92471-6

Court of Appeal Cause No. 46147-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

DAVID L. NEWLAND, Petitioner.

PETITION FOR REVIEW

Beau D. Harlan
612 East McLoughlin Blvd.
Vancouver, WA 98663
(360) 735-8200
WSBA No. 23924

Table of Contents

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

A. IDENTITY OF PETITIONER:

DAVID L. NEWLAND asks this court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION:

Petitioner seeks review of the unpublished opinion in *State of Washington v. David L. Newland*, No. 46147-1-II, filed October 6, 2015, holding that the trial court (1) did not abuse its discretion in admitting evidence of an unrelated child sexual abuse investigation in the trial of a man accused of Assault in the Third Degree, and 2) did not err in denying Newland's motion for a mistrial after the State's lead witness violated a limine restriction on sexual abuse testimony.

A copy of the decision is in the Appendix at pages 1 through 7.

C. ISSUE PRESENTED FOR REVIEW:

1. Under the Washington Rules of Evidence and ER 403 specifically, does a trial court fail to properly balance the probative value against unfair prejudice when the trial court allows admission of evidence implicating a defendant with child sexual abuse, defending a pedophile, and/or being a pedophile, for the purpose of establishing res gestae in a simple Assault III case?

2. Did the trial court abuse its discretion by not granting a mistrial when the government's star witness, who was present for motions in limine, willfully violated the court's

ruling by testifying in an outburst that the defendant was obstructing his investigation of credible allegations of child rape?

D. STATEMENT OF CASE:

PROCEDURAL HISTORY:

On January 10, 2013, David Newland Sr., was arrested and booked into the Clark County Jail on allegations of Assault in the Third Degree. (CP 114) The State of Washington filed an information alleging Mr. Newland committed the crimes of Assault in the Third Degree and Obstructing a Law Enforcement Officer on January 15, 2013. (CP 1). On January 18, 2013, the matter proceeded to arraignment, where Mr. Newland pled, 'not guilty. (CP 114)

After a series of motions the allegation of Assault in the Third Degree proceeded to trial on March 31, 2014, before the Honorable David Gregerson. The jury returned a verdict of 'Guilty' and Mr. Newland timely appealed. (CP 88) On October 6, 2015, Division II of the Washington State Court of Appeals affirmed Newland's conviction. (See Appendix A) Petitioner has timely filed the instant Petition for Review.

STATEMENT OF FACTS:

BACKGROUND

In December of 2012, Clark County Sheriff Deputy Chris Nichollis, received a report of sexual abuse from Ashely Fritz. (CP 22). Ms. Fritz was 21 when she made the report and made the report by phone from her home in Delaware. (CP 22). Ms. Fritz alleged that her step father, David Newland, Jr., not to be confused with the appellant in the instant matter, David Newland, Sr., sexually abused her ten years prior when she was 11 years old. (CP 22-23). Fritz made the report because her half-sister, E.N., resided with David Newland, Jr., and Fritz had concerns for E.N's welfare. After receiving the report, Nichollis referred the matter to CPS social worker, Kim Karu, and the Clark County Sheriff's Department for further investigation.

TRIAL TESTIMONY:

Child sexual abuse was referenced throughout the trial. McCarthy testified, "As an investigator, when we're interviewing children who are potentially victims bluntly, officer safety is not one of those things that's the forefront of your, of your head when your doing that." (RP 230, lns: 14-20) He testified that when he went to the Newland home on January

10, 2013, he was investigating allegations of child sexual abuse. (RP 233, lns: 5-8) Furthermore, McCarthy testified:

> the victim in this case had actually made a 911 call to, to the 911 operator here in Clark County. That was then routed to a deputy who wrote a report. That deputy then contacted the state and where the victim was currently living and arranged for the victim to be interviewed by a detective in that state. (RP 233, lns: 13-19)
>
> . . .
>
> ...by January 10th, I had spoken to the victim on the phone but I had not done a formal interview, she had already been formally interviewed in the state where she was currently a resident. I had spoken to that detective who had done the interview to assess his feelings about her, about the allegations that she was making, and as he has been working child sexual abuse cases for 20 year... (RP 233, lns: 21-24; RP 234, lns: 1-6)
>
> I am a detective assigned to the Children's Justice Center, which is a joint unit between the Vancouver Police Department and the Clark County Sheriff's Office. We investigate felony level crimes against kids. Most of those are child sexual abuse. (RP 235, lns: 20-24, RP 236, ln: 1)
>
> CPS kind of has two roles with us. One, they generate referrals when people call Child Protective Services and they generate a referral that then says there's an allegation of abuse, it's then forwarded to my supervisor, who then determines then whether or not this is criminal level that needs to be investigated. That[s] one role. (RP, 236, lns: 5-12)
>
> The second role is if there's an allegation that comes through law enforcement, someone calling 911, someone reporting it, and some – school calling 911, when we have a valid allegation of abuse, we will then reach out to CPS and report it ourselves so that they, then, have a referral to

