56445-9-II

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On July 6, 2023, I filed a true and correct copy of the **Petition for Review by the Appellant**, including appendix, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

Aaron Bartlett Clark County Prosecutor's Office	(X) via email to: aaron.bartlett@clark.wa.gov, cntypa.generaldelivery@clark.wa.gov

SIGNED in Tacoma, WA, on July 6, 2023.

STEPHANIE TAPLIN
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