

Court of Appeals No. 42200-0-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

EMANUEL LEONARD FINCH,

Defendant/Appellant.

OPENING BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 10-1-03475-9
The Honorable Vicki Hogan, Presiding Judge**

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I. ASSIGNMENTS OF ERROR

1. The trial court exceeded its authority in imposing conditions of community custody that had no relation to the crime committed.
2. The prosecutorial committed misconduct in closing argument.
3. Mr. Finch received ineffective assistance of counsel where his trial counsel failed to object to the prosecutor's improper closing argument.

II. ISSUES PRESENTED

1. May a trial court require a defendant to refrain from possession alcohol while on community custody where there is no evidence that alcohol played a role in any of the crimes? (Assignment of Error No. 1)
2. May a trial court require a defendant to complete an anger management course where while on community custody where there is no evidence that anger management issues played any role in any of the crimes? (Assignment of Error No. 1)
3. Does a prosecutor commit misconduct during closing argument where the prosecutor states her belief in the credibility of the State's witnesses, makes arguments designed to inflame the passions and prejudices of the jury, and expresses her personal belief of the defendant's guilt? (Assignment of Error No. 2)
4. Is it ineffective assistance of counsel for trial counsel to fail to object to flagrantly improper closing argument by the prosecutor? (Assignment of Error No. 3)

III. STATEMENT OF THE CASE

A. Factual Background

L.O.J. was born on 01-08-01. CP 3-4. T.J. was born on 01-26-99. CP 3-4. R. Emanuel Finch is the grandfather of both girls. He was born on 01-24-52. CP 3-4.

In June of 2010, L.O.J. was attending summer camp when she disclosed to a girl at the camp that her grandfather does “yucky” things to her. CP 3-4. The girl told her mother who notified child protective services. CP 3-4.

L.O.J. was forensically interviewed and disclosed that Mr. Finch touches both she and her sister, T.J. CP 3-4. L.O.J. asserted that digital penetration, oral sex, and sexual intercourse occurred. CP 3-4. L.O.J. said the abused happened on Saturdays when her grandmother was gone. CP 3-4. She told the interviewer that the touching started when she was 7 years old and in the third grade. CP 3-4. L.O.J. said that the last time anything occurred was approximately one week after she got home from camp on 06-18-10. CP 3-4. She stated that the last time Mr. Finch touched her, he touched her with his hands, tongue, and penis and had her hold his penis with her hand. CP 3-4. CP 3-4.

T.J. was also forensically interviewed and disclosed that digital penetration, oral sex was performed on her by Mr. Finch, as well as sexual intercourse. CP 3-4. T.J. also said the abuse occurred on Saturdays when her grandmother was gone. CP 3-4. T.J. claimed that the abuse started

when she was nine years old, and that the last abuse occurred when she was eleven. CP 3-4. T.J. stated that she had started her period in June of 2010 and that now Mr. Finch will only touch her with his hand. CP 3-4.

Mr. Finch was interviewed by police on 08-11-10. CP 3-4. Mr. Finch denied all allegations. CP 3-4. He was interviewed a second time on 08-13-10. During the second interview Mr. Finch admitted to touching the girls with his fingers, his lips, and his penis on the outside of the vaginal area and to having the girls hold his penis. CP 3-4. Mr. Finch admitted to touching T.J. more than 20 times and admitted to putting his mouth on her outer vaginal skin area three to four times. CP 3-4. Mr. Finch admitted to putting his mouth on L.O.J. two times. CP 3-4. Mr. Finch denied any penetration. CP 3-4.

B. Procedural Background

On August 16, 2010, Mr. Finch was charged with four counts of rape of a child in the first degree; two counts relating to L.O.J and two counts relating to T.J. CP 1-2.

On October 20, 2010, the State filed notice pursuant to RCW 9A.44.120 that it was seeking to introduce the hearsay statements of L.O.J. to N.R. (L.O.J.'s friend) and Kim Brune, the forensic interviewer. CP 8. On October 20, 2010, the State also filed a memorandum

requesting the trial court to find that L.O.J.'s statements to N.R. and Kim Brune were admissible as child hearsay under RCW 9A.44.120. CP 9-16.