> go along with our law enforcement case, and so then they work the case from the Child Protective Services side and we work the case from the law enforcement side. (RP 236, lns: 13-21)
>
> The safety aspect of the kids goes hand-in-hand between law enforcement and Child Protective Services because if we deem that –if, it it's deemed that the children in the home are not safe, CPS can't take the kids without law enforcement signing over custody unless they go get a writ from a judge. (CP 237, lns: 1-7)

McCarthy went on to testify that he went to the Newland household on January 10th 2013 as part of his official duties with the Clark County Sheriff's Department to do a welfare check on a child's safety and as part of his own child abuse investigation associated with the child sexual abuse allegations. (RP 237, lns: 19-24; 238, lns: 1-3)

McCarthy and CPS social worker Kim Karu arrived at the Newland home a little later than 12:30 on January 10th, 2013. (RP 239, lns: 10-11, lns: 21-22, RP 353, lns: 7-15) As McCarthy and Karu arrived at the home, another car, driven by an elderly 73 year old gentleman with a heart condition, David Newland, Sr., arrived at the same time. (RP 241, lns: 9-15, RP 268, lns: 5-9 RP 353, lns:17-21) Karu and McCarthy exited their vehicle, David Newland, Sr. exited his and David Newland Sr. introduced himself. (RP 353, lns: 22-24, RP 354, lns: 1-5) David Newland, Sr., was friendly, pleasant, cordial, said "come on in," and escorted Karu and McCarthy to the front door. (RP 281, lns: 13-15; RP

242, lns: 4-24; RP 336, lns: 14-16; RP 354, lns: 10-21) David Newland, Sr. walked McCarthy and Karu to the door and knocked or rang the door bell. (RP 243, lns: 1-2, RP 244, lns: 2-4; RP 337, lns: 7) Melani Newland, David Newland Sr.'s daughter in-law, answered the door and the three entered the home. (RP 244, lns: 3-5; RP 355, lns: 3-5) Melani Newland was the wife of David Newland, Jr. and mother of E.N.. (RP 244, lns: 6-13; RP 337, lns: 7-8) After entering the home, Melani walked toward the dining room table, located at the end of the entryway; McCarthy and Karu took their shoes off in the entryway. (RP 244, lns: 15-23) Karu explained to Melani that she was going to talk to E.N. alone. (RP 337, ln: 14) Melani Newland called to E.N. (RP 337, lns: 14-18) McCarthy and Karu walked toward the dining room table, E.N., came into the room from the kitchen and Karu introduced herself to E.N. (RP 245, lns: 5-11) Karu told E.N. she was going to talk to E.N. alone. (RP 337, lns: 17-18) Karu told E.N., "This is my friend Brendan. We're going to talk. Is there a place we can talk?" (RP 245, lns: 7-12) They were directed toward E.N.'s bedroom. (RP 245, lns: 13-14) E.N. walked toward her room, Karu followed. (RP 246, ln: 21) At the same time, David Newland Sr. asked McCarthy, "Hey, are you a cop?" in a non-aggressive, non-threatening, non-assertive way, while Newland, Sr., was approximately 10 feet away. (RP 247, ln: 3; RP 283, lns: 3-16, RP 348, lns: 20-22) McCarthy turned

around and said, "Yes, I'm a cop." (RP 247, ln: 10) Newland, Sr. responded, "You can't talk to her" or "You're not going to talk to anyone; I've got a lawyer." (RP 247, ln: 13; RP 340, lns: 14-15) McCarthy responded, "I can talk to her and that's why I'm here and this is my purpose of being here is to assess whether or not she is safe." (RP 247, lns: 15-18) David Newland Sr. closed the distance between him and McCarthy, they were face to face, e.g., 6 inches to a foot apart, and Newland, Sr. told McCarthy to sit down. (RP 248, lns: 4-9; RP 284, lns: 7-11; lns: 15-19) Newland, Sr. never physically obstructed McCarthy's progress down the hall toward E.N.'s room where the interview was to be conducted. (RP 284, lns: 17-23; RP 290, lns: 1-2) McCarthy perceived Newland, Sr.'s order to 'sit down' as a threat. (RP 286, lns: 15-24) McCarthy felt threatened and stupid. (RP 248, ln: 11) McCarthy felt threatened by Newland, Sr.'s demeanor; he was angry and yelling at McCarthy. (RP 249, lns: 3-5) McCarthy's voice was raised and used profanity. (RP 249, lns: 9-15; RP 379, lns: 18-22) McCarthy never ordered Newland, Sr. to "stop" "calm down" or propose "let's talk about this" because he didn't have a chance to. (RP 287, lns: 2-17; RP 288, lns: 12-15) McCarthy testified that he felt Newland, Sr.'s intent was to obstruct his actions and interfering with an investigation. (RP 250, lns: 7-9; RP 326, lns: 22-24) Newland made no verbal threats toward McCarthy.

