

NO. 63914-5-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRANDON BROWN,

Appellant.

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

APPELLANT'S REPLY BRIEF

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711



TABLE OF CONTENTS

A. ARGUMENT 1

1. WHERE THE EVIDENCE WAS INSUFFICIENT TO PRODUCE A UNANIMOUS VERDICT AS TO BOTH CONVICTIONS FOR VIOLATING RCW 9A.44.079, REVERSAL MUST BE GRANTED. 1

 a. The evidence was insufficient for the jury to isolate two separate incidents on which to base the two rape convictions. 1

 b. Mr. Brown’s convictions for rape of child in the third degree must be reversed and dismissed. 2

2. REVERSAL MUST BE GRANTED WHERE THE JURY WAS TAINTED DUE TO THE VIOLATION OF A PRE-TRIAL RULING AND PROSECUTORIAL MISCONDUCT, AND WHERE THE COURT’S FAILURE TO GRANT A MISTRIAL WAS AN ABUSE OF DISCRETION. 3

 a. The prosecutor willfully violated the court’s pre-trial order..... 3

 b. Mr. Brown was unduly prejudiced by this error..... 3

 c. The trial court’s denial of the mistrial motion was an abuse of discretion; therefore, reversal is required. 4

3. WHERE MR. BROWN’S RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE PROSECUTOR’S MISCONDUCT DURING CLOSING ARGUMENT, REVERSAL IS REQUIRED. 5

 a. Prosecutors have special duties which limit their advocacy..... 5

 b. The prosecutor’s misconduct in closing argument denied Mr. Brown a fair trial 6

c. Reversal is required.....	7
B. CONCLUSION.....	8

TABLE OF AUTHORITIES

Washington Supreme Court

MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959) 5

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971). 5

State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645
(1941) 5

State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988) 7

State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956) 7

State v. Charlton, 90 Wn.2d 657, 585 P.2d 142 (1978) 7

State v. Kroll, 87 Wn.2d 829, 558 P.2d 173 (1976) 5

State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984)..... 5

State v. Souza, 60 Wn. App. 534, 805 P.2d 237 (1991) 2

State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997) 4

Washington Court of Appeals

State v. Echevarria, 71 Wn. App. 595, 860 P.2d 420 (1993) 5

State v. Hayes, 81 Wn. App. 425, 914 P.2d 788 (1996) 2

State v. Holland, 77 Wn. App. 420, 891 P.2d 49 (1995) 2

State v. Newman, 63 Wn. App. 841, 822 P.2d 308 (1992) 2

State v. Sith, 71 Wn. App. 14, 856 P.2d 415 (1993) 6

United States Supreme Court

Bruton v. U.S., 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)
..... 4

Burks v. United States, 437 U.S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141
(1978) 2

Hudson v. Louisiana, 450 U.S. 40, 67 L. Ed. 2d 30, 101 S. Ct. 970
(1981) 2

Federal Courts

U.S. v. Murray, 784 F.2d 188, (1986)..... 4

A. ARGUMENT

1. WHERE THE EVIDENCE WAS INSUFFICIENT TO PRODUCE A UNANIMOUS VERDICT AS TO BOTH CONVICTIONS FOR VIOLATING RCW 9A.44.079, REVERSAL MUST BE GRANTED.

- a. The evidence was insufficient for the jury to isolate two separate incidents on which to base the two rape convictions.

Although the State brought two rape charges against Mr. Brown, the State failed to allege and to prove each charge as a separate and distinct incident. The information did not specify when either of the alleged acts occurred, but merely stated they occurred at an unspecified time between January 1, 2009, and February 11, 2009. CP 1-5. The complaining witness's testimony simply described a generic scenario, suggesting that she and Mr. Brown had sex "almost every day." The complaining witness's failure to provide any factual details that would serve to distinguish one alleged incident from another renders the State's account insufficient.

To ensure a defendant's constitutional rights to a unanimous jury verdict and to ensure proof beyond a reasonable doubt, the prosecutor must provide some factual details that serve to distinguish one sexual abuse incident from another. This Court reaffirmed that principle in State v. Hayes, where it held that the

evidence in such cases must “clearly delineate specific and distinct incidents of sexual abuse.” State v. Hayes, 81 Wn. App. 425, 431, 914 P.2d 788 (1996) (quoting State v. Newman, 63 Wn. App. 841, 851, 822 P.2d 308 (1992)).

Washington courts universally require the jury be instructed on the unanimity requirement in multiple acts cases, even those that consist only of evidence that shows the same act of sexual abuse occurred more than once. Hayes, 81 Wn. App. at 431; State v. Holland, 77 Wn. App. 420, 424-25, 891 P.2d 49 (1995).

b. Mr. Brown’s convictions for rape of child in the third degree must be reversed and dismissed. The State did not meet its burden of proving beyond a reasonable doubt that the elements of the crime occurred on two particular occasions upon which the jury could unanimously agree. The convictions must therefore be reversed. Where a conviction is overturned on appeal for insufficient evidence, a person may not be retried for that offense without violating the constitutional prohibition against double jeopardy. Hudson v. Louisiana, 450 U.S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981); Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); State v. Souza, 60 Wn. App.

534, 538, 805 P.2d 237 (1991). Thus, the convictions must be reversed and the charges dismissed.

