74143-8

FILED
Jun 29, 2016
Court of Appeals
Division I
State of Washington

NO. 74143-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JESSE THOMAS FULLER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN D. GAIN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

KRISTIN A. RELYEA
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Statutes

Rules and Regulations

Other Authorities

A. ISSUES

1. Whether Fuller has failed to show that the trial court abused its discretion by granting the jury's request to hear a transcript of the child victim's testimony during deliberations.

2. Whether Fuller has failed to show that the prosecutor committed misconduct in closing argument.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Jesse Thomas Fuller with two counts of Rape of a Child in the First Degree with the Domestic Violence allegation. CP 120-21. A jury convicted Fuller as charged. CP 172-74; 8RP 370-71.[1] The court sentenced Fuller to a minimum indeterminate sentence of 120 months. CP 200-11; 2RP 204-08.

2. SUBSTANTIVE FACTS

Olga Fuller met her former husband, Fuller, when she was 23 years old and graduating from college. 6RP 128, 142-43. They quickly fell in love and married the next year. 6RP 143. Shortly

[1] The Verbatim Report of Proceedings is designated as follows: 1RP (7/21/15), 2RP (7/27/15, 7/28/15, 9/25/15), 3RP (7/27/15), 4RP (7/28/15), 5RP (7/29/15), 6RP (7/30/15), 7RP (8/4/15), and 8RP (8/5/15).

thereafter, Olga[2] gave birth to their daughter, A.M.F.,[3] and later to another daughter, C.F.[4] 6RP 130, 143-44. Olga was the primary caregiver for the girls, staying at home to watch them and changing all but a handful of their diapers. 6RP 145. Fuller showed little interest in caring for the girls, and refused to watch them when Olga was gone. 6RP 145-48, 163. Fuller's lack of engagement with his daughters was a sore point in his marriage with Olga. 6RP 148.

When A.M.F. was four-and-a-half years old, Fuller's relationship with his daughters changed. 6RP 162-63. Fuller began watching the girls alone on a weekly basis, and started encouraging Olga to get out of the house, see friends, and run errands. 6RP 163-65, 183. Olga was shocked by the abrupt change in Fuller's behavior, and likened it to "seeing a unicorn." 6RP 163. Olga welcomed the change and starting "bragging" to her friends about it. 6RP 163-65, 179.

Fuller did not take the girls places when he watched them, but instead chose to stay at home. 6RP 183. Every time Olga tried to leave, the girls cried and begged her to stay. 6RP 179. A.M.F.

---

[2] To avoid confusion with the defendant, the State will refer to Olga Fuller by her first name. The State intends no disrespect.

[3] The State refers to A.M.F. by her initials to protect her privacy as a minor, and as a rape victim.

[4] The State refers to C.F. by her initials to protect her privacy as a minor.

clung to Olga's leg, and let out a "bloody murder scream and cry," although A.M.F. had no problem with Olga leaving her at an in-store daycare while Olga shopped. 6RP 179, 182. Olga did not know why A.M.F. was so upset, and tried to comfort her by promising to be "fast like lightning." 6RP 179.

On several occasions, Olga would return home and A.M.F. would approach her in their breakfast nook, and say in a quiet voice, "[W]hen you're gone, daddy does bad things to me." 6RP 185, 188. A.M.F. had a "[s]cared" and "alarmed" demeanor, but would not elaborate further. 6RP 186-87. Each time A.M.F. made these statements, Fuller was sitting nearby with his back to them. 6RP 186. A.M.F. would turn and look at Fuller without saying a word. 6RP 186-87. At some point, Olga asked if the "bad thing" was being spanked by Fuller, possibly in response to A.M.F. making her sister cry, and A.M.F. agreed. 6RP 186. Fuller did not respond when Olga tried to confront him about the spanking. 6RP 188. During this same time, A.M.F. started having daily accidents, urinating on herself, even though she had been potty trained for a couple of years.[5] 6RP 189.

[5] A.M.F. stopped having accidents shortly after Fuller was arrested. 6RP 190.

On June 10, 2014, a couple of days shy of A.M.F.'s fifth birthday, Olga left the house to run a quick errand at the nearby post office. 6RP 130; 7RP 199-200. A.M.F. was "extremely upset" and insisted on coming along, but Olga said no, and promised A.M.F. that she would be "super quick, quick like lightning." 7RP 202. When Olga returned an hour later, A.M.F. was excited to see her, and said that it was "okay" that Olga had taken longer "because daddy didn't do bad things" to her. 7RP 203.

Fuller left shortly thereafter, and Olga started getting C.F. ready for a nap. 7RP 204, 206. At the same time, A.M.F. asked if she could take a bath, which was out of the ordinary for her. 7RP 205. A.M.F. sat in the bath with her head down for 15 minutes before getting out and asking for her pajamas and a lollipop. 7RP 205-06. Olga gave A.M.F. both items, and then returned to C.F., who was screaming and resisting napping. 7RP 206. As soon as Olga finished with C.F., A.M.F. approached Olga and spontaneously said, "[M]ommy, daddy does the same things to me as he does to you." 7RP 206. Olga asked what she meant, and A.M.F. explained that Fuller made her "suck his pee-pee," referring

to his penis.[6] 7RP 206. A.M.F. also said something about "rubbing butts" with Fuller. 7RP 207. To A.M.F., "butts" meant both a person's genitalia and bottom. 6RP 155; 7RP 212.

