

NO. 71614-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

PAUL HOLLINGWORTH,

Appellant.

2016 JUL 19 PM 3:21  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I  
CLERK

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ELIZABETH J. BERNS

**BRIEF OF RESPONDENT**

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A. ISSUES

1. To prevail on a claim of prosecutorial misconduct that was objected to at trial, a defendant must establish that the challenged conduct was both improper and prejudicial. During the primary officer's testimony, the prosecutor presented a variety of digital and documentary evidence using a PowerPoint presentation, including: video of Hollingworth's sexually explicit internet chat messages with an undercover officer posing as a minor, screenshots of these same internet chats, and Hollingworth's written statement admitting to engaging in indecent proposals with a minor over the internet. The prosecutor titled the two slides displaying the statement, "Confession." Hollingworth objected. The trial court instructed the jury that the slides were a visual aid only, the actual evidence was the admitted exhibits, and that the jury was to disregard anything inconsistent with the actual exhibit. Has Hollingworth failed to show that the two slides titled "Confession" resulted in prejudice that had a substantial likelihood of affecting the verdict?

2. To prevail on a claim of prosecutorial misconduct where there was no objection below, a defendant must show that the alleged misconduct was so flagrant and ill-intentioned that an

instruction could not have cured any prejudice. In closing argument, the prosecutor quoted Hollingworth's own statement that his interview with the officer was a "wake-up call...to just how kind of sick it is" and that "it's kind of stomach turning." The prosecutor also explained that there were two charged counts, but five allegations that could provide a basis for finding Hollingworth guilty, and so that the jurors would all have to agree on one particular act for each count. In doing so, she explained that the jurors could perhaps choose which conduct that they found most offensive. Defense counsel did not object to either statement. Has Hollingworth failed to show that the remarks were improper or were so flagrant and ill-intentioned that any prejudice could not have been cured by an instruction?

3. Cumulative and repetitive prosecutorial misconduct may require reversal if it has so prejudiced the defendant's right to a fair trial that no instruction could have remedied the prejudicial effect. The only error that may have occurred in this case was promptly corrected by the trial court's curative instruction to the jury. Should this Court decline Hollingworth's invitation to reverse his convictions based on cumulative prosecutorial misconduct?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Paul Hollingworth was charged by amended information with two counts of felony communication with a minor for immoral purposes. CP 14-15. The Honorable Elizabeth Berns presided over the jury trial at which Hollingworth was found guilty. RP<sup>1</sup> 1; CP 34-35. The trial court sentenced Hollingworth to the low end of the standard range – 9 months. RP 654; CP 68-71.

2. SUBSTANTIVE FACTS

On September 30, 2011, Renton Police Officer Ryan Rutledge conducted an undercover investigation by posing as a 12-year-old girl in a Yahoo chat room. RP 318, 335. Rutledge created a publicly-displayed Yahoo profile of "SounderChick12" for the fictitious 12-year-old Ashton Michaels. RP 326, 328, 335. The profile listed Michaels' date of birth as February 2, 1999; her age as 12 years old; stated that she was in the seventh grade; and included juvenile interests, such as bike riding and movies like THE HUNGER GAMES. RP 326-27.

Rutledge entered the general Yahoo Seattle chatroom as Michaels and, within minutes, was contacted by private instant

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<sup>1</sup> The verbatim report of proceedings consists of eight volumes consecutively paginated. This brief will refer to the record as "RP" and by page number.

message by Hollingworth. RP 335-36. Hollingworth stated that he was a 25-year-old male from Bremerton. RP 336. Rutledge, posing as Michaels, responded that she was a 12-year-old female in Renton. RP 338. Hollingworth then requested pictures. RP 338. He sent his own pictures via Yahoo's photo sharing tool; the last several depicted him nude with an erect penis. RP 340-43.

Hollingworth then sent Michaels sexually explicit chat messages. RP 342-45. He asked her if the last few pictures excited her and described sexual acts that he wished they would perform on each other. RP 344-45. Michaels included in her responses that she was in the seventh grade or information indicating she was a minor. RP 344-47, 350-51. Hollingworth stated, "Yep, I could teach you a thing or two...", and continued escalating the sexually explicit messages. RP 344-47, 350-51.

Several months later, Hollingworth again engaged Michaels in sexually explicit instant message chats on January 12, 2012; February 14, 2012; and February 28, 2012. RP 353, 374, 391. Each of the chats followed a similar pattern as the first—with a request for pictures and with Hollingworth sharing the same or similar pictures showing him nude with an erect penis via Yahoo Photo Sharing or email. RP 357-58, 375-77, 399.

