

No. 47373-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Juan Guevara,**

Appellant.

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Grays Harbor County Superior Court Cause No. 13-1-00261-5

The Honorable Judge Mark McCauley

**Appellant's Opening Brief**

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### **ISSUES AND ASSIGNMENTS OF ERROR**

1. Prosecutorial misconduct deprived Mr. Guevara of his Sixth and Fourteenth Amendment right to a fair trial.
2. The prosecutor committed misconduct by shifting the burden of proof onto Mr. Guevara in closing argument.
3. The prosecutor's misconduct in shifting the burden of proof was flagrant and ill-intentioned.
4. Mr. Guevara was prejudiced by the prosecutor's improper argument shifting the burden of proof.

**ISSUE 1:** A prosecutor commits misconduct by improperly shifting the burden of proof onto the accused. Here, the prosecutor argued that the alleged victim "deserve[d] to be believed" unless the jury had a reason to think she was lying. Did prosecutorial misconduct deprive Mr. Guevara of his Sixth and Fourteenth Amendment right to a fair trial?

5. The prosecutor committed misconduct by attempting to bolster the alleged victim's testimony with facts not in evidence.
6. The prosecutor's misconduct in attempting to bolster a witness was flagrant and ill-intentioned.
7. Mr. Guevara was prejudiced by the prosecutor's improper argument in bolstering a state witness.

**ISSUE 2:** A prosecutor commits misconduct by bolstering the testimony of a state's witness with facts that have not been admitted into evidence. Here, the prosecutor argued in closing that the alleged victim's additional allegations against Mr. Guevara were supported by her statements to a nurse examiner despite the fact that there was no evidence to that effect. Did the prosecutor commit misconduct in violation of Mr. Guevara's Sixth and Fourteenth Amendment right to a fair trial?

8. The prosecutor committed misconduct by "testifying" to "facts" not in evidence during closing argument.
9. The cumulative effect of the prosecutor's improper arguments requires reversal of Mr. Guevara's conviction.

**ISSUE 3:** It is misconduct for a prosecutor to “testify” to unadmitted “facts” during closing argument. Here, the alleged victim claimed only that Mr. Guevara had touched her outside of her clothes and once tried unsuccessfully to put his hand inside the back of her pants; still, the prosecutor claimed in closing that Mr. Guevara had “escalated” his attempts by trying to put his hand down the front of her pants right before she disclosed the allegations. Did the prosecutor’s improper argument deprive Mr. Guevara of his Sixth and Fourteenth Amendment right to a fair trial?

10. Mr. Guevara was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
11. Mr. Guevara’s attorney provided ineffective assistance of counsel by failing to object to inadmissible profile testimony.

**ISSUE 4:** Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid tactical reason. Mr. Guevara’s attorney did not object to extensive inadmissible testimony about the “grooming process” used by a typical sex offender. Was Mr. Guevara denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

12. Mr. Guevara’s attorney provided ineffective assistance of counsel by eliciting additional allegations against his client beyond those offered by the state.

**ISSUE 5:** An accused person is denied the effective assistance of counsel when his/her attorney acts unreasonably and prejudices the defense. Here, defense counsel elicited additional allegations against Mr. Guevara -- beyond those offered by the state – which worked to make his client appear much worse. Was Mr. Guevara denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

13. Mr. Guevara’s attorney provided ineffective assistance of counsel by failing to object to extensive prosecutorial misconduct.

**ISSUE 6:** Failure to object to prosecutorial misconduct waives the issue for appeal unless the misconduct is flagrant and ill-

intentioned. Mr. Guevara's attorney failed to protect his client from extensive prosecutorial misconduct in closing argument or to obtain a curative instruction. Did defense counsel provide ineffective assistance under the Sixth and Fourteenth Amendments?

14. Mr. Guevara's exceptional sentence was entered in violation of his Sixth and Fourteenth Amendment right to a jury trial.
15. The jury's special verdict did not validly find aggravating circumstances because it was based in part on factors inherent in the crime.

**ISSUE 7:** A court violates the right to a jury trial by entering a special verdict based on the underlying guilty verdict rather than a valid finding of aggravated circumstances. Here, the jury's finding of the abuse of trust aggravator was based, in part, on the alleged victim's age, which was inherent in the guilty verdict. Was Mr. Guevara's exceptional sentence entered in violation of his Sixth and Fourteenth Amendment right to a jury trial?

16. Mr. Guevara's conviction is not supported by sufficient evidence.
17. No rational jury could have found all of the elements of first degree child molestation in Mr. Guevara's case beyond a reasonable doubt
18. The state did not present any evidence that Mr. Guevara was at least 36 months older than the alleged victim.
19. The state did not present any evidence that Mr. Guevara was not married to the alleged victim.

**ISSUE 8:** A conviction is not supported by sufficient evidence if no rational jury could have found each element proved beyond a reasonable doubt. Here, the state did not present any evidence to prove that Mr. Guevara was 36 months older than and not married to the alleged victim. Is Mr. Guevara's conviction supported by insufficient evidence?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Juan Guevara was the only father figure for his girlfriend's son and daughter as well as his own two sons. RP 20<sup>1</sup>. His girlfriend had chronic health problems requiring medication that made her drowsy. RP 20. She also had issues with drugs and alcohol. RP 94.