Shocked, Olga immediately retrieved her cell phone and, unbeknownst to A.M.F., started video recording A.M.F. talking about the abuse. 7RP 208-09; Ex. 3.[7] The video was admitted and played at trial. 7RP 210-11. In the recording, A.M.F. demonstrated how Fuller made her "suck his pee pee" by bobbing her head back and forth, and showed Olga the desk where Fuller forced her to perform oral sex. Ex. 3 IMG_1166.MOV at 00:05-:20, at 01:32-:51; CP 74-76.[8] A.M.F. explained that she and Fuller would "rub" "butts" together in Olga and Fuller's bed, and demonstrated how they did it by bending her knees up and down. Ex. 3 at IMG_1166.MOV at 02:40-:50; IMG_1167.MOV at 00:55-01:14; CP 77-78. A.M.F. explained that she did not tell Olga about the abuse sooner because Fuller threatened that she would be "taken away" from

---

[6] A.M.F. learned while potty training that a boy or girl's "pee-pee" was "where pee comes out." 6RP 155.

[7] Exhibit 3 consists of two cell-phone videos recorded by Olga. 7RP 209.

[8] The State prepared a transcript of the cell-phone videos, and provided it to the court. CP 74-78. Although the transcript was not admitted at trial, the State will provide additional citations to the transcript for ease of reference.

Olga, and her "property,"[9] if she told. Ex. 3 at IMG_1166.MOV at 01:51-02:27; CP 76.

Olga took A.M.F. to Seattle Children's Hospital the next day and reported the abuse. 7RP 223. She did not confront Fuller because she was "terrified." 7RP 223. The following day, Olga brought A.M.F. to the courthouse for a forensic interview with a trained child interviewer, Carolyn Webster. 6RP 118; 7RP 223-25. A video of the forensic interview was admitted and played at trial. Ex. 5; 6RP 118. A.M.F. refused to answer any of Webster's questions about what had happened with Fuller. Ex. 4 at 8, 10-15, 17, 20-21.[10] A.M.F. said that Fuller told her not to tell, and that if she did, she would be "taken away" from her "property." Ex. 4 at 8, 10-11, 20, 24.

Midway through the interview, Webster brought in Olga to briefly speak with A.M.F. Ex. 4 at 12. Although Olga told A.M.F. that she "trust[ed]" Webster, and that it was "okay" to tell Webster what had happened, A.M.F. refused, repeatedly saying, "I don't want to" and "I don't want to get sent away." Ex. 4 at 13-16. A.M.F.

---

[9] A.M.F. lived on five acres with a large playground, a tree, and a swing, and frequently referred to it as her "property." 7RP 214-15.

[10] The State provided a transcript of the forensic interview to the jury to assist it while viewing the video. 6RP 118. For ease of reference, the State will cite to the transcript. Ex. 4.

would not talk about what had happened with Fuller, even after Olga promised to take her to the playground and buy her an "ice cream cone dipped in chocolate." Ex. 4 at 15. A.M.F. ultimately told Webster that the "bad thing" was that she and Fuller "sometimes" spanked each other. Ex. 4 at 22.

A week or two later, A.M.F. told Olga that Fuller rubbed his "pee-pee" up and down between her legs. 7RP 228-29. A.M.F. later told Olga that she tried to "escape" Fuller, but that he always caught her, dragged her back under the desk, and spanked her. 7RP 230. Although Fuller told her it felt "good," she thought that it felt "yucky." 7RP 231. Further, A.M.F. told Olga that "it tastes like juice, but yucky." 7RP 231.

At trial, A.M.F. testified that she did not like living with Fuller because he made her "suck his butt" under his desk, while Olga was out shopping. 7RP 266. A.M.F. described Fuller's "butt" as his "front part" that he used for "peeing." 7RP 268. Fuller told A.M.F. to "keep on going," and spanked her if she stopped too soon. 7RP 268, 270. Although Fuller told A.M.F. not to tell Olga, A.M.F. told her because "it felt gross," and she wanted Fuller to stop making her "suck on his butt." 7RP 271, 274. A.M.F. testified that she performed oral sex on Fuller "[m]ore than one time," but denied

rubbing "butts" with him, or being alone with Fuller in his and Olga's bedroom. 7RP 271. A.M.F. testified that she "missed" Fuller, and that she felt "[b]ad" that he had gone "far away." 7RP 270.

At multiple points during A.M.F.'s testimony, the prosecutor, defense counsel, and court reporter, asked A.M.F. to speak louder, or to repeat what she was saying. 7RP 253-55, 258, 260, 262, 265-66, 269, 272-73, 274-75. A.M.F. had recently turned six years old at the time of trial, and had difficulty being heard, despite using a microphone. 7RP 251, 254.

