

63134-9

63134-9

NO. 63134-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JASON SEVERSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

A defendant who claims that prosecutorial misconduct deprived him of a fair trial bears the burden of showing both that misconduct actually occurred and that prejudice resulted. A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to argue those inferences to the jury. Moreover, remarks that would otherwise be improper are permitted in rebuttal if they are a fair reply to the arguments of the defense. In this case, the prosecutor argued in rebuttal that many of the arguments defense counsel had made were "red herrings," meaning that they were designed to distract the jurors' focus away from evidence of the defendant's guilt. The prosecutor then urged the jurors to focus on the evidence of guilt. Was this rebuttal proper?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Jason Severson (dob. 8/8/87), with four counts of rape of a child in the third degree. The information specified that count I had been committed against B.S. (dob 7/14/92), count II had been committed against L.B. (dob 4/13/92), count III had been committed against K.W. (dob 7/8/92),

and count IV had been committed against C.M. (dob 2/14/92). All charges stemmed from conduct that occurred in 2006 and/or 2007. CP 1-7.

Severson's jury trial took place in December 2008 before the Honorable Michael Heavey. At the beginning of the trial, the State dismissed the count involving L.B.; the other three counts were submitted to the jury. RP (12/4/08) 4-7; CP 34-35, 42-59. At the conclusion of its deliberations, the jury acquitted Severson of count I involving B.S., but convicted Severson as charged of the counts involving K.W. and C.M. CP 60-62.

The trial court imposed a standard-range sentence of 28 months on each count, to be served concurrently. CP 66-76. Severson now appeals. CP 77.

2. SUBSTANTIVE FACTS

In the summer of 2007, 14-year-old B.S. contacted 19-year-old Severson through MySpace in response to an ad Severson had posted claiming he was looking for a singer for his band. RP (12/10/08) 10-12. After communicating online, B.S. agreed to come to Severson's house for an audition. After singing for Severson, Severson told B.S. she was "in." B.S. told Severson her age and asked if it would be a problem, and Severson told her it would not.

RP (12/10/08) 11-17. B.S. went to Severson's house another five or six times for "band practice," but the band never actually existed.

RP (12/10/08) 18, 21.

After a while, B.S. and Severson started dating. RP (12/10/08) 22. On one occasion, when B.S. and Severson were in Severson's bedroom watching television, Severson took B.S.'s pants off and had anal intercourse with her. RP (12/10/08) 30-37. B.S. told two of her friends about it, and one of them eventually convinced her to talk to a school counselor. RP (12/10/08) 43, 46. This prompted an investigation by the Auburn Police Department, which led to the discovery of the other victims, K.W. and C.M. RP (12/9/08) 128-33; RP (12/15/08) 48-49.

K.W. and her best friend Kasie were 14 years old in January 2007 when they met Severson at the roller skating rink in Auburn. RP (12/9/08) 24. About a week later, the girls met Severson and a mutual friend named Chris at the Supermall. Both girls told Severson how old they were. RP (12/9/08) 28-30. K.W. and Severson started dating about three weeks after they met. RP (12/9/08) 30.

On one occasion, K.W.'s father picked up K.W., Kasie, Severson, and Chris at the mall to give them a ride to the skating

rink. RP (12/9/08) 36. During the drive, K.W.'s father asked Severson how old he was, and Severson admitted that he was 19 years old. K.W.'s father asked Severson why he was hanging around with 14-year-olds. RP (12/15/08) 126. After that, K.W. was not allowed to see Severson. RP (12/9/08) 37-38.

Nonetheless, a few weeks later, K.W. and Kasie went to Severson's house one night after telling their parents they were going to a school function. RP (12/9/08) 40-41. K.W. and Kasie had smoked marijuana before going to Severson's house. RP (12/9/08) 41-42. The girls went upstairs to Severson's bedroom to watch television. RP (12/9/08) 43.