Mr. Guevara picked up the slack in the home by doing the laundry, cooking, and other household chores for the whole family. RP 20, 25. He also disciplined all four of the children. RP 25.

Mr. Guevara got along with his girlfriend's daughter, ten-year-old C.M.C. RP 46. He and C.M.C. teased each other and joked around. RP 46.

Mr. Guevara's girlfriend was sexually assaulted when she was a child. RP 28, 114. She talked to her children about that experience starting when they were five years old. RP 28-29. She emphasized that no one should be permitted to touch them in their private areas. RP 29.

C.M.C., did not like it when Mr. Guevara disciplined her. RP 25-26. She would yell and slam doors. RP 26. Once, when she was seven years old, C.M.C. told her mother that Mr. Guevara had touched her inappropriately. RP 28. Mr. Guevara explained that he had had just

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<sup>1</sup> All citations to the report of proceedings are to the 152-page volume created by court reporter Johnston.

rubbed her belly and teased her about gaining weight. RP 24. C.M.C. later admitted that it could have been an accident. RP 30.

When C.M.C. was nine, her mother and Mr. Guevara had a baby together. RP 16. Her mother was busy with the baby and C.M.C. started to act like she was jealous. RP 29, 47. She was grumpy and started talking back more. RP 29. Her mother did not notice C.M.C. acting any differently toward Mr. Guevara. RP 25.

One day, Mr. Guevara took C.M.C. with him to seven-eleven. RP 110. She asked him to buy her hot chocolate but he did not have enough money. RP 110. She became angry and started screaming. RP 110. When they got home, he asked her to put some laundry away and she got angry again. RP 111. Mr. Guevara rubbed her back to try to calm her down. RP 111.

Then C.M.C. gave her mother a note claiming that Mr. Guevara had touched her inappropriately. RP 18, 111. Her mother confronted Mr. Guevara. RP 18, 111. He said that she should call the police if she was concerned. RP 19, 111. He said that he had not done anything wrong and would explain that to the police. RP 112.

The police arrested Mr. Guevara and he told them that C.M.C. was angry at him because of the hot chocolate incident and because he had asked her to do a chore. RP 110-111.

C.M.C. was interviewed by a forensic interviewer. Ex. 2. She said that Mr. Guevara touched her on the outside of her clothes – grabbing her buttocks and sometimes “squeezing” her vaginal area. Ex. 2, pp. 9-10, 12-18. She did not describe any sexual activity that was clearly beyond what any ten year old may be expected to know.

C.M.C. was also interviewed and examined by a sexual assault nurse. RP 79. She refused to submit to a vaginal exam or to give a urine sample. RP 83, 89, 92.

The state charged Mr. Guevara with child molestation in the first degree. CP 7. The state also alleged the aggravating factor that Mr. Guevara had abused a position of trust. CP 7.

The state moved *in limine* to admit C.M.C.’s testimony of alleged touching by Mr. Guevara before the charging period began. RP 8. Mr. Guevara objected, arguing that the evidence was only relevant to show propensity. RP 8-9. The court overruled Mr. Guevara’s objection, but limited the state to admitting allegations close in time to the charging period. RP 11-12.

At trial, C.M.C. described five incidents of Mr. Guevara touching her bottom or vaginal area over her pants, all of them occurring in the family’s most recent home. RP 35-43. C.M.C. also claimed that Mr. Guevara had once tried to put his hand inside of the back of her pants. RP

45. She said that he was unsuccessful in doing so. RP 45. She did not say that Mr. Guevara ever attempted to reach down the front of her pants. RP 45.

On cross examination, defense counsel attempted to confront C.M.C. with her prior statement that it had actually happened eight or nine times. RP 50. In response, C.M.C. claimed, as she had during her forensic interview, that Mr. Guevara had also touched her twice when they lived in a previous home. RP 53. On redirect, the state was then able to ask C.M.C. about the details of those additional allegations. RP 57-58.

The Sexual Assault Nurse Examiner (SANE) nurse testified but did not recount anything that C.M.C. said about specific allegations. RP 75-96. The nurse provided testimony on the “grooming process” in typical sexual assault cases. RP 85-87. She said that the process often looks like normal parental behavior:

The grooming process for children frequently looks like accidental touching, sexualized behaviors, things, you know, a parent figure who always loves them, and he gives them more attention, he gives them extra treats, maybe gives them that certain bit of love that they may not find someplace else. So, the grooming process can really look like normal behaviors...  
RP 86.

After the state rested, Mr. Guevara moved to dismiss the charge. RP 117. He pointed out that the state had not presented any evidence of Mr. Guevara’s age to prove that he was at least 36 months older than

C.M.C. RP 117. He also noted that the state had not presented any evidence that Mr. Guevara and C.M.C. were not married. RP 118. The court denied the motion, finding that circumstantial evidence that Mr. Guevara had a son, was dating C.M.C.'s mother, and could drive was sufficient to meet those elements. RP 122.

Regarding the abuse of trust aggravator, the court instructed the jury that they could consider "the vulnerability of the victim because of age or other circumstance." CP 24.

