NO. 46082-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JEFFREY A. ROETGER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 12-1-00033-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether Defendant failed to meet his burden of showing prosecutorial misconduct where the deputy prosecutor made arguments based on the evidence and responded to defense arguments regarding the credibility of the victims.

2. Whether Defendant failed to show ineffective assistance of counsel by failing to show that counsel's performance was deficient or prejudicial where defense counsel actively objected throughout the trial, made sustained objections during closing argument, and was acting with a legitimate trial strategy.

3. Whether the trial court properly excluded evidence of a victim's prior sexual abuse where such evidence was irrelevant.

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Jeffrey Roetger, hereinafter referred to as "Defendant," by information filed January 4, 2012 with three counts of first degree rape of a child as to A.K., one count of first degree child molestation as to A.K., one count of first degree child molestation as to A.C., one count of second degree rape of a child as to A.K., and one count

of third degree rape of a child as to A.K. CP 1-4. Trial commenced before the Honorable Edmund Murphy on January 23, 2014. RP 1.[1]

After a 3.5 hearing, statements made by Defendant were held admissible.

Both parties made motions in limine. RP 34-98. The State moved to exclude past sexual abuse of A.K. as not probative and unfairly prejudicial. RP 35-38. The trial court agreed with defense counsel that the case did not fall under the rape shield law, but it determined that such evidence was not relevant under ER 403 and excluded it. RP 52-54.

After the State rested its case-in-chief, Defendant moved to dismiss one of the counts of first degree rape of a child for insufficient evidence. RP 262. The trial court denied the motion. RP 265. Defense counsel called several witnesses, including Defendant. RP 335.

The jury found Defendant guilty of one count of first degree rape of a child as to A.K. and by special verdict form stated the crime was part of an ongoing pattern of sexual abuse. CP 183, 190. The jury also found Defendant guilty of: counts four and five, child molestation against A.K. and A.C.; counts six and seven, second and third degree rape of a child as to A.K.; and by special verdict, indicated that the child molestation of

[1] The consecutively paginated volumes of the verbatim report of proceedings will be cited as RP and their page number (RP #).

A.K. was part of an ongoing pattern of sexual abuse. CP 186-189, 192. The jury found Defendant not guilty of the two counts of first degree rape of a child as alleged in counts two and three. CP 184-185.

Defendant was sentenced to a standard range sentence of 318 months to life. CP 228. He filed this timely appeal. CP 240.

2. Facts

A.K. grew up living with her mother, Kristine Roetger. RP 192-193. When A.K. was in grade school, her mother married Defendant and the adults and their children moved in together. RP 192-193. Around this time, A.K. and A.C. were best friends, who spent countless nights at each other's houses. RP 148-149, 189. The pair, however, drifted apart as they entered junior high school years later. RP 189.

A.K. described a long history of abuse by Defendant. RP 195-206. When A.K. was in the fourth grade, she remembers him touching her breasts over her clothes. RP 195-96. Then, when she was ten, Defendant held her down in his bedroom and touched her with his penis. RP 198. A.K. testified about several events when she was twelve where Defendant would come into her room and touch her over and under her clothes. RP 199. She described another where Defendant took A.K. to his warehouse job and touched her vagina with both his fingers and his penis. RP 202.

The next event A.K. recalled was when she was twelve, Defendant entered her vagina with his penis. RP 203. A.K. described Defendant putting his fingers inside her vagina. RP 204, 205. A.K. also described Defendant holding her down and using his mouth to touch her vagina. RP 205-206.

A.C. and A.K. were best friends in grade school. RP 148. A.C. testified that when she went with the Roetgers to Ocean Shores, Defendant took her into the deep part of the pool to teach her how to swim. RP 154. While in the pool, Defendant touched her vagina over her bathing suit. RP 154. A.C. was ten at the time of this incident. RP 154. A.C. also went to Wild Waves with the Roetgers, where Defendant again touched her vagina over her bathing suit. RP 155. A.C. also described a time in fifth grade when her and A.K. were at Defendant's warehouse job and Defendant asked the girls to lift their shirts. RP 155. That same year, A.C. recalled riding on Defendant's lap while he drove his car, and Defendant rubbing her leg and breasts while she was on his lap. RP 157. A.C. witnessed Defendant doing the same to A.K. RP 157. A.C. testified that in the time she knew Defendant, he touched her breasts and vagina about five times over her clothing. RP 158-159.

