NO. 47392-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KENNETH ARCHIE PEEBLES, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John Hickman

No. 13-1-03732-9

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Did the state adduce sufficient evidence to prove all elements of child molestation beyond a reasonable doubt, including sexual contact? 1

2. Did the deputy prosecuting attorney commit misconduct while questioning a witness or in arguing evidence in closing? 1

3. Does the defendant to demonstrate deficiency of counsel and resulting prejudice for failing to object to the prosecutor's argument? 1

4. Was there cumulative error depriving the defendant of a fair trial? 1

B. STATEMENT OF THE CASE.

1. Procedure 1

2. Facts 2

C. ARGUMENT 3

1. THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE ALL ELEMENTS OF CHILD MOLESTATION BEYOND A REASONABLE DOUBT, INCLUDING SEXUAL CONTACT 3

2. THE DEPUTY PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT IN TRIAL OR CLOSING ARGUMENT 6

3. THE DEFENDANT FAILS TO DEMONSTRATE DEFICIENCY OF COUNSEL OR PREJUDICE THEREBY 13

4. THE DEFENDANT DOES NOT DEMONSTRATE CUMULATIVE ERROR DEPRIVING HIM OF A FAIR TRIAL. 16

D. CONCLUSION. 17

Table of Authorities

State Cases

In re Personal Restraint of Cross, 180 Wn.2d 664, 721, 327 P.3d 660 (2014) 15

In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) 15

Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932) 9

State v. Berg, 181 Wn.2d 857, 337 P. 3d 310 (2013) 3

State v. Binkin, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by*, ***State v. Kilgore***, 147 Wn.2d 288, 53 P.3d 974 (2002) 7

State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) 11

State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006) 3

State v. Carver, 122 Wn.2d 300, 306, 93 P. 3d 947 (2004) 6

State v. Copeland, 130 Wn.2d 244, 290-291, 922 P.2d 1304 (1996) 13

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984) 10

State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) 4

State v. Emery, 174 Wn.2d 741, 762, 278 P. 3d 653 (2012) 9, 11

State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 570 (1995) 6

State v. Gregory, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006) 9

State v. Harstad, 153 Wn. App. 10, 21, 218 P.3d 624 (2009) 5, 6

State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991) 6

State v. Ibarra–Cisneros, 172 Wn.2d 880, 896, 263 P.3d 591 (2011) 4

State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010) 4, 6

State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009) 14

State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004) 5

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) 13, 14

State v. Russell, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) 9

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) 4, 6

State v. Smith, 162 Wn. App. 833, 849, 262 P.3d 72 (2011) 12

State v. Thomas, 109 Wn.2d 222, 225–226, 743 P.2d 816 (1987) 13

State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) 4

State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011) 11

State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008) 7, 11, 12

State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137, 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007) 16

State v. Weber, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983) 10

State Yates, 161 Wn.2d 763, 168 P.3d 359 (2007) 10

Federal and Other Jurisdictions

Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) 13

Smith v. Phillips, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) 10

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 13, 14

Statutes

RCW 9A.44.010(2).....4, 5

RCW 9A.44.083(1).....4

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

1. Did the state adduce sufficient evidence to prove all elements of child molestation beyond a reasonable doubt, including sexual contact?
2. Did the deputy prosecuting attorney commit misconduct while questioning a witness or in arguing evidence in closing?
3. Does the defendant to demonstrate deficiency of counsel and resulting prejudice for failing to object to the prosecutor's argument?
4. Was there cumulative error depriving the defendant of a fair trial?

B. STATEMENT OF THE CASE.

1. Procedure

On September 30, 2013, the Pierce County Prosecuting Attorney (State) charged the defendant, Kenneth Peebles, Jr., with one count of child molestation in the first degree. CP 1. The case was assigned to Hon. John Hickman for trial. 1 RP 3.

At the end of the trial, after hearing all the evidence, the jury found the defendant guilty as charged. CP 87, 92. The court later sentenced the

defendant to 58 months to life in prison. CP 96. The defendant filed a timely notice of appeal the same day. CP 126.

