SUPREME COURT NO. 92586-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS ROBLES,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION ONE

Court of Appeals No. 73934-4-I
Clark County No. 13-1-02170-6

PETITION FOR REVIEW

CATHERINE E. GLINSKI
Attorney for Petitioner

GLINSKI LAW FIRM PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Constitutional Provisions

Rules

A. IDENTITY OF PETITIONER

Petitioner, NICHOLAS ROBLES, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Robles seeks review of the November 9, 2015, unpublished decision of Division One of the Court of Appeals affirming his conviction and sentence.

C. ISSUES PRESENTED FOR REVIEW

1. Robles was charged with third degree rape of a child, and the State's case rested solely on the testimony of the complaining witness. When questioning the witness on direct examination, the prosecutor implied that threatening communications to the witness and her family demonstrated Robles's guilt. Where there was no evidence that any such threats were connected to Robles or made with his knowledge or consent, did the court err in denying Robles's motion for a mistrial?

2. During closing argument the prosecutor expressed his personal belief in the alleged victim's testimony, called Robles's testimony ridiculous, and assured the jury that Robles was guilty. Did this improper argument deny Robles a fair trial?

3. Robles seeks review of the assertions of error in his statement of additional grounds for review.

D. STATEMENT OF THE CASE

In February 2012, SK reported to Battle Ground Police Officer Joshua Phelps that she had had sex with Nicholas Robles in January 2011, when she was 15 years old and he was 28 or 29. RP 72, 89-90, 146. SK gave a description of Robles's house and provided Phelps with his email address. RP 73-74, 79.

SK and Robles met through mutual acquaintances from church, and they saw each other occasionally at a local park. RP 75, 94, 96, 166. SK became infatuated with Robles. RP 95, 98. They exchanged emails and text messages, and she sent him photos of herself partially and totally nude. RP 76-77, 98, 101. SK testified that Robles asked her to send him some nice pictures, and it was her idea to send him nude photos. RP 101, 161-63. SK testified that she wanted to pursue a relationship with Robles, but he kept closing the door on her. RP 161.

SK testified that one day in January 2011, she skipped school, and Robles picked her up and brought her to his house to go hot-tubbing. RP 104. Once there they changed into their swimsuits and used the hot tub. RP 104-05. SK said that Robles put her on his lap and held her. RP 106. They then went to Robles's bedroom. RP 114. SK testified that Robles tried to put his penis in her vagina, but she told him she would rather have anal intercourse. He then applied a lubricant and put his penis in her anus.

RP 115. Afterward, they both showered. RP 117-18. SK testified that she told her parents about the incident the next day, but she asked them not to call the police because she had feelings for Robles and she believed she might get in trouble. RP 120.

SK and Robles continued to exchange emails after January 2011, but they did not spend any time together. RP 121. Sometime in December 2011, SK was with a group of people at a park, and she became upset when she saw Robles with another woman. SK started yelling at Robles that she loved him. RP 150-51. By the time of the December incident, SK was dating the man she eventually married in June 2012. RP 150-51. When she told her future husband about Robles, he insisted she report their contact to the police. RP 124. He showed her a Washington law about statutory rape, and they counted back from that date to figure out how old she was and when the contact occurred. RP 124, 150.

Phelps talked to Robles in July 2012. RP 75. Robles admitted that his text and email communications with SK had probably been inappropriate and that he was playing along with her infatuation, but he denied having sex with her. RP 76, 90, 167. He said they talked about having a hot tub party, but that never happened, and she had not been to his house. RP 77. When asked how she would be able to describe the

house if she had not been there, Robles said he believed she had seen pictures of the house. RP 78.

Robles explained at trial that he had shown a camera with pictures of the house to some friends when he was looking for someone to work on a remodeling project. SK was there at the time, and she ended up with the camera, which was returned to Robles a few days later. RP 170-72. He testified that SK had never been to his house and he had never had sex with her. RP 170.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. WHETHER THE ERRONEOUS DENIAL OF THE MOTION FOR MISTRIAL VIOLATED ROBLES'S RIGHT TO A FAIR TRIAL INVOLVES A SIGNIFICANT CONSTITUTIONAL QUESTION AND AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE. RAP 13.4(b)(3), (4).

