71303-5

71303-5

No. 71303-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JOSE MARRUFO-SARINANA,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

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# OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR.

1. The deputy prosecutor committed misconduct in closing argument.

2. The court erred in imposing the following condition of community custody: "Do not date women or form relationships with families who have minor children, as directed by the supervising Community Corrections Officer." CP 20.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The State's duty to ensure a fair trial precludes a deputy prosecutor from employing improper argument and tactics during trial. Where the deputy prosecutor appealed to the jury's passion and prejudice, vouched for the credibility of the alleged victim, and misstated the law during closing argument, did this cumulative misconduct require reversal?

2. Community custody conditions must be related to the crime of conviction and must be in accordance with due process. Where the condition prohibiting Mr. Marrufo-Sarinana from contact with families with minor children fails to provide sufficient notice or fair warning of the proscribed conduct, must the condition be stricken as unconstitutionally vague?

C. STATEMENT OF THE CASE

In February 2013, Jose Marrufo-Sarinana was living in Everett with his girlfriend, Reyna, and her three daughters – Kristal (15), Yulene (11), and Ashley (8).[1] 10/29/13 RP 15-17.

On the night of February 17, 2013, 11-year old Yulene fell asleep watching television in her mother's room, and ended up sleeping all night in the bed that her mother and Jose shared. Id. at 20-23, 80-84. Reyna, the mother, slept in the middle of the bed, with her daughter Yulene on one side, and Mr. Marrufo-Sarinana on the other. Id. at 24-25, 83-84.

In the morning, Reyna woke up at approximately 5:00 a.m., as she usually did, got ready for work, and left Yulene and Mr. Marrufo-Sarinana asleep and left for work. Id. at 83-84. Yulene stated that she awoke and noticed her mother was gone, and that Mr. Marrufo-Sarinana was hugging her. Id. at 26. Yulene claimed that Mr. Marrufo-Sarinana placed his hand on her stomach underneath her shirt, and that his hand touched her breast underneath the bra she had worn to bed. Id.

[1] First names are used to protect the anonymity of the witnesses; no disrespect is intended.

at 26-28. She also stated that his hand had gone "into [the] waistband" of her sweatpants. Id. at 30.[2]

Yulene left her mother's room and immediately told her older sister Kristal what she believed had happened. Id. at 36-38, 57-59. Kristal texted Reyna to come home from work immediately; Kristal also called the police. Id. 58-59, 61.

Everett police detectives interviewed Yulene and Mr. Marrufo-Sarinana, who waived his Miranda[3] rights in Spanish. In his statement, Mr. Marrufo-Sarinana wrote that he had hugged Yulene from the back, but denied that he had touched her inappropriately. 10/29/13 RP 145. He was arrested and charged with one count of child molestation in the first degree. CP 53-54.

Following a jury trial, Mr. Marrufo-Sarinana was convicted as charged. 10/30/13 RP 34; CP 26.

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[2] Yulene stated that her sweatpants were high-waisted, and that Mr. Marrufo-Sarinana never moved his hand below her waistband or her navel. 10/29/13 RP 32.

D. ARGUMENT

1. MR. MARRUFO-SARINANA'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT.

a. Mr. Marrufo-Sarinana has a right to due process.

The due process clause of the Fourteenth Amendment protects the right to a fair trial before an impartial jury. U.S. Const. amend. XIV; Const. art. I §§ 3, 21, 22. The right to a fair trial includes the presumption of innocence. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d P.2d 1129 (1996). The Fourteenth Amendment also "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The requirement that the government prove a criminal charge beyond a reasonable doubt – along with the right to a jury trial – has consistently played an important role in protecting the integrity of the

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[3] Miranda v. Arizona, 384 U.S. 436, S.Ct. 1602, 16 L.Ed.2d 694 (1966). At trial, Mr. Marrufo-Sarinana stipulated to the voluntariness of his statements to police. CP 54-57

American criminal justice system. Blakely v. Washington, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2000); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

b. Prosecutorial misconduct in closing argument deprived Mr. Marrufo-Sarinana of his right to a fair trial.

Prosecutorial misconduct violates the due process right to a fair trial when there is a substantial likelihood the prosecutor's misconduct affected the jury's verdict. Greer v. Miller, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984) ("only a fair trial is a constitutional trial"); U.S. Const. amend. XIV; Const. art. I, § 3.

