

NO. 42200-0-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

EMANUEL LEONARD FINCH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 10-1-03475-9

Response Brief

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly require defendant to attend an anger management course as part of his community custody because the course is related to the crime and reasonably related to the safety of the community?

2. Did the trial court exceed its statutory authority when it prohibited defendant from possessing alcohol as condition of his community custody?

3. Did the prosecutor commit misconduct when she relied on facts adduced at trial to support the credibility of the State's witnesses in her closing argument?

4. Did defendant receive ineffective assistance of counsel where defense counsel's decision not to object during the prosecutor's closing argument falls well within the wide range of permissible professional conduct?

B. STATEMENT OF THE CASE.

1. Procedure

On August 16, 2010, the Pierce County Prosecuting Attorney's Office (State) charged Emanuel Lenoard Finch (defendant) with four counts of rape of a child in the first degree. CP 1-2. The State amended

the information to include five counts of child molestation in the first degree. CP 39–44. Each of the nine counts included two aggravating circumstances: (1) the defendant used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime; and (2) the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time. CP 39–44. The State later filed a corrected information to correct the dates of the charging periods. CP 131–35; RP 11–12.

The Honorable Vicki L. Hogan impaneled a jury on April 7, 2011. RP 12. On the same day, the court determined that statements made by one of the victims, L.O.J., to a forensic interviewer and her friends were admissible. RP 172–77. The court also held a CrR 3.5 hearing where it determined that all of the statements that defendant made to detectives during two interviews were admissible. RP 262–65.

The jury found defendant guilty of all charges. CP 253–60; RP 881–85. The jury also returned special verdicts in the affirmative for both aggravating circumstances on each count. CP 262–70; RP 885–90.

On June 3, 2011, the court sentenced defendant to 600 months in custody. CP 314–32; RP 914–15. The court entered findings of fact and conclusions of law in support of an exceptional sentence. CP 297–301. It also sentenced defendant to community custody for the rest of his life upon release from custody. CP 323 (Judgment and sentence). Under the

conditions of his community custody, the court prohibited defendant from possessing alcohol and ordered him to complete an anger management course. CP 333–35.

Defendant timely filed this appeal on June 3, 2011. CP 336–56.

2. Facts

For reasons not stated in the record, T.J.B. and her sister L.O.J.,¹ moved in with defendant, a family member, without their parents in 2006. *See* RP 402–03. At that time, T.J.B. was eight and L.O.J. was six.² *See* RP 324–26. They shared a room in defendant’s attic. RP 328. The girls’ mother lived elsewhere during this time. RP 329–30.

Defendant began molesting T.J.B. when she was eight or nine. RP 405–06. He called her downstairs before he left for work, put his hands down her pants, and started rubbing her vaginal area for a couple of seconds. RP 406. This type of touching would happen almost every weekday before T.J.B. went to bed. RP 408, 424. While she did her hair in the morning in the bathroom, defendant would enter, tell her to “open up,” and molest her. RP 425–26.

¹ In the interest of privacy, the State will refer to the victims by their initials because they are minors.

² T.J.B. was born on January 26, 2009. RP 326. L.O.J. was born on January 8, 2001. RP 324.

The day after he began molesting T.J.B., defendant started molesting L.O.J. as well. RP 333, 414. L.O.J. was seven or eight at the time. RP 333. The first time occurred when defendant reached into L.O.J.'s pants and touched her vagina while she was lying on defendant's lap watching a movie. RP 335, 374–75. On weekdays, similar to T.J.B., defendant would stop L.O.J. on the stairs before she went to bed, reach into her pants, and molest her. RP 336. He performed similar touching while L.O.J. sat at the dinner table, as well as after giving her music lessons in the home's studio. RP 336–38, 385. The girls testified that these events occurred daily during the week. RP 338, 370, 382, 406–08, 424, 426.

When T.J.B. was between the ages of 10 and 12, defendant had her hold his penis multiple times. RP 409. He had her stroke it, grabbing her hand and forcing her to do so when she stopped. RP 430–31. He would tell her to lie down on the living room couch, put her feet off the end of the couch, and then penetrate her with his penis. RP 409–10, 434. He would also perform oral sex on her during some of these occasions. RP 415, 417. Defendant would rape her on the weekends while his wife was away from the home. RP 412–13.

After L.O.J. returned home from summer camp when she was nine, defendant called her downstairs and had her lay down on the couch. RP 339. He unzipped her pajamas, removed her underwear, and penetrated her with his penis. RP 338–42. This occurred again at a later date. RP

388–93. On other occasions, he would perform oral sex on her, have her hold his penis, or rub her chest while digitally penetrating her. RP 340–45. She said that defendant told her that “[t]his is our little secret” and that she should not tell others. RP 351.

L.O.J. first told a friend about defendant’s actions when she was at summer camp. RP 349–50. L.O.J.’s friend told her foster parent, who finally alerted authorities. RP 462–66, 484–89.

During an interview with authorities, defendant initially denied touching the girls’ vaginal areas, but later confessed to touching the girls, claiming that they were getting sexually curious and he wanted to protect them. RP 300–01, 619, 630–31. Defendant admitted to rubbing his hand on T.J.B.’s vagina on more than 20 occasions. *See* RP 301. During the same interview, defendant admitted to performing oral sex and to rubbing his penis on the girls’ genitals three to four times in the bathroom and living room. RP 304, 312–13, 632. He denied penetrating the girls with his penis. 303, 311, 623–24, 632.

