No. 32869-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

JOHN MARK CROWDER,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 14-1-00869-8

RESPONDENT'S SUPPLEMENTAL BRIEF IN RESPONSE TO DEFENDANT'S STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

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I. ISSUES PRESENTED

A. Whether the prosecutor's conduct was improper and prejudicial.

B. Whether the State presented sufficient evidence to support a conviction for Rape in the First Degree.

II. STATEMENT OF FACTS

In its Brief of Respondent, the State has set forth the substantive facts. The State would refer the Court to the Brief of Respondent and incorporate the facts and arguments therein.

III. ARGUMENT

A. Based upon the entire record, the defendant cannot establish that the prosecutor's conduct was improper and prejudicial.

The defendant alleges a series of issues that he claims rise to prosecutorial misconduct. First, he alleges witnesses were withheld and speedy trial was violated. Second, he claims the prosecution engaged in misconduct during closing arguments. Third, he asserts misconduct over omissions in two officer reports. Finally, he asserts prosecutorial misconduct for actions of law enforcement during the investigation of the case.

A prosecuting attorney represents the people and presumptively acts with impartiality in the interest of justice. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). To prevail on a claim of prosecutorial

misconduct, the defendant must establish "'that the prosecutor's 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, 727, 940 P.2d 1239 (1997))); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

The burden to establish prejudice requires the defendant to prove that there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); *see, e.g.*, *State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006) (defendant failed to prove that prosecutor's misconduct in eliciting testimony barred by pretrial ruling, to which he did not object, caused prejudice affecting the outcome of the trial). The prejudicial effect of a prosecutor's improper comments is determined by looking at the remarks "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *Brown*, 131 Wn.2d at 561. The "[f]ailure to object to an improper comment constitutes waiver of error unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." *Id.*

A prosecutor may not improperly express an independent, personal opinion as to the defendant's guilt. *State v. McKenzie*, 157 Wn.2d 44, 134 P.3d 221 (2006). In *State v. Armstrong*, the Court held that,

> While it is improper for a prosecuting attorney, in argument, to express his individual opinion that the accused is guilty, independent of the testimony in the case, he may nevertheless argue from the testimony that the accused is guilty, and that the testimony convinces him of that fact. . . . In other words, there is a distinction between the individual opinion of the prosecuting attorney as an independent fact, and an opinion based upon or deduced from the testimony in the case.

State v. Armstrong, 37 Wn. 51, 54-55, 79 P. 490 (1905).

To determine whether a prosecutor is expressing a personal opinion of the defendant's guilt, independent of the evidence, a reviewing court views the comments in context:

> It is not uncommon for statements to be made in final arguments which, standing alone, sounds like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is *clear* and *unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.*

State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983) (emphasis added).

Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. *State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967); *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). When reviewing a claim that prosecutorial misconduct requires reversal, the Court should review the statements in the context of the entire case. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

1. No witnesses were withheld and speedy trial was not violated.

First, the defendant alleges that key witnesses were withheld and that if his trial had had to be continued, a speedy trial violation would have occurred. Each of these issues were squarely addressed below by the Superior Court on the defendant's Motion to Dismiss. CrR 8.3 Motion to Dismiss, filed in trial court on 09/15/2014.[1] As fully briefed in the State's Response to Defendant's Motion to Dismiss, CP 188, which was submitted before the trial court, the defendant was merely displeased because the State arranged an interview without his presence. The State may speak to its witnesses as it wishes. It has long been recognized that either party may speak with a witness, so long as the witness agrees, without the permission of opposing counsel. *E.g.*, ABA Canon of Professional Responsibility 39. The State is under no obligation to arrange

[1] Designated via Supplemental Designation of Clerk's Papers on June 23, 2016.

for a defense interview. *State v. Wilson*, 108 Wn. App. 774, 778, 31 P.3d 43 (2001), *aff'd*, 149 Wn.2d 1, 65 P.3d 657 (2003).