In response to Hollingworth's requests for pictures of Michaels, Rutledge sent pictures of a young-looking female officer in civilian clothes. RP 358-60, 369, 383, 399, 410. Near the beginning of each chat, Michaels included her age of 12 or 13 years old<sup>2</sup>, or sent a message referencing her mother or school to communicate that she was a minor. RP 356, 362, 375, 392-93. Despite that fact, Hollingworth then engaged in sexually explicit chats with Michaels. RP 362, 378-81, 397-400, 410-14.

In the exchange on February 28, 2012, Hollingworth began chatting with Michaels over Yahoo Messenger, then requested that she switch to MSN Messenger so that he could use his web camera. RP 406-07. The chat switched to MSN messenger. RP 421-23. Hollingworth said that he would show her his body, then dropped his pants in front of the camera, masturbated for 20-30 seconds, and blew a kiss to the camera. RP 410-11, 428.

Rutledge saved the chat messages and video-recorded the seven hours of chats from January 12, 2012; February 14, 2012; and February 28, 2012. RP 348, 363, 365, 369, 374, 390, 415, 433, 436-37; Ex. 2; Ex. 3; Ex. 4. Rutledge recorded the first chat (on September 30, 2011), but that recording was lost when he

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<sup>2</sup> After February 2, 2012, which was Michaels' listed birthday, Rutledge, posing as Michaels, stated in the chats that she was 13 years old. RP 374.

switched computers. RP 341. At trial, the jury was shown the chats and video. RP 321, 323, 348, 374, 433, 436-37; Ex. 2; Ex. 3; Ex. 4.

In early 2013, Rutledge located Hollingworth using the Internet Protocol address<sup>3</sup> and personal information Hollingworth had shared. RP 371-72, 455. On February 29, 2013, Rutledge arrested Hollingworth at his home. RP 471. Hollingworth consented to the search and seizure of his computer. RP 472-73. The computer was later forensically examined revealing evidence of Hollingworth's usernames and interactions with Michaels. RP 451-52.

Rutledge interviewed Hollingworth. RP 473. The interview was recorded and played for the jury. RP 474-75; Ex. 5A; Ex. 6A.<sup>4</sup> Rutledge began by asking Hollingworth general questions about his internet chat room behavior. Ex. 5A; Ex. 6A at 4-20. Rutledge did not divulge that he had posed as Michaels. RP 476-77.

Hollingworth denied ever exchanging sexually explicit messages

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<sup>3</sup> An internet protocol (IP) address is a unique number assigned by an Internet Service Provider (such as Comcast) that is attached to any email or other communication sent by a user. RP 332-33. When the IP address is inputted into a publicly-available internet tool, the assigned Internet Service Provider and general location of that user is revealed. RP 371. Law enforcement can then obtain a search warrant for the subscriber's information. RP 332-33, 371-72.

<sup>4</sup> Exhibit 5A is the audio recording of Hollingworth's statement to Rutledge and Exhibit 6A is the transcript of the recording.

with someone 12 or 13 years old. Ex. 5A; Ex. 6A at 15-16. As the interview progressed, Rutledge showed Hollingworth the documents showing the sexually explicit messages, lewd picture exchange, and video of Hollingworth. Ex. 5A; Ex. 6A at 20-27. Only then did Hollingworth admit he remembered chatting with Michaels, but he denied recalling that she had said she was 13 years old. Ex. 5A; Ex. 6A at 32.

Later, Hollingworth admitted he remembered the last chat from February 28, 2012 and that Michaels had said she was 13 years old. Ex. 5A; Ex. 6A at 42. Rutledge continued showing the chat messages to Hollingworth and Hollingworth continued to state that he remembered the chat and photo sharing. Ex. 5A; Ex. 6A at 46-51. Hollingworth denied recalling that he had masturbated on the web camera, but agreed that he had done so in the past. Ex. 5A; Ex. 6A at 55-56. He explained that he had had many sexually explicit exchanges with individuals on the internet and exchanged lewd pictures. Ex. 5A; Ex. 6A at 56-62. At times, Hollingworth claimed that he thought that Michaels was fake and he decided to "mess around" by sending the sexually explicit messages after she said that she was 13 years old. Ex. 5A; Ex. 6A at 58-59.