(RP 380, lns: 9-14) McCarthy pushed Newland, Sr.'s right shoulder away with his left hand as they stood chest to chest. (RP. 250, lns: 11-15; RP 251, lns: 9-11; RP 289, ln: 4) It is undisputed that McCarthy initiated the physical contact by pushing Newland, Sr.. (RP 329, lns: 8-12) McCarthy didn't use a great deal of force, but attempted to push Newland, Sr. away from him and away from Karu who was down the hall. (RP, 250, lns: 22-25) McCarthy pushed Newland, Sr., in an attempt to create distance between Newland, Sr. and McCarthy. (RP 319, lns: 11-13) When McCarthy attempted to 'redirect' or move Newland, Sr., Newland Sr. threw his right arm and elbow back toward McCarthy's face. (RP 251, lns: 9-18, RP 252, lns: 1-7; RP 313, lns: 10-13, RP 314, lns: 5-12) Prior to McCarthy pushing Newland Sr., Newland had made no physical contact with McCarthy. (RP 277, lns: 8-12) In response, McCarthy took Newland, Sr. to the ground. (RP 253, ln: 2-22) Newland, Sr. threw his elbow and missed, and then McCarthy pushed Newland, Sr. forward and drove him toward a space between the dining room table and the living room where he went down in a heap between the dining room table and living room. (RP 255, lns: 13-18) McCarthy used physical force and momentum to driver Newland Sr. to the ground. (RP 291, lns: 15-18) It was a fast fluid quick event. (RP 291, lns: 19-21) Newland Sr. never landed any blow to McCarthy and McCarthy believes he may have

blocked Newland, Sr.'s arm with his right arm. (RP 254, lns: 22-23, RP 255, lns: 1-3) Mr. Newland Sr.'s elbow never hit McCarthy. (RP 291, ln: 10-11) Once on the ground, McCarthy was in the upper position and Newland struggled and fought. (RP, 256, lns: 9-12, RP 291, lns: 22-24, RP 291, ln: 1) McCarthy was in the top position trying to grab Newland's arm and restrain Newland and telling Newland to stop resisting. (RP 256, lns: 19-21, 257, lns: 1-3) Newland Sr. was face down on the carpet. (RP 291, lns: 7-12) McCarthy applied two hard knee strikes to Newland's ribs. (RP 258, lns: 17-21; RP 259, ln: 2-3, 9) In response, Newland, Jr., stopped resisting. (RP 259, ln: 11)

Kim Karu testified that she was employed as a social worker for the Department of Social and Health Services and CPS. (RP 330, lns: 5-9) Her duties include investigation of abuse and neglect in the parental home and assessment of safety and risk to children. (RP 330, lns: 11-13) In this case, Karu went to the Newland home to conduct a safety evaluation for E.N. (RP 351, lns: 15-19) Karu went further to testify that her concern was for the safety of the children and that her concern stemmed from child sexual abuse allegations that had been made against David Newland, Jr. (RP 352, lns: 7-11)

E. ARGUMENT: WHY REVIEW SHOULD BE ACCEPTED

1. The Decision of the Court of Appeals Conflicts with a Decision of the Supreme Court and with Other Decisions of the Court of Appeals.

a. Erroneous admission of child sexual abuse.

Under the United States Constitution, the Sixth Amendment and Fourteenth Amendment guarantee criminally accused persons the right to trial by an impartial jury. *State v. Davis*, 141 Wn.2d 798, 824, 10 P.3d 977 (2000). The Washington Constitution provides a similar safeguard. Wash. Const. art. I, §§ 3, 22. A defendant's right to a jury also includes the right to an unbiased and unprejudiced jury. *Davis* at 825. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *Id.* Not only should there be a fair trial, but there should be no lingering doubt about it. *Id.*

A trial court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *State v. Myers*, 133 Wn.2d 26, 34, 941 P.2d 1102 (1997). A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995).

