No.

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH A. PEEBLES, JR.,

Petitioner

APPEAL FROM DIVISION II
OF THE COURT OF APPEALS
#47392-5-II

PETITION FOR REVIEW

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WSB #17283

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I. IDENTITY OF PETITIONER

Kenneth A. Peebles, Jr., petitioner, respectfully requests that this Court accept review of the Court of Appeals' decision in case number 47392-5-II terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Petitioner respectfully requests that this Court review the Court of Appeals decision, affirming the jury's verdict in this case. The Court of Appeals erroneously determined that the State presented sufficient evidence to establish that any touching was done for purposes of sexual gratification, determined that the prosecutor did not engage in misconduct during the trial, and during closing argument, that defense counsel did not provide ineffective assistance of counsel, and that the cumulative errors did not deny petitioner a fair trial.

A copy of the decision from the Court of Appeals, Division II, terminating review which was filed on March 1, 2016 is attached as Exhibit "A".

III. ISSUES PRESENTED FOR REVIEW

1. Whether the State introduced evidence beyond a reasonable doubt to establish that any touching that occurred constituted sexual contact when the evidence presented identified that any touching that occurred was not done for purposes of sexual gratification?

2. Whether the Court of Appeals erred in holding that the prosecutor did not engage in misconduct during trial and during closing

arguments when the prosecutor introduced evidence in violation of a court order and when the prosecutor, during closing arguments, vouched for the complaining witness' credibility negatively commented on petitioner's credibility?

3. Whether defense counsel failed to provide effective assistance of counsel when defense counsel failed to request a mistrial when evidence that was previously ordered excluded was offered by the prosecutor?

4. Whether defense counsel failed to provide effective assistance of counsel when defense counsel failed to object to the prosecutor's improper statements during closing arguments and when the prosecutor made personal comments that vouched for the witness' credibility and derogatory comments about the petitioner, which comments denied petitioner his right to a fair trial?

5. Whether the cumulative effects of all errors occurring during trial deprived petitioner of his constitutional right to a fair trial?

IV. STATEMENT OF THE CASE

A. *Procedural History*

On September 30, 2013, the State charged Mr. Peebles with one count of Child Molestation in the First Degree against A.P., a minor child, for an event that occurred on or about July 16, 2013. CP 1. Pre-trial motions and trial were held from July 9-17, 2014. During the pre-trial motions, the court granted the defense motion in limine precluding the state from introducing any DNA evidence

obtained from A.P.'s underwear. On July 18, 2014, the jury returned a guilty verdict to one count of Child Molestation in the First Degree. CP 87. On August 22, 2014, the court sentenced Mr. Peebles to 58 months within the Department of Corrections. CP 90. The Court of Appeals affirmed his conviction, and this petition follows.

B. *Facts*

On July 16, 2013, Mr. Peebles went to the home of his long-time friend, Jeremy Parrish, to pick up his mail. RP 306:11-12. While there, he started drinking a home-brewed beer that had a significantly high alcohol content. RP 307:11-23; 308:5-18. Although Mr. Peebles only intended to be at Mr. Parrish's home for a short time, he stayed longer when Mr. Parrish offered to cook him dinner, and, after he began drinking beer, he decided to spend the night. RP 309:4-5, 330:1-7. After eating dinner, the next thing Mr. Peebles recalls was waking up the next morning in bed in his home. RP 309:12-20. Mr. Peebles still felt intoxicated and also realized he had injured his forearm and elbow. RP 310:2-6. Mr. Peebles had no recollection of what happened the evening before. RP 310:10-11.

Later that morning, Mr. Peebles sent Mr. Parrish a text message asking him how he arrived home. RP 311:12-15. During a subsequent phone call, Mr. Parrish informed Mr. Peebles of the sexual abuse allegations his daughter, A.P., had made, which left Mr. Peebles in shock as he had no memory of the event. RP 315:13-18. Mr. Peebles had no intention of engaging in sexual contact with A.P., RP 315:24-316:1, and he had no memory of having any contact with A.P. after

she went to bed that night. RP 316:2-4. The last memory that Mr. Peebles had of the evening was eating dinner in the kitchen. RP 337:4-9.

A.P. testified that she went to bed at about 9:30 that evening. After she fell asleep, she felt someone beside her, and recognized it was Mr. Peebles. RP 114:3-6. Mr. Peebles' hand touched her in uncomfortable places, like her bottom and below her hip. RP 115:24-116:3. After the touching, A.P. moved over in her bed, but she didn't say anything to Mr. Peebles and he didn't say anything to her. RP 118:2-9. A.P. awoke a second time and Mr. Peebles' hand was in the same place it was before. RP 118:10-14. Mr. Peebles' hand remained stationary during the event. RP 119:1-2. During the second event, neither Mr. Peebles nor A.P. said anything. RP 121:5-9. A.P. moved his hand again, got up and went to tell her father what happened. RP 118:20-21.