Kasie sat on the floor while K.W. and Severson sat together on Severson's bed. RP (12/9/08) 44. After a while, Kasie noticed that it was "awkwardly quiet" in the room. RP (12/9/08) 116. Severson reached inside K.W.'s pants and touched her vagina, and he repeatedly asked K.W. to "give him head." RP (12/9/08) 56-57. K.W. eventually relented, and performed fellatio on Severson for several minutes until he ejaculated into a shirt. RP (12/9/08) 57-60. After that, Kasie sat up and turned around, and saw that K.W. did not have any pants on. RP (12/9/08) 118. The girls stayed for another 10 or 15 minutes, then left. RP (12/9/08) 118. After this

incident, K.W. did not want to "hang out" with Severson anymore.

RP (12/9/08) 65.

C.M. was 14 years old in the summer of 2006 when she met Severson at the South Hill Mall. C.M. had communicated extensively with Severson online before meeting him in person. RP (12/15/08) 56-60. C.M. told Severson how old she was, but Severson told C.M. he was only 16 or 17. RP (12/15/08) 62. In fact, C.M. did not learn Severson's true age until shortly before trial. RP (12/15/08) 63. C.M. and Severson started dating "somewhat" about two weeks after they met. RP (12/15/08) 64.

On one occasion after spending time together at the mall, C.M. and Severson went to Severson's house. C.M. sat on the bed in Severson's bedroom while Severson played his guitar for a while. RP (12/15/08) 68-69. Eventually, Severson sat next to C.M. on the bed and they started "making out." RP (12/15/08) 75-76. Severson took off C.M.'s underwear, pulled his pants down, and had vaginal intercourse with C.M. for several minutes. RP (12/15/08) 80-84. C.M. took a shower when she got home, and she did not want to be with Severson anymore. RP (12/15/08) 87, 89.

While Severson was spending time with various underage girls, he also had an on-and-off relationship with Lacey Michler

(dob 10/17/88). Michler had been dating Severson sporadically since she was 16 years old. By the time of trial, Michler was the mother of Severson's toddler-age son and was 8 months pregnant with Severson's daughter. RP (12/15/08) 6-9.

Michler and Severson had argued about Severson's relationships with underage girls. RP (12/15/08) 11-12. Several of these discussions took place within earshot of Michler's mother, who overheard Severson admit to having sex with underage girls "numerous" times. RP (12/15/08) 40-41. Severson specifically admitted to Michler that he had "slept with" C.M. RP (12/15/08) 13.

A disputed, but largely peripheral issue at trial was the extent to which Lacey Michler had had contact with the victims. Michler admitted that she had communicated with C.M. on MySpace and they had developed a friendship of sorts. RP (12/15/08) 14. B.S. and K.W. stated that they had also communicated with Michler on MySpace, and K.W. stated that she had met Michler in person, but Michler denied this. RP (12/9/08) 82; RP (12/10/08) 28; RP (12/15/08) 14-15.

After conducting his investigation, Auburn Police Detective James Hamil arrested Severson on June 3, 2008. RP (12/9/08) 131. Detective Hamil transported Severson to the Auburn jail and,

after a proper advisement of rights, conducted an audio- and video-recorded custodial interview. RP (12/9/08) 135-37. During that interview, which lasted approximately one hour, Severson initially claimed he did not date underage girls because he did not "want to do anything illegal." Pretrial Ex. 2, p. 8. Towards the end of the interview, however, he admitted that K.W. had performed oral sex on him, although he denied having sex with any other underage girls. Pretrial Ex. 2, p.35.

Severson's defense at trial was that the victims and Lacey Michler were lying. Accordingly, Severson's defense counsel began his closing argument by stating that the State's evidence consisted of "[v]ersions and different versions, lies and more lies." RP (12/16/08) 27. Defense counsel then proceeded to attack the credibility of each witness. RP (12/16/08) 28-38. In rebuttal, the prosecutor argued that defense counsel's arguments were "red herrings," and urged the jurors to focus on the evidence that proved the defendant's guilt. RP (12/16/08) 40-43.

