

68503-1

68503-1

NO. 68503-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JOSE REYES,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

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**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. When a defendant claims prosecutorial misconduct, he bears the burden of establishing that the prosecuting attorney's comments were both improper and prejudicial. In closing argument, while discussing the charges and explaining the unanimity requirement, the prosecutor stated that the State could have charged Reyes for every day he had sex with the victim. Reyes' objection to this statement was overruled. Reyes moved for a mistrial based on other portions of the prosecutor's closing argument but the trial court denied his motion. Has Reyes failed to demonstrate that the prosecutor's statement was improper? Has Reyes failed to demonstrate that he was prejudiced by the prosecutor's statement?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Reyes was charged by amended information with Rape of a Child in the First Degree (count one) and two counts of Rape of a Child in the Second Degree (counts two and three). CP 25-26. All counts were committed against victim N.H. who was eleven years old during the period charged in count one and twelve years old

during the period charged in counts two and three. CP 25-26. A jury found Reyes guilty as charged. CP 27-29. The court imposed concurrent standard range indeterminate sentences on each count. CP 56-66.

## 2. SUBSTANTIVE FACTS

In July of 2004, when N.H. (D.O.B. 1/16/93), was 11 years of age, she and her family moved from Mexico to the Seattle area. RP 262-63.<sup>1</sup> N.H.'s family consisted of her mom, Rosa Melchor, and N.H.'s younger sister. RP 262. They initially moved in with Melchor's aunt, her aunt's husband (Gaspar), and the couple's children. RP 263-64. Gaspar introduced Melchor and her daughters to the defendant, Jose Reyes, when they first moved to Seattle. RP 266-67.

Shortly after moving, N.H. became angry with her mother for having a boyfriend (Ortega) as N.H. had believed that her parents would reunite when they moved to the United States. RP 328, 368. As N.H.'s relationship with her mother suffered, N.H. and Reyes became friends. RP 314-15. Reyes was in his 40s at the time. RP 420.

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<sup>1</sup> The verbatim report of proceedings consists of ten consecutively-paginated volumes that will be referred to as "RP."

After six months, Melchor decided to move out of her aunt's home and into an apartment with her daughters and Ortega. RP 268-69. Melchor and Ortega allowed Reyes to move in with them as well. RP 269. Reyes had his own room. RP 270. When they moved into the apartment, Melchor began to notice that Reyes was paying more attention to N.H. and spending more time with her. RP 272-73. N.H.'s behavior started to change such that she would not play with her younger sister as much and became withdrawn and quiet. RP 273-74.

After the move, Reyes became "more than friendly" with N.H.; he would buy her things and talk with her often. RP 313-16. While living in the apartment, Reyes had sexual intercourse with N.H. The first time, which happened prior to Christmas in 2004, N.H. was 11. RP 317, 322-23. She was standing in the kitchen when Reyes approached her and began touching her, kissing her and grabbing her breasts. RP 317-18. He pulled N.H. down to the kitchen floor and had sexual intercourse with her. RP 319-20. Sometime thereafter, Reyes told N.H. that he had had a dream in which God told him that N.H. was meant to be with him. RP 324. On another occasion, before N.H. turned 12, Reyes had sexual intercourse with N.H. on the bathroom floor. RP 324-25.

On N.H.'s twelfth birthday, Melchor woke up in the early morning hours and went into N.H.'s room to check in on her. RP 274-77, 325. She did not see N.H. in her room. RP 274. She then opened the door to Reyes' bedroom and found N.H. standing in the room. RP 275. N.H. was fully clothed and Reyes was lying in his bed. RP 275-76. The bedroom lights were off. RP 276. Melchor began to suspect something was wrong and confronted Reyes and N.H. about what they were doing. RP 277-79. Reyes claimed that he was not doing anything "bad." RP 278.

Several hours later, Melchor realized that N.H. was missing from her room; Melchor called the police and went looking for N.H. RP 279-80. After three hours, N.H. was found in Reyes' truck, which was parked on the side of the apartment. RP 280. When Melchor brought N.H. home, Reyes yelled at Melchor and claimed that he was not doing anything wrong. RP 281. When Melchor told Reyes to leave the apartment, he threatened Melchor that he would always find N.H. and that N.H. would look for him so that they would be able to get in touch. RP 281.

About a week later, N.H. ran away and went missing for approximately a month. RP 283-85. While N.H. was missing from home, she was staying with Reyes at his ex-brother-in-law's house

in the White Center neighborhood of Seattle. RP 330-31. On February 20, 2005, Melchor found Reyes' truck parked at the White Center home where she believed Reyes' ex-brother-in-law lived. RP 286-89. Melchor contacted police and reported that she believed N.H. was with Reyes. RP 287-88. King County Sheriff's deputies responded to the address in the late evening hours. RP 288, 791.

