

NO. 64553-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

STEVEN BOTTOMLEY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY  
THE HONORABLE LAURA GENE MIDDAUGH

**BRIEF OF RESPONDENT**

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## I. ISSUES PRESENTED

A. An attorney may make closing arguments based on common sense, common experience and reasonable inferences derived from the evidence. The prosecutor argued that S.V.'s difficulty in talking about the abuse was consistent with the juror's general experience with children and argued that the church group to which S.V. belonged held certain values based on evidence produced at trial. Did the prosecutor commit misconduct?

B. Conditions imposed by a trial court must be crime related. Where there was no evidence that alcohol or the internet were used in the commission of the crime, should prohibitions on the use of the internet and the purchase and consumption of alcohol be stricken?

C. The Department of Corrections (DOC) is specifically authorized to require participation in rehabilitative programs based on an assessment of risk to community safety. Where a condition of the Judgment and Sentence merely authorizes such possible future action by the DOC, should that condition be stricken?

## II. STATEMENT OF THE CASE

The defendant, Steven Bottomley, was charged with one count of Rape of a Child in the Third Degree for an incident involving S.V., a 14 year old male, during June of 2006. The trial took place in November of 2009. Trial testimony established the following:

Both Bottomley and S.V. attended the 7<sup>th</sup> Day Adventist church meeting during the summer of 2006. The camp meeting was a gathering of congregants from the Pacific Northwest. Church members of various ages attended meetings designed to minister to their spiritual well being. 3 RP 48, 51-52.<sup>1</sup>

S.V. met Bottomley while playing volleyball at a net provided by Bottomley. 3 RP 36-37. The game was attended primarily by teenagers, although some parents also attended. 3 RP 123-24, 278-79. Bottomley played at the game along with at least one of his friends. Parents complained about comments made by Bottomley with sexual and homosexual connotations including "Hey big boy," "Group hug in the shower tonight" and "If I asked you to drop the soap in the shower, would you do that?" 3 RP 125, 279-80. John

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<sup>1</sup> This brief cites to the verbatim report of proceedings as follows: 1RP - 6/23-25/2009; 2RP - 6/29-30/2009; 3RP 11/9, 16/2009; 4RP11/17-8, 12/4/2009.

McClarty, a pastor and head of security, shut down the game and ordered Bottomley to have no contact with children and to avoid areas where children were gathered after receiving complaints from parents about these comments. 3 RP 71-72.

Bottomley befriended S.V. that week, talking to him, offering him rides and walking with him to the store. One evening after playing cards, Bottomley invited S.V. to his van where the conversation turned to sex. Bottomley eventually performed fellatio on S.V. and attempted anal sex with S.V. Afterwards, Bottomley paid S.V. \$100. 3 RP, 147, 151-57, 297.

The following spring, after attending counseling, S.V. confided in his mother about the incident but was not willing to speak to the police. During the June camp meeting of 2007, Bottomley again tried to strike up a relationship with S.V. and spoke to S.V. on three to four occasions. S.V. pointed Bottomley out to his mother, but was only willing to talk about part of the abuse. 3 RP 167, 182-84, 308-11. When his mother alerted the camp security and the police, S.V. admitted that the defendant had offered him money for sex but indicated that he did not wish to give a statement. 3 RP 89-90. The defendant denied knowing S.V. to the responding officer. 3 RP 91.

S.V. eventually agreed to an interview with a prosecutor but only revealed portions of the abuse by Bottomley and indicated that the fellatio occurred in a camp tent, not the defendant's van. He later clarified that the fellatio occurred in the defendant's van and that he didn't initially want to admit that he followed the defendant to the van because it would sound better if it just happened at a tent in the middle of the camp meeting. 3 RP 187-88. He indicated that it was a difficult thing for him to talk about because of guilt and that he even attended a seminar because he needed to forgive himself. 3 RP 167, 185.

S.V.'s description of the van at trial, including details relating to its interior (full sized van set up for sleeping, made in the '70's, dark on the exterior and with red in the interior, coverings on the windows and bucket seats up front) were confirmed by the defendant's friend Jeff Nodell. 3 RP 148-49, 294-97. His knowledge that the defendant lived in Walla Walla was corroborated by the detective. 3 RP 104. Bank records showed that S.V. deposited \$100.50 shortly after the camp meeting. 3 RP 189.