On February 1, 2011, the State filed a memorandum of authorities asking the trial court to find the statements of Mr. Finch's former long-time girlfriend Quanita Schweinier and T.J., Mr. Finch's daughter, admissible as "other sex offense evidence" under RCW 10.58.090 and ER 404(b). CP 17-35. Notice that the State was seeking to introduce these statements was also filed on February 1, 2011. CP 36.

On March 11, 2011, the charges against Mr. Finch were amended to two charges of first degree child molestation and two charges of first degree child rape in relation to L.O.J, and three counts of first degree child molestation and two counts of first degree child rape in relation to T.J. CP 39-44. The aggravating factors of abuse of a position of trust and ongoing pattern of sexual abuse were alleged for each crime. CP 39-44.

On April 7, 2011, Mr. Finch filed a motion to exclude evidence of any alleged prior "other sex offense evidence." CP 97-130.

Also on April 7, 2011, the State filed an amended information correcting the dates of the charging periods. CP 131-135.

On April 7, 2011, a 3.5 hearing regarding the admissibility of Mr. Finch's statements to the police on August 11, 2010 and August 13, 2010

began. RP 7-50. Additionally, a hearing regarding the admissibility of L.O.J.'s statements to other people was started. RP 51-116.

The 3.5 hearing and child hearsay hearings resumed on April 11, 2011. RP 122-268. The trial court held that all of L.O.J.'s statements were admissible (RP 172-177) and that Mr. Finch's statements to the police were admissible. RP 262-265.

On April 12, 2011, the trial court entered an order finding the statements that L.O.J. made to N.R., M.A., and Kim Brune admissible. CP 137-139.

On April 13, 2011, the State indicated to the trial court that it would not be seeking to introduce the "other sex offense evidence" testimony of Quanita Schweinier and T.J. RP 274-275.

Trial began on April 13, 2011. RP 280.

On April 18, 2011, Mr. Finch filed a memorandum seeking admission of evidence that he agreed to take a polygraph examination when requested to do so by police on August 11, 2010. CP 142-150.

On April 19, 2011, argument was heard on Mr. Finch's motion to admit evidence that Mr. Finch agreed to take a polygraph. RP 579-587. The trial court held that no evidence regarding the request that Mr. Finch take a polygraph was admissible. RP 587.

At trial, Mr. Finch denied touching the vaginal areas of L.J. and T.O.J. with his hands or fingers, denied touching any part of the girls' bodies with his penis, and denied touching his lips or tongue to the vaginal area of either girl. RP 719-720. Mr. Finch denied confessing to the police, but admitted that it was possible he made the statements. RP 768-779.

The jury found Mr. Finch guilty of all charges and found that the State had proved both aggravating factors on all counts. CP 253-270.

On June 3, 2011, the trial court entered findings of fact and conclusions of law in support of Mr. Finch's exceptional sentence. CP 297-301.

Also on June 3, 2011, the trial court entered findings of fact and conclusions of law regarding the 3.5 hearing. CP 302-309.

Mr. Finch entered a stipulation as to his prior record and offender score on June 3, 2011. CP 310-313.

Mr. Finch received an exceptional sentence of 600 months confinement and \$3,502.38 legal financial obligations. CP 314-332. His sentence included the conditions that, while on community custody, Mr. Finch not "possess or consume any mood altering substances, to include alcohol" and that he "successfully complete an Anger Management

treatment program.” CP 333-335. Mr. Finch objected to the imposition of these conditions at sentencing. RP 915-916.

Notice of appeal was filed on June 3, 2011. CP 336-356.

IV. ARGUMENT

1. The trial court exceeded its authority in imposing the conditions that Mr. Finch not possess alcohol and complete an anger management treatment program during any period of community custody.