Toward the end of the interview, Rutledge thanked Hollingworth for being cooperative and apologized for having to ask him difficult questions. Ex. 5A; Ex. 6A at 64. Hollingworth responded:

I know it's not comfortable to sit here and do it but it's kind of a wakeup call, too, as to just how kind a sick it is not in the moment 'cause when you're in the moment you're like oh hey I'm just...

Ex. 5A; Ex. 6A at 64. Rutledge stated, "But as you go through and read that what was going on..." Ex. 5A; Ex. 6A at 64. Hollingworth finished, "It's kind a stomach turning." Ex. 5A; Ex. 6A at 64.

Hollingworth then wrote out his own statement:

I admit to talking to someone over the internet whom [sic] was not at the age of consent about indecent proposals. I infrequently use the internet for lude [sic] picture exchange and chat. I have never pursued anyone from the internet, let alone a minor. I only chatted with them after because they kept pursuing me months later and I had forgotten who they were. I chatted with them after they said they were 13 as a joke. I run into a lot of people that pretend to be someone and I was not interested in them because of their age. I thought they were another fake so I "messed around." I have two children, have been a youth sports official since 16, and only have the best recommendations of conduct involving minors. Everyone on the internet says things that aren't true, and I had thought this was just another. I, upon reviewing the chats, were [sic] disgusted and do not carry over that attitude. I realize that "getting my rocks off" while chatting to anyone that would, and

I've chatted with 10 screens at once, not caring who it was, just the interaction.

RP 479-81; Ex. 7.

At trial, Hollingworth testified that he had used Yahoo Messenger to engage in sexually explicit chats, but he claimed to have entered only adult chat rooms. RP 536-40. He testified that he remembered chatting with Michaels, but that he did not believe that she was truly 12 or 13 years old. RP 541-43.

C. ARGUMENT

THE DEPUTY PROSECUTOR DID NOT COMMIT REVERSIBLE MISCONDUCT.

Hollingworth contends that the prosecutor committed misconduct by titling Hollingworth's written statement "Confession" on a visual aid; by arguing in closing that the statement was a confession; and by improperly appealing to the jury's emotions during closing argument. Because the trial court gave a curative instruction concerning the title "Confession" and the prosecutor's closing argument was based on the evidence and was not improper in context, Hollingworth's claims fail.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653

(2012). Prejudice occurs only if “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). Where the defendant objected to the prosecutor’s remarks at trial or timely moved for mistrial, the trial court’s ruling is reviewed for abuse of discretion. State v. Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014).

Failure to object waives any error, unless the misconduct was so flagrant and ill-intentioned that no instruction could have cured the prejudice. Emery, 174 Wn.2d at 760-61. A defendant must show that (1) a curative instruction could not have corrected the prejudicial effect of the misconduct, and (2) the resulting prejudice had a substantial likelihood of affecting the verdict. Id.

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence. State v. Fisher, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009). On review, the prosecutor’s remarks are viewed “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).

1. Relevant Facts And Jury Instructions.

During Officer Rutledge's testimony, the State used a PowerPoint presentation to display the evidence that Rutledge had gathered, including the sexually explicit chat messages, the video recording of these chats, and Hollingworth's written statement. Ex. 2; Ex. 3; Ex. 4; Ex. 7.<sup>5</sup> The two slides displaying Hollingworth's statement had the type-written title "Confession" above a photograph of his hand-written statement. CP 64-65. The prosecutor briefly displayed this slide at the end of her direct examination of Rutledge—it was shown during only three pages of the record compared to the entire direct examination, which is 134 pages. RP 318-437, 454-58, 470-81.

Outside the presence of the jury, Hollingworth's counsel objected to the slides' title and requested a limiting instruction. RP 482, 484-85. The prosecutor agreed to remove the slides from the PowerPoint and did not object to the limiting instruction.

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<sup>5</sup> Exhibit 2 is the USB drive containing the PowerPoint presentation shown to the jury during Rutledge's testimony. It no longer contains the titled slides of Hollingworth's written statement, because the prosecutor removed the slides at the trial court's request. RP 485; Ex. 2. The slides were filed for the record. CP 64-65. Exhibit 2 does contain the other files shown during Rutledge's testimony: the video clips from the chats, file name 2014.01.23\_Hollingworth clips\_11p; and the chat messages and screen shots, file name Hollingworth Chat Evidence (also admitted in document form as Ex. 3). Exhibit 3 is a document of the internet chat messages and screen-shots of the video-recorded chats, Exhibit 4 is also a document of the internet chat messages, and Exhibit 7 is Hollingworth's written statement.

RP 483-84. The trial court clarified that Hollingworth's written statement did not include the title "Confession." RP 483; Ex. 7.

