NO. 46511-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRYCE SMILEY,

Appellant.

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

The Honorable Philip Sorensen, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Improper admission of a law enforcement officer's opinion as to appellant's veracity violated his right to a jury trial and requires reversal.

2. Prosecutorial misconduct in closing argument denied appellant a fair trial.

Issues pertaining to assignments of error

1. A law enforcement officer testified that he asked appellant during an interview what motive the alleged victim might have for making up the accusations and that appellant's response "just didn't make any sense." Did this opinion as to appellant's credibility or guilt violate his right to a jury trial?

2. The State's case on charges of child molestation and rape of a child depended solely on the accuser's credibility. In closing argument the prosecutor argued repeatedly that requiring more than the accuser's testimony would mean the majority of child molesters would never be held accountable for their actions. Did these appeals to the jury's fears, passions, and prejudices affect the verdict and deny appellant a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

The Pierce County Prosecuting Attorney charged appellant Bryce Smiley with one count of first degree rape of a child, two counts of first degree child molestation, two counts of second degree rape of a child, and two counts of third degree rape of a child. CP 1-4, 26-29, 30-33; RCW 9A.44.073; RCW 9A.44.083; RCW 9A.44.076; RCW 9A.44.079. The case proceeded to jury trial before the Honorable Phillip K. Sorenson. The jury found Smiley not guilty of first degree rape of a child but entered guilty verdicts on the other counts. CP 105-111. The court entered a standard range sentence, and Smiley filed this timely appeal. CP 118-19, 133.

2. Substantive Facts

Bryce Smiley's father, Jeff Smiley, married his stepmother, Jennifer Smiley, in 2006, when Smiley was 15 years old. 2RP[1] 170. Smiley, his father, and his two sisters moved into his stepmother's home. 2RP 174; 5RP 367. One sister lived with them for six months and the other for two years. 2RP 174-75. Smiley's stepsister, AB, was 8 years old when her mother married Smiley's father. 1RP 52. She spent half her

[1] The Verbatim Report of Proceedings is contained in six volumes, designated as follows: 1RP—5/5, 6, 7/14; 2RP—5/8/14; 3RP—5/12/14 (am); 4RP—5/12/14 (pm); 5RP—5/13/14, 5/14/14 (am), 7/18/14; 6RP—5/14/14 (pm).

time with her mother and half with her father until she was 13 or 14 years old, and from then on she spent weekdays with her mother and weekends with her father. 1RP 57; 2RP 171.

Smiley graduated high school in 2009 and continued to live with his father and stepmother, working at Jack in the Box. 2RP 176; 5RP 371-72. In January 2011, he joined the military. 5RP 371. He went to basic training in Missouri for five months and then was stationed at Joint Base Lewis-McChord, where he lived on base. 2RP 177; 5RP 373, 373. He seldom had time to visit his father's house, because his work as an MP, his additional training, and activities with friends kept him busy. 2RP 178; 5RP 375-76.

On December 7, 2012, Smiley was deployed to Afghanistan. The next day, AB told her father that Smiley had been touching her since she was in fourth or fifth grade. AB had talked about the touching with a friend a couple of years earlier but told her friend not to tell anyone. 1RP 103-04; 3RP 285-86. She told three more friends in the fall of 2012, again telling them not to say anything. 1RP 105; 2RP 134, 221; 3RP 266-67, 275. In December 2012 AB told her boyfriend, who called her father and told him he needed to talk to AB. 1RP 106; 2RP 136, 215. When AB's father learned of her allegations, he called Jeff and Jennifer Smiley and the police. 4RP 16.

AB's mother took her for a gynecological exam a few days later. 2RP 235. The physician's assistant who examined AB took a history, but because the last alleged incident was six months earlier, there was no way to corroborate that sexual contact had occurred. 2RP 237, 242.

AB was interviewed by detectives in January 2013. 4RP 32-33. She said in the interview that Smiley had touched her inappropriately, starting when she was in fourth or fifth grade, and it progressed to oral sex and one incident of vaginal/penile penetration around Christmas or New Year 2011-12. 4RP 36.

Smiley returned from Afghanistan because of the allegations. 5RP 378. He agreed to speak to detectives, and he denied all of AB's allegations. 4RP 39-40, 50-51.

