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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH JOHN THORGERSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George N. Bowden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied due process when the prosecutor made improper argument to the jury in opening statement and closing arguments. U.S. Const., amend. 14; Const. art. 1, § 3.

2. Appellant was denied due process by the prosecutor's improper questioning of him. U.S. Const., amend. 14; Const. art. 1, § 3.

3. The trial court erred by overruling the defense objection to the prosecutor's improper questioning of the defendant.

4. The court erred by permitting the prosecutor to testify in his closing argument, over objection, about what a witness would have said if he had asked her the question.

5. Appellant was denied effective assistance of counsel for counsel's failure adequately to object to the flagrant prosecutorial misconduct. U.S. Const., amends. 6, 14; Const., art. I, § 22.

Issues Pertaining to Assignments of Error

1. Is it improper for the prosecutor to state in opening statement how difficult it will be for the complaining witness to testify?

2. Is it improper for the prosecutor to tell the jury in opening statement that hearsay rules prevent him for presenting some evidence?

3. Is it improper for the prosecutor to permit without objection extensive evidence he considers "irrelevant," then to cross-examine the defendant about why defense counsel has presented such "irrelevant" evidence in the case?

4. Is it improper for the prosecutor to argue to the jury in closing that hearsay rules prevented him for presenting what the complaining witness told others, but since the defense counsel did not present evidence that those other statements were inconsistent, the jury should conclude all her statements were consistent with her testimony?

5. Is it improper for the prosecutor to argue to the jury that the complaining witness told her story to many other people who did not testify and who were not mentioned in the testimony, including "people in my office," and that the jury can infer all those statements to all those people were consistent with her testimony?

6. Is it improper for the prosecutor to argue the defense evidence is "bogus" and that defense counsel is using "sleight of hand" to fool the jury?

7. Is it improper for the prosecutor to argue the defense bears the burden of proof or of production?

8. Did cumulative prosecutorial misconduct violate appellant's due process right to a fair trial?

9. Did the court abuse its discretion when it overruled defense counsel's objections to these arguments?

10. Was appellant denied effective assistance of counsel if his attorney did not make sufficient objections to this prosecutorial misconduct?

B. STATEMENT OF THE CASE

1. Substantive Facts

Kenneth Thorgerson met his wife, Diana, when she was a single mother with a six-month-old daughter, Danielle. They married and two years later had a son, Nick. Diana and Ken never told

Danielle that Ken was not her biological father.
RPIII 66-68.¹

The family lived in a small two-bedroom apartment until Danielle was 12, when they bought a house. Ken worked days, leaving early in the morning. Until Danielle was 9, Diana was home after school before she left for work. When Diana's work shifted to start at 3:00 p.m., Ken picked up the kids after school and fixed them dinner. RPII 56; RPIII 96-97, 118-20.

At an early age, Danielle showed great talent at softball. Ken and Diana became very active in Little League. They served on the Board and were President and Vice-President of Softball within the club. Ken coached Danielle's team for many years. He worked hard to keep her active and out of trouble. RPII 58; RPIII 67-68, 114-15.

On days when they had a game, Ken would get up at 3:00 a.m. to go to work early so he could be off in time for the game. RPIII 115-16. He was at every practice, three times a week. RPII 57-58.

¹ The trial transcripts are designated as "RP" with the volume noted: I (5/19/08), II (5/20/08), or III (5/21/08). The sentencing transcript of 7/17/08, is denoted "RPS."

He used his vacation days to attend her tournaments. RPII 62.

Ken told Danielle if she kept working at softball and kept up her grades, she had an excellent chance of a softball scholarship for college. RPII 59. He believed she could make the Olympic team. RPIII 114.

As Danielle reached high school, however, she developed other interests, some her parents didn't approve of. She developed a habit of lying to get what she wanted. She admitted she had such a problem telling the truth, she gave people reason to distrust her. RPII 78, 81-82.

Danielle and Nick began "covering each other's back" with their parents. RPII 62. They lied to their parents many times. RPIII 17.

Despite her parents' financial problems, Danielle demanded that they get her things she wanted. When they couldn't afford the clothes she wanted, she went to her grandmother, who would buy them for her. RPII 69-70.² Diana was a pushover

² Danielle was very close to her grandmother. She spent summers with her. She knew she could go to her anytime with anything that was bothering her. Her grandma adjusted her schedule to attend Danielle's events. RPII 61-62, 72.

with the kids. Ken was the one who had to say no and enforce the rules. RPII 74; RPIII 21, 69.

When she got her driver's license, although she could have driven one of the family cars, Danielle demanded her parents buy her a car. They borrowed money to buy the one she found. Although Danielle agreed to pay half the price, she never did. RPII 64-65; RPIII 76.

In August, 2005, at age 16, Danielle wrote in her diary that she had quit lying. She wrote she couldn't believe that her dad didn't trust her since she had quit lying. Yet she admitted on the stand that she continued lying to avoid trouble for what she was doing. RPII 77-82.³

In the middle of her junior year, just before her 17th birthday, Danielle started seeing Jon. Diana and Ken liked Jon. With advanced planning, they permitted them to go out on dates. He was welcome at their home any time to see Danielle. But they disapproved of Danielle simply going to

Danielle never told her about any abuse.

³ She wrote nothing in her diaries about any abuse.

his house to "hang out" with no adult supervision.
RPII 83-84, 127-30, 141-43; RPIII 81-84.

Jon and Danielle thought her parents were too strict. Danielle loved Jon. She wanted to spend every waking minute with him. RPII 87-88, 130. She complained to her friend Jill that she had a right to see Jon as much as she wanted. She complained to Nick that Ken was overprotective. RPII 151-55; RPIII 24-25.

