

No. 922918

IN THE SUPREME COURT OF THE  
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JEFFREY A. ROETGER,

Petitioner.

**FILED**

SEP 28 2015

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

APPEAL FROM DIVISION II  
OF THE COURT OF APPEALS

#46082-3-II  
#33231-4-III

PETITION FOR REVIEW

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## **I. IDENTITY OF PETITIONER**

Petitioner Jeffrey A. Roetger respectfully requests that this Court review the Court of Appeals decision in case number 46082-3-II affirming his trial court convictions.

## **II. COURT OF APPEALS DECISION**

The Court of Appeals erroneously found that (1) the State did not commit prosecutorial misconduct despite numerous improper remarks during closing arguments, (2) defense counsel was not ineffective for failing to object to the State's improper remarks, and (3) Mr. Roetger's rights were not infringed when the trial court prevented him from fully confronting his accuser and presenting a complete defense.

A copy of the decision from the Court of Appeals, Division II, filed on August 25, 2015 is attached as Exhibit "A". It is important to note that the case was actually decided by a panel from Division III – apparently because of a backlog of cases in Division II.

## **III. ISSUES PRESENTED FOR REVIEW**

1. The Court of Appeals erred when it affirmed Mr. Roetger's convictions despite numerous improper remarks during the State's closing argument.
2. The Court of Appeals erred when it affirmed Mr. Roetger's convictions despite his being subjected to ineffective assistance of counsel where counsel failed to object to the State's improper remarks.

3. The Court of Appeal erred where it affirmed Mr. Roetger's convictions despite the trial court's denial of his right to confrontation and his right to present a complete defense.

#### IV. STATEMENT OF THE CASE

##### A. *Procedural History*

Jeffrey Roetger, petitioner herein, was convicted of one count of rape of a child in the first degree (Count I), two counts of child molestation in the first degree (Counts IV and V), one count of rape of a child in the second degree (Count VI) and one count of rape of a child in the third degree (Count VII) following a jury trial. CP 183-89. He was found not guilty of two counts of rape of a child in the first degree (Counts II and III). *Id.* The jury returned a special verdict finding of an "ongoing pattern of sexual abuse" on Counts I and IV. CP 190-92. The trial court sentenced Mr. Roetger to a standard range sentence of 318 months to life. CP 247.

Mr. Roetger filed a timely appeal to Division II. The case was transferred to Division III for review and on August 25, 2015 Division III, in an unpublished opinion, affirmed the convictions.

Prior to trial, defense counsel sought permission to admit evidence that one of the alleged victims [A.K.] had been previously victimized by her brother and that he had been convicted of the abuse. The trial court declined to allow the evidence. RP (1/23/14) 54.

1. **Prosecutorial Misconduct/Ineffective Assistance of Counsel**

During closing and rebuttal argument, the prosecutor made multiple improper remarks such as:

*Those are the incidents. You find any one of those happened, any one of those two beyond a reasonable doubt, then he is guilty. They both happened. He is guilty of molesting [A.C.]. RP (2/4/14) 403.*

*The simple fact is she didn't make this up. It happened to her at the hands of the defendant. The defendant repeatedly violated her, over and over and over. For that, he should be held responsible. For that, he is guilty of all seven counts and the aggravators. Id. at 409.*

*Somebody is unbelievable here. It is the defendant and his wife, the stories you heard from them. They are just that, stories. Id. at 436.*

*You judge credibility. Look at how they testified. What you saw from [A.K.] was real emotion that was not faked. She was giving you the real story. It was emotional for her. She had problems getting it out. That was real. You looked at [A.C.]. When [A.C.] was testifying, defense counsel was standing in a manner that made her eyesight go to the defendant. She was in fear. She asked him to move for that reason so she didn't have to look over there. That is real fear. That is not something that is faked. Id. at 438-39.*

*Oh, I think [A.K.] is getting it smacked right in her face. [A.K.] understands exactly the reality of her situation. Her mom has basically disowned her as a result of this. Counsel said, well, one of the things, one of the things he pointed out is sometimes kids make this up so that mommy will kick daddy out of the house. Well, that's not what happened here. This came to light and [A.K.] got the boot right away. [Mr. Roetger's wife] wasn't even truthful*

*about what happened there on the stand. Trying to make herself look better. We will get to that. Id. at 439-440.*

*The stories [A.K. and A.C] give you are consistent. They are consistent in that it happened. These acts happened. The defendant is living a nightmare for three years. He raped and molested two girls. They have lived with that since they were children. I don't care about his nightmare. Neither should you.<sup>1</sup> Id. at 441.*

*This is not embellishment. This is what happened to her. That's what she's telling you. Id. at 442.*

*Now, I have no doubt at some point [Mr. Roetger] did that when they learned to swim. That's not what was happening on these occasions. Id. at 446.*

*Obviously [the defendant] didn't have that conversation with her. If it truly happened like he said it did, then you would tell the mom. He didn't. Because it didn't happen that way. Id. at 448.*

*[Mr. Roetger's wife is] doing that to make herself look good. That is the only reasons she did that. No point was that the truth. No point was she truthful here on the stand.<sup>2</sup> Id. at 449.*

*The defendant is guilty. There is no reason why [A.C] and [A.K.] would ever go through all of this to make it up. What they told you was what happened to them. [A.K.] was systematically, and over the course of years, sexually abused by that defendant. That is what happened. If you believe them, if you believe what they told you on the stand, the defendant is guilty. What they told you was the truth. What they told you happened. The defendant is guilty. That is reasonable doubt. That is all I have to prove. I don't have to get everything*

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<sup>1</sup> This comment was objected to and the objection was sustained – although no corrective instruction was sought or given.