At trial, AB described touching and oral sex, which she said occurred on a weekly basis from when she was in fifth grade to when she was in ninth grade. 1RP 62, 64-67; 2RP 117-18. She also described two specific incidents, one during winter break in December 2011 or January 2012, and one between April and June 2012, which she said was the last incident. 1RP 90, 96, 99-100.

Jennifer Smiley testified about the family living arrangements, the parents' work schedules, and the children's activities. 2RP 169-76, 184-87. She testified about the family overnight trip to Oregon for Christmas

2011, saying that Smiley accompanied them and spent the night at their house when they returned the day after Christmas. 2RP 188. Gregory Becker, AB's father, testified about his phone call from AB's boyfriend, AB's allegations, and his discussion with Jeff and Jennifer Smiley and the police. 4RP 13-18. AB's friends described their conversations with AB about the allegations. 2RP 214, 221; 3RP 266, 275, 285. And a child interviewer testified in general regarding the frequency of delayed disclosure by victims of child sexual abuse. 5RP 326-29

Detective Franz Helmcke testified that he interviewed both AB and Smiley. He described AB's allegations, and he testified that Smiley categorically denied them. 4RP 40. Helmcke further testified that he asked Smiley in the interview if he could think of any reason why AB would make up the allegations. 4RP 41. Smiley said there were no problems between them, but AB may have been jealous that he was getting attention because he was deploying to Afghanistan. 4RP 41.

Helmcke testified that he confronted Smiley with the idea that his explanation didn't make any sense. 4RP 41. Helmcke had spoken to one of AB's friends who said that AB had talked about this a couple of years earlier, when she would not have known Smiley would be going to Afghanistan. 4RP 41. Helmcke did not know if Smiley was aware AB

had talked to her friends, but he testified that Smiley did not have a response that helped his reason make sense. 4RP 42, 53.

Jeff Smiley testified that he had never noticed any unusual or suspicious behavior between Smiley and AB, and he never noticed Smiley spending time in AB's room with her. When he got the call from Greg Becker about AB's allegations, it was a complete surprise. 5RP 351. He also testified that Smiley went to Oregon with the family for Christmas in 2011, but when they got back the next afternoon Smiley returned to base and did not spend the night at their house. 5RP 353-54. Smiley was not at the house any other time over that winter break. His father remembered that, because it was the first holiday that Smiley was not living at home, and the only time he had with the family was Christmas day. 5RP 354.

Smiley testified that there is no truth to AB's allegations. 5RP 378. He first learned of them when his father called him while he was on a layover on his way to Afghanistan, and he told his father they were completely untrue. 5RP 379. When he got back to Ft. Lewis he agreed to talk to the detective because he wanted to tell the police that the allegations were untrue. 5RP 380-81. In his perception, he had a normal relationship with AB, and her testimony was not accurate. 5RP 381.

In closing argument, the prosecutor detailed the elements of the charged offenses and told the jury that the real question they had to answer

was whether the alleged acts actually occurred. 5RP 420. She explained that the only evidence of these acts was AB's testimony but argued that that was enough to convict. 5RP 423-24. She continued,

> Can you imagine a system where it [corroborating evidence] was required? Recall Ms. Arnold's testimony and also Detective Helmcke. A lot of times these cases don't come to the attention of law enforcement until much, much later. It's not unusual for kids not to disclose to anyone where it's going to come to the attention of the system until months, sometimes years later. Even if they tell a friend, it doesn't necessarily mean it's going to go anywhere. Like when [AB] told Veronica, nothing happened for years later, so there isn't going to be any physical evidence left, if there was any to begin with.
>
> . . .
>
> If the system did work that way, kids would have to be told, we're sorry, we can't prosecute your case, we can't hold your abuser responsible because all we have is your word, and that's not enough. No one's going to believe a kid or a teen, and we need something else. We don't do that. That's not how the system works.
>
> If the law required that additional evidence, we couldn't prosecute so many of these cases, the majority of these cases. We couldn't hold the majority of sexual abusers responsible. We couldn't hold [AB]'s abuser responsible. So the law doesn't require it. All you need is someone telling you it happened, and if you believe that person, if you believe [AB], that's enough, you are satisfied beyond a reasonable doubt of the defendant's guilt.

5RP 424-26.