During direct examination of SK, the prosecutor asked when she found out that the case would be going to trial, and she answered that she had found out the previous Thursday. The prosecutor then asked whether, since Thursday, anyone had been contacting her friends and family about this case. RP 126. Defense counsel objected, and the court sent the jury out of the courtroom. RP 126. The prosecutor explained that he believed Robles's friends and family members had been calling SK's family since the case was called the past week. He argued that this possible

intimidation was relevant to show Robles's consciousness of guilt, although he admitted that these alleged communications did not come from Robles. RP 127.

Defense counsel argued that the information was not relevant because there was no showing that any communications were connected to Robles, and since the communications were not made to SK, they were hearsay. Moreover, the prosecutor had not informed the defense about these communications or sought a ruling on their admissibility before asking about them in the jury's presence. Counsel argued that the clear implication of the prosecutor's question in front of the jury was that Robles had been intimidating the witness. RP 127. The court sustained the defense objection, finding that the relevance was limited at best, and the evidence was highly inflammatory and prejudicial. RP 128.

The defense then moved for a mistrial, arguing that the prosecutor's question implied that the defendant had been contacting SK's family, and no instruction to disregard could cure that prejudice. RP 129-30. The court denied the motion, concluding that the question was somewhat innocuous, was not answered, and was insufficient to rise to the level of requiring a mistrial. RP 131. When the jury returned, the court instructed it to disregard the prosecutor's question. RP 133.

The fundamental right to a fair trial is guaranteed by the United States and Washington Constitutions. U.S. Const. amends. VI and XIV; Wash. Const. art. I, § 22. The erroneous denial of a motion for mistrial violates that right. See State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983) (proper question in determining whether trial irregularity such as an improper remark requires mistrial is whether the irregularity "prejudiced the jury, thereby denying the defendant his right to a fair trial.").

A trial court should grant a mistrial when a trial irregularity is so prejudicial that it deprives the defendant of a fair trial. State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). In determining whether a trial irregularity deprived the defendant of a fair trial, the appellate court considers (1) the seriousness of the irregularity, (2) whether the challenged evidence was cumulative of other properly admitted evidence, and (3) whether the irregularity could have been cured by an instruction to disregard. Babcock, 145 Wn. App. at 163; State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). An appellate court reviews a decision on a motion for mistrial for an abuse of discretion. Babcock, 145 Wn. App. at 163.

The trial irregularity here was the prosecutor's reference to evidence that was not, and could not be, properly admitted. Generally the

prosecution may offer evidence that a defendant threatened a witness as implication of guilt. State v. Kosanke, 23 Wn.2d 211, 215, 160 P.2d 541, 543 (1945). Where the threat does not come from the defendant, however, the State must show it was made by someone acting with his knowledge and consent. State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997). The court must balance the probative value and prejudicial effect of such evidence under ER 404(b) before it is admitted. State v. McGhee, 57 Wn. App. 457, 460, 788 P.2d 603, review denied, 115 Wn.2d 1013 (1990).

Here, as the trial court recognized, there was no evidence connecting Robles to any communications to SK or her family after the case was set for trial. The testimony sought by the prosecutor was thus irrelevant and highly prejudicial, and it was inadmissible under ER 404(b). RP 128. Moreover, the prosecutor did not afford the court the opportunity to rule on admissibility before asking about the communications in the presence of the jury, raising the implication of guilt. This reference to other bad acts suggestive of guilt was a very serious trial irregularity.

Additionally, there was no other evidence that Robles, or anyone acting with his knowledge or consent, had threatened SK or her family. The lack of cumulative evidence also weighs in favor of mistrial.