C. **ARGUMENT**

1. **THE PROSECUTOR'S REMARKS IN REBUTTAL WERE A FAIR REPLY TO THE CLOSING ARGUMENT OF SEVERSON'S DEFENSE COUNSEL.**

Severson's sole claim on appeal is that he was deprived of a fair trial due to prosecutorial misconduct. More specifically, Severson claims that the prosecutor's remarks in rebuttal argument, which characterized the defense's arguments as "red herrings," were so improper and prejudicial that this Court should reverse and remand for a new trial. This claim should be rejected. The prosecutor's remarks in rebuttal were entirely proper, as they were a fair reply to the arguments made in closing by Severson's attorney. In addition, given that all but one of the prosecutor's remarks were made without objection, Severson cannot demonstrate flagrant misconduct that resulted in irreparable prejudice. This Court should affirm.

A defendant who claims on appeal that prosecutorial misconduct during closing argument deprived him of a fair trial "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A defendant who did not make a timely objection at trial has waived any claim on appeal

unless the argument in question is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. A defendant who did make a timely objection still must show a "substantial likelihood" that the prosecutor's remarks affected the jury's verdict before an appellate court will grant a new trial. Id.

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Also, arguments in rebuttal that would otherwise be improper are nonetheless permissible when they are a fair reply to the defendant's arguments, unless such arguments go beyond the scope of an appropriate response. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). Moreover, the prosecutor's remarks must not be viewed in isolation, but "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561. Given these standards, Severson's claim fails.

As noted above, all of the remarks that Severson claims were improper were made during the State's rebuttal argument and, with only one exception, all were made without objection. The one

remark Severson's attorney objected to occurred near the beginning of rebuttal, just after the prosecutor explained his understanding of the origins of the term "red herring":

Many of you have probably heard of the term red herring. A lot of people don't know where it comes from, but red herrings are actually these little red smelly fish. In the 18th century, fugitives used to take them and wipe them on trails as they were trying to escape the law, and the blood hounds would go after them, and fugitives would get away. That's where the term red herring came from, and what you just heard was a series of red herrings from the defense. Mr. Warner's doing his best, he doesn't have a lot to work with, and so he's throwing everything he can at a wall.

MR. WARNER: Objection, your Honor.

THE COURT: Overruled.

RP (12/16/08) 40.

From there, the prosecutor proceeded to identify what he perceived to be "red herrings" in the defense's closing argument, including the following: 1) the defense's failure to mention Severson's admission that he had, in fact, had sex with K.W.; 2) the defense's attempt to focus on inconsistent testimony as to whether or not B.S. and Severson were "dating" or merely "hanging out"¹; 3) the defense's argument that Lacey Michler was behind everything,

¹ Based on the evidence in this case, as well as common experience, the difference to young teenagers between "dating" and "hanging out" is a subtle distinction at best.

and had orchestrated a "conspiracy" among the three young victims; and 4) the defense's failure to mention any of Severson's inconsistent or damaging statements. RP (12/16/08) 40-42.

Particularly given the tenor of the defense's closing argument in this case, during which Severson's counsel aggressively attacked the credibility of the three young victims and of Lacey Michler,² there is nothing at all improper about any of the prosecutor's remarks. Rather, the prosecutor merely stated that defense counsel did not "have a lot to work with," and that he was attempting to throw the jurors off track by making arguments and highlighting facts that were largely irrelevant and peripheral. This was a perfectly legitimate way to respond to the arguments of defense counsel, and Severson cannot demonstrate otherwise.

