IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32606-3-III

STATE OF WASHINGTON, Respondent,

v.

RAUL LOPEZ SOTO, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

In trial on charges of child rape, a detective answered a defense question by stating he believed the child witness, K.V., was a victim. In its closing and rebuttal arguments, the prosecuting attorney repeatedly emphasized the detective's belief in the child's story and opined that various aspects of the defense were "ludicrous." The prosecutor's statements were flagrant, ill-intentioned and prejudicial. The case should be remanded for a new trial.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The State committed flagrant, ill-intentioned misconduct in its closing argument.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Did the State improperly opine on guilt and the credibility of witnesses in its closing argument?

IV. STATEMENT OF THE CASE

The State charged Raul Lopez Soto with two counts of first degree child rape and one count of attempted first degree child rape based upon a forensic interview with 10 year old K.V. CP 2, 4-5. K.V. described two occasions when Soto invited her to play the "candy game," blindfolded

her, and placed something in her mouth. On the third occasion, she stated she peeked under the blindfold and saw Soto's penis. CP 2.

Before trial, K.V. allegedly recanted a portion of her statement and denied seeing Soto's penis. CP 10. When she testified at trial, she denied memory of most of the events and denied seeing Soto's penis, stating she thought she imagined it. RP at 99-109. Her recorded forensic interview was admitted into evidence. RP 171.

The defense in the trial focused on the family fight that precipitated K.V.'s initial disclosure. RP 181. K.V.'s brother, C.T., described a fight between him, Soto and K.V.'s mother culminating in K.V.'s mother taking K.V. and C.T. to stay at their uncle's house. RP 192-95. During the drive, K.V. told her mother she saw Soto pulling down his pants. RP 195-96. C.T. testified that he was not sure what K.V. was trying to describe, but "my mom told her and she said yeah." RP 195. K.V.'s mother, Alma Torres, also described a fight with Soto in which she threatened to move out, and testified that K.V. told her about the incident in the car. RP 214-17.

During the cross-examination of Detective Jose Martin, the following exchange transpired:

Q. You said that you drove mom and the victim to the courthouse?

A. I did.

Q. Who's the victim?

A. Kimberly.

Q. You had already made up your mind about that?

A. It was reported that way. I'm just identifying her.

Q. There wasn't anything in the interview that convinced you that she wasn't the victim?

Mr. Hintze: Objection.

The Court: I'm going to overrule it.

Mr. Hintze: Okay.

A. Can you ask the question again?

Q. (By Mr. Dold) There wasn't anything in the interview that convinced you she wasn't the victim?

A. Well, based on my training and experience, and I can honestly say that I believe she was a victim.

RP 277-78.

In its closing argument, the State emphasized the exchange, stating:

> Now, we heard testimony elicited by the defense that Detective Martin – it was an impact on him and he saw it. This experienced detective looked at that interview, and at that point where he had had an open mind he saw it, and he believed. He knew that this was true.

RP 352-53. The State also described Soto's testimony that K.V. may have seen his penis walking in on him in the bathroom as "ludicrous and desperate." RP 353. The State repeated these themes in rebuttal:

> If this is some utopia where everything is just perfect and this is the first big argument that they ever had, an argument that didn't result in blows being thrown, just upset at someone using the "B" word, well, that never happens in any household. That's suddenly going to result in them never coming back to a house that they've been at most in about a year, and a girl is going to expose this? That's what she's come up with, not the scissors incident or pushing or hitting or pinching, that suddenly I had some guy's penis in my mouth? Ludicrous. Does that make any sense whatsoever when you actually lay it out like that? No, it doesn't. That's why it wasn't explained logically because it's ludicrous.
>
> Is the girl who got up on the stand, that unsophisticated, meek little girl capable of saying what she said to Darla and all that detail if it did not happen? Is there any wonder that – it's blame. Is there any wonder that after the detective, who kept an open mind, didn't really know a lot of the details, then sees that interview, who wouldn't go into talking to the defendant after witnessing that and knowing the truth of what the girl said, with all those details? That is not something you see, is it? Do you expect that of ten-year old girls? Of course not.
>
> This ludicrous story that the defendant puts forward that it must be to somehow get a home back that they're never going to lose.

RP 370-71. The defense did not object.

Soto was convicted and sentenced to 162 months to life. RP 383, CP 67. He now appeals. CP 76.

