No. 92532-1

COA 32606-3-III

IN THE SUPREME COURT OF THE STATE OF

WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

RAUL LOPEZ SOTO, Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

B. COURT OF APPEALS DECISIONS

At issue is the unpublished court of appeals decision filed on October 15, 2015 in Division Three of the Court of Appeals.

C. ISSUE PRESENTED FOR REVIEW

1. Does the unpublished court of appeals decision meet the criteria for review under RAP 13.4(b)?

D. STATEMENT OF THE CASE

The Appellant, Raul Lopez Soto, was charged with two counts of first degree rape of a child and one count of attempted first degree rape of a child. The charges stem from the following facts:

In October of 2012, a 10-year-old girl, K.V., was living in Grandview with her family, as well as her sister's boyfriend, Raul Lopez Soto. RP 99. On three occasions, Soto played what was called "the candy game" with her. RP 103, 219, 229. This was his idea. RP 100. During the candy game he would cover her eyes with a t-shirt and have her kneel on the floor. RP 100-5, 108, 195-6. He told her to guess what flavor of candy he was placing in her mouth. However, she never saw him with any candy. Exhibit 1. On the last occasion this happened, she looked under the blindfold because she did not trust him. She then saw him pulling

down his pants and saw his "thing." Id. She told him to stop and that she would not play the game anymore. Id.

When K.V. reported this to her mother, K.V. was shaking and on the verge of crying. RP 195, 204. Her teenage brother, C.T. was also present at this time. RP 195. K.V.'s mother reported the disclosure to the police. RP 229. She also confronted Soto, who left the house and never came back. RP 218. K.V.'s mother and brother testified at trial about the disclosure she made. K.V. later gave a statement to a child interviewer. Exhibit 1.

In that interview, K.V. said that there was a problem with her sister's boyfriend. Exhibit 1. She described a candy game in which Soto would cover her eyes with a t-shirt and tell her to guess the flavor of a candy being placed in her mouth. Id. Soto told her that the candy was really hard so she could not bite it. Id. She said that it didn't taste like anything and she never saw any candy in his hand. Id. She described 3 different locations where he played this game with her. Id. On the last occasion, after being blindfolded she could still see a little under the bottom of the blindfold. Id. On this occasion, when she looked down, she saw Soto pull down his pants and saw what she calls his "thing." Id. She told him to stop and that she wouldn't play anymore. Id. She described

his "thing" as long, soft, round, and squishy and said it looked like skin. Id.

Soto gave a statement to Detective Martin. In that statement, he admitted that he and K.V. played a candy game. RP 273. According to his statement, it only involved candy and only took place on Halloween. RP 273. Soto also testified at trial. He admitted that the candy game did occur and that it occurred on Halloween. RP 301-2. He said that they were both kneeling and that he told her to put her fingers over her eyes. RP 302. He denied putting his penis in her mouth. RP 299.

After the trial, Soto was convicted and sentenced. His conviction was upheld on appeal.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. The Court of Appeals correctly held that Soto waived any contention that purported prosecutorial misconduct requires a new trial

In order to establish that he is entitled to a new trial due to prosecutorial misconduct, Soto must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Prejudice is established where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Dhaliwal, 150 Wn.2d 559, 578, 79

P.3d 432 (2003) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996)).

Here, the challenges involve the State's closing argument and rebuttal argument. There were no objections by the defense during either argument. As such, Soto waived the right to assert prosecutorial misconduct unless the remark was so "flagrant and ill intentioned" that it caused enduring and resulting prejudice that a curative instruction could not have remedied. Boehning, 127 Wn. App. at 518 (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995)).

In addition, improper remarks by the prosecutor are not grounds for reversal "if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." State v. Weber, 159 Wn.2d 252, 276-77, 149 P.3d 646 (2006) (quoting Russell, 125 Wn.2d at 86). These onerous standards of review prevent defendants from provoking or passively accepting the State's improper conduct at trial in order to undermine the validity of their convictions on appeal. State v. Jones, 144 Wn. App. 284, 299, 183 P.3d 307 (2008).