Moreover, Severson cannot show that the one remark he objected to had any effect on the jury's verdict, or that the prosecutor's ensuing discussion of "red herrings" was so flagrant and ill-intentioned as to be irreparably prejudicial. First, the jurors were instructed that the attorneys' remarks were not evidence, and

² As previously noted, defense counsel began his closing by characterizing the testimony of the State's witnesses as follows: "Versions and different versions, lies and more lies." RP (12/16/08) 27. He proceeded to attack the credibility of B.S., C.M., K.W., and Lacey Michler. RP (12/15/08) 28-38. He concluded by stating that everyone was "incredible." RP (12/16/08) 38-39.

that they were to base their verdicts solely on the evidence produced in court. CP 43, 45. Jurors are presumed to follow such instructions. State v. Gizzotti, 60 Wn. App. 289, 298, 803 P.2d 808, rev. denied, 116 Wn.2d 1026 (1991). Furthermore, the fact that the jury acquitted Severson of raping B.S. belies Severson's claim that he was prejudiced. In short, Severson has shown neither improper conduct nor prejudice. Accordingly, this Court should reject Severson's arguments, and affirm.

Nonetheless, Severson argues that prosecutor committed prejudicial misconduct for the following reasons: 1) the prosecutor's explanation of the origins of the term "red herring" is "highly suspect" and likely inaccurate; and 2) the prosecutor's use of the term "red herring" disparaged defense counsel personally, and disparaged the role of defense counsel generally. See Opening Brief of Appellant, at 14-16. These arguments are without merit.

As to the first point, at least according to Wikipedia, one widely-reported possible source of the term "red herring" stems from "escaping convicts who would use the pungent fish to throw

off hounds in pursuit."³ As Severson correctly notes, this etymology is probably not accurate, as Wikipedia further reports that the term most likely originated from a political column written by William Cobbett in 1807.⁴ But be that as it may, the prosecutor's explanation as to the term's genesis is hardly as "suspect" as Severson claims.

And in any event, Severson's argument that the prosecutor inaccurately informed the jury as to the origins of the term "red herring" is, in itself, a red herring. The actual etymology of the term "red herring" is of no moment in this case. What *is* of importance here is that in his rebuttal, the prosecutor used the term "red herring" properly in asking the jurors to reject the arguments of the defense.

All etymological debates aside, the term "red herring" undisputedly refers to a rhetorical device (or, more accurately, a logical fallacy) wherein the speaker makes an argument "which distracts the audience from the issue in question through the introduction of some irrelevancy."⁵ In the context of this case, the

³ See [http://en.wikipedia.org/wiki/Red_herring_\(idiom\)](http://en.wikipedia.org/wiki/Red_herring_(idiom)), attached as Appendix A.

⁴ See Appendix A.

⁵ See <http://www.fallacyfiles.org/redherrf.html>, attached as Appendix B.

prosecutor was utilizing this term to argue to the jurors that they should not be distracted by the defense's attempts to divert their attention from the evidence of Severson's guilt and to focus instead on peripheral or irrelevant issues. As stated above, this is a perfectly legitimate way to respond to the arguments of the defense. Indeed, it strains reason to suggest otherwise. And nowhere in the prosecutor's rebuttal did he disparage defense counsel, either *ad hominem* or otherwise. Rather, the prosecutor did precisely what any prosecutor *should* do in rebuttal argument: he argued why the jurors should not be swayed by defense counsel's arguments, and why they should find the defendant guilty based on the evidence. If this does not fall within the ambit of a fair reply, it is difficult to envision what would.

Lastly, Severson seems to suggest that the mere usage of the term "red herring" is improper because a red herring is, as the prosecutor stated, a "smelly fish." RP (12/16/08) 40. However, although several alternative words and phrases could be used instead of "red herring," they are all equally unflattering, if not more so.⁶ Moreover, although the prosecutor could conceivably have

⁶ Examples would include ruse, dodge, decoy, subterfuge, diversionary tactic, bait and switch, smoke and mirrors, and shell game, just to name a few. If used correctly, none of these words and phrases would be improper, either.

said that defense counsel was making arguments designed to "distract the audience from the issue in question through the introduction of some irrelevancy,"⁷ it is obviously much simpler and far less cumbersome to say "red herring" instead.

