NO. 47036-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

WARREN CARLOS MABRY, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-00818-0

BRIEF OF RESPONDENT

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SUPPLEMENTAL STATEMENT OF THE CASE

The State agrees with the Statement of Facts presented by Mabry, and adds the following additional facts.

Dr. Copeland, who medically evaluated A.G., testified that A.G. had previous urinary tract infections and yeast infections. RP 522. According to Dr. Copeland, sexual intercourse can cause pain after urination and urinary tract infections. RP 523-25, 573. A.G. was scared when speaking to Dr. Copeland. RP 526. Dr. Copeland testified that vaginal tissue can heal very quickly, like the skin on the inside of the mouth. RP 541. Dr. Copeland further testified that it would be unlikely for her to find evidence of penetrative trauma in the vagina, and it is not unusual to have a normal vaginal examination even where penetration has occurred. RP 548-49. On cross examination, Dr. Copeland was asked whether the pain A.G. described to her was caused by sexual abuse, and she answered that the pain A.G. described to her was consistent with the abusive acts A.G. described. RP 564.

Cecily Brown is a nurse in the emergency room at Legacy Hospital in Salmon Creek. RP 378. She saw A.G. in the emergency room late on

June 14, 2013 and into the early hours of June 15, 2013. RP 379. Among other things, Nurse Brown assisted in the collection of evidence from A.G. RP 380-81. Among the items collected was A.G.'s underwear. RP 386. The underwear was tested, and the interior rear cutting of A.G.'s underwear contained Mabry's DNA. RP 612. The jury heard that touch DNA is harder to recover from clothing than DNA from biological fluids, making it unlikely that Mabry's DNA on the inside of the crotch of A.G.'s underwear was innocent transfer from touch DNA. RP 621.

ARGUMENT

I. The prosecutor did not commit prejudicial misconduct.

Mabry's sole claim of error is that the prosecutor committed misconduct on two occasions during closing argument. Mabry did not object to either remark now complained of, and raises this claim for the first time on appeal.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v.*

Hughes, 118 Wn.App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the 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). Meaning, the reviewing court will not even review the claim unless the defendant demonstrates that the misconduct was so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The reviewing court should focus more on whether the allegedly improper remark could have been neutralized by a curative instruction and less on whether it was flagrant and ill-intentioned. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

In the context of closing arguments, a prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Fisher*,

165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory,* 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The court should review a prosecutor's comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

> Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

"In determining whether the misconduct warrants reversal, we consider its prejudicial nature and its cumulative effect." *State v. Suarez-Bravo*, 72 Wn.App. 359, 367, 864 P.2d 426 (1994). "[T]he 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).

Following Mabry's closing argument, in which Mabry alleged a complicated plan by which A.G.'s father and step-mother framed Mabry for child rape, the State argued:

> There's a principle used in logical problem solving known as "Occam's Razor," which states, "That among competing hypotheses, the one that makes the fewest assumptions is the one that you should select." So in other words, the simplest answer is going to be the right one.

RP 871.

Mabry asserts that this argument asked the jury to convict the defendant on less than reasonable doubt. This claim lacks merit.

The prosecutor's reference to Occam's razor did not lessen the State's burden of proof. The prosecutor did not make this remark as a way of explaining reasonable doubt. He was not equating proof beyond a reasonable doubt to everyday decision-making. Rather, he made the remark in fair response to defense counsel's closing argument, in which he painted an elaborate picture of a plan between A.G.'s father and step-mother to frame Mabry for rape of a child so that they could win custody of A.G. from her unfit mother. The prosecutor's reference to Occam's

razor was his lead-in to explaining why Mabry's argument was not reasonable. For example, A.G.'s father and step-mother would have had to know that the medical examinations would reveal no evidence of sexual abuse—something lay people generally do not understand. They also would have to have been sure that A.G.'s underwear would yield Mabry's DNA. Mabry's frame-up argument depended upon alleged facts that were quite involved and complicated. By pointing out that the State's evidence was more reasonable than Mabry's theory of the case, the prosecutor did not trivialize the burden of proof. Moreover, it must be noted that the cases which discuss trivializing the burden do not stand for the proposition that cases which involve simple fact patterns necessarily fail under the reasonable doubt standard. Cases are often simple. That doesn't mean the burden of proof has been lessened or trivialized. Trivializing of the burden of proof occurs when a prosecutor equates the jury's deliberations to everyday decision making like trying to select a dentist, or resorts to silly puzzle analogies which reduce the burden of proof to improper mathematical thresholds. Although the charges in this case were serious, the evidence was nevertheless fairly uncomplicated. A.G. alleged multiple instances in which Mabry raped her. Mabry's DNA was found in the crotch of A.G.'s underwear, severely hampering Mabry's attempt to

persuade the jury he was framed. The remark was not improper and this claim fails.

Mabry's second claim is that the prosecutor appealed to the passion and prejudice of the jury when he made this remark, to which no objection was lodged:

> We don't have the technology to go back in time and stop bad things from happening. We don't have the technology to take the bad memories out of someone's mind. [A.G.] had to deal with that ongoing sexual abuse. She had to live with it. We are still seeing what she's been left to deal with. And now the time has come for him to live with it.