A prosecutor's improper argument may deny a defendant his right to a fair trial, as guaranteed by the Sixth Amendment and by article I, section 22 of the Washington Constitution. State v. Monday, 171 Wn.2d 667, 676-77, 297 P.3d 551 (2011). A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)); State v. Huson, 73 Wn.2d 660, 663,

440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a "substantial likelihood" exists that the comments affected the jury." Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

c. The prosecutor committed misconduct by appealing to the emotions of the jury in closing argument.

Because a prosecutor's duty is to seek a verdict free from prejudice and based upon reason, he or she must refrain from arguments that deliberately appeal to the jury's passions or biases. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956); State v. Belgrade, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); In re Detention of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998) ("A prosecutor may not properly invite the jury to decide any case based on emotional appeals.").

Here, the deputy prosecutor injected emotion into his closing argument by presenting a "real world" narrative where "bad things happen, and people do bad things to children." 10/30/13 RP 21. In the prosecutor's "real world, ... oftentimes [bad things] stay secret." Id.

As the deputy prosecutor built on this theme, the rhetoric continued:

> STATE: And this is the building where those things are revealed: this is the building where people that prey on children are held accountable. And that's exactly what –
>
> DEFENSE: Objection, Your Honor.
>
> STATE: -- I am asking you to do.
>
> DEFENSE: Appealing to the passion and prejudice of the jury.
>
> THE COURT: Overruled.
>
> STATE: I was almost done. This is the [sic] exactly where those people are held accountable. And that's what I'm asking you to do by returning a verdict of guilty. Thank you.

10/30/13 RP 21-22 (emphasis added).

The deputy prosecutor injected emotion into the deliberation process by asking the jury for assurances that "people that prey on children" will be "held accountable." Id. at 21-22. The jury's duty to is

determine whether the State proved all the elements of the charged crime beyond a reasonable doubt based on the evidence or the lack of evidence presented at trial, not in order to hold "those people" – implying all people who "do bad things to children" -- accountable. Id. at 21.

This is because a prosecutor may not ask a jury to return a jury verdict in order to send a message, or to act as the conscience of the community. See State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (finding prosecutor's request to let the victim and "children know that you're ready to believe them" improper), review denied, 114 Wn.2d 1011, 790 P.2d 169 (1990); State v. Powell, 62 Wn. App. 914, 918-19, 816 P.2d 86 (1991) (improper to exhort jury to send a message regarding child abuse), review denied, 118 Wn.2d 1013, 824 P.2d 491 (1992). In State v. Perez-Mejia, this Court reversed a murder conviction due to prosecutorial arguments that encouraged jurors to use their verdict to correct a larger societal problem. 134 Wn. App. 907, 917-18, 143 P.3d 838 (2006) ("it is improper for a prosecutor to 'direct the jurors' desires to end a social problem toward convicting a particular defendant.'") (internal citation omitted).

Because the deputy prosecutor's argument here, which urged jurors to return a guilty verdict in order to punish "those people" who "prey on children," is analogous to the argument this Court found improper in Perez-Mejia, reversal must be granted. 134 Wn. App. at 921.

d. The prosecutor committed misconduct by expressing a personal opinion about the complainant's credibility.

It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness in the form of an opinion. State v. Lindsay, __ Wn.2d __, 326 P.3d 125, 132 (2014) (citing Reed, 102 Wn.2d at 145); State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008); State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). A prosecutor's personal opinion on witness credibility is problematic because "[a] jury is especially likely to perceive the prosecutor as an 'expert' on matters of witness credibility, which he addresses everyday in his role as representative of the government in criminal trials." United States v. McKoy, 771 F.2d 1207, 1211 (9th Cir. 1985).

Here, the deputy prosecutor vouched for the alleged victim, expressing his personal opinion that she was telling the truth – "If you think for some reason she was lying, she deserves an Academy Award. And that was from start to finish in this case." 10/30/13 RP 14. Instead

of approaching the evidence as a dispassionate advocate for the State, the prosecutor argued that Yulene's testimony was so convincing that even if the jury chose not to convict, the child should receive an award for her acting abilities. 10/30/13 RP 14. Such statements are improper and "suggest not the dispassionate proceedings of an American jury trial." Reed, 102 Wn.2d at 146-47.

e. The prosecutor committed misconduct by misstating the law and trivializing the reasonable doubt standard in closing argument.