<sup>2</sup> This comment was also objected to and the objection was sustained – although, again, no corrective instruction was sought or given.

defense counsel says. Oh, well, maybe I could have gotten medical records. That is not what reasonable doubt is. Reasonable doubt is your belief in truth of charges. *When you listen to [A.K], when you listen to [A.C], what they are telling you is what happened to them.* RP 451-52.

**B. Facts**

Jeff and Kristine Roetger were married on June 16, 2006 and have been married ever since. RP 335, 337. They each entered the marriage with children: Mr. Roetger with one son, Mrs. Roetger with two sons and a daughter, A.K. RP 335-36. A.K. was seven or eight when Mr. and Mrs. Roetger began their relationship. RP 336. Mr. Roetger was blamed for breaking up the relationship between Mrs. Roetger and her former husband (A.K.'s father). RP 336.

From 2005 to 2011, Mr. Roetger worked at a company called Expeditors – working first as a “warehouseman” driving a forklift and later as a shift lead. RP 338. He worked the swing shift during that period of time which meant he worked from roughly 3:00 p.m. each day until 11:00 p.m. or later. RP 339. Because A.K. was not home from school until after Mr. Roetger would leave for work each day, they were not home at the same time. RP 341.

During this period of time, A.K. developed a friendship with a classmate, A.C. RP 342. By all accounts A.K. and A.C. were close friends throughout elementary school. RP 148. A.C. would “sleep over a lot, stay over a lot.” RP 224. A.K. and A.C. drifted apart after elementary school and were no longer friends after that. RP 148.

On August 15, 2011, Mr. Roetger became aware that he was being falsely accused of raping and molesting his step-daughter A.K. and molesting A.C. RP 364. He was soon thereafter contacted by police. He voluntarily cooperated and gave a statement – adamantly denying the allegations. RP 364-65.

At trial, the State's case against Mr. Roetger did not include any physical evidence nor any eyewitness testimony; rather its case relied entirely on the testimony of A.K. and A.C. See RP's generally. A.K. and A.C.'s versions of Mr. Roetger's alleged brazen misconduct varied greatly in both what they personally observed, but also from statement to statement. Upon being confronted with their inconsistencies, oftentimes the allegations evolved again. For example:

A.C. claimed she and A.K. accompanied Mr. Roetger to his work one time and while there, they were playing under a desk. A.C. claimed Mr. Roetger told the girls that they could not come out from under the desk unless they lifted their shirts and exposed their breasts to him. RP 156. A.C. admitted seeing security cameras in the office. RP 162. A.C. stated that no contact occurred. A.K. testified differently, saying Mr. Roetger touched both girls during that visit to Mr. Roetger's place of work. RP 207. In a previous interview she stated that no contact had occurred that day. RP 215.

A.C. alleged that she and A.K. rode in Mr. Roetger's car and that he would allow them to sit on his lap and control the steering wheel but

during that time he would inappropriately touch them. RP 157. She specifically testified that Mr. Roetger would have one hand on the steering wheel and would touch her with the other hand. RP 164. This was inconsistent with what she stated during a defense interview -- where she specifically stated Mr. Roetger did not have either hand on the steering wheel. RP 166. She could not remember if the vehicle was big or small, nor whether it was a car or truck. RP 166. A.K. said this occurred when she was 14 or 15. RP 222. She said it occurred 4 or 5 times. RP 222. A.K. testified that she would sit on Mr. Roetger's lap and that A.C. would do the same. RP 222-23. This was inconsistent with what A.K. stated during a prior interview where she denied that she or A.C. had ever sat in Mr. Roetger's lap. RP 223. When confronted with this inconsistency, A.K. admitted that Mr. Roetger never touched her or A.K. inappropriately while driving. RP 223.

A.K. testified about an incident where Mr. Roetger had allegedly taken her to the warehouse at his job and tried to take off her pants and put his fingers and his penis on or in her vagina. RP 226. This was inconsistent with a pretrial interview where she denied Mr. Roetger used his finger or his penis. RP 227. She outright admitted that her previous statement was different than her trial testimony. RP 227.

A.K. testified she never told her mom (Kristine Roetger) about the alleged abuse, however, that was inconsistent with what she stated in a different interview -- where she stated she tried to tell her mom what was

allegedly occurring. RP 212-13. Mrs. Roetger denied any such conversation ever occurred. RP 302.