In closing, the State argued that the defendant used the sexual comments at the volleyball court to identify S.V. as not being offended by the sexual banter and also to make later conversation with S.V. seem more acceptable because the topic had already been broached in public at a church meeting. The State also argued that S.V. did not immediately disclose all of the abuse because of the embarrassment any child might have in discussing such topics and also because such topics would be even less accepted in the context of his church community.

The jury convicted Bottomley. At sentencing, the trial court imposed all conditions of community custody that were proposed by the Department of Corrections (hereinafter "the DOC"), including restrictions on the purchase and possession of alcohol and restrictions on internet use. The court also directed the defendant to undergo a substance abuse evaluation if directed by his CCO or sexual deviancy treatment specialist.

Bottomley now appeals.

### III. ARGUMENT

- A. **AN ATTORNEY MAY MAKE CLOSING ARGUMENTS BASED ON COMMON SENSE, COMMON EXPERIENCE AND REASONABLE INFERENCES DERIVED FROM THE EVIDENCE. THE PROSECUTOR ARGUED THAT S.V.'S DIFFICULTY IN TALKING ABOUT BOTTOMLEY'S RAPE WAS CONSISTENT WITH THE JUROR' GENERAL EXPERIENCE WITH CHILDREN AND ARGUED THAT THE CHURCH GROUP TO WHICH S.V. BELONGED HELD CERTAIN VALUES BASED ON EVIDENCE PRODUCED AT TRIAL. DID THE PROSECUTOR COMMIT MISCONDUCT?**

Bottomley claims that the prosecutor committed misconduct by arguing facts not in evidence and by appealing to the jury's passions and prejudice. To the contrary, the State merely argued inferences based on the evidence produced at trial and asked the jury to consider their common sense and experience when arguing that it would be difficult for S.V. to talk about being raped by the defendant. In addition, Bottomley failed to preserve any claimed error by failing to object and the comments, even if misconduct, were not so flagrant and ill-intentioned that no curative instructions could have obviated any possible prejudice.

Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. State v. Hughes, 106 Wn.2d 176, 195, 721 P.2d 902 (1986). A defendant who alleges prosecutorial misconduct must establish that the prosecutor's conduct was both

improper and prejudicial. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The impropriety and prejudicial impact of a prosecutor's remarks, "must be reviewed 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." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. Dhaliwal, 150 Wn.2d at 578, 79 P.3d 432. A defendant who does not make a timely objection waives review unless the prosecutorial misconduct "is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

**1. The defendant has not preserved the issue of prosecutorial misconduct for appeal.**

The failure to object to alleged misconduct constitutes a waiver of that claim "unless the remark is deemed to be so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to

the jury." State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995) (citation omitted).

The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial . . . in the context of the trial. Moreover, 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 a new trial or on appeal.

State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (internal quotations omitted). Even if a prosecutor's remarks touch on a constitutional right, the failure to object to such comments constitutes a waiver of review. State v. Klok, 99 Wn. App. 81, 992 P.2d 1039 (2000).

Bottomley only objected to one of the remarks that he now alleges to be misconduct.<sup>2</sup> Nor did Bottomley move for a mistrial immediately following the argument or at any time after the verdict. This failure to object or move for a mistrial constitutes a waiver of his claim of error to all comments but the one objected to.

The failure of Bottomley's counsel to object is strong evidence that the remarks were not so prejudicial that his right to a

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<sup>2</sup> Bottomley objected to the prosecutor framing the issues in the case as "How could [S.V.] find the strength to talk about it at all? The extraordinary thing in this child is that he was able to talk about it." 4 RP 368.

fair trial was violated. See Swan, 114 Wn.2d at 661. Nor has Bottomley demonstrated that a curative instruction would not have remedied any potential prejudice arising from the prosecutor's remark. See, e.g., State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008) (prosecutor's argument that defense counsel's mischaracterization was "an example of what people go through in a criminal justice system when they deal with defense attorneys. . . [and a] classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing," improperly disparaged defense counsel but was not sufficiently flagrant that no instruction could have cured it). Therefore, this Court should decline to consider all claims not preserved.

**2. The prosecutor's arguments did not constitute misconduct.**

"In closing argument a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence." State v. Brown, 132 Wn.2d 529, 564, 940 P.2d 546 (1997). Moreover, attorneys may ask the jurors to use their own life experiences to evaluate the evidence and witnesses. See Brett,

126 Wn.2d at 175-76 (approving of the prosecutor's request to the jurors to consider that the witness was truthful because it was a traumatic event that was "the kind of scenario of events that she's going to remember"). This is true because a "jury, in exercising its collective wisdom, is expected to bring its opinions, insights, common sense, and everyday life experience into deliberations." State v. Briggs, 55 Wn. App. 44, 58, 776 P.2d 1347 (1989). See also WPIC 5.01, "Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience."