At trial, defendant denied touching their vaginal area or touching them with his hands or fingers. RP 303, 719. He denied having his penis touch any part of their bodies. RP 719. He also denied performing oral sex on his victims. RP 720. When asked whether he made the aforementioned statements to detectives, defendant repeatedly said it was possible, though he never admitted to or denied making the statements. RP 768–70, 775–77.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY IMPOSED A SENTENCING CONDITION THAT DEFENDANT COMPLETE AN ANGER MANAGEMENT COURSE BECAUSE THE COURSE IS CRIME-RELATED AND REASONABLY RELATED TO THE SAFETY OF THE COMMUNITY

When the trial court has statutory authority to impose a sentencing condition, this Court reviews sentencing conditions for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). The trial court abuses its discretion when the sentence it imposes is manifestly unreasonable, such that no reasonable person would adopt the view of the court. *Id.* No causal link need be established between the crime and the prohibition, so long as the condition relates to the circumstances of the crime. *State v. Warren*, 134 Wn. App. 44, 70, 138 P.3d 1081 (2006).

Sentencing is controlled by the law in effect at the time a criminal offense is committed. *State v. Acevedo*, 159 Wn. App. 221, 231, 248 P.3d 526 (2010) (citing *State v. Schmidt*, 143 Wn.2d 658, 673–74, 23 P.3d 462 (2001)).

The range which defendant committed his crimes covers from January 26, 2008 to June 26, 2010. CP 131–35. The law during this time provided broad discretion to the trial court to impose conditions on community custody:

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section. . . .

(3) Discretionary conditions. *As part of any term of community custody, the court may order an offender to:*

(a) Remain within, or outside of, a specified geographical boundary;

(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) *Participate in crime-related treatment or counseling services;*

(d) Participate in rehabilitative programs or otherwise *perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;*

(e) Refrain from consuming alcohol; or

(f) Comply with any crime-related prohibitions.

RCW 9.94A.703 (2009) (emphasis added).³

a. The anger management course is a crime-related treatment

In this case, the trial court properly imposed the anger management program because the treatment is related to defendant's crime. Defendant forcibly compelled his victims to participate in his actions. For example,

³ The full statute is attached as Appendix A. Because the statute was enacted on August 1, 2009, it is applicable to most of defendant's charges. *See* CP 131–35 (Counts II, III, IV, VII, VIII, IX).

T.J.B. testified that defendant would threaten to tackle her if she did not rub his penis. RP 410. He would grab her hand and force her to rub his penis up and down when she refused to do so willingly. RP 431.

When T.J.B. and L.O.J. developed a plan to confront defendant about his actions (e.g., by entering the room and asking defendant what he was doing while the other girl was being raped), T.J.B. stated that she was too scared to follow through with the plan because she feared defendant would retaliate by yelling at her. RP 414–15. T.J.B. also testified that when she did not spread her legs for defendant to molest her while she did her hair in the morning, defendant would order her to “open up.” RP 439.

That the anger management course is related to the crime is manifest by defendant’s forcible compulsion through threats and other commands. Because the treatment is related to the overall manner in which defendant committed his crime, the trial court had proper authority to impose such a condition on defendant’s community custody.

- b. The anger management program in this case can be classified as affirmative conduct that is reasonably related to the safety of the community

In *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003), the trial court required defendant to participate in alcohol counseling for his conviction of burglary. *Id.* at 203. On appeal, defendant argued that the counseling was unreasonable because it was not related to the crime. *Id.* at 207. The State argued that the counseling could be qualified as affirmative

conduct that is reasonably related to the crime. *Id.* at 207–09. This Court, however, concluded that “alcohol counseling ‘reasonably relates’ to the offender’s risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.” *Id.* at 208. The court remanded the issue for resentencing with instructions to strike the condition pertaining to alcohol counseling. *Id.* at 212.

The facts in the present case are distinguishable from *Jones*. First, as argued above, the record reflects evidence that anger or forcible compulsion was indeed related to defendant’s crimes. This includes defendant’s threatening to hurt his victim if she refused to hold his penis, as well as forcibly compelling T.J.B. and L.O.J. to commit sexual acts with him. RP 410, 414–15, 431, 439.

Second, the defendant in *Jones* was convicted of burglary, unlike the defendant’s convictions here of child molestation and rape. The law treats sex offenders with high deference to community safety. *See, e.g.*, RCW 9A.44.130 (registration of sex offenders).

Third, the trial court relied in part on the pre-sentencing investigation report when it determined defendant was a threat to the community and should participate in an anger management program. *See* RP 898–901, 922. The pre-sentencing investigation concludes:

A risk assessment was completed during the pre-sentence interview. Factors which require attention to reduce the risk of Mr. Finch to re-offend include his sexual deviancy, lack of current employment, his attitude and orientation, and the

potential for re-offending similarly to the instant offenses. *Recommended conditions on Appendix H will enable the Department of Corrections (DOC) to effectively monitor and supervise Mr. Finch in the community if necessary. Intervention to these areas would assist in reducing potential risk to community safety.* Also, the Department of Corrections, as a matter of policy, supervises sex offenders and violent offenders who are placed on supervision, at an elevated level, and are assisted with that supervision by qualified Sexual Deviancy counselors.

CP 286 (Section X) (emphasis added). The trial court adopted the presentencing investigation, and thereby agreed that Appendix H outlines necessary conditions to reduce the risk that defendant posed to community safety.

One example from the report states that although defendant had been diagnosed with Hepatitis-C, he “pursued his [victims] for his own sexual pleasure, which indicates a blatant disregard for their health and general safety.” CP 287 (subparagraph 2). The report also details the nature of defendant’s predatory behavior and states that “it can be postulated that an exact number of his past victims will never be known.” CP 287 (subparagraph 2). Due to the severe threat defendant poses the community upon his release, the court required defendant to abide by several conditions that would best serve the interests of the community; one of those conditions being the anger management course.