Sentencing courts may impose only statutorily authorized sentences. *State v. Paulson*, 131 Wn.App. 579, 588, 128 P.3d 133 (2006). They do not have legal authority to sentence an offender beyond that authorized by the legislature. *In re Pers. Restraint of Fleming*, 129 Wn.2d 529, 533, 919 P.2d 66 (1996). A trial court’s action is void if it exceeds its sentencing authority. *Paulson*, 131 Wn.App. at 588, 128 P.3d 133 (citing *State v. Phelps*, 113 Wn.App. 347, 355, 57 P.3d 624 (2002)).

“In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). Whether or not the trial court had statutory authority to impose community custody conditions is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The Sentencing Reform Act of 1981, chapter 9.94A RCW, states that “[a]s a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.” RCW 9.94A.505(8). A “crime-related prohibition” is defined as

an order of a court prohibiting conduct that **directly relates to the circumstances of the crime for which the offender has been convicted**, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.030(13) (emphasis added).

The court is limited to the types of alcohol related community custody conditions it can order depending on the nature of the crime committed. In *State v. Jones*, 118 Wn.App. 199, 202–203, 76 P.3d 258 (2003), the defendant pleaded guilty to first degree burglary and “other crimes,” and the court imposed a prison sentence and conditions of community custody relating to alcohol consumption and treatment. Nothing in the evidence suggested that alcohol contributed to the defendant’s offenses. *Jones*, 118 Wn.App at 207–208, 76 P.3d 258. The Court of Appeals found that the trial court had the authority to prohibit alcohol consumption but that it could not order the defendant “to participate in alcohol counseling.” *Jones*, 118 Wn.App. at 208, 76 P.3d

258. The court reasoned that the legislature intended a trial court to be able “to prohibit the consumption of alcohol regardless of whether alcohol had contributed to the offense.” *Jones*, 118 Wn.App. at 206, 76 P.3d 258. However, when ordering participation in treatment or counseling, the treatment or counseling must be related to the crime. *Jones*, 118 Wn.App. at 207–08, 76 P.3d 258; *see also State v. McKee*, 141 Wn.App. 22, 34, 167 P.3d 575 (2007) (finding that community custody provisions prohibiting purchasing and possession of alcohol were invalid when alcohol did not play a role in the crime), *review denied*, 163 Wn.2d 1049, 187 P.3d 751 (2008).

Here, there was no evidence that alcohol played any part in any of the crimes Mr. Finch was convicted of committing. Therefore, the condition prohibiting Mr. Finch from possessing alcohol is invalid since it is not crime-related.

Similarly, there is no evidence that anger management issues played any role in the crimes Mr. Finch was convicted of committing. The trial court’s order that Mr. Finch successfully complete an anger management treatment program while on community custody is invalid. The trial court exceeded its authority in imposing these conditions and the conditions are invalid.

2. The prosecutor's closing argument was improper and deprived Mr. Finch of a fair trial.

A prosecuting attorney is a quasi-judicial officer. *See State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). A prosecuting attorney represents the people and presumptively acts with impartiality in the interest of justice. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). As a quasijudicial officer, a prosecutor must subdue courtroom zeal for the sake of fairness to the defendant. *Fisher*, 165 Wn.2d at 746, 202 P.3d 937. The Washington Supreme Court has characterized the duties and responsibilities of a prosecuting attorney as follows:

He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial.

We do not condemn vigor, only its misuse. When the prosecutor is satisfied on the question of guilt, he should use every legitimate honorable weapon in his arsenal to convict. No prejudicial instrument, however, will be permitted. His zealousness should be directed to the introduction of competent evidence. He must seek a verdict free of prejudice and based on reason.

As in *Huson*, we believe the prosecutor's conduct in this case was reprehensible and departs from the prosecutor's duty as an officer of the court to seek justice as opposed to merely obtaining a conviction.

State v. Coles, 28 Wn.App. 563, 573, 625 P.2d 713, review denied, 95 Wn.2d 1024 (1981) (citations omitted) (quoting *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968)).

Prosecutorial misconduct may violate a defendant's due process right to a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). A prosecutor's conduct is evaluated by examining it in the full trial context, including the evidence presented, the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Monday*, 171 Wn.2d at 675, 257 P.3d 551. A defendant suffers prejudice only where there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict. *Monday*, 171 Wn.2d at 675, 257 P.3d 551.