In closing, the prosecutor argued that the jury should believe C.M.C.'s testimony unless there was affirmative evidence that she was lying:

And every person that takes that chair deserves to be believed. The reason why justice is blind, it doesn't matter what your gender is, what your age is, what your race is. They deserve to be believed until you have a reason to do otherwise. And in this case, she has given you no reason. There has been no evidence that tells you she is doing anything other than telling the truth.  
RP 145.

... and she has given you no reason not to believe her. And by the law, her testimony supports a conviction.  
RP 149.

The prosecutor argued that Mr. Guevara had escalated his attempts against C.M.C. by trying to put his hand down the front of her pajama pants. RP 128. She claimed that C.M.C. had discussed the allegations in

the previous home with the sexual assault nurse so the jury knew that she had not made them up on the stand. RP 134.

The state also recounted the SANE nurse's testimony about the "grooming process" to argue that treating a child well and seemingly innocent touching is a normal mechanism of molestation. RP 127. She said that Mr. Guevara's loving, fatherly behavior was part of what prevented C.M.C. from revealing the allegations earlier. RP 127.

The jury convicted Mr. Guevara and answered yes to the interrogatory asking whether he had abused a position of trust. CP 26-27.

Mr. Guevara's only criminal history was a misdemeanor conviction for harvesting forest products without a permit. CP 32. The court gave him an exceptional sentence of 84 months to life. CP 43-44.

This timely appeal follows. CP 55.

### **ARGUMENT**

**I. THE PROSECUTOR COMMITTED MISCONDUCT BY IMPROPERLY SHIFTING THE BURDEN OF PROOF ONTO MR. GUEVARA, BOLSTERING THE ALLEGED VICTIM'S TESTIMONY WITH FACTS NOT IN EVIDENCE, AND OTHERWISE "TESTIFYING" TO "FACTS" NOT IN EVIDENCE**

The state did not present any real evidence against Mr. Guevara beyond C.M.C.'s testimony. In closing, instead of merely recounting the evidence against Mr. Guevara, the prosecutor argued that C.M.C. "deserved to be believed" unless the jury had an affirmative reason to

think she was lying. RP 145, 149. She said that the jury should convict Mr. Guevara because there was no evidence that C.M.C. was lying. RP 145, 149.

The prosecutor claimed that C.M.C.'s testimony was backed up by her prior statements to the sexual assault nurse, even though the nurse did not testify regarding any such statements. RP 134.

She also argued that Mr. Guevara had "escalated" his attempts against her by trying to put his hand down the front of her pants, even though C.M.C. never claimed that he had done so. RP 128.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "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.” Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

Prosecutorial misconduct requires reversal, even absent an objection below, if it is so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012).

- A. The prosecutor improperly shifted the burden of proof onto Mr. Guevara by arguing that everyone who testifies alleging sexual abuse “deserves to be believed” unless proven unreliable and that the jury should convict Mr. Guevara because they had not been given a reason to think that C.M.C. was not telling the truth.

The state’s case against Mr. Guevara turned on C.M.C.’s credibility. In closing, the prosecutor argued that C.M.C. “deserved to be believed” because “justice is blind.” RP 145. She said that every witness in the case (all of whom testified on behalf of the state) was to be believed unless the jury had an affirmative reason to think s/he was lying. RP 145.

The prosecutor argued that the jury should believe C.M.C., specifically, because “there has been no evidence that tells you she is doing anything other than telling the truth.” RP 145, 149.

The prosecutor's arguments constituted flagrant and ill-intentioned misconduct because they improperly shifted the burden of proof onto Mr. Guevara to produce evidence that C.M.C. was lying.

Due process places the burden on the state to prove each element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; art. I, § 22; *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing *Jackson v. Virginia*, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).<sup>2</sup> The presumption of innocence makes up the "bedrock principle upon which our criminal justice system stands." *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010).

A prosecutor commits misconduct by making arguments shifting the burden of proof onto the accused. *State v. Walker*, 164 Wn. App. 724, 732, 265 P.3d 191 (2011). A prosecutor's misstatement of the state's burden of proof "constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *Johnson*, 158 Wn. App. at 685-86.

It is also misconduct for a prosecutor to argue that the jury has to find that the state's witnesses are lying in order to acquit the accused. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). Such

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<sup>2</sup> This violation of Mr. Guevara's right to the presumption of innocence created manifest error affecting a constitutional right, which may be raised for the first time on appeal. RAP 2.5(a)(3).

arguments subvert the presumption of innocence and infringe upon an accused person's decision to remain silent at trial. *Id.* at 214.

Here, the prosecutor improperly shifted the burden of proof onto Mr. Guevara by arguing that C.M.C. "deserved to be believed" unless the jury had an affirmative reason to think she was lying. The argument implied that Mr. Guevara had a duty to present evidence impeaching C.M.C.'s credibility in order to be acquitted.

Indeed, the jury did not need to think C.M.C. was lying in order to acquit Mr. Guevara. Rather, they were *required* to acquit him *unless* they were convinced of his guilt beyond a reasonable doubt. *Fleming*, 83 Wn. App. at 213. If the jury had doubts regarding whether C.M.C. was mistaken, recalled the events incorrectly, or simply thought her testimony was insufficient to prove guilt beyond a reasonable doubt, acquittal was required. *Id.* None of those circumstances would have required the jury to find that C.M.C. did not "deserve to be believed."

Mr. Guevara was prejudiced by the prosecutor's improper burden-shifting argument. *Glasmann*, 175 Wn.2d at 704.