The trial court properly required defendant to attend an anger management course because defendant manifested behaviors associated with anger when he committed his crimes. Furthermore, by adopting the recommendations of the pre-sentencing report, the trial court determined that the anger management course was necessary to reduce the potential risk to community safety. The trial court thus properly required defendant to attend an anger management program.

2. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY WHEN IT IMPOSED A CONDITION ON DEFENDANT'S COMMUNITY CUSTODY THAT PROHIBITED HIM FROM POSSESSING ALCOHOL.

This Court reviews de novo whether the trial court had statutory authority to impose certain conditions of community custody. *Acevedo*, 159 Wn. App. at 231 (citing *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007)). A trial court may only impose statutorily authorized sentences. *State v. Paulson*, 131 Wn. App. 579, 588, 128 P.3d 133 (2006) (citing *State v. Phelps*, 113 Wn. App. 347, 354–55, 57 P.3d 624 (2002)). “If the trial court exceeds its sentencing authority, its actions are void.” *Id.* When the trial court imposes an unauthorized condition on community custody, this Court remedies the error by remanding for resentencing with instructions to strike the unauthorized condition. *See Jones*, 118 Wn. App. at 212.

RCW 9.94A.505(8) states: “As part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.” The law defines a “crime-related prohibition” as:

[A]n 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 a court may be required by the department.

RCW 9.94A.030(10) (2009).

The State concedes that while the trial court has authority to prohibit defendant from consuming alcohol under RCW 9.94A.703(3)(e),⁴ there is no statute that authorizes the court from prohibiting defendant from *possessing* it. The trial court expressly found that there was no testimony to support any substance abuse related to the crime. RP 919. The trial court thus exceeded its authority when it barred defendant from possessing alcohol as a condition on his community custody. The State respectfully requests that the Court remands the issue for resentencing with instructions to strike the provision that requires defendant to not possess alcohol.

⁴ Appendix A.

3. THE PROSECUTOR DID NOT COMMIT
PROSECUTORIAL MISCONDUCT WHEN SHE
PROPERLY ARGUED FACTS ADDUCED AT TRIAL

In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004) (citing *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)). A defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict. *Id.* at 306.

The court reviews a prosecutor's alleged misconduct "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." *State v. Russell*, 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994).

- a. The prosecutor did not personally vouch for the credibility of the State's witnesses or express a personal opinion regarding defendant's guilt

A prosecuting attorney may not express a personal opinion regarding the defendant's guilt. *State v. McKenzie*, 157 Wn.2d 44, 54, 134 P.3d 221 (2006). Improper vouching for the credibility of a witness or for the defendant's guilt generally occurs where the prosecuting attorney literally says "It is my personal" opinion or belief. *See, e.g., State v. Case*, 49 Wn.2d 66, 68, 298 P.2d 500 (1956) (expressing personal opinion as to what the evidence showed); *State v. Henderson*, 100 Wn. App. 794, 804, 998 P.2d 907 (2000) (expressing personal belief regarding characterization

of evidence); *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003) (expressing personal belief in the credibility of a witness).

Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion. *McKenzie*, 157 Wn.2d at 53–54.

A prosecutor’s remarks that are in direct response to a defense argument are not grounds for reversal as long as the remarks do not “go beyond what is necessary” to respond to the defense’s argument. *State v. Dykstra*, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). Therefore, defense counsel’s conduct, as well as the prosecutor’s response, is relevant. *State v. Ramirez*, 49 Wn. App. 332, 337, 742 P.2d 726 (1987).

Defendant first argues that the prosecutor improperly vouched for the credibility of the State’s witnesses. Brief of Appellant at 12–15. Defendant fails, however, to identify a single instance where the prosecutor actually expressed a personal opinion or belief pertaining to the credibility of the State’s witnesses. *See* Brief of Appellant at 12–15. Instead, the prosecutor properly argued reasonable inferences from the evidence:

[L.O.J.] is also a courageous little girl. So eventually she was able to talk about it. She talked to you about how she talked the [sic] [forensic interviewer], and how she was scared to tell anybody how [defendant] told her this is your and me’s little secret. And then she said, I accidentally told my friends. She is not in there making things up cavalierly describing what is going on. She is worried. I accidentally told my friend.

Why would she have this type of demeanor? Why would she have this type of language if she is just making it up for whatever purpose it is they think that she made this up for? *She is not. She is telling the truth.*

RP 829–30 (emphasis added). The prosecutor later argued that T.J.B. and L.O.J. were telling the truth because they had no motive to lie:

The criminal justice system is uncomfortable. Why would they lie and have to go in for medical exams where they are prodded, put into stirrups, asked questions by a stranger, subjected to a defense interview, and then made to come in here and tell a room full of strangers what's been going on. They are not lying. *And there is no credible evidence that they are lying, or that they have any motive to make this up.*

RP 835 (emphasis added). Never did the prosecutor state her personal belief or opinion regarding T.J.B.'s and L.O.J.'s testimony. Instead, she made reasonable inferences based on evidence offered at trial.

The prosecutor made a similar argument regarding the testimony of two detectives who testified that defendant confessed to some of his crimes. After defendant took the stand and denied that he confessed to detectives, the prosecutor had to explain why the detectives' and defendant's testimony differed:

Now, initially [defendant] denies [performing oral sex], but eventually he starts confessing. Now, he says, well, I don't remember saying that. I could have said it. There is [sic] only a few things where he says, no, I didn't say that, and he admits to remembering some details, coincidentally details that tend to help him. But he says yes, that he asked for an attorney, and the detectives told you he didn't ask for an attorney. He never asked to terminate the interview. It's his desperate attempt to try and convince you to believe that

there is this police conspiracy out there, that he didn't say these things, and that's preposterous.

