

67174-0

67174-0

NO. 67174-0-1

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

---

STATE OF WASHINGTON,

Respondent,

v.

JONAS I. HERNANDEZ,

Appellant.

---

BRIEF OF RESPONDENT

---

MARK K. ROE  
Prosecuting Attorney

SETH A. FINE  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 FEB 16 AM 10:32

**TABLE OF CONTENTS**

I. ISSUES ..... 1

II. STATEMENT OF THE CASE ..... 2

    1. State’s Evidence..... 2

    2. Defendant’s Evidence..... 4

III. ARGUMENT ..... 6

    A. THE JURY COULD PROPERLY INFER THAT THE DEFENDANT ACTED FOR PURPOSES OF SEXUAL GRATIFICATION WHEN HE REPEATEDLY RUBBED THE VICTIM’S VAGINAL AREA AND HAD NO LEGITIMATE REASON FOR DOING SO..... 6

    B. THE PROSECUTOR’S CLOSING ARGUMENT WAS PROPER. .... 9

        1. A Prosecutor Can Properly Argue That Accepting The Defense Version Of The Events Requires Believing The Defense Witnesses. .... 10

        2. A Prosecutor Can Properly Argue That Two Witnesses Coordinated Their Testimony, When That Argument Is Based On A Reasonable Interpretation Of The Evidence..... 15

        3. A Prosecutor Can Properly Argue That Some Witnesses Are Credible And Others Are Not Credible. .... 16

        4. A Prosecutor Does Not Disparage Defense Counsel By Arguing That A Child-Witness May Have Been Frightened By The Trial Participants, Including The Attorneys. .... 17

    C. DEFENSE COUNSEL COULD HAVE MADE A REASONABLE TACTICAL CHOICE NOT TO HIGHLIGHT THE PROSECUTOR’S ARGUMENT BY OBJECTING..... 18

IV. CONCLUSION ..... 22

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>In re Davis</u> , 152 Wn.2d 647, 101 P.3d 1 (2004) .....	19
<u>State v. Anderson</u> , 153 Wn. App. 417, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2011).....	14
<u>State v. Brett</u> , 126 Wn.2d 136, 892 P.2d 29 (1995), <u>cert. denied</u> , 516 U.S. 1121 (1996) .....	16
<u>State v. Curtiss</u> , 161 Wn. App. 673, 150 P.3d 496 (2011).....	8, 14
<u>State v. Davenport</u> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	9
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996), <u>review</u> <u>denied</u> , 131 Wn.2d 1018 (1997) .....	10
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	9, 21
<u>State v. Grier</u> , 171 Wn.2d 17, 246 P.3d 1260 (2011) .....	18, 19
<u>State v. Hoffman</u> , 116 Wn.2d 31, 804 P.2d 577 (1991).....	15, 16
<u>State v. Powell</u> , 62 Wn. App. 914, 816 P.2d 86 (1991), <u>review</u> <u>denied</u> , 118 Wn.2d 1013 (1992) .....	7
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	7
<u>State v. Sargent</u> , 40 Wn. App. 340, 698 P.2d 598 (1985) .....	16
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 619 (1990), <u>cert. denied</u> , 498 U.S. 1046 (1991) .....	10
<u>State v. Thorgerson</u> , 172 Wn.2d 438, 258 P.3d 43 (2011).....	17
<u>State v. Walker</u> , 164 Wn. App. 724, 265 P.3d 191 (2011).....	14
<u>State v. Whisenhunt</u> , 96 Wn. App. 18, 980 P.2d 232 (1999) .....	7, 9
<u>State v. Wright</u> , 76 Wn. App. 811, 888 P.2d 1214, <u>review denied</u> , 127 Wn.2d 1010 (1995).....	11

### FEDERAL CASES

<u>Bussard v. Lockhart</u> , 32 F.3d 322 (8 <sup>th</sup> Cir. 1994).....	19
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) .....	19, 21
<u>United States v. Harper</u> , 662 F.3d 958 (7 <sup>th</sup> Cir. 2011) .....	14

### WASHINGTON STATUTES

RCW 9A.44.010(2) .....	7
------------------------	---

### COURT RULES

RAP 2.5(a)(2) .....	6
---------------------	---

## **I. ISSUES**

(1) The victim testified that the defendant reached into her bed and rubbed her vagina, over her clothing. When she tried to move away, he continued touching her. This went on for five or ten minutes. Could a reasonable jury conclude that the touching was for purposes of sexual gratification?