RP 880.

The prosecutor's fleeting remark about going back in time to stop bad things from happening, and A.G. having to live with bad memories, did not cause the jury to render a verdict based on passion or prejudice. The remarks were of minor moment in the overall trial, they conjured no more outrage than would naturally flow from the allegations A.G. lodged against the defendant, and they were not objected to. "A prosecutor is not barred from referring to the heinous nature of a crime but nevertheless retains the duty to ensure a verdict 'free of prejudice and based on reason.'" *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158, 1169 *review denied*, 175 Wn. 2d 1025, 291 P.3d 253 (2012).

The prosecutor here did not invent an entire murder scenario out of whole cloth as the prosecutor did in *Pierce*, supra. He did not appeal to racial bias, as the prosecutors did in *State v. Perez-Mejia*, 134 Wn.App. 907, 143 P.3d 838 (2006) and *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011). He did not craft a closing argument on the notion of a war on a particular crime, as the prosecutor did in *State v. Echevarria*, 71 Wn.App. 595, 860 P.2d 420 (1993).

Rather, the prosecutor was touching on a theme presented throughout the trial—A.G.'s occasional inconsistencies and lack of memory, and the effect her ordeal may have had on account of what occurred. The prosecutor also touched generally on the heinousness of the crime. Some of these remarks were arguably irrelevant, but not so flagrant and ill-intentioned that they could not have been obviated by a curative instruction.

The fact that the remarks were not objected to, by an attorney who made four objections during the prosecutor's closing remarks, suggests that the remarks did not appear particularly impactful or prejudicial at trial. Mabry certainly hasn't shown that they were flagrant and ill-intentioned, that they could not have been neutralized by an instruction to disregard, or that there is a substantial likelihood they contributed to the verdict. The evidence in this case was very strong; markedly stronger than

is typical in child sexual abuse cases. Mabry's DNA was found in the crotch area of A.G.'s underwear. These remarks did not affect the jury's verdict, and engendered no more prejudice than would naturally be engendered by the disgusting acts testified about throughout the trial.

Mabry has not shown that these brief remarks of the prosecutor, when viewed in the context of the entire trial, were so prejudicial that they could not have been neutralized with a timely curative instruction, nor can he show a substantial likelihood they affected the verdict. Mabry also has not shown the cumulative effect of these two remarks somehow warrants a new trial where, even assuming he can show each of the remarks was improper, he cannot show that they could not have been easily neutralized with a curative instruction. Mabry's conviction should be affirmed.

II. Legal Financial Obligations

Mabry argues that discretionary legal financial obligations should not have been imposed in this case where the trial court wholly failed to consider his ability to pay such legal financial obligations on the record. The State agrees with Mabry that the trial court erred in imposing discretionary LFOs, and avers in this case that review is warranted despite his lack of objection below because it was unreasonable, given his sentence of 480 months, for his attorney not to object to imposition of these fees.

The State merely disagrees with Mabry on a few minor points: First, the jury demand fee (as well as the criminal filing fee) were not imposed in this case because the amounts listed for those fees were not brought over to the left hand column denoting "Court costs." Unless the numbers are brought over to the "Court costs" line and added together, the State doesn't believe that the clerk reads the J&S as having imposed those costs. In any case, the State has since removed the pre-printed amounts on that part of the J&S for everything but the mandatory $200 criminal filing fee, which will hopefully avoid confusion in the future.

Second, the State disagrees that the crime lab fee is a discretionary LFO rather than a mandatory one. RCW 43.43.690 says:

> (1) When an adult offender has been adjudged guilty of violating any criminal statute of this state and a crime laboratory analysis was performed by a state crime laboratory, in addition to any other disposition, penalty, or fine imposed, the court shall levy a crime laboratory analysis fee of one hundred dollars for each offense for which the person was convicted. Upon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay the fee.
>
> (2) All crime laboratory analysis fees assessed under this section shall be collected by the clerk of the court and forwarded to the state general fund, to be used only for crime laboratories. The clerk may retain five dollars to defray the costs of collecting the fees.

Thus, the crime lab fee is mandatory in a case such as this. It can be suspended by the court if the defendant submits a verified petition that he does not have the ability to pay the fee. This statute does not require the court to determine, a priori, a defendant's ability to pay this fee.

Finally, the State avers that remand to the trial court for consideration of ability to pay discretionary legal financial obligations is unnecessary because the State will not be seeking their imposition on remand. The State withdraws its request for repayment of discretionary LFOs,[1] and suggests that they should be stricken from the judgment and sentence without need for a new hearing.

CONCLUSION

Mabry's conviction should be affirmed. His case should be remanded to strike discretionary legal financial obligations from his judgment and sentence.

DATED this 7th day of October, 2015.

Respectfully submitted:

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[1] The discretionary LFOs in this case are the court appointed attorney fee, the court appointed expert fee, and the $500 fine. CP 63.

CLARK COUNTY PROSECUTOR

October 08, 2015 - 11:44 AM

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