2. Facts

July 16, 3013, Jeremy Parrish was relaxing at his University Place, Washington, home after work. 5 RP 206. His friend, the defendant, arrived to pick up some mail at the house. 5 RP 306, 6 RP 330. As Parrish and the defendant were good friends, former roommates, and fellow soldiers, Parrish invited the defendant to stay for dinner. 5 RP 206. In addition to their meal, Parrish and the defendant drank some beer that Parrish had brewed. 5 RP 207. They decided that the defendant should stay the night because he had been drinking. 5 RP 212, 307.

AP, the victim, went to bed before the adults did. 4 RP 111. She wore shorts, underwear, and a t-shirt to bed. 4 RP 111-112. She awoke when the defendant laid down in bed with her. 4 RP 113. She moved over and went back to sleep. 4 RP 115. She later awoke to find the defendant lying on his side with his front to her back. *Id.* The defendant was touching her on her buttocks and her hip. 4 RP 116. His hand was inside her shorts but outside her underwear. *Id.* The victim removed the defendant's hand from her. 4 RP 118. The defendant replaced his hand and touched the victim's abdomen, below her stomach. 4 RP 119. The

defendant moved his hand further down to touch her vagina, over her underwear. 4 RP 120.

The victim got out of bed and woke her father, Parrish. 4 RP 117, 5 RP 214. She told him what the defendant had done. *Id.* Parrish found the defendant asleep in another room. 5 RP 216. Parrish woke the defendant and drove him home. 5 RP 217.

Parrish told the victim's mother about the incident. 4 RP 150. The mother called the police. 4 RP 152, 169. The victim described the molestation to her mother. 4 RP 155-156. Professionals later examined the victim and interviewed her. 5 RP 245, 270.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE TO PROVE ALL ELEMENTS OF CHILD MOLESTATION BEYOND A REASONABLE DOUBT, INCLUDING SEXUAL CONTACT.

In a challenge to the sufficiency of the evidence, the appellate court determines whether any rational fact finder could have found the essential elements of the charged crime beyond a reasonable doubt, viewing the trial evidence in the light most favorable to the State. ***State v. Brockob***, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). The appellate court takes the State's evidence as true, and review is de novo. ***State v. Berg***, 181 Wn.2d 857, 337 P. 3d 310 (2013).

An insufficiency claim "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *see also* ***State v. Kintz***, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). Direct and circumstantial evidence are equally reliable. ***State v. Thomas***, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The Court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. ***Thomas***, at 874-875; ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The presence of contrary or countervailing evidence is irrelevant to a sufficiency-of-the-evidence challenge because the evidence is viewed in the light most favorable to the State. ***State v. Ibarra–Cisneros***, 172 Wn.2d 880, 896, 263 P.3d 591 (2011).

A person is guilty of first degree child molestation "when the person has [ ] sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.083(1). In a separate section, titled "Definitions," the legislature defines "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

The defendant argues that there was insufficient evidence to prove all elements, including sexual gratification. App. Br., at 1,2. "[S]exual

gratification" is not an essential element to the crime of first degree child molestation but a definitional term that clarifies the meaning of the essential element, "sexual contact." ***State v. Lorenz***, 152 Wn.2d 22, 36, 93 P.3d 133 (2004); RCW 9A.44.010(2)[1]. "Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touch was for the purpose of sexual gratification." ***State v. Harstad***, 153 Wn. App. 10, 21, 218 P.3d 624 (2009).

In ***Harstad***, the defendant touched the child victim at night when everyone else was asleep. She slept wearing only a T-shirt and underwear. The buttocks and hips are "a sufficiently intimate part of the anatomy that a person of common intelligence has fair notice that the nonconsensual touching of them is prohibited." *Id.*, at 22. The Court found that substantial evidence supported the jury's conclusion that Harstad touched the victim's intimate parts when he put his hand under the blanket and moved it from side to side "[b]y [her] private area." While the evidence did not show that Harstad touched the victim under her clothing, Harstad moving his hand back and forth on the victim's intimate parts was sufficient to prove sexual gratification. *Id.*, at 22-23.

The evidence in the present case is remarkably similar to that in ***Harstad***. The defendant climbed into bed with the victim. 4 RP 114. He initially touched her buttocks and her hip. 4 RP 116. The victim moved his

[1] "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

hand away and went back to sleep. 4 RP 115, 118. The defendant then continued. He moved his hand down the front of the victim, below her stomach, to touch her genitals. 4 RP 119-120. The defendant touched the victim inside her shorts, and over her underwear. 4 RP 116, 120.