During a pretrial interview, A.K. was adamant that she was abused by Mr. Roetger "every day." RP 217. However, this was different than her trial testimony where she stated the incidents were sporadic. RP 216. During cross-examination it was pointed out that during her pretrial interview she actually had told multiple different versions of the same statement regarding frequency of contact. RP 217. However, A.K. stubbornly declined to admit that she was making two different statements. RP 217-218.

A.C. claimed she went with A.K.'s family to Ocean Shores. RP 149. On that trip, A.C. and the Roetger family were swimming and playing in a hotel pool. RP 154. A.C. stated that Mr. Roetger touched her inappropriately in the swimming pool. RP 154. She stated that several members of Mr. Roetger's family were present in the pool when this molestation was allegedly occurring. RP 168. A.K. testified that she did not remember A.C. accompanying the Roetger family vacation to Ocean Shores. RP 191. Mrs. Roetger testified that A.C. was there but that her entire family was in the pool as were at least six other hotel guests. RP 304. She did not observe anything inappropriate. RP 306.

A.C. also claimed that she accompanied A.K.'s family to Wild Waves and that Mr. Roetger inappropriately touched her vagina in the Wild Waves pool. RP 155. She admitted Mrs. Roetger and several family

members – in addition to many people from the crowd – were present when this touching allegedly occurred. RP 170-71.

A.C. described an incident where she was watching TV at A.K.'s house when Mr. Roetger allegedly reached around her shoulder and fondled her breast. RP 159. She claimed Mrs. Roetger possibly witnessed this. RP 160. Mrs. Roetger denied ever witnessing such an incident. RP 308.

A.K. testified the only person she told about the abuse was A.C. and then seconds later stated that she also told another girl, Jennifer Adamson. RP 218. Similarly, she told an interviewer that Mr. Roetger would show favoritism towards his son, Connor and then rub A.K.'s face in it. RP 220. She denied that occurred during trial. RP 220.

Regarding whether misconduct occurred during the frequent sleep overs, A.K.'s testimony was wildly inconsistent. RP 224. She first stated that inappropriate conduct occurred during the sleep overs. Id. Then she stated it didn't. Id. She then testified that it did. RP 224.

#### V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Pursuant to RAP 13.5A and RAP 13.4(b), this Court will accept an petitioner's petition if the decision of the Court of Appeals was in conflict with decisions of this Court or other decisions of the Court of Appeals – or if the case involves a significant question of constitutional law or public interest. RAP 13.4(b)

Here, as set forth below, this Court should accept Mr. Roetger's petition because the Court of Appeals' decision was in conflict with several prior cases decided by this Court and others.

**A. THE COURT OF APPEALS DECISION AFFIRMING MR. ROETGER'S CONVICTION – DESPITE NUMEROUS IMPROPER REMARKS DURING THE STATE'S CLOSING ARGUMENT – WAS IN CONFLICT WITH SEVERAL CASES DECIDED BY THIS COURT, THE U.S. SUPREME COURT, THE COURT OF APPEALS AND THE NINTH CIRCUIT.**

Whether a witness has testified truthfully is for the jury to determine. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (*plurality opinion*) (citing United States v. Brooks, 508 F.3d 1205, 1210 (9<sup>th</sup> Cir. 2007)). "It is improper for a prosecutor personally to vouch for the credibility of a witness." State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Improper vouching generally occurs if the prosecutor expresses her personal belief as to the witness' credibility or indicates that evidence not presented at trial supports the witness's testimony. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). "[T]he prosecutor has a special obligation to avoid 'improper suggestions, insinuations, and especially assertions of personal knowledge.'" United States v. Roberts, 618 F.2d 530, 533 (9<sup>th</sup> Cir. 1980) (*quoting Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L.Ed.2d 1314 (1935)).

Improper prosecutorial remarks deny a defendant a fair trial and necessitate a new trial if there is a substantial likelihood that the comments affected the verdict. State v. Echevarria, 71 Wn.App. 595, 597, 860 P.2d

420 (1993). Even in the absence of an objection by the defense, reversal is still required if the remarks were so flagrant or ill-intentioned that no curative instruction could have obviated the prejudice. Echevarria, 71 Wn.App. at 597.

In In re the Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673, 675 (2012) this Court stated:

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. “A “[f]air trial” certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.”

Id. at 677 (internal citations omitted).

In Glassman, this Court went on to cite the commentary on the *American Bar Association Standards for Criminal Justice* std. 3-5.8, which holds:

The prosecutor’s argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor’s conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor’s arguments, not only because of the prestige associated with the prosecutor’s office but also because of the fact-finding facilities presumably available to the office.

Glasmann, 286 P.3d at 679 (quoting *American Bar Association Standards for Criminal Justice* std. 3-5.8).

Here, as shown above, during closing arguments the State made numerous conclusory remarks about Mr. Roetger's guilt; each of which were poorly masked statements about what the State "believed." The remarks served as personal testimony from the prosecutor who was acting as a witness; informing the jury of what the State believed. That was improper. That it happened numerous times only served to tilt the balance of fairness away from Mr. Roetger, thereby denying him his constitutional right to a fair trial from an impartial jury.