Relevancy and the admissibility of relevant evidence are governed by ER 401 and ER 402, which state:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401
>
> All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible. ER 402

To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality). *5 K. Tegland, Wash. Prac.* § 82, at 168 (2d ed. 1982). The relevancy of evidence will depend upon the circumstances of each case and the relationship of the facts to the ultimate issue. *Chase v. Beard*, 55 Wn.2d 58, 61, 346 P.2d 315 (1959). In this case, the "child sex abuse" evidence the state sought to admit was relevant; however, it should have been excluded under ER 403 which states in relevant part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or is misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Under ER 403, even relevant evidence should be excluded if its probative value is substantially outweighed by the danger of unfair

prejudice. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). The trial court is vested with broad discretion in deciding to balance relevance against prejudice. *State v. Baldwin*, 37 P.3d 1220 (2001), review denied, 147 Wn.2d 1020, 60 P.3d 92 (2002). Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision by the jury. *State v. Gould*, 58 Wn. App. 175, 183, 791 P.2d 569 (1990). The addition of the word "unfair" in ER 403 obligates the court to weigh the evidence in the context of the trial itself, bearing in mind fairness to both the State and defendant. *State v. Bernson*, 40 Wn. App. 729, 736, 700 P.2d 758 (1985). Prejudice becomes "unfair" when it is likely to arouse an emotional response rather than a rational decision by the jury. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

Within its context, "unfair prejudice" means an undue tendency to suggest a decision on an improper basis-commonly an emotional one. *Id.* (citing *State v. Cameron*, 100 Wn.2d 520, 529, 674 P.2d 650 (1983)). Similarly, evidence becomes prejudicial, unfair, and is inadmissible where it bears only a remote or artificial relationship to the legal or factual issues actually raised. *Id.*at 531.

In this case, the trial court underestimated the prejudicial effect of infusing allegations of "sex abuse of a child," which are of marginal relevance, into a simple Assault III case. Ultimately, this led to a trial

irregularity in which the State's primary witnesses violated a motion in limine, and in an outburst, stated that he had credible evidence of child rape occurring in a home the defendant was circumstantially connected with.

In a case similar to the matter at bar, the court found relevant evidence was highly prejudicial in *State v. Cameron.* In *Cameron*, the defendant was charged with murder and admitted to the crime. *State v. Cameron*, 100 Wn.2d 520, 521, 674 P.2d 902 (1983). Before trial, the defendant moved in limine to exclude evidence of pubic hair State investigators found on the victim's body. *Id.* at 527. During trial, the defendant objected again to the trial court's admission of the hair and related testimony. *Id.* The State asserted that the hair and related testimony was essential to the defendant's identification as the assailant and thus relevant under ER 402. *Id.* Ultimately, the Supreme Court reversed the conviction ruling that the evidence would raise an unsubstantiated inference of a sexual attack and could only inflame the jury's passions. *Id.* at 528.

Res gestae evidence is evidence that completes the story of the crime by establishing the immediate time and place of its occurrence. *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). Such evidence makes up a link in the chain of an unbroken sequence of events

surrounding the charged offense. *Id.* Res gestae is no longer a freestanding exception to ER 404(b). *State v. Grier*, 168 Wn. App. 635, 645-47, 278 P.3d 225 (2012). Instead, the proper analysis is relevance under ER 401. *Id.* If the res gestae evidence is relevant, then it is generally admissible under ER 402, unless its potential prejudice outweighs its probative value under ER 403. *Id.* at 649. Even under an ER 404(b) analysis the res gestea exception requires that evidence be relevant to a material issue and its probative value must outweigh its prejudicial effect. *State v. Acosta*, 123 Wn. App. 424, 442, 98 P.3d 503 (2004). Again, the fact that the detective was investigating possible child sex abuse at the hands of the defendant's son only serves to unfairly paint the defendant in the light of protecting a potential pedophile, implicate the defendant as potentially complicit in such conduct, and serves to inflame the passions of the jury.

This case is also similar to *State v. Trickier*, 106 Wn.App. 727, 733-34, 25 P.3d 445 (2001). In *Trickier*, the police investigated the defendant as a result of stolen property in his possession where the defendant was on trial only for a stolen credit card. *Id. Trickier* held that while the events leading up to the discovery of the stolen credit card were relevant and somewhat probative, it was not shown that Mr. Trickier possession of other allegedly stolen items was an inseparable part of his

possession of the stolen credit card. Division Three reversed the conviction and held the events leading up to the discovery of the stolen card were inadmissible as res gestae evidence. *Id.*

b. Willful violation of motion in limine.