Neither A.K. nor A.C. initially reported the sexual abuse inflicted by Defendant. RP 160, 211. A.C. testified that she was embarrassed, scared, and did not think anyone would believe her because Defendant

told her no one would. RP 160. A.K. similarly testified that she was too scared to say anything because Defendant told her not to tell anyone. RP 211.

The abuse eventually came to light when A.C.'s mother, Kristen C., overheard a conversation between A.C. and a friend. RP 151. When she asked A.C. about it later, A.C. reported telling her mother, "That [A.K.] had been raped. I told her several situations where he had touched me, and I have seen him touch her." RP 152. Kristen C. called Child Protective Services and A.K.'s mother to report the abuse. RP 185-186.

Defendant, Kristine Roetger, and their children lived in various homes during A.K.'s childhood, including those of many of Defendant's friends. RP 337-338. Kathleen Brodock and Richard Shoopman—two friends they had lived with—testified that they never witnessed Defendant be inappropriate with A.K. while living with them. RP 272, 282. Kristine Roetger additionally testified that A.K. never told her of anything inappropriate Defendant had done. RP 301-302.

Defendant, in his testimony, denied the allegations, but admitted that A.K. and A.C. came to his office, that A.K. came there a few times, and that A.C. went to Ocean Shores with them. Defendant testified that he did play with the children in the pool at Ocean Shores. RP 344-353.

Defendant also testified that he did most of the discipline of the children. RP 359.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO PROVE PROSECUTORIAL MISCONDUCT BECAUSE THE PROSECUTOR'S CLOSING REMARKS WERE PROPERLY BASED ON THE EVIDENCE AND WERE IN RESPONSE TO DEFENSE COUNSEL'S THEORY OF THE CASE THAT CALLED INTO QUESTION WITNESS CREDIBILITY.

In a prosecutorial misconduct claim, the defendant bears the burden of proving the conduct was both improper and prejudicial. ***State v. Emery***, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Failure to object to an improper remark is 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). Objections are required both to prevent further improper remarks and to prevent potential abuse of the appellate process. ***Emery***, 174 Wn.2d at 762.

The focus of a reviewing court should be less on whether the misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured. ***Emery***, 174 Wn.2d at 762. When reviewing a claim that prosecutor's statement requires reversal, the

court should review the statements in the context of the entire case. ***Thorgerson***, 172 Wn.2d at 443 (citing ***Russell***, 125 Wn.3d at 86).

As a quasi-judicial officer, a prosecutor must insure the defendant receives a fair trial. ***State v. Thorgerson***, 172 Wn.2d 438, 443, 258 P.3d 43 (2011); ***State v. Boehning***, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). However, in closing argument, a prosecutor has wide latitude to argue reasonable inferences, including inferences drawn from evidence regarding the credibility of a witness. ***Thorgerson***, 172 Wn.2d at 448. Improper vouching of a witness only occurs if a "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." *Id.* at 443 (emphasis added). A prosecutor may freely comment on witness credibility based on the evidence. ***State v. Lewis***, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). Further, remarks of a prosecutor, even if improper, do not warrant reversal if they were invited by defense counsel and are in reply to his statements, unless the remarks are not a pertinent reply or are sufficiently prejudicial that a curative instruction would be ineffective. ***Russell***, 125 Wn.2d at 86 (citing ***State v. Dennison***, 72 Wn.2d 842, 849, 435 P.2d 526 (1967)); ***State v. Dykstra***, 127 Wn. App. 1, 8, 110 P.3d 758 (2005).

