NO. 46587-6-II

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

STATE OF WASHINGTON, Respondent

v.

NICHOLAS SIMUKAS ROBLES, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-02170-6

BRIEF OF RESPONDENT

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I. SUBSTANTIVE FACTS

S.K. first met the defendant, Nicholas Robles, in the summer of 2010.[1] They knew one another through church. RP 62, 166. She believed she was 13 years old when she first met him.[2] RP 95. The defendant was 28 years old the summer they met. RP 76. S.K. told the defendant she was 14. RP 95. The defendant responded by joking that he would have to stay away from her because she was so young. RP 95. S.K. believed the defendant was "older than 20." RP 95. S.K. saw the defendant quite a few times that summer, perhaps every other Sunday. RP 96. On one occasion she saw him at 24-Hour Fitness while there with her sister. RP 96. They said hello to each other and the defendant told S.K. that she had a "nice

[1] S.K. did not explicitly say that she first met the defendant in the summer of 2010. When asked to describe when she first met the defendant, she described the circumstances of the meeting rather than the specific date or year. However, over the next five pages of her testimony, the context shows that she first met the defendant in the summer of 2010. RP 94-99.

[2] S.K. later conceded in her testimony that she was mistaken. She was 14 years old in the summer of 2010, not 13. She was born on March 16, 1995. RP 75.

body," and a "nice ass." RP 96-97. S.K. recalled telling him that she "looked good for a 14 year-old." RP 97. While at the gym, the defendant came over to S.K. while she was in the Jacuzzi and asked her for her phone number. RP 97. S.K. admitted that she wanted the defendant to contact her because she was attracted to him. RP 97-98.

S.K. and the defendant began exchanging emails in August of 2010. RP 98-99. The emails were flirtatious. RP 100-101. The defendant asked S.K. in one of the emails to "send me some pictures." RP 101. She responded by texting him a picture of her bare breasts. RP 101. S.K. explained "I felt like if I did he would be more interested in me and wanting to be with me in general." RP 101. S.K. also told him she wouldn't send him nude pictures (presumably referring to fully nude pictures), and he replied, "that is not good." RP 102. She then told him that if he wanted to see her nude, he could come look at her in person. RP 102.

S.K. and the defendant ultimately agreed to meet. RP 103. They decided that she would skip school and he would pick her up from the church in her neighborhood, and they would go to his house and use the hot tub. RP 103. This occurred in January of 2011. RP 103-04. S.K. brought a swimsuit because she understood they were going into the hot tub. RP 104. When they arrived at the defendant's house, S.K. went into

the bathroom and changed into her swim suit. RP 104. S.K. put her clothes back on over her swim suit for the walk out to the hot tub. RP 104. She felt weird at this time, wondering why she had come there and wishing she hadn't. RP 104-105. Her physical interaction with boys up to that point was limited to kissing a boy in the seventh grade. RP 105. When she made the plan to meet the defendant, S.K. thought they would go to the hot tub and hang out and then she would go home. RP 105. She thought perhaps they would kiss and cuddle. RP 105. S.K. had a very specific memory of the defendant wearing green and white shorts, the type that appeared to change color. RP 105. S.K. sat on the opposite side of the defendant in the hot tub, but he instructed her to come closer to him. RP 106. The defendant placed her on his lap and held her there, preventing her from moving away. RP 106. They eventually left the hot tub and went into the bedroom. RP 114.

In bedroom, the defendant and S.K. massaged one another, and he tore off her bikini bottoms. RP 114-15. S.K. did not want to have sex with the defendant, but she didn't tell that to the defendant. RP 115. She kept quiet. RP 115. When the defendant tried to penetrate her vagina, S.K. asked him to penetrate her anus instead, because she'd heard at school that you would remain a virgin that way. RP 116. She felt numb, and when the defendant penetrated her she told him "No, don't." RP 116-17. The

defendant didn't stop, however. RP 117. S.K. felt like she couldn't move, and it hurt. RP 117. She described it as burning and stinging. RP 117. When the defendant was done he instructed S.K. to shower. RP 117. When she used the toilet she saw blood. RP 118. She cried when she was in the bathroom, wanting to wash off everything and to get out of there. RP 119. She was in too much pain to put on her jeans again, so after her shower she asked for a pair of sweats. RP 118. The defendant turned on the television and she sat next to him, believing that they would cuddle. RP 120. S.K. thought that cuddling was the type of thing that happens "after something like that." RP 120.