A prosecutor who attempts to have jurors decide a case based upon their passions rather than the evidence commits misconduct. State v. Brett, 126 Wn.2d 136, 179, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). But it is permissible to use passionate words to describe the nature of the defendant's crime. See State v. Pirtle, 127 Wn.2d 628, 673-74, 904 P.2d 245, cert. denied, 518 U.S. 1026 (1996). "{A} prosecuting attorney is not muted because the acts committed arouse natural indignation{.}" Gentry, 125 Wn.2d at 644. The prosecutor may also discuss the impact of the crime on the victim and his or her family. Gentry, 125

Wn.2d at 644. But it is impermissible to invite the jurors to make an irrational decision or decide with their passions. Id.

**a. The prosecutor's argument about the common values of those who attended the camp meeting were based on the evidence.**

The prosecutor first broached the idea of the conservative moray's of the camp meeting when explaining why the volleyball game furthered Bottomley's plan to have sex with S.V.

You heard from [S.V.]. He was 14 years old. He didn't quite understand everything, but he knew that it wasn't quite appropriate, and he heard other people laughing, and so when the discussion of sex came up later, that topic had been broached.

This is a Seventh Day Adventist camp meeting. Premarital sex is not encouraged. Sex between two men is not encouraged. Talk between a 40-year old man and a 14-year-old boy is not encouraged. But Stas had already seen that this guy was doing it out in the open, not apologetic, nothing to be ashamed of.

4 RP 352-53. He later discussed those conservative moray's in the context of why S.V. might have a difficult time initially revealing all of the details of his rape by Bottomley:

Because there are all types of pressures, between peer pressure, between the pressure of someone they may wind up being interested in, all types of pressures that make them do things that, you know, are contrary to what their parents tell them, contrary to what their friends might tell them, contrary to what they might tell them.

And this situation was not nearly so innocuous. It was far harder for [S.V.]. This situation involved what wound up going across taboos for [S.V.'s] community.

This is a church. We all know that well. This is a church that would have frowned on sexual contact between two men, frowned on sexual contact before marriage, frowned on sexual contact with a young person, frowned on sexual contact between people of disparate ages.

The defendant claims that the assertions regarding the beliefs of those present at the camp meeting were not supported by the evidence. The fact that the church did not approve of these things is a permissible inference to be drawn from the fact that the head of security for the Seventh Day Adventist camp meeting shut down the volleyball game based on allegations that the defendant made sexual innuendo relating to premarital sex, between males, from a 38 year old man aimed primarily at teenage boys. The fact that the two mothers of the children, the defendant's mother and S.V. all identified the comments as inappropriate support the argument that the community likewise disapproved of the sexual activity suggested by the defendant's comments. To the

- b. The prosecutor's discussions about "basic truths" were merely appeals to the common experiences of the jurors.**

At trial, the prosecutor noted a number of things that would make it difficult for S.V. to talk about the defendant raping S.V.

- The prosecutor noted that sex is not easy for teenagers to talk about and that children can be confused about sex. 4 RP 363-64.
- The prosecutor noted that although a child may not legally consent to sex, S.V. still regretted the volitional acts of walking to the defendant's van and going to the woods to masturbate with the defendant. 4 RP 365.
- The prosecutor noted that there can be different reactions to one's first sexual experience and to rape, "Another basic truth is that people come to terms with what has happened to them when they are raped, or, frankly, when they have sex early in their lives in different ways and it often takes time." 4 RP 366.
- Finally, the prosecutor noted that anybody would prefer to come to terms with the circumstances described by S.V. in a private setting instead of publicly, through interviews with church security, police, prosecutors and jurors. 4 RP 366-67.

Attorneys may ask the jurors to use their own life experiences to evaluate the evidence and witnesses. See Brett, 126 Wn.2d at

175-76 (approving of the prosecutor's request to the jurors to consider that the witness was truthful because it was a traumatic event that was "the kind of scenario of events that she's going to remember"). Each of these "basic truths" were appeals to the jury to consider their common knowledge of children and human nature in general based on their own life experiences and were not misconduct.