Clearly the State was attempting to schedule interviews, but the schedules of both parties and those of the witnesses were difficult. The State attempted to get these done early on in the case, but defense counsel is the one who wanted to wait and who objected to any sort of continuance within speedy trial. Response to State's Motion for Continuance, filed in trial court on 09/10/2014.[2] The State succeeded in giving defense counsel an opportunity to interview the witnesses. And now, defense counsel wishes to argue that it was misconduct to not do so faster. In this case, if the defendant did not believe the State was trying to obtain an interview quickly enough, he had every opportunity to contact the State's witnesses himself. He did not do so. If he was unable to arrange an interview, he could have moved for a deposition under CrR 4.6. He did not do so.

Furthermore, the defendant cannot demonstrate prejudice because there was ample time left within speedy trial. When evaluating this exact issue, the courts have been quite clear. A late (or even un-conducted) interview cannot justify anything more than a continuance, unless speedy trial is an issue. "Because Irons was not in custody and his speedy trial expiration was not imminent, his case should not have been dismissed

until speedy trial expiration became an issue." *State v. Wilson*, 149 Wn.2d 1, 12, 65 P.3d 657, 662 (2003). Indeed, if given the option between dismissal and taking action to lengthen the remaining time for speedy trial, the court must try all available options before dismissal. This includes pretrial release. *Id.* The defendant is only in this alleged prejudice because he insisted on a trial date long before the expiration of his speedy trial period. If he believed additional time was necessary, he had every opportunity to ask for a continuance. The State had asked for a continuance. State's Motion and Affidavit to Continue, filed in trial court on 09/17/2014.[3] As well, the defendant did have an opportunity to interview the witnesses he complains of. Given that courts have held that an interview the morning before the witnesses in question testify can satisfy a defendant's right to a fair trial, the complaints the defendant raises that he only had three full days to adjust his cases seem rather out of place. *State v. Osborne*, 18 Wn. App. 318, 326, 569 P.2d 1176 (1977). The defendant is in no way entitled to the perfect impeachment evidence. *State v. Mankin*, 158 Wn. App. 111, 124, 241 P.3d 421 (2010). He has the information from the interview. The fact that he cannot confront the witnesses with word-for-word transcripts is not a constitutional violation. *Id.*

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[2] Designated via Supplemental Designation of Clerk's Papers on June 23, 2016.

Furthermore, the defendant cannot create prejudice and then benefit from it. *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984). The defendant had more than enough time left in his speedy trial period to continue the matter, and he chose not to.

Accordingly, nothing arising from the defendant's choice to go to trial well in advance of speedy trial or for not being present for an interview amounts to prosecutorial misconduct in any way.

2. The defendant cannot show prejudicial error from statements made by the State in closing arguments.

Next, in a series of one sentence quotes, the defendant maintains a few of the prosecution's statements during closing arguments, when taken completely out of context, amount to misconduct. Statement of Additional Grounds (SAG) at 3-4. However, the Superior Court did not abuse its discretion in permitting each of the statements to be made during closing.

In reviewing a closing argument, a reviewing court views the comments in context:

> It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until

[3] Designated via Supplemental Designation of Clerk's Papers on June 23, 2016.

> such time as it is *clear* and *unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.*

Papadopoulos, 34 Wn. App. at 400 (emphasis added).

Reviewing the entire closing argument shows that the prosecution was arguing directly from the evidence at trial. First, each of the pictures the defendant addresses were actually admitted at trial. RP at 334-35; SAG at 3. Second, contrary to the standard in *Papadopoulos*, the defendant quotes a series of conclusory statements made by the prosecutor but ignores the context in which they were argued to the jury. SAG at 3-4. For example, the defendant cites, "This is what happened" (RP at 557), however the entire context followed:

> This is what happened. She's sitting there and some man is trying to get her to drink. And he takes her head back and he tries to force her to drink some vodka. Now, how she has described that some got in her mouth. She coughed some out. You know, she [is] Type One diabetic. And that freaked her out.