During closing argument, the prosecutor discussed A.M.F.'s panicked cries when Olga left, and suggested that the jury "[t]hink for a moment about the powerlessness of that little girl in that environment." 8RP 291-92. The prosecutor also told the jury that if they "believed" A.M.F., then that was "enough" to find Fuller guilty. 8RP 301.

Further, the prosecutor analogized A.M.F.'s disclosure process to A.M.F. going to a "new swimming pool," "test[ing] the waters" with Olga, "back[ing] out" with Webster, and then "swimming" when she took the witness stand and knew that she was safe, and could no longer be hurt by Fuller. 8RP 304-05. The prosecutor ended her argument by discussing the burden of proof,

and reminding the jury that if they believed A.M.F.'s testimony about what Fuller did, then they were "satisfied beyond a reasonable doubt." 8RP 311-12. While making this point, the prosecutor stated, "When you heard her testify to these things, I think you knew that she was telling you what happened." 8RP 312. Fuller did not object at any point during the prosecutor's closing argument. 8RP 287-313.

During deliberations, the jury requested a transcript of A.M.F.'s testimony because they "had a very hard time hearing her."[11] 8RP 334; CP 184. Fuller objected to the court providing the jury with a transcript, arguing that it would unduly emphasize A.M.F.'s testimony over other testimony, and that it could be considered a comment on the evidence. 8RP 334, 338. The State disagreed, arguing that the jury should be allowed to hear A.M.F.'s testimony given her "soft spoken" and "very quiet" voice on the stand. 8RP 335-36. The State noted that the court could remedy Fuller's concerns by providing the jury with a limiting instruction. 8RP 335.

[11] The jury also asked to review Olga's cell-phone video and A.M.F.'s forensic interview video, which the court granted without objection from either party. 8RP 334; CP 186. Fuller does not assign error to this decision on appeal.

The court granted the jury's request after reviewing the pattern jury instruction on jurors rehearing trial testimony, and recognizing the "difficulty" everyone had hearing A.M.F., despite using a microphone. 8RP 338. The court noted that the court reporter stated at one point that she could not hear A.M.F., and that a juror motioned a couple of times like he could not hear A.M.F. 8RP 338. The court focused on the fact that the jury indicated that they "had a hard time hearing [A.M.F.]." 8RP 338-39.

The court asked the court reporter to prepare a transcript of A.M.F.'s testimony, and then arranged for another judge's bailiff to read the transcript to the jury in open court. 8RP 339. The court provided both parties with a copy of the transcript before it was read to the jury. 8RP 339. Prior to reading the transcript, the court instructed the jury as follows:

> Ladies and gentlemen, you've asked to rehear the testimony of [A.M.F.]. After consulting with the attorneys, I am granting your request. In making this decision, I want to emphasize that I'm making no comment on the value or weight to be given to any particular testimony in this case. The testimony you requested will be read to you here in the courtroom. You will hear it only one time. After you've heard the testimony, you will return to the jury room to resume deliberations. When you – when you do, remember that your deliberations must take into account all of

> the evidence in the case, not just the testimony that you have asked to rehear.[12]

8RP 341. The court did not provide the jury with a copy of the transcript as it was being read, or allow the jury to have a copy in the jury room. A.M.F.'s testimony was read only once by the bailiff, and the jury resumed deliberations immediately thereafter.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ALLOWED THE JURY TO HEAR A.M.F.'S TESTIMONY DURING DELIBERATIONS.

Fuller argues that the bailiff's reading of A.M.F.'s trial testimony during deliberations amounted to reversible error. Fuller's claim fails. The trial court properly granted the jury's request given the unique circumstances presented, and ensured

---

[12] The court's instruction mirrored the pattern jury instruction on jurors rehearing trial testimony, which provides:

> You have asked to rehear (identify the requested trial testimony). After consulting with the attorneys, I am granting your request.
>
> In making this decision, I want to emphasize that I am making no comment on the value or weight to be given to any particular testimony in this case.
>
> The testimony you requested will be *[read to you] [replayed for you]* here in the courtroom. You will hear it only one time.
>
> After you have heard the testimony, you will return to the jury room and resume your deliberations. When you do, remember that your deliberations must take into account all the evidence in the case, not just the testimony that you have asked to rehear.

WPIC 4.74.

that Fuller received a fair trial. Even if the trial court abused its discretion by granting the jury's request, the error was harmless.

Reading back testimony to the jury during deliberations is generally disfavored; however, a trial court has discretion to grant such a request. State v. Koontz, 145 Wn.2d 650, 654, 41 P.3d 475 (2002); see also CrR 6.15(f)(1). Whether a trial court should allow a jury to rehear testimony turns on the "particular facts and circumstances of the case," and must be weighed against the danger that the jury may place undue emphasis on the testimony being considered a second time at such a late stage of the trial. Koontz, 145 Wn.2d at 654. Replaying videotaped testimony raises greater concerns than rereading a transcript because videotaped testimony permits the jury "to hear and see more than the factual elements contained in a transcript." Id. at 655.