The defendant cites State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), for the premise that the prosecutor's comment that "people come to terms with what has happened to them when they are raped, or, frankly, when they have sex early in their lives in different ways and it often takes time" argues facts not in evidence. Warren determined that a comment from a prosecutor that "long delays are common because people frequently repress sexual abuse." The comment by the prosecutor in Warren dealt provided information that was outside the common experience of most jurors - that victims of sexual abuse repress it. In contrast, the comment in this case likened S.V.'s rape to any other early sexual experience and concluded that it would be difficult to talk about. Unlike the prosecutor in Warren, the prosecutor in this case "did not purport to quote from evidence that was not admitted. Rather, [he]

simply made an argument based on common sense." State v. Barrow, 60 Wn. App. 869, 873-74, 809 P.2d 209 (1991).

**c. The prosecutor's arguments were not appeals to passion.**

After noting each of the factors that would make it difficult for a person in S.V.'s position to talk about the rape, the prosecutor discussed whether the inconsistencies brought out during the cross-examination of S.V. were significant to S.V.'s credibility:

[T]he question that I ask you is not: is it surprising that [S.V.] would have a difficult time saying, "It happened in the van," or "I went willingly with this stranger." The question that's appropriate is not: "Why in the world would [S.V.] not tell Detective Hamil about masturbating with the defendant in the woods?"

I think the appropriate question is: How could [S.V.] find the strength to talk about it at all? The extraordinary thing in this child is that he was able to talk about it.

4 RP 368. The prosecutor's argument was valid: It was not unusual that S.V. would have difficulty disclosing all of the details of the abuse up front because there were many possible reasons for him to not want to talk about it. Instead it would be difficult for someone to disclose every detail and that doing so would take a significant amount of personal strength.

Bottomley contends that this is an appeal to passion because the use of the word "extraordinary" implied that S.V.'s efforts were heroic. It is permissible to use passionate words to describe the nature of the defendant's crime. See State v. Pirtle, 127 Wn.2d 628, 673-74, 904 P.2d 245, cert. denied, 518 U.S. 1026 (1996). Extraordinary, as used by the prosecutor here and elsewhere in this trial merely meant unusual or out of the ordinary (The State began its opening by noting "Stas Vukshich was a 14-year-old, . . . , who was an ordinary kid in and incredibly extraordinary situation." 4 RP 346.).

**d. The prosecutor's comments did not amount to racial or religious stereotyping of the defendant.**

The defendant relies on State v. Sang, 184 Wash. 444, 51 P.2d 414 (1935), to argue that the comments made by the State relating to the beliefs held by the members of S.V.'s church amount to religious stereotyping. In Sang, a Chinese defendant was charged with perjury for testifying that he had no involvement in a particular gambling establishment. The prosecutor argued that "The Chinese are natural gamblers; . . . It is a trait." Id. at 446. In contrast, this prosecutor's argument that the sponsors of the camp

meeting frowned on the activities described in the defendant's comments on the volleyball field was a reasonable inference based on the reactions of Church Security and the parents to Bottomley's comments at the volleyball game. Moreover, the comments by the State were not used to describe Bottomley's traits in order to convict him, they were merely a generalized description of conservative Christian morality in order to discuss the effect those morality's might have had on S.V.'s willingness to disclose particularly embarrassing portions of the rape.

**e. The last line of the State's rebuttal closing was not error.**

The final line of the State's rebuttal closing was "Convict the defendant." 4 RP 398.<sup>3</sup> Bottomley relied on the original, incorrect report of proceedings and complains that the State finished its closing with "Convict him for him." Bottomley further concludes that such language should be interpreted as a request that the jury convict Bottomley for S.V. Such an argument, if made, would be an appeal to passion, but would be at odds with the rest of the closing. Taking the State's closing argument as a whole, this court should

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<sup>3</sup> The State has moved to correct the report of proceedings. This cite assumes that the motion is granted.

not find that there was a substantial likelihood that the language, even if made would have effected the jury's verdict. This court should likewise reject an argument that such language was so flagrant and ill-intentioned that no curative instructions could have obviated any prejudice engendered by the misconduct.

**B. THE STATE AGREES THAT CERTAIN CONDITIONS OF COMMUNITY CUSTODY SHOULD BE STRICKEN BECAUSE THEY ARE NOT CRIME-RELATED.**

Bottomley claims that the trial court exceeded its statutory authority in imposing conditions of community custody limiting or prohibiting his use of the internet and prohibiting the possession or purchase of alcohol. The State agrees that these particular conditions should be stricken from Bottomley's judgment and sentence because they are not crime-related. Under former RCW 9.94A.710 and former RCW 9.94A.700(5)(e), the trial court may impose "crime-related prohibitions" as conditions of community custody. In this case, however, the trial court imposed prohibitions relating to internet use and purchasing or possessing alcohol that are not crime-related based on the evidence presented.