As softball season approached in her senior year, Ken and Danielle argued about how much time she was spending with Jon. Danielle decided her senior year was about having fun. She talked about quitting softball. Ken wrote her a long note, hoping she'd change her mind. He believed with her talent, softball would open many opportunities for her. RPIII 77-79, 140-44.

Jon and Danielle created "loopholes" in her parents' rules to find ways of spending more time together -- by telling more lies. RPII 141-43. Danielle decided Ken's emphasis on grades and softball didn't allow her to have a "normal teenage life." RPII 89-90.

Danielle was at Jon's house one weekend in the fall of her senior year when she told him her father had sexually molested her when she was younger. A week later, she told her best friend, Jill, the same thing. RPII 46-49. A couple of days after that, she told her brother, Nick, while she was talking to Jon on the phone. RPIII 6-10, 24.⁴

Nick and Danielle went together to the school counselor, Ms. Carson. Danielle reported Ken had molested her. Ms. Carson called CPS and the police, as required by law. An officer came to the school. Danielle reported sexual abuse and Nick reported physical abuse. RPIII 46, 107-08.

Nick testified he lied in his statement that he was abused. He reported Ken had been violent with his mother, too. It was another lie. Ken had never struck Diana. And although he'd used corporal punishment when the children were younger, he had not struck the kids in several years. RPIII 16-29, 83-84.

⁴ Nick initially didn't believe Danielle. RPII 50.

On November 3, 2006, a deputy sheriff called Diana to say her children feared for their lives and were being taken into protective custody. CPS told her the children reported child abuse. In shock, Ken and Diana drove to speak with a detective about their children. On the way, Ken made a smart-aleck comment like, What's next? Was Danielle going to accuse him of sexual abuse? Diana said it was not funny. RPIII 85-88, 145-47.

The detective told Ken that Danielle had, in fact, accused him of sexual abuse. Ken denied any abuse. RPIII 46-49, 52.

Diana tried to have the children placed with an aunt or uncle. Danielle chose to stay with her best friend. Jill's single mom was gone a great deal, giving her much more freedom than she'd had at home. Nick stayed there too, but was kicked out for using drugs. He wanted to come home in December, but CPS wouldn't approve it. He lived with an uncle the rest of that school year, then moved back in with his parents. RPIII 71-72, 89-90.

It was only during the shelter care process that Danielle learned that Ken was not her biological father. RPII 121.

The court ordered Diana and Ken not to contact the children until they were 18, but said the children could contact them. Nick called home immediately. Diana called Danielle on her 18th birthday in January. Danielle had not understood the court order, and was very angry at Diana for not calling her sooner. RPII 108; RPIII 72-73.

Ken and Diana sold their house so they could pay the required \$2,000/month in child support while their children were placed out of their home. RPIII 88.

Soon after Nick moved back home, Danielle called saying she wanted to come home too. Diana continued seeing Danielle, but said she couldn't come home. RPIII 90-93.

2. Procedural Facts

a. Charges

On May 21, 2007, the state charged Ken Thorgerson with one count of child molestation in the second degree. It alleged he had molested

Danielle when she was between the ages of 12 and 14. CP 69-70.

The state offered a plea bargain: If Mr. Thorgerson pled guilty to a misdemeanor assault, it would recommend two months of work release. Mr. Thorgerson, however, believed an innocent man should not have to plead guilty to something he did not do. RPS 23.

When he chose to go to trial, the state amended the charges to add three counts of Child Molestation 1° to the original charge. All three charged he molested Danielle between January 22, 1995 and January 21, 2001, when she turned twelve. CP 67-68.

b. Prosecutor's opening statement

In opening, the prosecutor told the jury:

That man compelled Danielle Thorgerson to massage his penis, to caress him for his sexual pleasure. Right through the point of ejaculation. She'll tell you all about that if she's able. No doubt it will be difficult. But I expect her to tell you what he did.
...

RPI 158-59.

And there came a point where she's now about 17, and she's still not told anybody about this happening. It's been years since it stopped. She's kept this secret to herself. She's got a boyfriend

about this time; his name is Jon Westlake. She confides in him what had happened. And he generally wouldn't be able to testify to -- about everything that's said in that conversation because the rules don't allow it. But I do expect that he'll testify the nature or the demeanor of that conversation, and he'll tell you it's a pretty sad one.

RPI 161.

c. Testimony

Danielle, age 19 at trial, testified. After asking her about her family and her home life, the prosecutor asked if she had any bad memories. She said yes, her parents argued a great deal about money so there was tension in the house. RPII 11.

Q How about specifically with respect to your stepdad? Things always good with him?

A No.

Q O.K. Did he ever do anything wrong, in your opinion, directly to you?

A Yes.

Q What did he do?

A One that particularly sticks in my mind is I think it was toward the end of beginning of my are junior and senior year [sic]. I didn't have a job; I worked a little bit after junior year started, but I quit because my grades were getting -- getting really low. And I was really determined to graduate high school, so I quit. But I also got my license, and I was constantly asking for money to pay for gas, and that's when he and my mom got angry and told me that I needed to go out and get a job because they weren't going to pay for my gas anymore. And he really got on me about it.

And one day, I think it was a Sunday morning, I had gone out and throughout the entire week I was filling out job applications, trying to go out and get a job because I wanted to keep my car. That was the deal. If I got a job, I got to keep my car that they had boughten [sic] me. And he asked me something about, well, do you have a job yet?

And I sarcastically said, "Do I look like I have a job?" And he came over and slapped me while my mom was sitting on the other side of the couch.