In order to prevent undue emphasis, testimony should be reheard in open court, under the court's supervision, and with the defendant and both counsel present. Koontz, 145 Wn.2d at 657. Allowing the jury unsupervised and unlimited access to testimonial materials in the jury room increases the risk that the jury might place undue emphasis on the evidence. State v. Monroe, 107 Wn. App. 637, 641, 27 P.3d 1249 (2001). Prior to presenting the

testimony to the jury, both parties should be afforded an opportunity to review it. Koontz, 145 Wn.2d at 657.

A trial court's decision to allow the jury to rehear trial testimony is reviewed for an abuse of discretion. Koontz, 145 Wn.2d at 658. A court abuses its discretion only when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In other words, the reviewing court considers whether "any reasonable judge would rule as the trial judge did." State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Here, the trial court properly exercised its discretion to allow the jury to rehear A.M.F.'s testimony. At the time of trial, A.M.F. had just turned six years old. 7RP 251. She was soft spoken and very quiet on the stand. 8RP 335-36. Based on the record, everyone had difficulty hearing her – the court reporter, the prosecutor, defense counsel, and most importantly, the jury. 7RP 253-55, 258, 260, 262, 265-66, 269, 272-75; 8RP 338; CP 184. A.M.F. was asked 14 times during her short testimony to speak up

or repeat herself.[13] 7RP 253-55, 258, 260, 262, 265-66, 269, 272-75. One juror held up his ear twice during A.M.F.'s testimony "like he couldn't hear." 8RP 338. The jury's inquiry indicated that they had "*a very hard time*" hearing A.M.F. 8RP 334; CP 184 (emphasis added).

Moreover, the trial court took several steps to ensure that the jury would not place undue emphasis on A.M.F.'s testimony. The court provided a copy of the transcript of A.M.F.'s testimony to both counsel prior to presenting it to the jury, affording each party an opportunity to review it and correct any errors. 8RP 339. The court enlisted the help of a neutral party, another judge's bailiff, to read A.M.F.'s testimony once, in open court, with Fuller and both counsel present. 8RP 339. The court never allowed the jury to have a copy of the transcript while it was read to them, or back in the jury room. Further, the court sensibly chose to have the bailiff read A.M.F.'s testimony as a whole to avoid the jury placing undue emphasis on any one part of her testimony. See State v. Morgensen, 148 Wn. App. 81, 89-90, 197 P.3d 715 (2008) (recognizing that a "selective presentation" of a witness's testimony

[13] The transcript of A.M.F.'s testimony is less than 30 pages long.

is "more likely to place an undue emphasis on that portion of the evidence").

Critically, the trial court instructed the jury that by granting the jury's request, it was not commenting on the evidence, or making any comment on the value or weight to be assigned to "any particular testimony." 8RP 341. The court reminded the jury that when it resumed deliberations, it "must take into account all of the evidence in the case," not just A.M.F.'s testimony. 8RP 341. Based on this record, the court wisely and carefully exercised its discretion to repeat A.M.F.'s testimony, and protected Fuller's right to a fair and impartial jury in the process.

Nonetheless, Fuller argues that the trial court "overemphasiz[ed]" A.M.F.'s testimony by allowing the jury to hear it during deliberations, and erred by allowing "a clear and articulate surrogate," to read the transcript without a contemporaneous instruction that the transcript was not evidence. Opening Br. of Appellant at 1-2, 19. Fuller's argument fails.

To advance his undue emphasis claim, Fuller primarily relies on the Ninth Circuit's decision in United States v. Binder, 769 F.2d 595 (9th Cir. 1985), overruled on other grounds by United States v. Morales, 108 F.3d 1031, 1035 n.1 (9th Cir. 1997), despite its

inapposite facts. In Binder, the circuit court held that the trial court had abused its discretion by allowing *videotaped testimony* of child victims to be replayed during deliberations. 769 F.2d at 600-01. The Binder court reasoned that "[v]ideotape testimony is unique" because it enables the jury to view the witness's demeanor, and "serves as the functional equivalent of a live witness." Id.

Further, the Binder court criticized the trial court's decision to selectively replay specific portions of the videotaped testimony, rather than the entire testimony, because it "may have placed an undue emphasis on the portion of the testimony revealed to the jury a second time." 769 F.2d at 601. The court noted that the "preferred procedure" is to prepare a transcript of the videotaped testimony, and read the transcript to the jury in the courtroom with all parties present. Id. at 601, n.1.

Here, the trial court exceeded the "preferred procedure" set forth in Binder, by arranging for the court reporter to prepare a transcript of A.M.F.'s testimony, providing both counsel with an opportunity to review it prior to presenting it, recruiting a neutral party to read it in open court with all parties present, and instructing the jury that their deliberations "must take into account all of the evidence in the case," not just A.M.F.'s testimony. 8RP 336-37,

339, 341. Fuller's reliance on Binder is inapt given that it actually supports the trial court's actions in this case.

To the extent that Fuller argues that the trial court should have also instructed the jury that the transcript is not a substitute for the jurors' memory of the testimony, and that a transcript lacks a witness's demeanor while testifying, his claim should be rejected as waived. Assignment of Error A. Fuller faults the trial court for failing to instruct the jury that "A.M.F.'s testimony at trial was the evidence rather the reciting of the transcript." Opening Br. of Appellant at 19. But, Fuller never requested such language at trial.