The primary issue at Mr. Finch's trial was one of credibility. The evidence against Mr. Finch was comprised of the statements made by T.J. and L.O.J. to other people that Mr. Finch molested them, the testimony of T.J. and L.O.J.'s which essentially repeated T.J. and L.O.J.'s statements to other people, and Mr. Finch's alleged confession. Mr. Finch denied molesting the girls and asserted that he did not make the statements the police claimed he made. Thus, the jury's decision in this case turned on

which witnesses it found to be credible. If the jury believed the State's witnesses, then Mr. Finch was guilty. If the jury believed Mr. Finch's witnesses, then Mr. Finch was innocent.

Against this factual background, the prosecutor made numerous statements during closing arguments that expressed the prosecutor's personal belief that Mr. Finch was guilty, were statements that vouched for the credibility of the State's witnesses, were statements that referred to facts not in evidence, and were statements that improperly appealed to the passions and prejudices of the jury.

a. Statements vouching for the credibility of the State's witnesses.

The prosecutor began the State's closing argument with the following statements:

Last week I stood before you, and I told you that the time that [L.O.J.] and [T.J.] spent with their grandfather wasn't the safe and treasured time that most children have when they spend time with their grandparents. Instead, for [L.O.J.] and [T.J.], it was a waking nightmare. It was an abomination. Because night after night, week after week, month after month, and year after year, their grandfather, the Defendant, Emanuel Leonard Finch, raped them and he molested them...He is guilty as charged of Child Molestation in the first degree. He is guilty of abusing their trust, and he is guilty of raping their innocence.

The State has the burden of proof in this case. The Defendant has nothing to prove. It is the State's burden. The State has met that burden and the State has embraced its burden, and there is no longer any reasonable doubt that

the Defendant is now guilty of these crimes. He is guilty.
Guilty. Guilty.

RP 813-814.

These opening statements set the tone for the rest of the prosecution's closing argument. At numerous points during closing argument, the prosecutor made comments to the jury that clearly were comments which vouched for the credibility of the State's witnesses. When discussing L.O.J.'s testimony, the prosecutor stated "she is telling the truth" and not making it up. RP 830. Later, when discussing both L.O.J. and T.J., the prosecutor told the jury, "They are not lying. And there is no credible evidence that they are lying, or that they have any motive to make this up. So there is only one conclusion, and that conclusion is that they are telling the truth." RP 835.

Later in the closing argument, the prosecutor discussed the credibility of the police detectives who testified at the trial: "Do you really think that Detective Graham and Detective Brooks and Detective Miller are going to put their professional careers on the line by fabricating a confession? There is absolutely no way that any single one of those detectives would do that." RP 838. Later, the prosecutor again vouched for the credibility of the detectives by arguing to the jury

Do you know [sic] think that three professionals with 60 plus combined years of law enforcement experience are

going to come in here and lie to you, or that they are going to sit down at their computers and as they are typing up their reports, reach into the ether and pull out statements that the Defendant didn't make, and attribute them to him? They are not going to put their career on the line for one man. No, they are going to accurately report the things he said on August 13th.

RP 841-842.

The prosecutor returned to the discussion of the credibility of the State's witnesses at the close of the State's closing argument. Referring to either T.J. and L.O.J., or the detectives, or both, the State told the jury, "There is no motive for them to make it up. They are not lying. They are telling you the truth." RP 847. In the State's rebuttal, the prosecutor asked the jury, "Do you believe that everybody else is lying except for the defendant? Obviously not." RP 875.

It is misconduct for a prosecutor to vouch for a witness by expressing his or her personal belief as to the truthfulness of a witness. [*State v.*] *Ish*, 170 Wn.2d [189]at 196, 241 P.3d 389 [2010]. "It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness." *Ish*, 170 Wn.2d at 196, 241 P.3d 389 (*quoting State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008)). The prosecutor argued that "the truth of the matter is [the police witnesses] were just telling you what they saw and they are not being anything less than 100 percent candid."...We conclude the prosecutor improperly vouched for the credibility of the police witnesses.