RPII 11-12.

Over objections as to relevance, Danielle explained why she believed there was increased tension with her stepfather as she grew older:

A I believe it had to do a lot of as I was growing up and I wanted to be a little bit more independent and I was becoming a young adult and so I wanted to do things on my own and be more independent, and he didn't like that. That I wanted to go out and actually do things.

Q Were there ever things that he wanted to do that you did not want him to do?

A Yes.

Q Like what?

A Can you help me? I don't understand.

Q You know what this trial is about, right?

A Yes.

Q You've talked to the police and other people about the allegations in this trial, correct?

A Yes.

Q Does that have anything to do with the escalating tension, in your opinion?

A Yes.

RPII 13-14.

In response to further leading questions, Danielle opined that things got worse at home because she decided to say no to her stepfather's sexual interactions. RPII 14.

When asked if she remembered the first time there was sexual interaction, Danielle answered "Yes and no." The prosecutor asked why.

Because I remember some things since it was so long ago, I've gotten to the point where I've kind of blocked it out, just to kind of help myself move on and forget about it. So now thinking back and trying to remember it is a little hard because I've blocked it out for so long.

RPII 15. She then testified that at various times during her childhood, Ken had taken her hand and placed it on his penis, urging her to masturbate him. She decided when she was in 7th grade she wouldn't do it anymore. She said no. It didn't happen again. RPII 15-33. She testified he never touched her genital area. He'd tried, but she never let him. RPII 35-36.⁵

On cross-examination, Danielle agreed her testimony at trial was different from what she'd

⁵ Ms. Carson, the school counselor, testified that Danielle specifically told her that her dad put his hand down her pants and touched her genitalia. Ms. Carson wrote that in her statement to the police. RPIII 107, 125.

told Ms. Carson at the school. She admitted she'd lied again. RPII 100.

Ken Thorgerson testified he had never had sexual contact of any kind with Danielle. RPIII 113, 121.

In response to questions, all four members of the Thorgerson family testified to Ken's many activities with the children, his commitment to Danielle's softball, and his financial commitment to providing for his children. The state did not object to any of this questioning. RPII 56-62; RPIII 20, 67-68, 74-76, 115-18.

On cross-examination, the prosecutor asked:

Q There's been a lot of testimony about a lot of good things you've done for your children, correct?

A Correct.

Q If a father had done all those things for a daughter but still molested her, in your mind, would those things make up for that?

A No.

MR. NAKKOUR: Objection, Your Honor. Improper. It's inflammatory.

THE COURT: Overruled.

BY MR. HUNTER:

Q Was the answer no?

A No.

Q So regardless of whether or not a father does all these things, it doesn't change a thing if he, in fact, molested his daughter, is that -- would you agree with that statement?

A I would agree.
Q **So what does all that have to do with this trial** other than trying to make you look good?
A Who is trying to make me look good?
Q Well, if you paid for her clothes and you paid for her car insurance and all the things you did do, I'm not talking about things that she wanted you to do but you couldn't. **All the things you did do, what does that have to do with her allegation against you?**
A That's just me being a father to my child.
Q Right. **Does it have anything to do with this trial?**
A Absolutely not.
Q **So why have we heard so much of it?**
A Because that's the type of person that I am.

RPIII 150-52.

d. Prosecutor's closing argument

The prosecutor argued to the jury:

This is a case about justice. It's about justice for Danielle Thorgerson. Don't get me wrong, we've sat through a three-day trial, and that trial was all about the defendant. That's his due process. But the outcome, the outcome is about justice for Danielle. And she deserves it.

RPIII 163.

It's a very simple basic question that you have to decide to determine the outcome of this case.

And that is, is here any credible, reasonable explanation that's supported by the evidence to doubt what Danielle said? Look at it this way: If it didn't happen, why is she saying it did? Start from that perspective. If it didn't happen, why is she saying it did?

RPIII 164.

What this case is about is justice, and it tests our justice system because you can't just say, look, she says one thing, he says another. There's no way to find beyond a reasonable doubt. If anybody amongst you is tempted to do that, I'm counting on the rest of you to say, whoa, whoa, whoa. Let's look at this. Because if it didn't happen, why is she saying it did?

RPIII 166.

Look, if you believe her, you must find him guilty unless there is a reason to doubt her based on the evidence in the case. So don't say we believe her but.

RPIII 168.

Danielle didn't do that. **She went on to tell the full truth.** Now, it's not just he said, she said. I did submit it that way to you up to this point, but it's not. Now, there's no video, but there is the letter and there is the statement to Detective Wells. **And the explanation you got for both was bogus. Absolutely bogus.** Now, I can't submit them to you and say there is no other possible explanation. I can't. But **when the defense tries to sell an explanation to you that doesn't make sense, you know it's not truthful.** And if there was a reasonable explanation for those items and that statement, you would have gotten an explanation that makes sense. You would have got the truthful explanation.

So even though it's not a smoking gun for me to present it to you, **when you look at what the defense tried to do with it, it really is.** Why are they trying to make you think things are not the way they really are? That's desperation.

RPIII 171-72.

So here's the other thing about Danielle's testimony if that's -- that's really the only significant contradiction that the defense pointed out. We did make a point of asking her about all of the people she's talked to. So think about that. She told her boyfriend, she told a girlfriend, she told her brother, she told the school counselor, she told Deputy Eastep, she talked briefly to a detective. She wrote a written statement on it to the deputy. She talked to a nurse. She's talked to people in my office and an advocate. Others. So we're already past 10.