After A.P. spoke to her father, Mr. Parrish contacted Mr. Peebles, and asked him whether he had entered A.P.'s room. Mr. Peebles was passed out and incoherent. RP 216:20-22. Mr. Parrish then drove Mr. Peebles home. RP 217:2-17. During the ride home, Mr. Peebles slept. RP 218:3-5. When Mr. Parrish dropped Mr. Peebles off at his home, he was unsteady on his feet. RP 218:15-17.

When Mr. Parrish was interviewed by Deputy Smith of the Pierce County Sheriff's Department, he provided a written statement and informed Deputy Smith that both he and Mr. Peebles were drinking alcohol and that Mr. Peebles became noticeably intoxicated prior to the incident. RP 170:23-25; 290:16-21, 291:4-8. With respect to the touching, Mr. Parrish indicated that A.P. told him that her pants had been pulled down one time, RP 291:17-22, but A.P. stated that

she had not been touched on her private parts. RP 292: 5-15. At trial, Mr. Parrish testified that A.P. told him that Mr. Peebles crawled into the bed, pulled her pants down twice, but nothing else occurred. RP 214:19-215:5.

When A.P.'s mother talked with her about the event, A.P. indicated that Mr. Peebles had entered her room, pulled her pants down twice, and placed his hand on her butt. RP 155:20-156:4.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Petitioner respectfully requests that this Court accept review of this case because the Court of Appeal's decision conflicts with an earlier decision in State v. Powell, 62 Wn.App. 914, 816 P.2d 86 (1991) which held that inadvertent touching that is susceptible of an innocent explanation does not establish that a touching was done for purposes of sexual gratification. RAP 13.4(b)(2).

Additionally, the Court of Appeal's decision conflicts with this Court's decisions regarding prosecutorial misconduct as set forth in In Re Glassman , 175 Wn.2d 696, 286 P.3d 675 (2012), RAP 13.4(b)(1).

Finally, this petition involves a significant question of law under both the Constitution of the State of Washington and the United States Constitution because petitioner raises issues that occurred at trial which prevented him from receiving a fair trial because of individual errors that were prejudicial as well as the cumulative effect of all errors that occurred at trial. RAP 13.4(b)(3).

A. INSUFFICIENT EVIDENCE EXISTS TO ESTABLISH THAT ANY TOUCHING BY PETITIONER WAS FOR SEXUAL GRATIFICATION.

As this Court is aware, due process requires the state to prove its case beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). When challenging the sufficiency of evidence, this court must determine:

> "whether, after reviewing 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."

State v. Weisberg, 65 Wn.App. 721, 724, 829 P.2d 252 (1992). See also State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

In Weisberg, Division II of the Court of Appeals reversed a jury's conviction when the state produced insufficient evidence of forcible compulsion in a rape case. There, testimony failed to establish that the defendant either suggested or threatened harm to the alleged victim if she did not comply with his request to engage in sexual intercourse. Based upon the evidence, which the court presumed to be true, the court found that the evidence was insufficient to support a finding of guilt.

Here, the testimony at trial illustrates that the State failed to prove, beyond a reasonable doubt, that petitioner touched A.P. for purposes of sexual gratification. Although A.P. gave various pre-trial statements and testimony regarding how she was touched, the evidence presented was insufficient to prove that any touching done by petitioner was for his sexual gratification as opposed to being inadvertent.

Further, no forensic medical evidence supported a finding of an improper touching, and such evidence, frankly, was not relevant for any purpose. See, generally, RP 244:4-262:5.

The Court of Appeal's decision, in rejecting petitioner's argument, cites to the cases of State v. Harstad, 153 Wn.App. 10, 218 P.3d 624 (2009) and State v. Powell, 62 Wn.App. 914, 816 P.2d 86 (1991) to show the differences between touchings done for purposes of sexual gratification and inadvertent touchings that do not support such a finding. Respectfully, petitioner's case is more comparable to Powell than it is to Harstad.

In Harstad, it was absolutely clear that the touching was for purposes of sexual gratification taking into consideration all of the evidence introduced at trial. Not only was there touching, the defendant made sexual comments and engaged in sexual actions indicative of sexual conduct. Conversely, in Powell, the touchings were inadvertent. Mr. Powell testified that he was affectionate with children and if he touched or hugged a child that it was inadvertent and innocent rather than for a sexualized reason. Additionally, the court noted that Mr. Powell made "no threats, bribes, or requests not to tell ..." Powell, 62 Wn.App. at 918.

With respect to petitioner's situation, significantly, A.P.'s disclosures were inconsistent during the varying times that she spoke about the event. Although it is not contested that petitioner was in A.P.'s bed, A.P.'s pre-trial statements and testimony were inconsistent regarding the manner in which she was touched. Additionally, the touching occurred outside her clothing and there was no skin to

skin touching. As such, insufficient evidence existed to prove that any touching done by petitioner was for purposes of sexual gratification.