(2) Did any of the following arguments by the prosecutor constitute misconduct that was so flagrant and prejudicial that it can be challenged for the first time on appeal:

(a) Arguing that accepting the defense version of the case required accepting the testimony of defense witnesses;

(b) Arguing that two defense witnesses had coordinated their testimony, where the witnesses admitted discussing the case, and one of the witnesses had changed his account of the events so as to match the other witness's account;

(c) Arguing that the State's witnesses were credible and the defense witnesses were not credible; or

(d) Arguing that the 11-year-old victim might have been frightened by all the adults in the courtroom, including the attorneys?

(3) Was defense counsel ineffective for failing to object to the above arguments?

## **II. STATEMENT OF THE CASE**

### **1. State's Evidence.**

On the night of December 11-12, 2010, 11-year-old J.R. spent the night with her friend I.P., who lived next door. The other residents of the house were Victor Coronado and Gabriella Cruz (I.P.'s parents), Daniela Cruz (Gabriella's sister), and the defendant, Jonas Hernandez (Gabriella and Daniela's brother). 4 RP 63-65.

J.R. and I.P. went to bed shortly after 10 p.m. They slept together on a top bunk bed. 2 RP 13, 16, 26-27. During the night, J.R. was awakened by someone touching her. She looked at her cell phone and saw that it was 3:00 a.m. She used the light from her phone to see who was touching her. She saw that it was the defendant. By shining the light on the bottom bunk, she saw that Daniela was asleep there. 2 RP 28, 35.

The defendant was standing on the ladder leading to the top bunk. She believed that she had kicked the blankets off, but she wasn't sure. The defendant was touching her on the vagina, over her sweat pants. (J.R. wouldn't say "vagina" in court, but she

spelled it.) She testified it as a “soft touch,” which she demonstrated. She agreed with the prosecutor’s description: “you’re kind of raising your knuckles up with pulling your fingers together.” 2 RP 28-30, 42.

When J.R. felt the defendant touching her, she kicked at him. He put his arms on the bed, lay his head on the mattress, and pretended to be asleep. She scooted up the bed. He then started touching her again. She again kicked at him and scooted up the bed, and he again pretended to be asleep. This sequence was repeated four or five times. 2 RP 31-33, 60-63. This lasted five or ten minutes. 2 RP 66.

Finally, J.R. scooted up so that the defendant couldn’t touch her any more. 2 RP 31. He got off the ladder and went back to his bed. At some point, J.R. sent a text to I.P., but I.P. did not respond. Finally, J.R. woke up I.P. and told her that she wanted to go home. J.R. called her father and asked him to unlock the door. 2 RP 35-37. When she got home, she told her parents what had happened. She was shaken and crying. Her parents immediately contacted police. 2 RP 94-99, 117-18.

Deputy Nathan Alanis of the Snohomish County Sheriff’s Office responded to the call. He arrived at 8:18 a.m. After

speaking with J.R. and her parents, he went next door and contacted the defendant. He asked the defendant what had happened the night before. The defendant said that he had checked on his niece while she was sleeping. He showed Deputy Alanis the bedroom. 2 RP 170-71. Deputy Alanis asked the defendant if anything had happened while the girls had been sleeping. The defendant said that he might have slipped and touched her. 2 RP 176-77. Deputy Alanis testified that he had not told the defendant what the allegations were. 2 RP 179.

I.P. was called as a State's witness. She testified that she had slept in the same bed with J.R. During the night, she heard the defendant and Daniela come in and go to bed. The defendant rearranged the blanket, and she went back to sleep. According to I.P., J.R. was still there when she woke up at 8:20 the next morning. 2 RP 139-44.

## **2. Defendant's Evidence.**

The defendant testified that when he went to bed, Daniela asked him to check up on the girls. He went up the ladder and looked at them. There was a bump, but he couldn't tell if it was the blanket or a person. He tried to "sort out the mess." Then he saw

the light of the cell phone. He thought that his niece was awake, so he went down the ladder. 4 RP 146-47.

The next morning, the defendant was contacted by Deputy Alanis. The deputy told him that he was being accused of touching J.R. He asked if the defendant had any idea why those accusations were being made. The defendant said that he had tried to put the covers over his niece. 2 RP 16-17. The deputy kept asking why J.R. would say that he was touching her. Finally, the defendant said, "maybe by accident I did touch her." 3/21 RP 16-20.