When the jury returned, the trial court instructed the jury:

Ladies and gentlemen of the jury, the document that you previously viewed on the screen was intended to be a visual aid only. Exhibit 7 is the admitted evidence and anything inconsistent, you must disregard.

RP 486.

The State's closing argument focused on the digital evidence and Hollingworth's statement showing that he believed Michaels was a minor. The prosecutor first outlined the elements of the crime and the State's burden of proof. RP 594-96. She then explained that there were five sexually explicit chat conversations that could support a conviction, but that the jury would need to agree which of the chats supported count 1 and count 2. RP 597. The prosecutor explained that the jurors could choose which of the chats they would like to base their findings of guilt on, perhaps by choosing which ones they found most offensive. RP 597; CP 29. Hollingworth's counsel did not object to this statement. RP 597.

The prosecutor continued her closing argument by discussing Rutledge's and Hollingworth's credibility. RP 597-98. She detailed the evidence of the sexually explicit chat messages.

RP 598-600. Then, she pointed to the many instances where Michaels said she was 12 or 13 years old or referenced that she was underage and then Hollingworth requested pictures of her, sent lewd pictures of himself, or sent sexually explicit messages. RP 598-600.

Next, the prosecutor discussed Hollingworth's recorded statement. RP 600-01. She argued that Hollingworth began by denying the crime and then began to admit to the crimes as Rutledge showed him the chat messages. RP 601. The prosecutor recounted a number of Hollingworth's quotes from his statement to Rutledge and pointed out where the evidence of his internet chats contradicted his statements. RP 601-03.

The prosecutor quoted Hollingworth's admission where he stated that he remembered chatting with Michaels and that was the first time he had ever done that with a 13-year-old. RP 604. She then quoted Hollingworth several more times, including when Hollingworth stated to Rutledge:

I know it's not comfortable to sit here and do it, but it's kind of a wake-up call too just as to just how kind of sick it is. Not in the moment, because when you're in the moment, you're like oh, hey, I'm just – it's kind of stomach turning.

RP 605; Ex. 5A; Ex. 6A at 64. The quote also appears on the PowerPoint presentation that the prosecutor used during her closing argument. Ex. 17.<sup>6</sup> The prosecutor argued that this statement showed that Hollingworth had believed Michaels was a minor. RP 604-05.

After recounting Hollingworth's oral statements, the prosecutor then discussed his written statement. RP 607-08. She stated, "And finally, go to his written confession." RP 607. She then read the first several lines, "I admit to talking to someone over the Internet who's [sic] not the age of consent about indecent proposals." RP 607. Hollingworth's counsel did not object to any of these statements. RP 605, 607.

After the jury had been excused, Hollingworth's counsel made a motion for a mistrial based on prosecutorial misconduct. He argued that the prosecutor's argument regarding Hollingworth's and Rutledge's credibility was inappropriate. RP 622. He also argued that this misconduct compounded prior errors of the prosecutor violating pretrial orders and writing "Confession" on a piece of evidence during Rutledge's testimony. RP 622.

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<sup>6</sup> Exhibit 17 is a copy of the prosecutor's PowerPoint presentation that she used during closing argument.

The trial court denied the motion. RP 625. First, the trial court ruled that the prosecutor had violated no pretrial rulings, that the prosecutor's argument in closing regarding credibility was not improper, and that there was no admitted evidence that had the term "confession" on it. RP 624-25. The trial court also ruled that the prosecutor's use of the term "confession" in her closing PowerPoint was not improper—although Hollingworth had not objected or asked for a mistrial on those grounds. RP 625.

2. The Trial Court's Instruction To The Jury Cured Any Prejudice From The Two Slides Of Hollingworth's Statement With The Title "Confession."

Hollingworth claims the prosecutor committed misconduct when she briefly showed Hollingworth's written statement to the jury on a PowerPoint slide with the title "Confession" during Rutledge's testimony. He contends that the error was exacerbated when the prosecutor argued in closing that Hollingworth's statement was a confession. Both claims fail. Any prejudice from the brief display of Hollingworth's written statement with the title "Confession" was cured by the trial court's instruction to the jury and the prosecutor appropriately argued that the statement was a confession.

