

NO. 68503-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE REYES,

Appellant.

REC'D
SEP 20 2012
King Co. Superior Court
Clerk's Office

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

The Honorable Regina Cahan, Judge

BRIEF OF APPELLANT

JARED B. STEED
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct during closing argument by suggesting the evidence would have supported additional criminal charges against appellant.

2. The trial court erred in denying appellant's motion for a mistrial based on prosecutorial misconduct.

Issues Pertaining to Assignments of Error

Appellant was charged with three counts of child rape for conduct allegedly occurring over two years. The trial court admitted evidence of alleged uncharged sexual acts between appellant and the complaining witness after the charging period only to assess the reasonableness of the witness' delay in reporting the charged acts. The prosecutor nevertheless suggested during closing argument that the evidence would have supported additional criminal charges.

1. Did the prosecutor's suggestion improperly appeal to the emotions of the jury, invite the jury to determine guilt based on improper grounds, undermine the limited purpose for which evidence was admitted, and create a substantial likelihood the misconduct affected the verdict?

2. Did the trial court err in denying the motion for a mistrial based on prosecutorial misconduct?

B. STATEMENT OF THE CASE

1. Trial Testimony

Rosa Melchor and her daughters, C.H. and N.H., moved to the United States from Mexico in July 2004. RP¹ 261-62, 306-08, 354. Melchor and 11-year-old N.H. met Jose Reyes while living at Melchor's aunt's house. Before long, Melchor and N.H. considered Reyes a member of the family. RP 262-68, 306-11, 355, 359. He bought N.H. candy and clothes and helped Melchor look for a job. RP 313, 667-68.

Melchor invited Reyes to move into an apartment with her in December 2004. N.H. and C.H. shared one bedroom. Reyes used a separate bedroom. Melchor and her boyfriend slept in the living room. RP 264-65, 269-70, 315, 360.

N.H. was not enrolled in school and spent the days in the apartment with Melchor and C.H. RP 663, 676, 718. Melchor noticed N.H. was quieter, wore longer clothing, and no longer used lip gloss or nail polish. RP 714. Melchor believed Reyes began paying more attention to N.H. RP 272-74.

Melchor found N.H. in Reyes' bedroom one morning around the time of her 12th birthday in January 2005. RP 274-75, 277, 325-26, 365,

¹ This brief refers to the verbatim report of proceedings as follows: RP – January 23, 25, 26, 30, 31, 2012, February 1, 2, 3, 2012, and March 9, 2012.

680-81. N.H. was clothed and standing by the bedroom door. Reyes was clothed and lying in bed. RP 275-76, 365-66, 681-82. Melchor did not see any sexual activity. RP 683. Reyes and N.H. denied anything “had happened.” RP 694. N.H. told Melchor she went into the bedroom to turn off Reyes’ television. Melchor did not believe N.H. and told her not to speak to Reyes in the future. RP 686-88. Melchor asked Reyes to move out of the apartment. RP 279, 692.

Later that day, N.H. left the apartment through her bedroom window. RP 278, 689. Melchor found N.H. sitting in Reyes’ truck. The truck was parked at the apartment. RP 280. Reyes was not in the truck. RP 281. Reyes told Melchor he was not “doing anything wrong” but that he and N.H. would always find a way to contact each other. RP 281. Reyes moved out of the apartment two weeks later. RP 692.

N.H. left the apartment again eight days later. RP 282-83. Melchor’s aunt found N.H. at the airport. N.H. stayed at Melchor’s aunt’s house for three days before leaving again. RP 284, 328.

About one month later, Melchor called police after seeing Reyes’ truck parked outside his ex-brother-in-law’s house. RP 285-87. Police found N.H. underneath a bed in the house. RP 329-31, 795-96, 800. Melchor said N.H. was dirty, poorly dressed, and wearing men’s underwear. RP 290-91. Reyes was standing next to the bed. RP 795-96.