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. Without ever stating her personal belief, the prosecutor reiterated statements that the defendant made during the interview to argue why the detectives had no motive to fabricate such a story. *See* RP 839–41.

When speaking about defendant's guilt, the prosecutor relied on the evidence to argue that the defendant was guilty beyond a reasonable doubt:

Instead of love and affection, [T.J.B.] was told to "open up." Instead of hugs and kisses of [an interfamily] type, at least, [defendant] asked her if he could go one more time. *And it's for that reason, ladies and gentlemen, that the Defendant is guilty.* He is guilty as charged of Child Molestation in the First Degree and Rape of a Child 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 814 (emphasis added). By preceding her argument with the statement, “And it’s for that reason,” the prosecutor properly identified the facts adduced at trial that supported a guilty verdict (e.g., that defendant told T.J.B. to “open up,” etc.).

Defendant argues that the prosecutor improperly stated her opinion about defendant’s guilt during her rebuttal closing argument. Brief of Appellant at 18. But the prosecutor’s statements were made in response to the defense’s closing, and she drew conclusions from the evidence. Defense counsel’s closing argument challenged the credibility of the State’s witnesses:

You need to have confidence in what you are hearing. You need to have confidence before you can find things by proof beyond a reasonable doubt.

Is this [testimony] coached? Has the testimony of these girls been coached, or is it imagination? And neither girl ever sees it occur with the other. Every night. Every night before he goes to work. Almost every night. Interesting also that they are told, that [L.O.J.] says she is told not to tell, and it’s happening multiple times for her, according to her trial testimony, multiple times in a day. And she is told not to tell only the first time and the last time. It’s our little secret. The only times were the first time and the last time. [T.J.B.] says she was never told anything like that

These inconsistencies are doubt. They are questions.

RP 854–55. In response to defense counsel’s statements, the prosecutor argued:

There is absolutely no motive, no reason for these girls to make this up. There is no reason that they would want to leave that house where they had some measure of stability. They had video games, they had computers, they had lessons. They had all sorts of things. They didn't make this up to gain attention. They didn't make this up to deflect attention. They didn't make this up for personal advantage, and certainly [T.J.B.] didn't make this up so she could go to Truman Middle School. Those girls didn't make this up.

As a result, ladies and gentlemen, it is no longer reasonable doubt that the Defendant molested and raped [T.J.B.]. And it is no longer reasonable doubt that the Defendant raped and molested [L.O.J.]. *And it is for that reason*, ladies and gentlemen, that you need to find the Defendant guilty as charged, guilty of raping and molesting [L.O.J.], and guilty of raping and molesting [T.J.B.].

RP 876 (emphasis added).

The prosecutor's statements were necessary because the case hinged primarily on the testimony of T.J.B. and L.O.J. When reviewing the prosecutor's statements in the context of the entire argument, it is apparent that they were made in direct response to the defense's closing argument. The prosecutor properly argued that defendant was guilty because the State's witnesses were credible. *See* RP 876.

Defendant fails to reference any statement where it is "clear and unmistakable that counsel [was] not arguing an inference from the evidence." *McKenzie*, 157 Wn.2d at 53–54. For the reasons described above, this Court should deny defendant's claim that the prosecutor improperly vouched for the credibility of the State's witnesses and the defendant's guilt.

- b. The prosecutor relied solely on evidence that was introduced at trial to argue that the jury did not hear every detail about defendant's crimes

A prosecutor is “permitted latitude to argue the facts in evidence and reasonable inferences” in closing argument. *Dhaliwal*, 150 Wn.2d at 577 (quoting *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985)). It is improper for a prosecutor to make statements that are not sustained by the record. *Id.*

The prosecutor’s statement that defendant abused L.O.J. and T.J.B. “night after night, week after week, month after month, and year after year,” is amply supported by the record. First, defendant committed his crimes for the duration of a two year period beginning in 2008—when L.O.J. was seven or eight, and T.J.B. was eight or nine. CP 131–35; RP 333, 406. L.O.J. testified that defendant molested her for the last time just before she moved out of the house in the summer of 2010. RP 355.

L.O.J. also testified that defendant molested her after “every music class” she had with him. RP 338, 382. These music lessons occurred “[b]asically almost every day.” RP 370. She testified that he molested her while they waited for dinner, and whenever he said goodnight to her. RP 343–44, 381–83.

T.J.B. testified that defendant put his hands down her pants and rubbed her vagina every weekday. RP 406–08, 424. She also testified that defendant asked her to “open up” and molested her “[p]robably every other day” while she did her hair. RP 426. When asked how often the defendant raped her, T.J.B. testified that it happened “[a]lmost every weekend, unless it was a holiday and [defendant’s wife] wouldn’t go to the casino because it was too busy.” RP 413.

Two detectives also testified that defendant admitted to molesting T.J.B. more than twenty times. RP 301, 621. The detectives also testified that defendant admitted to touching his genitals to the girls’ genitals on multiple occasions in several rooms. RP 312–13, 630–31.

It was a reasonable inference that defendant abused his victims frequently. That he abused L.O.J. and T.J.B. daily for two years was not a mischaracterization or exaggeration of the evidence offered at trial.