The evidence against him was not overwhelming. C.M.C. did not demonstrate precocious knowledge of sexual matters, claiming only that Mr. Guevara had touched her outside of her clothes. RP 35-43. She refused to submit to a vaginal exam even though she claimed that Mr.

Guevara had “squeezed” her so hard earlier that day that it had caused her pain. RP 43, 83. She regularly acted out when Mr. Guevara disciplined her and knew that claims of inappropriate touching were a surefire way to get her distant mother’s attention. RP 25-26, 28-29. The state’s case against Mr. Guevara was not so strong that the prosecutor’s improper arguments had no effect.

Additionally, Mr. Guevara exercised his right to remain silent at trial. RP 123. Accordingly, his defense hinged on the proper application of the presumption of innocence and the state’s burden of proof. The prosecutor’s arguments created an erroneous legal landscape in which acquittal was virtually impossible unless Mr. Guevara presented affirmative evidence in his defense. There is a substantial likelihood that the prosecutor’s improper argument affected the outcome of Mr. Guevara’s trial. *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707.

The *Fleming* court found the argument in that case to constitute flagrant and ill-intentioned misconduct because it was made more than two years after previous case ruling such an argument to be improper.

*Fleming*, 83 Wn. App. At 214 (citing *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991)). Here, the prosecutor made the same improper argument in Mr. Guevara’s case eighteen years after the court’s decision in *Fleming*. The argument was also long after numerous decisions reversing convictions based on a prosecutor’s improper shifting of the burden of proof onto the accused in other ways. See e.g. *Walker*, 164 Wn. App. at 732; *Johnson*, 158 Wn. App. at 685-86.

The prosecutor violated long-standing case law prohibiting exactly the type of argument that she made in Mr. Guevara’s case. *Id.* Her misconduct was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707.

Arguments with an “inflammatory effect on the jury” are also generally not curable by an instruction. *Pierce*, 169 Wn. App. at 552. The prosecutor’s argument that C.M.C. “deserved” to be believed because “justice is blind” encouraged the jury to convict Mr. Guevara based on emotion rather than evidence. The argument’s prejudicial effect could not have been undone by an instruction from the court. *Id.*

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by making arguments improperly shifting the burden onto Mr. Guevara to prove his innocence. *Walker*, 164 Wn. App. at 732; *Johnson*, 158 Wn. App. at 685-86. Mr. Guevara’s conviction must be reversed. *Id.*

- B. The prosecutor committed misconduct by bolstering C.M.C.’s testimony with “facts” not in evidence.

During C.M.C.’s testimony, it was unclear whether she had alleged additional acts of molestation by Mr. Guevara (those allegedly occurring in the previous home) for the first time on the stand. RP 52-54.

In response to that issue, the prosecutor claimed in closing that C.M.C.’s additional claims were not fabricated because she had told the sexual assault nurse about them during her interview. RP 134. But the sexual assault nurse did not say anything about any allegations of molestation in the previous home. RP 75-96. Her report is also silent on the matter. Ex. 3.

A prosecutor commits misconduct by “testifying” during closing argument to “facts” not in evidence. *Glasmann*, 175 Wn.2d at 705. A prosecutor may not make arguments bolstering the credibility of a witness even if the evidence supports such an argument. *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008); U.S. Const. Amend. VI, XIV; art. I, § 22.<sup>3</sup> Accordingly, a prosecutor commits misconduct by attempting to bolster a witness’s credibility with prejudicial “facts” not in evidence. *Jones*, 144 Wn. App. at 292-94.

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<sup>3</sup> This violation of Mr. Guevara’s right to a fair trial created manifest error affecting a constitutional right, which may be raised for the first time on appeal. RAP 2.5(a)(3).

Here, the prosecutor's argument bolstered C.M.C.'s testimony about the additional allegations by referring to "facts" that were never admitted into evidence. The argument encouraged the jury to find C.M.C. more credible regarding the additional allegations even when no evidence supported such a conclusion. The prosecutor's argument was improper. *Jones*, 144 Wn. App. at 292-94.

Mr. Guevara was prejudiced by the prosecutor's improper bolstering of C.M.C.'s testimony. *Glasmann*, 175 Wn.2d at 704. As outlined above, the evidence against Mr. Guevara was far from overwhelming. The defense theory relied, in part, on the idea that C.M.C. was not credible because she had changed her story regarding the number of times Mr. Guevara had allegedly touched her. RP 140. Rather than relying on the admitted evidence, the prosecutor responded to this argument by relying on "facts" that were never admitted. RP 134. There is a substantial likelihood that the prosecutor's improper argument affected the verdict. *Id.*

Reversal is required because the prosecutor's improper argument was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707. Again, the prosecutor had access to long-standing case law proscribing exactly the type of argument she made in Mr. Guevara's case. *See e.g. Jones*, 144 Wn. App. at 292-94. The introduction of additional "evidence" in the case

would also have been difficult to cure with an instruction from the court once the bell had been rung.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct in Mr. Guevara's case by improperly bolstering C.M.C.'s testimony with "facts" that were not in evidence. *Jones I*, 144 Wn. App. at 292-94. Mr. Guevara's conviction must be reversed. *Id.*

C. The prosecutor improperly "testified" to "facts" not in evidence by claiming that Mr. Guevara had escalated his attempts against C.M.C. by trying to put his hand down the front of her pants.