In the present case, Defendant contends that the prosecutor acted improperly during closing arguments by vouching for witness credibility. Defendant failed to object to all but one of the many comments he lists as improper. The one objection for commenting on witness credibility that Defendant made during trial was sustained by the judge. RP 449. However, that was the only objection lodged for improper vouching for witness credibility. Therefore, Defendant must prove the remaining comments were so flagrant and ill intentioned that they caused prejudice which could not have been cured by instruction. ***Russell***, 125 Wn.2d at 86.

At trial, defense counsel attempted to highlight inconsistencies in the testimonies of A.K. and A.C. as compared to earlier statements. *See e.g.*, RP 166, 207, 212-213, 223, 224. Defense counsel in his opening statement brought the alleged inconsistencies to the jury's attention. RP 145. Highlighting inconsistencies and questioning the truth of the testimony presented was the theme of defense counsel's closing argument. *See* RP 414, 417, 419, 420-421, 422, 424-425, 426, 428. For example, defense counsel in closing stated, "Again, remember what [A.K.] said the first time, 'Well, I must have left that out.' No. How about the evidence shows that *you are creating it out of whole cloth as you speak*? What about that possibility?" RP 422 (emphasis added). In his rebuttal argument, the prosecutor opened with, "As counsel talked about, let's talk

about credibility because I agree with him. Somebody is uncredible here." RP 436. The prosecutor continued his rebuttal by discussing the facts supporting a jury's conclusion of credibility, or lack thereof. *See, e.g.*, 438-439, 441, 442, 446, 447-448, 449, 451-452.

Defendant has failed to show the comments made by the prosecutor were improper for at least two reasons. First, they were proper comments on witness credibility based on the evidence, not personal opinion. *See* ***Lewis***, 156 Wn. App. at 240. Second, defense counsel invited comments relating to the credibility of the witnesses when he built his entire case on the theory that A.K. and A.C. were not telling the truth.

During defense counsel's closing, he made several remarks about the credibility of A.K. and A.C. For example, defense counsel said, "*It is as if [A.K.] was making it up as she was going along.* That is what the evidence suggests. You saw it. Detail by detail." RP 422 (emphasis added). In response to the assertions made by defense counsel, the prosecutor presented to the jury details of the testimony of both A.K. and A.C. and the reasonable inferences they could make from the testimony. For example, focusing on the testimony of A.K., the prosecutor talked about how many times A.K. said she had been molested and raped. RP 441. This line of argument was in response to defense counsel's assertion that A.K. was making her story up out of "whole cloth." RP 422. This is

when the prosecutor made the statement that Defendant contends was improper: "This is not embellishment. This is what happened to her. That's what she's telling you." RP 442. This statement was made at the end of a longer argument presenting facts for the jury to consider when weighing credibility and in response to defense counsel's attack on her credibility. Therefore, the statement, taken in context, was not improper.

Similar analyses may be done for each of the statements alleged by Defendant to be improper. The statements are taken out of context in relation to the rest of the prosecutor's argument and out of context in relation to defense counsel's argument. The comments made by the prosecutor in his rebuttal were a reasonable response to defense counsel's argument. The comments did not exceed what was necessary to make a response, nor did they constitute an improper appeal to the jury's passions or prejudices. Therefore, the statements made by the prosecutor in closing were not improper.

In ***State v. Thorgerson***, an analogous case relying on the testimony of people and no physical evidence, the Court was faced with a similar issue of prosecutorial misconduct in closing argument. *See* 172 Wn.2d at 438. The Court did not find the prosecutor's remarks on witness credibility improper:

> The defense itself raised the issues of D.T.'s credibility and whether she consistently told her story of abuse . . . . [t]he 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.

Id. at 445-46. The Court then concluded:

> Simply put, the question of truth or lying was explored in great detail by the defense . . . . [b]ecause 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.

Id. at 448.