How many times was the defense able to say, well, isn't it true you told the nurse this? So you never got to hear all the statements. That's why I never got to ask the boyfriend what did she say to you? We were able to describe about the emotion, the demeanor, the timing, things of that nature? But you didn't get the statement that she says to her from me because there's hearsay rules. The defense brought some out or if they thought there was contradiction, they were allowed to ask about that. So out of all these versions, all these people she's talked to over a year, how many times did the defense grind out a contradiction? None.

How does somebody do that? How does this bad liar tell it 10 or more times over a year with a conspiracy involving three other young people and nothing breaks down? You know how that works? It's the truth.

RPIII 174-75.

The defense argued in relevant part:

You want to talk about trouble. Martha Stewart was arrested and convicted and put in jail for perjury. Major league baseball today is facing major perjury charges. You think that's not

trouble? You think a 19-year-old girl isn't scared of going to jail for perjury? Whoa. Don't know what country we're living in, but I'm sure that played a very prevalent part in her deciding to come and testify and continue the charade.

And let's not forget in 1996 in Wenatchee, there was a big scandal, a sex sting scandal.

MR. HUNTER: Objection. Arguing facts not in evidence.

THE COURT: Sustained.

RPIII 189.

In rebuttal, the prosecutor argued:

The entire defense is sleight of hand. Look over here, but don't pay attention to there. Pay attention to relatives that didn't testify that have nothing to do with the case. They know her tells. Don't pay attention to the evidence.

RPIII 195-96. He continued:

If that doesn't do it, think of this, Mrs. Carson -- I should have asked her this. My mistake. If you find that's a reason to acquit, go for it, I guess. But Mrs. Carson would have told her herself, based on the testimony you heard, she makes sure the kids know what she has to do.

MR. NAKKOUR: I'm going to object, Your Honor. Assumes facts not in evidence at this point in time.

THE COURT: Well, I think that she did testify that she had to make a report, as I recall. Am I misinterpreting the evidence?

Ladies and gentlemen, you'll have to trust your own memories of what the witnesses have testified to on the stand. I'll overrule the objection.

RPIII 196-97.

e. Verdict

The jury found Mr. Thorgerson guilty as charged of all four counts. CP 45-48.

f. Motion for New Trial

The defense brought a motion for new trial based on prosecutorial misconduct in closing argument, including the prosecutor's expression of his personal belief and his reference to the defense using "smoke and mirrors." Supp. CP [Subno. 50].

The state responded it had not argued "smoke and mirrors" but "sleight of hand." The prosecutor explained his intentional strategy to permit the defense to admit "a flood of irrelevant testimony" without objection, and then to argue to the jury the evidence was not relevant and was a "sleight of hand." Supp. CP [Subno. 55 at 4-5].⁶

⁶ "The 'sleight of hand' argument also pertained to the flood of irrelevant testimony presented by the defense in an effort to portray the Defendant as a man of good character. **It was a tactical decision of the prosecution to allow a great deal of such evidence, in lieu of objecting, to allow for such a 'sleight of hand' argument.**" State's Response to Defense Motions for Arrest of Judgment and for New Trial [Subno. 55] at 4-5.

The court denied the motion. CP 20-21.

g. Sentencing

At sentencing, the prosecutor commented how he had been worried about an acquittal because people don't want to believe child abuse occurs. RPS 11.

The experienced judge candidly observed from the evidence presented, "the jury could have convicted or could have acquitted." RPS 25.

I could not tell and would not have hazarded a guess as to what the jury would do with the evidence with their consideration and their discussion of that evidence.

RPS 27.

The court sentenced Mr. Thorgerson to 149 months, the bottom of the standard range for these crimes. RPS 24; CP 4-19.

This appeal timely follows. CP 22-38.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT DENIED APPELLANT A FAIR TRIAL AND DUE PROCESS.

The prosecutor's duty is to ensure a verdict free of prejudice and based on reason.

The district attorney is a high public officer, representing the state, which seeks equal and impartial justice, and it is as much his duty to see that no innocent man suffers as it is to see that

no guilty man escapes. In the discharge of these most important duties he commands the respect of the people of the county and usually exercises a great influence upon jurors. In discussing the evidence he is ... given the widest latitude within the four corners of the evidence by way of comment, denunciation or appeal, but he has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.

State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct can deny due process and a fair trial. U.S. Const., amend. 14; Const., art. 1, § 3; Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935); Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983), cert. denied, 469 U.S. 920 (1984).

In State v. Claflin, 38 Wn. App. 847, 851-52, 690 P.2d 1186 (1984), the court provided an excellent discourse on the bounds of proper argument:

The largest and most liberal freedom of speech is allowed an attorney in the conduct of his client's cause. ... *To this freedom of speech, however, there are some limitations.* ... [W]hat a counsel says or does in the argument of a case must be pertinent to the matter on trial before the jury, and he takes the hazard of its not being so. **Now, statements of facts not proved, and comments thereon, are outside of the case. They stand legally irrelevant to the matter in question and are therefore**

not pertinent. If not pertinent, they are not within the privilege of counsel.

(Court's emphasis in italics; bold emphasis added.)

The Rules of Professional Conduct provide:

A lawyer shall not:

...
(e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

RPC 3.4.

"Fair trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office, information from its records, and the expression of his own belief of guilt into the scales against the accused.

State v. Case, supra, 49 Wn.2d at 71.

a. Evidence outside the record

[A] prosecutor may never suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty.

State v. Perez-Mejia, 134 Wn. App. 907, 916, 143 P.3d 838 (2006); State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994); United States v. Garza, 608 F.2d 659, 663 (5th Cir. 1979).