The alleged touching by Mr. Guevara that C.M.C. described did not change much over time. RP 35-43. Even though it had allegedly gone on for about a year, C.M.C. described only touching of her buttocks and "squeezing" of her vaginal area from the outside of her clothing. RP 35-43. The only other act that C.M.C. alleged was that Mr. Guevara once tried unsuccessfully to put his hand down the back of her pants. RP 45. She did not specify when that had happened. RP 45.

Still, the prosecutor argued in closing that Mr. Guevara had "escalated" his conduct. RP 128. She claimed that Mr. Guevara had taken it "one step further" during the last incident by trying to put his hand down the *front* of C.M.C.'s pajama pants. RP 128. The prosecutor committed misconduct by "testifying" to "facts" that were not in evidence.

A prosecutor commits misconduct by urging a jury to consider “facts” that have not been admitted into evidence. *Glasmann*, 175 Wn. 2d at 705; *Pierce*, 169 Wn. App. at 553.

Here, the prosecutor’s argument distorted C.M.C.’s testimony by making it appear as though Mr. Guevara’s actions had intensified right before C.M.C. reported them to her mother. RP 128. She also misrepresented the evidence as showing that Mr. Guevara had tried to put his hand down the front of C.M.C.’s pants when she never claimed that he had done so. RP 128.

Mr. Guevara was prejudiced by the prosecutor’s improper “testimony” to “facts” not in evidence. *Glasmann*, 175 Wn.2d at 704. One of the holes in the state’s case was that C.M.C. did not exhibit knowledge of sexual matters beyond that of a typical ten-year-old. The allegations she described mirrored what a child might imagine when told repeatedly by her mother that people may try to touch her inappropriately in her private areas. RP 35-43. She also did not claim that Mr. Guevara’s advances had ever intensified even though they allegedly spanned a year. RP 35-43. Still, the prosecutor argued that his actions had “escalated” during the final allegation because Mr. Guevara tried to put his hand down the front of C.M.C.’s pants. RP 128.

The prosecutor's fabricated "evidence" also offered an explanation for the timing of C.M.C.'s reporting beyond the fact that she was angry because Mr. Guevara had refused to buy her hot chocolate and then asked her to put laundry away. There is a substantial likelihood that the prosecutor's improper argument affected the verdict. *Id.*

Reversal is required because the prosecutor's misconduct was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707. Once again, the prosecutor had access to long-standing case law prohibiting the injection of "facts" not in evidence into closing argument. *See e.g. Id.*; *Pierce*, 169 Wn. App. at 553. The bell of the additional "evidence" would also have been difficult to un-ring with a curative instruction.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by "testifying" to "facts" not in evidence during closing argument. *Id.* Mr. Guevara's conviction must be reversed. *Id.*

D. The cumulative effect of the prosecutor's misconduct requires reversal of Mr. Guevara's convictions.

The cumulative effect of repeated instances of prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *Walker*, 164 Wn. App. at 737.

Here, the prosecutor improperly shifted the burden of proof onto Mr. Guevara, bolstered C.M.C.'s testimony with "facts" not in evidence, and otherwise "testified" to un-admitted "facts" in closing argument. RP 128, 134, 145, 149.

Whether considered individually or in the aggregate, the prosecutor's improper arguments require reversal of Mr. Guevara's conviction. *Walker*, 164 Wn. App. at 737.

**II. MR. GUEVARA'S ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO INADMISSIBLE PROFILE EVIDENCE, ELICITING HIGHLY PREJUDICIAL EVIDENCE, AND FAILING TO OBJECT TO PROSECUTORIAL MISCONDUCT.**

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*<sup>4</sup>

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<sup>4</sup> Ineffective assistance raises an issue of constitutional magnitude that the court can consider for the first time on appeal. *Kylo*, 166 Wn.2d at 862; RAP 2.5(a)(3).

A. Mr. Guevara's attorney provided ineffective assistance by failing to object to extensive inadmissible profile evidence that was used to make the otherwise innocuous facts of his case appear sinister.

Much of C.M.C.'s testimony about Mr. Guevara described seemingly innocent behavior. C.M.C. said that Mr. Guevara hugged her, that they teased each other, and that he did a lot to care for the family. RP 39-41, 46-47.

In response, the state elicited testimony from the SANE nurse that "grooming" for child molestation often involves a parent who gives a child extra love and attention. RP 86. The state relied on this evidence to argue in closing that Mr. Guevara's normal fatherly behavior was part of the "grooming" process and is what prevented C.M.C. from revealing the allegations earlier. RP 127.

Counsel provides deficient performance by failing to object to inadmissible evidence absent a valid strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Reversal is required if an objection would likely have been sustained and the result of the trial would have been different without the inadmissible evidence. *Id.*

Expert testimony on "grooming" is inadmissible profile evidence in a sex case. *State v. Braham*, 67 Wn. App. 930, 937, 841 P.2d 785 (1992), *amended* (Jan. 4, 1993); ER 403. Such evidence has "virtually no

probative value” and is unduly prejudicial when it is used to imply a specific person’s guilt based on characteristics of known offenders. *Id.* at 939. The evidence is prejudicial when it lends otherwise innocuous evidence a “sinister cast.” *Id.* at 939-40.