To claim error on appeal, an appellant challenging a jury instruction must first show that he took exception to that instruction in the trial court. State v. Salas, 127 Wn.2d 173, 181, 89 P.2d 1246 (1995); RAP 2.5(a). The objecting party must indicate the instruction objected to and the reasons for the objection. CrR 6.15(c); see also CrR 6.15(f)(1) (requiring that parties have an "opportunity to comment" on the appropriate response to a jury inquiry, and that "any objections" be made a part of the record).

The rule requiring a timely and well-stated exception is "well-settled law" and "not a mere technicality." State v. Bailey, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990). The objection must

apprise the court of "the precise points of law involved and when it does not, those points will not be considered on appeal." Id. The purpose of the rule is to clarify the nature of a party's objection at the time that the trial court has all of the evidence and legal arguments before it, so that the trial court can correct any error. Salas, 127 Wn.2d at 182; City of Seattle v. Rainwater, 86 Wn.2d 567, 571, 546 P.2d 450 (1976).

Here, Fuller objected to the court having A.M.F.'s testimony read back to the jury during deliberations, but he did not object, or propose any additional language, to the court's cautionary instruction, which mirrored WPIC 4.74. 8RP 334, 338-39. Fuller has waived his claim by failing to propose the language that he now claims should have been given, and depriving the trial court of the opportunity to correct the alleged error at the time it occurred.

Even if Fuller's claim was preserved, he cannot show that no reasonable judge would have granted the jury's request, and instructed the jury in accordance with WPIC 4.74, for the reasons previously stated. Moreover, any error committed by the trial court was harmless. Given the substantial evidence against him, Fuller cannot show that the error "materially affected" the outcome of his trial. Koontz, 145 Wn.2d at 660. Setting aside A.M.F.'s trial

testimony that Fuller made her perform oral sex, there was significant other evidence to support Fuller's conviction.

For example, Olga testified that A.M.F. told her that Fuller made A.M.F. "suck his pee-pee" and "rub[] butts." 7RP 206-07. A.M.F. told Olga that "it tastes like juice, but yucky." 7RP 231. The jury saw the video that Olga recorded of A.M.F. disclosing the abuse, and demonstrating how she performed oral sex on Fuller. Ex. 3 IMG_1166.MOV at 00:05-:20; CP 74, 77-78. Further, the jury heard about how Fuller's interest in A.M.F. changed, and how he started volunteering to watch A.M.F. alone, causing A.M.F. to cling to Olga's leg and let out a "bloody murder scream and cry." 6RP 163-65, 179. Taken together, there was substantial evidence, independent of A.M.F.'s trial testimony, that Fuller raped A.M.F. Given this evidence, any error in reading A.M.F.'s testimony to the jury during deliberations was harmless because Fuller cannot show that the alleged error "materially affected" the outcome of his trial.

2. FULLER RECEIVED A FAIR TRIAL FREE OF PROSECUTORIAL MISCONDUCT.

Fuller argues that multiple instances of prosecutorial misconduct deprived him of a fair trial, although he did not object to any of them at trial. First, Fuller contends that the prosecutor

improperly appealed to the passions and prejudice of the jury by encouraging them to think about A.M.F.'s "powerlessness" when Olga left her alone with Fuller, and analogizing A.M.F.'s disclosure process to swimming in an unfamiliar pool. Second, Fuller claims that the prosecutor minimized the burden of proof by arguing that if the jury believed A.M.F., then it had sufficient evidence to convict him. Finally, Fuller argues that the prosecutor impermissibly vouched for A.M.F. by suggesting that the jury "knew" A.M.F. was telling them "what happened."

Fuller's claims fail. The prosecutor's acknowledgement of A.M.F.'s "powerlessness," and her description of A.M.F.'s stop-start disclosure process, was reasonably drawn from the evidence produced at trial. The prosecutor's contention that the jury could convict Fuller if it believed A.M.F. was a proper statement of the law. Further, the prosecutor's argument about what the jury "knew" was not a comment on Fuller's guilt. In addition, Fuller cannot show that the prosecutor's comments were "so flagrant and ill-intentioned" that they created a lasting prejudice that could not be neutralized by a curative instruction to the jury.

To establish prosecutorial misconduct, the defendant must show that the prosecutor's comments were "both improper and

prejudicial in the context of the entire record and the circumstances at trial." State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (citations omitted). Comments are prejudicial only if there is a substantial likelihood that the misconduct affected the jury's verdict. Id. at 443. Failing to object to an improper remark at trial and to request a curative instruction constitutes waiver on appeal unless the remark is "so flagrant and ill-intentioned" that the resulting prejudice could not be neutralized by a curative instruction. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610, cert. denied, 498 U.S. 1046 (1991). "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." Id. (quoting Jones v. Hogan, 56 Wn.2d 23, 26, 351 P.2d 153 (1960)).

