71303-5

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NO. 71303-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE MARRUFO-SARINANA,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Was the defendant denied a fair trial by the prosecutor's remarks in closing argument?

2. At sentencing the court imposed a condition of supervision that the defendant was to not date women or form relationships with families who have minor children related to the crime of child molestation. The defendant agreed to this condition. Is any objection to the condition waived by the agreement? If not, is the condition so vague that an ordinary person could not understand what was prohibited?

II. STATEMENT OF THE CASE

The morning of February 18, 2013, after his girlfriend, Y.D's mother, left for work, the 36 year old defendant found himself alone in bed with the 11 year old Y.D. Y.D. was still asleep. The defendant took advantage of this situation by embracing Y.D. from behind. Although his embrace woke her, Y.D. was frightened and pretended to be asleep. The defendant began rubbing his hand on her stomach, under her clothing, then up under her bra. He fondled her breast for a while, then moved his hand back to her stomach, moving it in slow circular motion, dipping his hand below the

waistband of her sweatpants a couple of times before Y.D. stopped pretending she was asleep and fled the room. 2RP 14; 25-35; 79.

The defendant had been in a romantic relationship with the victim's mother for approximately three years and was living with her and her three juvenile daughters in Snohomish County, Washington. The defendant worked the night of February 17, 2013. The then 11 year old Y.D. sat on her mom's bed with her to watch T.V. Y.D. fell asleep still wearing her sweat pants, t-shirt, bra and underpants. The defendant returned from work at about midnight and he too got into the king size bed and fell asleep. During the night, Y.D. was on one side of the bed, the defendant on the other and her mom was in the middle. Y.D.'s mom got up at 5:30 a.m. to leave for work by 6:30 a.m. Before she left, she said goodbye to the defendant who was awake but still in bed. Y.D. was still asleep. Y.D. and the defendant were still on opposite sides of the king size bed. 2RP 17, 20, 22-25, 48, 53; 81; 83; 89-91.

At about 7:00 a.m. the defendant took advantage of the opportunity of Y.D. being asleep and alone in the bed with him. Y.D. woke when the defendant wrapped his arms and legs around her. Y.D. was laying on her right side, facing away from the defendant. The defendant was also on his side with his left leg

over Y.D.'s legs and his left arm around her. The defendant then moved his hand under Y.D.'s shirt, up her stomach to her bra, under her bra and fondled her breast. Y.D. was terrified. She pretended to be asleep, hoping the defendant would stop. He didn't. The fondling continued. The defendant then moved his hand back down Y.D.'s stomach, down to her waistband. The defendant moved his hand into her waistband, then back up, around, back down into her waistband, in a slow circular motion. Y.D. decided she couldn't just hope it would stop; she opened her eyes, got out of bed and went straight out the door, shutting it behind her. Y.D. ran straight to her sisters' room and told them what happened. Her older sister testified, described Y.D. as really scared and crying like she had never seen her cry before. The girls locked the door to the room and texted their mother. Y.D.'s mother returned and asked the girls what had happened. She described Y.D. for the jury as "Destroyed, crying, terrified." 2RP 91. They called the police. Both her mother and her sister described Y.D.'s behavior since the incident as not wanting to talk about it and being afraid to be alone with males. 2RP 26-39, 57-60; 89-90.

Immediately following the disclosure, Y.D's mother confronted the defendant. The defendant's explanation was that he

was just hugging Y.D., nothing happened. He gave a more detailed explanation in his written statement to the responding officers. He stated, that he woke up to urinate, and came back to bed. He hugged Y.D. from the back only; he had never done that. When Y.D. woke up, she freaked out, but nothing of that happened. And she left the room. He fell asleep for a while, and then got up to get ready for work when his alarm went off. He also stated that he accepted his fault, that he knew he was not supposed to do. 2RP 89-90; 145.