During cross-examination, McCarthy testified as follows:

> Q: Did at any time you feel stupid for being a bully after you pushed the defendant down?
> A: No, I felt stupid because... he was there to interfere with my investigation, to prevent us from talking to an 11 yr. old when ***I had substantial criminal or credible evidence that his son raped his granddaughter.*** (emphasis added)
>
> Court: The jury will disregard the last word. (RP 315, lns: 19-324, RP 316, lns: 1-11)

An irregularity in trial proceedings is grounds for reversal when it is so prejudicial that it deprives the defendant of a fair trial. *State v. Condon*, 72 Wn. App. 638, 647, 865 P.2d 521 (1993). To determine whether a trial irregularity deprived a defendant of a fair trial, a reviewing court considers the following factors: (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow. *State v. Escalona*, 49 Wn. App. 251, 255, 742 P.2d 190 (1987). A reviewing court reviews claims of prejudice against the backdrop of all the evidence. *Id.* at 254. While a violation of an order in

limine is considered a serious trial irregularity, not all violations of orders in limine have been held to be so serious as to deprive the defendant of a fair trial. *State v. Thompson*, 90 Wn. App. 41, 46-47, 950 P.2d 977 (1998).

In *State v. Escalona*, the State charged Escalona with second degree assault while armed with a deadly weapon, a knife. Before trial, the court granted a defense motion in limine to exclude any reference to Escalona's prior conviction for the same crime. *Id.* at 252. At trial, a witness volunteered that Escalona had a record and had stabbed someone. *Id.* at 253. Defense counsel immediately moved to strike and asked that the jury be excused. *Id.* The judge ordered the statement stricken and excused the jury. *Id.* Defense counsel moved for a mistrial, but the court denied it. When the jury returned, the judge instructed it to disregard the witness's last answer. The conviction was reversed, and the court emphasized that no instruction can remove the prejudicial impression created by evidence that is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors. *Id.* at 255.

Our Supreme Court has recognized that "in sex cases . . . the prejudice potential of prior acts is at its highest and a careful and methodical consideration of relevance and an intelligent weighing of potential prejudice against probative value is particularly important." *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). In that case,

a sex case, the court decided that the potential for prejudice was particularly high because: (1) The State's case was supported by only a 12-year-old's testimony, and witnesses repeating what the minor told them about the allegations; (2) there were no other eyewitnesses or physical evidence; and (3) the trial court gave the instruction that the jury could consider prior sex conviction for any relevant purpose which was in violation of a statute that was found unconstitutional.

In this case, the admission of 'child sex abuse' evidence, the willful violation of the motion in limine, and numerous references to a CPS investigation whitewashed a simple Assault III case into a sex case. Therefore, the resulting prejudice caused by the violation of the motion in limine was even greater. In addition, the state's theory of the assault was a "swing-and-miss" supported only by the testimony of detective McCarthy himself. Karu, the CPS worker, didn't see the alleged assault. (RP 341, lns: 20-24, RP 342, lns: 1-15, RP 499, lns: 16-21, RP 526, lns: 24, RP 527, ln: 1)

Again, an ER 403 analysis is the final step in determining whether the States proffered evidence of an uncharged "act", obstructing an officer to protect a suspected pedophile, would be admissible under ER 404(b). See *Saltarelli* at 363. ER 403 requires exclusion of evidence, even if relevant, if it's probative value is substantially outweighed by the danger

of unfair prejudice. *Id.* In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence. *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983). In this case, whether under a strict ER 403 analysis or a 404(b) type of analysis the court should have excluded the prejudicial evidence of "sex abuse" in favor of the defendant. The prejudicial effect of the willful violation of the motion in limine by McCarthy was compounded by the opening of Pandora's box and the erroneous admission of evidence pertaining to "sex abuse of a minor."

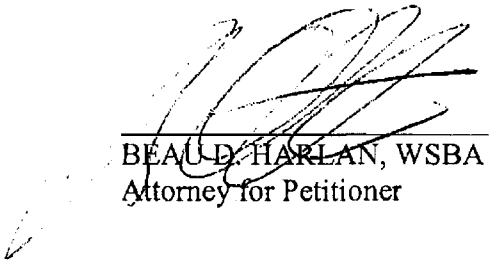
Ultimately, the serious trial irregularity in conjunction with the cumulative nature of other prejudicial inadmissible evidence could not be cured by asking the jury to disregard the word "rape." Any relevance of "child sex abuse" is outweighed by the unfair prejudice of eliciting and emotional response from the jury and that denied the defendant his right to a fair trial.

F. CONCLUSION

Based upon the foregoing argument and authority for Review, Petition seeks an order reversing Newland's conviction and remanding the matter for a new trial with the specific order excluding any reference to 'Child Abuse,' 'Child Sexual Abuse' and/or 'Child Rape.'