Police allowed Reyes to leave the house after being unable to speak with him in English. RP 796-97, 800. N.H. was returned to her mother. RP 290-91.

Melchor took N.H. to the hospital that evening. RP 291-92. Pediatrician Elinor Graham conducted a "very careful" physical examination of N.H. RP 385, 391, 399. N.H. denied any sexual contact occurred between her and Reyes. RP 400, 421, 424, 436. She "insisted" her and Reyes were just friends. RP 436. Graham found no physical evidence of sexual assault or intercourse. RP 426-29, 434-36. N.H.'s pregnancy and sexually transmitted disease tests were negative. RP 434-35. Graham collected N.H.'s underwear and skin, vaginal, rectal, and oral buccal swabs. RP 403, 414-15.

N.H. returned to the apartment with Melchor. RP 293, 297, 698. Melchor saw Reyes walking around the outside of the apartment three times. RP 293. He left when Melchor saw him. RP 294-95. N.H. left the apartment two weeks later. RP 297, 698. She returned several months later but left again before returning permanently in 2008. RP 298, 346, 581, 698, 808.

N.H. acknowledged leaving the apartment two or three times because she was unhappy. RP 328, 368. N.H. believed Melchor and her father would reunite after they moved to the United States. She was angry

with Melchor for having a boyfriend. N.H. became friends with Reyes during the time she was angry with Melchor. RP 311, 316-17, 357-60, 370-71. Nothing sexual occurred between N.H. and Reyes while she lived at her mother's aunt's house. RP 314-15.

Eventually, N.H. believed Reyes was being "more than just friendly." RP 313-14. After moving to the apartment, Reyes grabbed N.H. in the kitchen, kissed her, and touched her breasts. Reyes laid N.H. down, moved her underwear aside, and put his penis inside her vagina. N.H. was not sure how long the incident lasted. RP 315-22, 361.

A second incident "happened the same as the first" while N.H. was in the bathroom. RP 324-25. N.H. was 11-years-old at the time of both incidents. RP 322-25, 364. She did not say anything to Reyes or Melchor because she was scared. RP 322. N.H. said she had intercourse with Reyes two or three times before her 12th birthday. RP 351, 364. Reyes told N.H. he had a dream where God told him they were meant to be together. RP 324. N.H. did not recall any sexual incidents between her and Reyes when she stayed at her aunt's house or Reyes' ex-brother-in-law's house. RP 314-15, 333.

N.H. left home for the last time when she was 12. RP 298, 338. She stayed in a Seattle park with Reyes for a "pretty long time," and had intercourse every other day. RP 335-38. Later, Reyes and N.H. moved to

an apartment in Everett. RP 338-40. They had intercourse almost daily.
RP 352.

N.H. became friends with Sarahi Martinez while living in Everett.
RP 340-41, 372, 509-10. N.H. told Martinez her name was "Anaigh." RP
518. She introduced Reyes as her father and told Martinez her mother
lived in Mexico. RP 344, 372, 511, 519. Eventually, N.H. told Martinez
that Reyes was her "boyfriend," and that they had intercourse for the first
time when she was 13. RP 513, 520-21, 526.

N.H. called Martinez after having an argument with Reyes. N.H.
said she no longer wanted to be with Reyes. Martinez brought N.H. to her
parent's house. Three days later, Martinez's father took N.H. to
Melchor's apartment. RP 343, 372, 514-16.

Melchor and then 15-year-old N.H. moved in August 2008. RP
345, 440-42. N.H. saw Reyes again in 2010 when he whistled at her from
the corner of her school. Reyes smiled at N.H. the following day. N.H.
and Melchor contacted police after seeing Reyes a third day. RP 346-50,
375, 441-47, 709. N.H. told Detective Michael Gordon she was 11 when
she first had intercourse with Reyes. RP 536, 559, 562, 567-68. She told
Sheriff James Schauer she was 12 when she first had intercourse with
Reyes in 2005. RP 575, 578-82.