The day following the rape, S.K. told her parents what happened. RP 120. Her father wanted to call the police, but S.K. asked him not to. RP 120. S.K. had feelings for the defendant, and she also believed that she would be in trouble as well. RP 120. S.K. continued to exchange emails with the defendant and continued to have feelings for him. RP 121-23. In April of 2012, S.K. told her then boyfriend about what happened with the defendant and he told her that under the law in Washington, she had been raped. RP 124. Following that, S.K. contacted a sexual assault hotline, and was in turn referred to the Children's Justice Center in Clark County. RP 125.

The defendant admitted to Office Phelps of the Battle Ground Police Department that he believed S.K. was 13 years-old when he met her. RP 62. He also admitted that S.K. had sent him pictures of herself naked and in lingerie. RP 62. He denied, however, that he had sexual contact with her. RP 62.

The defendant was ultimately charged with, and convicted of, rape of a child in the second degree. CP 1, 46.

II. MOTION FOR MISTRIAL

During direct examination of S.K., the prosecutor asked the following questions:

> Prosecutor: "Okay. Now, when did you find out that this case was definitely going to trial?"
>
> S.K.: "On Thursday."
>
> Prosecutor: "And that was last -- so today is the 19th. Was that the 15th?"
>
> S.K.: "Yes. I got a phone call from Sherry, and she said that I had to be here on Monday."
>
> Prosecutor: "And was anyone -- since Thursday, has anyone been contacting your friends or family about this case?"
>
> S.K.: "Yes."

RP 126.

At that point, Robles objected and asked to be heard outside the presence of the jury. RP 126. Outside the presence of the jury, the prosecutor explained that he believed members of the defendant's family, and his friends, had been contacting the victim's family since the case had been called ready for trial. RP 127. The prosecutor believed it might show potential intimidation of S.K. RP 127. The trial court ruled that in the absence of proof that it was the defendant himself who had made the communication, the proffered evidence would not be relevant and sustained the objection. RP 128. Robles nevertheless moved for a mistrial based on the prosecutor's question. RP 129. Robles argued that the question, "has anyone been contacting your friends and family about this case?", necessarily leads to the conclusion that it was the defendant who had been contacting her friends and family and that the jury could not disregard the question even if instructed to do so. RP 129-30. The State responded that the question was of minor moment in the overall testimony, which had lasted an hour and half at that point. RP 130. The prosecutor also pointed out that the question was innocuous in that no mention was made of threats or anything of that nature. RP 130.

The trial court denied the motion:

> The motion before the Court is for a mistrial based on the question that immediately preceded the break. The Court will note that the remedy of mistrial is one of the most

> drastic remedies that are -- that is available under circumstances. The Court's -- the Court concludes that under the circumstances, the fact that the question came up in somewhat an innocuous fashion, that it was not answered, and that it is relatively small in the grand scheme of things is insufficient to rise to the level to grant a mistrial under the circumstances.

PRP 131.

C. ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR A MISTRIAL.

Robles claims that the trial court abused its discretion when it denied his motion for a mistrial. The State disagrees.

The decision whether to grant a mistrial is within the sound discretion of the trial court, and the decision is reviewed for abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002); *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). "A denial of a motion for mistrial should be overturned only when there is a substantial likelihood that the prejudice affected the verdict." *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010), citing *Rodriguez* at 921; see also *Hopson*, supra, at 284 (only errors affecting the outcome of the trial are deemed prejudicial). In determining whether a trial irregularity should compel a new trial, the reviewing court examines (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court

properly instructed the jury to disregard it. *Hopson* at 284. When testimony is improper, the question is whether the improper testimony, when viewed in the context of all of the evidence, deprived the defendant of a fair trial. *Gamble* at 178.