Finally, the trial court's instruction to disregard was insufficient to cure the irregularity. In concluding that an instruction was the appropriate cure, the court found that the prosecutor's question was innocuous and unanswered, and the irregularity was a small piece in the grand scheme. RP 131. The court's findings overlook the serious nature of the trial irregularity. The prosecutor's question, even unanswered, carried with it the implication that Robles was threatening the State's key witness because he knows he is guilty. Such an implication, when completely unsupported by evidence, cannot be characterized as innocuous. In the grand scheme of things, this case came down to a credibility determination. The jury could believe either SK or Robles. Under the circumstances, there is no guarantee that the jury could have effectively disregarded the prosecutor's highly prejudicial and unsupported consciousness of guilt implication. The prosecutor's conduct deprived Robles of a fair trial, and the trial court abused its discretion by denying the motion for a mistrial.

2. THE COURT OF APPEALS HOLDING THAT THE PROSECUTOR'S CLOSING ARGUMENT DID NOT CONSTITUTE REVERSIBLE MISCONDUCT CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND THE COURT OF APPEALS. RAP 13.4(b)(1), (2).

In his closing argument, the prosecutor told the jury that Robles did not dispute the things that SK said happened before January 2011 or what she said happened after January 2011. He argued that the one thing Robles did not agree with was "what happened inside that house." He continued,

> Why would we agree and believe her on all these other details before and after, but not believe her on the one part of the entire case, the one reason we're here, the sexual abuse? Why would we not believe her when we believe all these other facts?

RP 217. He repeatedly told the jury that SK was not lying, that she could not possibly "fabricate this entire event[,]" and she could not fabricate her experience. RP 220, 222, 230. He told the jury that Robles's testimony about SK seeing pictures of his house was ridiculous. RP 227. He said that SK knew too much about the house and that Robles was guilty. RP 230. Defense counsel did not object to the prosecutor's improper argument.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v.

Williams, 425 U.S. 501, 503, 96 S.Ct.1691, 48L.Ed.2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). The prosecutor, as an officer of the court, has a duty to see that the accused receives a fair trial. State v. Carlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

Prosecutorial misconduct may deprive the defendant of a fair trial, and only a fair trial is a constitutional trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. V and XIV; Wash. Const. art. 1, § 3. "A '"fair trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.'" State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) (quoting State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); State v. Reed, 102 Wn.2d 140, 145-47, 684 P.2d 699 (1984)). Thus, in the interest of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason. Charlton, 90 Wn.2d at 664.

A defendant is deprived of a fair trial when there is a substantial likelihood that the prosecutor's misconduct affected the verdict. State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing Reed, 102 Wn.2d at 147-48). When the defendant establishes misconduct and resulting prejudice, reversal is required. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994).

The prosecutor committed misconduct in this case when he assured the jury of his personal belief in SK's credibility and Robles's guilt. He clearly and unmistakably expressed his opinion that SK was telling the truth and could not have fabricated her testimony about the alleged incident, which directly contradicted Robles's testimony. By asking the jury "why would we not believe her?" he clearly inserted his opinion into the jury's decision-making process. It is misconduct for a prosecutor to vouch for a witness by expressing his personal belief as to the witness's truthfulness. State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). "Whether a witness has testified truthfully is entirely for the jury to determine." Ish, 170 Wn.2d at 196. And by expressing his belief that Robles's testimony was "ridiculous," the prosecutor communicated his opinion as to Robles's guilt. It is also improper for the prosecutor to

express an independent, personal opinion as to the defendant's guilt. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). The Court of Appeals' conclusion that the prosecutor's argument was not improper conflicts with these prior decisions.

The prosecutor's misconduct requires reversal despite defense counsel's failure to object. Even where defense counsel fails to object, reversal is required if the misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995); Belgarde, 110 Wn.2d at 507. "[T]he failure to object will not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial." State v. Walker, 182 Wn.2d 463, 477, 341 P.3d 976 (2015). "An objection is unnecessary in cases of incurable prejudice only because there is, in effect, a mistrial and a new trial is the only and the mandatory remedy." Id. (internal quotation omitted) (citing State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012)).