Based on this evidence, the King County Prosecutor charged Reyes with one count of first-degree child rape for incidents allegedly occurring between November 1, 2004 and January 15, 2005. The State charged Reyes with two counts of second-degree child rape for incidents allegedly occurring between January 16, 2005 and January 15, 2006. CP 1-6, 25-26.

Based on N.H.'s allegations, police tested N.H.'s previously obtained underwear and buccal swabs. RP 469, 554-55, 732. No semen or semen protein was detected on any of N.H.'s buccal swabs. RP 479, 490, 498-99. One sperm cell was detected on the underwear. RP 488, 503-04. Forensic scientist Katherine Woodward could not say how the sperm cell got onto the underwear. RP 468, 505. DNA testing on the underwear showed one male and one female contributor. RP 736-40. Forensic scientist Lorraine Heath opined there was a one in 2.1 trillion chance that the contributors were someone other than N.H. and Reyes. RP 741-42, 763. Heath could not say how the DNA got onto the underwear. RP 767.

After hearing the above, a King County jury found Reyes' guilty as charged. CP 27-29; RP 632-35. The trial court imposed concurrent standard range indeterminate sentences of 216 months to life for the first degree child rape conviction, and 194 months to life on each second

degree child rape conviction. CP 56-66; RP 649. Reyes' timely appeals. CP 67.

2. Prosecutorial Misconduct

Before closing argument, defense counsel proposed a limiting instruction for evidence of the alleged sexual acts that occurred after the charging period. RP 532; CP 22-24. The State did not object. RP 532.

The instruction was provided to the jury as follows:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of acts of alleged sexual intercourse that occurred after January 15, 2006 and may be considered by you only for the purpose of determining the reasonableness of any delay in reporting the alleged acts of sexual intercourse. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this instruction.

CP 41 (Instruction 8).

The prosecutor began her closing argument by stating: "He couldn't stay away. He just couldn't help himself he had to come back. He had to track her down and he had to find her while she was trying to move on with her life trying to live in peace." RP 598. She continued, "What was he thinking?" Did he think that he was such a great man that he was she was just missing him so much[?]" Defense counsel's objection for "character evidence" was overruled. RP 599.

The prosecutor continued with the same theme, stating “[t]hat she was missing him so much that even though he she hadn’t tried to contact him after she left that she was going to see him and want to come back to him. His arrogance.” RP 599. Defense counsel objected to the remarks as inappropriate argument “appealing to the passion and prejudice of the jury[.]” The court sustained the objection and asked the prosecutor to “move on.” RP 599.

The prosecutor’s argument continued, and the following dialogue occurred:

Prosecutor: His choices are why we are here. His choices to come back because now [N.H.] she wanted to move on. She left him and as she told you I wanted to put those memories behind me. I wanted to go on with my life. She didn’t care about reporting this to law enforcement. She didn’t care about holding him accountable until he wouldn’t leave her alone.

Defense Counsel: Objection again Your Honor.

Court: Overruled.

Defense Counsel: She is arguing the facts that are not in evidence.

Court: Overruled.

Prosecutor: But aren’t you glad? Aren’t you glad he made that choice?

Defense Counsel: Objection again Your Honor this is totally inappropriate argument.

Court: Sustained on the “aren’t you glad.”
Let’s move on.

Prosecutor: He came back into her life and that is why you are all here.

RP 599-600.

The prosecutor continued by explaining what evidence supported each of the charged acts. RP 602-06. The prosecutor then stated, “Essentially the State could have charged him [Reyes] for every day that he had sex with [N.H.]” RP 606. Defense counsel immediately objected, stating, “The State has made its decision as to what the charges might be what the State could or couldn’t do is not relevant.” The objection was overruled. RP 606.