State v. Ramos, --- P.3d ----, *8 n. 4, WL 4912836 (2011).

Vouching will be found only when it is “clear and unmistakable” that counsel was expressing a personal opinion. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied* 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996). Improper vouching occurs when the prosecutor expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness. *Ish*, 170 Wn.2d at 196, 241 P.3d 389. Whether a witness testifies truthfully is an issue entirely within the province of the trier of fact. *Ish*, 170 Wn.2d at 196, 241 P.3d 389.

The prosecutor’s statements in this case about the credibility of L.O.J., T.J., and the detectives were clearly improper statements vouching for the credibility of the State’s witnesses. The prosecutor’s comments were clear statements that the jury should find the detectives to be more credible than Mr. Finch because the detectives were police officers with long careers.

b. Statements suggesting evidence not introduced at trial supports the credibility of the State’s witnesses and that the defendant committed more crimes than were charged.

The prosecutor also made arguments to the jury that suggested that there was other criminal conduct committed by Mr. Finch that the State had address at trial. Aside from the prosecutor’s assertion in her initial

statements to the jury that Mr. Finch abused T.J. and L.O.J. “night after night, week after week, month after month, and year after year” (RP 813-814), the prosecutor argued to the jury that Mr. Finch had “confess[ed] to some, but not all of his dark deeds.” RP 840. During the State’s rebuttal closing argument, the prosecutor told the jury, “These little girls were molested for years and years. Have you heard every single awful thing that that man has done to them? No.” RP 866.

At closing, the State may draw reasonable inferences from the evidence. *State v. Millante*, 80 Wn. App 237, 250, 908 P.2d 374 (1995), review denied 129 Wash.2d 1012, 917 P.2d 130 (1996). The State may not, however, offer new facts under the guise of argument. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Arguments based on facts not in evidence are improper. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). But, prejudicial error only occurs when it is clear and unmistakable that the prosecutor is not arguing an inference from the evidence. *Brett*, 126 Wn.2d at 175, 892 P.2d 29.

The State’s suggestion that the jury had not heard “every single awful thing” Mr. Finch had done to the girls and that Mr. Finch had confessed to “some, but not all of his dark deeds” were clearly arguments by the prosecutor relying on “facts” not introduced at trial. The prosecutor relied on these unknown “facts” to suggest to the jury that the

alleged victims in this case had suffered even more abuse at the hands of Mr. Finch than the State was charging and, at the same time, that Mr. Finch was attempting to conceal these further misdeeds by refusing to confess all of his crimes to the police.

It is clear and unmistakable that the prosecutor was arguing inferences not supported by the evidence. The prosecutor's own statements make clear that the jury had not heard evidence of these other purported acts of abuse, yet the prosecutor relied on those undescribed acts to elicit sympathy for the alleged victims from the jury and to demonize Mr. Finch by alleging that he refused to confess to all of his crimes. Further, the prosecutor used these unproven "facts" to suggest that L.O.J. and T.J. were telling the truth since the girls had suffered so much abuse. As discussed below, these statements were also improper appeals to the passions and prejudices of the jury and were clearly not an inference from any evidence presented to the jury. As such, they were improper arguments.

c. Statements of the prosecutor's personal belief that Mr. Finch was guilty.

It is improper for a prosecutor to state a personal belief about the guilt or innocence of the accused. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

The prosecutor in this case made numerous statements that were expressions of the prosecutor's personal belief that Mr. Finch was guilty. The prosecutor's initial statement to the jury in closing argument was that "there is no longer any reasonable doubt that the Defendant is now guilty of these crimes. He is guilty. Guilty. Guilty." RP 814. Later, when discussing whether or not Mr. Finch was also guilty of the aggravating factors of abuse of a position of trust and a pattern of sexual abuse, the prosecutor stated that the answer to those questions was "unequivocally yes." RP 846.

The prosecutor ended her rebuttal closing argument by telling the jury, "it is no longer reasonable to doubt that the Defendant molested and raped [T.J.]. And it is no longer reasonable to doubt that the Defendant raped and molested [L.O.J.]. And it is for that reason...that you need to find the defendant guilty as charged." RP 876.

