IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32869-4-III

STATE OF WASHINGTON, Respondent,

v.

JOHN MARK CROWDER, Appellant.

APPELLANT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

John Crowder filed a Statement of Additional Grounds on October 15, 2015. By letter dated May 24, 2016, the court requested that the parties submit additional briefing on two issues raised in the Statement, namely, (1) cumulative prosecutorial misconduct, and (2) insufficiency of the evidence to support the rape conviction.

II. ISSUES PERTAINING TO ERRORS RAISED IN SAG

1. Whether the prosecuting attorney committed repeated misconduct that rises to the level of cumulative error.
2. Whether sufficient evidence supports the conviction beyond a reasonable doubt.

III. SUPPLEMENTAL STATEMENT OF THE CASE

The acts of misconduct identified by Crowder consist broadly of two types: (1) repeated late disclosure of information and evidence, in several cases after trial was already underway, and (2) inflammatory statements made by the prosecuting attorney in closing argument.

Before trial, Crowder's counsel requested that the State produce two of its witnesses, the young men who were the subjects of the furnishing marijuana charges, for defense interviews. CP 58, 59-60. The State originally scheduled the interviews and rescheduled them. CP 59.

On the morning of September 8, 2014, eight days before trial, when the interviews had still not been arranged, the prosecuting attorney sent the following e-mail message to Crowder's attorney:

> I know you still want to interview, the boys and the two forensic scientist. Since we are not sure what will happen on Thursday -I thought it would be prudent to try and figure out a way to make this happen.
>
> I'm thinking for the two boys we need to try to interview them after hours -I'm going to suggest the Richland Public Library which is open till 9 pm Mon- Thurs. OR we can also try to interview the boys this weekend.
>
> Given the time constraints- we might need to do a telephonic with the two forensic scientists.
>
> What days are you available after hours this week?

CP 63. Crowder's attorney responded that he was available any night that week. CP 62.

That same night, without notifying defense counsel, the State interviewed one of the witnesses requested. CP 60. The State also did not disclose the interview or its contents – which included new information – to the defense until three days later, at which point only five days remained before trial. CP 60. The State did not produce the witnesses for defense interviews until three days before trial. CP 60. At no point did the State inform Crowder's attorney that it no longer intended to arrange the interviews, which it had repeatedly undertaken to do without objection

as early as July 30, 2014 and as late as September 8, 2014. CP 63, 65, 71, 73, 75.

After trial was underway, three law enforcement witnesses disclosed additional information that was not disclosed to the defense previously. CP 177. In response to defense objections, the State's forensic scientist was not allowed to testify to her opinion that the DNA samples had been diluted by efforts to clean them, because that opinion was not contained in any of her reports or disclosed to the defense until the day before trial commenced. I RP 8-11. Further, a deputy who had contact with Crowder and the two minor boys after they had allegedly smoked marijuana together and did not previously disclose any observation or belief that Crowder appeared to be under the influence at the time was not allowed to testify to that belief in light of the lateness of the disclosure. II RP 262-65. However, one of the detectives did not disclose until cross-examination that police had made efforts to interview certain child witnesses, but were unsuccessful, and referred to nebulous "suspicions" as to why. III RP 404-07.

Throughout the trial, the primary evidence of the rape consisted of I.D.'s testimony, as no other person witnessed it. I.D. testified that on the night in question, she received a text message from her friend S.I. to hang

out with him and Z.H., her former boyfriend. II RP 131-33. She snuck out of a window and walked towards the school where a Jeep pulled over and let her in. II RP 134. She claimed that S.I. and Crowder were in the jeep. II RP 134. They drove to a house and sat by a fire with S.I., Z.H., and Crowder's child. II RP 135. While Crowder left to take his child home, Z.H. pulled a bottle of vodka from his backpack and offered it to her to drink, but she refused. II RP 136.

According to I.D., Crowder returned about five minutes later and gave Z.H. some weed, which he and Z.H. smoked. II RP 136. Z.H. and Crowder were both drinking. II RP 137. I.D. said that Crowder pulled her up from where she was sitting and tried to hug her, but she did not hug him back. II RP 138. He offered her marijuana and vodka, but she did not consume any. II RP 138. Z.H. began to vomit and passed out in a chair, while S.I. fell asleep. II RP 139. I.D. was sitting by the fire when she claimed Crowder came up behind her, pulled her head back, and tried to put vodka down her throat. II RP 139. She kept her mouth closed but a little bit got inside her mouth. II RP 140.