Defense counsel moved for a mistrial based on prosecutorial misconduct immediately after the prosecutor’s closing argument. Counsel stated the prosecutor’s comments were not supported by the evidence and “appeal[ed] to the passion and prejudice of the jury” and were “meant to inflame the jury[.]” RP 608. Counsel specifically contended the prosecutor’s reference to Reyes as “arrogant” and her “aren’t you glad” question was tantamount to asking the jury whether it was happy the State charged Reyes. RP 608-10. The prosecutor maintained the argument was

not misconduct but based on “reasonable inferences” from the evidence.
RP 609.

The trial court denied the motion, reasoning a mistrial was not warranted because it sustained the objection to the prosecutor’s “aren’t you glad” comment, and the remaining argument was not misconduct but based on reasonable inferences from the proven evidence. RP 609-10.

C. ARGUMENT

1. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT BY SUGGESTING THE EVIDENCE WOULD HAVE SUPPORTED ADDITIONAL CHARGES AGAINST REYES.

A prosecuting attorney’s misconduct during closing argument can deny an accused his right to a fair trial as guaranteed by the Sixth Amendment and Const. art. I, § 22 (amend. 10); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). Consistent with their duties, prosecutors must not urge guilty verdicts on improper grounds. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); State v. Gibson, 75 Wn.2d 174, 176, 449 P.2d 692 (1969), cert. denied, 396 U.S. 1019 (1970).

a. The Prosecutor Impermissibly Invited the Jury to Convict Reyes Based on Uncharged Crimes.

A prosecutor is forbidden from appealing to the passions of the jury and encouraging it to render a verdict based on emotion rather than properly admitted evidence. Belgarde, 110 Wn.2d at 507-08; State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). Improper appeals to passion or prejudice include arguments intended to incite feelings of fear, anger, or desire for revenge and that otherwise prevent calm and dispassionate appraisal of the evidence. State v. Elledge, 144 Wn.2d 62, 85, 26 P.3d 271 (2001). This includes comments encouraging jurors to convict based on propensity to commit the crime charged. State v. Fisher, 165 Wn.2d 727, 748-49, 202 P.3d 937 (2009). It is particularly offensive to suggest during closing argument that the defendant committed an uncharged crime. State v. Henderson, 100 Wn. App. 794, 803, 998 P.2d 907 (2000); State v. Torres, 16 Wn. App. 254, 256, 554 P.2d 1069 (1976).

The prosecutor's closing argument falls squarely into this category. Here, the prosecutor referred to uncharged incidents and suggested N.H.'s allegations would have supported many additional charges. Defense counsel's timely objection was overruled. RP 606.

There are several problems with this argument. First, it suggested the evidence supported additional charges and therefore bolstered N.H.'s credibility as to both the uncharged and charged incidents. Second, it invited the jury to find Reyes guilty because of the many times he committed similar uncharged crimes. Finally, it contravened the limited purpose for which evidence of the uncharged crimes was admitted. Such argument improperly appealed to the passion and prejudice of the jury and invited the jury to determine guilt based on improper grounds.

Similar reference to uncharged incidents and dismissed charges constituted reversible error in State v. Torres and State v. Boehning.² In Torres, the prosecutor during opening statements asked the jury to find the defendants guilty for not only the charged offenses but for other burglaries the State would prove. Torres, 16 Wn. App. at 256-57. Each defendant's motion for a new trial based on prosecutorial misconduct was denied. Torres, 16 Wn. App. at 255.

On review, the Court found the prosecutor improperly suggested one of the co-appellants was guilty of offenses not charged. Torres, 16 Wn. App. at 255. The Court reversed the convictions, concluding the

² 127 Wn. App. 511, 111 P.3d 899 (2005).

opening statements and other instances of prosecutorial misconduct deprived the defendants of a fair trial. Torres, 16 Wn. App. at 263-65.

In Boehning, the State charged three counts of first degree child rape, and alternatively, three counts of first degree child molestation. Boehning, 127 Wn. App. at 515. At the close of the evidence, the State dismissed the rape charges and amended the information to include only the three first degree molestation charges. Boehning, 127 Wn. App. at 517.