V. ARGUMENT

Soto contends that the prosecuting attorney's arguments in closing deprived him of a fair trial. The defendant carries the burden of establishing that the conduct is both improper and prejudicial. *State v. Korum*, 157 Wn.2d 614, 650, 141 P.3d 13 (2006). The error is not prejudicial unless there is a substantial likelihood the misconduct affected the verdict. *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997) (*citing State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). Absent a defense objection at trial, the issue is waived unless the misconduct is "so flagrant and ill-intentioned that it evinces and enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Korum*, 157 Wn.2d at 650 (*quoting Stenson*, 132 Wn.2d at 719).

The prosecutor has broad latitude to draw reasonable inferences from the evidence and express those inferences to the jury in closing argument. *Stenson*, 132 Wn.2d at 727. However, the prosecutor may not vouch for the credibility of any witness, or express an opinion about the guilt or innocent of the accused. *State v. Sargent*, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985). The injection of the prosecutor's personal reaction to a defense theory is improper. *State v. Stith*, 71 Wn. App. 14, 856 P.2d 415 (1993). Because a prosecuting attorney represents the

people and must act with impartiality in the pursuit of justice, he "must subdue courtroom zeal for the sake of fairness to the defendant." *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011) (*citing State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009)). He must further refrain from making "bald appeals to passion and prejudice." *Fisher*, 165 Wn.2d at 747.

A prosecutor may use the evidence to explain why the jury might want to believe one witness over another. *See Brett*, 126 Wn.2d at 175. Such explanations are consistent with the prosecutor's responsibility to act impartially in the public interest. But,

> If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.

State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

In the present case, the prosecutor's arguments exceeded the bounds of impartial advocacy and voiced the prosecutor's own impassioned opinion of Soto's guilt. Rather than merely explaining why the jury should reject Soto's explanation, the prosecutor repeatedly opined that the defense theories were "ludicrous." Moreover, the prosecuting

attorney invaded the province of the jury by repeatedly commenting on K.V.'s credibility and Detective Martin's belief in her story. *See State v. Walden*, 69 Wn. App. 183, 185-86, 847 P.2d 956 (1993). These comments fall well within the scope of irrevocably prejudicial argument that any advocate for the people should know to avoid.

The State may argue that Soto invited the error because his attorney's questioning elicited Martin's statement that he believed K.V. was a victim. But Washington and U.S. Supreme Courts have criticized this line of reasoning, emphasizing that the appropriate response to defense impropriety is a curative instruction. *Sargent*, 40 Wn. App. at 345 (*examining U.S. v. Young*, 470 U.S. 1, 12-13, 105 S. Ct. 1038, 84 L.Ed.2d 1 (1985)). The credibility of witnesses is within the sole province of the jury, and testimonial opinions about credibility are irrelevant and interfere with the jury's function. *Walden*, 69 Wn. App. at 185-86. Here, even to the extent defense counsel's likely inadvertent elicitation of improper opinion testimony[1] could be considered an "invited" error, nothing the defense did thereafter could be said to have provoked the prosecutor or

[1] Noting that the State objected to the defense question and was overruled by the trial court, it seems unlikely that the court anticipated the question would invite comment on witness credibility as the State's objection would have been well founded.

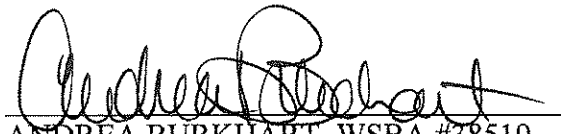
otherwise excused his repeated arguments that K.V.'s disclosure was credible because Detective Martin "knew" it was true.

The error in this case is not harmless. "When the credibility of a witness is crucial, improper vouching is particularly likely to jeopardize the fundamental fairness of the trial." *U.S. v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998). Here, K.V.'s statements comprised the entire substantive case against Soto; accordingly, her credibility was critical. The State, in placing its thumb on the scale, impermissibly bolstered K.V.'s forensic interview, without which its case would have been exceedingly slim.

VI. CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the court reverse the conviction, vacate the judgment and sentence and remand the case for a new trial.

RESPECTFULLY SUBMITTED this 22nd day of December, 2014.



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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 22nd day of December, 2014 in Walla Walla, Washington.

Andrea Burkhart