2. REVERSAL MUST BE GRANTED WHERE THE JURY WAS TAINTED DUE TO THE VIOLATION OF A PRE-TRIAL RULING AND PROSECUTORIAL MISCONDUCT, AND WHERE THE COURT'S FAILURE TO GRANT A MISTRIAL WAS AN ABUSE OF DISCRETION.

- a. The prosecutor willfully violated the court's pre-trial order concerning the Seals Motel ruling. Despite this pre-trial ruling, near the end of his direct examination of Officer Bruneau, the prosecutor elicited this inadmissible information from the officer. When the witness was excused, defense counsel promptly moved for a mistrial, noting that during pre-trial motions, all parties had agreed that testimony about the shooting at the Seal's Motel was not admissible. Stating he was unable to "unring the bell," defense counsel moved for a mistrial, arguing that the prosecutor had neglected to ask the trial court to reconsider its pre-trial ruling, and without any consequences against the State, there would be no incentive for the State to continue to follow the court's rulings.

- b. Mr. Brown was unduly prejudiced by this error. Prior to trial, the trial court agreed with the parties that any mention of the shooting at the Seal's Motel was "more prejudicial than probative."

5/11/09 RP 98. Defense counsel's primary concern was that the incident involved individuals with guns; the court's instruction to disregard evidence of police misconduct was insufficient to lift the taint created by the misconduct of the prosecutor who elicited precisely the testimony that had been precluded pursuant to motions in limine.

This testimony – the implication that Mr. Brown spends his time in a motel surrounded by unsavory characters who participate in shootings -- created an enduring prejudice which so infected the proceedings that the curative instruction could not have been – and was not – effective. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997); see also U.S. v. Murray, 784 F.2d 188, 189 (6th Cir. 1986) (“Such an instruction ... is very close to an instruction to unring a bell”); Bruton v. U.S., 391 U.S. 123, 129, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (citations omitted) (“The naïve assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction”).

c. The trial court's denial of the mistrial motion was an abuse of discretion; therefore, reversal is required. For these reasons, the trial court abused its discretion when it denied Mr. Brown's mistrial motion. When a trial court's exercise of its discretion

is “manifestly unreasonable or exercised on untenable grounds, or for untenable reasons,” an abuse of discretion exists. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941). Since the court’s abuse of discretion resulted in an enduring prejudice to the entire proceedings, reversal is required.

3. WHERE MR. BROWN’S RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE PROSECUTOR’S MISCONDUCT DURING CLOSING ARGUMENT, REVERSAL IS REQUIRED.

a. Prosecutors have special duties which limit their advocacy. A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)); see also State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

The reviewing court must decide first whether such comments were improper, and if so, whether a “substantial likelihood” exists that the comments affected the jury.” Reed, 102 Wn.2d at 145. The burden is on the defendant to show

that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

b. The prosecutor's misconduct in closing argument denied Mr. Brown a fair trial. The prosecutor made improper comments during his closing arguments, tainting the jury and violating Mr. Brown's right to due process.

The prosecutor began his closing argument this way:

It should not be lost on any of us in this courtroom, but the real villain and the real evil that the laws of the State of Washington are designed to protect against (inaudible) criminalized that someone's profiting off of the back of a child who is engaged in prostitution.

5/20/09 RP 571 (emphasis added). Within a few additional lines of similar outrageous argument, defense counsel properly objected, noting that the prosecutor was appealing to the sympathies and emotions of the jury. Id. at 572.

As in State v. Fleming, the prosecutor here repeatedly implied that because Mr. Brown was charged with an "evil" or "villainous" offense, he was not entitled to the same constitutional protections as others. 83 Wn. App. 209, 216, 921 P.2d 1076 (1996) (holding that "the State must convict on the merits, and not by way of misstating the nature of reasonable

doubt, misstating the role of the jury,... and improperly shifting the burden of proof to the defense”). When a prosecutor’s closing argument relies upon inflammatory comments designed to appeal to a jury’s passions and prejudices, rather than to properly admitted evidence, and “the misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.” State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing State v. Case, 49 Wn.2d 66, 74, 298 P.2d 500 (1956); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978)).

Although the State may characterize the prosecutor’s remarks in its response brief as merely “dramatic,” Resp. Brief at 24, words such as “evil” and “villain” are improper argument. See Fleming, 83 Wn. App. at 216.

c. Reversal is required. The cumulative effect of various instances of prosecutorial misconduct may violate a defendant’s right to a fair trial. State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955); State v. Torres, 16 Wn. App. 254, 262-63, 554 P.2d 1069 (1976).

Due to the remarks constituting misconduct in the closing argument during Mr. Brown’s trial, there is a substantial likelihood the

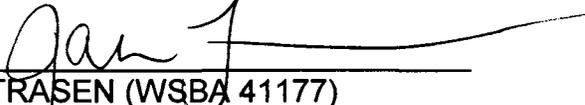
cumulative effect affected the jury's verdict; therefore, this Court should reverse his conviction. Reed, 102 Wn.2d at 146-47.

B. CONCLUSION

For the foregoing reasons, Mr. Brown respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 8th day of June, 2010.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
Washington Appellate Project (91052)
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 63914-5-I
)	
BRANDON BROWN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF JUNE, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> ANDREA VITALICH, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> BRANDON BROWN 850353 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) () ()	U.S. MAIL HAND DELIVERY _____

2010 JUN -7 PM 4:16

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF JUNE, 2010.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710