During closing argument, the prosecutor explained why the State dismissed the rape counts. The prosecutor stated the complainant was not able to “talk with this group of strangers as well as she was able to do it one-on-one in the past” and that there were “some other charges, those charges aren’t present anymore because she didn’t want to talk about this as much as she was willing to talk about it before.” Boehning, 127 Wn. App. at 519.

The prosecutor further argued the complainant was credible, her statements were consistent, and “that when she talked to people one-on-one many months ago, people who had gained some trust with her, there’s an inference that she must have said something a little bit more, because you heard about some other charges. But when talking to this group of strangers, she wasn’t comfortable enough going that far.” Boehning, 127

Wn. App. at 520. The prosecutor concluded, “[a]nd so it’s reasonable that this child might have gone a little farther in discussing what happened to her in a safer environment.” Boehning, 127 Wn. App. at 521. Boehning did not object to the prosecutor’s closing arguments. The jury convicted Boehning as charged. Boehning, 127 Wn. App. at 518.

The Court of Appeals rejected the State’s assertion that the dismissed rape charges were evidence from which reasonable inferences and arguments about the molestation charges could be made. Boehning, 127 Wn. App. at 521-22. Citing Torres, the Court found the prosecutor “impermissibly asked the jury to infer that Boehning was guilty of crimes that had been dismissed and were not supported by trial testimony.” Boehning, 127 Wn. App. at 522. The Court concluded the prosecutor’s argument regarding the dismissed counts “alone compels reversal” because it “improperly appealed to the passion and prejudice of the jury and invited the jury to determine guilt based on improper grounds.” Boehning, 127 Wn. App. at 522.

Like Torres and Boehning, here the prosecutor’s argument improperly appealed to the jury’s passion and prejudice and invited them to determine Reyes’ guilt based on improper grounds. The argument impermissibly suggested Reyes was guilty of additional uncharged counts of child rape. Such argument improperly inferred that N.H.’s allegations

regarding the uncharged acts were credible and invited the jury to infer that Reyes' participation in those acts made it more likely he committed the charged crimes. Like Boehning, this misconduct should compel reversal.

Furthermore, the prosecutor's comments contravened the trial court's limiting instruction. The other acts evidence was introduced for the limited purpose of determining N.H.'s reasonableness in delaying the reporting of the charged sexual acts. CP 41 (Instruction 8). The prosecutor's suggestion that this evidence would have supported additional charges ignored the court's instruction. RP 532-33.

Fisher is instructive in this regard. Fisher was accused of sexually molesting his stepdaughter. Fisher, 165 Wn.2d at 733. Before trial, the court excluded evidence Fisher physically abused his biological child and his stepchildren unless the defense made delayed reporting an issue. Fisher, 165 Wn.2d at 734. Despite this ruling, the prosecutor brought up the past abuse, and presented a theme throughout the trial that Fisher's molestation of his stepdaughter was consistent with his history. Fisher, 165 Wn.2d at 734-37, 748. Defense counsel did not request, and the trial court did not provide, a limiting instruction for this evidence. Fisher, 165 Wn.2d at 734.

Defense counsel did note a “standing objection” to the prosecutor’s comments during closing argument that the evidence of alleged physical abuse proved Fisher’s propensity to sexually abuse his stepdaughter. Fisher, 165 Wn.2d at 737. The prosecutor stated:

There can be no doubt that the defendant is abusive. It shows in the way the defendant deals with and has dealt with children in his life. Children are objects to be abused. Had there been one instance of the defendant being abusive, that would be a very good argument. Had he been abusive once to Tyler, once to Brett, no. It’s not once, it’s thirteen separate instances, ladies and gentlemen. Thirteen separate instances, including [the stepdaughter] and including the sexual abuse.

. . . And the defendant engaged in a repeated pattern of abuse that didn’t stop with physical abuse. It spilled right over into sexual abuse.

Fisher, 165 Wn.2d at 738.