Further, the prosecutor's statements served as personal testimony bolstering the credibility of the State's witnesses while disparaging the credibility of Mr. Roetger and his witnesses. That was improper. The jury was the fact-finder and its job was to conclude which witnesses were credible and which were not. Testimony from the State about what or who it believed further served to deny Mr. Roetger a fair trial.

The prosecutor's office has inherent "prestige" that jurors are aware of as set forth in the ABA comment cited in Glasmann. In other words, jurors see prosecutors as credible. If the prosecutor is allowed to testify as to what he/she believes, the defendant is denied the presumption of innocence and placed in a position of proving the prosecutor's beliefs are wrong. This again serves to deny a defendant like Mr. Roetger his right to a fair trial.

The ABA comment also discusses the presumed "fact-finding facilities" of the prosecutor's office. This presumption from the jury that

the prosecutor “really knows what happened” tips the balance against the defendant if the prosecutor is allowed to express that belief in trial rather than let the evidence determine guilt.

The jury in Mr. Roetger’s case was not presented with physical evidence of guilt or eyewitness testimony. The case came down solely to the accusations of A.K. and A.C. versus Mr. Roetger’s denial of the accusations. Mr. Roetger has highlighted the numerous inconsistencies in the testimony and statements of his accusers. The jury apparently looked past the inconsistencies and found an “abiding belief” in the truth of the charges. However, the jury was exposed to the multiple instances of prosecutorial misconduct in the State’s closing and rebuttal closing arguments. Mr. Roetger could not cross-examine the prosecutor. The State received the benefit of having a witness with inherent prestige and inherent fact-finding facilities testify in its closing argument. That was improper. This Court should, respectfully, accept review and reverse Mr. Roetger’s convictions.

**B. THE COURT OF APPEALS’ DECISION AFFIRMING MR. ROETGER’S CONVICTIONS – DESPITE HIS COUNSEL’S FAILURE TO OBJECT TO THE NUMEROUS IMPROPER REMARKS DURING THE STATE’S CLOSING ARGUMENT – WAS A FAILURE TO APPROPRIATELY FIND THAT MR. ROETGER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AS SET FORTH IN THE MANY CASES CITED BELOW.**

To show ineffective assistance of counsel, a defendant must show that (1) his or her lawyer’s representation was deficient, and (2) the

deficient performance prejudiced him/her. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) . Representation is deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs when but for counsel's deficient performance, the proceeding's result would have been different. McFarland, 127 Wn.2d at 335. If a party fails to satisfy one prong, this Court need not consider the other. State v. Foster, 140 Wn.App. 266, 273, 166 P.3d 726, *rev. denied*, 162 Wn.2d 1007 (2007).

Courts are highly deferential to counsel's performance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Strickland, 466 U.S. at 689. Tactical decisions cannot form the basis for a claim of ineffective assistance of counsel. McFarland, 127 Wn.2d at 336.

Here, as noted above, the prosecutor made numerous statements vouching for the credibility of the alleged victims and the truthfulness of their testimony and the State's case. Defense counsel only objected to two of the remarks. Both objections were sustained but no curative instructions – nor a mistrial – were sought. The jurors were never instructed to disregard the prosecutor's improper remarks. In a trial where credibility of the witnesses was paramount, to allow the State to effectively testify that the alleged victims were credible witness was to allow the jury to be swayed in favor of believing them.

There is no evidence or reasonable justification to contend that the decision not to object to the numerous remarks was tactical, nor can it be argued that counsel shouldn't have sought curative relief or a mistrial when his objections were sustained. Again, credibility was critical in this case – as the accusers' statements provided the only "evidence" of criminal behavior. Nothing could be gained by allowing additional evidence and support favoring the credibility of those who testified against Mr. Roetger.

The second prong of the Strickland test requires the defendant to show prejudice – i.e. that the result of the trial would have been different but for the ineffective representation. While this is a somewhat ambiguous and subjective standard, it is clear that in this case the credibility of the witnesses was the determinative factor. There was no physical evidence or eyewitness testimony from others besides the alleged victims to support the charges and their testimony was replete with inconsistencies. Therefore, without independent evidence of guilt, it is clear that the result of the trial would have been different had counsel objected to each of the instances of misconduct and sought curative relief or a mistrial following the objections that were sustained.

**C. THE COURT OF APPEALS' DECISION WAS IN DIRECT CONFLICT WITH STATE V. CARVER, 37 WN.APP. 122, 678 P.2d 842 (1984).**

At trial, Mr. Roetger sought to present evidence that one of his alleged victims, A.K., had been abused by her brother during a period

between 2003 and 2004 (the allegations against Mr. Roetger allegedly began in 2005). RP 35-54. The State sought exclusion of the same evidence citing, among other things, the rape shield statute. Id.

Specifically the defense sought to present the evidence so as to rebut the inevitable presumption from the jury that A.K.'s sexual knowledge was connected to acts involving Mr. Roetger. Defense counsel briefed the matter and it was argued in pretrial motions. Id., RP 35-54. The Court excluded the evidence. RP 54.

