No. 83357-5

CHAMBERS, J. (dissenting) — Kenneth Thorgerson was convicted of child molestation. He argues that it was prosecutorial misconduct (1) for the prosecutor to have implied to the jury that there were out-of-court statements to corroborate the State's case, but the jury would not hear those statements because of the hearsay evidence rules; (2) for the prosecutor to have impugned defense counsel; and (3) for the prosecutor to have suggested the defendant needed to establish inconsistencies in the State's evidence, shifting the burden of proof. Although I do not agree with Thorgerson's third argument, I agree with his first two, and would find that the cumulative misconduct was so flagrant and ill-intentioned that a curative instruction would not have cured the error. Because I would reverse his conviction and grant a new trial, I respectfully dissent.

FACTS

When she was 17 years old, D.T. disclosed to several friends and family members that Thorgerson, her stepfather, had molested her. According to D.T., when she was six or seven years old Thorgerson began forcing her to touch him sexually over his sweat pants. This conduct progressed over a number of years until finally, when D.T. was in the sixth grade, Thorgerson forced her to manipulate his genitals to the point of ejaculation. The abuse continued until D.T. began to refuse when she was in the seventh grade. D.T. did not tell anyone about these events until

she confided in her high school boyfriend.[1] In addition to her boyfriend, D.T. also told a friend, her younger brother, and eventually her high school counselor. After hearing D.T.'s story, the counselor contacted the police and Child Protective Services and informed them of the allegations. Thorgerson flatly denied having any improper contact with D.T. He maintained that D.T. and her boyfriend had developed a plan to lie about the molestation in order to be able to spend more time together and avoid Thorgerson's strict rules.

At trial, the evidence was limited to statements by D.T. and those to whom she had made statements.[2] There was no physical evidence and no eyewitness testimony. Thorgerson was charged with three counts of first-degree child molestation and one count of second-degree child molestation.

Thorgerson argues that during his trial, the prosecutor committed several acts of prejudicial misconduct. First, Thorgerson argues the prosecutor improperly vouched for the credibility of witnesses. The facts relevant to this contention are as follows.

During opening statements, the prosecutor referenced hearsay statements and the hearsay rule that would preclude the jury from hearing the statements, stating:

> She's got a boyfriend about this time; . . . . She confides in him what had happened. *And he generally wouldn't be able to testify to – about everything that's said in that conversation because the rules don't*

[1] The record does not disclose D.T.'s exact age when the abuse ended, but I assume a four to six year gap between when the conduct stopped and D.T.'s reporting of the conduct.

[2] The persons to whom D.T. spoke and who testified at trial were (1) Jonathan Westlake, her boyfriend at the time; (2) Jill Backstrom, her friend; (3) N.T., her brother; (4) Lisa Carson, her school counselor; and (5) Scott Wells, a detective who had spoken briefly with D.T.

> *allow it.* But I do expect that he'll testify the nature [sic] or the demeanor of that conversation, and he'll tell you it's a pretty sad one.

I Verbatim Report of Proceedings (VRP) at 161 (emphasis added). The defendant did not object.

The prosecutor referenced more statements not presented as evidence at trial during his closing argument:

> We did make a point of asking [D.T.] about all the people she's talked to. . . . She told her boyfriend, she told a girlfriend, she told her brother, she told the school counselor, she told Deputy Eastep, she talked briefly to a detective. . . . She talked to a nurse. She's talked to people in my office and an advocate. Others.[3]

III VRP at 174-75. The prosecutor continued:

> How many times was the defense able to say, well, isn't it true you told the nurse this? *So you never got to hear all the statements.* That's why I never got to ask the boyfriend what did she say to you? We were able to describe about the emotion, the demeanor, the timing, things of that nature? *But you didn't get the statement that she says to her from me because there's hearsay rules.*

III VRP at 175 (emphasis added). Again, Thorgerson did not object.