Daniela Cruz testified that she had been visiting with her boyfriend (later her fiancé), Noe Cisneros. He left a little bit after 2:00 a.m. She then got ready for bed. The defendant came up shortly afterwards. She asked him to check on the girls. He went up on the ladder for a few seconds and came back down. They talked for around seven minutes and then went to sleep. 4 RP 88-97.

Mr. Cisneros testified that he had been drinking with Daniela and her family. Mr. Coronado and Gabriella went to bed at around 1:00 a.m. He continued to visit with Daniela and the defendant. He testified that he left at around 2:00 .am. 3 RP 158-60. A week

before trial, Mr. Cisneros had told a police officer that he had left at around 1:00 a.m. 3/21 RP 56. On cross-examination, both he and Daniela testified that, after that interview, they had discussed the events of that night. Daniela testified that this included a discussion of the time frames. 4 RP 114. Mr. Cisneros likewise testified that they had discussed the time frames, but he was vague about whether that discussion occurred after the police interview. 4 RP 46-47.

### **III. ARGUMENT**

#### **A. THE JURY COULD PROPERLY INFER THAT THE DEFENDANT ACTED FOR PURPOSES OF SEXUAL GRATIFICATION WHEN HE REPEATEDLY RUBBED THE VICTIM'S VAGINAL AREA AND HAD NO LEGITIMATE REASON FOR DOING SO.**

The defendant raises two arguments, neither of which was raised in the trial court. First, the defendant challenges the sufficiency of the evidence. Under RAP 2.5(a)(2), "failure to establish facts upon which relief can be granted" can be raised for the first time on appeal.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the

defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citations omitted).

The defendant specifically claims that there was insufficient evidence that he acted "for the purpose of gratifying sexual desire," which is a requirement for "sexual contact." RCW 9A.44.010(2).

Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification. However, in those cases in which the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification.

State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992) (citations and footnote omitted).

Here, the victim testified that the defendant reached onto her bed and touched her vagina, over clothing. She demonstrated a rubbing motion. When she kicked him and moved away, he touched her again. 2 RP 30-33, 62-63. This went on for five or ten minutes. 2 RP 66.

The testimony in this case is similar to that in State v. Whisenhunt, 96 Wn. App. 18, 980 P.2d 232 (1999). There, the

victim testified that the defendant reached over a school bus seat to touch her in the vaginal area. He did so on three separate occasions. Since this contact was neither equivocal nor fleeting, it supported a reasonable inference that the defendant acted for the purpose of sexual gratification. Id. at 24.

The defendant claims that the touching was “inadvertent, equivocal, innocently and reasonable explained, and occurred while [he] was performing the caretaking function of straightening the tangled covers.” Brief of Appellant at 13. In support of this claim, he cites to his own testimony. The jury, however, was not required to believe that testimony. Evaluating witness credibility and resolving conflicting testimony is the sole province of the jury. An appellate court will not review the jury’s decisions on these subjects. State v. Curtiss, 161 Wn. App. 673, 150 P.3d 496 (2011).

Under the victims’ testimony, the touching was not inadvertent – the defendant repeatedly touched her in the same place, even when she tried to move away. It did not occur while straightening the covers – she was “pretty sure” that she had kicked the blankets off. 2 RP 42. It was not equivocal – the defendant had no legitimate reason for touching the victim repeatedly on her

vaginal area. As in Whisenhunt, the jury could reasonably infer that the touching was for the purpose of sexual gratification.

**B. THE PROSECUTOR'S CLOSING ARGUMENT WAS PROPER.**

The defendant next claims that the prosecutor's closing argument constituted misconduct. This argument can be raised for the first time on appeal, but only to a limited extent:

Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. The failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error unless the remark is deemed to be so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.

State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995).

Prosecutorial misconduct requires reversal only if, in light of the entire record, there is a substantial likelihood that it affected the jury verdict, thereby denying the defendant a fair trial. State v. Davenport, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984). "The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the

trial.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 619 (1990),  
cert. denied, 498 U.S. 1046 (1991).

**1. A Prosecutor Can Properly Argue That Accepting The Defense Version Of The Events Requires Believing The Defense Witnesses.**

The defendant claims that the prosecutor mis-stated the burden of proof. As he points out, “it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State’s witnesses are either lying or mistaken.” State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). It is, however, proper for a prosecutor to argue that to *believe* the defendant, it must conclude that the State’s witnesses were mistaken. The improper argument gives the jury a false choice between believing the State’s witnesses and acquitting the defendant. It ignores the possibility that the jury could acquit without determining which version was more credible. The proper argument does not present this danger.