Defendant argues that the prosecutor’s statement that defendant “confess[ed] to some, but not all of his dark deeds” was improper and relied on facts not introduced at trial. Brief of Appellant at 16. This argument takes the prosecutor’s statements out of context, however, and should be construed with the totality of the circumstances in which she gave the statement.

During an interview with detectives, defendant initially denied performing oral sex on his victims. RP 301, 303. As the interview progressed, however, defendant admitted that his acts “changed from penetration to touching to oral sex.” RP 303. He later stated that his mouth came in contact with L.O.J.’s vagina a “couple of times,” and T.J.B.’s vagina “a couple of more than that.” RP 304. He also admitted touching his genitals to their genitals. RP 312–13. Despite these concessions, defendant did not admit that he raped the girls via penile penetration. RP 303, 311.

The prosecutor highlighted this context when she told the jury that defendant had “[c]onfess[ed] to some, but not all of his dark deeds.” RP 840. She stated:

Detective Graham told you, and this is last Wednesday, he asked [defendant], are the girls lying, and he read the quote for you, “I am not saying that. I know you are not making it up. I am in serious trouble. I am going to lose everything, my job, my wife my house.” Why would he say those things unless he knows what he did? He knows what he did was wrong. He knows what he did for sexual gratification, *and he is confessing.*

My mouth came in contact with their vagina. And he told you that it came into contact with L.O.J. twice, with T.J.B., three or four times. Detective Brooks on Monday came in and she testified, or Tuesday, and she demonstrated for you right before the noon hour the way in which the Defendant demonstrated for them how he would rub his lips on their vaginas.

He talked about how his penis touched them two times. *He wouldn't admit to everything*, that he tried to actually insert it, *but eventually he admits that he rubbed it on top of them*, again, minimizing the number of times in which he does it once with each girl. *Confessing to some, but not all of his dark deeds.*

Think about the August 13th interview

RP 839–40 (emphasis added). The prosecutor simply reiterated what detectives had already testified: that defendant confessed to some of his acts (e.g., molesting and oral sex), but not all of his deeds (e.g., rape, penile contact).

Finally, the prosecutor's rhetorical question to the jury whether they had heard every detail about defendant's crimes was asked in direct response to statements made by defense counsel during his closing argument. RP 866. Defense counsel attempted to undermine the victims' testimony by questioning why their testimony at trial was *more detailed* than the testimony they gave during their forensic interview:

[The forensic interviewer] told you that this is a process, that these disclosures are a process. And that more is going to come to light over time.

So, how is it that you know when the process is complete? The testimony is that there is music lessons, once again, at least four nights a week. And it's after every music lesson, every night before he goes to work and all every night. Is it complete yet or do we need five times a day? When is it complete? You need to have confidence in what you are hearing. You need to have confidence before you can find things by proof beyond a reasonable doubt.

RP 854. In rebuttal, the prosecutor responded:

Disclosure is a process, and many keep it inside for years and years and years and they don't tell anybody because they are ashamed, because it's dirty, because they feel bad about themselves, because they worry they won't be believed. So don't hold it against them that they didn't disclose in a manner that [defense counsel] would have had them disclose.

He asked when is it going to be complete? You know what? It's never going to be complete. It will never be complete. These little girls were molested for years and years. Have you heard every single awful thing that that man has done to them? No. Will anybody, any single individual, *ever truly know every detail about every event?* And the answer to that is also no.

So when [defense counsel] asks, when will it be complete? The answer is never.

RP 866 (emphasis added). The prosecutor neither suggested that defendant committed more crimes than were described at trial, nor relied on facts not introduced at trial. She offered a reasonable inference why the victims' description of defendant's acts grew more detailed over time—a direct response to defense counsel's question.

In making the above statements, the prosecutor made reasonable inferences from evidence offered at trial or responded to defense counsel's closing argument.

- c. The prosecutor argued to the jury why the State's witnesses were credible, and did not require the jury to determine that the State's witnesses were lying in order to acquit defendant

It is misconduct for a prosecutor to argue that a jury must find that the State's witnesses are either lying or mistaken in order to acquit a defendant. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) (citing *State v. Casteneda-Perez*, 61 Wn. App. 354, 362–63, 810 P.2d 74 (1991)). The court in *Fleming* found such misconduct where the prosecutor offered the false choice to the jury that “for you to find the [defendants] not guilty of the crime of rape . . . you would have to find either that [the State's witness] has lied about what occurred in that bedroom or that she was confused; . . .” *Id.* at 213 (emphasis omitted).

The present case hinged on the credibility of each party's witnesses; the defendant's testimony directly conflicted with his victims' and the detectives' testimony. The court's first instruction to the jury states that the jury members are the “sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law.” CP 206 (Instruction No. 1).

The prosecutor prefaced her closing argument by reminding the jury about the importance of this instruction when she stated, “I have already talked to you about what is undisputed. Before we get into the testimony, *you are the sole judges of credibility of each and every witness that you sat here and listened to*, including the Defendant, and including the defendant’s wife.” RP 818 (emphasis added). After reminding the jury about their role, she argued why each of the State’s witnesses was credible. *See* RP 835, 838, 841–42, 847.

Defense counsel’s theme for closing argument centered on why the State’s witnesses could have fabricated their stories. In the opening paragraphs of his argument, he asked:

So, why would these girls make this up? It’s a question. There are many questions. There may not be many answers. Maybe it’s because of their – to gain attention. That is one of the reasons that people make things up. Maybe it’s to deflect attention. That’s another reason people make things up. Maybe it’s for personal advantage. We may never know
.....