Second, Thorgerson contends the prosecutor committed misconduct by improperly impugning defense counsel by accusing the defense of "sleight of hand" and using terms like "bogus" and "desperation" to describe the defense. III VPR at 171-72, 195-96. Specifically, Thorgerson points out the prosecutor admitted to planning the sleight-of-hand argument from the beginning. First the prosecutor

[3] Deputy Eastep, the nurse, the advocate, and the people in the prosecutor's office did not testify at trial. Nor did any additional "others" to whom D.T. may have spoken.

intentionally did not object when the defendant offered evidence that he was a caring father which the prosecutor felt was immaterial and irrelevant. *Id.* The prosecutor next engaged in the following cross-examination of Thorgerson:

> Q. So what does all that have to do with this trial other than trying to make you look good?
> A. Who is trying to make me look good?
> Q. Well, if you paid for her clothes and you paid for her car insurance and all the things you did do, I'm not talking about things that she wanted you to do but you couldn't. All the things you did do, what does that have to do with her allegation against you?
> A. That's just me being a father to my child.
> Q. Right. Does it have anything to do with this trial?[4]

[4] A more complete excerpt of that portion of the cross-examination is as follows:

> Q. There's been a lot of testimony about a lot of good things you've done for your children, correct?
> A. Correct.
> Q. If a father had done all those things for a daughter but still molested her, in your mind, would those things make up for that?
> A. No.
>
> [DEFENSE COUNSEL]. Objection, Your Honor. Improper. It's inflammatory.
>
> THE COURT. Overruled.
>
> [PROSECUTOR].
>
> Q. Was the answer no?
> A. No.
> Q. So regardless of whether or not a father does all these things, it doesn't change a thing if he, in fact, molested his daughter, is that – would you agree with that statement?
> A. I would agree.
> Q. So what does all that have to do with this trial other than trying to make you look good?
> A. Who is trying to make me look good?
> Q. Well, if you paid for her clothes and you paid for her car insurance and all the things you did do, I'm not talking about things that she wanted you to do but you couldn't. All the things you did do, what does that have to do

III VRP at 151.

Then during his closing rebuttal argument, the prosecutor referenced the defense tactic of portraying Thorgerson as a caring father as "sleight of hand":

> So what does a molester look like? Think you can pick him out of a crowd?
>
> The entire defense is sleight of hand. Look over here, but don't pay attention to there. Pay attention to relatives that didn't testify that have nothing to do with this case. . . . And that's just another example of sleight of hand. Look at everything except what matters.
>
> He bought her hamburgers. He bought her socks. He's a good guy. He can't be a molester. Molesters don't do that. Molesters don't look like him.

III VRP at 195-96.

Finally, Thorgerson contends the prosecutor engaged in misconduct by shifting the burden. The prosecution stated in closing:

> [I]f [the defense] thought there was a contradiction, they were allowed to ask about that. So out of all these versions, all these people she's talked to over a year, how many times did the defense grind out a contradiction? None. . . . You know how that works? It's the truth.

III VRP at 175. This argument, Thorgerson claims, "conveyed that Mr. Thorgerson,

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with her allegation against you?
A. That's just me being a father to my child.
Q. Right. Does it have anything to do with this trial?
A. Absolutely not.
Q. So why have we heard so much of it?
A. Because that's the type of person that I am.

III VRP at 150-52.

not the state, carried the burden of producing evidence regarding his stepdaughter's credibility." Pet. for Review at 14.

A jury convicted Thorgerson of all charges. The Court of Appeals, Division One, affirmed in an unpublished opinion, and this court granted review. *State v. Thorgerson*, 168 Wn.2d 1010, 226 P.3d 782 (2010).

ANALYSIS

Standard of review

"Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." *State v. Brett*, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995) (citing *State v. Hughes*, 106 Wn.2d 176, 195, 721 P.2d 902 (1986)); *see also State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). The defendant bears the burden of showing the comments were both improper and prejudicial. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008) (citing *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2008)). Improper comments are prejudicial "'where "there is a *substantial likelihood* the misconduct affected the jury's verdict."'" *Yates*, 161 Wn.2d at 774 (quoting *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997))).[5] If the