Where ... the parties present the jury with conflicting versions of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other. This argument is well within the wide latitude afforded to the prosecutor in drawing and expressing reasonable inferences from the evidence.

State v. Wright, 76 Wn. App. 811, 824-25, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995).

In the present case, the testimony of the witnesses was flatly in conflict. The victim testified that the defendant repeatedly touched her vaginal area, even when she tried to move away. 2 RP 31-33. The defendant testified that he simply attempted to straighten her blankets. 4 RP 147. The victim testified that the defendant's sister was asleep at the time. 2 RP 34. The sister testified that she had just gone to bed and asked the defendant to check on the girls. 4 RP 90-91. These accounts cannot all be true. If the jurors believed one, they must necessarily disbelieve the other.

In closing argument, defense counsel argued that the victim's testimony was implausible. Counsel based this argument on the testimony of defense witnesses:

And what person in their right mind would do this? Starting with the basics: There are two eyewitnesses in the room. There is an eyewitness close to the same age in the same bed, two inches away. That takes a lot of guts to commit one of the most serious felonies there is with a potential eyewitness right there and with an adult awake and talking to you a few feet away.

3/21 RP 88. This argument assumes that the defendant's sister was telling the truth. If the victim was telling the truth, the adult was not "awake and talking to you" – she was fast asleep. 2 RP 34.

The prosecutor was entitled to point this out, and he did:

Of course, she's asking you to think rationally when it's not rational for a 19-year-old to even being to be rational when he decides to touch the 11-year-old. Their entire case rests on you accepting their version of the events, not the State's version of the events.

3/21 RP 109.

These witnesses aren't credible. These witnesses are Mr. Hernandez's family. And absolutely they want to help him out. There's no doubt about that. And nobody can fault them for that. But they've been talking. They've talked about how the timeline fits and changed the timeline to make it fit. Mr. Hernandez's sister even talked about how it is that it was essentially her job. And when I said, "It was your job?", she kind of skirted around the issue. In order for you to accept Defense's version, you have to accept their witnesses' testimony, and the problem is their witnesses' testimony is not credible.

3/21 RP 117.

The prosecutor never said that to *acquit* the defendant, the jury had to believe the defense witnesses. Rather, he said that to *accept the defense version of events*, the jury had to believe the defense witnesses. This statement was correct. Making it was not misconduct.

The defendant also complains of the following argument by the prosecutor:

And then the Defense goes after Deputy Alanis. Deputy Alanis was honest here today, wasn't he, when he talked about what he did. Don't you find him credible? Do you see any reason in the world to believe that Deputy Alanis is not telling the truth? Because if you accept their version of the events, then Deputy Alanis is just dead wrong. He told them why he was there. He told Mr. Hernandez exactly why he was there. And Deputy Alanis said he told him why he was there, but he didn't say that he had been accused of touching.

3/21 RP 119.

This argument correctly summarizes the testimony. The defendant and Deputy Alanis gave two completely different versions of the circumstances surrounding the defendant's statements. According to the defendant, Deputy Alanis repeatedly said that the victim had accused him of touching her. 3/21 RP 15-17. According to Deputy Alanis, he never said this. 3 RP 79. It was proper for the prosecutor to point out the inconsistency and argue that Deputy Alanis's testimony was more credible.

The defendant argues that it was improper for the prosecutor to *imply* that the jury needed to determine the truth. He cites two cases from Division Two, in which it was held improper for a prosecutor to *expressly* state that the verdict should "declare the

truth.” State v. Anderson, 153 Wn. App. 417, 429 ¶ 22, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2011); State v. Walker, 164 Wn. App. 724 ¶¶ 20-23, 265 P.3d 191 (2011). This holding is questionable. The Seventh Circuit Court of Appeals has held it proper for a prosecutor to refer to the trial as a “search for truth”:

[T]rials are searches for the truth; the burden of proof is just a device to allocate the risk of error between the parties. Indeed, both the Supreme Court and this court have repeatedly noted that criminal jury trials serve an important “truth-seeking” function. The [prosecutor] here did no more than to repeat the uncontroversial proposition.

United States v. Harper, 662 F.3d 958, 961 (7<sup>th</sup> Cir. 2011) (citations omitted); see State v. Curtiss, 161 Wn. App. 673, 701 ¶¶ 59-60, 250 P.3d 496, review denied, 171 Wn.2d 1012 (2011) (proper for prosecutor to ask jury to “return a verdict that you know speaks the truth”).