The trial court's decision to exclude the evidence was in direct conflict with State v. Carver, 37 Wn.2d 122, 678 P.2d 842 (1984). In Carver, this Court held that the evidence of prior sexual abuse was relevant to Carver's defense because without it, the state could argue that the victims would not have knowledge of sex acts but for the (alleged) acts of the defendant.

Carver is on-point. The allegations from A.K. and A.C. involved sexual touching of several different varieties allegedly beginning in elementary school. The jury was left with the presumption that the accusers would not be aware of such sexual acts but for the acts of Mr. Roetger. This was unfair where A.K. had been subjected to similar abuse by her brother and likely learned about those sexual acts from him. That A.K. and A.C. were best friends suggests A.C.'s knowledge of those sex acts may have come from A.K.'s disclosures to her about what her brother was doing – not from incidents involving Mr. Roetger.

The exclusion of the prior sex abuse evidence served to deny Mr. Roetger the ability to challenge his accusers' basis of sexual knowledge. It also denied him his constitutional right to confront his accusers and present a defense. For those reasons, respectfully, this Court should accept review and reverse his convictions.

VI. CONCLUSION

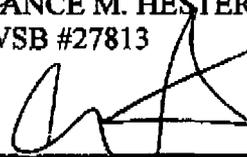
Based on the arguments, records and files contained herein, Petitioner respectfully requests that this Court accept review of this matter and reverse Mr. Roetger's convictions.

Respectfully submitted this 22<sup>nd</sup> day of September, 2015.

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**CERTIFICATE OF SERVICE**

Kathy Herbstler, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the petition for review to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington, this 22<sup>nd</sup> day of September, 2015.

  
KATHY HERBSTLER

0008  
8251  
8/27/2015

**FILED**  
**AUGUST 25, 2015**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

STATE OF WASHINGTON,	)	No. 33231-4-III
	)	
Respondent,	)	
	)	
v.	)	
	)	
JEFFREY ALLEN ROETGER,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

BROWN, J. — Jeffrey A. Roetger appeals his convictions for first, second, and third degree rape of a child and two counts of first degree child molestation involving his step daughter, A.K., and her friend, A.C. He contends prosecutorial misconduct, ineffective assistance of counsel, and denial of his right to confront witnesses. In his pro se statement of additional ground for review (SAG), Mr. Roetger reiterates some of his appellate counsel's concerns and adds cumulative error. We affirm.

**FACTS**

Mr. Roetger and Kristine Roetger met in June 2001 and were married in June 2006. A.K. was 10 when her mother and Mr. Roetger married and her best friend was



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A.C. They spent significant time at each other's houses and often had sleepovers. The pair later drifted apart as they entered junior high school.

A.K. described a long history of abuse by Mr. Roetger. When A.K. was in the fourth grade, she remembers him touching her breasts over her clothes. On one occasion that year, Mr. Roetger held her down in his bedroom and touched her with his penis. A.K. also reported that when she was 12 years old, Mr. Roetger would come into her room and touch her over and under her clothes. A.K. described a specific incident where Mr. Roetger took her to the warehouse where he worked and touched her vagina with both his fingers and his penis. A.K. also recalled when she was 12 years old, Mr. Roetger entered her vagina with his penis. A.K. described Mr. Roetger putting his fingers inside her vagina and holding her down and using his mouth to touch her vagina.

A.K.'s friend, A.C., detailed an incident where she went with the Roetgers to Ocean Shores and Mr. Roetger took her into the deep end of the hotel pool to teach her how to swim. While in the pool, Mr. Roetger touched her vagina over her bathing suit. A.C. was 10 years old at the time. A.C. went to Wild Waves Theme Park with the Roetgers, where Mr. Roetger again touched her vagina over her bathing suit. A.C. described a time in fifth grade when she and A.K. were at Mr. Roetger's work and Mr. Roetger asked the girls to lift their shirts. That same year, A.C. recalled riding on Mr. Roetger's lap while he drove his car, and Mr. Roetger rubbed her leg and breasts while she was on his lap. A.C. witnessed Mr. Roetger doing the same to A.K. A.C. testified

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that in the time she knew Mr. Roetger, he touched her breasts and vagina about five times over her clothing.

Neither A.K. nor A.C. initially reported these incidents. A.C. testified she was embarrassed, scared, and did not think anyone would believe her because Mr. Roetger told her no one would. A.K. similarly related she was too scared to say anything because Mr. Roetger told her not to tell anyone. Two to three years later, and after the girls were no longer close friends, A.C.'s mother overheard a conversation between A.C. and two other friends. Later, A.C.'s mother asked her about the conversation and A.C. confided in her mother, "That [A.K.] had been raped" and then told her mother several instances where Mr. Roetger had touched her inappropriately. Report of Proceedings (RP) at 152. A.C. told her mother she had witnessed Mr. Roetger inappropriately touch A.K. A.C.'s mother immediately reported the abuse and called A.K.'s mother. A.K.'s mother did not believe the allegations; A.K. moved in with her father.