Is it the school where T.J.B. wants to go, to another school?
RP 848–49. He continued this line of argument for the duration of his closing argument, and even raised doubts about the detectives’ testimony:

These inconsistencies are doubt. They are questions. And then we have the police, the police with vested interests. They have got a case and they need to solve it. They need to

move this case to the prosecution, to the prosecution team. Close it out for them. But they can't They have got to close the case.

RP 855.

The prosecutor responded to defense counsel's closing by emphasizing why her witnesses were telling the truth, corresponding her argument to defense counsel's attacks:

Ladies and gentlemen, fundamentally you will have to ask yourself who was lying. Is it [defendant] who is lying, or is it L.O.J., T.J.B., [the detectives]?

There is absolutely no motive, no reason to that they would want to leave that house where they had some measure of stability. They had video games, they had computers, they had lessons. They had all sorts of things. *They didn't make this up to gain attention. They didn't make this up to deflect attention. They didn't make this up for personal advantage, and certainly T.J.B. didn't make this up so she could go to [a different school].* Those girls didn't make this up.

RP 875–76 (emphasis added). The prosecutor outlined specific reasons why the State's witnesses were credible. She never cornered the jury into the false choice that *in order to acquit* the defendant, they had to find that the State's witnesses were lying.

- d. The prosecutor did not make statements intended to inflame the passions and prejudices of the jury

A prosecutor commits misconduct when her argument improperly appeals to feelings of fear, anger, revenge, or is otherwise irrelevant, irrational, and inflammatory. *State v. Elledge*, 144 Wn.2d 62, 85, 26 P.3d

271 (2001) (citing *State v. Rice*, 110 Wn.2d 577, 608, 757 P.2d 889 (1988); *State v. Reed*, 102 Wn.2d 140, 145–46, 684 P.2d 699 (1984)). The State is, however, “entitled to admit evidence related to ‘the circumstances of the crime.’” *Elledge*, 144 Wn.2d 62, 85, 26 P.3d 271 (2001) (quoting *Rice*, 110 Wn.2d at 607). This is true even when the nature of the crime requires counsel to render an emotional narration of the events. *Id.*

The facts of this case unfortunately involved the rape and molestation of two young girls. The prosecutor had a duty to highlight and present these facts to the jury—facts that rendered an emotional narration of the events. There was testimony that defendant molested his victims daily and raped them on weekends for years. *See* RP 338, 370, 382, 406–08, 412–13, 424, 426. In response to defense counsel’s question when the victims’ depiction of the events would finally be complete, the prosecutor argued that the jury did not and could not have heard every single detail pertaining to defendant’s crimes. *See* RP 854, 866. As argued above, each of the prosecutor’s statements were properly based on trial testimony and limited to the circumstances of the crime.

e. The prosecutor’s conduct did not result in enduring prejudice

Where a defendant fails to object to alleged misconduct, he waives any resulting error unless the conduct is (1) flagrant, (2) ill-intentioned, and (3) so prejudicial that any resulting prejudice could not have been

neutralized by a curative instruction. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Reversal is not required where the error could have been obviated by an instruction that the defense did not request. *Id.* The jury is “presumed to follow the instruction that counsel’s arguments are not evidence.” *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008).

Defendant did not object to any of the allegedly improper remarks by the prosecutor. *See* RP 813–47, 864–76. He also failed to request a curative instruction for any alleged misconduct. *See* RP 876–80. Defendant thus waived any resulting error absent the court’s determination that the conduct was flagrant, ill-intentioned, and the resulting prejudice could not have been neutralized with a curative instruction.

The State acknowledges that the prosecutor’s statements regarding the credibility of the State’s witnesses were made intentionally. The prosecutor opened her closing argument in anticipation of the defendant’s theory of the case—that the victims had some underlying motive to lie about the molestation and rape, and that the detectives had reason to “close the case” and concoct a story about defendant’s interview. *See* RP 316–22, 374–97, 421–38, 639–53 (cross examinations); *see also* RP 848–64 (defendant’s closing argument).

As argued above, it was also proper for the prosecutor to argue that the jury had not heard all of details about defendant’s acts because the evidence showed that defendant had molested and raped his victims for

years. While the victims' testified about defendant's crimes in general, they only gave specific details for some of the incidents. The prosecutor was entitled to make reasonable inferences based on that evidence.

Furthermore, the jury is presumed to have followed the court's instruction that:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. *It is important, however, for you to remember that the lawyers' statements are not evidence.* The evidence is the testimony and the exhibits. The law is contained in my instructions to you. *You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.*

CP 206 (Instruction No. 1) (emphasis added). Even if this Court finds that the prosecutor's statements were improper, the trial court mitigated any potential prejudice when it instructed the jury to disregard any statement not based on the evidence.

The court might also have provided an additional instruction to the jury at the defendant's request to disregard closing statements that were not supported by the evidence. However, defendant did not request such an instruction.

Defendant waived any potential error when he failed to object to the prosecutor's alleged misconduct. When considering the context of the entire trial, the prosecutor supported her assertions with evidence and rebutted defendant's theory of the case. The trial court obviated any

potential prejudice when it cautioned the jury to disregard any assertions by the lawyers that were not supported by the evidence. The State respectfully requests this Court to deny the relief sought by defendant.

4. DEFENSE COUNSEL'S PERFORMANCE WAS NOT INEFFECTIVE BECAUSE HIS PERFORMANCE WAS NEITHER DEFICIENT NOR PREJUDICIAL TO THE DEFENSE.

To prove a counsel's failure to object constituted ineffective assistance, a defendant must show (1) the failure to object fell below prevailing professional norms; (2) the trial court would have likely sustained the objection; and (3) the result of the trial would have been different had the evidence not been admitted. *In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); see also *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984).