A. FACTS RELEVANT TO CLOSING ARGUMENT.

In his closing argument, the prosecutor stated,

> But your job, your role as juror, is not to decide how bad somebody was molested. The job is to decide whether or not they were molested at all, and specifically whether or not the State's evidence has proved it beyond a reasonable doubt....
>
> If there's a spectrum of acts that meet child molestation, you're not to decide where it falls on that spectrum, only whether or not it's on the spectrum at all.
>
> Maybe analogous to a pregnancy test, yes or no. If it's yes, it doesn't tell you how pregnant or how far along; just is or isn't.
>
> So with that in mind, I want to have you think about the evidence in this case and whether it's shown beyond a reasonable doubt that that man molested Y.D.

3RP 12-13.

The prosecutor also argued that the evidence in the case came down to the testimony of Y.D. He reminded the jurors that he and the defendant's trial counsel asked during voir dire about assessing witness credibility and being able to find something beyond a reasonable doubt based on a child's testimony alone. He pointed out that the jurors had said that it was not only what a person says, it's how they say it. He then argued to the jury about how she said it. "If you think for some reason she was lying, she deserves an Academy Award. And that's from start to finish in this case. Her sister told you that she'd never seen her cry that hard before.... the initial officer in this case, Atkins. He said she was crying so hard that she couldn't speak." He then reminded the jurors that they had the opportunity to see how she reacted when she testified. 3RP 13-14.

At the end of his argument, the prosecutor had addressed the potential for the jury to want to believe any explanation, "like Y.D. just had a bad dream." He pointed out that "Human nature will compel you to want to find an innocent explanation for bad things. Wouldn't it be nice if this was just a big mistake?"

After going through the evidence in the case, he said,

[Prosecutor] So despite that human nature, you can't always pretend or ignore it. Particularly not in this courtroom, in this building right here right now. Like it or not, you're going to face it, and when you do, there's no reason to doubt the defendant did exactly what Y.D. said he did.

And this is the building where those things are revealed; this is the building where people that prey on children are held accountable. And that's exactly what...

[Defense counsel] Objection, Your Honor.

[Prosecutor] ...I am asking you to do.

[Defense counsel] Appealing to the passion and prejudice of the jury.

[Court] Overruled.

[Prosecutor] I was almost done. This is the exactly where those people are held accountable. And that's what I'm asking you to do by returning a verdict of guilty. Thank you.

3RP 21-22.

In her closing, the defendant's trial counsel pointed out how much the evidence in the case rested on the juror's determination of the credibility of Y.D. She started her closing argument by referencing a U.S. Supreme Court opinion addressing the presumption of innocence, stating, "If it suffices to accuse, what will become of the innocent?" 3RP 22. She went on to say, "There were only two people in that bedroom, Y.D. and Jose Marrufo-Sarinana." The defendant's trial counsel then proceeded to attack Y.D.'s credibility both directly and indirectly, for example, claiming

she just had a bad dream. She concluded this line of her argument by stating, "Bottom line is the only evidence in this case is what Y.D. said happened and what Jose said happened." 3RP 23-28.

The defendant's trial counsel also commented on the prosecutor's representation of the burden of proof, "That Mr. Hunter has to prove beyond a reasonable doubt, a burden which he recognizes is a heavy one, that Jose committed the acts that constitute the crime of which he's charged." 3RP 24.

She pointed out the defendant's story, that he hugged Y.D., that she got up and left and he went back to sleep. He didn't follow her. 3RP 26-27.

The prosecutor pointed out in his rebuttal that the defendant's story was that he was hugging her, Y.D. woke up and freaked out, but it also said that he's never hugged her before. The prosecutor pointed out that if the defendant had never hugged her before and she freaked out when she woke up and ran out of the room, it was not reasonable to believe the defendant just went back to sleep. He asked the jury what would an innocent person do? 3RP 30. He pointed out again that Y.D.'s demeanor and facts had been consistent throughout the case, from her first report to her sister, to her mom, to the police officers, the nurse, and the defense

attorney in an interview and in trial on the witness stand. 3RP 29-30.