The nurse’s testimony in Mr. Guevara’s case was very similar to that held inadmissible in *Braham*. In both cases, the expert testified that creating a close bond with the child and giving him/her attention was part of the “grooming” process. *Id.* at 933-34; RP 86. Both experts claimed that such a bond was a mechanism to make the child feel more comfortable so the relationship can be sexualized without the child telling anyone. *Id.* at 933; RP 86.

Just as in *Braham*, the evidence was used in Mr. Guevara’s case to make an otherwise normal and loving familial relationship appear “sinister.” *Id.* at 939-40.

The SANE nurse’s testimony about the “grooming process” was inadmissible in Mr. Guevara’s case. *Id.* A reasonable defense attorney would have objected. Mr. Guevara’s lawyer provided deficient performance by failing to protect his client from the irrelevant, highly-prejudicial evidence. *Saunders*, 91 Wn. App. at 578.

There was no valid tactical reason underlying defense counsel’s failure to object to the inadmissible profile testimony. *Id.* The evidence

did not lend anything to the defense theory that C.M.C. had fabricated the allegations. Indeed, the evidence provided the state's primary mechanism for refuting that theory. Mr. Guevara's attorney should have objected.

There is a reasonable probability that defense counsel's failure to object affected the outcome of Mr. Guevara's trial. *Kyllo*, 166 Wn.2d at 862. The improper admission of expert testimony on "grooming" prejudices the accused when the state relies on it in closing argument to lend the evidence in the case a "sinister cast that it would not otherwise have had." *Braham*, 67 Wn. App. At 939-40.

Here, as in *Braham*, the "grooming" evidence was used to make Mr. Guevara's loving relationship with C.M.C. appear malevolent. It also explained away several problems with the state's case, including C.M.C.'s late disclosure despite the fact that her mother spoke to her frequently about inappropriate touching. The "grooming" evidence also helped remedy the state's evidentiary problem related to C.M.C.'s prior accusation of Mr. Guevara based on likely harmless behavior. Mr. Guevara was prejudiced by his attorney's unreasonable failure to object. *Kyllo*, 166 Wn.2d at 862.

Mr. Guevara's defense attorney provided ineffective assistance of counsel by failing to object to inadmissible and highly-prejudicial profile

evidence. *Saunders*, 91 Wn. App. at 578; *Braham*, 67 Wn. App. at 937.

Mr. Guevara's conviction must be reversed.

- B. Defense counsel provided ineffective assistance by eliciting additional allegations against Mr. Guevara beyond what the state sought to introduce.

Mr. Guevara objected when the state sought to introduce C.M.C.'s testimony regarding allegations that occurred outside of the charging period. RP 8-9. The court overruled Mr. Guevara's objection, relying on the fact that the additional allegations were close to the charging timeframe. RP 11-12. On direct examination of C.M.C., the state elicited evidence of five alleged incidents, all close to the charging period, and all occurring in the family's current house. RP 35-43.

On cross examination, defense counsel brought out testimony that C.M.C. also alleged that Mr. Guevara had touched her inappropriately at their previous home. RP 53. Once defense counsel had opened that door, the state asked her about those additional allegations on redirect and relied on them in closing argument. RP 57-58, 131, 134.

A reasonable defense attorney would not have offered evidence of additional allegations against his/her client beyond those relied upon by the state. Mr. Guevara's counsel provided deficient performance by eliciting additional incriminating evidence. *Kyllo*, 166 Wn.2d at 862; *See also Saunders*, 91 Wn. App. 575.

No reasonable trial strategy can justify Mr. Guevara's attorney's actions. Indeed, counsel recognized the prejudicial effect of any allegations beyond those in the charging period and objected to their admission. RP 8-9. The court overruled his objection, but limited the state to alleged incidents close in time to the charging period. RP 11-12. Counsel had no tactical reason for exacerbating the prejudicial effect of that ruling by eliciting additional incriminating evidence. The additional testimony also demonstrated for the jury that C.M.C.'s allegations spanned a much longer time period than illustrated by state's evidence alone.

Mr. Guevara was prejudiced by his attorney's deficient performance. Once defense counsel had introduced the additional evidence, the prosecution was able to elicit the details of the allegations on redirect. RP 57-58. The state also relied on the evidence in closing argument. RP 131, 134.

The potential for prejudice from admission of other bad acts evidence is "at its highest in sex offense cases." *State v. Slocum*, 183 Wn. App. 438, 442, 333 P.3d 541 (2014) (quoting *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012)). The evidence presents a danger that the jury will convict not because of the strength of the evidence of the charges but because of the jury's overreliance on evidence of other acts. *Id.*

Absent defense counsel's deficient performance, the jury would not have known that C.M.C. allegations spanned a significantly longer period than what she described in direct examination. The additional evidence was not relevant to the charged conduct and was beyond the court's ruling *in limine*. Still, the evidence encouraged the jury to rely on propensity and the fact that the allegations spanned a long period, rather than the evidence of the actual charges. There is a reasonable probability that defense counsel affected the outcome of the trial by introducing additional allegations against Mr. Guevara. *Kyllo*, 166 Wn.2d at 862.