The prejudice resulting from the prosecutor's impermissible argument in this case could not have been cured. The prosecutor vouched for the credibility of the State's key witness. Not only was she the alleged victim, but her testimony was the only evidence that the charged incident even occurred. It was crucial to the State's case that the jury believe SK.

But the prosecutor's personal assurances that she was believable unfairly bolstered her credibility. The prosecutor's assurances created an enduring prejudice that could not have been neutralized by a curative instruction. See State v. Sargent, 40 Wn. App. 340, 345, 698 P.2d 598 (1985) (prosecutor's statement in closing argument that he believed the State's witness could not have been cured with appropriate instruction and deprived defendant of a fair trial). The Court of Appeals' holding to the contrary conflicts with prior decisions of this Court and the Court of Appeals.

3. THIS COURT SHOULD REVIEW ISSUES RAISED IN THE STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW.

Robles raised several arguments in his statement of additional grounds for review, which the Court of Appeals rejected. Those arguments are incorporated herein by reference.

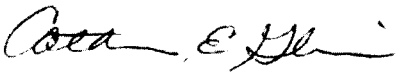
F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Robles's conviction and sentence.

DATED this 9th day of December, 2015.

Respectfully submitted,

GLINSKI LAW FIRM PLLC



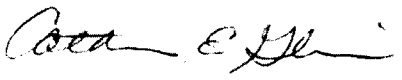
CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in *State v. Nicholas Robles,* Court of Appeals Cause No. 73934-4-I, as follows:

Nicholas Robles
1496 SE Althaus Drive
Troutdale, OR 97060

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



Catherine E. Glinski
Done in Port Orchard, WA
December 9, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	DIVISION ONE
	)	
Respondent,	)	No. 73934-4-I
	)	
v.	)	UNPUBLISHED OPINION
	)	
NICHOLAS SIMUKAS ROBLES,	)	
	)	
Appellant.	)	FILED: November 9, 2015
	)	

DWYER, J. — Nicholas Robles was convicted of rape of a child in the third degree. On appeal, Robles contends that the trial court improperly denied his motion for a mistrial and that the prosecutor engaged in misconduct by expressing his personal opinion regarding the victim's truthfulness and Robles' guilt. Robles also raises additional issues in a statement of additional grounds. Finding no error, we affirm.

I

Robles and S.K. first met in the summer of 2010. Robles was 28 years old at the time. When S.K. told Robles that she was 14 years old, he responded by joking that he would have to stay away from her because she was so young.

Robles and S.K. saw one another several times that summer. On one occasion, they encountered each other at the gym. Robles told S.K. that she had

a nice body and a "nice ass" and, later, asked for her telephone number, which she gave him.

S.K. and Robles began exchanging e-mails in August of 2010. In one e-mail, Robles asked S.K. to "send [him] some pictures." She responded by texting him a picture of her bare breasts. S.K. explained, "I felt like if I did he would be more interested in me and wanting to be with me in general." When S.K. subsequently told him that she was "done with pictures like that," he replied, "You don't do pics. That is not good." She then told him that if he wanted to see her nude, he could come look at her in person.

S.K. and Robles ultimately agreed to meet in January of 2011. They decided that S.K. would skip school, Robles would pick her up, and they would go to his house and use the hot tub. When they arrived at Robles' house, S.K. went into the bathroom and changed into her swimsuit. She felt "weird" at this time, wondering why she had come there and wishing that she had not. Her physical interaction with boys up to that point was limited to kissing a boy in the seventh grade. When she made the plan to meet Robles, S.K. thought they would go to the hot tub and hang out and then she would go home. She thought perhaps they would kiss and cuddle.

In the hot tub, S.K. sat on the opposite side of Robles, but he instructed her to come closer to him. Robles placed S.K. on his lap and held her there, preventing her from moving away. They eventually left the hot tub and went into Robles' bedroom.