A prosecutor has "wide latitude" in closing argument to draw and express reasonable inferences from the evidence. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Allegedly improper comments are reviewed in the context of the entire argument, the issues presented, the evidence addressed, and the instructions to the jury. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). "The absence of a motion for mistrial at the time

of the argument strongly suggests to a court that the argument . . . did not appear critically prejudicial to an appellant in the context of the trial." Swan, 114 Wn.2d at 661.

Fuller first claims that the prosecutor improperly appealed to the passions and prejudice of the jury by asking the jury to "[t]hink for a moment about the powerlessness of that little girl," and by comparing A.M.F.'s disclosure process to swimming in a new pool. 8RP 292, 304-05. Fuller argues that the prosecutor's comments had "nothing whatsoever" to do with proving the crimes charged, and were "contrary to the prosecutor's duty to ensure a verdict free of prejudice and based on reason." Opening Br. of Appellant at 22. Fuller is mistaken.

Although a prosecutor is a quasi-judicial officer who "must subdue courtroom zeal for the sake of fairness to the defendant," a prosecutor has "wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses." Thorgerson, 172 Wn.2d at 443, 448. Here, the prosecutor's statements were reasonably drawn from the evidence, and well within the bounds of proper argument.

Olga testified that every time she left A.M.F. alone in Fuller's care, A.M.F. clung to Olga's leg, let out a "bloody murder scream

and cry," and begged Olga to stay. 6RP 179. Sometimes Olga had to "scrape" A.M.F. off of her leg because A.M.F. "would literally just not let go." 6RP 180-81. A.M.F.'s desperate reaction to Olga leaving her with Fuller was remarkable because A.M.F. "liked" it when Olga left her at an in-store daycare. 6RP 182. Drawing on this testimony in closing argument, the prosecutor invited the jury to think about "the powerlessness of that little girl in that environment when she saw her mom getting her purse, grabbing her shopping list, getting her keys, and getting ready to go." 8RP 292. Contrary to Fuller's claim, the prosecutor did not "invite[] each juror to think about being a little girl left alone with someone who has raped her before and who will rape her again." Opening Br. of Appellant at 21.

Instead, the prosecutor properly focused on A.M.F.'s environment to explain A.M.F.'s panic at being left alone with Fuller, and to corroborate her claims of sexual abuse. The prosecutor's characterization of A.M.F. as "powerless" was accurate. At the time of the abuse, A.M.F. was four years old and indisputably had no control over her parents' actions. 6RP 130, 162-63. She had no control over when Olga left, whether Olga took her along, or how long Olga stayed away. More importantly, she had no control over

Fuller's actions, and could not protect herself against his efforts to forcibly compel her into performing oral sex. See 7RP 230 (A.M.F. told Olga that when she tried to "escape," Fuller caught her, dragged her back under the desk, and spanked her). The prosecutor never argued that the jury should convict Fuller because A.M.F. was young, vulnerable, or defenseless. Instead, the prosecutor properly argued that the jury should convict Fuller based on his actions. 8RP 295-300.

Similarly, the prosecutor's swimming analogy correctly summarized A.M.F.'s disclosure process. The prosecutor argued:

> Now, let's talk more about what [A.M.F.] has said over time, credibility and consistency. . . [Y]ou can think of it this way, if [A.M.F.] were to go up to a new swimming pool, a place that she's never been before, and to look at the water . . . she's looking at the water and wondering, how deep is that water? How swift is the current? How cold is the water? What does a little girl like [A.M.F.] do? Does she just jump in off the rope swing? Or does she test the waters by putting her toe in? A little girl like [A.M.F.] tests the waters, which is exactly what she did when she started to tell her mom, Mommy, daddy does bad things to me. What's mom going to say? Am I going to get sent away? Is she going to believe me? . . .
>
> . . . She waits. She finds a time that's safe and goes in a little bit deeper. Mommy, daddy makes me do the same things that you do. He makes me suck his pee-pee, and we rub butts together. A little bit further in.
>
> And then the forensic interview where all of a sudden all of her fears – all the fears the defendant

> instilled in her start to come true. I can't do this. She backs out. It's too deep. It's too cold. . . .
>
> And then yesterday, yesterday, 14 months after her initial disclosure, [A.M.F.] was swimming. She was safe . . .

8RP 303-06. The prosecutor's swimming analogy was reasonably drawn from the evidence, and accurately captured A.M.F.'s initial disclosures to Olga, subsequent non-disclosure to Webster, and ultimate disclosure to the jury a year later about what Fuller had done to her.

The prosecutor's comments are a far cry from other statements held to have improperly appealed to the passions or prejudice of the jury.[14] See State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (holding prosecutor improperly appealed to jurors' passions and prejudice by asking the jury to "[l]et her and children know that you're ready to believe them and [e]nforce the law on their behalf"); State v. Jones, 71 Wn. App. 798, 806-08, 863 P.2d 85 (1993) (holding that prosecutor's reference to

[14] Although Fuller cites State v. Warren, 134 Wn. App. 44, 68-69, 138 P.3d 1081 (2006), aff'd, 165 Wn.2d 17 (2008), as authority for his argument that the prosecutor improperly appealed to the jury's passions and prejudice, his reliance on Warren is misplaced. In Warren, the prosecutor asserted that abused children "carefully assess who they will disclose to and how they will do it," and that the "phenomenon of delayed disclosure" is not "uncommon." Id. at 69. The court held that the prosecutor's statements were improper because "there was no evidence at trial about child sexual abuse victims in general or about how and why they disclose abuse." Id. Thus, Warren addressed a different type of prosecutorial misconduct – relying on facts not in evidence – that is not at issue here.

society's concern for children as reflected in popular music was improper in a child-rape case).