In challenging the evidence, the defendant admits all this evidence as true. *See* ***Salinas*** and ***Kintz***, *supra*. He also admits the truth of the inferences the jury could draw from this evidence. *Id.* As in ***Harstad***, the defendant was an unrelated adult with no caretaking function who touched the intimate parts of the victim. The defendant continued this behavior after the victim had moved his hand away. From this evidence, the jury could conclude that the touching was sexual contact; for the purpose of sexual gratification, and not an accident, as the defendant later argued.

2. THE DEPUTY PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT IN TRIAL OR CLOSING ARGUMENT.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. ***State v. Gentry***, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), citing ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). A defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict. ***State v. Carver***, 122 Wn.2d 300, 306, 93 P. 3d 947 (2004). If a curative instruction could have cured the error and the defense failed to request one, then reversal is

not required. ***State v. Binkin***, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by*, ***State v. Kilgore***, 147 Wn.2d 288, 53 P.3d 974 (2002); *see* ***State v. Warren***, 165 Wn.2d 17, 195 P.3d 940 (2008).

a. The fact that DNA evidence was collected was inadvertently revealed to the jury.

Here, Dep. Smith had collected evidence, including the clothing the victim had worn to bed. 4 RP 171. During trial, the State was offering this evidence through him. 4 RP 172. All the clothing was in exhibit #12. There was also a small, closed, undescribed packet in exhibit #12. Neither the prosecutor nor Dep. Smith knew what it contained. 4 RP 177.

Exhibit #12, a container of items MC 1, MC 2, and MC 3, had been opened and admitted, without objection. 4 RP 173. Then, the prosecutor began to have Dep. Smith identify and describe the items:

> Q: Deputy Smith, if you could, beginning with MC 1, just take the item out, stand up with the Court's permission and briefly display to the jury what's contained inside.
> THE COURT: Any objection to publication?
> [DEFENSE COUNSEL]: There's not, Your Honor.
> THE COURT: You may proceed.
> Q: What's in that little packet?
> A: It's some sort of test, DNA test.
> Q: Okay, thank you. Why don't we put those back in MC No. 1 and then start with MC No. 2?
>
> (Witness complies.)

4 RP 174. The prosecutor proceeded and never mentioned or referred to the DNA item in front of the jury.

As soon as the witness was done and the jury excused for the day, the Court, *sua sponte*, addressed the issue. The prosecutor immediately apologized and explained that she did not know what the small package contained, thinking it was perhaps a barrette that the victim had been wearing. 4 RP 177. The Court found that the prosecutor did not know what the package contained. *Id.* Both the Court and defense counsel had assumed it was an innocuous item; a dehumidifier pack. *Id.*

The parties immediately discussed possible remedies. The prosecutor offered to agree to a limiting instruction, if the defense so requested. *Id.* The Court gave defense counsel time to consider what remedy, if any, to pursue. Defense counsel decided to return to his office, do some research, and think about it overnight. 4 RP 178.

The next day, the court and parties decided to remark Exhibit #12; removing the DNA test package and remarking the items to go to the jury. 5 RP 279. The parties took care to make sure that only proper items would be included in the exhibit.

The record reflects that this reference to DNA was inadvertent. The parties and the court took appropriate remedial steps without further mention or attention being drawn to the item.

Even if the prosecutor had deliberately elicited the reference to the DNA test, the defendant cannot show prejudice. A limiting instruction could have easily cured what little prejudice may have resulted from Dep.

Smith's testimony. There was no issue regarding identity in the trial. Defense counsel considered the options of remedy and decided to let the reference go without further mention to the jury, which might have called further attention to it.

b. The prosecuting attorney properly argued credibility and evidence in her closing argument.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. ***State v. Russell***, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994). Where defense counsel objected to a prosecutor's remarks at trial, the trial court's rulings are reviewed for abuse of discretion. ***State v. Gregory***, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006).

The Court must review this argument in the context of the entire closing and the court's instructions. The Court's focus is less on what the prosecutor said; but rather on the effect which was likely to flow from the remarks. *See* ***State v. Emery***, 174 Wn.2d 741, 762, 278 P. 3d 653 (2012). "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" *Id.*, quoting ***Slattery v. City of Seattle***, 169 Wash. 144, 148, 13 P.2d 464 (1932). *See also*, ***Smith v. Phillips***, 455 U.S. 209, 102 S. Ct.