Deputy Martin Hodge contacted the resident, and was given consent to check inside the home for N.H. RP 795. Hodge found Reyes in one of the bedrooms and attempted to speak with him. RP 795. Reyes claimed that he did not speak English and walked out of the room. RP 796. Hodge looked underneath the bed in the room and found N.H. hiding. RP 796. After reuniting N.H. with Melchor, Hodge attempted to contact Reyes again but Reyes was no longer in the home. RP 797-98. Although N.H. denied any sexual contact with Reyes, police encouraged Melchor to take N.H. to Harborview Medical Center for an examination. RP 291, 421.

Melchor brought N.H. to the hospital where a sexual assault examination was performed on her. RP 391-94. N.H. returned home with Melchor but went missing again after about two weeks. RP 293. During those two weeks, Melchor saw Reyes standing

outside her apartment on two occasions, but he fled when she tried to contact him. RP 294.

After the two weeks at home, N.H. went missing from March 2005 until January 2006, when she was found by law enforcement and returned home. RP 297-98. During the time she was gone, she was living with Reyes. RP 336-40. For a year, they slept in parks at night and N.H. would spend her days in the library while Reyes worked. RP 336-39. N.H. and Reyes would have sex almost every day. RP 337.

In February of 2006, N.H. went missing again and did not return home until May of 2008. RP 338, 440. During that time, N.H. and Reyes got an apartment in Everett. RP 338. They represented themselves as father and daughter. RP 340, 344. While Reyes was working, N.H. would wander around the city and ride the city bus. RP 339. On one occasion, she met a girl named Sarah Martinez. RP 340-41. Through Sarah, N.H. learned what a "normal life" was supposed to be. RP 341. N.H. eventually confided in Sarah that Reyes was not her father. RP 340-41. In May of 2008, with the assistance of Sarah and her father, N.H. returned home. RP 342, 346. In May of 2010, N.H. walked into the King County Sheriff's Office after she had seen Reyes watching her

while she and her boyfriend were walking to and from school. RP 346-49. Reyes had whistled at her and they had made eye contact. RP 346-47.

Detective Michael Gordon was assigned the case from the 2005 report of a missing child. RP 541. In 2010, based on the new incident report, Gordon submitted the 2005 sexual assault kit to the Washington State Crime Lab for DNA testing. RP 474. One sperm cell was found in N.H.'s underwear, which had been collected as a part of the sexual assault examination. RP 487-88. DNA testing revealed the presence of Reyes' DNA. RP 741-42.

C. ARGUMENT

1. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.

Reyes claims that the deputy prosecutor committed misconduct in closing argument by "inviting the jury to convict Reyes based on uncharged crimes" and that the trial court erred in denying his motion for a mistrial. Reyes' claims are without merit. He mischaracterizes the prosecutor's argument in an attempt to liken it to instances of improper appeals to the passions and prejudices of jurors. Rather, the argument was nothing more than

the prosecutor's attempt to explain the requirement that the jury be unanimous as to which acts Reyes committed. Even if the prosecutor's statement was improper, Reyes fails to demonstrate that it had a substantial likelihood of affecting the verdict.

When a defendant alleges prosecutorial misconduct, he bears the burden of establishing that the prosecuting attorney's comments were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). Allegedly improper arguments must be viewed in "the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given." State v. Gregory, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006) (quoting State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995)).

Appellate courts review trial court rulings on prosecutorial misconduct for abuse of discretion. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). Where a defendant objects or moves for mistrial on the basis of alleged prosecutorial misconduct, the appellate court gives deference to the trial court's ruling because "the trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial." State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239

(1997). Even if the defendant objected at trial, a claim of prosecutorial misconduct fails if he has not demonstrated that the misconduct had a substantial likelihood of affecting the verdict. State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009).

a. The Prosecutor's Statement Was A Proper Explanation Of The Unanimity Requirement.

Contrary to the claims made by Reyes, the prosecutor's statement, that "[e]ssentially the State could have charged him for every day he had sex with [N.H.]," made during closing argument, was not an appeal to the passions or prejudice of the jury, requesting that they convict him due to the commission of uncharged crimes.<sup>2</sup> Rather, in the context of the argument, it is clear that the prosecutor was explaining to the jury that they needed to be unanimous as to which act constituted each count where the testimony revealed that N.H. and Reyes had had sex more than ten times (although he was charged with only three counts). RP 605-06. The remarks directly preceding and following the contested statement clearly indicate that the prosecutor was

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<sup>2</sup> Reyes objected to this statement at trial but his objection was overruled.

explaining the Petrich<sup>3</sup> instructions given to the jury. See CP 46, 50.