RP at 557. Contrary to misconduct, the prosecutor's statements were directly related to the evidence heard in trial and tying that evidence to the prosecutor's theory of the case. Similarly, the defendant cites, "Don't give in to that smoke screen" (RP at 555), ignoring the entire context of the argument that the only thing that matters is that I.D. was there:

> Let's talk about the assault on [I.D.]. Who cares how she got there? Think about that. Who cares? How did she get there and how did she get alone with the defendant are the

> questions. How did she get there? Who texted who? Okay. Who picked her up? Okay.
>
> Does any of that matter, really matter in her rape case? Does that really matter how she got there? Aside from the fact that she was picked up by this man. But how she got there? She was there. Why is this 14-year-old child around this man? Well, because she snuck out of her parents' house and she was meeting up with two boys, okay? Was it [Z.H.] that picked her up or [S.I.] that picked her up? Who cares who picked her up? It's the fact that she was there is enough.
>
> Don't give in to that smoke screen. Don't get into that. [I.D.] got alone with that man because she was meeting two boys. Who texted who and who decided to pick her up and all of that is just smoke screen. [I.D.] snuck out to meet two boys and ended up alone with the defendant. We can agree on that.

RP at 555.

Next, the defendant points to the statement that "she swore to tell the truth. And she did." RP at 547; SAG at 3. While out of context it may appear as vouching, in context it was a statement headlining how a 14-year-old's testimony was corroborated by the physical evidence:

> She told you. She came into this courtroom and -- And remember, this was a 14-year-old child, a child who walked into this courtroom, in front of a courtroom of strangers, in front of the man that did this crime to her. She walked slowly up there and she got up there on that stand. And she looked at the Judge. And she held up her right hand and she swore to tell the truth. And she did. Do you think that was easy for her? Do you think that would have been easy for an adult? Remember, this is a 14-year-old child. But not only did she come in here and tell you what happened to her body, but the physical evidence in the case

> walked in here and told you what happened to that child. You learned about a gun. And she told you that was the gun. . . .
>
> You learned that she had a bruise on her chest. . . . And you got a picture of it.

RP at 546-47.

Finally, the defendant quotes, "It's time for justice to be served" (RP at 564; SAG at 3), while ignoring that immediately preceding it, the prosecution had stated:

> Ladies and gentlemen, I'm gonna ask that you find him guilty. You have all that you need to find him guilty as charged of Rape in the First Degree, because that's what she says happened. And that is what the evidence shows you what happened.

RP at 564.

Ultimately, each of the statements the prosecution made during closing arguments were properly tied to the evidence at trial and arguing how that evidence met the State's burden. Accordingly, the defendant cannot show any prosecutorial misconduct occurred during closing arguments.

3. Reports of Deputy Korten and Detective Runge

The defendant next asserts misconduct from omissions in the officer's reports. However, as more fully briefed in response to Defendant's Motion for a New Trial, CP 181-87, each of the defendant's concerns were remedied by the trial court. Here, when the new evidence

surfaced, compliant with its CrR 4.7 obligations, the State presented it to defense counsel. CP 183. More importantly, the remedy, exclusion of the information, was granted by the trial court. The Court excluded every piece of evidence that the defendant alleged the State had concealed. Deputy Korten's opinion was never placed in front of the jury. Detective Runge's difficulties in reaching the girls were, but not his thoughts as to why. Lastly, the fact that the DNA samples were diluted, which led to a possibility that the crime scene had been cleaned, was entirely excluded. The defendant obtained his desired remedy to those alleged errors.

Accordingly, not only do the omissions by the officers not amount to prosecutorial misconduct, but because the omitted information was excluded, the defendant cannot demonstrate prejudice.