[5] This has been our prosecutorial misconduct standard for at least 40 years. *See State v. Music*, 79 Wn.2d 699, 714-15, 489 P.2d 159 (1971), *vacated in part by Music v. Washington*, 408 U.S. 940, 92 S. Ct. 2877, 33 L. Ed. 2d 764 (1972). The court has recently applied the more rigorous constitutional harmless error standard, requiring proof beyond a reasonable doubt that improper remarks did *not* affect the verdict, where the misconduct involved blatant appeals to racial bias. *State v. Monday*, No. 82736-2, 2011 WL 2277151, at *7 (Wash. June 9, 2011). Here, the prosecutor made no appeal to racial bias, and his remarks did not directly infringe upon a constitutional right of the defendant. *See Warren*, 165 Wn.2d at 26 n.3. Therefore the substantial likelihood standard is the proper standard for determining whether any error in this case was prejudicial or harmless. *See id.*

defendant fails to object or request a curative instruction at trial, the issue of misconduct is waived unless the conduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Stenson*, 132 Wn.2d at 719. Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Korum*, 157 Wn.2d 614, 652, 141 P.3d 13 (2006) (citing *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)).

The Unique Role of a Prosecutor

It is a noble calling to represent the people. As agents of the State, prosecutors are justifiably held in high regard by jurors. They are presumed to be learned in the law. As the court recently observed:

> A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice. *State v. Case*, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956) (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899)).
>
> Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. *Id.* at 71. Thus, a prosecutor must function within boundaries while zealously seeking justice. *Id.*

State v. Monday, No. 82736-2, 2011 WL 2277151,*5 (Wash. June 9, 2011).

Prosecutors, like judges, are servants of the law. *State v. Gorman*, 219 Minn. 162, 175, 17 N.W.2d 42 (1944). A prosecutor's success is not measured like that of an athlete by the number of wins and losses at the end of a season. The proper

measure of the success of any prosecutor is the prosecutor's devotion to the law, fidelity to the rules of the court and rules of evidence, and dedication to guarding the protections our constitutions and laws afford every person, including the accused. Again, as the court recently observed of the office of prosecutor: "such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims." *State v. Montgomery*, 56 Wash. 443, 447-48, 105 P. 1035 (1909), *quoted with approval in Warren*, 165 Wn.2d at 27-28. I add that most prosecutors act admirably in their quasijudicial capacity and are loyal servants of the law and the cause of justice.

Vouching

It is misconduct for a prosecutor to personally vouch for the credibility of a witness. *Brett*, 126 Wn.2d at 174. Improper vouching generally occurs if the prosecutor expresses his or her personal belief about the veracity of a witness, or if the prosecutor indicates that evidence not presented at trial supports the witness's testimony. *United States v. Brooks*, 508 F.3d 1205, 1209 (9th Cir. 2007) (quoting *United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002)). "[A]lthough prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements not supported by the record." *State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006). Courts review comments made by a prosecutor during closing argument in "the context of the

prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Here, Thorgerson argues that the prosecutor vouched for D.T.'s credibility by implying he personally knew that out-of-court statements she made were consistent with her testimony. According to Thorgerson, the prosecutor "bolstered [D.T.'s] testimony with inferences that the state had other information that the jury could not hear, but that it should rely on anyway, to believe [D.T.] was telling the truth." Pet. for Review at 13. Specifically, Thorgerson points out that the prosecutor informed the jury that D.T. had told her story consistently to others who had not testified at trial and, although the jury was prevented from hearing those statements by the hearsay rules, the jury should conclude from this out-of-court evidence that D.T. was being truthful. *Id.*

The Court of Appeals, Division Two, dealt with a similar issue in *State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005). *Boehning* also involved charges of child molestation. *Id.* at 513. During closing argument the prosecutor in that case, referencing the victim's testimony, stated:

> "[H.R.] spoke to Diana Tomlinson. [H.R.] spoke to Carey Price. [H.R.] spoke to this detective here. [H.R.] spoke to Defense counsel. And then [H.R.] spoke to you, many months later.
>
> "And when [H.R.] was speaking, Defense counsel had the opportunity to cross her on any of her previous statements, any of her previous statements to Carey Price, to Detective Holladay, to Diana Tomlinson, to himself, and he did so, remember? He asked some

> questions about prior stuff.
>
> "*But he never pointed out that she told a different story to these other individuals*. . . .
>
> "The State can't bring up hearsay, but [the defense] can bring up any inconsistent statements, and there *were not inconsistent statements, and that's why you didn't hear them. So she has been very consistent.*"

Id. at 520 (quoting court record).

