IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 83357-5
Respondent,	)	
	)	
v.	)	En Banc
	)	
KENNETH JOHN THORGERSON,	)	
	)	
Petitioner.	)	Filed August 25, 2011
___________________________________	)	

MADSEN, C.J.—A jury convicted Kenneth Thorgerson on four counts of child molestation. He contends that his convictions must be reversed because prosecutorial misconduct occurred during his trial. We agree with the Court of Appeals that some of the conduct he challenges was not misconduct and that the misconduct that did occur does not constitute reversible error. Accordingly, we affirm the Court of Appeals.

FACTS

When D.T. was about six or seven years old, her stepfather, defendant Kenneth Thorgerson, began trying to place her hand on his penis. She testified at trial that initially Thorgerson made her touch him over clothing, but about the time that she started fourth

grade Thorgerson successfully forced her to touch him directly. Then, after two years during which Thorgerson persisted in trying to get D.T. to touch him, when she was in sixth grade she "gave him a hand job until he ejaculated" because she was "sick" of his attempts to force her to touch him and thought if she did this he would leave her alone. II Verbatim Report of Proceedings (VRP) (May 20, 2008) at 27. When D.T. was in the seventh grade, she refused Thorgerson's persistent attempts to force her to touch him sexually and threatened to tell her mother. She was not forced to touch him again.

D.T. did not tell anyone about Thorgerson's abuse until she was 17 years old. Then she told her high school boyfriend. She also told her brother and her best friend, and eventually she confided in Lisa Carson, her high school counselor. Ms. Carson contacted the police and Washington State Department of Social and Health Services, Child Protective Services.

Thorgerson denied any improper contact with D.T. He said that D.T. and her boyfriend had fabricated the story in order to avoid Thorgerson's strict rules and spend more time together.

The State charged Thorgerson with three counts of first-degree child molestation and one count of second-degree child molestation. At the trial, the State's evidence consisted of D.T.'s testimony and the testimony of people that she made statements to about the abuse. There was no physical evidence or eyewitness testimony.[1]

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[1] As this court has observed, physical and testimonial evidence is commonly unavailable in cases involving sexual abuse of a child. Generally, the child is the only eyewitness and physical corroboration is unavailable because sex offenses against children tend to involve nonviolent conduct. *State v. Young*, 160 Wn.2d 799, 818 n.13, 161 P.3d 967 (2007); *State v. Swan*, 114

Thorgerson testified and denied the allegations. The defense presented its theory that D.T., along with her boyfriend and aided by her brother and girl friend, asserted the allegations in order to avoid her father's strict rules. The jury convicted Thorgerson on all counts charged. The trial court denied Thorgerson's motion for a new trial based on prosecutorial misconduct. He appealed, and the Court of Appeals affirmed in an unpublished decision. *State v. Thorgerson*, noted at 150 Wn. App. 1038 (2009), *review granted*, 168 Wn.2d 1010, 226 P.3d 782 (2010).

Thorgerson maintains that during his trial the prosecuting attorney improperly vouched for D.T.'s credibility and bolstered her testimony, shifted the burden of proof to the defendant, and impugned defense counsel. Thorgerson did not object at trial to any of the instances of claimed prosecutorial misconduct. The facts pertaining to these claims are discussed in detail below.

ANALYSIS

To prevail on a claim of prosecutorial misconduct, the defendant must establish "'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997))); *accord State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The burden to establish prejudice requires the defendant to prove

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Wn.2d 613, 623, 790 P.2d 610 (1990).

that "there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." *Magers*, 164 Wn.2d at 191 (alteration in original); *accord Dhaliwal*, 150 Wn.2d at 578; *Russell*, 125 Wn.2d at 85; *see*, *e.g.*, *State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006) (defendant failed to prove that prosecutor's misconduct in eliciting testimony barred by pretrial ruling, to which he did not object, caused prejudice affecting the outcome of the trial). The "failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994); *accord Fisher*, 165 Wn.2d at 747. When reviewing a claim that prosecutorial misconduct requires reversal, the court should review the statements in the context of the entire case. *Russell*, 125 Wn.2d at 86.