"When a prosecutor compares the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the gravity of the standard and the jury's role." Lindsay, 326 P.3d at 132; State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009); State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018, 936 P.2d 417 (1997).

Here, the deputy prosecutor told the jury in closing argument that it need not decide where the acts alleged fell on the "spectrum" of child molestation, "only whether or not it's on the spectrum." 10/30/13 RP 13. The deputy prosecutor next stated:

> Maybe analogous to a pregnancy test, yes or no. If it's yes, it doesn't tell you how pregnant or how far along; just is or isn't.

10/30/13 RP 13.

The comparison of the reasonable doubt standard and a pregnancy test is inapposite.[4] Our Supreme Court held in Lindsay that when a prosecutor compares the reasonable doubt standard and the certainty that jurors may feel in everyday situations -- such as when completing a puzzle or upon knowing they are safe to cross a street -- the prosecutor has improperly lowered the State's burden of proof. 326 P.3d at 132.

f. Reversal is required due to the misconduct, objected to and not, because the misconduct was prejudicial and impervious to curative instruction.

Although defense counsel did not object to two of the three improper arguments during the prosecutor's closing argument (see §§ 1(d) and (e), supra), appellate review is not precluded if the misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012). Even under the more stringent standard for determining prejudice, applied to the two comments without objection, the result would be the same. Glasmann, 175 Wn.2d at 707

(finding misconduct so pervasive it could not have been cured by an instruction, despite failure to object). Here, as in Glasmann, the cumulative effect of repeated prejudicial prosecutorial misconduct in closing argument was so flagrant that no instruction or series of instructions could have erased their combined prejudicial effect. Id.; State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

A prosecutor's misconduct is also viewed as flagrant and ill-intentioned where case law and professional standards are available to the prosecutor and clearly warn against the conduct committed at trial. Glasmann, 175 Wn.2d at 707. It was well-settled law, well before Mr. Marrufo-Sarinana's trial, that arguments that trivialize the reasonable doubt standard are forbidden. See, e.g., Anderson, 153 Wn. App. at 431.

Existing case law also clearly warned prosecutors to refrain from arguments that suggested the jury must find "the victim or witness was mistaken or lying in order to acquit; instead, [the jury] is required to acquit unless it is convinced beyond a reasonable doubt of the defendant's guilt." Id. (Quinn-Brintnall, J., concurring) (quoting

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[4] In a case involving allegations of sexual misconduct, as here, the analogy is particularly prejudicial and insensitive.

Fleming, 83 Wn. App. at 213) (finding it "disheartening" that "a dozen years since Fleming," prosecutors still argue that jurors must find the victim was lying in order to acquit, and thus explaining the flagrant and ill-intentioned finding).

The cumulative effect of misconduct may be so flagrant that no instruction could cure the combined prejudicial effects of the misconduct. Glasmann, 175 Wn.2d at 707. Here, the prosecutor lowered the burden of proof by clumsily analogizing the reasonable doubt standard to a pregnancy test; he also vouched for the alleged victim by arguing that she should be believed – or else was an award-winning liar. Lastly, the prosecutor argued that the jury should return a guilty verdict in order to hold "those people" accountable, after speaking of people who "prey on children." 10/30/13 RP 21-22.

Due to the remarks constituting misconduct in the closing argument, there is a substantial likelihood the remarks affected the jury's verdict; therefore, this Court should reverse Mr. Marrufo-Sarinana's conviction. Reed, 102 Wn.2d at 146-47; Fleming, 83 Wn. App. at 214.

2. THE CONDITION OF COMMUNITY CUSTODY WHICH PROHIBITS FORMING RELATIONSHIPS WITH WOMEN OR FAMILIES WITH MINOR CHILDREN SHOULD BE STRICKEN AS UNCONSTITUTIONALLY VAGUE.

In the instant case, one of the conditions of community custody imposed upon Mr. Marrufo-Sarinana at sentencing was the following:

> **8. Do not date women or form relationships with families who have minor children, as directed by the supervising Community Correction Officer.**

CP 20 (Appendix 4.2 Additional Conditions of Community Custody).

This condition is written so broadly as to seemingly prohibit Mr. Marrufo-Sarinana from maintaining communication with friends or family members who "have minor children," regardless of whether those children live with them, or whether the appellant has access to visitation. The condition is unclear about written communication with such families, and it delegates full authority to the community correction officer to determine the conduct which is permitted.

a. Standard of review.