1. Detective's belief that K.V. was a victim.

A prosecutor's closing argument is reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Boehning, 127 Wn. App. 511, 519 111 P.3d 899 (2005). This framework of analysis is critical. One cannot just examine a few sentences from the closing argument and say that it is prejudicial without analyzing the comments in the context of the closing and in the context of the evidence presented at trial.

First, we start with the issues raised at trial. The defense theory was that everyone involved in the investigation and prosecution of the case started out with a premature and incorrect belief that Soto was guilty and that the victim was telling the truth. RP 360, 365. In closing, defense counsel told the jury:

> Everybody else but the jury started out with the proposition that Raul was guilty, mom, [C.T.], Officer Arraj, Detective Martin, Darla. Everybody started with the proposition that my client was guilty. They worked from that proposition to try and prove it. The results of that is what got played out during the trial.

RP 365. He argued that the victim advocate "assumes the children are telling the truth" and that Ms. Jensen, the interviewer was "still doing advocacy," as opposed to being a neutral fact-finder. At one point in

closing argument, he told the jury that Detective Martin was "absolutely convinced that [Soto] is guilty." RP 360.

Second, we look at the evidence presented at trial. With Jan Wahl, the victim advocate, the defense inquired if it was her job to believe in the victim:

> DEFENSE: You have been serving in that role as advocate?
> ADVOCATE: Yes.
> DEFENSE: That's a support person so that the person who's coming in isn't taken advantage of by the prosecutor, by the defense, by law enforcement, by anybody else, but they have somebody they can count on?
> ADVOCATE: Right.
> DEFENSE: Somebody who believes them?
> ADVOCATE: That's right.
> DEFENSE: I think that at one point in time you told me that it's not your job to challenge their statements. It's your job to believe them, correct?
> ADVOCATE: That's correct.
> DEFENSE: Okay. It would be difficult to do -- somebody else does that other stuff. They need somebody who doesn't question them.
> ADVOCATE: Yes.

RP 292.

With Darla Jensen, the child interviewer, the defense emphasized that most of her career involved working as an advocate, and not conducting child interviews. RP 182. This was later used to argue in

closing that she was "still doing advocacy" and started with the proposition that Soto was guilty. RP 360, 365.

With Detective Martin, Soto's attorney tried to establish that Detective Martin had also prematurely decided that his client was guilty. The cross-exam went as follows:

> DEFENSE: Who's the victim?
> DETECTIVE: Kimberly.
> DEFENSE: **You had already made up your mind about that?**
> DETECTIVE: It was reported that way. I'm just identifying her.
> DEFENSE: There wasn't anything in the interview that convinced you that she wasn't a victim?
> PROSECUTION: Objection.
> COURT: I'm going to overrule it.
> PROSECUTION: Okay.
> COURT: Can you ask the question again?
> DEFENSE: There wasn't anything in the interview that convinced you that she wasn't a victim?
> DETECTIVE: Well, based on my training and experience, and I can honestly say that I believe she was a victim

RP 277-8 (emphasis added).

The defense attorney then discussed Soto's arrest and how the detective had no doubt that he was going to arrest Soto when Soto came into the police department. The cross-exam went as follows:

> DEFENSE: There was no doubt in your mind that you were going to arrest Raul when he came in?

DETECTIVE: No, there wasn't.

RP 279. Again, the defense theory was that the detective had his mind mind up too soon during the investigation.

The cross-examination continued with the defense quoting statements that the detective made during the tape-recorded questioning of Soto:

> DEFENSE: If this isn't a correct quote, please let me know. "I cannot believe that that happened. I'm sorry. It is hard for me to believe. I don't—I don't—I can't believe that this did not happen. I honestly believe that this did happen." You told him that?
> DETECTIVE: I would have to review the video.
> DEFENSE: That's consistent with what you believe today, isn't it?
> DETECTIVE: Yes.

RP 279 (quotations added).

Later, outside the presence of the jury, the judge made a record as follows:

> COURT: Now, I've got that part nailed down. Let me go back for one moment here. There was a couple objections I wanted to make a quick reference to. It was during Detective Martin's testimony, actually cross-examination. I just want it to be clear. Mr. Dold, and it's my words, essentially invited Officer Martin to comment on guilt or innocence as far as I was concerned, whether he believed Kimberly or felt her to be a victim.