940, 71 L. Ed. 2d 78 (1982); ***State v. Davenport***, 100 Wn.2d 757, 675 P.2d 1213 (1984); ***State v. Weber***, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983).

c. Where Defense counsel objected.

Defense counsel objected during the State's closing argument, that the prosecutor was arguing facts not in evidence. 6 RP 357. The court correctly instructed the jury that "this is simply their concluding remarks, and you decide factually what's been proved or not been proved." *Id.*, at 357-358. The court had previously so instructed the jury in Instruction 1 (CP 64); and also immediately before the prosecutor began:

> Ladies and gentlemen of the jury, as I indicated, you may take notes, if you wish, for closing as long as you understand that closing is not evidence but is simply the attorneys' concluding remarks as to what they believe the evidence has shown.

6 RP 354.

The jury is presumed to follow the court's instructions. *See e.g.* ***State Yates***, 161 Wn.2d 763, 168 P.3d 359 (2007). Even if the prosecutor had argued facts not in evidence, the defendant cannot show prejudice where the jury was correctly instructed about the evidence more than once.

Here, the defendant complains in his appeal that the prosecutor questioned the credibility of the defendant's theory of the case and his testimony. App. Br. at 10-11. Like most cases, this case involved issues of witness credibility. Prosecutors may, and usually do, argue inferences

from the evidence, and witness credibility. This is not improper. *See* ***State v. Warren***, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). The appellate court will not find prejudicial error "unless it is 'clear and unmistakable' that counsel is expressing a personal opinion." ***State v. Brett***, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

d. Where defense counsel failed to object.

If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill -intentioned that an instruction could not have cured the resulting prejudice. ***Emery***, 174 Wn.2d at 761. Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *Id.*, quoting ***State v. Thorgerson***, 172 Wn.2d 438, 455, 258 P.3d 43 (2011).

Here, the prosecutor's credibility argument began with a review of factors from the jury instruction on credibility. 6 RP 359; *see* Instruction 1, CP 64. The prosecutor then reviewed the evidence in detail. She reviewed and discussed the victim's testimony in detail, including the factors of demeanor (6 RP 360, 371), motive or bias (6 RP 373-374), and the possible alternatives where the allegations came from (6 RP 372-374).

The prosecutor argued from the evidence that the victim was credible. The prosecutor never vouched for the victim's credibility. Vouching is not based on evidence; it occurs where the prosecutor places the prestige of the government behind the witnesses or indicates that information not presented supports the witness. *See e.g.* ***State v. Smith***, 162 Wn. App. 833, 849, 262 P.3d 72 (2011).

The prosecutor went on to contrast the victim's testimony and credibility with the defendant's. She pointed out that the defendant had motive and bias to claim an alcoholic blackout. 6 RP 374. She reviewed his testimony and argued that his version of events was unreasonable and not credible. 6 RP 376.

The defense did not object to any of this, probably because it was proper argument. As such, it is not "flagrant or ill-intentioned." The jury was properly instructed regarding credibility and the evidence. The State was arguing in the context of, and referring to, the instructions. If the defendant thought that the prosecutor was straying from the instructions, he could have asked the court to remind or re-instruct the jury. *See* ***Warren***, *supra.* He did not. He has waived the issue on appeal.

The defense only objected in this part of the argument when the prosecutor characterized the defense of alcohol blackout as "ridiculous." 6 RP 377. This was stated after the prosecutor reviewed the defendant's testimony in context of the rest of the evidence. She was drawing a strong,

negative, conclusion from the evidence. Use of the word "ridiculous" in argument may be accurate or hyperbole. Other words may be more persuasive or professional, but its use in characterizing evidence or testimony is not, in and of itself, objectionable or the basis of prejudicial misconduct. Even use of word "liar" as a comment on defendant's credibility not improper where the prosecutor is drawing a conclusion from evidence. *See* ***State v. Copeland***, 130 Wn.2d 244, 290-291, 922 P.2d 1304 (1996).

3. THE DEFENDANT FAILS TO DEMONSTRATE DEFICIENCY OF COUNSEL OR PREJUDICE THEREBY.

To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Thomas***, 109 Wn.2d 222, 225–226, 743 P.2d 816 (1987). "Surmounting ***Strickland***'s high bar is never an easy task." ***Padilla v. Kentucky***, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

Counsel's performance is deficient when it falls below an objective standard of reasonableness under prevailing professional norms. ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that counsel's performance was not deficient. *Id.* The court

reviews counsel's performance in the context of all of the circumstances presented by the case and the trial. *Id.* at 334–35.