I.D. got angry and started to walk home, but Crowder grabbed her arm and took a gun out of his pocket. II RP 140. He then told her to get naked and get in the back of his Jeep. II RP 140-41. He held the gun up

against her forehead and pulled back the hammer. II RP 142. I.D. described the gun as a revolver, having a "spinning barrel." II RP 143.

I.D. began walking towards the Jeep when S.I. came around and asked for a blanket, but Crowder told him to go back to sleep. II RP 143-44. I.D. removed her clothes and laid down on the back seat of the Jeep, where she claimed Crowder penetrated her vagina with his penis and fingers. II RP 144. She cried and told him to stop, but it continued for an hour. II RP 145. Eventually she vomited outside of the car onto the ground, and Crowder backed away. II RP 145. She then got dressed and ran home. II RP 145.

After I.D. snuck back in through the window, she used the bathroom and discovered she was bleeding. II RP 146. She stated she doesn't normally have a period because of medication. II RP 147. After that, she went to bed and went to sleep. II RP 148. Several days later, I.D. told an aunt what happened. II RP 149-50.

I.D.'s testimony was inconsistent with prior statements she gave to law enforcement, inconsistent with the testimony of S.I. and Z.H., and unsupported by the physical evidence. She testified that S.I. picked her up in the car with Crowder, but S.I. and Z.H. disputed who was there. II RP 135; II RP 235, 245; II RP 297. Earlier, she told police that she had met

Z.H. and S.I. outside of her house. II RP 209. During her testimony, she told police Crowder pulled her head back and tried to pour vodka down her throat, but she closed her mouth and only a little bit got in her mouth. II RP 139-40. In her earlier statement, she said that Crowder poured a quarter bottle of vodka down her throat, pouring it for a minute, and he forced so much vodka down her throat it made her sick. II RP 165-70. At trial, she said that she vomited outside the car and the rape stopped, but in her earlier interview she said she vomited on Crowder, and stated in a defense interview that she could not vomit. II RP 145, 181-84. I.D. said that S.I. walked up to the truck after Crowder had pulled the gun on her, but S.I. said that he saw no gun and he would have seen a gun if Crowder had been holding one. II RP 174-75, 251-52. Finally, while police recovered blood and DNA belonging to I.D. in Crowder's Jeep, they recovered no semen on her shorts and none of Crowder's DNA. III RP 491-99. Instead, they located I.D.'s DNA mixed with that of an unknown male. III RP 495, 501. No vomit belonging to I.D. was located inside or outside of the car. III RP 475, 509.

Moreover, the evidence demonstrated that I.D.'s relationship with the two young men was complicated. She had previously been in a relationship with Z.H. that ended just a couple days before, and she was upset about it. II RP 131-32, 156-57, 322. She had been texting with S.I.

that day, and S.I. reportedly was the one who wanted to meet up with I.D. and "get lucky." II RP 312, 323. She also texted with both S.I. and Z.H. afterward, but all three of them deleted the texts. II RP 187-88, 253, 318-20. I.D. texted Z.H. to ask if he had marijuana, shortly after Z.H. was threatened about being turned in to the police. II RP 319.

During closing arguments, the prosecuting attorney made a number of statements identified by Crowder as improper:

- "And [I.D.] held up her right hand and she swore to tell the truth. And she did." Defense did not object. IV RP 547.
- "[I]t is where her blood was found that paints the picture of exactly what happened in this case." Defense did not object. IV RP 547.
- "The defendant leans over and says, hey, you guys want to smoke some weed? You think those boys were excited about that? You think those boys are like, oh, whoa, score. I've got some adult here who is going -- " The defense then objected, which was overruled. The prosecuting attorney then continued, "He leans over. Hey, you boys want to smoke some weed? They're like, yeah, let's do that. He says, okay. We need to get rid of these other kids that are here." IV RP 550.

- "I don't want you to get caught up in the smoke screen of all the small details." Defense did not object. IV RP 554.
- "Don't give in to that smoke screen." Defense did not object. IV RP 555.
- "This is what happened." Defense did not object. IV RP 557.
- "And there was a trace amount of something else in there. You can't rule out John Crowder as the person that was trace in there." Defense did not object. IV RP 561.
- "It's time for justice to be served." Defense did not object. IV RP 564.

These statements occurred throughout a closing argument in which the prosecuting attorney repeatedly referred to 14 year old I.D. as "the child," asked the jury to consider whether appearing and testifying was easy for her, repeatedly dramatized the events that were the subject of the testimony, informed the jury that Crowder's marijuana was "the high THC concentrated stuff," displayed I.D.'s shorts to the jury and repeatedly asked them to look at the menstrual blood stains, suggested the defendant had to manipulate her because "[m]aybe her body wasn't reacting the way that he was hoping," and asked the jury to think about what "this child" went through in evaluating her credibility. IV RP 546-64.