There is a strong presumption that defendant received effective representation. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (citing *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689; see also *Grier*, 171 Wn.2d at 44. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, at 690.

Defendant must rebut the presumption that counsel's performance cannot be characterized as legitimate trial strategy or tactics. *Davis*, 152 Wn.2d at 714. "Lawyers do not commonly object during closing argument 'absent egregious misstatements.' A decision not to object during summation is *within the wide range of permissible professional legal conduct.*" *Davis*, 152 Wn.2d at 717 (quoting *United States v. Necoechea*, 986 F.2d 1273, 1281 (9th Cir.1993)) (emphasis added).

This Court may consider whether defendant was prejudiced by counsel's conduct before considering the performance prong. *Strickland*, 466 U.S. at 670. Prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; accord *Grier*, 171 Wn.2d at 34. When challenging a conviction, the court must find that the factfinder would have had a reasonable doubt respecting the defendant's *guilt* absent the errors. *Strickland*, 466 U.S. at 695. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696.

In the present case, defense counsel's decision to not object during the prosecutor's closing argument falls directly within the wide range of professional conduct proscribed by *Davis*. See 152 Wn.2d at 717. It is likely that defense counsel did not object to the prosecutor's closing argument because—as argued above—the prosecutor's statements were neither improper nor "egregious misstatements." *Id.* Aside from merely

pointing out that defense counsel did not object to the prosecutor's closing argument, defendant refers to nothing to rebut the presumption that counsel's performance was effective. *See* Brief of Appellant at 25.

Even then, it is questionable at best whether the trial court would have sustained the objection. The trial depended on which witnesses the jury believed; the prosecutor and defense counsel argued why their witnesses were credible during their closing statements. The trial court presumably would have overruled an objection from either side because both attorneys simply emphasized the credibility of their own witnesses. Regardless, defendant makes no showing that the trial court would have sustained the objection. *See* Brief of Appellant at 25.

When considering the substantial amount of evidence that defendant repeatedly molested and raped his victims, defendant makes no showing that there was reasonable doubt *pertaining to his guilt* absent his counsel's performance. *Strickland*, 466 U.S. at 695. For example, when the prosecutor asked defendant whether he had confessed to detectives during his interview, defendant repeatedly answered, "I don't recall." RP 769–76. Defendant even testified that it was "possible" that he admitted to most of the crimes. RP 769–76. Even if this Court assumed counsel objected to the prosecutor's statements *and* the trial court sustained the objection, it is a stretch that the jury's verdict would have been undermined given the fact that defendant did not even deny confessing to some of his crimes.

Defense counsel's performance did not fall below an objective standard of reasonableness when he failed to object. The trial court would likely not have sustained such an objection given the issues in the case (e.g., credibility determinations). Finally, defendant makes no argument that the jury's verdict was compromised due to his counsel's performance. For these reasons, the State respectfully requests that this Court deny defendant's claim of ineffective assistance of counsel.

D. CONCLUSION.

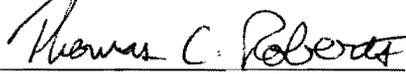
Regarding the defendant's community custody conditions, the trial court properly imposed an anger management course because the course is related to the crime and reasonably related to community safety. However, the trial court did exceed its statutory authority where it prohibited defendant from possessing alcohol. The State requests that the Court remands the latter issue for resentencing.

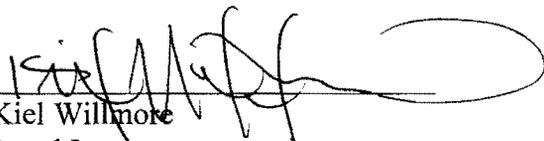
The prosecutor did not commit misconduct during her closing argument because she relied on testimony adduced at trial in each of her arguments. The Court should consider the entire context of the argument because some of her statements were made in response to defense counsel's closing argument. Finally, defendant does not show how defense counsel's performance falls below an objective standard of

reasonableness. There is also no showing of how defense counsel's performance undermined the trial as pertaining to defendant's guilt. The State respectfully requests the Court to deny these claims.

DATED: February 13, 2012.

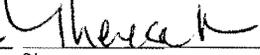
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Kiel Willmore
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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 the date below.

2.13.12 
Date Signature

APPENDIX “A”

C

West's Revised Code of Washington Annotated Currentness

Title 9. Crimes and Punishments (Refs & Annos)

▣ Chapter 9.94A. Sentencing Reform Act of 1981 (Refs & Annos)

▣ Supervision of Offenders in the Community

→ → **9.94A.703. Community custody--Conditions**

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.

(1) **Mandatory conditions.** As part of any term of community custody, the court shall:

- (a) Require the offender to inform the department of court-ordered treatment upon request by the department;
- (b) Require the offender to comply with any conditions imposed by the department under RCW 9.94A.704;
- (c) If the offender was sentenced under RCW 9.94A.507 for an offense listed in RCW 9.94A.507(1)(a), and the victim of the offense was under eighteen years of age at the time of the offense, prohibit the offender from residing in a community protection zone;
- (d) If the offender was sentenced under RCW 9A.36.120, prohibit the offender from serving in any paid or volunteer capacity where he or she has control or supervision of minors under the age of thirteen.

(2) **Waivable conditions.** Unless waived by the court, as part of any term of community custody, the court shall order an offender to:

- (a) Report to and be available for contact with the assigned community corrections officer as directed;
- (b) Work at department-approved education, employment, or community restitution, or any combination thereof;
- (c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;
- (d) Pay supervision fees as determined by the department; and

(e) Obtain prior approval of the department for the offender's residence location and living arrangements.