Importantly, when the evidence presented is consistent with both an inculpatory hypothesis and exculpatory hypothesis, such evidence is insufficient to support a conviction. See State v. Bridge, 91 Wn.App. 98, 966 P.2d 418 (1998). There, the court reversed a conviction based upon fingerprint evidence because such evidence was insufficient to establish the defendant's guilt beyond a reasonable doubt. Bridge, 91 Wn.App. at 100.

Here, and as set forth above and viewing the evidence in the light most favorable to the State, the evidence presented is consistent with both an inculpatory and exculpatory hypothesis. Under such circumstances, and pursuant to Powell, supra, such evidence is insufficient to support a conviction. Accordingly, and based upon both the evidence and lack of evidence of a touching for purposes of sexual gratification, petitioner respectfully urges that insufficient evidence exists to support the verdict. As such, petitioner urges this Court to accept review.

B. PETITIONER WAS DENIED A FAIR TRIAL BECAUSE OF PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT.

Prosecutorial misconduct denies a defendant the right to a fair trial and necessitates a new trial if there is a substantial likelihood that the comments affected the verdict. State v. Echevarria, 71 Wn. App. 595, 597, 860 P.2d 420 (1993). If the misconduct implicates the constitutional rights of the defendant, however, reversal is required unless the error is harmless

beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). A defendant claiming prosecutorial misconduct must establish the impropriety of the state's comments and their prejudicial effect. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

It is well established that "the prosecutor has a special obligation to avoid 'improper suggestions, insinuations, and especially assertions of personal knowledge.'" United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980)(*quoting* Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629 (1935)). It is improper for a prosecutor to personally vouch for or against a witness's credibility for truthfulness. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Indeed, numerous Washington cases have found misconduct where the prosecutor improperly vouched for a witness or made an explicit statement of personal opinion as to a witness's credibility. See, e.g., State v. Allen, 161 Wn.App. 727, 746, 255 P.3d 784, *review granted*, 172 Wn.2d 1014 (2011); State v. Horton, 116 Wn.App. 909, 921, 68 P.3d 1145 (2003).

Further, where a prosecutor explicitly or implicitly communicates his or her personal knowledge about the underlying facts of a case, he or she will be deemed to have vouched for or against the credibility of a witness. United States v. Edwards, 154 F.3d 915, 921 (9th Cir. 1998). Assertions of personal knowledge run afoul of the advocate – witness rule, which prohibits attorneys from testifying in cases they are litigating. Id.; see also, RPC 3.7 cmt. 1 (recognizing that "[c]ombining the roles of advocate and witness can

prejudice the tribunal and the opposing party"). Lawyers are not permitted to impart to the jury personal knowledge about an issue in the case under the guise of either direct or cross examination – or during argument – when such information is not otherwise admissible in evidence. State v. Denton, 58 Wn.App. 251, 257, 792 P.2d 537 (1990)(*citing* State v. Yoakum, 37 Wn.2d 137, 222 P.2d 181 (1950)).

Here, during closing argument, the prosecutor made the following inappropriate remarks:

- "What does alcohol not do? It does not make a criminal act not criminal. Claims of alcoholic blackout are self-reported. They obviously have an insensitive, and they're seeking to avoid responsibility for their deviant behavior. This claim of alcoholic blackout is a farce. Being drunk is one thing. What he's claiming is something entirely different, that after two beers he blacks out, can't remember anything. That's just ridiculous, ladies and gentlemen. It's the claim" – RP 377:5-14.

- Mr. Girard: "I'd object to that characterization, Your Honor." RP 377:15-16.

- The Court: "It's argument, Counsel. Your objection is noted for the record." RP 377:17-18.

- Ms. Williams: "The defendant's claim and his version is ridiculous, and it's not supported by the evidence in any single way." RP 377:19-21.

During rebuttal, the prosecutor made the following inappropriate remarks, which were not objected to:

- "So at the end of this, ladies and gentlemen, do you have an abiding belief in the truth of this charge? Do you have an abiding believe that A.P. telling the truth? Do you have an abiding belief that when A.P. sat on the stand on Tuesday and she looked at

you and told you what happened to her, did you believe her? *And there's no reason not to.*" RP 378:8-14.

- "He has that ability to understand those instructions, to get out of Dodge after he's been caught and to feign intoxication because he's trying to avoid criminal responsibility, just like he did yesterday when he testified and this morning when he testified. Because he's trying to evade criminal responsibility for what he did to Alexis." RP 393:13-19.

- "Mr. Girard said – was discussing a scheme, this scheme that he had that he concocted and how that that was sort of a silly idea. Well, frankly, the defendant's scheme almost worked. If it wasn't for Angelita Bio, we wouldn't be here. Jeremy Parrish wasn't going to call law enforcement. He didn't call law enforcement. Ms. Bio called law enforcement. So quite frankly, the defendant's scheme, it almost worked. And it almost worked because of the 20-year relationship he has with a man who is like his brother." RP 393:20-394:4.

- "Voluntary intoxication, this is the defendant's attempt just to evade justice." RP 397:1-2.