> DEFENSE: Correct.
> COURT: I would not have allowed that under any other circumstances. I want the record to be clear that that testimony was brought forth by you, and he was responding to questions that you specifically directed him to respond to.
> DEFENSE: I asked the same question of Ms. Wahl.
> COURT: Exactly. Thank you for clearing that up. I wanted to make sure that the record stood solid in that regard.

RP 327-8.

Soto argued that his attorney inadvertently elicited improper opinion testimony. (Appellant's brief at 7). When looking at the questioning in conjunction with the rest of the cross-examination and in conjunction with the closing argument of the defense, the elicitation of that testimony was clearly intentional. Soto's attorney knew that Detective Martin believed K.V. before the detective had talked to Soto. This was evident from the quotes read into the record from the detective's tape-recorded interview with Soto. See RP 279. That is precisely why he brought out the belief—to show that the detective did not have an open mind. There was nothing inadvertent about the question. It was all part of the defense theory. If it was inadvertent, the defense would have moved on. Instead, the defense continued to question the detective about his belief in the victim. RP 279.

On redirect, to rebut the defense questioning and explain that Detective Martin had an open mind, the prosecutor asked if Detective Martin's thoughts on the case were solidified before the forensic interview:

> PROSECUTION: Counsel asked a lot of questions regarding your opinion at various stages regarding this before the child forensic interview and you watched that?
> DETECTIVE: Right.
> PROSECUTION: Before that, had your thoughts on this case solidified?
> DETECTIVE: No, none whatsoever.

RP 285. This was the only redirect on the subject, despite the lengths that the defense went to try and show that Detective Martin conducted a flawed investigation by not keeping an open mind.

This redirect was permissible because once Soto had opened the door, the prosecutor was then permitted to explain, clarify, or contradict the evidence. Under the well-established open door doctrine, a party may open the door during the questioning of a witness to otherwise inadmissible evidence. State v. Korum, 157 Wn.2d 614, 646, 141 P.3d 13 (2006).

This is exactly what was done in this case. After Soto opened the door, the prosecutor followed up to establish that the detective had kept an open mind until he watched the child forensic interview. This is allowed

because once a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence regarding that issue. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008).

During closing arguments, the prosecutor briefly summarized the testimony that was elicited from Detective Martin:

> Now, we heard testimony elicited by the defense that Detective Martin—it was an impact on him and he saw it. This experienced detective looked at that interview, and at that point where he had had an open mind he saw it, and he believed. He knew that this was true.

RP 353.

From this summary, Soto claims that the prosecutor invaded the province of the jury by commenting on Detective Martin's belief in the victim. However, there was no objection made to this summary of the trial testimony. The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (citations omitted).

Further, there was nothing improper about the prosecutor's closing argument. Soto relies on State v. Walden, a case in which the prosecutor on cross asked a witness whether another witness was mistaken when describing a suspect's height. 69 Wash. App. 183, 186, 847 P.2d 956

(1993). The court found misconduct in this situation, but that it was harmless error. Id. at 187. Walden is nothing like the case at hand. Here, the prosecutor in closing merely summarized the evidence intentionally elicited by the **defense** on cross-examination—testimony that was objected to by the State.

Nor did the prosecutor's remarks set forth a statement of personal belief. He did not vouch for a witness. Closing argument does not constitute improper vouching unless it is clear and unmistakable that the prosecutor is not arguing an inference from the evidence but is instead expressing a personal opinion about credibility. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996).

The Court found a statement of personal belief in Sargent, where the prosecutor informed the jury, "I believe Jerry Lee Brown. I believe him." State v. Sargent, 40 Wn. App. 340, 343, 698 P.2d 598 (1985) (emphasis omitted). The Court concluded the prosecutor's remarks directly placed "the integrity of the prosecution" on the side of Brown's credibility. Sargent, 40 Wn. App. at 344. The statement in Sargent was a clear statement of the prosecutor's personal belief in a witness.

Here, in contrast, the prosecutor, never stated who he believed. His remarks were not expressing any personal opinion about credibility. And at the end of his closing, he repeated to the jury that credibility

determinations are the jury's alone. RP 359. The prosecutor directed the jury to the evidence *without* asking the jury to place its faith in the prosecutor's assessment of the victim's credibility.