B. FACTS RELEVANT TO CONDITION OF SUPERVISION.

At sentencing, the prosecutor and the defendant's trial counsel and the defendant signed Appendix 4.2 Additional Conditions of Community Custody. Seven of the 24 conditions listed were stricken from the list and one was partially deleted before they were presented to the court. "And the Department of Corrections proposed an all-inclusive list of conditions. Ms. Rivera and I have looked at it together and proposed some deletions. I'll pass forward a proposed original to your honor." Sentencing RP 4. The sentencing court agreed with the recommended conditions stating, "And I've signed off on the conditions that the lawyers have agreed to for DOC supervision." Sentencing RP 6. The defendant had agreed to the condition represented as number 8 in Appendix 4.2.: "Do not date women or form relationships with families who have minor children, as directed by the supervising Community Corrections Officer." CP 20.

III. ARGUMENT

1. THE PROSECUTOR APPROPRIATELY ARGUED THE FACTS AND LAW OF THIS CASE AND THEREBY THE DEFENDANT WAS NOT DENIED A FAIR TRIAL.

In a prosecutorial error[1] claim, the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653, 662 (2012). If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. But if the defendant failed to object at trial, the defendant is deemed to

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[1] "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g.,* State v. Fauci, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); State v. Leutschaft, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State urges this Court to use the same phrase in its opinions.

have waived any error, unless the prosecutor's conduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. In other words, the defendant must show that: (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the conduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. Emery, 174 Wn.2d at 760-761. Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747, 785 (1994).

Instead of examining improper conduct in isolation, we determine the effect of a prosecutor's improper conduct by examining that conduct in the full trial context, including the evidence presented, "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551, 555 (2011).

A. THE PROSECUTOR'S ARGUMENT DID NOT APPEAL TO THE JURORS PASSIONS AND PREJUDICES.

This court has held it permissible for a prosecutor to argue that the defendant be "held to account." State v. McNallie, 64 Wn.

App. 101, 110-11, 823 P.2d 1122 (1992), aff'd on other grounds, 120 Wn.2d 925, 846 P.2d 1358 (1993). "Arguments intended to "incite feelings of fear, anger, and a desire for revenge" that are " 'irrelevant, irrational, and inflammatory' " are improper appeals to passion or prejudice." In re Cross, 180 Wn.2d 664, 724, 327 P.3d 660, 694 (2014). The argument at question was not irrelevant, irrational or inflammatory. It was not a request to send a message. It was a request to hold the defendant accountable. Arguments asking the jury to hold a defendant accountable are not improper. That, in essence, is what the challenged remarks asserted. To the extent the remarks could be construed as an improper 'message' argument, they were neither flagrant nor incurable; they did not engender an incurable feeling of prejudice in the mind of the jury. Arguments which may evoke an emotional response are appropriate if restricted to the circumstances of the crime. Cross, 180 Wn.2d at 725.

"In this case, the prosecutor was making arguments based on evidence adduced at trial. [the defendant] has failed to meet his burden to establish that these comments were improper or that there is a substantial likelihood the jury verdict was affected

thereby." State v. Brett, 126 Wn.2d 136, 180, 892 P.2d 29, 52 (1995), cert. denied, 516 U.S. 1121 (1996).

B. THE PROSECUTOR WAS ALLOWED TO ARGUE REASONALBE INFERENCES FROM THE EVIDENCE AND THIS WAS NOT IMPROPER VOUCHING FOR THE VICTIM'S CREDIBILITY.

The defendant objects to the prosecutor's argument regarding Y.D.'s demeanor and consistency throughout the case as being deserving of an Academy Award if she was lying. Considered in context, these statements were a proper argument that the evidence did not support the defense theory that Y.D. had fabricated or mistaken the events in her complaints against the defendant. Cases involving alleged child sex abuse make the child's credibility an inevitable, central issue. State v. Kirkman, 159 Wn.2d 918, 933, 155 P.3d 125, 133 (2007).