The prosecutor then recounted the testimony describing physical abuse. Fisher, 165 Wn.2d at 738. Fisher was convicted of four counts of child molestation. Fisher, 165 Wn.2d at 733.

On appeal, Fisher argued the prosecutor committed misconduct in discussing the ER 404(b) evidence. Fisher, 165 Wn.2d at 746. The Supreme Court agreed, reasoning the evidence was admitted solely to explain the complainant’s delay in reporting, and that contrary to that limitation, the prosecutor used it as propensity evidence in closing argument. Fisher, 165 Wn.2d at 747. “Using the evidence in such a

manner after receiving a specific pretrial ruling regarding the evidence,” the Court emphasized, “clearly goes against the requirements of ER 404(b) and constitutes misconduct.” Fisher, 165 Wn.2d at 748-49. The Court concluded the misconduct denied Fisher a fair trial despite the trial court’s instruction that the attorneys’ remarks were not evidence and defense counsel’s failure to request a curative or limiting instruction. Fisher, 165 Wn.2d at 737, 749.

Like Fisher, here the prosecutor did not use evidence of uncharged acts for the limited purpose. Although there was no pre-trial ruling regarding the admissibility of the uncharged acts, defense counsel proposed the limiting instruction shortly before closing arguments specifically to prevent the acts from being used as evidence of Reyes’ propensity to sexually abuse N.H. RP 532-33. The prosecutor did not object to the limiting instruction or defense counsel’s articulated purpose for requesting it. RP 532. As in Fisher, the prosecutor’s argument constitutes misconduct because it contravened the limited purpose for which the State had agreed the jury was to consider the uncharged acts evidence.

b. The Prosecutor’s Misconduct Requires Reversal.

Here, the misconduct warrants reversal for the same reasons it did in Boehning and Fisher. Misconduct warrants reversal when it “was both

improper and prejudicial in the context of the entire record and circumstances at trial.” State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), rev. denied, 151 Wn.2d 1039 (2004). The defendant bears the burden of establishing both. Hughes, 118 Wn. App. at 727. Prejudice is established if there is a substantial likelihood the misconduct affected the jury’s verdict. Belgarde, 110 Wn.2d at 508; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

Like in Boehning, the prosecutor’s references to Reyes’ uncharged acts “alone compels reversal,” because it “improperly appealed to the passion and prejudice of the jury and invited the jury to determine guilt based on improper grounds.” Boehning, 127 Wn. App. at 522. Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). Statements made during closing argument are presumably intended to influence the jury. Reed, 102 Wn.2d at 146. Such was the case here. The prosecutor’s suggestion that Reyes’ conduct supported additional charges invited the jury to improperly convict Reyes’ based on his propensity to engage in similar uncharged acts with N.H.

Although the court gave a limiting instruction, it overruled defense counsel’s timely objection to the prosecutor’s improper use of the evidence in closing argument. This signaled to the jury that the trial court

believed the prosecutor's argument was proper. See State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006) (trial court's overruling of defense objection and failure to give curative instruction "augmented the argument's prejudicial impact by lending its imprimatur to the remarks."). See also Davenport, 100 Wn.2d at 764 (1984) (trial court's overruling of petitioner's timely objection "lent an aura of legitimacy to what was otherwise improper argument.").

In other words, the trial court signaled to the jury that the limiting instruction did not mean what it said. Even if it had, "no instruction can 'remove the prejudicial impression created by evidence that is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" State v. Babcock, 145 Wn. App. 157, 164-65, 185 P.3d 1213 (2008) (quoting State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987)) (recognizing that evidence of other sexual abuse similar to that charged is "highly prejudicial" and therefore "inherently difficult to disregard.").