Fuller's second claim that the prosecutor minimized the burden of proof also fails. The prosecutor argued twice in closing that if the jury "believed" A.M.F., then that was "enough" to find Fuller guilty beyond a reasonable doubt. 8RP 301, 311-12. The first time that the prosecutor made this argument was in the context of explaining that "testimony is evidence,"[15] and that testimony is "just as powerful as DNA, as forensic evidence, as medical evidence." 8RP 300. The prosecutor argued that "makes sense" because "these kinds of crimes are committed in secrecy," pointing out that the perpetrator chooses the time, place, manner, and victim. 8RP 300. The prosecutor then asserted that A.M.F. "was the only eyewitness to what her father did to her," and argued, "*[I]f you listened to [A.M.F.] and you believed her, that is enough in this case for you to find the defendant guilty.*" 8RP 300-01 (emphasis added).

The second time the prosecutor made this claim was at the end of closing argument, while discussing reasonable doubt. The

[15] The prosecutor's argument that "testimony is evidence" tracked the court's jury instruction on credibility. See CP 153 (providing "[t]he evidence that you are to consider during your deliberations consists of the testimony"), 155 (asserting "[t]he evidence is the testimony").

prosecutor briefly referenced the instruction defining reasonable doubt, and argued, "*if you believe [A.M.F.] when she tells you what her father did, you are satisfied beyond a reasonable doubt.* The law doesn't require corroboration." 8RP 311-12 (emphasis added). In both instances, the prosecutor properly stated the law.

It is well settled that a victim's word is sufficient alone to convict a defendant of a sex offense. See, e.g., RCW 9A.44.020(1) (recognizing that "it shall not be necessary that the testimony of the alleged victim be corroborated" to convict a person of a sex offense); State v. Conlin, 45 Wash. 478, 479, 88 P. 932 (1907) (recognizing that "the uncorroborated testimony of the prosecutrix is sufficient if the jury finds it to be true"); State v. Galbreath, 69 Wn.2d 664, 669, 419 P.2d 800 (1966) (reiterating that "a person accused of a sex offense involving children may be convicted upon the uncorroborated testimony of the complaining witness, if the jury finds such testimony to be true").

Here, the prosecutor's remarks accurately summarized the law. The prosecutor's comments bore no resemblance to the prosecutorial misconduct that required reversal in the case relied on by Fuller, State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). In Fleming, the prosecutor argued that to acquit the

defendants, the jury would have to find that the victim lied, was confused, or fantasized about what had happened. Here, the prosecutor properly focused on the evidence required *to convict* Fuller, and never suggested what the jury must find *to acquit* him. 8RP 300-01, 311-12.

Contrary to Fuller's claims, the prosecutor did not argue that "all that was required to find Jesse Fuller guilty was *some* belief in A.M.F.'s testimony," and that "if the jury believed A.M.F.'s testimony it would *have* to convict." Opening Br. of Appellant at 25 (emphasis added). Significantly, Fuller does not provide any citations to the record where the prosecutor allegedly made such claims. The prosecutor's proper remarks are in stark contrast to prosecutorial misconduct deemed to have diminished the burden of proof. See State v. Warren, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008) (prosecutor argued that the defendant is *not* entitled to the benefit of the doubt); State v. Berube, 171 Wn. App. 103, 120-21, 286 P.3d 402 (2012) (prosecutor argued that the jury should "search for the truth" and not "search for reasonable doubt").

Fuller's final claim that the prosecutor improperly vouched for A.M.F.'s credibility is also meritless. While discussing

reasonable doubt at the end of closing argument, the prosecutor stated:

> Ladies and gentlemen, the last point I want to make in my closing is the State's burden, proof beyond a reasonable doubt . . .
>
> When you heard [A.M.F.] testify to these things, *I think you knew that she was telling you what happened.* And reasonable doubt is a high burden . . .
>
> When you leave this case as days go by . . . you will know that this case was proven to you beyond a reasonable doubt because *you'll look back and know what [A.M.F.] said is what happened to her.*

8RP 311-12 (emphasis added). Contrary to Fuller's claim, the prosecutor's remarks are not a clear expression of the prosecutor's personal belief in A.M.F.'s truthfulness, but rather a permissible inference drawn from the evidence.

A prosecutor commits misconduct by expressing a personal belief in a witness's veracity, or arguing that evidence not presented at trial supports a witness's testimony. Thorgerson, 172 Wn.2d at 443. Whether a witness testifies truthfully is an issue reserved solely for the trier of fact. Id. A reviewing court considers the challenged comment in the context of the argument as a whole, the issues in the case, the evidence discussed, and the court's instructions. State v. McKenzie, 157 Wn.2d 44, 54, 134 P.3d 221 (2006). "Prejudicial error does not occur until such time as it is

clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion." Id. (quoting State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)).