The State charged Mr. Roetger with three counts of first degree rape of a child as to A.K., one count of first degree child molestation as to A.K., one count of first degree child molestation as to A.C., one count of second degree rape of a child as to A.K., and one count of third degree rape of a child as to A.K.

Before trial, the State moved to exclude alleged past sexual abuse of A.K. by another family member as not probative and unfairly prejudicial. The trial court noted

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the case did not fall under the Rape Shield Statute, RCW 9A.44.202, but determined the evidence was not relevant under ER 403 and excluded it.

At trial, both A.K. and A.C. testified against Mr. Roetger. Mr. Roetger testified, denying the allegations and challenging A.K. and A.C.'s credibility. A.K.'s mother testified for the defense.

During closing and rebuttal argument, the prosecutor partly argued:

Those are the incidents. You find any one of those happened, any one of those two beyond a reasonable doubt, then he is guilty. They both happened. He is guilty of molesting [A.C.].

The simple fact is she didn't make this up. It happened to her at the hands of the defendant. The defendant repeatedly violated her, over and over and over. For that, he should be held responsible. For that, he is guilty of all seven counts and the aggravators.

RP at 403, 409. Later the prosecutor added:

Somebody is incredible [sic] here. It is the defendant and his wife, the stories you heard from them. They are just that, stories.

You judge credibility. Look at how they testified. What you saw from [A.K.] was real emotion that was not faked. She was giving you the real story. It was emotional for her. She had problems getting it out. That was real. You looked at [A.C.]. When [A.C.] was testifying, defense counsel was standing in a manner that made her eyesight go to the defendant. She was in fear. She asked him to move for that reason so she didn't have to look over there. That is real fear. That is not something that is faked.

RP at 436, 438-39. Later, the prosecutor argued:

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Oh, I think [A.K.] is getting it smacked right in her face. [A.K.] understands exactly the reality of her situation. Her mom has basically disowned her as a result of this. Counsel said, well, one of the things, one of the things he pointed out is sometimes kids make this up so that mommy will kick daddy out of the house. Well, that's not what happened here. This came to light and [A.K.] got the boot right away. [A.K.'s mom] wasn't even truthful about what happened there on the stand. Trying to make herself look better. We will get to that.

RP at 439-40. The prosecutor continued:

The stories [A.K. and A.C.] give you are consistent. They are consistent in that it happened. These acts happened. The defendant is living a nightmare for three years. He raped and molested two girls. They have lived with that since they were children. I don't care about his nightmare. Neither should you.

RP at 441. Defense counsel objected to the comment about not caring about Mr.

Roetger's nightmare as inflaming the jury. The court sustained the objection. Next, the prosecutor stated:

This is not embellishment. This is what happened to her. That's what she's telling you.

Now, I have no doubt at some point [Mr. Roetger] did that when they learned to swim. That's not what was happening on these occasions.

Obviously [Mr. Roetger] didn't have that conversation with her. If it truly happened like he said it did, then you would tell the mom. He didn't. Because it didn't happen that way.

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RP at 442, 446, 448. While discussing A.K.'s mother's testimony, the prosecutor discussed the mother claiming she still had a relationship with A.K. but then retracting that statement:

She's doing that to make herself look good. That is the only reason she did that. No point was that the truth. No point was she truthful here on the stand.

RP at 449. Defense counsel objected based on comment on the credibility of a witness. The court sustained the objection. Lastly, the prosecutor stated:

The defendant is guilty. There is no reason why [A.C.] and A.K.] would ever go through all of this to make it up. What they told you was what happened to them. [A.K.] was systematically, and over the course of years, sexually abused by that defendant. That is what happened. If you believe them, if you believe what they told you on the stand, the defendant is guilty. What they told you was the truth. What they told you happened. The defendant is guilty. That is reasonable doubt. That is all I have to prove. I don't have to get everything defense counsel says. Oh, well, maybe I could have gotten medical records. That is not what reasonable doubt is. Reasonable doubt is your belief in truth of charges. When you listen to [A.K.], when you listen to [A.C.], what they are telling you is what happened to them.

RP at 451-52.

The jury found Mr. Roetger guilty of one count of first degree rape of a child (A.K.), one count of second degree rape of a child (A.K.), one count of third degree rape of a child (A.K.) and two counts of first degree child molestation (A.K. and A.C.). The jury found Mr. Roetger not guilty of the remaining counts. He appealed.

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## ANALYSIS

### A. Prosecutorial Misconduct

The issue is whether Mr. Roetger was denied a fair trial based on prosecutorial misconduct. He contends the prosecutor wrongly commented on witness credibility during his closing remarks. Because defense counsel did not object to a majority of those comments, Mr. Roetger contends he was denied effective assistance of counsel.