RP 377:5-21, 378:8-14, 393:13-394:4; 397:1-2.

The State's claim that petitioner's "claim and version is ridiculous" specifically relates to his credibility and was clearly improper. Further, the prosecutor did this twice and the court failed to take any remedial action, thus empowering the prosecutor's flagrant remarks. Further, the prosecutor vouched for A.P.'s credibility, and impugned petitioner's credibility and the defense raised no objection throughout the closing argument, which is improper.

It is well-established that a prosecutor simply cannot vouch for or against a witness's credibility. The evidence of touching for purposes of sexual gratification was marginal, at best, and when the prosecutor committed misconduct during closing argument, it is impossible to conclude that the prosecutor's conduct did not influence the jury. This is especially true where the entirety of the state's case hinged on the credibility of both A.P. and petitioner. By commenting on petitioner's credibility, the prosecutor represented herself as a witness. That is improper. Therefore, respectfully, reversal is required.

The Court of Appeal's decision regarding the prosecutor's argument about petitioner's credibility was as follows: "Even if the references to the defense theory as a farce and as ridiculous were improper, they were not prejudicial." COA decision at 9. Respectfully, the Court of Appeal's position is not supported by the case law.

In In re the Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673, 675 (2012) our Supreme Court stated:

> The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 22 of the Washington State Constitution. Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. "A '"[f]air trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office … and the expression of his own belief of guilt into the scales against the accused.'"

Id. At 677 (internal citations omitted).

The Glassman court cited the commentary on the *American Bar Association Standards for Criminal Justice* std. 3-5.8, which holds:

> The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.

Glasmann, 286 P.3d at 679 (*quoting American Bar Association Standards for Criminal Justice* std. 3-5.8).

Here, the state made numerous conclusory and improper remarks about petitioner's defense and testimony, all of which were poorly masked statements about what the state "believes." Such conclusions of guilt were improper for numerous reasons. The remarks served as personal testimony from the prosecutor who was acting as a witness; informing the jury of what the state believes. That was improper. That it happened numerous times and was ratified by the trial court as "argument" only served to tilt the balance of fairness away from petitioner, thereby denying him his constitutional right to a fair trial from an impartial jury.

Further, the prosecutor's statements served as personal testimony bolstering the credibility of the state's witnesses while disparaging the credibility of petitioner. That was improper. The jury was the fact-finder and its job was to determine which witnesses were credible.

As noted, the prosecutor's office has inherent prestige and presumed "fact-finding facilities" that jurors are aware of as set forth in the ABA comment cited in Glasmann. In other words, jurors see prosecutors as credible. If the prosecutor is allowed to testify as to what he/she believes, i.e. the defense is "ridiculous" the defendant is denied the presumption of innocence and placed in a position of proving the prosecutor's beliefs are wrong.

Finally, the ABA comment also discusses the presumed "fact-finding facilities" of the prosecutor's office. This presumption from the jury that the prosecutor "really knows what happened" tips the balance against the defendant if the prosecutor is allowed to express that belief in trial rather than let the evidence determine guilt.

The jury in petitioner's case was not presented with any physical evidence of guilt or eyewitness testimony. The case came down solely to the accusations of A.P. versus petitioner's denial of the accusations. Given that A.P.'s disclosure varied over time, the jury apparently looked past the inconsistencies and found an "abiding belief" in the truth of the charge. The state received the benefit of having a witness with inherent prestige and inherent fact-finding facilities, i.e., the prosecutor, testify in its closing argument. That was improper.

In a case like petitioners - credibility is paramount. The state should not have been allowed to personally vouch for its witness and

disparage petitioner. Because such improper argument occurred, which the court allowed, the prosecutor committed prejudicial misconduct.

C. PETITIONER'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE NUMEROUS INSTANCES OF PROSECUTORIAL MISCONDUCT.

To show ineffective assistance of counsel, a defendant must show that (1) his or her lawyer's representation was deficient and (2) the deficient performance prejudiced him/her. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Representation is deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs when but for counsel's deficient performance, the proceeding's result would have been different. McFarland, 127 Wn.2d at 335. If a party fails to satisfy one prong, this Court need not consider the other. State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

Courts are highly deferential to counsel's performance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Strickland, 466 U.S. at 689. Tactical decisions cannot form the basis for a claim of ineffective assistance of counsel. McFarland, 127 Wn.2d at 336.

Here, as noted above, the prosecutor made numerous statements vouching for the credibility of the alleged victim and other witnesses. Aside from one objection during the State's opening closing argument, the

defense counsel failed to object to any other remark. In a trial where credibility of the witnesses was paramount, and the state's evidence was weak, to allow the state to effectively testify the alleged victim was a credible witness was to allow the jury to be swayed in favor of believing her.

No basis or reasonable justification exists to contend that the decision not to object to the prosecutor's numerous remarks made during rebuttal was tactical. Again, credibility was critical in this case. Nothing could be gained by allowing vouching testimony and support favoring the credibility of those who testified against petitioner.