Here, the prosecutor didn't merely argue evidence that was not admitted. He explained it had not been admitted, explained the law that prohibited it being admitted, and still called on the jury to draw conclusions from the evidence not so admitted. He referred to the many people Danielle had "told" of the abuse, including many not mentioned in the testimony:

She talked to a nurse. She's talked to people in my office and an advocate. Others. So we're already past 10.

RPIII 174. No nurse, no advocate, and no "people in my office" testified. Nonetheless, the prosecutor proceeded to explain that hearsay rules prohibited him from having those witnesses testify to what she told them. The jury should therefore infer, since the defense didn't show contradictions in her statements, that her many prior statements were all consistent. RPIII 174-75.⁷

This misconduct is squarely controlled by State v. Boehning, 127 Wn. App. 511, 513, 111 P.3d 899 (2005):

⁷ He had intimated this argument during his opening statement, when he improperly referred to how hearsay rules prohibited him from presenting the content of Danielle's statements to others. RPI 161.

The prosecutor also impermissibly bolstered the victim's credibility by arguing that her prior statements, which were (1) plainly hearsay, (2) not admissible ..., and (3) not admitted, were consistent with her trial testimony. The prosecutor based this argument on the fact that the defense counsel did not impeach the victim with any prior inconsistent statements to witnesses. **The State's claim that this is a reasonable inference is wrong; this argument also constituted prosecutorial misconduct.**

The court reversed the three counts of first degree child molestation. Id. at 513.

The prosecutor's closing argument here is indistinguishable from that in Boehning. The Boehning prosecutor reviewed several people the complaining witness, H.R., spoke to.

And when [H.R.] was speaking, Defense counsel had the opportunity to cross her on any of her previous statements, any of her previous statements to Carey Price, to Detective Holladay, to Diana Tomlinson, to himself, and he did so, remember? He asked some questions about prior stuff.

But he never pointed out that she told a different story to these other individuals. The only reasonable inference is she didn't tell a different story to these other individuals, because he would do his job and he would bring it up.

The state can't bring up hearsay, but he can bring up any inconsistent statements, and there were no inconsistent statements, and that's why you didn't hear them. So she has been very consistent.

Boehning, 127 Wn. App. at 520 (court's emphases).

The court noted the prosecutor argued the same inference later in closing. It concluded:

These remarks were highly prejudicial and constitute flagrant misconduct. First, the prosecutor argued that H.R.'s disclosures to Detective Holladay, Tomlinson, and Price--disclosures that were inadmissible at trial--were "consistent" with H.R.'s testimony at trial.

Id. at 521.

In arguing that H.R.'s out-of-court statements were consistent with her statements at trial and that she had disclosed even more to Tomlinson, Detective Holladay, and Price, the prosecutor left the jury with the impression that these witnesses "had a great deal of knowledge favorable to the State which, but for the court's rulings, would have been revealed. . . . This repeated attempt to bolster H.R.'s trial testimony and credibility by instilling inadmissible evidence in the jurors' minds was so flagrant as to constitute misconduct.

Additionally, the prosecutor committed misconduct by repeatedly arguing that, because Boehning had failed to establish that H.R.'s out-of-court statements about the abuse were inconsistent with her testimony at trial, the jury could infer that H.R.'s hearsay statements were consistent with her trial testimony and that she was a credible witness. **In so doing, the prosecutor improperly argued that Boehning, not the State, carried the burden of production to present evidence regarding H.R.'s credibility.**

In this case, the jury's verdict turned almost entirely upon the

credibility of the complaining witness and the defendant. There were no witnesses or physical evidence to corroborate H.R.'s testimony about the abuse; Tomlinson, Officer Holladay, and Price testified only that H.R. had disclosed the fact of abuse. And the evidence arguably supported either party's version of events. We cannot conclude that a rational jury probably would have returned the same verdict without the prosecutor's improper remarks.

The prosecutorial misconduct in closing argument denied Boehning a fair trial and warrants reversal.

Boehning, 127 Wn. App. at 522-23 (court's emphases in italics; bold emphasis added).

b. Vouching for witness

"Fair trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office, information from its records, and the expression of his own belief of guilt into the scales against the accused.

State v. Case, supra, 49 Wn.2d at 71; State v. Susan, 152 Wash. 365, 278 Pac. 149 (1929). In State v. Jungers, 125 Wn. App. 895, 106 P.3d 827 (2005), the court reversed because the prosecutor argued the police officers believed one version of the events, not the other.

The prosecutor argued that Danielle had spoken with a nurse and "people in my office and an advocate." He thus conveyed that people within his

control, people with expertise, and information he had even though he had not presented it to the jury, further vouched for Danielle's testimony. This argument is utterly improper. Boehning, supra.

Here the prosecutor went even further in closing: he argued that he had failed to ask Ms. Carson a question, but if he had asked her, what she would have testified to. Even when defense counsel objected as going outside the record, the court overruled the objection and instructed the jury it must decide what was or was not admitted into evidence. This argument not only vouched for a witness, but was the prosecutor personally testifying to what a witness would have said had he asked.

This is a clear violation of RPC 3.4, asserting personal knowledge of facts in issue.

c. Shifting the burden of proof

Although prosecutors have "wide latitude" to make inferences about witness credibility, it is flagrant misconduct to shift the burden of proof to the defendant.

State v. Miles, 139 Wn. App. 879, 889, 162 P.3d 1169 (2007). "A prosecutor commits misconduct by

misstating the jury's role or the burden of proof." State v. Thomas, 142 Wn. App. 589, 598, 174 P.3d 1264 (2008).

In this case, the prosecutor argued there was no "credible reasonable explanation to doubt what Danielle said." RPIII 164. Later he argued, "if you believe her, you must find him guilty unless there is a reason to doubt her based on the evidence in the case." RPIII 168.