Prosecutorial misconduct may deprive a defendant of his right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). To prevail on a claim of prosecutorial misconduct, Mr. Roetger must establish that the conduct was both improper and prejudicial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prosecutorial misconduct is prejudicial where a substantial likelihood exists the improper conduct affected the jury's verdict. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). But where, as here, defense counsel fails to object, any error is waived unless the conduct was so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

Proper and timely objections provide the trial court an opportunity to correct the misconduct and caution jurors to disregard it, preventing abuse of the appellate process and saving substantial time and expense of a new trial. *State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976, cert. denied, 135 S. Ct. 2844 (2015) (citing *State v. Emery*, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012)). In determining if prejudice could have been

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neutralized by an admonition to the jury, we focus less on whether the misconduct was flagrant or ill-intentioned and more on whether any misconduct could have been obviated by a curative instruction. *Emery*, 174 Wn.2d at 762.

The defendant bears the burden of establishing improper arguments and their prejudicial effect. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Even if improper, the prosecutor's remarks are not grounds for reversal "if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *Russell*, 125 Wn.2d at 86. We review the allegedly improper comments in the context of the entire closing argument, the issues presented, the evidence addressed, and the jury instructions. *Russell*, 125 Wn.2d at 85-86.

Mr. Roetger argues 11 remarks during closing argument were improper comments on witness credibility. Two of those comments were objected to by counsel; one of those two, however, was not objected to for the same reason as Mr. Roetger raises on appeal (i.e., defense counsel objected to the comment about not caring about Mr. Roetger's nightmare as inflaming the jury). Thus, the sole comment that we review under the "improper and prejudicial" standard is the prosecutor's comment that the purpose of A.K.'s mother's testimony that she has a good relationship with her daughter was "to make herself look good. That is the only reasons she did that. No point was that the truth. No point was she truthful here on the stand." RP at 449; see *Fisher*, 165 Wn.2d at 747; RP at 449. The court sustained the defense objection.

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The court instructed the jury to "disregard" any inadmissible evidence or remarks. Clerk's Papers (CP) at 150. Further, the court instructed the jury it was "the sole judge[] of the credibility of each witness." CP at 151. Further still, the court instructed the jury, "The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence." CP at 62.

Prejudice occurs where a substantial likelihood exists the improper conduct affected the jury's verdict. *Yates*, 161 Wn.2d at 774. Here, defense counsel objected to a comment on A.K.'s mother's truthfulness, the court sustained the objection, and the court instructed the jury to disregard inadmissible comments. We presume the jury followed the trial court's instructions. *State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1991). Therefore, since we presume the jury disregarded the remark, Mr. Roetger cannot show he was prejudiced by it. Accordingly, Mr. Roetger's challenge to this comment does not amount to reversible error.

The remaining 10 challenged remarks on appeal are reviewed under the "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by admonition to the jury" standard. *Stenson*, 132 Wn.2d at 719. The prosecutor commented, "He is guilty of molesting [A.C.] . . . [A.K.] didn't make this up . . . . Somebody is unbelievable [sic] here . . . . You judge credibility. Look at how they testified. What you saw from [A.K.] was real emotion that was not faked. She was giving you the real story. . . . This came to light and [A.K.] got the boot right

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away. [A.K.'s mom] wasn't even truthful about what happened there on the stand . . . . The stories [A.K. and A.C.] give you are consistent. They are consistent in that it happened. These acts happened . . . . This is not embellishment. This is what happened to [A.K.] . . . . There is no reason why [A.C.] and [A.K.] would ever go through all of this to make it up." RP at 403, 409, 426, 438, 440-41, 451.

It is improper for a prosecutor to vouch for witness credibility because the trier of fact has sole authority to assess the credibility of witnesses. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Vouching may occur in two ways, "the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." *State v. Allen*, 161 Wn. App. 727, 746, 255 P.3d 784 (2011).

A prosecutor has wide latitude to draw reasonable inferences from the evidence. *Stenson*, 132 Wn.2d at 727. It is not misconduct for a prosecutor to argue a witness is truthful based on inferences from the evidence. *State v. Rivers*, 96 Wn. App. 672, 674-75, 981 P.2d 16 (1999). "Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion." *State v. McKenzie*, 157 Wn.2d 44, 54, 134 P.3d 221 (2006) (quoting *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)).

This case centered on witness credibility. Mr. Roetger asserted both A.K. and A.C. were lying and presented evidence to support his defense. Thus, the prosecutor's advice to the jury to believe A.K. and A.C.'s testimony were proper comments on

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witness credibility based on the evidence, not personal opinion. Furthermore, defense counsel invited comments relating to the credibility of the witnesses when he built his case on the theory that A.K. and A.C. were not telling the truth.

Mr. Roetger directs us to our Supreme Court's recent opinion in *Walker*, where the court reversed the defendant's conviction based on prosecutorial misconduct. 182 Wn.2d at 485. But, there, the prosecutor composed a PowerPoint presentation with multiple slides containing altered versions of admitted evidence to support the State's theory of the case, presented derogatory depictions of the defendant, and expressed personal opinions on the defendant's guilt. *Id.* Our case is distinguishable.

Given all, we conclude Mr. Roetger fails to show the prosecutor's comments were so "flagrant and ill-intentioned" that they "evinced an enduring and resulting prejudice that could not have been neutralized by admonition to the jury." *Stenson*, 132 Wn.2d at 719. Accordingly, his prosecutorial misconduct argument fails.