In the bedroom, Robles asked for a massage. When S.K. was massaging his chest, Robles "tore" off her bikini bottoms. That was when S.K. realized "that [they] were going to do something. [They] were going to have sex." S.K. "didn't want to, but [she] didn't show that . . . . [She] just kept quiet." "[T]hen [Robles] pushed [S.K.] onto the side of the bed and he started to try and put his penis into [her] vagina." S.K. told him, "No, don't put it in -- not in there, I would rather do it in the ass." S.K. later explained that she said this because "[she] figured that if [her] vagina wasn't penetrated, [she] would still be a virgin. Because at that point, [she] was a virgin." Robles stepped away to apply lubricant to his penis. As he approached S.K. again, "[she] felt numb. [She] [did] not know[ ] how to speak, how to say anything. [She] just lay still." As Robles was inserting his penis into her anus, S.K. told him "No, don't," but he persisted. "[S.K.] was just quiet for the rest of the time. [She] didn't say anything else." S.K. later described that, when Robles forced his penis into her anus, she felt "burn[ing] or sting[ing]" pain.

After he ejaculated inside of her, Robles instructed S.K. to shower. When she used the toilet before showering, S.K. saw blood. She cried when she was in the bathroom, wanting to wash everything off and "get out of there." S.K. was in too much pain to put on her jeans again so, after her shower, she asked for a pair of sweatpants. Robles turned on the television and S.K. sat next to him, believing that they would cuddle. She thought that cuddling was the type of thing that happens "after something like that."

The day following the rape, S.K. told her parents what had happened. Though her father wanted to call the police, S.K. asked him not to, and he did not. In April of 2012, S.K. told her boyfriend about what Robles had done, and her boyfriend told her that, under Washington law, she had been raped. Following that conversation, S.K. contacted a sexual assault hotline and was referred to the Clark County Children's Justice Center. A criminal investigation ensued.

Robles was subsequently contacted by Officer Joshua Phelps of the Battle Ground Police Department. Robles told Phelps that he believed that S.K. was 13 years old when he met her. He also admitted that S.K. had sent him pictures of herself naked and in lingerie. He denied, however, having had any sexual contact with her.

Robles was ultimately charged with, and convicted of, rape of a child in the third degree. He now appeals.

II

Robles first contends that the trial court erred by denying his request for a mistrial after the prosecutor asked a question that, he claims, deprived him of a fair trial. We disagree.

> In determining whether a trial court abused its discretion in denying a motion for mistrial, [appellate] court[s] will find abuse "only when no reasonable judge would have reached the same conclusion." [State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (internal quotation marks omitted).] "The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Only errors affecting the outcome of the trial will be deemed prejudicial." [Hopson, 113 Wn.2d at 284; accord State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983) ("[T]he correct

> question [is] [d]id the remark prejudice the jury, thereby denying the defendant his right to a fair trial?").] In determining the effect of an irregular occurrence during trial, we examine "(1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it." [Hopson, 113 Wn.2d at 284.]

State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

Juries are presumed to follow the trial court's instructions. State v. Williams, 159 Wn. App. 298, 321, 244 P.3d 1018 (2011); accord State v. Hanna, 123 Wn.2d 704, 711, 871 P.2d 135 (1994).

The following exchange, which occurred during the prosecutor's direct examination of S.K., is at issue:

> Q. Okay. Now, when did you find out that this case was definitely going to trial?
> A. On Thursday.
> Q. And that was last -- so today is the 19th. Was that the 15th?
> A. Yes. I got a phone call from Sherry, and she said that I had to be here on Monday.
> Q. And was anyone -- since Thursday, has anyone been contacting your friends or family about this case?
> A. Yes.
>
> [Defense counsel]: Objection; relevance.
> THE COURT: Relevance, Counsel?
> [Defense counsel]: We have -- I think we need a conference outside the presence of the jury.
> [Prosecutor]: I would agree with that, Your Honor.
> THE COURT: Okay. Ladies and gentlemen, let's have you retire to the jury room for a few moments. We will call you back shortly.

Outside the presence of the jury, the prosecutor informed the court and, for the first time, Robles' counsel that he believed that members of Robles' family, and several of Robles' friends, had been contacting S.K.'s family since the case had been called ready for trial. The prosecutor believed that "it would go to show consciousness of guilt [or] possible intimidation of the State's witness."