Defense counsel responded in closing argument that the State had not proved that AB's allegations were true or that a crime had been committed. 5RP 445. The jury could not merely assume that the allegations were true. It had to be convinced of their truth beyond a

reasonable doubt. 5RP 448. Counsel agreed with the State that the only evidence in the case was AB's allegations but argued they were vague, inconsistent, and not credible. 5RP 451. Counsel suggested that AB never wanted the allegations to come out, which is why she told her friends not to say anything about them. Once her parents and the police became involved, they were nearly impossible to take back, so she went along with the lie. 5RP 459-60.

In rebuttal, the prosecutor responded,

> Defense counsel argued that her allegations are vague, inconsistent and not credible....These are consistent, regular occurrences that no one would be able to pinpoint and make specific, and there's no requirement that she be specific. There's nothing in there that says in your instructions in the law that says there has to be an actual date for each occurrence. I mean, it would be impossible, and then people who molested and raped kids on a regular basis like happened here, we couldn't ever prosecute them, right?

5RP 470-71. She returned to this theme again, stating

> If you follow through with defense counsel's argument and reasoning, there's nothing beyond [AB]'s allegations. The State has nothing to show you, no physical evidence. [AB] was examined and there was no evidence. If you follow through with that, we could never hold so many people responsible for abusing children. It would be that system that I referenced in my initial closing, where we'd have to tell the kids, sorry, because there's nothing corroborating, because there's nothing confirming what you are telling us, we can't prosecute, we can't hold your abuser responsible, and that is not the way that it is, folks. It is not. That is not our system. We don't need anything else. The law doesn't require it. Our system doesn't require it.

5RP 473.

C. ARGUMENT

1. IMPROPER ADMISSION OF THE LAW ENFORCEMENT OFFICER'S OPINION AS TO SMILEY'S CREDIBILITY VIOLATED HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL AND REQUIRES REVERSAL.

"Generally, no witness may offer testimony in the form of an opinion regarding the veracity of the defendant. Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). Improper opinion testimony violates the defendant's constitutional right to a jury trial. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008); State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). Thus, an explicit or nearly explicit opinion on the defendant's guilt or credibility can constitute a manifest constitutional error, which may be challenged for the first time on appeal. Kirkman, 159 Wn.2d at 936; RAP 2.5(a).

Whether testimony constitutes an improper opinion depends on the circumstances of each case, including the type of witness, the nature of the charges, the defense presented, and the other evidence in the case. Demery, 144 Wn.2d at 759. It is well established that a witness may not

testify about the credibility of another witness. Demery, 144 Wn.2d at 758-58; State v. Jones, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003). When the jury learns the witness's opinion of the defendant's credibility, reversal may be required. Id. "Particularly where an opinion on the veracity of a defendant is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the factfinder and deny the defendant of a fair and impartial trial." State v. Notaro, 161 Wn. App. 654, 661, 255 P.3d 774 (2011) (citing Dolan, 118 Wn. App. at 329).

In Demery, the trial judge admitted a tape recording of the defendant's interview with the police, during which the police officers suggested Demery was lying. One of the detectives testified at trial that when he made these statements to Demery, he was employing a common interrogation technique designed to see if Demery would change his story. Demery, 144 Wn.2d at 757. The Court of Appeals reversed Demery's conviction, concluding that the officers' statements constituted impermissible opinion testimony regarding the veracity of the defendant. Demery, 144 Wn.2d at 755.

The Washington Supreme Court reversed the Court of Appeals opinion. Four justices concluded that the officers' statements were not impermissible opinion testimony but merely placed the defendant's statements during the police interview into context. Demery, 144 Wn.2d

at 764 (plurality opinion). Another four justices concluded that, although the officers' statements were made in the course of an interrogation, their words clearly stated their belief that the defendant was lying. They therefore constituted impermissible opinion as to the veracity of the defendant and should have been excluded. Demery, 144 Wn.2d at 771 (Sanders, J., dissenting). Justice Alexander agreed with the dissent that the accusation that Demery was lying was opinion evidence regarding the defendant's veracity which should not have been admitted. Demery, 144 Wn.2d at 765 (Alexander, J., concurring). He concluded that the error was harmless, however, and concurred with the plurality only as to the result. Id.