A prosecutor may properly draw inferences from the evidence as to why the jury would want to believe one witness over another. Brett, 126 Wn.2d at 175. Prosecutors may, however, argue an inference from the evidence, and prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion. Id. A prosecutor arguing the victim's testimony had a "badge of truth" and the "ring of truth" and

that it "rang out clearly with truth in it" was found to be proper argument when the credibility of the witness had been put in question by the defendant. "First, there was no explicit statement of personal opinion. (prejudicial error will not be found unless it is clear and unmistakable that counsel is expressing a personal opinion). Second, prosecutors have wide latitude to argue reasonable inferences from the facts concerning witness credibility." State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940, 946 (2008).

In the case at bar, the prosecutor was making a reasonable inference from the evidence regarding Y.D.'s presentation throughout the case. The testimony showed her sister described her as really scared and crying like she had never seen her cry before. Her mother described Y.D. as "Destroyed, crying, terrified"; and the prosecutor pointed out that the jury had been able to observe her demeanor in the courtroom when she testified. The prosecutor did not indicate he personally believed her or vouch for her credibility; he argued a reasonable inference from the evidence. As in Warren, the defendant did not object to this argument at trial. Warren, at 30.

C. THE PROSECUTOR DID NOT MISSTATE THE LAW IN HIS CLOSING ARGUMENT.

The defendant has alleged the prosecutor misstated the law to the jury; trivializing the reasonable doubt standard by comparing it with a pregnancy test. This is not an accurate representation of the prosecutor's argument. The comment with regard to the pregnancy test was made when arguing to the jury that they didn't need to determine how bad a molestation was or even where it fell on the spectrum of molestation, just whether it had been proven to be molestation at all; specifically whether or not the State's evidence had proven it beyond a reasonable doubt. The pregnancy test comment was part of an argument against jury nullification and was not used in any way to explain or compare to the burden of proof beyond a reasonable doubt.

The jury was accurately instructed on the burden of proof beyond a reasonable doubt. 1 CP 32. The instruction defined the burden as "a reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence." Id.

The prosecutor reiterated the court's definition of reasonable doubt in his comments regarding the burden of proof. 3RP 18-19.

In addition, unlike the argument in Anderson, the prosecutor here did not attempt to downplay the seriousness of the burden of proof. The prosecutor acknowledged that reasonable doubt was a difficult concept, a significant burden. The defendant's trial counsel even commented on the prosecutor recognizing proof beyond a reasonable doubt is a heavy burden in her closing argument. State v. Anderson, 153 Wn. App. 417, 431-32, 220 P.3d 1273 (2009).

D. ANY PREJUDICE RESULTING FROM THE ARGUMENTS THE DEFENDANT IDENTIFIES AS IMPROPER COULD HAVE BEEN CURED WITH AN INSTRUCTION IF THE ARGUMENT WAS IMPROPER.

If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. Emery, 174 Wn.2d at 760-61. Even if improper the defendant has not shown that any error could not have been neutralized by an instruction. When considering whether an instruction could cure any resulting prejudice from an erroneous argument the Court has looked to the nature of the arguments made, the other instructions given by the

court, and the strength of the State's case. Throughout his argument the prosecutor made it clear it was the State's burden to prove each element of the offense beyond a reasonable doubt. When discussing the not married element he argued "The reason I have to ask it is if nobody says it, there's no evidence of it, and you can't find what the law requires you to find." 3RP 17.

In Thorgersen the court noted that an improper argument did not warrant reversal where the victim's testimony throughout trial was consistent with what witnesses testified she told them before trial. State v. Thorgersen, 172 Wn.2d 438, 452, 258 P.3d 43 (2011). In the case at bar, the victim's testimony was consistent with her prior reporting to her sister, mother, nurse and the defense attorney during the pre-trial interview.