The second prong of the Strickland test requires the defendant to show prejudice – i.e. that the result of the trial would have been different but for the ineffective representation. While this is a somewhat ambiguous and subjective standard, it is clear that in this case the credibility of the witnesses was the determinative factor. No physical evidence, or eyewitness testimony, existed other than the alleged victim to support the charges, and A.P.'s testimony was replete with inconsistencies. Therefore, without independent evidence of guilt, it is clear that the result of the trial would have been different had counsel objected to each of the instances of misconduct.

D. THE PROSECUTOR, COMMITTED MISCONDUCT AND THE DEFENSE COUNSEL WAS INEFFECTIVE WHEN THE DNA EVIDENCE WAS INTRODUCED AT TRIAL.

During pre-trial motions in limine, the State sought to introduce DNA evidence obtained from A.P.'s underwear. The defense moved to exclude such testimony based upon its prejudicial effect against petitioner. RP 27:11-30:8; RP 60:7-62:12. The court granted the defense motion. RP 62:13-68:18.

During the testimony of Deputy Jason Smith, the prosecutor asked the deputy when introducing into evidence A.P.'s underwear, to comment about other items that were contained within the State's exhibit. RP 173:5-174:7. The deputy responded that the evidence was "some sort of test, DNA test" RP 174:6-7.

Clearly, this testimony violated the Court's order on the DNA motion in limine and simply no reason existed for such question to be asked of the deputy when clearly the response would violate the Court's order. Further, defense counsel did not object or seek a mistrial as a result of the DNA evidence and simply wanted to leave the answer it as it was. RP 191:17-24. Respectfully, the prosecutor committed misconduct as any competent and ethical prosecutor would realize that the question asked would elicit testimony precluded by the court, and the failure of the defense counsel to request a mistrial is ineffective as no trial tactic exists that would make such decision sound. As such, and based upon both the

prosecutor's misconduct and the defense counsel's ineffectiveness, petitioner's right to a fair trial was prejudiced.

E. CUMULATIVE ERRORS DENIED PETITIONER A FAIR TRIAL.

Reversal may be required due to the cumulative effects of trial court errors, even if each error standing alone would otherwise be considered harmless. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); State v. Alexander, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992). Error may take one of two forms--constitutional and non-constitutional error. State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).

Constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. Whelchel, at 728; Guloy, at 425. Non-constitutional error requires reversal if, within reasonable probabilities, it materially affected the outcome of the trial. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993); State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

Here, the errors mentioned above unfairly prejudiced petitioner's right to a fair trial. In addition to insufficient evidence to support a conviction, the prosecutorial misconduct that occurred during closings, the prosecutorial misconduct that introduced DNA evidence that the court

expressly ruled was inadmissible, and the ineffective assistance of counsel, all contributed to deny petitioner a fair trial.

This was a case where the state's evidence was marginal and largely inconsistent, and the jury was to consider the credibility of the complaining witness and petitioner. Absent the errors set forth above, petitioner would have been acquitted. Because it cannot be stated beyond a reasonable doubt that petitioner's conviction would stand absent the jury receiving, and not receiving, the evidence as outlined above, this Court should accept review.

VI. CONCLUSION

Based on the arguments, records and files contained herein, petitioner respectfully requests that this Court accept review of this matter.

Respectfully submitted this 30th day of March, 2016.

HESTER LAW GROUP, INC., P.S.
Attorneys for Petitioner

By: _____
BRETT A. PURTZER
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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the petition for review to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Kathleen Proctor
Deputy Prosecuting Attorney
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Kenneth Peebles, Jr.
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Washington Correctional Center
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Shelton, WA 98584

Signed at Tacoma, Washington, this 30th day of March, 2016.

LEE ANN MATHEWS

Filed
Washington State
Court of Appeals
Division Two

March 1, 2016

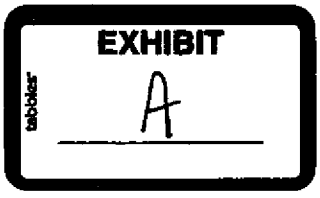
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KENNETH ARCHIE PEEBLES, JR.	No. 47392-5-II UNPUBLISHED OPINION

MELNICK, J. – Kenneth Archie Peebles, Jr. appeals his conviction of child molestation in the first degree. We hold that sufficient evidence existed to show that Peebles engaged in sexual contact with the victim and that an inadvertent reference to DNA[1] evidence did not result in prejudice. Additionally, the prosecuting attorney argued legitimate inferences from the evidence during closing argument and any misstatements were not prejudicial. Finally, defense counsel's decision not to object to the DNA reference and the prosecuting attorney's closing argument did not constitute ineffective assistance, and that cumulative error did not deprive Peebles of a fair trial. We affirm his conviction.

[1] Deoxyribonucleic acid.



FACTS

When Peebles arrived at Jeremy Parrish's home to pick up some mail, Parrish invited his longtime friend to dinner. Parrish's eight-year-old daughter AP was staying with her father and knew Peebles. Peebles and Parrish drank home brewed beer and they eventually decided that Peebles should stay the night because he had been drinking.