These statements are clearly statements by the prosecutor that the prosecutor believed Mr. Finch was guilty. Had the prosecutor been suggesting that the evidence indicates the defendant was guilty or that the jury should examine the evidence and find that Mr. Finch was guilty, the prosecutor would have qualified her statements that the defendant was "guilty guilty guilty" with phrases such as "It is the State's position that the evidence will show that Mr. Finch is guilty." By not qualifying her

statements that Mr. Finch was guilty, the prosecutor was clearly expressing her personal belief that Mr. Finch was guilty.

d. Statements intended to inflame passions and prejudices of the jury against Mr. Finch.

The prosecutor has a duty to “seek a verdict free of prejudice and based on reason.” *Huson*, 73 Wn.2d at 663, 440 P.2d 192. It is improper to present argument not based on the evidence that appeals to the jury’s passion and prejudice. *State v. Echevarria*, 71 Wn.App. 595, 598, 860 P.2d 420 (1993). A prosecutor is not allowed to make improper remarks that appeal to the jury’s passions. *Reed*, 102 Wn.2d at 146-148, 684 P.2d 699. Comments “calculated to appeal to the jury’s passion and prejudice and encourage it to render a verdict on facts not in evidence are improper.” *State v. Stith*, 71 Wn.App. 14, 18, 856 P.2d 415 (1993).

“Arguments that courts characterize as improper appeals to passion or prejudice include arguments intended to ‘incite feelings of fear, anger, and a desire for revenge’ and arguments that are ‘irrelevant, irrational, and inflammatory ... that prevent calm and dispassionate appraisal of the evidence.’” *State v. Elledge*, 144 Wn.2d 62, 85, 26 P.3d 271 (2001) (citations omitted).

As discussed above, the prosecutor made arguments to the jury about how L.O.J. and T.J. were molested nightly for years and that the

jury had not heard “every single awful thing” that Mr. Finch had done to them. RP 813-814, 866. In addition to being based on “facts” not presented in evidence, these arguments were intended by the prosecutor to inflame the sympathies of the jurors and to prejudice them against Mr. Finch by suggesting to the jury that T.J. and L.O.J. had been victimized in more ways than the State had evidence to support.

The alleged victims in this case were two very young girls. The prosecutor’s arguments that they had been molested nightly for years by Mr. Finch who refused to admit to all of his “dark deeds” and that the jury had not heard all of the acts that had been perpetrated against the girls were clearly arguments which were intended to incite feelings of anger towards Mr. Finch and a desire for revenge. These arguments were improper and it was misconduct for the prosecutor to make them.

e. Statements that the jury must find that the State’s witnesses were lying to find Mr. Finch innocent.

Washington courts have repeatedly held that 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. *See State v. Flemming*, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996), *review denied* 131 Wash.2d 1018, 936 P.2d 417 (1997); *State v. Casteneda–Perez*, 61 Wn.App. 354, 362–63, 810 P.2d 74 (“it is misleading and unfair to make it

appear that an acquittal requires the conclusion that the police officers are lying”), *review denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991); *State v. Wright*, 76 Wn.App. 811, 826, 888 P.2d 1214, *review denied* 127 Wn.2d 1010, 902 P.2d 163 (1995)¹; *State v. Barrow*, 60 Wn.App. 869, 874–75, 809 P.2d 209, *review denied* 118 Wn.2d 1007, 822 P.2d 288 (1991).

The prosecutor’s arguments about T.J., L.O.J., and the detectives not lying to the jury referenced above and found at RP 835, 838, 841-842, 847, 875, are clearly an argument that to find Mr. Finch not guilty the jury would have to find that the State’s witnesses were lying. These arguments were improper.

f. The prosecutor’s conduct was so flagrant and ill-intentioned that the resulting enduring prejudice could not have been neutralized by a limiting instruction.