In Boehning, the prosecutor argued:

One thing the State submits that you should give a lot of time thinking about ... is to think about why does anyone ever fabricate anything. *Because if you don't have an abiding belief in [H.R.], that means she made something up. Well, why would [H.R.] make this up?*

127 Wn. App. at 517 (court's emphasis).

As in Boehning, the prosecutor here also argued that the defense would have presented to the jury any inconsistencies between her many prior statements and her testimony at trial; and if he failed to do so, the jury should infer the statements were consistent with her testimony.

This argument effectively shifted the burden of production to the defense. It posed that the jury begins with a presumption that Danielle is

telling the truth, and only if there is evidence to doubt her could the jury consider a not guilty verdict.

[T]o the extent the prosecutor's argument presented the jurors with a false choice, that they could find Miles not guilty only if they believed his evidence, it was misconduct. The jury was entitled to conclude that it did not necessarily believe Miles and Bell, but it was also not satisfied beyond a reasonable doubt that Miles was the person who sold the drugs to Wilmoth.

Miles, 139 Wn. App. at 890. As in Boehning and Miles, this argument was improper and prejudicial.

d. Expressing personal belief and demeaning defense counsel

[It is not] accurate to state that defense counsel, in general, act in underhanded and unethical ways, and absent specific evidence in the record, no particular defense counsel can be maligned. Even though such prosecutorial expressions of belief are only intended ultimately to impute guilt to the accused, not only are they invalid for that purpose, they also severely damage an accused's opportunity to present his case before the jury. ... Furthermore, such tactics unquestionably tarnish the badge of evenhandedness and fairness that normally marks our system of justice and we readily presume because the principle is so fundamental that all attorneys are cognizant of it.

Bruno v. Rushen, supra, 721 F.2d at 1195. Accord: State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993) (remarks disparaging defense counsel are

improper); State v. Gonzalez, 111 Wn. App. 276, 283, 45 P.3d 205 (2002) (improper to impugn defense counsel).

The prosecutor argued the defense evidence of what Mr. Thorgeron wrote in the note and said to the detective was "bogus." Yet he acknowledged he had no evidence there was another explanation than what the defense argued.

And if there was a reasonable explanation for those items and that statement, you would have gotten an explanation that makes sense. You would have got the truthful explanation.

So even though it's not a smoking gun for me to present it to you, when you look at what the defense tried to do with it, it really is. Why are they trying to make you think things are not the way they really are? That's desperation.

RPIII 171-72.

The prosecutor also argued the defense was using "sleight of hand" to trick and deceive the jury. RPIII 195-96.

All of these arguments demean the role of defense counsel in arguing his theory of the case. This approach of attacking defense counsel to obtain a conviction was condemned in State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984). There the supreme court reversed a murder conviction because

the prosecutor argued the defendant was a "liar" represented by "a bunch of city lawyers" and "city doctors who drive down here in their Mercedes Benz" relying on the defendant's "lies."

The prosecutor's comments struck directly at the evidence which supported petitioner's theory by appealing to the hometown instincts of the jury. He emphasized the fact that petitioner's counsel and expert witnesses were outsiders, and that they drove expensive cars. **Each of these statements was calculated to align the jury with the prosecutor and against the petitioner.**

Reed, 102 Wn.2d at 147 (emphasis added). See also State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968) (argument that "[the defendant] is trying to bamboozle you the same as he has done Judges for the past twenty-five years" was "reprehensible" misconduct).

e. Opening statement

An opening statement should not be argumentative, inflammatory, misstate what will be contained in the evidence, or contain expressions of the personal belief of the prosecutor.

State v. Torres, 16 Wn. App. 254, 258, 554 P.2d 1069 (1976).

The prosecutor here began the trial by expressing his personal belief of the emotional

trauma the complaining witness would have to overcome to testify.

She'll tell you all about that **if she's able. No doubt it will be difficult.**

RPI 158-59. This gratuitous injection of emotion can only be intended to call on the jury's sympathy, passion, and prejudice. It has no place in counsel's opening statement.

In fact, there is nothing on this record to suggest Danielle had difficulty being "able" to testify.

A similar reliance on the prosecutor relying on the emotion of a sexual abuse case was roundly condemned in State v. Claflin, supra. Although the extent of the misconduct there was greater than this statement in opening, the purpose was the same.

Similarly, in Boehning, the prosecutor told the jury that the complaining witness had difficulty testifying in open court although she had told others what happened. The court concluded this argument was improper. Boehning, 127 Wn. App. at 517.

The prosecutor also suggested in opening how the court rules would prevent him from presenting

the content of Danielle's statements to others. It was completely improper to begin the trial by suggesting to the jury evidence that would NOT be presented. See State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955).⁸

f. Cross-examination

As a witness, Mr. Thorgerson was sworn, as were all witnesses, to answer truthfully the questions put to him by counsel. He did not determine those questions.

The prosecutor's questions to Mr. Thorgerson discussed above were not intended to elicit facts within his knowledge. They were argumentative. They were intended to place before the jury the prosecutor's questions about defense counsel's strategy. The prosecutor essentially was arguing to the jury, with his questions, that defense counsel was presenting irrelevant evidence to curry favor with the jury. And he was trying to use this strategy against Mr. Thorgerson.

⁸ "Furthermore, reference was made to the divorce complaint when the deputy prosecutor knew that the complaint was not in evidence. He knew that the court did not permit it to be placed in evidence." Reeder, 46 Wn.2d at 892.