(3) **Discretionary conditions.** As part of any term of community custody, the court may order an offender to:

(a) Remain within, or outside of, a specified geographical boundary;

(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) Participate in crime-related treatment or counseling services;

(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

(e) Refrain from consuming alcohol; or

(f) Comply with any crime-related prohibitions.

(4) **Special conditions.**

(a) In sentencing an offender convicted of a crime of domestic violence, as defined in RCW 10.99.020, if the offender has a minor child, or if the victim of the offense for which the offender was convicted has a minor child, the court may order the offender to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

(b)(i) In sentencing an offender convicted of an alcohol or drug-related traffic offense, the court shall require the offender to complete a diagnostic evaluation by an alcohol or drug dependency agency approved by the department of social and health services or a qualified probation department, defined under RCW 46.61.516, that has been approved by the department of social and health services. If the offense was pursuant to chapter 46.61 RCW, the report shall be forwarded to the department of licensing. If the offender is found to have an alcohol or drug problem that requires treatment, the offender shall complete treatment in a program approved by the department of social and health services under chapter 70.96A RCW. If the offender is found not to have an alcohol or drug problem that requires treatment, the offender shall complete a course in an information school approved by the department of social and health services under chapter 70.96A RCW. The offender shall pay all costs for any evaluation, education, or treatment required by this section, unless the offender is eligible for an existing program offered or approved by the department of social and health services.

(ii) For purposes of this section, "alcohol or drug-related traffic offense" means the following: Driving while under the influence as defined by RCW 46.61.502, actual physical control while under the influence as defined by RCW 46.61.504, vehicular homicide as defined by RCW 46.61.520(1)(a), vehicular assault as defined by RCW

46.61.522(1)(b), homicide by watercraft as defined by RCW 79A.60.050, or assault by watercraft as defined by RCW 79A.60.060.

(iii) This subsection (4)(b) does not require the department of social and health services to add new treatment or assessment facilities nor affect its use of existing programs and facilities authorized by law.

CREDIT(S)

[2009 c 214 § 3, eff. Aug. 1, 2009; 2009 c 28 § 11, eff. Aug. 1, 2009; 2008 c 231 § 9, eff. Aug. 1, 2009.]

HISTORICAL AND STATUTORY NOTES

Reviser's note: This section was amended by 2009 c 28 § 11 and by 2009 c 214 § 3, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Short title--2009 c 214: "This act shall be known as the Eryk Woodruff public safety act of 2009." [2009 c 214 § 1.]

Effective date--2009 c 214: "This act takes effect August 1, 2009." [2009 c 214 § 4.]

Effective date--2009 c 28: See note following RCW 2.24.040.

Intent--Application--Application of repealers--Effective date--2008 c 231: See notes following RCW 9.94A.701.

Severability--2008 c 231: See note following RCW 9.94A.500.

Laws 2009, ch. 28, which made technical corrections, in subsec. (1)(c), updated statutory references.

Laws 2009, ch. 214, § 3, in subsec. (1)(c), twice substituted "9.94A.507" for "9.94A.712"; and inserted subsec. (1)(d).

Laws 2009, ch. 214, § 1, provides:

"This act shall be known as the Eryk Woodruff public safety act of 2009."

Laws 2009, ch. 214, § 2, provides:

“(1) The sentencing guidelines commission shall review the crime of assault of a child in the first degree as it relates to: The elements of the crime, sentencing under the sentencing reform act grid, all provisions providing for exceptional sentences both above and below the standard sentencing ranges, judicial discretion in sentencing, earned early release, and community custody requirements. As part of its review, the commission shall:

“(a) Study the relevant provisions of the sentencing reform act relating to assault of a child in the first degree;

“(b) Consider the revision of the sentencing range for assault of a child in the first degree which includes, but is not limited to, taking into consideration the violence of the offense, the age of victims, the criminal history of the offender, the mental health capacity of the offender, and the risk of the offender reoffending in the community;

“(c) Consider the use of advisory sentencing guidelines for assault of a child in the first degree;

“(d) Consider the modification of the mandatory minimum term of confinement for an offender convicted of assault of a child in the first degree;

“(e) Consider altering the statutory provisions surrounding earned early release for an offender convicted of assault of a child in the first degree;

“(f) Consider restructuring or adjusting the statutory community custody conditions for offenders convicted of assault of a child in the first degree;

“(g) Consider the use of determinate plus sentencing that provides for a minimum and a maximum term of confinement for an offender convicted of assault of a child in the first degree; and

“(h) Determine the fiscal impact of any proposed recommendations.

“(2) The commission shall review and make recommendations regarding the revision or modification of the sentences of offenders convicted of the crime of assault of a child in the first degree.

“(3) The commission shall submit its findings to the appropriate committees of the legislature no later than December 31, 2009.”

LIBRARY REFERENCES

2010 Main Volume

Sentencing and Punishment  1817.
Westlaw Topic No. 350H.

RESEARCH REFERENCES

Treatises and Practice Aids

32 Wash. Prac. Series § 11:8, Other Consequences Following Conviction.

32 Wash. Prac. Series § 15:13, Other Consequences--License Revocation and Reinstatement--Ignition Interlock License.

32 Wash. Prac. Series § 16:11, Other Consequences--License Revocation and Reinstatement--Ignition Interlock License.

13B Wash. Prac. Series § 3607, Community Custody.

West's RCWA 9.94A.703, WA ST 9.94A.703

The statutes and Constitution are current with Legislation from the 2011 2nd Special Session effective through January 1, 2012, and Chapters 1 and 2 (Initiative Measures 1163 and 1183) from the 2012 Regular Session.

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