In sum, Severson cannot show that the prosecutor's remarks in rebuttal were improper, and he also cannot show either that the jury's verdict was affected or that a curative instruction would have been ineffective. Severson's claim fails.

⁷ See Appendix B.

D. **CONCLUSION**

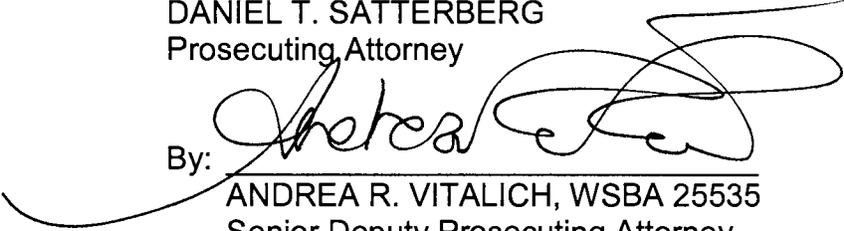
Severson's claim of prosecutorial misconduct is without merit. For all of the reasons stated above, this Court should affirm Severson's convictions for two counts of rape of a child in the third degree.

DATED this 2nd day of December, 2009.

RESPECTFULLY submitted,

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Appendix A

Red herring (idiom)

From Wikipedia, the free encyclopedia

A **red herring** is an idiom referring to a device which intends to divert the audience from the truth or an item of significance.^[1] For example, in mystery fiction, an innocent party may be purposefully cast as highly suspect through emphasis or descriptive techniques; attention is drawn away from the true guilty party.

In a literal sense, there is no such fish species as a "red herring"; rather it refers to a particularly strong kipper, meaning a fish - typically a herring but not always - that has been strongly cured in brine and/or heavily smoked. This process makes the fish particularly pungent smelling and turns its flesh red (and makes it very noticeable, notably for the idiom).^[2] This term, in its literal sense as a type of kipper, can be dated to the late Middle Ages, as quoted here c1400 *Femina* (Trin-C B.14.40) 27: "He etep no ffyssh But heryng red." Samuel Pepys used it in his diary entry of 28 February 1660 "Up in the morning, and had some red herrings to our breakfast, while my boot-heel was a-mending, by the same token the boy left the hole as big as it was before."^[3]

The idiomatic sense of "red herring" has, until very recently, been thought to originate from a supposed technique of training young scent hounds.^[2] There are variations of the story, but according to one version, the pungent red herring would be dragged along a trail until a puppy learned to follow the scent. Later, when the dog was being trained to follow the faint odour of a fox or a badger, the trainer would drag a red herring (whose strong scent confuses the animal) perpendicular to the animal's trail to confuse the dog.^[4] The dog would eventually learn to follow the original scent rather than the stronger scent. An alternate etymology points to escaping convicts who would use the pungent fish to throw off hounds in pursuit.^[5]

In reality, the technique was probably never used to train hounds or help desperate criminals. The idiom probably originates from an article published 14 February, 1807 by journalist William Cobbett in the polemical *Weekly Political Register*.^[6] In a critique of the English press, which had mistakenly reported Napoleon's defeat, Cobbett recounted that he had once used a red herring to deflect hounds in pursuit of a hare, adding "It was a mere transitory effect of the political red-herring; for, on the Saturday, the scent became as cold as a stone."^[6] As British etymologist Michael Quinion says, "This story, and [Cobbett's] extended repetition of it in 1833, was enough to get the figurative sense of *red herring* into the minds of his readers, unfortunately also with the false idea that it came from some real practice of huntsmen."^[6]

See also

- Foreshadowing
- And Then There Were None

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- ↑ Red herring. (n.d.). *The American Heritage Dictionary of the English Language*, Fourth Edition. Retrieved February 04, 2009, from: <http://dictionary.reference.com/browse/Red%20herring>