The trial court ruled that, "without an implication of [Robles], I think we're on a[n ER] 403 problem here[,] where we've got somewhat limited relevance at best but very highly inflammatory and prejudicial possible effect." The court sustained Robles' objection.[1]

Robles nevertheless moved for a mistrial based on the prosecutor's question.[2] Robles argued that the question necessarily led to the conclusion that it was him who had been contacting her friends and family and that the jury could not disregard the question even if instructed to do so. The State responded that the question was of minor moment in the context of the trial to that point and, in particular, S.K.'s testimony, which had lasted approximately 1.5 hours by then and focused on Robles' rape of S.K. and events proximate thereto. The prosecutor also argued that the question was innocuous in that no mention was made of either Robles or threats.

The trial court denied the motion, stating:

> The motion before the Court is for a mistrial based on the question that immediately preceded the break. The Court will note that the remedy of mistrial is one of the most drastic remedies that are -- that is available under circumstances. The Court's -- the Court concludes that under the circumstances, the fact that the question came up in somewhat an innocuous fashion, that it was not answered, and that it is relatively small in the grand scheme of things is insufficient to rise to the level to grant a mistrial under the circumstances.

---

[1] The trial judge's concerns were warranted. While the prosecution may offer evidence that a defendant threatened a witness as an implication of guilt, State v. Kosanke, 23 Wn.2d 211, 215, 160 P.2d 541 (1945), where the threat does not come from the defendant, the State must show that it was made by someone acting with his knowledge and consent. State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997). No such evidence was presented here. Moreover, even if the evidence had been otherwise admissible, the trial court would not have abused its discretion by concluding that, despite its relevance, the evidence was unfairly prejudicial. See ER 403.

[2] "[S]ince [the day you found out that this case was going to trial], has anybody been contacting your friends and family about this case?"

When the jury returned, before the prosecutor's questioning resumed, the trial court instructed the jury as follows:

> All right. So ladies and gentlemen, we -- right before the break, there was a question that was pending. I'm instructing you to disregard that question. It wasn't answered, but it's been deemed by the Court to be inadmissible. So that's an order for you to disregard and -- that last question before we took the break.
> Go ahead, Mr. Robinson.[3]

The record herein supports the trial court's conclusion that Robles was not prejudiced by the prosecutor's improper question, as remedied by the trial court's curative instruction. Although Robles repeatedly asserts that the prosecutor's question "carried with it the implication that Robles was threatening the State's key witness because he knows he is guilty," in actuality, the prosecutor's question mentioned neither Robles nor any threats, much less any threats to S.K. Rather, it referred to "anyone" "contacting" S.K.'s family or friends. Moreover, the question arose in the context of S.K. being asked when and how she had been made aware that the case was proceeding to trial and S.K. responding that she had been contacted by someone named "Sherry," presumably a representative of the prosecutor's office. The questioning to that point was unrelated to any communications, much less nefarious communications, from Robles, or people acting on his behalf, to S.K. or her family. The question, in the form and context in which the jury heard it, was innocuous. Although the subject matter could have become prejudicial, the questioning was stopped before it reached that

[3] The prosecutor then resumed his questioning on a different topic, asking: "[Y]ou described this occurring at the defendant's home. Where is that – what's the location of that home?"

point.[4] The trial court, which was in the best position to evaluate the effects of the question, did not abuse its discretion by finding that the irregularity of the prosecutor's question did not rise to a level that would warrant a mistrial and that, instead, a curative instruction was sufficient.

III

Robles next contends that the prosecutor engaged in flagrant and ill-intentioned misconduct. This is so, he asserts, because the prosecutor expressed his personal belief regarding S.K.'s truthfulness and Robles' guilt. We disagree.