The prosecutor had the opportunity, if he believed such testimony was irrelevant and inadmissible, to object to defense counsel's questions. ER 401, 402. He did not do so.

Similar questioning was found improper in State v. Jones, 144 Wn. App. 284, 294-95, 183 P.3d 307 (2008).

The prosecutor's proper course of action was to object to Jones's question. The prosecutor did not object. Instead, she seized the opportunity to admit otherwise clearly inadmissible and inflammatory hearsay evidence

. . . A criminal defendant can "open the door" to testimony on a particular subject matter, but he does so under the rules of evidence. A defendant has no power to "open the door" to prosecutorial misconduct. We hold that the State's redirect examination was improper

. . . Thus, even if Jones had "opened the door" to evidence or examination of a particular *subject* at trial, the prosecutor is not absolved of her ethical duty to ensure a fair trial by presenting only competent evidence on this subject.

Jones, 144 Wn. App. at 295, 298. The Jones court found the prosecutor's reliance on improper testimony in closing argument required reversal. Id. at 300-01.

The court similarly condemned the misuse of cross-examination in State v. Bozovich, 145 Wash. 227, 233, 259 Pac. 395 (1927):

The whole tenor of the cross-examination shows disregard of the purpose for which such questions are asked, namely, to ascertain whether the witness has information contrary to the testimony given in chief--not to discredit the person on trial.

In Bozovich, despite instructions for the jury to disregard counsel's questions, the court reversed the conviction.

As in Jones, it was completely improper for the prosecutor to question Mr. Thorgerson about his counsel's examinations.

g. Prejudice

[T]rained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.

State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996).

While the prosecuting attorney was not testifying as a witness under oath, his statements were no less injurious to appellants. The office of prosecuting attorney is quasi judicial. The incumbent is elected by the people to perform the highly responsible duties of the office in the belief that he possesses the high standard of character deemed necessary to the proper performance of his functions; his declarations to the jury are not taken lightly as the words of a mere advocate, but as having the prestige of authority.

State v. O'Donnell, 191 Wash. 511, 514, 71 P.2d 571
(1937).

Attorneys sometimes, with a persistency worthy of a better cause, press, during the trial, into the record, much that is objectionable; and, as soon as they get verdicts, they seem to awake to a realization of the fact that they have performed works of supererogation, and have done more to win their causes than was required of them, or more than was necessary, and, as an excuse for this excess of energy, insist that it had no prejudicial effect, and no harm resulted from it.

State v. Claflin, supra, 38 Wn. App. at 851-52.

As in Boehning, this was a case of credibility between two people. There were no other eyewitnesses. There was no physical evidence. The prosecutor clearly believed this was a close case. He said as much at the sentencing hearing. RPS 25. The learned trial judge also stated on the record that he could not "hazard a guess" as to the jury's verdict from the evidence. RPS 27. The misconduct clearly was prejudicial.

h. Flagrant and ill-intentioned

In Boehning, the court found the misconduct was flagrant and ill-intentioned, requiring reversal even without objection.

In State v. Charlton, 90 Wn.2d 657, 660-61, 585 P.2d 142 (1978), the defense attorney argued in closing that the state had failed to call an informant as a witness. In rebuttal, the prosecutor said: "I'll go one better. Who was there that was another witness to the arrest, the defendant could have called? Where is Mrs. Charlton?" On appeal, the Supreme Court reversed the conviction for this single improper argument, observing:

[T]he prosecutor certainly must have been aware of the privilege contained in RCW 5.60.060(1). Since the prosecutor was aware of the privilege, he also must have been aware that petitioner, by virtue of the privilege, was not compelled to produce his spouse for testimonial purposes. Yet the prosecutor endeavored to suggest, by means of a comment to the jury, that petitioner was concealing or withholding testimony. The inference which he anticipated the jurors might draw was that the spouse's testimony would be unfavorable to petitioner and consistent with his guilt. Swan clearly states such an inference is impermissible when the marital privilege has been asserted. **We can only conclude, therefore, that the comment upon which it was hoped the jurors would ground the desired, impermissible inference was mindful, flagrant, and ill-intentioned conduct.** Petitioner did not, therefore, waive his right to object to conduct of this sort by failing to request a curative instruction.

Charlton, 90 Wn.2d at 663-64 (emphases added).

The prosecutor's violation here was mindful, flagrant and ill-intentioned. Boehning, supra; Charlton, supra.

The prosecutor clearly knew what the hearsay law was: he explained it to the jury in opening statement and again in closing argument.

He clearly knew he was going outside the record: he argued what the witness would have testified if he had asked the question, and he argued statements to people who were never mentioned in the testimony.

He also knew arguing evidence outside the record was improper: he raised that objection when defense counsel argued even matters of public knowledge having nothing to do with the specifics of this case. RPIII 189.

And if there was any doubt, the prosecutor set out his carefully planned "strategy" to permit irrelevant evidence that he could use improperly later to argue "sleight of hand."

The court erroneously overruled defense counsel's objections, strongly suggesting further objections would have been for naught. Thus it is unlikely any corrective instruction would have been

given, much less been sufficient to overcome this misconduct.

i. Cumulative error

"In determining whether the misconduct warrants reversal, we consider its prejudicial nature and its cumulative effect." Boehning, 127 Wn. App. at 518; State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

There comes a time, however, when the cumulative effect of repetitive prejudicial error becomes so flagrant that no instruction or series of instructions can erase it and cure the error. ... Courts must not permit this to happen, for when it does the freedom of each citizen is subject to peril and chance.

State v. Torres, supra, 16 Wn. App. at 263; State v. Case, supra, 49 Wn.2d at 73.