2. ^{a b} Quinion, Michael (2002). "The Lure of the Red Herring (<http://www.worldwidewords.org/articles/herring.htm>) ". *WorldWideWords*. <http://www.worldwidewords.org/articles/herring.htm>. Retrieved April 21 2007.
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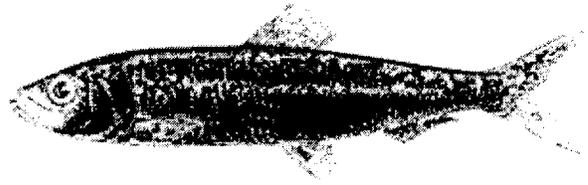
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Appendix B

Red Herring



Alias:

- Ignoratio Elenchi ("ignorance of refutation", *Latin*)
- Irrelevant Thesis

Type: Informal Fallacy

Etymology:

The name of this fallacy comes from the sport of fox hunting in which a dried, smoked herring, which is red in color, is dragged across the trail of the fox to throw the hounds off the scent. Thus, a "red herring" argument is one which distracts the audience from the issue in question through the introduction of some irrelevancy. This frequently occurs during debates when there is an at least implicit topic, yet it is easy to lose track of it. By extension, it applies to any argument in which the premisses are logically irrelevant to the conclusion.

Exposition:

This is the most general fallacy of irrelevance. Any argument in which the premisses are logically unrelated to the conclusion commits this fallacy.

History:

This fallacy is often known by the Latin name "Ignoratio Elenchi", which translates as "ignorance of refutation". The ignorance involved is either ignorance of the conclusion to be refuted—even deliberately *ignoring* it—or ignorance of what constitutes a refutation, so that the attempt misses the mark. This explanation goes back to Aristotle's *On Sophistical Refutations*, the focus of which is fallacious refutations in debate. As with all of Aristotle's original fallacies, its application has widened to all arguments.

Of course, fallacies of ambiguity involve irrelevance, in that the premisses are logically irrelevant to the conclusion, but this fact is disguised by ambiguous language. However, Aristotle classifies Ignoratio Elenchi as language-independent, though he does say:

One might, with some violence, bring this fallacy into the group of fallacies dependent on language as well.

But this would make Ignoratio Elenchi so wide that just about every fallacy—with the exception of Begging the Question—would be a subfallacy of it. This is too wide to be useful, so I will follow Aristotle in restricting it to non-linguistic fallacies, excluding those disguised by ambiguity or vagueness.

Exposure:

Logical relevance is itself a vague and ambiguous notion. It is ambiguous in that different types of reasoning involve distinct types of relevance. It is vague in that there is little agreement among logicians about even deductive relevance, with logicians divided into different camps, so-called "relevance" logicians arguing for a more restrictive notion of logical relevance than so-called "classical" logicians.

Another ambiguity of the term "relevance" is that *logical* relevance can be confused with *psychological* relevance. The fact that two ideas are logically related may be one reason why one makes you think of the other, but there are other reasons, and the stream of consciousness often includes associations between ideas that are not at all logically related. Moreover, not all logical relations are obvious, so that a logical relationship may not cause a psychological relationship at all.

Because it is the most general fallacy of irrelevance, most fallacious arguments will be identified as some more specific type of irrelevancy.

Subfallacies:

- Appeal to Consequences
- Bandwagon Fallacy
- Emotional Appeal
- Genetic Fallacy
- Guilt by Association
- Straw Man
- Two Wrongs Make a Right

Sources:

- Aristotle, On Sophistical Refutations, Section 1, Part 5; W. A. Pickard-Cambridge, translator.
- S. Morris Engel, Analyzing Informal Fallacies (Prentice-Hall, 1980), pp. 95-99.



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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JASON SEVERSON, Cause No. 63134-9-I, 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.

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