To show that a prosecutor's comment denied a defendant a fair trial, the defendant must show that a prosecutor's conduct was both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Where a prosecutor's comments are improper and defense counsel objected at trial, the defendant must show a substantial likelihood that the comments prejudiced the jury's verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). "[O]nly those errors [that] may have affected the outcome of the trial are prejudicial." State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

However, if a defendant fails to object and to request a curative instruction, the defendant waives a prosecutorial misconduct claim unless the

[4] The fact that no prejudicial information had yet been admitted when Robles objected distinguishes this case from State v. Babcock, 145 Wn. App. 157, 185 P.3d 1213 (2008), upon which Robles relies. Therein, the defendant moved for a mistrial after the State decided, mid-trial, to drop the child molestation charge against him. Evidence related to the child molestation charge had already been admitted and, the defendant asserted, the prejudice resulting from this evidence could not be cured by a jury instruction to disregard it. The trial court denied the defendant's request for a mistrial. The Court of Appeals reversed, agreeing with the defendant that the circumstances therein were such that "no instruction [could] 'remove the prejudicial impression'" created by the evidence of child molestation. Babcock, 145 Wn. App. at 164 (quoting State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987)).

comment "was so flagrant [and] ill-intentioned that an instruction could not have cured the prejudice." State v. Corbett, 158 Wn. App. 576, 594, 242 P.3d 52 (2010). "'An objection is unnecessary in cases of incurable prejudice only because there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.'" State v. Walker, 182 Wn.2d 463, 477, 341 P.3d 976 (2015) (internal quotation marks omitted) (quoting Emery, 174 Wn.2d at 762). "The absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Edvalds, 157 Wn. App. 517, 525-26, 237 P.3d 368 (2010) (citing State v. Swan, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990)).

Because it is entirely for the jury to determine whether a witness has testified truthfully, it is misconduct for a prosecutor to vouch for a witness by "'stat[ing] a personal belief as to the credibility of [that] witness.'" State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (quoting State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008)). Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony. Ish, 170 Wn.2d at 196 (citing United States v. Brooks, 508 F.3d 1205, 1209 (9th Cir. 2007)). However, because prosecutors have wide latitude to argue reasonable inferences from the facts concerning witness credibility, a reviewing court will not find prejudicial error "unless it is clear and unmistakable that counsel is expressing a personal opinion." State v. Allen, 176 Wn.2d 611, 631, 294 P.3d 679 (2013).

Herein, Robles asserts broadly that the prosecutor engaged in misconduct by stating his personal opinion regarding both S.K.'s credibility and Robles' guilt. However, Robles specifically identifies only one allegedly problematic statement, which is as follows:

> What's the one thing they don't agree with? What happened inside that house. Why would we agree and believe her on all these other details before and after, but not believe her on the one part of the entire case, the one reason we're here, the sexual abuse? Why would we not believe her when we believe all these other facts?

Robles argues that the prosecutor's use of the pronoun "we" constitutes vouching.

While it is true, as the State acknowledges on appeal, that prosecutors should generally avoid using the pronoun "we" in closing argument, its use is not always improper. In United States v. Younger, 398 F.3d 1179 (9th Cir. 2005), for example, the Ninth Circuit concluded that the prosecutor had not engaged in misconduct by repeatedly saying "we know" in reference to what he argued was shown by the evidence.[5] While ultimately concluding that the prosecutor's statements were not improper, the court also acknowledged the ambiguity caused by a prosecutor using the phrase "we know," reasoning thusly:

> We do not condone the prosecutors' use of "we know" statements in closing argument, because the use of "we know" readily blurs the line between improper vouching and legitimate summary. The question for the jury is not what a prosecutor believes to be true or what "we know," rather, the jury must decide

[5] Therein, the prosecutor said, for example: "'[W]e know [defendant] possessed the backpack. We know that. We know inside the backpack were the 81 rocks wrapped for retail sale and the 18 packets of cocaine powder also wrapped for sale' and '[w]e know that in the neighboring compartment, the bigger compartment, they had two loaded firearms.'" Younger, 398 F.3d at 1191.