A prosecuting attorney represents the people and presumptively acts with impartiality in the interest of justice. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). As a quasijudicial officer, a prosecutor must subdue courtroom zeal for the sake of fairness to the defendant. *Id.*

Vouching. Improper vouching occurs when the prosecutor expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness. *Ish*, 170 Wn.2d at 196. Whether a witness testifies truthfully is an issue entirely within the province of the trier of fact. *Id.*

Thorgerson maintains that the prosecuting attorney vouched for D.T.'s credibility

by suggesting that he knew personally that statements she made outside of the courtroom were consistent with her testimony and bolstered her testimony by implying that the State had information the jury could not hear because of the hearsay rules but which showed D.T. told her story consistently, including to people who did not testify, and therefore the jury should conclude that D.T. was testifying truthfully. One of the statements about which Thorgerson complains occurred in the prosecutor's opening statement:

> 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 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 VRP (May 19, 2008) at 161.

In context, this statement concerns a witness's expected testimony, a permissible subject for opening statements. *See Magers*, 164 Wn.2d at 191 ("[d]uring an opening statement, a prosecutor may state what the State's evidence is expected to show"); *see State v. Whelcel*, 115 Wn.2d 708, 727, 801 P.2d 948 (1990). We do not believe this comment rises to the level of misconduct. And, although we do not approve the reference to rules that prevented the boyfriend from relaying all he was told, the prosecutor did not refer to the nature of that testimony or his personal belief in what was said to the boyfriend. Moreover, the jury was instructed that opening statements are not evidence, and the jury must be presumed to have followed this instruction. *See State v. Grisby*, 97 Wn.2d 493, 647 P.2d 6 (1982) (when the trial court instructs that an opening statement is not evidence, the jury is presumed to follow the instruction). Moreover, as discussed

below, *defense* counsel raised the issue of the consistency of D.T.'s statements and elicited her testimony that all of her statements, including statements to her boyfriend, were consistent. For all these reasons, even if the reference to the "rules" was misconduct, it was not prejudicial. We agree with the Court of Appeals that there is no likelihood this comment affected the jury verdict.

The next incident cited by Thorgerson occurred during closing argument, when the prosecuting attorney argued:

> We did make a point of asking [D.T.] about all of 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 wrote a written statement on it to the deputy. She talked to a nurse. She's talked to people in my office and an advocate. Others. So we're already past 10.
>
> How many times was the defense able to say, well, isn't it true you told the nurse this? So you never got to hear all the statements. That's why I never got to ask the boyfriend what did she say to you? We were able to describe about the emotion, the demeanor, the timing, things of that nature? But you didn't get the statement that she says to her from me because there's hearsay rules.

III VRP (May 21, 2008) at 174-75.

Thorgerson contends these comments constituted misconduct and that prejudice is established because this case turned on the credibility of two witnesses—the victim and the defendant—and the prosecutor's references to consistency of the victim's statements to persons who did not testify at the trial created "a 'substantial likelihood' of affecting the jury" in these circumstances. Pet. for Review at 17.

Again, we do not condone the prosecutor's reference to the hearsay rules and how

they affect production of evidence at trial. But the more important focus here is Thorgerson's claim that the prosecutor's references bolstered D.T.'s testimony and informed the jury that he had personal knowledge and believed that D.T. was telling the truth, and therefore the members of the jury should also believe her.

As the State correctly points out, the defense itself raised the issue of D.T.'s credibility and whether she consistently told her story of abuse. Thorgerson's counsel stated in opening argument, "So how do you, as a 17-year-old girl, get out from under the thumb of your father? Well, you come up with a story. And that's what happened in this case." I VRP at 168. During cross-examination of D.T., defense counsel returned to this theme and repeatedly questioned D.T. about lying, in connection with her day-to-day activities as she grew up, in connection with her reports of being molested, and in her courtroom testimony. Defense counsel asked the victim if she and her boyfriend had come up with "this story so that you could get out from under the rules your father and mother had in place," to which she responded, "No." II VRP at 88. Defense counsel then asked if she had discussed the allegations with the prosecutor, detectives, the school counselor, her boyfriend, another friend, her brother, her grandmother, her mother, the defendant himself, the sheriff's officers, doctors, and the victim's advocate. *Id*. at 95-97. The victim responded that she had discussed the allegations with most of these people but not her brother, grandmother, mother or the defendant. *Id*. Defense counsel then asked her, "And you've told your story . . . numerous times," to which she responded, "Yes." *Id*. at 98. Counsel next asked, "And to the best of your knowledge, it stayed consistent

the entire time," to which she again responded, "Yes." *Id*.

In fact, Thorgerson himself expressly agrees `that the State could have argued that the victim's out-of-court statements were all consistent because in response to the defense counsel's question whether she had been consistent every time she told someone about being molested, the victim responded that she had been consistent. In this concession, the defendant is correct. The defense's theory of the case was that the victim was lying and her reports of molestation were part of a scheme she and her boyfriend created in order to be free of her father's strict rules about her activities and dating. Thus, the subject of the victim's consistency in telling others what happened, including persons who did not testify at the trial, was raised by the defense. The defense also extensively inquired into instances where the victim had lied about various things as she was growing up (and admitted in her testimony that she had done so).