Thorgerson is controlling in this case. As explored above, defense counsel's argument focused on the credibility of A.K. and A.C. Similar to ***Thorgerson***, defense counsel also presented argument of A.K.'s motive to fabricate a story, including Defendant being in charge of discipline, jealousy of Defendant's biological son, and anger that Defendant had allegedly caused the demise of her mother and father's marriage. RP 427. Defense counsel's theory of the case in ***Thorgerson*** and in the present case are very similar, as are the comments made by defense counsel, comments which the Court held opened the door for comment by the prosecutor in closing where he already has wide latitude.

Because the prosecutor's statements were based on the evidence in the record and made in response to defense counsel's assertions, they were

not improper. Any prejudice could have been neutralized by an admonition to the jury reminding them—as they were so instructed—that they are the sole judges of witness credibility and the lawyers' statements are not evidence. CP 151. Defendant failed to object, but such an instruction was given anyway.

Defendant has failed to show the prosecutor's remark was so flagrant and ill intentioned that it could not have been cured by the trial court if Defendant had objected. Therefore, Defendant has failed to show prosecutorial misconduct.

2. DEFENDANT HAS FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE HAS FAILED TO SHOW COUNSEL'S PERFORMANCE WAS DEFICIENT OR PREJUDICIAL BECAUSE DEFENSE COUNSEL ACTIVELY OBJECTED THROUGHOUT THE TRIAL AND WAS ACTING WITH A LEGITIMATE TRIAL STRATEGY.

To demonstrate ineffective assistance of counsel, a defendant must show two things: (1) defense counsel's representation fell below an objective standard of reasonableness in light of all circumstances, and (2) defense counsel's representation prejudiced the defendant. ***State v. McFarland***, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-

prong test in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

The burden is on the defendant alleging ineffective assistance to show deficient representation based on the record below. ***McFarland***, 127 Wn.2d at 335. There is a strong presumption that counsel's representation was effective. *Id.*; ***State v. Brett***, 162 Wn.2d 136, 198, 892 P.2d 29 (1995). The failure of a defendant to show either deficient performance or prejudice defeats his claim. ***State v. Emery***, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). Further, a claim for ineffective assistance of counsel fails if the actions of counsel go to the theory of the case or to legitimate trial tactics. ***McFarland***, 127 Wn.2d at 336 (citing ***State v. Garrett***, 124 Wn.2d 504, 519, 881 P.2d 185 (1994)).

In the present case, Defendant argues his counsel was ineffective for failing to object to the prosecutor's statements during closing. The record shows otherwise. Trial counsel's decision about whether to object is a classic example of trial tactics and only in egregious circumstances relating to evidence central to the State's case, will the failure to object constitute incompetent representation that justifies reversal. ***State v. Madison***, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show (1) "the absence of legitimate strategic or tactical

reasons supporting the challenged conduct," (2) "that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted." ***State v. Saunders***, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Defendant has not carried that burden here.

First, defense counsel's conduct did not fall below an objective standard of reasonableness. Defense counsel was actively making objections throughout the trial, and, in fact, he made three sustained objections during the prosecutor's closing and rebuttal arguments. RP 426, 441, 449. The basis to one of these objections was: "Comment on the credibility of a witness." RP 449. Thus, it is evident that defense counsel was paying attention, was aware of the type of objection Defendant now raises, and chose to not lodge the objection at the trial.

Second, given that the credibility of the victims was the central theme of defense counsel's case, there are conceivable legitimate strategic reasons for him to not have objected to the prosecutor's response. Objecting to the prosecutor's rebuttal where he discussed the evidence supporting a determination of credibility could have led the jury to wonder why defense counsel could make claims that A.K. created her story "out of whole cloth" but the prosecutor could not respond to those claims. *See* RP 422. Making statements speaking to credibility, then objecting to the

prosecutor's response to those statements, may not have been well-perceived by the jury. Therefore, defense counsel could have refrained from objecting—more than he did—for reasons of legitimate trial strategy. Failure to show deficient representation alone defeats Defendant's claim.

Defendant has also not shown that he was prejudiced by defense counsel's failure to object. To show prejudice, Defendant must show that, except for counsel's alleged errors, the result of the proceeding would have been different. ***McFarland***, 127 Wn.2d at 335. Defendant has not made this showing.