IV. ARGUMENT

A. Whether prosecutorial misconduct tainted Crowder's trial

1. In late disclosure of evidence.

Discovery obligations are generally governed by CrR 4.7. Under that rule, any new material or information must be promptly disclosed to the other party. CrR 4.7(g)(2). Additionally, parties are prohibited from impeding each other's investigations. CrR 4.7(g)(1). Violation of the rules of discovery may be grounds for sanctions under CrR 4.7(g)(7) and may further constitute government mismanagement under CrR 8.3(b). *See generally State v. Brooks*, 149 Wn. App. 373, 203 P.3d 397 (2009).

Failure to timely disclose evidence that requires a defendant to choose between having a speedy trial or going to trial prepared is grounds for sanctions. *See State v. Salgado-Mendoza*, __ Wn. App. __, __ P.3d __, 2016 WL 3004544 (May 24, 2016). A lesser sanction than dismissal may be warranted under the facts of any particular case, and dismissal is considered an extraordinary remedy. *See State v. Beliz*, 104 Wn. App. 206, 211-12, 15 P.3d 683 (2001); *State v. Ramos*, 83 Wn. App. 622, 637, 922 P.2d 193 (1996). However, mismanagement by the State may not compel a defendant to choose between his right to a speedy trial and his

right to adequately prepare his defense. *State v. Price*, 94 Wn.2d 810, 814, 620 P.2d 994 (1980).

Here, the prosecutor's late disclosure of evidence at trial was largely remedied by the trial court's exclusion of it. However, the handling of the interview of Z.H. and S.I. was far more problematic. While the State had no obligation under CrR 4.7 to arrange the interviews, the State nevertheless undertook to do so and represented to defense counsel that arrangements would be made. Having done so, the prosecuting attorney was obliged to act diligently and without gamesmanship. *State v. Wilson*, 149 Wn.2d 1, 10-11, 65 P.3d 657 (2003); *see also generally State v. Sherman*, 59 Wn. App. 763, 801 P.2d 274 (1990). Moreover, the prosecuting attorney was specifically advised that delay would implicate speedy trial because counsel's trial schedule in the following weeks was full. CP 64. Given the shortness of time until trial and the multiple weeks the prosecuting attorney had to arrange the interviews, the decision to interview the witnesses independently, wait three days to disclose the contents of the new interviews, and then fail to arrange the defense interviews until two days before trial constitutes the kind of gamesmanship and lack of diligence that amounts to misconduct.

Moreover, the mismanagement was prejudicial because it presented exactly the Hobson's choice between adequate preparation and speedy trial recognized in *Price*. The State knew in advance that Crowder's attorney could not continue the trial date within the speedy trial deadline due to other scheduling conflicts. CP 64-65. Moreover, S.I. and Z.H. gave different versions of events in their interviews, but because of the shortness of time before trial, the defense could not prepare transcripts for impeachment or modify the defense. CP 60.

The State's failure to produce the witnesses to the defense until two days before trial while granting itself access to interview them, under circumstances where the State had agreed for several weeks to arrange the interviews, impeded the defense investigation under CrR 4.7(g)(1). Its failure to timely disclose that the interviews had occurred and the contents of the interviews for another three days when there was less than one week until trial violated its obligation to diligently disclose new information to the other party under CrR 4.7(g)(2). The delays were prejudicial because the defense lacked adequate time to prepare as a consequence of the delays.

Accordingly, the trial court erred in denying Crowder's motions to dismiss and for a new trial. RP (Motions) 16. While dismissal is an

extraordinary remedy, continuance was no longer a viable remedy because the motions could not even be heard until after the trial was already concluded. Failing to at least grant a new trial at which the defense could be adequately prepared amounts to an abuse of discretion.

2. In closing argument.

A claim of prosecutorial misconduct requires the defendant to show that the prosecutor's conduct was both improper and prejudicial, considering the context of the record as a whole and the circumstances at trial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). When the defendant has objected at trial, the burden is then to show that the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). When there is no objection, however, the defendant must show that the misconduct was so flagrant and ill intentioned that no curative instruction could have cured the prejudice. *Id.* at 760-61.