Evidence may not be altered and submitted to the jury. In re Personal Restraint of Glasmann, 175 Wn.2d 696, 705, 286 P.3d 673 (2012). However, an attorney may use visual aids or graphics at trial, particularly to highlight quotes or summarize detailed information. State v. Hecht, 179 Wn. App. 497, 506, 319 P.3d 836 (2014). Such tools may not be used to inflame the passions or prejudices of the jury or to express the prosecutor's personal opinion of the defendant's guilt. In re Glasmann, 175 Wn.2d at 706-08. A prosecutor expresses a personal opinion if it is "clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion." State v. McKenzie, 157 Wn.2d 44, 54, 134 P.3d 221 (2006) (emphasis omitted) (quoting State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983)).

The supreme court held in In re Glasmann that the prosecutor's extensive PowerPoint presentation in closing argument improperly inflamed the passions and prejudices of the jury and expressed the prosecutor's personal opinion of the defendant's guilt. 175 Wn.2d at 705-08. The PowerPoint included five slides displaying Glasmann's booking photograph, in which Glasmann was unkempt and bloody. Id. at 701-02, 705. Each time

the photograph was shown, the prosecutor added the captions: “DO YOU BELIEVE HIM?” or “WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?” Id. at 701-02.

The last three times the prosecutor displayed the photograph, it had “GUILTY” written in red letters diagonally over Glasmann’s face; the next slide added another “GUILTY” to form an “X” over Glasmann’s face; and the last slide added a horizontal “GUILTY” to the first two, so that it read, “GUILTY, GUILTY, GUILTY.” Id. at 702. The court held that the misconduct from this presentation and accompanying argument was so pervasive that no instruction could have cured it. Id. at 707.

By contrast, here, the prosecutor briefly displayed Hollingworth’s written statement, an admitted exhibit, and simply added the title “Confession.” RP 479-81; CP 64-65. The word was not written in all capital letters and appears to have been in black type. CP 64-65. It did not obscure the written statement and was clearly set above and to the left, indicating it was a title. CP 64-65.

Compared to the highly inflammatory and prejudicial slides in Glasmann, the two titled slides here did not amount to prejudicial misconduct. The prosecutor did not use inflammatory photographs or language. Instead, she added a title to distinguish the large

amount of evidence that she showed the jury during her direct examination of Rutledge. For example, exhibit 3, a thirty-six page document of the chat messages also shown during Rutledge's testimony, similarly had a title of the date, username, and chat room provider. Ex. 3.

Further, the statement was a confession. Hollingworth's statement began: "I admit to talking to someone over the internet whom [sic] was not at the age of consent about indecent proposals." CP 64-65. The statement had also been admitted after a hearing under CrR 3.5, a rule entitled, "Confession Procedure." CrR 3.5; RP 10-72, 105-08. The prosecutor did not err.

Moreover, the trial court cured any potential prejudice by immediately instructing the jury that the slides were merely a visual aid and anything inconsistent with the actual exhibit must be disregarded. RP 486. Prior to closing argument and in the written instructions, the jury was further instructed that the lawyers' remarks were not evidence, that they must disregard any statement or argument that was not supported by the evidence, and that they were to base their decision solely on the evidence. RP 581-84; CP 18. Jurors are presumed to follow the court's instructions. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

Hollingworth's claim that the prosecutor improperly argued that the statement was a confession in closing argument also fails. The statement includes Hollingworth's admission to making "indecent proposals" to "someone [who] was not at the age of consent" and that he continued to do so after the person "said they were 13." RP 480-81; Ex. 7. The prosecutor's argument that this statement constitutes a confession was properly based on the evidence. That the prosecutor expressed this argument in part by entitling a slide of Hollingworth's statement in her closing PowerPoint "Confession" does not make the argument improper. Ex. 17; see Hecht, 179 Wn. App. at 506. The context made it clear that the prosecutor was not expressing her personal opinion of Hollingworth's guilt. Instead, she argued the evidence that showed his guilt, including his admissions of guilt. RP 601-07.

Because Hollingworth did not object or raise this argument in his motion for a mistrial, he must show that the use of the term "confession" was so flagrant and ill-intentioned that no instruction could have cured any prejudice. He cannot make that showing. The trial court ruled on the issue despite the fact that Hollingworth did not raise it in his motion for a mistrial. RP 625. The trial court properly found that the prosecutor's use of the term was

appropriate because 1) the prosecutor noted at the beginning of her closing argument that the PowerPoint was only her shorthand version; 2) the jury was instructed to disregard anything not supported by the evidence; and 3) the jury was instructed that the attorney's statements were not evidence. RP 625.