Alternatively, Mr. Roetger contends his attorney provided ineffective assistance of counsel by failing to object to the prosecutor's remarks during closing argument. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness. *Stenson*, 132 Wn.2d at 705-06. To satisfy the prejudice prong, a defendant must show a "reasonable probability that, except for counsel's unprofessional

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errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

We strongly presume counsel provided effective assistance. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). To rebut this presumption, a defendant bears the burden of establishing the absence of any "conceivable legitimate tactic explaining counsel's performance." *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). Here, Mr. Roetger has not shown defense counsel lacked any conceivable and legitimate reason not to object or that if his attorney had objected to the 10 remarks during closing argument, the result of the trial would have been different.

#### B. Confrontation

The issue is whether Mr. Roetger was denied his right to confront witnesses. He contends his Sixth Amendment right to confront A.K. was violated when the court excluded evidence she was allegedly molested in the past by another family member.

The confrontation clause guarantees a criminal the right to confront witnesses against him or her in a criminal prosecution. *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Constitutional issues, such as the potential violations of the Sixth Amendment right to confront witnesses, are subject to de novo review. *State v. Price*, 158 Wn.2d 630, 638-39, 146 P.3d 1183 (2006).

The right to cross-examine adverse witnesses is not absolute. "The confrontation right and associated cross-examination are limited by general

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considerations of relevance." *State v. Darden*, 145 Wn.2d 612, 620-21, 41 P.3d 1189 (2002) (citing ER 401, ER 403). The right is also limited by the Rape Shield Statute, RCW 9A.44.020, that excludes evidence of a victims' prior sexual behavior if offered to attack the credibility of the victim. We review the trial court's limitation of the scope of cross-examination for an abuse of discretion. *Darden*, 145 Wn.2d at 619. Discretion is abused if it is exercised without tenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Before trial, the State successfully requested exclusion of past alleged sexual abuse of A.K. by another family member. The court declined to apply the Rape Shield Statute, RCW 9A.44.202, but determined the evidence was not relevant under ER 403, reasoning, "in balancing the probative value that has been presented to me versus unfair prejudice which involves confusing issues, misleading the jury, I don't see a lot of probative value that has been presented to me at this point." RP at 53.

Under ER 403, evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. The trial court has wide discretion in balancing the probative value of evidence against its potential prejudicial impact. *State v. Coe*, 101 Wn.2d 772, 782, 684 P.2d 668 (1984).

Mr. Roetger argues the excluded evidence was admissible to show A.K. learned about sexual acts from another source. See *State v. Carver*, 37 Wn. App. 122, 124-25, 678 P.2d 842 (1984) (evidence of victims' prior sexual abuse relevant to rebut inference that they would not know about such sexual acts unless they had experienced them

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with defendant). But, the *Carver* court reversed the trial court's exclusion of prior abuse evidence because the victims were "very young girls" and the inference was they could solely have known about sexual acts from the defendant. *Id.* at 124-25. A.K. and A.C., although young at the time of the incidents, were in high school when they reported the abuse and adults by the time trial began. Thus, the risk of the jury inferring that the only knowledge of sexual acts the two adults had was because of Defendant was not present. Therefore, *Carver* is factually distinct from the present case,

Here, the weighing of evidentiary principles -- relevance, probative value, and prejudice -- shows the decision was not made by the trial court for untenable reasons. The court properly considered the evidence and reasonably concluded the evidence should not be admitted. Given all, the court had tenable grounds to exclude evidence of alleged prior sexual abuse. Accordingly, we conclude the court's ruling does not violate the confrontation clause, and, therefore, does not warrant reversal.

#### C. SAG

In his pro se SAG, Mr. Roetger reiterates appellate counsel's adequately addressed confrontation arguments. We are not required to address it further. See RAP 10.10(a) (providing the purpose of an SAG is to "identify and discuss those matters that the defendant believes have not been adequately addressed by the brief filed by the defendant's counsel"). The remaining issue is whether cumulative error denied Mr. Roetger's a fair trial. The cumulative error doctrine mandates reversal where the combined effect of several nonreversible errors denied the defendant a fair trial.

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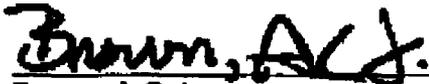
*State v. Davis*, 175 Wn.2d 287, 345, 290 P.3d 43 (2012), *cert. denied*, 134 S. Ct. 62 (2013). Having identified no errors that occurred during Mr. Roetger's trial, this court should decline to grant relief under the cumulative error doctrine.

Affirmed.

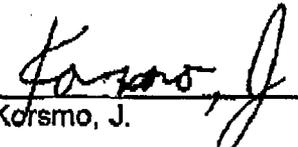
A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

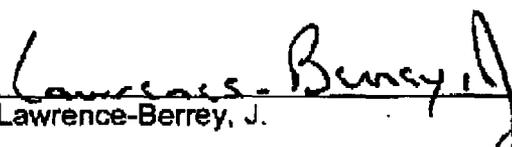
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Brown, A.C.J.

WE CONCUR:

  
Korsmo, J.

  
Lawrence-Berrey, J.