A sentencing court's decision to impose a crime-related community custody condition is reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 375, 229 P.3d 686 (2010) ("A court abuses its

discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard").

An erroneous sentence may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 752, 758, 193 P.3d 678 (2008) (finding condition prohibiting possession of pornography ripe for review and unconstitutionally vague). Where a sentence has been imposed for which there is no legal authority, appellate courts have the power and the duty to correct such an erroneous sentence upon discovery. See, e.g., In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980).

b. The condition prohibiting contact with families with minor children is unconstitutionally vague.

There is no presumption in favor of the constitutionality of a community custody condition. State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). In Sanchez Valencia, the Supreme Court considered a community custody condition prohibiting the possession of drug paraphernalia. 169 Wn.2d at 793. In considering the appellant's vagueness challenge, the Court acknowledged that a community custody condition "is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would

be classified as prohibited conduct." Id. (quoting Sanchez Valencia, 148 Wn. App. 302, 321, 198 P.3d 1065) (2009) (internal quotation omitted).

However, the Sanchez Valencia Court held that the breadth of potential violations under the drug paraphernalia condition rendered it unconstitutionally vague. 169 Wn.2d at 793. Because the condition failed to "provide ascertainable standards of guilt to protect against arbitrary enforcement," the condition failed to provide proper notice of proscribed conduct. Id. The Sanchez Valencia Court noted that the breadth of potential violations offends the vagueness test. Id.; Bahl, 164 Wn.2d at 753. Because the condition might potentially encompass a wide range of everyday items, the Court noted concern that "'an inventive probation officer could envision any common place item as possible for use as drug paraphernalia,' such as sandwich bags or paper." Sanchez Valencia, 169 Wn.2d 794-95.

In Bahl, the Court expressed similar concern over the discretion the community correction officer was delegated to enforce the restriction on accessing or possessing pornographic materials. 164 Wn.2d at 758. The Bahl Court concluded the community custody condition prohibiting pornography was unconstitutionally vague, holding:

> The fact that the condition provides that Bahl's community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.

Bahl, 164 Wn.2d at 758 (emphasis added).

This community custody condition is unconstitutionally vague, just as were the conditions challenged in Sanchez Valencia and Bahl, above. Mr. Marrufo-Sarinana has a due process right to fair warning of proscribed conduct. U.S. Const. amend. XIV, Const. art. I, sec. 3; Bahl, 164 Wn.2d at 752. Because the proscribed conduct in the challenged condition is vague, the condition must be stricken.

Under this condition, Mr. Marrufo-Sarinana, may not "date women or form relationships with families who have minor children." CP 20. Just as the Supreme Court held in Bahl, "the fact that the condition provides that [the] community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent." 164 Wn.2d at 758. Should one community corrections officer determine that Mr. Marrufo-Sarinana is permitted to visit friends or relatives that have children in the home, but another officer disagree, the condition is not sufficiently definite to apprise the appellant of prohibited

conduct and does not prevent arbitrary enforcement. U.S. Const. amend. XIV; Const. art. I, sec. 3.

Indeed, the condition is written so broadly as to prohibit forming relationships with "families who have minor children." – due to its generic language, it is difficult to conceive of many homes the 36-year-old appellant could ever visit.[5] Read literally, the condition prohibits Mr. Marrufo-Sarinana from befriending any person if they "have minor children" – regardless of whether those children live in the home, or whether Mr. Marrufo-Sarinana ever visits that home.

Because the condition of community custody involving families with minor children is unconstitutionally vague, it must be stricken. Sanchez Valencia, 169 Wn.2d 794-95; Bahl, 164 Wn.2d at 758.

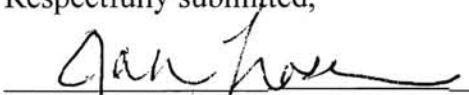
[5] More narrowly tailored, the condition might proscribe more specific conduct, such as, "overnight visits with families with young children living at home."

E. CONCLUSION

For the foregoing reasons, Mr. Marrufo-Sarinana respectfully requests this Court reverse his conviction, or in the alternative, remand this matter for re-sentencing.

DATED this 27th day of June, 2014.

Respectfully submitted,



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

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| STATE OF WASHINGTON, | ) | |
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| JOSE MARRUFO-SARINANA, | ) | |
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| Appellant. | ) | |

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON, THIS 27TH DAY OF JUNE, 2014.

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