Applying the majority holding in Demery to this case, Helmcke's testimony that Smiley's explanation for AB's allegations "just didn't make sense" was improper opinion as to the veracity of the defendant. Helmcke was not merely recounting his statements to Smiley during the interrogation to explain an interrogation technique. See, e.g., Notaro, 161 Wn. App. at 669. He was actually giving his opinion that Smiley's explanation was not credible. Helmcke testified that in cases like this where there is no physical evidence and it is basically a he said/she said situation, he would look at whether the accuser had a motive to lie. Helmcke told the jury that after asking Smiley to speculate as to why AB

might have made up the accusations, he thought Smiley's explanation "just didn't make any sense to me." 4RP 40-41.

Although defense counsel did not object to Helmcke's improper opinion testimony, the detective's explicit or nearly explicit opinion on Smiley's credibility constitutes a manifest constitutional error, which this Court may review on appeal. Kirkman, 159 Wn.2d at 936; RAP 2.5(a). Admission of improper opinion evidence violates the constitutional right to a jury trial and requires reversal unless the error was harmless beyond a reasonable doubt. Dolan, 118 Wn. App. at 330 (citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Demery, 144 Wn.2d at 759; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)).

In Demery, the improper admission of opinion testimony was deemed harmless because the officers' accusation during the interrogation that the defendant was lying did not play a significant role in the State's case. From the way it was presented at trial, it was clear that the officer was not expressing a judgment about the defendant's veracity, but merely trying to trick the defendant into changing his story. Demery, 144 Wn.2d

at 766 (Alexander, J., concurring). Given this context and the strength of the State's other evidence, the error was harmless. Id.[2]

Here, on the other hand, the detective's opinion of Smiley's credibility likely had a significant effect on the verdict. The State could not prove the charged offenses with physical evidence. There were no witnesses to any of the charged acts, and no one who lived with AB and Smiley noticed anything about their relationship or interactions that would suggest the allegations were true. As Helmcke stated, this was a he said/she said case. If the jury believed Smiley, it could not believe AB and it would have to acquit. Testimony from Helmcke that Smiley's statement didn't make any sense likely carried a lot of weight with the jury on this crucial determination. See Demery, 144 Wn.2d at 765 (testimony from law enforcement officer carries "special aura of reliability"). The State cannot prove that the improper admission of Helmcke's opinion as to Smiley's veracity was harmless beyond a reasonable doubt, and his convictions must be reversed.

[2] Justice Alexander applied the non-constitutional harmless error standard, because neither party in that case asserted that the error was of constitutional magnitude. Demery, 144 Wn.2d at 765-66 (Alsexander, J., concurring). The plurality opinion recognized, however, that admitting impermissible opinion testimony violates the constitutional right to a jury trial. Demery, 144 Wn.2d at 759.

2. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED SMILEY A FAIR TRIAL.

The prosecutor, as an officer of the court, has a duty to see that the accused receives a fair trial. State v. Carlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Prosecutorial misconduct may deprive the defendant of a fair trial, and only a fair trial is a constitutional trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. V and XIV; Wash. Const. art. 1, § 3.

A defendant is deprived of a fair trial when there is a substantial likelihood that the prosecutor's misconduct affected the verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing Reed, 102 Wn.2d at 147-48). When the defendant establishes misconduct and resulting prejudice, reversal is required. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994).

The prosecutor committed misconduct in this case when she repeatedly argued that requiring anything more than AB's testimony in

order to convict would mean that child molesters could never be held responsible for their actions. Exhortations of this kind—to decide a case based on passion or to send a message to others engaged in similar crime—are prohibited, See e.g. United States v. Young, 470 U.S. 1, 18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985); Unites States v. Kopituk, 690 F.2d 1289, 1342-43 (11th Cir. 1982); State v. Finch, 137 Wn.2d 792, 839-42, 975 P.2d 967 (1999); State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 118 (1989); State v. Claflin, 38 Wn. App. 847, 690 P.2d 1186 (1984). Such argument jeopardizes the defendant's right to be tried solely on the basis of the evidence presented to the jury. Young, 470 U.S. at 18.