Without a timely objection, reversal is only required if the conduct is so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative jury instruction. *State v. Warren*, 165 Wn.2d 17, 43, 195 P.3d 940 (2008),

¹ “Where a jury must necessarily resolve a conflict in witness testimony to reach a verdict, a prosecutor may properly argue that, in order to believe a defendant, the jury must find that the State’s witnesses are mistaken. This argument is not objectionable because it does no more than state the obvious and is based on permissible inferences from the evidence. It is misconduct, however, for a prosecutor to argue that, in order to believe a defendant, a jury must find that the State’s witnesses are lying.” *Wright*, 76 Wn.App. 811, 826, 888 P.2d 1214.

cert. denied Warren v. Washington, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009).

Trial counsel for Mr. Finch did not object to any of the State's improper argument discussed above. However, given the fact that the main issue for the jury to decide was the credibility of the witnesses, the State's arguments which, as discussed above, were based on facts not in the record and which were designed to prejudice the jury against Mr. Finch created an enduring prejudice against Mr. Finch that could not have been neutralized by a curative instruction. The charges against Mr. Finch were terrible. The State's suggestion that there was more abuse than was indicated by the evidence presented by the State and the State's accusation that Mr. Finch had confessed to "some, but not all of his dark deeds" was an improper argument which told the jury that Mr. Finch was only being held accountable for some of his "dark deeds."

The prosecutor's argument was not only intended to inflame the passions and prejudices of the jury, but the prosecutor vouched for the credibility of the State's witnesses and told the jury that to find Mr. Finch innocent the jury would have to believe that the State's witnesses were lying. The prejudice caused by the multiple improper closing arguments presented by the prosecutor could not have been neutralized by any curative instruction.

Given that the credibility of the witnesses was the sole issue before the jury, there is a substantial likelihood that the prosecutor's improper closing arguments affected the jury's verdict. It is difficult enough for a jury to remain neutral and impartial in cases where it is alleged that a child suffered sexual abuse. It is impossible for a jury to stay neutral and reach a calm and reasoned verdict when the prosecutor emphasizes that the defendant has committed more crimes than are before the jury and that to find the defendant innocent the jury must find that the State's witnesses, including the alleged victims, are lying.

The prosecutor committed flagrant and ill-intentioned misconduct in presenting argument based on "facts" not presented to the jury which were designed to inflame the passions and prejudices of the jury against Mr. Finch and which told the jury that the only way Mr. Finch could be found innocent would be if the jury found the State's witnesses were lying. This improper argument deprived Mr. Finch of a fair trial and requires vacation of his conviction and remand for a new trial.

3. Mr. Finch received ineffective assistance of counsel when his trial counsel failed to object to the prosecutor's improper closing argument.

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth

Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480, *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183 (2000), *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”).

The purpose of the effective assistance of counsel guarantee of the Sixth Amendment is to ensure that a criminal defendant receives a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-226, 7453 P.2d 816 (1987) (applying the two-prong test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984))).

There is a strong presumption that defense counsel’s conduct is not deficient, however, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel’s

performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2005).

Where a defendant has received ineffective assistance of counsel, the proper remedy is remand for a new trial with new counsel. *State v. Ermert*, 94 Wn.2d 839, 851, 621 P.2d 121 (1980).

As discussed in section 2 above, the prosecutor made numerous improper and prejudicial statements during closing argument. Mr. Finch's trial counsel failed to object to any of these comment. It was not objectively reasonable, nor can it be considered legitimate trial strategy for Mr. Finch's trial counsel to fail to object to the prosecutor's improper closing argument. Mr. Finch received ineffective assistance of counsel and this court should vacate Mr. Finch's convictions and remand his case for a new trial.

VI. CONCLUSION

For the reasons stated above, this court should vacate Mr. Finch's convictions and remand his case for a new trial.

DATED this 21st day of November, 2011.

Respectfully submitted,

Sheri Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on November 21, 2011, she delivered by e-mail to the Pierce County Prosecutor's Office, pcpatccf@co.pierce.wa.us Tacoma, Washington 98402, and by United States Mail to appellant, Emanuel L. Finch, DOC # 348900, Stafford Creek Corrections Center, 191 Constantine Way Aberdeen, Washington 98520 true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on November 21, 2011.

Norma Kinter

ARNOLD LAW OFFICE

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