The court held these remarks were highly prejudicial and flagrant misconduct. *Id*. The court reasoned that by arguing the victim's out-of-court statements were consistent with her testimony at trial, "the prosecutor left the jury with the impression that these witnesses 'had a great deal of knowledge favorable to the State which, but for the court's rulings, would have been revealed.'" *Id.* at 522 (quoting *State v. Alexander*, 64 Wn. App. 147, 155, 822 P.2d 1250 (1992)). The court noted that the prosecutor had "impermissibly bolstered the victim's credibility by arguing that her prior statements, which were (1) plainly hearsay, (2) not admissible . . . , and (3) not admitted, were consistent with her trial testimony."[6] *Id.* at 514. Although defense counsel failed to object to the prosecutor's arguments in *Boehning*, the court nevertheless held that the misconduct warranted reversal. *Id.* at 518, 523.

[6] The majority is correct that the prosecutor in *Boehning* also improperly referred to charges that had been dropped. *Boehning*, 127 Wn. App. at 522. That the prosecutor in *Boehning* made additional improper statements does not alter the court's holding that an argument indistinguishable from the one used here "impermissibly bolstered" the victim's testimony. *Id.* at 514. The court was clear that this separate argument "also constituted prosecutorial misconduct." *Id.*

I would apply the reasoning of the *Boehning* court here. First, the prosecutor referenced facts clearly outside of the record to imply that D.T. was a credible witness. Second, the prosecutor's repeated suggestions that D.T.'s inadmissible out-of-court statements were truthful had the effect of telling the jury the content of those statements even though the jury never actually heard them. *See Alexander*, 64 Wn. App. at 155. Such a strategy essentially negates the rule preventing the jury from hearing hearsay statements and impermissibly bolsters the credibility of the witness. Finally, the prosecutor's remarks gave the impression to the jury that the State had additional favorable evidence in the form of numerous consistent statements that the jury was prevented from hearing by the court rules. *See Boehning*, 127 Wn. App. at 522. The prosecutor's statements were highly improper.

Impugning Defense Counsel

It is not misconduct for a prosecutor to argue the evidence does not support the defense's theory of the case. *Russell*, 125 Wn.2d at 87. However, a prosecutor must not impugn the role or integrity of defense counsel. *See Warren*, 165 Wn.2d at 29-30; *State v. Negrete*, 72 Wn. App. 62, 67, 863 P.2d 137 (1993); *Bruno v. Rushen*, 721 F.2d 1193, 1194-95 (9th Cir. 1983).

Thorgerson claims the prosecutor impugned defense counsel in two ways. First, the prosecutor intentionally failed to object to evidence he considered irrelevant and asked the defendant argumentative questions concerning trial strategy on cross-examination in order to set up a later argument that defense counsel was

engaged in "sleight of hand." III VRP at 150-52, 195-96. Second, the prosecutor referred to the defense's arguments as "bogus" and the result of "desperation." III VRP at 171-72.

The State argues that the prosecutor's comments were proper. It asserts that the comments disparaged defense counsel's argument, not defense counsel himself. Suppl. Br. of Resp't at 8. Moreover, the State points out that the cases relied upon by Thorgerson are distinguishable because they contain much more egregious statements regarding defense counsel than the case at hand. *Id.* at 9.

The comments made by the prosecution in the cases cited by Thorgerson are more blatantly improper than those of the prosecutor in this case. In *Negrete*, 72 Wn. App. at 66 (quoting court record), the prosecutor said defense counsel was "'*being paid to twist the words of the witnesses.*'" The court held the statement was improper but not irreparably prejudicial. *Id.* at 67. In *State v. Gonzales*, 111 Wn. App. 276, 283, 45 P.3d 205 (2002), the prosecutor directly contrasted the roles of prosecutor and defense counsel. Similarly, in *Bruno*, 721 F.2d at 1194 n.2, "the obvious import of the prosecutor's comments was that *all* defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth." In contrast, isolated remarks calling defense arguments "bogus" and "desperate," while strong and perhaps close to improper, do not directly impugn the role or integrity of counsel, and such isolated comments are unlikely to amount to prosecutorial misconduct. *See Brown*, 132 Wn.2d at 566 (prosecutor's characterization of defense argument as "ludicrous" was a strong but fair editorial

comment on the evidence).