Mr. Guevara's attorney provided ineffective assistance of counsel by offering evidence of allegations against Mr. Guevara beyond those relied upon by the state. *Kyllo*, 166 Wn.2d at 862. Mr. Guevara's conviction must be reversed. *Id.*

C. Mr. Guevara's attorney provided ineffective assistance by failing to object to extensive, prejudicial prosecutorial misconduct.

The prosecutor at Mr. Guevara's trial committed extensive misconduct in closing by making arguments shifting the burden onto Mr. Guevara, bolstering C.M.C.'s testimony with "facts" not in evidence, and otherwise "testifying" to un-admitted "evidence." RP 128, 134, 145, 149. The overall effect of the prosecutor's improper arguments was to encourage the jury to convict Mr. Guevara based not on the evidence

against him but because he could not provide affirmative evidence that C.M.C. was lying.

A failure to object constitutes ineffective assistance when counsel has no valid tactical reason to waive objection. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007).

In most cases, failure to object to prosecutorial misconduct waives the issue for appeal.<sup>5</sup> *Glasmann*, 175 Wn.2d at 704. Failure to object to prosecutorial misconduct is generally unreasonable. Misconduct that undermines the defendant's credibility or bolsters the prosecution's case can be particularly prejudicial. *Hodge v. Hurley*, 426 F.3d 368, 387 (6th Cir. 2005).

Here, the prosecutor committed numerous instances of misconduct. The prosecutor improperly shifted the burden of proof onto the defense, bolstered C.M.C.'s testimony with "facts" not in evidence, and "testified" to "facts" not in evidence. RP 128, 134, 145, 149. Mr. Guevara's counsel did not object to any of this misconduct. *Id.* Counsel had no valid tactical reason for failing to object. A timely objection could have halted the prosecutor's improper arguments. At the very least, counsel could have obtained a curative instruction. Counsel provided deficient performance

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<sup>5</sup> Exceptions exist for misconduct that is flagrant and ill-intentioned or that creates a manifest error affecting a constitutional right.

by failing to object to extensive prosecutorial misconduct. *Hendrickson*, 138 Wn. App. at 833.

Counsel's failure to object to prosecutorial misconduct prejudiced Mr. Guevara. Mr. Guevara's defense relied on the jury holding the state to its burden of proof. The prosecutor improperly minimized that burden by shifting it onto Mr. Guevara to provide affirmative evidence that C.M.C. was lying in order to be acquitted. RP 145, 149. The prosecutor further bolstered C.M.C.'s testimony with "facts" that were not in evidence. RP 134. Finally, the prosecutor fabricated an "escalation" of Mr. Guevara's alleged attempts by claiming that he had tried to put his hand down the front of C.M.C.'s pants right before she reported the touching to her mother. RP 128.

Defense counsel should have objected. *Hendrickson*, 138 Wn. App. at 833. There is a reasonable probability that his failure to do so affected the outcome of Mr. Guevara's trial. *Kyllo*, 166 Wn.2d at 862.

Counsel's failure to object constituted deficient performance and prejudiced Mr. Guevara. *Kyllo*, 166 Wn.2d at 862. Accordingly, Mr. Guevara's conviction must be reversed. *Id.*

**III. THE COURT VIOLATED MR. GUEVARA’S RIGHT TO A JURY TRIAL BY ENTERING AN EXCEPTIONAL SENTENCE BASED ON A JURY FINDING THAT CONSIDERED FACTORS INHERENT IN THE CRIME IN DETERMINING WHETHER AGGRAVATING CIRCUMSTANCES EXISTED.**

The jury considered C.M.C.’s age in determining whether Mr. Guevara had abused a position of trust to justify an exceptional sentence. CP 24. But the alleged victim’s age is a factor that inheres in the crime of first degree child molestation. RCW 9A.44.083.

The jury’s supposed finding of an aggravating factor could have been based only on facts that were used to prove elements of the crime itself. Accordingly, the jury finding is inadequate to form the basis for a sentence beyond the standard range. The court violated Mr. Guevara’s right to a jury trial by imposing an exceptional sentence based on a jury finding that improperly considered factors inherent in the crime.

The right to a jury trial prohibits a court from entering an exceptional sentence absent a valid jury verdict finding of aggravating circumstances. *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). U.S. Const Amend. VI, XIV; Wash. Const art. I, § 21, 22.<sup>6</sup> An exceptional sentence that is actually based on the underlying

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<sup>6</sup> Manifest error affecting a constitutional right can be raised for the first time on appeal. RAP 2.5(a)(3).

guilty verdict, rather than a special verdict, is not actually supported by a finding of aggravated circumstances and violates the constitution.

*Williams-Walker*, 167 Wn.2d at 899.

A factor inherent in the crime cannot justify a finding of aggravating circumstances. *State v. Ferguson*, 142 Wn.2d 631, 647-48, 15 P.3d 1271 (2001). A factor inheres in the crime if it was necessarily considered by the legislature in establishing the standard range for the offense. *Id.*; *See also State v. Stubbs*, 170 Wn.2d 117, 127-149, 240 P.3d 143 (2010); *State v. E.A.J.*, 116 Wn. App. 777, 789, 67 P.3d 518 (2003).