In Anderson the prosecutor made three arguments relating to the burden of proof which the Court held were improper. One of the arguments trivialized the State's burden of proof by comparing the standard to everyday decision making. The Court found none of these arguments were so prejudicial in themselves that an instruction could not have cured the error. The Court's conclusion was further supported by the trial court's instruction regarding the

presumption of innocence which minimized any negative impact on the jury. Anderson, 153 Wn. App. at 431-32.

Because jurors are directed to disregard any argument that is not supported by the law and the court's instructions, a prosecutor's arguments do not carry the "imprimatur of both the government and the judiciary." Emery, 174 Wn.2d at 759. Here the court properly instructed the jury on the burden of proof and the role of counsel's arguments. 1 CP 29, 32. The jury was instructed that the State bore the burden of proof, and the defendant had no burden of proving a reasonable doubt existed. 1 CP 32. The court also properly instructed the jury on the presumption of innocence, which may only be overcome by evidence beyond a reasonable doubt. 1 CP 32. The jury was instructed that the evidence consisted of the testimony and the exhibits. 1 CP 28.

2. THE SENTENCING COURT DID NOT ERR BY IMPOSING THE CONDITIONS OF SUPERVISION.

As part of his sentence, the defendant was ordered to be on community custody for the rest of his life. Sentencing RP 6. Among the conditions imposed, the sentencing court required the defendant to not date women or form relationships with families who have minor children, as directed by the supervising Community

Corrections Officer. The defendant objects to the sentencing court imposing this condition.

"Generally, imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable." State v. Sanchez Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059, 1063 (2010)(internal citations omitted). Thus, a sentence will be reversed only if it is "manifestly unreasonable" such that "no reasonable man would take the view adopted by the trial court." State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365, 1374 (1993). Here as the defendant violated the trust of the victim's family and took advantage of the opportunity of a sleeping child, the condition is clearly crime related. However, the defendant claims this condition is constitutionally vague.

A. THE INVITED ERROR DOCTRINE PRECLUDES THE DEFENDANT FROM COMPLAINING THAT THE TRIAL COURT ERRED BY IMPOSING THE AGREED CONDITIONS OF SUPERVISION.

The invited error doctrine applies only where the defendant engaged in some affirmative action by which he knowingly and voluntarily set up the error. Where it applies, this doctrine precludes judicial review even where the alleged error raises constitutional issues. State v. Phelps, 113 Wn. App. 347, 353, 57

P.3d 624, 628 (2002). The defendant is not alleging the sentencing court acted beyond its jurisdiction by imposing the crime related condition that the defendant not date women or form relationships with families who have minor children, as directed by the supervising Community Corrections Officer. The defendant complains of the conditions vagueness. However, it is clear from the record that the defendant affirmatively agreed with the condition. The prosecutor provided the court with a list of proposed conditions indicating he and the defendant's attorney had gone through the list, made some deletions and changed some of the language. The sentencing court announced he was signing off on the agreed upon DOC conditions the lawyers had agreed upon. At no time did the defendant object or assert that he was not in agreement with the conditions. This was an affirmative agreement with the language of the condition and as such any objection to the condition is barred.

B. THE CONDITION IS NOT UNCONSTITUTIONALLY VAGUE.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct. This assures that ordinary people can understand what is and is not allowed, and

are protected against arbitrary enforcement of the laws. State v. Sanchez Valencia, 169 Wn.2d 782, 791, 239 P.3d 1059, 1063 (2010). In Valencia, the condition against possession of paraphernalia was found to be over-broad because it was not limited to drug paraphernalia and it reasonably followed that the condition might potentially encompass a wide range of everyday items and thus did not provide an ascertainable standard of guilt to protect against arbitrary enforcement. Id. at 794. This would be akin to the condition imposed here, if the sentencing court had left out the qualifier of "minor" children. However, that is not the case, the qualifier is part of the condition and it is sufficiently specific to allow the average person fair warning of the conduct to be avoided and to protect the defendant from arbitrary, ad hoc or discriminatory law enforcement.

Limitations upon fundamental rights are permissible, provided they are imposed sensitively. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365, 1374 (1993).

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on October 10, 2014.

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