There is a substantial likelihood this misconduct affected the jury's verdict given the totality of the prosecutor's other objectionable statements during closing argument. Elsewhere in the closing argument, the prosecutor questioned "what was he thinking?" and called Reyes' conduct "arrogant." The prosecutor also inferred Reyes had almost gotten away with

rape, stating N.H. “didn’t care about reporting this to law enforcement. She didn’t care about holding him accountable until he wouldn’t leave her alone.” The prosecutor then asked the jury, “but aren’t you glad? Aren’t you glad he made that choice?” in reference to Reyes’ reappearance in N.H.’s life prior to his arrest. RP 598-600.

These statements were clearly designed to appeal to the passions and emotions of the jury. Defense counsel tried to minimize the improper effect of these comments, objecting five times to the characterization of Reyes’ conduct. The objections had little effect as only the comments regarding “arrogance” and “aren’t you glad” were sustained, without an instruction to the jury to disregard the comments. RP 599-600. In the context of the argument as a whole, these prejudicial comments added to the potential for a verdict based on Reyes’ propensity to engage in similar uncharged acts with N.H. The prosecutor’s misconduct deprived Reyes of his right to a fair trial.

2. THE TRIAL COURT ERRED IN DENYING REYES’
MOTION FOR A MISTRIAL BASED ON
PROSECUTORIAL MISCONDUCT

A trial court should grant a mistrial when an irregularity is so prejudicial that it renders the trial unfair. Babcock, 145 Wn. App. at 163. Prosecutorial misconduct is a form of irregularity. Davenport, 100 Wn.2d at 762.

In determining whether an irregularity deprived the accused of a fair trial, reviewing courts consider: (1) the seriousness of the irregularity, (2) whether the challenged evidence was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard, which a jury is presumed to follow. Babcock, 145 Wn. App. at 163. The standard of review is abuse of discretion. Escalona, 49 Wn. App. at 255. Although deference is given to the trial court's denial of a mistrial motion, "[i]f 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.'" Belgarde, 110 Wn.2d at 508 (quoting Case, 49 Wn.2d at 74).

The trial court reasoned a mistrial was not warranted in Reyes' case because it sustained the objection to the prosecutor's comment "aren't you glad" and the remaining argument was based on a "reasonable inference." RP 609-10.

The court's denial of the motion on the basis that it had sustained the "aren't you glad" comment is untenable because the jury was never instructed to disregard that remark, or any other remark the court sustained. See State v. Swan, 114 Wn.2d 613, 659, 790 P.2d 610 (1990) (where trial court merely sustained an objection but did not strike the

evidence or instruct the jury to disregard it, the evidence “remained in the record for the jury’s consideration[.]”), cert. denied, 498 U.S. 1046 (1991).

The trial court’s finding that the prosecutor’s argument was based on a “reasonable inference” is likewise untenable. The prosecutor’s numerous prejudicial comments, coupled with the suggestion that Reyes’ conduct supported additional charges, invited the jury to improperly convict Reyes’ based on his propensity to engage in similar uncharged acts with N.H. Such an argument impermissibly shifted “the jury’s attention to the defendant’s propensity for criminality, the forbidden inference...” State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), rev. denied, 133 Wn.2d 1019 (1997). The court therefore erred in failing to grant a new trial.

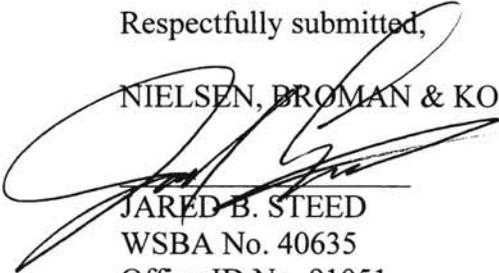
D. CONCLUSION

For the reasons discussed above, Reyes' convictions should be reversed and the case remanded.

DATED this 20th day of September, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED

WSBA No. 40635

Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 68503-1-I
)	
JOSE REYES,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF SEPTEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSE REYES
DOC NO. 355629
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF SEPTEMBER 2012.

x Patrick Mayovsky

2012 SEP 20 PM 1:01
COURT OF APPEALS
STATE OF WASHINGTON