Performance is not deficient where counsel's conduct can be characterized as legitimate trial strategy or tactics. ***State v. Kyllo***, 166 Wn.2d 856, 863, 215 P.3d 177 (2009); ***McFarland,*** 127 Wn.2d at 336. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. ***Strickland***, 466 U.S. at 690. The issue in such a review is not whether the defense strategy was risky, successful, popular, or uncommon. The question is: was it reasonable under the circumstances; in other words, a legitimate strategy?

A defendant establishes prejudice by showing there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. ***McFarland***, 127 Wn.2d at 335. When a defendant challenges a conviction, "the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." ***Strickland***, 466 U.S. at 695.

a. DNA reference.

Sometimes inadmissible evidence is mentioned or revealed by a witness. Counsel must decide the appropriate way to respond or handle such an occurrence. It can be a legitimate trial tactic to withhold an objection to avoid emphasizing inadmissible evidence. *See* ***In re Personal***

Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). That is apparently what the parties decided to do here. The prosecutor quickly moved past the answer and made nothing of it. Defense counsel waited until after the jury had been excused to discuss the matter and what to do about it. This was a reasonable approach.

The defendant cannot show prejudice. There was no question regarding identity in this case. The defendant did not deny being in the victim's bed. 6 RP 325. Rather, he could not remember (5 RP 315, 316, 6 RP 337); and, any touching was unintentional (6 RP 379). Therefore, the brief and inadvertent reference to DNA evidence had no impact on the result of the case.

b. Prosecutor's closing and rebuttal argument.

A decision not to object during closing argument is within the wide range of permissible professional legal conduct. The Supreme Court has observed that it is uncommon for lawyers to object during closing argument absent egregious misstatements. *See* ***In re Personal Restraint of Cross***, 180 Wn.2d 664, 721, 327 P.3d 660 (2014); ***Davis***, 152 Wn.2d at 717. Nevertheless, here defense counsel did object during closing argument, and the court properly instructed the jury. Counsel may have felt that where the jury had already been instructed three times on the topic, the jury had received sufficient reminders that the State's closing was merely its view of the evidence. Also, as to the first instance, defense

counsel had yet to make his argument, and therefore had the opportunity to argue his view of the evidence and point out any mistakes or mischaracterizations made in the State's closing. All of these tactics are well within the reasonable choices for defense counsel. The defendant fails to show deficiency of counsel.

Likewise, the defendant cannot demonstrate that, had counsel objected more, or differently, the objections would a) have been sustained, and b) probably effected a different result; i.e. the defendant would have been acquitted. The defendant shows neither.

4. THE DEFENDANT DOES NOT DEMONSTRATE CUMULATIVE ERROR DEPRIVING HIM OF A FAIR TRIAL.

Under the cumulative error doctrine, the Court of Appeals may reverse a defendant's conviction when the combined effect of trial errors deny the defendant's right to a fair trial, even if each error alone would be harmless. ***State v. Weber***, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137, 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007). The doctrine does not apply where errors are few and have little or no effect on the trial's outcome. ***Weber***, 159 Wn.2d at 279.

Here, the defendant fails to show a cascade of error that resulted in denying him a fair trial. In fact, there was no error.

D. CONCLUSION.

The defendant received a fair trial where a great deal of evidence was admitted against him and the jury was properly instructed. The victim's testimony, although challenged, was unrebutted. In a challenge to the sufficiency of the evidence it is all accepted as true. The prosecutor's rebuttal argument was proper. The defendant waived this issue where he did not object to it and did not request curative instructions.

The State respectfully requests that the conviction be affirmed.

DATED: July 21, 2015

MARK LINDQUIST
Pierce County
Prosecuting Attorney

THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

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.

7/21/15
Date Signature

PIERCE COUNTY PROSECUTOR

July 21, 2015 - 10:20 AM

Transmittal Letter

Document Uploaded: 5-473925-Respondent's Brief.pdf

Case Name: State v. Kenneth Peebles, Jr.

Court of Appeals Case Number: 47392-5

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Respondent's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

brett@hesterlawgroup.com