In the present case, the prosecutor never said that the jury should try to determine the truth. He simply pointed to conflicts in the testimony and argued that the State’s witnesses were more credible. Truth has not been banished from criminal trials. It is not misconduct for a prosecutor to *imply* that a jury should seek it. The prosecutor’s arguments were proper.

## **2. A Prosecutor Can Properly Argue That Two Witnesses Coordinated Their Testimony, When That Argument Is Based On A Reasonable Interpretation Of The Evidence.**

In closing argument, the prosecutor argued that defense witnesses had “coordinated with each other” and “figured out their timelines to make this work.” 3/21 RP 119. The defendant claims that this argument mis-stated the evidence. He is wrong. The prosecutor’s argument represented a reasonable interpretation of the evidence.

Daniela Cruz (the defendant’s sister) and Noe Cisneros (Ms. Cruz’s fiancé) both testified as defense witnesses. Both testified that Mr. Cisneros had left the house at around 2:00 a.m. 3 RP 159; 4 RP 88. A week earlier, however, Mr. Cisneros had told police that he left shortly after 1:00 a.m. 3/21 RP 56. On cross-examination, both he and Ms. Cruz testified that they had discussed the events of that night, including the time frames. 4 RP 46-47, 114. According to Ms. Cruz, they discussed this topic after the police interview: “We have been making comments about that, whether he remembers the times or not.” 4 RP 114.

“In closing argument, the prosecuting attorney has a wide latitude in drawing and expressing reasonable inferences from the evidence.” State v. Hoffman, 116 Wn.2d 31, 94-95, 804 P.2d 577

(1991). The evidence here showed that two defense witnesses gave police disparate accounts of their actions. The witnesses then discussed the case and ended up testifying to similar accounts. This evidence supports a reasonable inference that the witnesses had coordinated their testimony. In arguing that this occurred, the prosecutor acted well within his broad latitude to express inferences from the evidence.

### **3. A Prosecutor Can Properly Argue That Some Witnesses Are Credible And Others Are Not Credible.**

The defendant claims that the prosecutor improperly “vouched” for the credibility of witnesses.

It is improper for a prosecutor personally to vouch for the credibility of a witness. Prosecutors may, however, argue an inference from the evidence, and prejudicial error will not be found unless it is clear and unmistakable that counsel is expressing a personal opinion.

State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996).

The defendant cites State v. Sargent, 40 Wn. App. 340, 698 P.2d 598 (1985). There, the prosecutor explicitly stated his personal opinion: “I believe Jerry Lee Brown.” Id. at 343. Here, there was no such statement. The prosecutor never expressed any

personal belief about witness credibility. Rather, he argued witness credibility based on the evidence:

How do we know that it happened in the way that [J.R.] described it? Because just about everything that [J.R.] says is corroborated. Just about everything she says is confirmed by someone else or by the evidence that exists. So what is that evidence? What is it that she said and how is it confirmed? I'm going talk to you about that in just a few minutes.

3/21 RP 74. This argument was proper.

**4. A Prosecutor Does Not Disparage Defense Counsel By Arguing That A Child-Witness May Have Been Frightened By The Trial Participants, Including The Attorneys.**

Finally, the defendant claims that the prosecutor “disparaged” defense counsel. “It is improper for the prosecutor to disparagingly comment on defense counsel’s role or to impugn the defense lawyer’s integrity.” State v. Thorgerson, 172 Wn.2d 438, 451-52 ¶ 30, 258 P.3d 43 (2011). No such disparagement occurred in this case.

In discussing the victim’s testimony, the prosecutor argued:

I'm sure Ms. Mann [defense counsel] is going to get up here and to talk to you about the fact [J.R.] didn't remember that Mr. Hernandez first touched her on the inside of her leg. Probably because that's not exactly the touch she was worried about. She's sitting in a courtroom with a group of adults watching her every move. She's got a judge, she's got a court reporter, she's got a court clerk, she's got big, scary attorneys, she's got police officers and she has members of the public in the courtroom. And she's having to talk

about what? About someone touching her vagina. She was probably frightened and it was very difficult probably for her to do.

3/21 RP 83-84.