But Thorgerson maintains that the prosecutor could not call on the jury to rely on evidence the State could not and did not produce, i.e., the actual content of the statements that D.T. made to others, and in particular to persons who did not testify at trial.

But the prosecutor's references were not to *additional* content, i.e., evidence that could form any additional basis on which to find the defendant guilty. Rather, the prosecutor referred to evidence that the victim made consistent statements to persons who did not testify to this fact at trial. Numerous individuals *did* testify at trial and their testimony was evidence that the victim told a consistent story about the molestation. The defense was able to bring out only one contradiction—the school counselor reported that

D.T. said Thorgerson touched her genitals when D.T. testified that she was able to keep him from actually touching her.[2] The whole point of the prosecutor's argument was that D.T. *consistently* told her story.

In these circumstances, the prosecutor's references to the victim having made additional out-of-court statements consistent with her in-court testimony, while advising the jury those statements were not admissible as evidence, *possibly* bolstered her credibility to some degree. However, the prosecutor's comment that there was additional consistent testimony is simply unlikely to have made much difference in light of the evidence elicited by defense counsel that D.T. had given a consistent account of the molestation to her boyfriend, her girl friend, her girl friend's mother, her brother, someone from the sheriff's office, detectives, an advocate, a counselor, and the prosecutor and prosecutor's staff. Thorgerson fails to meet his burden to establish a *substantial likelihood* that the outcome of the proceeding was altered.

Indeed, it is a close question whether misconduct occurred at all. In closing argument the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991); *see Fisher*, 165 Wn.2d at 747. Simply put, the question of truth or lying was explored in great detail by the defense, and it is the defense that elicited the victim's testimony that her statements had been consistent to numerous persons identified by the defense, some of whom did not testify at

[2] The State explained this contradiction as the witness being mistaken. III VRP at 174.

the trial. Because the defense elicited this testimony that she made consistent statements to others who did not testify, the question of such consistency became fair game for comment in closing, where the prosecutor has great latitude to argue from the evidence.

Thorgerson contends, however, that this case "substantially mirrors" the facts in *State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005), where prosecutorial misconduct required reversal of the defendant's convictions. Pet. for Review at 10. We disagree. In *Boehning*, 127 Wn. App. at 517, the prosecutor argued that because the defendant had failed to establish that the child victim's out-of-court statements about sexual abuse were inconsistent with her trial testimony, the jury could infer that all of her statements were consistent and true. But in *Boehning*, the defense itself did not initiate and pursue an inquiry into whether the victim had told her story consistently, including to persons who did not testify, as occurred in the present case. Because the defense did so here, the prosecutor's references to the same thing, consistent out-of-court statements, was not likely to have affected the outcome of the trial, as explained.

In addition, in *Boehning*, the defendant's convictions were reversed in large part because the prosecutor told the jury that the victim was not able to tell her story as well in court as she had in a safer setting, and discussed three rape counts that had been dismissed, informing the jury "that there were 'some other charges, those charges aren't present anymore because she didn't want to talk about this as much as she was willing to talk about it before.'" *Id*. (emphasis omitted) (quoting the transcript). This was, as the Court of Appeals held, highly prejudicial, reversible misconduct. It invited the jury to

determine guilt on improper grounds. *Id*. at 522.

Here, nothing remotely comparable occurred. The prosecutor did not refer to anything that might support other charges and did not suggest that D.T. should be believed because outside of court she provided additional information that would lead the jury to infer she had disclosed more serious allegations that would support additional charges—rather, the prosecutor's argument informed the jury what the defense had already elicited, that she told the *same* story out of court. Thus, unlike in *Boehning*, the prosecutor did not refer to evidence not admitted at trial where that evidence would provide an additional basis for finding the defendant guilty.