AP went to bed before the adults. She wore shorts, underwear, and a T-shirt to bed. AP awoke when she felt Peebles lie down beside her. He laid on his side facing her back. AP felt Peebles's hand touching her buttocks and the area below her hip. His hand was inside her shorts but outside her underwear. She moved his hand and went back to sleep. She awoke a second time when Peebles touched her in the same places and in her vaginal area.

AP then got out of bed and woke her father. When she told him what Peebles had done, Parrish got up and found Peebles asleep in another room. Parrish woke Peebles and drove him home. Peebles seemed unsteady but entered his house unassisted.

The next day Parrish told AP's mother about the incident and she called the police. AP described the touching to her mother and to professionals who examined and interviewed her.

The State charged Peebles with child molestation in the first degree. It sought to introduce DNA evidence obtained from AP's shorts that revealed two separate male DNA profiles; however, the defense moved before trial to exclude that evidence because the DNA test concluded that "the sample was not suitable for comparison purposes." Clerk's Papers (CP) at 27. The trial court granted the motion to exclude any reference to DNA evidence.

At trial, AP and her parents testified to the facts cited above. AP's mother also testified that AP told her that Peebles touched her buttocks twice. Parrish stated that AP told him that Peebles crawled into bed with her and pulled down her pants twice, though he admitted telling a

deputy that AP said Peebles pulled her pants down once. Parrish also told the deputy that AP denied being touched in her private parts.

Deputy Jason Smith testified about going to Parrish's house and collecting the clothing that AP had worn to bed. This clothing was placed into three envelopes that were admitted into evidence. When the prosecutor asked Smith to identify the contents of each envelope, she also asked about the contents of a packet in the first envelope. Smith replied, "It's some sort of test, DNA test." IV Report of Proceedings (RP) at 174. The prosecutor then asked about the second envelope without further reference to DNA.

After excusing the jury for the day, the trial court addressed the DNA issue sua sponte. The prosecutor apologized for the inadvertent reference to DNA evidence, explaining that she had no idea that the DNA test was in the packet. The prosecutor added that the defense was entitled to a limiting instruction. After considering the matter overnight, defense counsel decided against an instruction that would highlight the DNA issue.

A deputy prosecutor who attended an interview with AP testified that the child stated Peebles had touched her "chest, bottom, and front." V RP at 293. Peebles testified that after drinking two high-alcohol beers with Parrish, he could only remember eating dinner and then waking up in his own home the next morning. He stated that he was shocked when Parrish told him about AP's allegations, but he explained that he could not deny molesting AP because of his intoxication that evening.

The jury found Peebles guilty as charged and the trial court imposed a standard range sentence of 58 months. Peebles appeals his conviction.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Peebles argues that insufficient evidence existed to prove that he touched AP for the purpose of sexual gratification. We disagree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In determining whether the necessary quantum of proof exists, we need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

To convict Peebles of child molestation in the first degree, the jury had to find beyond a reasonable doubt that he had sexual contact with AP, that AP was less than 12 years old at the time and not married to Peebles or in a domestic partnership with him, that AP was at least 36 months younger than Peebles, and that the act occurred in Washington. The trial court instructed the jury that "[s]exual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party." CP at 70 (Instr. 6). Sexual gratification

is not an essential element of the crime of child molestation in the first degree. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). Rather, it is a definitional term that clarifies the meaning of sexual contact. *Lorenz*, 152 Wn.2d at 36.

"'Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touch was for the purpose of sexual gratification,'" although courts require additional proof of sexual purpose when clothes cover the intimate part touched. *State v. Harstad*, 153 Wn. App. 10, 21, 218 P.3d 624 (2009) (quoting *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991)). Peebles does not dispute that the touching of AP occurred on her intimate parts. *See In re Welfare of Adams*, 24 Wn. App. 517, 520, 601 P.2d 995 (1979) (buttocks, hips and lower abdomen may be intimate parts of the anatomy). He argues, however, that the State failed to provide the additional proof needed to establish that the touching occurred for the purpose of sexual gratification.

The *Harstad* court held such proof existed because the defendant rubbed the victim's upper thigh back and forth while engaging in heavy breathing. 153 Wn. App. at 22-23. This touching occurred at night while everyone else in the household slept. *Harstad*, 153 Wn. App. at 21. But we concluded in *Powell* that the purpose of the defendant's fleeting touches of the victim's chest, bottom, and thighs was equivocal and capable of innocent explanation. 62 Wn. App. at 917-18. This touching occurred as the defendant hugged the victim, lifted her off his lap, and sat with her in his truck. *Powell*, 62 Wn. App. at 917-18. The evidence was insufficient to support the inference that this touching outside the victim's clothing occurred for the purpose of sexual gratification. *Powell*, 62 Wn. App. at 918.