While appeals to the jury to act as the conscience of the community are not impermissible per se, they become so when the prosecutor emotionalizes the process with remarks designed to inflame the jurors' passions. Kopituk, 690 F.2d at 1342-43; Finch, 137 Wn.2d at 841; State v. Powell, 62 Wn. App. 914, 918-19, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992). For example, in Powell, the defendant was convicted of first degree child molestation after the prosecutor told the jury in her final closing argument in effect "that a not guilty verdict would send a message that children who reported sexual abuse would not be believed, thereby 'declaring open season on children'." Powell, 62 Wn. App. at 918. These remarks were flagrantly improper and prejudicial.

Id. at 919. See also Bautista-Caldera, 56 Wn. App. at 195 (prosecutor's argument that jury should to let "children know that you're ready to believe them and [e]nforce the law on their behalf" improper because it exhorts jury to send a message to society about general problem of child sexual abuse).

The prosecutor's argument in this case is strikingly similar to the prejudicial remarks in Powell. She argued that if corroborating evidence of sexual abuse were required, "kids would have to be told, we're sorry, we can't prosecute your case, we can't hold your abuser responsible because all we have is your word, and that's not enough." 5RP 425-26. She went on, "If the law required that additional evidence, we couldn't prosecute so many of these cases, the majority of these cases. We couldn't hold the majority of sexual abusers responsible. We couldn't hold [AB]'s abuser responsible. So the law doesn't require it." 5RP 426. And she returned to this theme in rebuttal, stating that if the law required a specific date for each occurrence, "it would be impossible, and then people who molested and raped kids on a regular basis like happened here, we couldn't ever prosecute them, right?" 5RP 470-71. She argued again that if corroborating evidence were required, "we could never hold so many people responsible for abusing children. ... we'd have to tell the kids, sorry, because there's nothing corroborating, because there's nothing

confirming what you are telling us, we can't prosecute, we can't hold your abuser responsible, and that is not the way that it is, folks." 5RP 473.

It is true, as the prosecutor argued, that the law does not require physical evidence or other corroboration. But the jury may not be convinced of the charges without such evidence if it has doubts as to the accuser's credibility, and the jury has to be convinced beyond a reasonable doubt in order to convict. The defense argument was that AB's credibility was questionable because her allegations were vague and inconsistent, and there was no other evidence suggesting they were true. The prosecutor's argument suggested that failing to convict on the basis of testimony alone would mean that the majority of child molesters would never be held accountable for their actions. This argument was clearly designed to distract the jury from the weakness of the State's case and urge a verdict based on fear and outrage.

Prosecutorial misconduct requires reversal if there is a substantial likelihood the misconduct affected the jury's verdict. Even where defense counsel fails to object, request a curative instruction, or move for mistrial, reversal is required if the misconduct was so flagrant and ill intentioned that a curative instruction could not have obviated the resulting prejudice. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995); Belgarde, 110 Wn.2d at 507.

Where there is little corroboration of the State's theory and/or the credibility of witnesses is key, the likelihood of prejudice resulting from prosecutorial misconduct is heightened. State v. Padilla, 69 Wn. App. 295, 302, 846 P.2d 564 (1993). The State's case depended wholly on AB's credibility. The prosecutor's misconduct diverted the jury's focus from a dispassionate evaluation of credibility to the emotional and terrifying idea of the majority of child molesters in our society going unpunished. Moreover, no instruction could have cured the prejudice here. The images conjured by the prosecutor's inflammatory remarks were likely to shape the jury's deliberations regardless of any instruction. This was not one isolated remark in an otherwise appropriate argument. This was a major theme of the prosecutor's closing argument, to which she returned in rebuttal, just before the jury began their deliberations. "This is one of those cases of prosecutorial misconduct in which '[t]he bell once rung cannot be unrung.'" Powell, 62 Wn. App. at 919. There is a substantial likelihood this misconduct affected the verdict, and Smiley's convictions must be reversed.

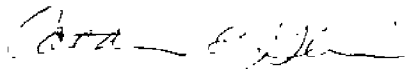
D. CONCLUSION

The improper admission of opinion evidence regarding Smiley's credibility violated Smiley's right to a jury trial, and the prosecutor's inflammatory and flagrantly improper closing argument denied Smiley a

fair trial. This Court should reverse Smiley's convictions and remand for a new trial.

DATED March 12, 2015.

Respectfully submitted,



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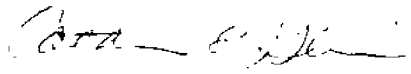

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