In *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), in response to the defendant's argument that police had inadequately investigated the murders with which the defendant was charged, the State belittled the idea that the police failed to investigate evidence of innocence and also suggested there might be incriminating evidence that remained undeveloped. The court explained that while it is misconduct for the prosecutor to suggest that evidence not presented at trial provides additional grounds for the jury to return a guilty verdict, it is not misconduct for the prosecutor to argue that evidence does not support the defense theory or to fairly respond to defense counsel's argument. *Id*. The court said it appeared that the prosecutor's statement was aimed more at responding to defense criticisms than at finding an additional reason to convict. *Id*.[3]

[3] In addition, the trial court gave a curative instruction with respect to *defense counsel*'s subsequent reference to evidence that had been held back from the defense, instructing the jury that any remarks about additional evidence being withheld were to be disregarded. *Russell*, 125 Wn.2d at 87-88. This court said the curative instruction also ameliorated any effect the

In the present case, as in *Russell*, the defense theory was the focus of the prosecutor's references, i.e., the consistency of the victim's statements to others and whether she told the truth or had concocted a story for the purpose of avoiding her stepfather's control. Also, as in *Russell*, the prosecutor's references were not to evidence forming an additional reason for finding the defendant guilty. The prosecutor referred to evidence that the victim made consistent statements to persons who did not testify. But numerous individuals *did* testify at trial and their testimony was evidence that the victim told the same story—she was consistent. The references to additional consistent statements did not provide any additional ground for finding the defendant guilty—the evidence was already before the jury and thoroughly developed by the defense.

Under these circumstances, this case is *not* substantially the same as *Boehning*, contrary to Thorgerson's contention.

Impugning defense counsel. Thorgerson maintains that in closing argument the prosecuting attorney improperly impugned defense counsel. The prosecuting attorney accused the defense of engaging in "sl[e]ight of hand" tactics and used disparaging terms like "bogus" and "desperation" to describe the defense. III VRP at 171-72, 195-96. The prosecuting attorney planned the "sleight of hand" argument in advance. He refrained from objecting to defense evidence to the effect that Thorgerson was a caring father although the prosecutor believed the evidence was immaterial and irrelevant. During cross-examination, the prosecutor asked Thorgerson about this evidence, obtained his

prosecutor's statement might have had. *Id*. at 87.

agreement that just because a father would do good things for his daughter would not justify molesting her, and then asked him whether the evidence he had done good things for his daughter had anything to do with the trial, to which Thorgerson replied, "Absolutely not." III VRP at 151. The prosecutor then asked Thorgerson, "So why have we heard so much of it?" *Id*. Thorgerson answered, "Because that's the type of person that I am." *Id*. at 152.

In closing argument, the prosecutor referred to the testimony about things Thorgerson had done for his daughter:

> So what does a molester look like? Think you can pick him out of a crowd?
>
> The entire defense is sl[e]ight of hand. Look over here, but don't pay attention to there. Pay attention to relatives that didn't testify that have nothing to do with the case. . . . Don't pay attention to the evidence. . . .
>
> [Prosecuting attorney refers to another aspect of the defense.] Your decision comes from the evidence in this case. And that's just another example of sl[e]ight 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.

It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity. *State v. Warren*, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008); *State v. Negrete*, 72 Wn. App. 62, 67, 863 P.2d 137 (1993). To the extent these comments can fairly be said to focus on the evidence before the jury, we agree with the Court of Appeals that no misconduct occurred. But unlike the Court of Appeals, we believe the comments are not so restricted. Rather, the prosecutor impugned

defense counsel's integrity, particularly in referring to his presentation of his case as "bogus" and involving "sleight of hand." *Warren*, 165 Wn.2d at 29; *see id*. (improper for prosecutor to describe defense counsel's argument as a "'classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing'" (quoting court proceedings)). In particular, "sleight of hand" implies wrongful deception or even dishonesty in the context of a court proceeding. *Webster's Third New International Dictionary* 2141 (2003) ("sleight of hand" defined in part as "adroitness and cleverness in accomplishing a deception" and "a cleverly executed trick or deception"). The prosecutor went beyond the bounds of acceptable behavior in disparaging defense counsel. Further, given that the "sleight of hand" argument was planned in advance, we conclude that it was ill-intentioned misconduct.[4]

Nonetheless, this misconduct was not likely to have altered the outcome of this case. As pointed out, the victim's testimony was consistent throughout the trial and was consistent with what the witnesses testified she had told them before the trial, with one exception. The prosecutor's disparaging remarks essentially told the jury to disregard what the prosecutor believed was irrelevant evidence. While characterizing the defense as "sleight of hand" was entirely inappropriate, it cannot fairly be said to have had a substantial likelihood of altering the jury's determination that relevant evidence showed

[4] We do not intend to suggest that the prosecutor was precluded from arguing that the testimony about what the defendant had done for his daughter did not excuse his criminal conduct.

the defendant committed these crimes.

In any event, we believe that a curative instruction would have alleviated any prejudicial effect of this poorly thought out attack on defense counsel's strategy.