Further, the prosecutor only twice referred to Hollingworth's statement as a "confession"; she primarily used the term "statements." RP 598-608. In rebuttal, the prosecutor also urged the jury to listen to the interview themselves to determine what Hollingworth said. RP 619-20. In this context, the brief references in closing argument to "confession" were not reversible error.

### 3. The Prosecutor's Statements In Closing Argument Were Proper.

Hollingworth next contends that the prosecutor improperly appealed to the jury's emotions with two statements in closing argument. Because Hollingworth did not object to either statement and the context reveals both were proper, the claim fails.

The first statement that Hollingworth contends was improper was the prosecutor quoting Hollingworth's recorded statement:

I know it's not comfortable to sit here and do it, but it's kind of a wake-up call too just as to just how kind of sick it is. Not in the moment, because when you're in

the moment, you're like oh, hey, I'm just – it's kind of stomach turning.

RP 605; Ex. 5A; Ex. 6A at 64. The transcript of Hollingworth's recorded statement contains this exact quote and it is also displayed in the PowerPoint used in closing argument. Ex. 6A at 64; Ex. 17 at 18.

The context clarified that this statement was a quote from Hollingworth. Immediately before and after the quote, the prosecutor had discussed Hollingworth's statement. RP 604-09. And, after reciting the quote, the prosecutor argued that it represented a more credible explanation than Hollingworth's trial testimony. RP 605. It was not improper.

Hollingworth also contends that the prosecutor's explanation of the Petrich<sup>7</sup> instruction was an improper appeal to the jury's emotions. The prosecutor explained that the evidence showed five instances of sexually explicit internet chat communications, any one of which would support a finding of guilt on one count. RP 597.

The prosecutor then stated:

You all have to, 12 agree, on whatever date you attribute to whichever account; but ultimately there are only two counts charged and five incidents to choose from, so you get to decide which chats

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<sup>7</sup> State v. Petrich, 101 Wn.2d 566, 683 P.2d 73 (1984).

perhaps you find the most offensive and would like to have him found guilty of.

RP 597; CP 29.

Immediately after this statement, the prosecutor recounted the detailed evidence that showed Hollingworth's guilt. RP 598-609. That evidence included sexually explicit chat messages, pictures that Hollingworth sent showing himself nude with an erect penis, and the video recording of Hollingworth masturbating during the last chat. Thus, the context shows the prosecutor was simply acknowledging that some of Hollingworth's actions were more egregious, i.e., words describing sex acts versus live video.

Immediately before explaining the Petrich instruction, the prosecutor had also outlined the elements of the crime and the State's burden of proof. RP 594-96. And, throughout her argument, she focused on the evidence and urged the jury to convict based on the evidence, not on what they found offensive. RP 598-607. The jury had also been instructed that it must base its decisions on the facts proved and the law in the instructions, not on sympathy or prejudice. RP 585; CP 19.

Moreover, Hollingworth's counsel did not object to either statement nor raise it in his motion for a mistrial after closing argument. On appeal, Hollingworth cannot show that either statement was so flagrant and ill-intentioned that it could not have been cured by an instruction. Reversal is not warranted.

4. Because There Was At Most One Instance Of Misconduct, Reversal Is Not Required Due To The Cumulative Effect Of Prosecutorial Misconduct.

Hollingworth seeks reversal based on the cumulative effect of prosecutorial misconduct. The cumulative effect of repetitive and prejudicial prosecutorial misconduct may require reversal. In re Glasmann, 175 Wn.2d at 707. However, here, the prosecutor did not commit repeated misconduct. As outlined above, the only error was the prosecutor's titling one exhibit "Confession," and that error was promptly corrected by the trial court's instruction to the jury. The prosecutor's later arguments in closing were appropriate or, at the least, could have been cured by an instruction. Hollingworth received a fair trial. Reversal is not warranted on this basis.

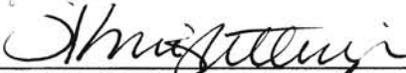
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Hollingworth's convictions.

DATED this 16<sup>th</sup> day of January, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

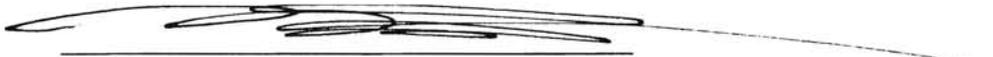
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Attorneys for Respondent  
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Kevin A March, the attorney for the appellant, at 1908 E Madison St, Seattle, WA, 98122, containing a copy of the Brief of Respondent, in State v. Paul Ashton Hollingworth, Cause No. 71614-0, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 16 day of January, 2015.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Name  
Done in Seattle, Washington