As indicated by our State Supreme Court, "[a] prosecutor may argue inferences from the evidence, including inferences as to why the jury would want to believe one witness over another." State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). Here, the prosecutor was entitled to argue why K.V. should be believed and why Soto should not be believed. And the entirety of the prosecutor's argument was based on the evidence admitted at trial.

Soto claims that the error is not harmless because K.V.'s credibility was critical. He argues that her statements comprised the entire substantive case against Soto. (Appellant's brief at 8). It is important to remember that under RCW 9A.44.020, in order to convict a person of rape of a child "it shall not be necessary that the testimony of the alleged victim be corroborated." RCW 9A.44.020. Nonetheless, there was substantial corroboration here and numerous factors showing that K.V.'s statements were reliable and credible.

K.V. first described the candy game in the car to her mother and brother as they were leaving the house they shared with Soto. C.T., her brother, described his sister as scared, shaking, and about to cry as she

disclosed what happened. He said that K.V. at first used the word penis or the Spanish equivalent and disclosed that Soto stuck his penis in her mouth. K.V. said this happened on 3 separate occasions. RP 219.

During a subsequent child forensic interview, K.V. said that there was a problem with Soto. Exhibit 1. She said that that the problem was he had a candy game and that it had happened 3 times. Id. She described the first time when she was in her room after dinner and he told her to get on her knees and blindfolded her with a shirt he put on her. Id. He told her to guess the candy and told her "it's really hard so you can't bite it." Id. She didn't see any candy and when he put something in her mouth, she said it didn't taste like anything. Id.

On the second occasion, she was in the backyard and the same thing happened. Id. That time it happened 2 or 3 times. Id. The third and last time, she was in the basement in her brother's room. Id. She didn't trust him so she made sure she could still see a little. Id. She said she saw his "thing" and told him to stop and that she wouldn't play anymore. Id. He went upstairs and never gave her any candy. Id. She went in the shower and cried. Id.

K.V. had a hard time testifying at trial. She testified that something upsetting happened between her and Soto. RP 99. She said that it was a game that Soto started called the candy game. This was a

game in which he would blindfold her with a t-shirt and tell her he was putting candy in her mouth. RP 99-100, 108. She said that she never saw the candy and wasn't sure if candy was put in her mouth. RP 101, 104. She said it happened 3 times and that it was before Halloween. RP 103-4.

At trial she testified that she did not remember if Soto put any body part in her mouth and that she might have imaged that he put his private part in her mouth. RP 105, 112. However, she said that her memory was better at the time she spoke to the child interviewer than it was at the time of her testifying. RP 102, 108.

From the facts of this case, we know that K.V. described a fixed time period of abuse, October of 2012. This was consistent throughout the trial. She also was able to describe that it happened close to a memorable event, Halloween. She was also consistent that this happened on 3 occasions. Facts she gave during the forensic interview were confirmed through other witnesses, her mother and brother, and Soto himself. And she was consistent in her disclosure to her family and to the child interviewer.

The timing of the disclosure occurred at a time when others were upset with Soto and the family had just left the house they shared with Soto, a time when K.V. may have felt safer to disclose the abuse. In addition, her statements were spontaneous. Nobody questioned her about

whether anything did or did not happen before she made her initial disclosure. Furthermore, K.V. disclosed to individuals that one would expect a child to disclose abuse to, people she trusted such as her mother and brother.

She also used age-appropriate language, for example, when she referred to his penis as his "thing." In addition, she was able to describe, appropriate for her age, what his "thing" looked like. These are specific details that lend credibility to her and the fact that the events in question did occur. She also displayed appropriate emotion in the interview when she started crying after begin asked why she did not tell anybody before. In addition, she described how she cried in the shower after seeing Soto's "thing." Furthermore, she made a statement about being afraid to tell because Soto would get mad, another statement describing how she felt at the time. This not only explains the late disclosure but her ability to describe her feelings suggests that this was something that actually happened to her.