Courts should evaluate misconduct considering the effect it produced. *Id.* at 762 (*quoting State v. Navone*, 186 Wash. 532, 538, 58 P.2d 1208 (1936)). The question is whether the jury has been so prejudiced or inflamed as to prevent the defendant from receiving a fair trial. *Id.* (*quoting Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d

434 (1932)). Moreover, although a defendant may fail to show any one statement incurable with proper instructions, the cumulative effect of multiple instances of misconduct may result in incurable prejudice. *State v. Case*, 49 Wn.2d 66, 73-74, 298 P.2d 500 (1956); *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

Prosecuting attorneys, as representatives of the people, "have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant." *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). A prosecuting attorney may not call the jury's attention to matters or considerations that the jury has no right to consider, such as evidence outside the record and evidence that serves only to inflame the jury. *State v. Belgarde*, 110 Wn.2d 504, 508-09, 755 P.2d 174 (1988). In an emotional sexual assault trial, use of vivid and highly inflammatory language may serve only as an appeal to passion and prejudice and may be so prejudicial that no curative instruction can erase the harm. *State v. Claflin*, 38 Wn. App. 847, 850-51, 690 P.2d 1186 (1984).

Moreover, a prosecutor may not express a personal opinion as to the credibility of a witness or the guilt of the defendant. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). While a prosecutor may argue the evidence does not support a defense theory, the prosecutor may not

impugn the defense. *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014).

The statements challenged by Crowder, taken individually, might be harmless, but taken collectively and in the context of the argument as a whole, served to vouch for I.D.'s credibility by describing her testimony as "the truth" and "what happened"; served to appeal to the sympathies of the jury by characterizing I.D. as a child and asking the jury to consider what she went through, and by waving I.D.'s bloodied shorts at the jury and speculated about how her body reacted and how Crowder would have manipulated her; and served to inflame the jury against Crowder by dramatizing the events testified to, by pointing to facts not in the record such as Crowder's marijuana being "the high THC concentrated stuff" and Crowder being unable to be ruled out of the trace DNA evidence, and by trivializing the evidentiary discrepancies and maligning the defense case by referring to them as a "smoke screen," finally exhorting the jury to serve justice by convicting.

Taken as a whole, the prosecuting attorney's argument sought to persuade the jury through emotionalism rather than argument. The effect, and perhaps the purpose, was to encourage the jury to feel protective of I.D. and condemnation of Crowder, so as to disregard the factual

discrepancies the prosecuting attorney encouraged them to dismiss as a smoke screen. Because the prosecutor sought to inflame the jury's emotions through improper argument, the result is a trial that cannot be relied upon as fair.

B. Whether sufficient evidence supports the conviction for first degree rape.

In reviewing a challenge to the sufficiency of the evidence, the court considers the evidence in the light most favorable to the State. *State v. Randecker*, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971). The court then evaluates whether any rational trier of fact could find each element proven beyond a reasonable doubt. *State v. Pruitt*, 145 Wn. App. 784, 790, 187 P.3d 326 (2008). The verdict should be reversed if, after reviewing the evidence, the court cannot conclude that any rational trier of fact could have found the essential elements of the charge beyond a reasonable doubt. *State v. Randhawa*, 133 Wn.2d 67, 73, 941 P.2d 661 (1997).

This standard does not require the reviewing court to believe that the evidence at trial established guilt beyond a reasonable doubt, but rather whether any rational jury could be so convinced. *State v. Smith*, 31 Wn. App. 226, 228, 640 P.2d 25 (1982). The credibility of witnesses and the weight of the evidence is the sole province of the jury. *State v. Blum*, 17

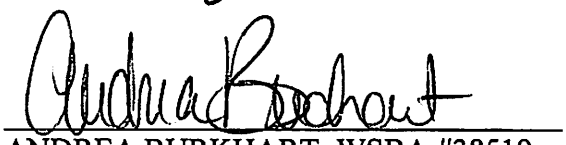
Wn. App. 37, 41, 561 P.2d 226 (1977). Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The jury's essential function is to judge the weight and credibility of the evidence to discount theories it determines unreasonable. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

To prove the charge of rape in the first degree, the State was required to present evidence that Crowder engaged in sexual intercourse with I.D. by forcible compulsion and used or threatened to use a deadly weapon or what appeared to be a deadly weapon. RCW 9A.44.040(1)(a). Here, substantial evidence likely supports the verdict because the jury was entitled to believe I.D.'s testimony, however problematic. *See Blum*, 17 Wn. App. at 41. However, the court should carefully review the evidence as a whole in making this determination. *See State v. Lord*, 117 Wn.2d 829, 882, 822 P.2d 177 (1991).

V. CONCLUSION

For the foregoing reasons, and for the reasons argued in the Appellant's Brief and Reply Brief previously filed herein, Crowder respectfully requests that the court reverse his convictions and grant a new trial.

RESPECTFULLY SUBMITTED this 5th day of July, 2016.



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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 5th day of July, 2016 in Walla Walla, Washington.

Breanna Eng