In this case, the complained of question was: "And was anyone -- since Thursday, has anyone been contacting your friends or family about this case?" RP 126. That is the entirety of the claimed irregularity. This question, in the form the jury heard it, was innocuous. Because defense counsel suspected that it would become non-innocuous, he objected and the court prudently heard the matter outside the presence of the jury. Although the subject matter could have become prejudicial, it was stopped before it ever came close to reaching that point. In the context of the questions that immediately preceded this question, the prosecutor was asking generic questions about when S.K. learned this case would finally be going to trial. In the context of the entire trial, in which the jury heard that these families know each other through church, and that S.K. may have even loved the defendant—even after he raped her—and continued contact with him after the rape, it would not necessarily be apparent to the jury that the prosecutor was suggesting something nefarious. The jury heard extensive testimony about S.K.'s continued contact with the defendant well after the rape. The trial judge, who was in the best position

to evaluate the effect of the question, correctly found that the irregularity did not rise to the level that would compel the court to employ the most drastic remedy available to it—a new trial. Moreover, the trial court instructed the jury to disregard the question because it had "been deemed by the Court to be inadmissible." RP 133. Contrary to Robles' claim, the trial court's instruction to disregard was adequate to cure any prejudice that may have resulted from the prosecutor's question. The instruction was clear without being hysterical. It struck the appropriate tone and did not call further undue attention to the matter, which may have prejudiced the defendant.

The trial court did not abuse its considerable discretion in denying the motion for a new trial.

II. THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT.

Robles complains about several instances of claimed prosecutorial misconduct, none of which were objected to and none of which were flagrant and ill intentioned.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the

prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn.App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Meaning, the reviewing court will not even review the claim unless the defendant demonstrates that the misconduct was so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are

allowed to draw reasonable inferences from the evidence." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory,* 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor's comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

> Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

"In determining whether the misconduct warrants reversal, we consider its prejudicial nature and its cumulative effect." *State v. Suarez-Bravo*, 72 Wn.App. 359, 367, 864 P.2d 426 (1994). "[T]he 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. Edvalds*, 157 Wn.App. 517, 525-26, 237 P.3d 368 (2010), citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Here Robles complains of several statements that he does not fully reprint in his brief, save for one. The one remark he reprints in his brief is this:

> What's the one thing they don't agree with? What happened inside that house. Why would we agree and believe her on all these other details before and after, but not believe her on the one part of the entire case, the one reason we're here, the sexual abuse? Why would we not believe her when we believe all these other facts?

RP 217.

Robles argues that the prosecutor's use of the pronoun "we" constitutes vouching. "It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness." *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). Improper vouching generally occurs if the prosecutor expresses her personal belief as to the veracity of the witness or

indicates that evidence not presented at trial supports the witness's testimony. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). But because prosecutors have wide latitude to argue reasonable inferences from the facts concerning witness credibility, a reviewing court will not find prejudicial error unless it is clear and unmistakable that counsel is expressing a personal opinion. *State v. Allen*, 176 Wn.2d 611, 631, 294 P.3d 679 (2013).

The use of the term "we know" by a prosecutor can be problematic in that it is ambiguous, and such language should be avoided. In *United States v. Younger*, 398 F.3d 1179 (9th. Cir., 2005), the Ninth Circuit addressed a claim of misconduct where the prosecutor repeatedly said, "we know" in reference to what he argued was shown by the evidence. The following are examples of what the prosecutor said: "'We know [defendant] possessed the backpack. We know that. We know inside the backpack were the 81 rocks wrapped for retail sale and the 18 packets of cocaine powder also wrapped for sale' and '[w]e know that in the neighboring compartment, the bigger compartment, they had two loaded firearms.'" *Younger* at 1191. Although the defendant in *Younger* timely objected to the prosecutor's remarks, the district court overruled the objection. *Id.* The Ninth Circuit held that the use of the term "we know" can "readily blur[] the line between improper vouching and legitimate

summary." *Younger* at 1191. However, the Court found the comments to be harmless because