On the other hand, the prosecutor's statement that "[t]he entire defense is sleight of hand" is more troublesome. III VRP at 195. "Sleight of hand" implies trickery or wrongdoing and can be interpreted as an attack on counsel rather than on counsel's arguments. There is a fine line between disparaging an argument and disparaging defense counsel, and arguments must be made carefully or the line is crossed. "Sleight of hand" suggests an act by an actor; in this case the actor was defense counsel. Here the prosecution twice used the term "sleight of hand" regarding the defense.

Moreover, the prosecutor admits that he intentionally did not object to evidence he considered irrelevant and aggressively questioned the defendant in cross-examination on the defense strategy specifically in order to make the sleight-of-hand claim in closing. Thus the prosecutor planned to make the sleight-of-hand argument and thereby imply trickery and wrongdoing on the part of defense counsel. These remarks impermissibly impugned defense counsel and were improper.

Burden Shifting

Arguments by the prosecution that shift the burden of proof onto the defense constitute misconduct. *See State v. Gregory*, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006). "An argument about the amount or quality of evidence presented by the defense does not necessarily suggest that the burden of proof rests with the defense." *Id.* at 860. However, a prosecutor generally cannot comment on the lack of defense evidence because the defense has no duty to present evidence. *State v.*

Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

Thorgerson lastly argues that the prosecutor shifted the burden of proof onto the defendant by pointing to the failure of the defendant to raise any prior inconsistent statements. The prosecution stated in closing that "if [the defense] thought there was a contradiction, they were allowed to ask about that. So out of all these versions, all these people she's talked to over a year, how many times did the defense grind out a contradiction? None. . . . You know how that works? It's the truth." III VRP at 175. This argument, Thorgerson claims, "conveyed that Mr. Thorgerson, not the state, carried the burden of producing evidence regarding his stepdaughter's credibility." Pet. for Review at 14.

The State argues no burden shifting occurred. It claims the defendant opened the door to the prosecutor's statements because the defense aggressively cross-examined D.T. and questioned several other witnesses in an attempt to establish inconsistencies. The State also argues that any error or misconduct was waived because Thorgerson failed to object or request a curative instruction.

Given the defense's efforts to establish inconsistencies in the versions of D.T.'s story, the State has the better argument. It was appropriate for the State to comment on the defense's failure and on the consistency of its evidence because the defense opened the door by trying to extract contradictions from witnesses. Moreover, the prosecutor's comment on the defense's failure to "grind out" inconsistencies was isolated and not a theme. Under these circumstances, the prosecutor did not imply the defense had a burden to develop inconsistencies. To

the extent that Thorgerson believed statements by the prosecutor suggested a shifting of the burden of proof or production from the State to the defendant, Thorgerson could have asked for a curative instruction, which would have cured any error. *See Warren*, 165 Wn.2d at 28 (interruption of prosecutor's argument with a correct and thorough curative instruction by trial judge was sufficient to remedy prejudice).

Prejudice

The prosecutor's remarks bolstering the testimony of the complaining witness were both improper and prejudicial. There was no physical evidence of the conduct that, according to D.T., ended years before she reported it. There were no other eyewitnesses present during the incidents D.T. described. The question the jury had to answer in resolving this case was whether it believed D.T.'s version of events or whether it believed Thorgerson's version.