Here, the evidence is less ambiguous than in *Powell* and more similar to the touching in *Harstad*. The State provided testimony that the touching occurred in AP's bed while she and the

rest of the household slept. After AP felt Peebles touch her buttocks, she removed his hand from inside her shorts, only to again feel him touch her buttocks as well as her vaginal area. This touching is not capable of innocent explanation. *See State v. Whisenhunt*, 96 Wn. App. 18, 24, 980 P.2d 232 (1999) (defendant's touching of victim's vaginal area three times was "not open to innocent explanation"). For the foregoing reasons, sufficient evidence existed to establish an inference that the touching of the victim's intimate areas over her clothing occurred for the purpose of sexual gratification.

II. PROSECUTORIAL MISCONDUCT

Peebles next argues that the prosecutor committed misconduct during direct examination of a witness and during closing argument, and that this misconduct deprived him of a fair trial. We disagree.

A defendant has a fundamental right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). Prosecutorial misconduct can deprive a defendant of this constitutional right. *Glasmann*, 175 Wn.2d at 703-04.

To prevail on a prosecutorial misconduct claim, a defendant must prove that the prosecutor's conduct was both improper and prejudicial. *Glasmann*, 175 Wn.2d at 704. Prejudice is established if there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). If the defendant did not object at trial, he is deemed to have waived any error unless the misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

A. Disclosure of DNA Evidence

Peebles argues that the prosecutor should have realized that her question to Deputy Smith about the contents of a packet inside an exhibit would elicit prohibited testimony about DNA test results. The State responds that after the inadvertent remark about the fact of a DNA test occurred, the parties and the court took the appropriate remedial steps to eliminate the possibility of any further DNA reference and thereby eliminated any potential prejudice. We agree with the State.

Although defense counsel did not object when Deputy Smith testified that the packet contained "some sort of test, DNA test," the trial court addressed the issue sua sponte. IV RP at 174, 176. The prosecutor apologized and explained that she had no idea that the DNA test was in the packet, thinking instead that it might have contained the victim's barrette. Both the trial court and defense counsel accepted her explanation and admitted that they had thought it was a dehumidifier packet. The court and the parties subsequently removed the DNA test and relabeled the exhibit.

We decline to find misconduct in the inadvertent violation of the trial court's pretrial ruling excluding DNA evidence.[2]

B. Closing Argument

Peebles's remaining claims of prosecutorial misconduct concern statements made during closing argument. Peebles complains that in five separate instances, the prosecutor personally vouched for AP's credibility, expressed her personal knowledge of the facts of the case, and impugned Peebles's credibility.

[2] The witness merely mentioned a DNA test. The actual test and its conclusions were never revealed to the jury.

We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Jones*, 144 Wn. App. 284, 290, 183 P.3d 307 (2008). "'A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury.'" *Jones*, 144 Wn. App. at 290 (quoting *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005)).

It is improper for a prosecutor personally to vouch for the credibility of a witness. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Vouching is not based on evidence and occurs when the prosecutor places the government's prestige behind the witness or indicates that information not presented to the jury supports the witness's testimony. *State v. Allen*, 161 Wn. App. 727, 746, 255 P.3d 784 (2011). "Just as it is improper for a prosecutor personally to vouch for the credibility of a witness, it is improper for a prosecutor to personally vouch against the credibility of a witness." *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003) (internal quotation marks omitted). But prejudicial error will not be found unless it is "'clear and unmistakable' that counsel is expressing a personal opinion" rather than arguing an inference from the evidence. *Brett*, 126 Wn.2d at 175 (quoting *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)). A prosecutor may freely comment on witness credibility based on the evidence. *Allen*, 161 Wn. App. at 746.

Peebles argues that the prosecutor vouched against his credibility in two sets of comments that occurred during the first part of her closing argument. The first set is as follows:

> [PROSECUTOR]: What does alcohol not do? It does not make a criminal act not criminal. Claims of alcoholic blackout are self-reported. They obviously have an insensitive [sic], and they're seeking to avoid responsibility for their deviant behavior. This claim of alcoholic blackout is a farce. Being drunk is one thing. What he's claiming is something entirely different, that after two beers he blacks out, can't remember anything. That's just ridiculous, ladies and gentlemen. It's the claim--
>
> [DEFENSE COUNSEL]: I'd object to that characterization, Your Honor.
>
> [THE COURT]: It's argument, Counsel. Your objection is noted for the record.
>
> [PROSECUTOR]: The defendant's claim and his version is ridiculous, and it's not supported by the evidence in any single way.

VI RP at 377.

During opening statement, defense counsel told the jury that Peebles drank so much that night that he was incoherent and passed out in the bed in which Parrish found him. Peebles testified that he was so intoxicated that he could not remember what happened after dinner on the night in question. The trial court instructed the jury that while evidence of voluntary intoxication does not make an act less criminal, the jury could consider intoxication in determining whether Peebles acted for the purpose of satisfying either party's sexual desires.