Here, the degree of culpability for child molestation turns entirely on the age of the alleged victim and the relative age of the accused. *See* RCW 9A.44.083 (child molestation first degree punishes sexual contact with a child younger than twelve by someone at least 36 months older); RCW 9A.44.086 (child molestation in the second degree sexual contact with a child between the ages of twelve and fourteen by someone at least 36 months older); RCW 9A.44.089 (child molestation in the third degree punishes sexual contact with a child between the ages of fourteen and sixteen by someone at least 48 months older).

Age is the only factor the legislature employs in differentiating among the standard sentences in various child molestation offenses. *See* RCW 9A.44.083, RCW 9A.44.086, RCW 9A.44.089.

Still, the court instructed the jury that it could consider C.M.C.'s age in determining whether Mr. Guevara had abused a position of trust in committing the offense. CP 24. The effect of the instruction was that the jury could have answered "yes" to the special interrogatory based only on facts that went directly to an element of the crime itself. As such, the jury's verdict is not a valid finding of aggravated circumstances and cannot support an exceptional sentence.

Because the jury was permitted to consider factors inherent in the offense, its affirmative answer to the special interrogatory is not a valid finding of aggravating circumstances. *Ferguson*, 142 Wn.2d at 647-48. Accordingly, the jury finding is not sufficient to justify an exceptional sentence in Mr. Guevara's case. *Williams-Walker*, 167 Wn.2d at 899. Mr. Guevara's sentence must be vacated and his case remanded for resentencing.

**IV. THE STATE DID NOT PRESENT ANY EVIDENCE TO PROVE TWO ELEMENTS OF THE CHARGE.**

To convict Mr. Guevara for child molestation in the first degree, the state had to prove beyond a reasonable doubt that he was at least 36 months older than C.M.C. and not married to her. RCW 9A.44.083.

But the state did not present any evidence of Mr. Guevara's age or marital status. *See RP generally*. The state's other evidence was

insufficient for a rational jury to find those elements proved beyond a reasonable doubt. Accordingly, the state failed to prove two elements of the charge and Mr. Guevara's conviction must be reversed for insufficient evidence.

Due process requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice.<sup>7</sup> *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

When Mr. Guevara moved to dismiss the charge based on the failure of proof outlined above, the state argued that the circumstantial evidence was sufficient because it showed that: Mr. Guevara had a son, was able to drive, and was dating C.M.C.'s mother. RP 119. The state

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<sup>7</sup> To be sufficient, evidence must be more than substantial. *Vasquez*, 178 Wn.2d at 6. On review, inferences drawn in favor of the prosecution may not rest on evidence that is "patently equivocal." *Id.*, at 8. To establish even a *prima facie* case, the prosecution must present evidence that is consistent with guilt and inconsistent with a hypothesis of innocence. *State v. Brockob*, 159 Wn.2d 311, 328-29, 150 P.3d 59 (2006) (addressing the *corpus delicti* rule).

also argued that C.M.C. was too young to get married in Washington even with parental consent. RP 119.

First, the evidence was insufficient to show beyond a reasonable doubt that Mr. Guevara was not married to C.M.C. The fact that C.M.C. was young and that Mr. Guevara was dating her mother does not prove beyond a reasonable doubt that they were not married. They could have been married in a state or country with different age requirements. Dating another person certainly does not invalidate a legal marriage.

The circumstantial evidence was also not enough to establish Mr. Guevara's age beyond a reasonable doubt. He could have had a son and driven a car illegally while still being less than 36 months older than C.M.C.

The state could easily have elicited the necessary evidence – had it been available – through simple questions of C.M.C. and her mother. The state failed to do so. *See RP generally*. The state failed to meet its burden to prove each element of the charge against Mr. Guevara beyond a reasonable doubt. *Vasquez*, 178 Wn.2d at 6. His conviction must be reversed for insufficient evidence. *Id.*

## CONCLUSION

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by making arguments shifting the burden of proof onto Mr. Guevara, bolstering C.M.C.'s testimony with "facts" not in evidence, and "testifying" to other "facts" not in evidence.

Mr. Guevara's defense attorney provided ineffective assistance by eliciting additional, highly prejudicial allegations that had not been offered by the state, failing to object to inadmissible profile evidence, and failing to object to extensive prosecutorial misconduct.

The state failed to present any evidence to support two of the elements of Mr. Guevara's charge.

For all these reasons, Mr. Guevara's conviction must be reversed.

In the alternative, the court violated Mr. Guevara's right to a jury trial by entering an exceptional sentence based on a jury verdict that did not validly find aggravating circumstances beyond the facts inherent in the crime. Mr. Guevara's sentence must be vacated and his case remanded for resentencing.

Respectfully submitted on March 24, 2015,

**BACKLUND AND MISTRY**



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CERTIFICATE OF MAILING

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Juan Guevara, DOC #374844  
Washington Corrections Center  
PO Box 900  
Shelton, WA 98584

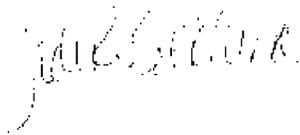
And to:

Grays Harbor County Prosecuting Attorney  
102 West Broadway, #102  
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 24, 2015.



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Jodi R. Backlund, WSBA No. 22917  
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**BACKLUND & MISTRY**

**March 24, 2015 - 4:11 PM**

**Transmittal Letter**

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