There was no evidence that Bottomley used the internet prior to the rape nor that he used it to contact S.V. A prohibition on

internet access that is not crime-related must be stricken. State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

Accordingly, condition 23 of Appendix H - Conditions of community custody, "Do not access the internet without the prior approval of your supervising community corrections officer and sex offender treatment provider" must be stricken.

The sentencing court is expressly authorized to order the defendant not to *consume* alcohol. Former RCW 9.94A.700(5)(d). Moreover, the court may impose monitoring conditions, such as alcohol and drug testing, to assure the offender's compliance with its orders. See State v. Riles, 135 Wn.2d 326, 342, 957 P.2d 655 (1998). However, a sentencing court's order prohibiting the purchase and possession of alcohol is not valid in the absence of evidence that alcohol use was related to the defendant's crimes. See State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). Therefore, Bottomley is correct that the trial court lacked the statutory authority to order these conditions in this case. As a result, condition number 15 on Appendix H of Bottomley's judgment and sentence should be modified to strike the words "purchase, possess or," while leaving the word "use" as written in accordance with the applicable statute.

**C. THE CONDITION REGARDING A POSSIBLE SUBSTANCE ABUSE EVALUATION AND TREATMENT IS VALID BECAUSE IT MERELY AUTHORIZES POSSIBLE FUTURE ACTION BY THE DOC.**

Although the State agrees that the conditions discussed in the previous argument section should be stricken or modified, the State does not agree that condition number 20, which concerns a possible future substance abuse evaluation and the potential for treatment, should be stricken as well. To the contrary, this condition merely authorizes possible future action by the DOC that the DOC is already authorized to take.

Under the relevant statutory provisions applicable in this case, the DOC is authorized to impose conditions of community custody, including participation in rehabilitative programs, whether or not such conditions are crime-related. Accordingly, the condition of community custody Bottomley now challenges is valid because it merely authorizes the DOC to take future action that it is already within its power to take. Accordingly, this condition should be affirmed.

As previously noted, in imposing conditions of community custody, the trial court must comply with former RCW 9.94A.700(4)

and (5). Former RCW 9.94A.710. In this respect, Bottomley is correct that any treatment or counseling services ordered directly by the trial court must be crime-related. See Brief of Appellant.

But the DOC is granted the authority to impose additional conditions of community custody above and beyond those ordered directly by the trial court at sentencing. See former RCW 9.94A.720(d). Under this statute, the DOC is required to conduct a risk assessment and "may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs . . . ." Former RCW 9.94A.715(2)(b). Bottomley's argument fails to recognize that additional conditions of community custody as may be deemed appropriate by the DOC under former RCW 9.94A.715 need *not* be "crime-related." Rather, they need only be "based upon the risk to community safety." Former RCW 9.94A.715(2)(b). Therefore, because the condition of community custody at issue here is contingent upon a finding by the sexual deviancy treatment provider or community corrections officer, and will only be implemented upon a risk assessment and evaluation by the DOC, the trial court in this case has done no more than authorize the DOC to do what it

already has authority to do by statute.<sup>4</sup> In short, because condition number 20 is contingent upon proper action by the DOC, Bottomley's claim regarding this condition should be rejected.

But finally, even if this Court finds that Bottomley's claim has merit, this Court should remand for entry of an order striking condition number 20 without prejudice to the DOC's authority to order an evaluation and treatment if it deems such action necessary to protect community safety when Bottomley is released from total confinement.

#### IV. CONCLUSION

For the foregoing reasons, the State asks this Court to reject Bottomley's claims relating to prosecutorial misconduct. The State agrees that this Court should remand for entry of an order striking conditions of community custody relating to internet use and possession or purchase of alcohol. The condition related to the potential for a substance abuse evaluation should be affirmed.

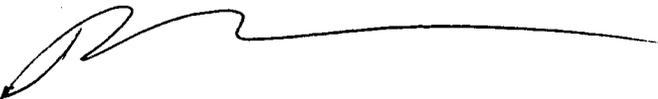
DATED this \_\_\_\_\_ day of September, 2010.

Respectfully submitted,

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<sup>4</sup> In this respect, the community custody condition at issue here is arguably superfluous.

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