Furthermore, Soto corroborated a lot of what K.V. described as well. He admitted that there was a candy game and that they played it in October. He admitted that her eyes were covered. He admitted that they were both kneeling. While he did not admit to the ultimate act in question, he confirmed a good part of what K.V. disclosed.

Based on the facts in this case, and assuming, for sake of argument, that Soto has shown any misconduct, he has not shown misconduct so flagrant and ill-intentioned that it caused enduring and resulting prejudice that a curative instruction would not have remedied.

2. Use of the words ludicrous and desperate.

Soto challenges parts of the closing argument where the prosecutor used the terms "ludicrous" and "desperate" to describe Soto's explanation as to how K.V. may have seen his penis and his explanation of the motive behind her accusation. RP 353, 370-1. First, there was nothing improper about the use of those terms. Second, Soto never objected and he has not shown that the comments were so "flagrant and ill-intentioned" that a curative instruction would have been futile.

Our State Supreme Court has even approved of the use of the word "ludicrous" when describing a defense theory:

> The prosecutor's characterization of the defense theory as "ludicrous" was reasonable in light of the evidence. Appellant admitted raping and torturing Ms. Washa over a prolonged period of time. It was the prosecution's contention that, under those circumstances, she was not likely asleep while Appellant was anywhere nearby. The use of the word "ludicrous" was simply editorial comment by the prosecuting attorney which was a strong, but fair, response to the argument made by the defense.

State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997), cert denied, 523 U.S. 1007 (1998) (citing State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994)).

Here, the use of the word "ludicrous" in rebuttal was an appropriate response to Soto's claim that after a heated argument between her brother and Soto, the victim made up an allegation of rape in order to go back home. It was also made in response to a strong defense closing that attacked the motives of the victim.

The use of the term "desperate" was in the following context:

> The defendant desperately tried to throw out explanations that were, frankly, the evidence will show and common sense, were not true. It's just born out of desperation. Of course, she would know what a male penis would look like. I never lock the door. Everybody has walked in on me. It doesn't matter. It's my house. I can do what I want. It doesn't matter if there's little kids running around or my mother-in-law. It's my house, my house. Does that ring true? What does that say when you throw something so ludicrous and desperate out there?

RP 353.

In State v. Thorgerson, our Supreme Court found that isolated remarks calling defense arguments "bogus" and "desperate," while strong and perhaps close to improper, do not directly impugn the role or integrity of counsel, and such isolated comments are unlikely to amount to

prosecutorial misconduct. 172 Wn.2d 438, 455-6, 258 P.3d 43 (2011) (citing Brown, 132 Wn.2d at 566).

Here, the term was used to refer to Soto's own description of events. The prosecutor argued that the evidence and common sense showed that Soto's version of what happened was untrue. In this context, the statement about Soto's explanations being born out of desperation was not prosecutorial misconduct.

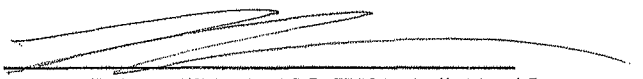
In sum, Soto simply has not shown that there was improper argument or prosecutorial misconduct so flagrant and ill-intentioned that a curative instruction could not have remedied any undue prejudice. An instruction to disregard part of the prosecutor's argument would have been an easy solution. Furthermore, the jury was already instructed that the lawyers' statements are not evidence and that they may "disregard any remark, statement, or argument that is not supported by the evidence or the law..." CP 23.

F. CONCLUSION

For the reasons stated above, this case does not meet any of the criteria in RAP 13.4(b). First of all, the decision is not in conflict with a decision of the Supreme Court or another decision of the Court of Appeals. Second, a significant question of law under the Constitution of the State of Washington or of the United States is not involved. Lastly,

the petition does not involve an issue of substantial public interest that should be determined by the Supreme Court. As such, the petition for review should be denied.

Respectfully submitted this 7th day of December, 2015,



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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on December 7, 2015, by agreement of the parties, I emailed a copy of STATE'S ANSWER TO PETITION FOR REVIEW to Ms. Andrea Burkhart at andrea@burkhartandburkhart.com.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7th day of December, 2015 at Yakima, Washington.

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Good afternoon,

Attached for filing is the State's Answer to Petition for Review in State v. Raul Lopez Soto, 92532-1

Thank you,

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