Here, the prosecutor's remark came at the end of a lengthy closing argument reviewing all of the evidence against Fuller, including A.M.F.'s statements to Olga, A.M.F.'s statements and gestures on the cell phone videos, A.M.F.'s testimony, and the corroborative circumstantial evidence. 8RP 287-312. Having fully discussed all of this evidence, the prosecutor argued in summation that the jury "knew that [A.M.F.] was telling you what happened." 8RP 312. The prosecutor never argued, let alone suggested, that she believed A.M.F. was telling the truth, or that other evidence not presented at trial supported A.M.F.'s testimony. Indeed, the prosecutor phrased the argument both times in terms of what *the jury* knew. See 8RP 312 (arguing "you knew," and "you'll look back and know").

The prosecutor's statements are not comparable to other instances of prosecutorial misconduct based on improper vouching. See State v. Sargent, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985) (prosecutor repeatedly stated, *"I believe Jerry Brown,"* the

only witness linking the defendant to the crime) (emphasis in original); State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (prosecutor argued, "*the State believes, this prosecutor believes*, that [the defendant] got up there and lied") (emphasis added). For all of the reasons discussed, none of the prosecutor's comments challenged by Fuller were improper.

Nonetheless, even assuming that the prosecutor's arguments were improper, they were not prejudicial. Fuller's failure to object, request a curative instruction, or move for a mistrial, "strongly suggests" that the prosecutor's remarks did not appear "critically prejudicial" in context. Swan, 114 Wn.2d at 661. A curative instruction advising the jury to disregard the prosecutor's remarks would have remedied the error.

Moreover, the challenged comments were brief and represented a small part of the prosecutor's overall closing argument. The court properly instructed the jury that the "lawyers' statements are not evidence" and that they should disregard any argument not supported by the evidence. CP 155. The jury is presumed to have followed the court's instructions. Swan, 114 Wn.2d at 662. Given these circumstances, Fuller cannot show that there is a substantial likelihood that the prosecutor's remarks

affected the jury's verdict. See Thorgerson, 172 Wn.2d at 451-52 (holding that the prosecutor improperly impugned defense counsel by referring to his presentation of his case as "bogus" and involving "sleight of hand," but that the misconduct did not require reversal because "the victim's testimony was consistent throughout the trial and was consistent with what the witnesses testified she had told them before the trial").

Finally, Fuller cannot show that the prosecutor's remarks were "so flagrant and ill-intentioned" that no curative instruction would have neutralized their prejudicial effect. Swan, 114 Wn.2d at 661. Fuller does not even attempt to make such an argument beyond the conclusory statement that the alleged errors were "incurable." Opening Br. of Appellant at 26. The prosecutor's comments here fall far short of other comments deemed to have required reversal based on their flagrant and ill-intentioned nature. See State v. Belgarde, 110 Wn.2d 504, 507-09, 755 P.2d 174 (1988) (holding that the prosecutor's remarks that the defendant was "strong in" a group described by the prosecutor as a "deadly group of madmen" and "butchers that kill indiscriminately," were flagrant, highly prejudicial, and could not have been neutralized by a curative instruction); State v. Claflin, 38 Wn. App. 847, 850-51,

690 P.2d 1186 (1984) (finding prosecutor's reading of a poem in closing argument detailing the effect of rape on victims was "nothing but an appeal to the jury's passion and prejudice" that could not be eliminated by a curative instruction).

None of the prosecutor's challenged comments warrant reversal of Fuller's conviction, particularly when viewed in context of the entire argument, the issues in the case, the court's instructions, and the evidence addressed in argument. Brown, 132 Wn.2d at 561. The prosecutor's remarks properly stated the law and were reasonably drawn from the evidence. Given the overwhelming weight of the evidence against Fuller, there is not a substantial likelihood that the jury's verdict would have been different. Any prejudice caused by the prosecutor's comments could have been neutralized by a curative instruction. Fuller cannot show that prosecutorial misconduct deprived him of a fair trial.

3. CUMULATIVE ERROR DID NOT DENY FULLER A FAIR TRIAL.

Fuller contends that the cumulative effect of reading A.M.F.'s transcript to the jury during deliberations and the alleged prosecutorial misconduct affected the verdict. The cumulative error doctrine is limited to cases where there have been "several trial errors

that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The doctrine does not apply to cases where the defendant has failed to establish any error. Warren, 134 Wn. App. at 69. Fuller's cumulative error claim fails because he has not shown that any error occurred at his trial.

D. CONCLUSION

For the foregoing reasons, the Court should affirm Fuller's conviction.

DATED this 29th day of June, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Kristin A. Relyea
KRISTIN A. RELYEA, WSBA #34286
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Cassandra L. Stamm, the attorney for the appellant, at casey@seattlecriminalattorney.com, containing a copy of the Brief of Respondent, in State v. Jesse Thomas Fuller, Cause No. 74143-8, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 29 day of June, 2016.

Name:
Done in Seattle, Washington