It is clear from the record that the victim was embarrassed by her testimony. She would not even speak the word “vagina,” spelling it instead. 2 RP 29. In discussing that embarrassment, the prosecutor’s argument did not single out defense counsel. He referred to “big, scary attorneys” – so he included himself as much as the defense attorney. He also included the judge, the reporter, the clerk, and the investigating officers. The argument did not disparage any of these people. It simply asserted that their collective presence frightened an 11-year-old girl who had to talk about sexual abuse. The argument was proper.

**C. DEFENSE COUNSEL COULD HAVE MADE A REASONABLE TACTICAL CHOICE NOT TO HIGHLIGHT THE PROSECUTOR’S ARGUMENT BY OBJECTING.**

The defendant also claims that defense counsel’s failure to object to the prosecutor’s argument constituted ineffective assistance. To establish this claim, the defendant must show that (1) counsel’s performance was deficient and (2) the deficient performance resulted in prejudice. State v. Grier, 171 Wn.2d 17 ¶

40, 246 P.3d 1260 (2011); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To establish deficient performance, the defendant must show that the challenged acts were “outside the broad range of professionally competent assistance.” Strickland, 466 U.S. at 690. There is a strong presumption that counsel’s actions were reasonable. Grier, 171 Wn.2d at 33 ¶ 41. “When counsel’s conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” Id. ¶ 42.

There are valid tactical reasons not to object to a prosecutor’s closing argument.

Counsel’s decision to object during the prosecutor’s summation must take into account the possibility that the court will overrule it and that the objection will either antagonize the jury or underscore the prosecutor’s words in their minds. Thus, the question we have to ask is not whether the prosecutor’s comments were proper, but whether they were so improper that counsel’s only defensible choice was to interrupt those comments with an objection.

Bussard v. Lockhart, 32 F.3d 322, 324 (8<sup>th</sup> Cir. 1994). “A decision not to object during summation is within the wide range of permissible professional legal conduct.” In re Davis, 152 Wn.2d 647, 101 P.3d 1 (2004).

Under the circumstances of the present case, these tactical concerns were particularly acute. For the reasons already discussed, counsel could properly have believed that an objection was unlikely to be successful. Also, any improper implications in the prosecutor's argument were subtle. Counsel could legitimately be concerned that a "curative instruction" would do more harm than good.

Even if counsel's performance could be considered deficient, the defendant cannot show prejudice. To establish this, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonable, conscientiously, and impartially applying the standards that govern the decision." Id. at 695.

Here, the jury was instructed: "You must disregard any remark, statement, or argument [by the lawyers] that is not supported by the evidence or the law in my instructions." CP 37, inst no. 1. In determining prejudice, it must be presumed that the

jurors followed this instruction. If they did so, they would reject any argument by the prosecutor that expressed personal opinions, misstated the burden of proof, or argued facts contrary to the evidence – all of which would be contrary to the jury instructions or the evidence. Under the standards set out in Strickland, no misconduct of this nature can be considered prejudicial.

Ultimately, the defendant's ineffective assistance claim adds very little to his position. If a prosecutor's argument cannot be challenged for the first time on appeal, it is highly unlikely that the failure to challenge it at trial would constitute ineffective assistance. The argument can be challenged for the first time on appeal if it was flagrant and prejudicial. Gentry, 125 Wn.2d at 640. If the argument was not flagrant, defense counsel could reasonably decide not to highlight it with an objection. If it was not prejudicial, failure to object to it could not constitute ineffective assistance – particularly since Strickland applies a definition of "prejudice" that is more restrictive than the one used under Gentry. An ineffectiveness claim is thus either unnecessary (if the prosecutor's argument was flagrant and prejudicial) or unfounded (if the argument was not flagrant or not prejudicial). Here, the argument was neither flagrant

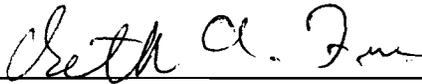
nor prejudicial, so the defendant can establish neither deficient performance nor prejudice.

**IV. CONCLUSION**

The judgment and sentence should be affirmed.

Respectfully submitted on February 15, 2012.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
\_\_\_\_\_  
SETH A. FINE, WSBA # 10937  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 FEB 16 AM 10:31

THE STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
JONAS I. HERNANDEZ,  
  
Appellant.

No. 67174-0-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 15<sup>th</sup> day of February, 2012, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT  
1511 THIRD AVENUE, SUITE 701  
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 15<sup>th</sup> day of February, 2012.

A handwritten signature in cursive script that reads "Seth A. Fine". The signature is written in black ink and is positioned above a horizontal line.

\_\_\_\_\_  
SETH A. FINE, #10937  
Deputy Prosecuting Attorney