Defendant is correct in his assertion that witness testimony was the primary evidence offered in this case. Therefore, the credibility of witnesses would likely have been important to the jury's decision. However, Defendant has failed to show how defense counsel's failure to object to the prosecutor's closing argument resulted in prejudice. The jury was instructed that it was the sole judge of credibility, and the jury was given a list of things it could consider in making that determination. CP 151. The jury was also instructed that remarks made by the lawyers are not evidence. CP 151. The jury is presumed to follow the court's instructions. ***Emery***, 174 Wn.2d at 766. Defendant has failed to rebut this presumption. Therefore, Defendant has failed to show prejudice, and with it, ineffective assistance of counsel.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED EVIDENCE OF A.K.'S PRIOR ABUSE AFTER DETERMINING IT LACKED RELEVANCE AFTER WEIGHING THE PROBATIVE VALUE AGAINST THE PREJUDICIAL EFFECT.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. ***State v. Thach***, 126 Wn. App. 297, 310, 106 P.3d 782 (2005). Deference must be given to the sound discretion of the trial court; the test is "whether there are tenable grounds or reasons for the trial court's decision." ***State v. Kinard***, 109 Wn. App. 428, 432, 36 P.3d 573 (2001); ***State v. Harris***, 97 Wn. App. 865, 870, 989 P.2d 553 (1999), *review denied*, 140 Wn.2d 1017, 5 P.3d 10 (2000). A trial court abuses its discretion when "no reasonable person would have decided the matter as the trial court did." ***State v. Thomas***, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), *aff'd*, 166 Wn.2d 380 (2009).

The rape shield law was not intended to provide a blanket exclusion of evidence; rather, the purpose is to eliminate prejudicial evidence of prior sexual conduct of a victim. ***State v. Carver***, 37 Wn. App. 122, 124, 678 P.2d 842 (1984). Merely because evidence pertains to sexual experience does not mean it will fit into the confines of the rape shield law. *Id.* Rather, the court must apply general evidentiary principles of relevance and prejudice. *Id.*

The trial court in this case stated it was "clear" that this case "does not fall under the rape shield law." RP 52. Therefore, "[t]he Court is left to analyze this under relevancy requirements of Evidence Rule 403 and has to do a balancing of probative versus prejudicial effect." *Id.* After hearing argument from both parties, the judge concluded, "I don't see a lot of probative value that has been presented to me at this point." RP 53. The weighing of evidentiary principles—relevance, probative value, and prejudice—shows the decision was not made by the trial court judge for untenable reasons. The court properly considered the evidence and reasonably concluded the evidence should not be admitted.

Defendant's reliance on ***State v. Carver*** is misplaced. 37 Wn.App. 122, 124, 678 P.2d 842 (1984). Applying the same evidentiary principles of relevance, probative value, and prejudice as the trial court in the present case, the court in ***Carver*** found the evidence relevant to rebut the presumption that the "very young girls" could have only known about sexual acts from the defendant. *Id.* at 124-125. A.K. and A.C., although very young at the time of the incidents, were adults by the time trial began. RP 147, 188. The risk of the jury inferring that the only knowledge of sexual acts the two adults had was because of Defendant was thus not present here. Therefore, ***Carver*** is factually distinct from the present case,

and it cannot be contended that the trial court's decision here was contrary to ***Carver***.

D. CONCLUSION.

Defendant's claim of prosecutorial misconduct must fail because the prosecutor did not act improperly when he made arguments based on the evidence and responded to defense counsel's arguments relating to witness credibility. Defendant has failed to show that defense counsel was ineffective for failing to object to the prosecutor's proper arguments, and Defendant has not shown prejudice. The trial court did not abuse its discretion by excluding evidence of prior sex abuse that was found

irrelevant. For these reasons, the Defendant's convictions should be affirmed.

DATED: DECEMBER 15, 2014

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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PIERCE COUNTY PROSECUTOR

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