DATED this 5th day of November, 2015

Respectfully submitted,



BEAU D. HARLAN, WSBA NO. 23924
Attorney for Petitioner

G. APPENDIX

Filed
Washington State
Court of Appeals
Division Two

December 6, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID L. NEWLAND, Appellant.	No. 46147-1-II UNPUBLISHED OPINION

MAXA, J. – David Newland appeals his conviction of third degree assault, which arose from an incident where he assaulted a police officer investigating a complaint that Newland's adult son had sexually abused a child. We hold that (1) the trial court did not abuse its discretion in admitting limited evidence regarding the sexual abuse investigation, (2) the trial court did not err in denying Newland's motion for a mistrial after the State's lead witness violated in limine restrictions on sexual abuse testimony, and (3) the prosecutor did not engage in misconduct during rebuttal closing argument by commenting on a witness that Newland failed to call at trial. Accordingly, we affirm Newland's conviction.

FACTS

On January 10, 2013, Clark County Sheriff's Detective Brendon McCarthy and Child Protective Services (CPS) social worker Kim Karu went to Newland's son's residence to conduct a welfare check on Newland's granddaughter, EM, because of allegations that Newland's son previously had sexually abused EM's older sister. As McCarthy and Karu arrived at the

residence, Newland also arrived in his own vehicle. Newland directed them to the home and EM's mother, Melanie Newland,[1] let them in the house.

When Newland discovered that McCarthy was a law enforcement officer, he told McCarthy that he could not talk with EM. McCarthy replied that he could talk to EM and that he was there to check on her safety. Newland then walked up to McCarthy, put his face in McCarthy's face, and yelled at him to sit down. McCarthy tried to move Newland back by pushing on Newland's shoulder. Newland responded by throwing his elbow at McCarthy's face. The attempt missed, but McCarthy took Newland to the ground and subdued him.

During this altercation, Melanie called 911. She told the 911 operator that a police officer was attacking her father-in-law.

The State charged Newland with third degree assault; specifically, with intentionally assaulting a law enforcement officer who was performing his official duties at the time of the assault. Before trial, Newland moved to exclude evidence of allegations of sexual abuse against his son. He argued that the evidence was not relevant to whether an assault took place and was prejudicial because it made it appear that he was protecting a pedophile.

The trial court ruled that certain evidence regarding the allegations would be admissible because it was relevant to explain why McCarthy and Karu were at the residence, to show that McCarthy was working in his capacity as a law enforcement officer, and to show Newland's motive of protecting his son. However, the trial court ruled in limine that the State could not identify the victim or specifically discuss the allegations. The trial court also limited the testimony to evidence "that the law enforcement was there to investigate welfare, based upon a

[1] For sake of clarity, we refer to Melanie Newland as "Melanie" hereafter. We intend no disrespect.

report of a third party of alleged sexual abuse from a substantial time earlier." 1 Report of Proceedings (RP) at 34. The trial court acknowledged that the evidence was somewhat prejudicial, but it offered Newland a limiting instruction.[2]

During McCarthy's cross-examination, Newland asked him if he felt stupid for pushing Newland down. McCarthy explained:

> I felt stupid because in trying to be accommodating to Mr. Newland, I let him into the house, I took off my shoes, okay, and I allowed that situation to be there, and I felt stupid because it -- when he came up to me it became clear why he was there, which was to interfere with the investigation, to prevent us from talking to the 11-year-old when *I had substantial criminal -- or credible evidence that his son had raped . . . his granddaughter.*

2 RP at 315-16 (emphasis added). Newland objected, and the trial court instructed the jury to disregard "that last remark from the witness." 2 RP 316. Newland moved for a mistrial. The trial court denied the motion, reasoning that any harm was minimal, it instructed the jury to disregard the remark, and issued a jury instruction instructing the jury to disregard anything the trial court told it to disregard.

During the trial, the State stated that if Newland called Melanie as a witness, it intended to cross-examine her about the sexual abuse allegations against her husband. The next day, Newland announced that he would not be calling Melanie as a witness because of the State's intended cross-examination. Newland then asked the trial court to preclude the State from making any suggestion that Newland should have called Melanie as a witness. The State agreed not to make any such argument.

During rebuttal closing argument, in discussing the 911 recording, the prosecutor said, "We don't know what she [Melanie] saw." 3 RP at 521. And he repeated this theme, stating, "We have

[2] Newland refused any limiting instruction.

no idea what direction she was looking," "[b]ut we have no idea what she saw before seeing him on the ground," and "[c]ounsel says it's the source but we don't have really any information at all from that source." 3 RP at 522-23. The trial court overruled Newland's objections to these statements.