4. Alleged inadequacies of investigation do not amount to prosecutorial misconduct.

Finally, the defendant asserts that a number of alleged inadequacies in the investigation somehow amounts to prosecutorial misconduct. SAG at 4-5. However, the standard is "'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances.'" *Magers*, 164 Wn.2d at 191 (quoting *Hughes*, 118 Wn. App. at 727 (citing *Stenson*, 132 Wn.2d at 727)); *Dhaliwal*, 150 Wn.2d at 578. Nothing in the allegations regarding the

investigation has anything to do with the prosecutor's conduct. Accordingly, no prosecutorial misconduct could follow from the alleged inadequacies.

5. Conclusion

Fundamentally, nothing the defendant has raised shows misconduct by the prosecution; and more importantly, the defendant has failed to establish that there is a substantial likelihood the alleged misconduct affected the jury's verdict. Accordingly, the defendant's prosecutorial misconduct claims should be denied.

B. More than sufficient evidence existed to support a conviction for Rape in the First Degree.

The defendant asserts that there was insufficient evidence to support a conviction for Rape in the First Degree. However, the defendant's argument ignores the volume of direct and circumstantial evidence presented at trial.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all

reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

At trial, 14-year-old I.D. testified as to what the defendant did to her. RP at 129-98. Her testimony alone would be sufficient to sustain a conviction for Rape in the First Degree. RCW 9A.44.020(1) provides: "In order to convict a person of any crime in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated." Nonetheless, the victim's testimony was corroborated by several witnesses, marks on her body, matching gun found in the defendant's house, and the forensic evidence.

Fifteen-year-old S.I. and 16-year-old Z.H. corroborate that I.D. came to the location of the crime at their request. RP at 133-35, 235, 297-98. S.I. testified that after Z.H. passed out, he went to go check on I.D. RP at 236. He saw I.D. in front of the defendant's Jeep. *Id.* He thought she looked scared. RP at 237. The defendant told him to go back to the bonfire. *Id.* I.D. testified that S.I. had come up to check on her, but the

defendant told him to go away. RP at 143-44. S.I. then passed out at the fire. RP at 238. I.D. was then raped by the defendant in the back of his Jeep. RP at 143-48. The defendant raped her digitally and vaginally. *Id.* The defendant also "sucked" on her breasts, leaving marks. *Id.* Pictures of these marks were admitted at trial. RP at 147. After the rape was done, 14-year-old I.D. ran home. RP at 145. There, she discovered she was on her period. RP at 146-47.

In addition, the victim described the gun the defendant used when he raped her. RP at 140-44. The gun used during the crime was found in the defendant's house. RP at 143, 359-61.

Furthermore, Stephen Greenwood with the Washington State Crime Laboratory testified that five areas in the defendant's Jeep tested presumptive positive for blood: (1) interior side of rear driver's side door, (2) driver side edge of the rear seat cushion, (3) driver side of the rear seat cushion, (4) rear middle passenger seat, and (5) back of the front passenger seat upright. RP at 462-75. Pictures of the exact locations of these spots were admitted at trial. *Id.* Anna Wilson with the Washington State Crime Laboratory testified that the five areas were consistent with being the blood of I.D. RP at 484-510. At trial, the State argued that the five areas were consistent with how the child described the digital and

vaginal penetration, rather than I.D. just sitting in the back seat while menstruating. RP at 557-63.

While the defendant cites to evidence which he believes to be lacking, taking the above evidence in a light most favorable to the State, any rational trier of fact would have found the defendant guilty. Accordingly, like his prosecutorial misconduct claim, the defendant's insufficient evidence claim falls short.

IV. CONCLUSION

The defendant has failed to demonstrate that the prosecution engaged in misconduct or that any misconduct affected the jury's verdict, and the State presented the jury more than sufficient evidence to support a conviction for Rape in the First Degree.

RESPECTFULLY SUBMITTED this 23rd day of June, 2016.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on June 23, 2016.

Courtney Alsbury
Appellate Secretary