Even if no single example of the prosecutor's misconduct in this case were sufficient alone to warrant reversal, clearly the repeated impropriety which permeated opening, cross-examination, closing and rebuttal arguments, require reversal. The repeated examples also demonstrate the flagrancy of the prosecutor's misconduct. It was not a single slip of the tongue in the heat of argument.

2. THE TRIAL COURT ERRED IN OVERRULING DEFENSE COUNSEL'S OBJECTIONS TO THIS MISCONDUCT.

Defense counsel objected to the improper questioning of Mr. Thorgerson, RPIII 150-52, and to the prosecutor arguing matters outside the evidence, RPIII 196-97. On each occasion, the court overruled his objections. These rulings were error.

In Suarez-Bravo, the defense also objected to some of the prosecutor's improper conduct, but the objections, as here, were overruled. Although the state argued the objections were insufficient to preserve the error, the court disagreed.

Here, the objections covered the relevancy of the prosecutor's line of questioning and adequately informed the trial court of the basis for the claim of error.

72 Wn. App. at 365.

The egregious argument of what a witness would have said if the prosecutor had only asked her demanded the trial court's condemnation. Instead, it fell back to instructing the jury it was to determine what the testimony was or was not. But this instruction disregarded the impropriety: the prosecutor already had explained he had not asked

the question, and then was telling the jury what the witness would have said. By overruling this objection, the court effectively told the jury it could consider this argument.

These were erroneous rulings that served to support and promote the prosecutor's ongoing misconduct.

3. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S MISCONDUCT.

Given the trial court's overruling of defense counsel's objections, it is apparent from this record that the court would not have sustained repeated objections on these points, nor instructed the jury to disregard.

As discussed above, the case law strongly supports that the prosecutorial misconduct here was so flagrant and ill-intentioned as to warrant reversal without further objection. State v. Boehning, supra.

However, should this court conclude that defense counsel failed to make sufficient objections to this misconduct, it should conclude counsel's failure to object was ineffective assistance of counsel.

The right to counsel, and to effective assistance of counsel, goes to the very integrity of the fact-finding process. Burgett v. Texas, 389 U.S. 109, 19 L. Ed. 2d 319, 88 S. Ct. 258 (1967); United States Constitution, amends. 6, 14; Constitution, art. I, § 22. Denial of the assistance of counsel constitutes a per se violation of the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Id., 466 U.S. at 686.

Strickland requires two components to establish ineffective assistance of counsel.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

In State v. Boehning, supra, after concluding the convictions must be reversed for flagrant prosecutorial misconduct, the court noted that appellant also had raised a claim of ineffective assistance of counsel.

We need not address these claims because we reverse on other grounds. But we emphasize that where, as here, the prosecutorial misconduct is so flagrant that it denies the defendant a fair trial, defense counsel should have recognized such an egregious breach.

Boehning, 127 Wn. App. at 525.

To the extent defense counsel failed to object sufficient to preserve the error here, there is no reasonable strategic purpose for that failure. Based on Boehning, a reasonable defense counsel would recognize this misconduct and object.

There can be no question the improper argument was prejudicial. If proper objections would have excluded this argument, then counsel's failure to object was deficient performance and ineffective assistance of counsel.

The prejudice is clear. In a close factual case, the prosecutor argued evidence outside the record, argued his own knowledge of evidence not presented, shifted the burden of production, and

impugned defense counsel. These errors denied Mr. Thorgerson due process and a fair trial.

D. CONCLUSION

The prosecutor's misconduct in this case permeated his opening statement, his cross-examination of the defendant, his closing argument and his rebuttal. He relied on matters outside the evidence, called on the jury to consider evidence he knew was not admissible, and supplied a question he had not asked and the witness's answer to that question.

This misconduct was flagrant and ill-intentioned, and in no way could he have believed it was proper. Nor could any instruction have mitigated the prejudice. Indeed, the court overruled what objections were made, leaving it to the jury to decide what was supported by the evidence.

This misconduct requires reversal of these convictions.

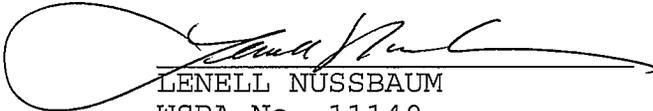
The court erroneously overruled defense objections to this misconduct.

If defense counsel's objections were inadequate to properly raise this repeated

misconduct, then Mr. Thorgerson was denied effective assistance of counsel, and this court should reverse his convictions on that basis.

DATED this 18th day of November, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lenell Nussbaum", is written over a horizontal line.

LENELL NUSSBAUM
WSBA No. 11140
Attorney for Appellant

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	
)	COA NO. 62071-1-I
)	
Plaintiff,)	
v.)	DECLARATION OF SERVICE
)	FOR BRIEF OF APPELLANT
)	
KENNETH THORGERSON,)	
)	
Defendant.)	

I declare that on this date I served on the party listed below an original and a copy of Brief of Appellant, by depositing the same in the United States Postal Service, postage prepaid, addressed as follows:

Mr. Richard Johnson, Clerk of the Court
Court of Appeals, Division One
One Union Square
600 University Street
Seattle, WA 98101

I declare that on this date I served on the parties listed below a copy of Brief of Appellant, by depositing the same in the United States Postal Service, postage prepaid, addressed as follows:

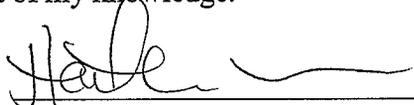
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Mr. Ken Thorgerson
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I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

Nov. 19, 2008, Seattle, WA
Date and Place


HEATHER MUWERO
Legal Assistant to Lenell Nussbaum