The jury found Newland guilty. Newland appeals.

ANALYSIS

A. ADMISSION OF SEXUAL ABUSE ALLEGATIONS

Newland claims that he was denied his constitutional right to a fair trial because the trial court allowed the State to present evidence regarding the sexual abuse allegations against his son. He concedes that this evidence was relevant, but he argues that it was inadmissible under ER 403 because its unfair prejudicial effect substantially outweighed any probative value.[3] We disagree.

ER 403 allows a trial court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." Prejudice is "unfair" if it is more likely to arouse an emotional response than a rational decision by the jury and creates an undue tendency to suggest a decision on an improper basis. *State v. Haq*, 166 Wn. App. 221, 261-62, 268 P.3d 997 (2012).

We review a trial court's evidentiary rulings for an abuse of discretion. *Id.* A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Id.* at 262.

[3] Newland also argues on appeal that the evidence was inadmissible under ER 404(b). However, he did not make this objection at trial, and therefore we do not consider this argument. RAP 2.5(a).

Here, the trial court recognized that evidence regarding the allegation of sexual abuse against Newland's son was relevant to show the circumstances surrounding the incident and Newland's possible motive for interfering with a law enforcement officer. The trial court also acknowledged that the evidence could be prejudicial, but believed that any prejudice could be cured with a proper instruction to the jury. Further, the trial court carefully limited the evidence the State could present while admitting enough evidence "to give the jury enough information so that they're not having so many question marks that they're filling that in with incorrect information which could be prejudicial to either side." 1 RP at 32.

Newland relies on *State v. Cameron*, 100 Wn.2d 520, 674 P.2d 650 (1983). In that case, the trial court allowed the State to introduce evidence that pubic hair found on the victim matched Cameron's even though Cameron twice had confessed to killing the victim. *Id.* at 527-28. The court held that the evidence was unnecessary for identifying Cameron and unfairly prejudicial because it suggested a possible sexual attack or sexual abuse for which there was no basis in the record. *Id.* at 529. But here, the trial court did not allow any evidence implicating Newland as a pedophile as in *Cameron*. And while the evidence may have shown that Newland was trying to protect his son, most jurors would not draw a negative inference from that or base their verdicts on such an impermissible inference.

Newland also relies on *State v. Trickler*, 106 Wn. App. 727, 25 P.3d 445 (2001). In that case, the State introduced evidence that Trickler possessed stolen property as res gestae even though he was only charged with possession of stolen credit cards. *Id.* at 733. Division Three of this court held that this was error because the admitted evidence, 16 pieces of stolen property, violated ER 404(b) by depicting Trickler as a thief. *Id.* at 733-34. Here, the trial court did not

allow the State to introduce evidence that Newland had committed other crimes as in *Trickler*. The evidence suggested that allegations of sexual abuse had been made against Newland's son.

The trial court has broad discretion to weigh the probative value of evidence against any prejudice effect, and therefore we give deference to a trial court's ER 403 ruling. *State v. Hawkins*, 157 Wn. App. 739, 750, 238 P.3d 1226 (2010). We hold that the trial court did not abuse this discretion in allowing the State to introduce limited evidence about the sexual abuse allegations against Newland's son.

B. VIOLATION OF IN LIMINE RULING

Newland argues that the trial court erred in denying his mistrial motion after McCarthy violated in limine restrictions on evidence of sexual abuse by testifying that he had substantial criminal or credible evidence that Newland's son raped Newland's granddaughter. We disagree.

We review a trial court's decision to deny a motion for a mistrial for an abuse of discretion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). In evaluating this claim, we consider (1) the seriousness of the irregularity, (2) whether the irregularity involved cumulative evidence, and (3) whether the trial court instructed the jury to disregard the evidence. *Id.* These factors are considered with deference to the trial court because the trial court is in the best position to discern prejudice. *State v. Garcia*, 177 Wn. App. 769, 777-78, 313 P.3d 422 (2013). A trial court should only grant a mistrial if there is such prejudice that nothing short of a mistrial will ensure the defendant a fair trial. *Emery*, 174 Wn.2d at 765. And an abuse of discretion will be found for denial of a mistrial only when no reasonable judge would have reached the same conclusion. *Id.*

Here, the trial court acknowledged that McCarthy violated its in limine restrictions. However, the consideration of the three mistrial factors shows that the trial court did not abuse

its discretion. First, the irregularity was not particularly serious because McCarthy's statement was brief and the State did not reference it again. Further, the allegation impugned Newland's son and not Newland directly. Second, the evidence was cumulative because the jury already was aware that the State was investigating Newland's son for sexual abuse. Third, the trial court instructed the jury to disregard the statement. We presume that juries follow the court's instructions and consider only evidence that is properly before them. *State v. Perez-Valdez*, 172 Wn.2d 808, 818-19, 265 P.3d 853 (2011).