The State's argument was a comment on the defense's theory and on Peebles's credibility that was based on the evidence and the total argument. *See State v. Copeland*, 130 Wn.2d 244, 290-91, 922 P.2d 1304 (1996) (use of word "liar" as comment on defendant's credibility was not improper where prosecutor was drawing inference from evidence). Even if the references to the defense theory as a farce and as ridiculous were improper, they were not prejudicial. It was not clear that the prosecutor expressed a personal opinion rather than drawing an inference from the evidence. *See Horton*, 116 Wn. App. at 921 (misconduct was unmistakable where prosecutor told jury that he believed the defendant lied).

Peebles next complains of this statement:

> So at the end of this, ladies and gentlemen, do you have an abiding belief in the truth of this charge? Do you have an abiding belief that [AP is] telling the truth? Do you have an abiding belief that when [AP] sat on the stand on Tuesday and she looked at you and told you what happened to her, did you believe her? And there's no reason not to.

VI RP at 378. Defense counsel did not object to this statement. We view this argument as a comment based on the evidence that did not constitute misconduct.

Peebles also complains of statements made during the State's rebuttal argument. The first began with a reference to Peebles and his ability to leave the Parrish home, set his alarm at his own home, and proceed with his normal routine the following day despite his alleged intoxication.

> He has that ability to understand [Parrish's] instructions, to get out of Dodge after he's been caught and to feign intoxication because he's trying to avoid criminal responsibility, just like he did yesterday when he testified and this morning when he testified. Because he's trying to evade criminal responsibility for what he did to [AP].
>
> [Defense counsel] said--was discussing a scheme, this scheme that he had that he concocted and how that . . . was sort of a silly idea. Well, frankly, the defendant's scheme almost worked. If it wasn't for [AP's mother], we wouldn't be here. Jeremy Parrish wasn't going to call law enforcement. He didn't call law enforcement. [AP's mother] called law enforcement. So quite frankly, [Peebles's] scheme, it almost worked. And it almost worked because of the 20-year relationship he has with a man who is like his brother.

VI RP at 393-94.

Defense counsel did not object. The statements are based on inferences from the evidence as well as defense counsel's closing argument where he argued that one act of accidental touching from a drunken man did not constitute sexual contact. We see no misconduct in the statements highlighted above.

Finally, Peebles complains of this statement: "Voluntary intoxication, this is the defendant's attempt just to evade justice." 6 RP 397. Again, defense counsel did not object. Because it is not clear and unmistakable that the prosecutor was asserting her personal opinion rather than arguing an inference from the evidence, we reject this claim of misconduct as well. Peebles's argument that prosecutorial misconduct deprived him of a fair trial fails.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Peebles argues that he received ineffective assistance of counsel when his attorney failed to object to the above statements and to the prosecutor's elicitation of DNA testimony. We disagree.

To prove a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness and that this deficiency prejudiced the defendant. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Prejudice results when it is reasonably probable that but for counsel's errors, the result of the proceeding would have been different. *Thomas*, 109 Wn.2d at 226. We strongly presume that defense counsel's performance was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We need not address both prongs of the ineffective assistance of counsel test if the defendant makes an insufficient showing on one prong. *State v. Garcia*, 57 Wn. App. 927, 932, 791 P.2d 244 (1990). Because claims of ineffective assistance of counsel present mixed questions of law and fact, we review them de novo. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

When counsel's strategy can be characterized as legitimate trial strategy, it cannot provide a basis for an ineffective assistance of counsel claim. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d

512 (1999). The decision of whether to object is a clear example of trial strategy. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). To prevail on an ineffective assistance of counsel claim based on the failure to object, the defendant must show (1) an absence of legitimate strategic or tactical reasons for failing to object; (2) that the objection likely would have been sustained if raised; and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Having already held that the deputy's statement about the DNA test was not prejudicial error in the context of Peebles's prosecutorial misconduct claim, we need not repeat that analysis in this context. And, having held that none of the closing argument statements to which defense counsel did not object constituted misconduct, we cannot conclude that counsel's failure to object was deficient. *See In re Pers. Restraint of Cross*, 180 Wn.2d 664, 721, 327 P.3d 660 (2014) (defense counsel's failure to object to prosecutor's closing argument generally will not constitute deficient performance). We reject Peebles's claim of ineffective assistance of counsel.

IV. CUMULATIVE ERROR

Finally, Peebles argues that the cumulative effect of the errors he has identified deprived him of a fair trial. We disagree.

Under the cumulative error doctrine, a reviewing court may reverse a defendant's conviction when the combined effect of trial errors denied him a fair trial, even if each error alone would be harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). The doctrine does not apply where the errors are few and have little or no effect on the trial's outcome. *Weber*, 159 Wn.2d at 279. We see no accumulation of error that deprived Peebles of a fair trial, and we reject his claim of cumulative error.

We affirm.

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.

Melnick, J.

We concur:

Maxa, P.J.

Sutton, J.

HESTER LAW OFFICES

March 30, 2016 - 1:01 PM

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