Burden of Proof. Finally, Thorgerson maintains that during closing argument the prosecutor improperly shifted the burden of proof to the defense.

In closing argument, as mentioned, the prosecuting attorney referred to hearsay statements that could not be introduced because of the hearsay rules, noted that the defense elicited some of the evidence that the prosecutor could not introduce, and then added,

> if they thought there was a contradiction [in D.T.'s story told to various individuals], they were allowed to ask about that. So out of all these versions, all these people she's talked to over a year, how many times did the defense grind out a contradiction? None.
>
> How does somebody do that? How does this bad liar tell it 10 or more times over a year with a conspiracy involving three other young people and nothing breaks down? You know how that works? It's the truth.

III VRP at 175.

As mentioned, a prosecutor has wide latitude to argue reasonable inferences from the evidence. However, it is improper for the prosecutor to argue that the burden of proof rests with the defendant. *State v. Gregory*, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006). A prosecutor generally cannot comment on the defendant's failure to present evidence because the defendant has no duty to present evidence. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003); *State v. Cleveland*, 58 Wn. App. 634, 647, 794

P.2d 546 (1990).

As explained, D.T.'s veracity and the issue of whether she consistently told the same story to numerous persons were thoroughly explored at trial by the defense. The defense expended considerable effort in attempting to establish inconsistencies in D.T.'s story as told to other individuals. Indeed, it was the defense that introduced this issue into this case and opened the door to the prosecutor's argument by trying to obtain contradictory testimony from witnesses. Under these circumstances, we conclude that the prosecutor did not imply that the defense had the burden of producing evidence of inconsistencies. In fact, the defense having attempted to do exactly this, the prosecutor's comment was a permissible argument based on the evidence.

Thorgerson also argues that the prosecuting attorney committed misconduct by informing the jury that there was no credible basis for doubting what D.T. said, and "if you believe her, you must find him guilty unless there is a reason to doubt her based on the evidence in the case." III VRP at 168. Thorgerson contends that in this argument the prosecuting attorney improperly shifted the burden of proof to the defendant by informing the jurors that they should presume that D.T. was telling the truth.

In context, the prosecutor discussed the "beyond a reasonable doubt" burden of proof that the State bears, argued that there were no holes in D.T.'s testimony, and advised the jury not to come out of the jury room saying, "[W]ell, we believed her, but we acquitted him." *Id.* In doing so, the prosecutor did not misstate the burden of proof. He then continued with the comment about which Thorgerson complains, "Look, if you

believe her, you must find him guilty unless there is a reason to doubt her based on the evidence in the case." *Id.* The prosecutor then said, "And if you don't believe her, he's not guilty." *Id.* In context, the prosecutor did not tell the jury there was a presumption that D.T. was telling the truth, but rather argued that the jurors should believe her testimony and if they did, then they should find Thorgerson guilty. This was not misconduct, particularly given the latitude that a prosecutor has in arguing from the evidence during closing argument.

Thorgerson also maintains that the cumulative effect of prosecutorial misconduct affected the verdict. Cumulative error may call for reversal, even if each error standing alone would be considered harmless. *Weber*, 159 Wn.2d at 279. However, the doctrine does not apply where the defendant fails to establish how claimed instances of prosecutorial misconduct affected the outcome of the trial or how combined claimed instances affected the outcome of the trial. *Id.* Accordingly, we conclude that the cumulative error doctrine does not apply here.

Lastly, Thorgerson argues that he was denied constitutional rights. First, he maintains he was denied due process of law and a fair trial, but these claims are tied directly to his claims of prejudicial prosecutorial misconduct. Second, he contends that his counsel was ineffective because counsel failed to object to "flagrant prosecutorial misconduct." Pet. for Review at 20. The Court of Appeals rejected the claim of ineffective assistance of counsel because, since the challenged conduct was not improper or not prejudicial, Thorgerson failed to establish that counsel's performance was

deficient. We agree and note in particular that he fails to establish the "flagrant misconduct" upon which he bases his cumulative error claim.

CONCLUSION

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. If he failed to object at the time the misconduct occurred, he must establish that no curative instruction would have obviated any prejudicial effect on the jury and he must establish that prejudice resulted that had a substantial likelihood of affecting the jury verdict. Here, Thorgerson fails to meet his burden.

The Court of Appeals' decision is affirmed.

AUTHOR:

Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Mary E. Fairhurst

Justice Charles W. Johnson

Justice James M. Johnson

Justice Debra L. Stephens