> what may be inferred from the evidence. We emphasize that prosecutors should not use "we know" statements in closing argument.
>
> Nonetheless, the record in this case confirms that the prosecutors used the phrase "we know" to marshal evidence actually admitted at trial and reasonable inferences from that evidence, not to vouch for witness veracity or suggest that evidence not produced would support a witness's statements. [United States v.]Leon–Reyes, 177 F.3d [816,] at 822 [(9th Cir. 1999)]. The prosecutors' statements thus were not improper. [United States v.]Cabrera, 201 F.3d [1243,] at 1250 [(9th Cir. 2000)]; [United States v.]Toomey, 764 F.2d [678,] at 681 [(9th Cir.1985)]. Moreover, in the context of the entire trial, we conclude that the prosecutors' use of "we know" did not materially affect the verdict. See Toomey, 764 F.2d at 681.

Younger, 398 F.3d at 1191.

Because a prosecutor's use of the pronoun "we" in closing argument is ambiguous, and because the determination of whether it constitutes misconduct depends on the context in which it is used, courts are particularly reliant on defense counsel to object and make a record when its use appears "critically prejudicial." Edvalds, 157 Wn. App. at 525-26. Herein, Robles did not object. Due to the absence of an objection, we are not informed of the trial court's view on the matter of either the intent or the effect of the prosecutor's statement. Without this, Robles has not provided us a basis to conclude that the prosecutor's comments were "clear[ly] and unmistakabl[y]" improper. Allen, 176 Wn.2d at 631. Moreover, even if we were to conclude that the prosecutor's comments were improper, they certainly did not rise to the level of being flagrant and ill-intentioned. Furthermore, had Robles objected, any potential prejudice could have been cured by a proper instruction. See Younger, 398 F.3d at 1190 (prosecutor's statement that "'the government believes that [defendant] did

possess cocaine and cocaine base for sales purposes'" was not prejudicial where defense counsel immediately objected and the prosecutor immediately rephrased his statement).[6]

The prosecutor's remarks were not improper, and certainly were not flagrant and ill-intentioned. Moreover, if they were objectionable, they could have been remedied by a curative instruction. Therefore, Robles has not carried his burden of showing that these remarks entitle him to a new trial.

IV

Robles submits a pro se statement of additional grounds pursuant to RAP 10.10. He does not establish an entitlement to relief on any of the grounds presented.

"[T]he appellate court will not consider a defendant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). Generally, "the appellate court is not obligated to search the record in support of claims made in a defendant's statement of additional grounds for review." RAP 10.10(c); accord State v.

---

[6] In addition to his contention regarding the prosecutor's use of "we," Robles asserts that the prosecutor vouched for S.K. by arguing that, based on the level of detail that S.K. was able to provide about Robles raping her and about her surroundings that day, it was not believable that S.K. had fabricated her story. However, prosecutors are permitted wide latitude to argue reasonable inferences from the evidence concerning witness credibility, Allen, 176 Wn.2d at 631, and the prosecutor's argument herein—that the level of detail that S.K. testified to indicated that she was credible—was a permissible inference from the evidence.

It was also not improper for the prosecutor to describe Robles' story as "ridiculous." "[W]ords like 'ridiculous' or 'preposterous' in relation to testimony are not, alone, an improper expression of personal opinion as long as the prosecutor is arguably drawing an inference from the evidence." State v. Lindsay, 180 Wn.2d 423, 438, 326 P.3d 125 (2014). Robles claimed that S.K's detailed memory of the house in which the crime occurred came from pictures she saw on a camera phone. However, the evidence was that the pictures on the phone were taken *before* the house was remodeled, but the details S.K. gave were consistent with the house as it looked *after* the remodel. In calling Robles' story "ridiculous," the prosecutor was arguing that his account was not credible, which was permissible argument.

Meneses, 149 Wn. App. 707, 715-16, 205 P.3d 916 (2009) (It is not our role "to search the record to find support for the defendant's claim.").

While Robles lists several issues that could potentially be reviewable, he has not sufficiently identified the nature of the alleged errors. Because none of Robles' claims of error are sufficiently developed for review, we decline to reach them.

Affirmed.

Dwyer, J.

We concur:

Trickey, J.

Cox, J.