Newland argues that the detective's statement coupled with all the other testimony about child sexual abuse created incurable prejudice. We disagree. As discussed above, the trial court admitted limited testimony about the reason for the home visit. And while McCarthy and Karu provided background information about their roles in investigating sexual abuse, this did not create unfair prejudice against Newland. Nothing in the record suggests that the jury did anything other than evaluate whether Newland attempted to strike McCarthy.

We hold that the trial court did not abuse its discretion in denying Newland's motion for a mistrial.

C. COMMENT ON NEWLAND'S FAILURE TO CALL A WITNESS

Newland argues that the prosecutor's rebuttal argument constituted misconduct because it improperly shifted the burden of proof by suggesting that Newland had failed to produce Melanie as a witness. We disagree.

A prosecutor may commit misconduct during closing argument by mentioning that the defendant failed to present witnesses or by stating that the jury should find the defendant guilty simply because he did not present evidence to support his defense theory. *State v. Jackson*, 150 Wn. App. 877, 885, 209 P.3d 553 (2009). But "[t]he mere mention that defense evidence is

lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense." *Id.* at 885–86.

Where, as here, the defendant advances a theory to exculpate him, the theory is not immunized from attack. *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). The evidence supporting the defendant's theory of the case is subject to the same searching examination as the State's evidence. *Id.* And a prosecutor generally is permitted to make arguments that were invited or provoked by defense counsel and are in reply to his or her acts and statements. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

Here, the prosecutor's rebuttal argument did not suggest that Newland had failed to call Melanie as a witness. Instead, the argument addressed Newland's argument that Melanie's 911 transcript was the best evidence. Newland argued during closing:

> Some people say that water is purest at its source, okay? So if there's a spring outside of Washougal up on the hill up there somewhere, that water's bubbling out of that spring coming out of the ground, that's pure water, safe for all of us to drink. Right out of the ground, okay. But that water travels downhill and it picks up dirt, maybe giardia or whatever else as it hits the Washougal River, and then it slides out to the Columbia, and we all know what the Columbia looks like. Nobody wants to drink from the Columbia, right? By the time it hits the Columbia it's soiled, it's dirty, it doesn't make -- and, and it starts to change, change in its purity. Melanie Newland's statement is the source. Her statement's made at the source. When this thing is happening as it's happening, without opportunity for deliberation, forethought, fabrication, without that statement being soiled and tarnished by time and self-interest. I'd ask you to listen to it one more time.

3 RP at 517.

The prosecutor argued that the 911 call was not the best source of evidence and that the jury should discount this claim. The prosecutor explained that the 911 recording did not show what Melanie saw before McCarthy and Newland were on the ground:

> Counsel says this is the source; we should put a lot of stock in this 911, but, we don't know what she saw. And this assault went down really fast. This elbow

> being thrown, probably just a split second. We have no idea which direction she was looking. . . . But we have no idea what she saw before seeing him on the ground.

3 RP at 521-22. In other words, the prosecutor argued that the 911 tape neither corroborated nor disproved Newland's claim. This argument was not improper.

The prosecutor did not impermissibly comment on Newland's failure to call a witness. Instead, the prosecutor's rebuttal argument properly responded to Newland's closing argument. Accordingly, we hold that the prosecutor did not engage in misconduct.

We affirm Newland's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

BJORGEN, A.C.J.

LEE, J.

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that I arranged for the originals of the preceding Petition for Review and Certificate of Service to be filed by e-filing in Division II of the Court of Appeals.

And that I arranged for a copy of the Petition for Review and Certificate of Service to be on Respondent at the address(es) below:

Ann.cruser@clark.wa.gov
Rachael.probstfeld@clark.wa.gov

DATED this 5th day of November, 2015, at Vancouver, WA.

DANA STEVISON

HARLAN LAW FIRM

November 05, 2015 - 3:13 PM

Transmittal Letter

Document Uploaded: 6-461471-Petition for Review.pdf

Case Name:

Court of Appeals Case Number: 46147-1

Is this a Personal Restraint Petition? Yes ● No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

● Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Beau D Harlan - Email: bdh@harlanlaw.net

A copy of this document has been emailed to the following addresses:

bdh@harlanlaw.net
dstevison@harlanlaw.net
ann.cruser@clark.wa.gov
rachael.probstfeld@clark.wa.gov