The prosecutor listed numerous people to whom D.T. told her story, including "people in my office" and, remarkably ambiguously, "[o]thers." III VRP 174-75. He then lamented that the jury "never got to hear" all their statements "because there's hearsay rules." *Id.* at 175. In a case where credibility was critical, the prosecutor intentionally bolstered D.T.'s testimony by suggesting to the jury that D.T. had consistently told others who never testified exactly what she had testified to in court even though he knew that evidence was inadmissible. He implied to the jury that if only the hearsay rules had not prevented those people from testifying and revealing what D.T. told them, the jury would have known what he knew—that all

her statements were in fact consistent—and thus they should be more convinced by D.T.'s version than Thorgerson's version. The prosecutor's arguments suggested that hearsay evidence not presented at trial supported D.T.'s testimony and thus provided additional grounds for finding the defendant guilty.[7] *See State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citing *United States v. Garza*, 608 F.2d 659, 663 (5th Cir. 1979)); *see also Brooks*, 508 F.3d at 1209 (quoting *Hermanek*, 289 F.3d at 1098). In a trial that turned on credibility, the prosecutor's bolstering of the complaining witness's testimony by referencing out-of-court statements the jury was not permitted to hear had a substantial likelihood of affecting the jury's verdict.

The State contends that because the defendant failed to object or ask for a curative instruction, the issue is waived on appeal. *See Stenson*, 132 Wn.2d at 719. As mentioned already, as representatives of the government of the people, prosecutors are justifiably held in high regard by jurors. The purpose of the rules of evidence is "that the truth may be ascertained and proceedings justly determined." ER 102. When a prosecutor flouts the law and the rules of evidence by persistently asking improper questions or knowingly and intentionally ignoring the rules of

[7] The majority suggests that only a reference to additional *content* in D.T.'s out-of-court statements could support a conclusion that the prosecutor's arguments provided additional impermissible ground for finding the defendant guilty. Majority at 8-9. This is contrary to the reasoning in *Boehning* above and sets a potentially harmful precedent. This court should be clear that arguments commenting on the consistency between in-court testimony and out-of-court hearsay statements to witnesses who never testified and lamenting the rules that prevent the jury from hearing those statements are entirely improper. The defense raised the issue of consistency, and thus, as I have explained, it was not improper for the prosecutor to point out the failure of the defense to find any inconsistencies. But the defense's raising the issue of consistency does not provide a justification for bolstering the victim's testimony with the arguments relied on by the prosecutor in this case.

evidence for the purpose of presenting to the jury evidence that the law does not permit the jury to hear, the prosecutor intentionally prejudices the defendant and the cause of justice. *See Stewart v. Commonwealth*, 185 Ky. 34, 213 S.W. 185, 188 (1919) (refusal of the court to permit the witness to answer improper questions cannot remove the prejudicial effect that the questions had on the minds of the jury). Often where, as here, the prosecutor suggests that it is the law, the courts, and the system itself that is preventing the jury from hearing important evidence, a curative instruction will not be effective in overcoming the prejudice because the prosecutor has implied the court itself is obstructing the truth. *See Alexander*, 64 Wn. App. at 155 (prosecutor's repeated attempts in closing to instill inadmissible evidence in jurors' minds despite court sustaining numerous objections on the matter during trial was flagrant and ill-intentioned misconduct).

The prosecutor's remarks impugning defense counsel were also improper. The prosecutor admitted that he planned his remarks as part of his strategy. While perhaps not prejudicial standing alone, these comments must be viewed in context and in combination with any other misconduct. *See Korum*, 157 Wn.2d at 652; *Dhaliwal*, 150 Wn.2d at 578. Taken together with the prosecutor's vouching and flouting of the court and its rules of evidence, I would hold the cumulative misconduct was so flagrant and ill-intentioned that a curative instruction could not have remedied the prejudice. The defendant must show a "substantial likelihood" that the verdict was affected. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). The defendant met that burden here.

CONCLUSION

The prosecutor in this case improperly vouched for a witness's credibility by referring to inadmissible statements and flouted the law and court rules by implying the rules were standing in the way of the truth. Moreover, the prosecutor's remarks impugned defense counsel. Taken as a whole and in context, the prosecutor's conduct was so flagrant and ill-intentioned that an instruction would not have cured the resulting prejudice. Because I believe the proper remedy in this case is reversal and remand for a new trial, I dissent.

AUTHOR:

Justice Tom Chambers

WE CONCUR:

Justice Gerry L. Alexander

Justice Susan Owens

Richard B. Sanders, Justice Pro Tem