> [T]he record in this case confirms that the prosecutors used the phrase "we know" to marshal evidence actually admitted at trial and reasonable inferences from that evidence, not to vouch for witness veracity or suggest that evidence not produced would support a witness's statements. The prosecutors' statements thus were not improper. Moreover, in the context of the entire trial, we conclude that the prosecutors' use of "we know" did not materially affect the verdict.

Younger at 1191.

Here, the State acknowledges that the use of the pronoun "we" during closing argument should generally be avoided, but what occurred here is markedly different than what occurred in *Younger*. In *Younger*, the prosecutor was arguably aligning himself with the jury. Here, the prosecutor used the term "we" in a more colloquial sense, meaning "you," or "one," or "a person." The prosecutor's use of "we," which occurred only briefly in the overall closing argument, is properly read as the prosecutor saying:

> What's the one thing they don't agree with? What happened inside that house. Why would *a person* agree and believe her on all these other details before and after, but not believe her on the one part of the entire case, the one reason we're here, the sexual abuse? Why would *a person* not believe her when *a person* believe[s] all these other facts?

This is the way defense counsel likely heard the argument, because he, despite very aggressive advocacy and repeated objections throughout the trial, did not object to these remarks. Robles has not shown these remarks were flagrant and ill intentioned, or that they could not have been remedied by a prompt objection and curative instruction. Because the prosecutor was not referring to matters outside of the evidence, the remarks were not prejudicial.

The quotation above is the only remark by the prosecutor that Robles specifically identifies. He generally complains about the prosecutor arguing that it was not believable that S.K. fabricated this event based on the level of detail she provided about the event itself as well as her surroundings (the house, what the defendant was wearing, etc.). But the prosecutor's argument was proper because it argued a reasonable inference from the evidence. The prosecutor did not "vouch" for S.K. when he argued that her memory and the level of detail she provided should lead to the conclusion that she was credible. Arguing about the relative credibility of witnesses is the primary function of closing argument. It was also not improper for the prosecutor to point out that the defendant's story was ridiculous where he claimed that the victim's detailed memory of the house came from pictures she saw on a camera phone, when the alleged pictures on the phone were taken *before* the

house was remodeled, but the details she gave were consistent with the house as it looked *after* the remodel. (See RP 250). S.K.'s description of the interior of the house was far too detailed for it to be credible that she recalled the details solely from pictures she briefly saw on a phone, much less when you consider that the pictures (if they even existed on the phone) were of the house before it was remodeled, according to the defendant's own story. The defendant's story was not credible. It was, in fact, absurd. The prosecutor, in calling the story ridiculous, was arguing that the defendant's account was not credible. This is a permissible function of closing argument. The word "ridiculous" is accurate, and the isolated use of the term here was not improper. See e.g. *State v. Lindsay*, 180 Wn.2d 423, 438, 326 P.3d 125 (2014) ("An isolated use of the term 'ridiculous' to describe a witness's testimony is not improper in every circumstance. But labeling testimony 'the most ridiculous thing I've ever heard' is an obvious expression of personal opinion as to credibility.")

The prosecutor's remarks were not improper, and certainly were not flagrant and ill intentioned. If they were objectionable, which defense counsel did not believe they were, they could have been easily remedied by a curative instruction. Robles has not carried his burden of showing that the these remarks entitle him to a new trial.

D. CONCLUSION

The judgment and sentence should be affirmed in all respects.

DATED this 7th day of May, 2015.

Respectfully submitted:

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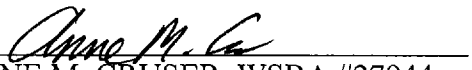
By: 

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