Immediately preceding the contested statement, the prosecutor was recalling the testimony heard at trial and clarifying which acts pertained to the three charging periods. She explained that count one was charged for the time period that Reyes had sexual intercourse with N.H. while they all lived in Melchor's apartment. RP 602-04. The prosecutor then explained that, although counts two and three were charged as the same time period, the jury should find Reyes guilty in count two for the time period where N.H. was staying with Reyes at his ex-brother-in-law's house and where Reyes' semen was found in her underwear. RP 604-05. Next, the prosecutor explained the charging period for count three:

And that in SeaTac park they lived in a tent and that the defendant would have sex with her almost every day that is Count III. You only have to find and agree that one of those days occurred. Those are the allegations[,] those are the charges. Essentially the State could have charged him for everyday that he had sex with [N.H.].

RP 605-06.

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<sup>3</sup> State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

While the prosecutor was interrupted by defense counsel's objection and the trial court's overruling of the objection, she immediately continued her statements explaining that each count had multiple incidents associated with it:

But there are three counts. Count one: kitchen. You also heard that there was a bathroom incident. You have to agree that one of those things occurred[,] you don't have to agree that both of them occurred[,] that is in one of your jury instructions. Count II is the time period around the Harborview sex kit when [N.H.] had been missing as you heard in the testimony for about 15 days after she had turned 12. Count III is having sex in the park.

RP 606. Clearly, the prosecutor was explaining the unanimity requirement rather than improperly bolstering any witness's credibility or inviting the jury to convict for uncharged crimes.

Reyes attempts to liken the prosecutor's statement here to those found to be misconduct in Torres<sup>4</sup> and Boehning,<sup>5</sup> but the statement here is not remotely analogous to those made by the prosecutors in those cases. The Torres prosecutor, in opening statement, told jurors that they should convict Torres not only for the crimes for which he was charged but also for uncharged crimes. Torres, 16 Wn. App. at 256. The prosecutor's statements here did

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<sup>4</sup> State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976).

<sup>5</sup> State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005).

not make such a suggestion; rather, the prosecutor explained that the jury had to agree on which incidents constituted the crimes charged. Additionally, in Torres, the prosecutor's actions displayed an egregious pattern of misconduct not present in the current case. The Torres prosecutor described the defendants by using their ethnicity in a way that suggested she was disparaging them, and she phrased her opening in an improper way suggesting that it was testimony itself. Id. at 257-58. During the direct examination of the victim, the Torres prosecutor persistently asked leading questions despite continually sustained objections. Id. Also, in cross-examination of a defense witness, the Torres prosecutor elicited that the defendant had not testified in a pretrial hearing, which drew attention to Torres's failure to testify. Id. at 259. And then in closing, the prosecutor commented on Torres's failure to call his wife as a witness despite the existence of a marital privilege. Id. at 259-60. Moreover, in rebuttal argument, the prosecutor discussed possible punishments and made a reference to probation reports and other information that the judge would have at sentencing. Id. at 261-62. In reversing the conviction, the court noted that some of these issues, standing alone, would result in reversal and others would not, but that the acts of misconduct committed by the

prosecutor were so numerous as to “irreparably taint the proceedings.” Id. at 263. Such pervasive and improper behavior is simply not present in this case.

In Boehning, the prosecutor improperly explained to the jury why some of the charges had been dismissed at the close of the State's case. Boehning, 127 Wn. App. at 513-14. In doing so, the prosecutor communicated inadmissible evidence by claiming that the victim had provided a more extensive statement about what had happened to her than that which she testified to at trial. Id. at 519-22. The prosecutor also stated that the victim had been consistent in her reports of the crimes, despite the fact that the earlier reports were inadmissible. Id. at 522-23. In doing so the court found that the prosecutor's references to evidence outside, the record constituted flagrant misconduct and was intended to inflame the passions of the jury, because it impermissibly invited jurors to infer that Boehning was guilty of crimes that had been dismissed and which were not supported by trial testimony. Id. at 523. Conversely, the prosecutor here referred to the admitted testimony from N.H. that suggested that Reyes and N.H. had had sex numerous times during the three charging periods, and clarified that the jurors had to agree on what acts constituted each count.

Reyes attempts to suggest that other comments made by the prosecutor were improper (“what was he thinking,” “his arrogance,” and “aren’t you glad”), but cites no authority in support. See App. Br. at 20-21. Rather, he merely claims that they were “designed to appeal to the passions and emotions of the jury.” App. Br. at 21. However, the context of these comments reveals that the prosecutor was arguing that the jury could infer N.H.’s credibility based on her actions and the actions of Reyes. RP 598-99, 609-10. As the trial court properly found, the prosecutor argued, based on reasonable inferences from the evidence, that N.H.’s account of the sexual abuse was credible, in part because N.H. reported it only when Reyes tried to contact her several years later. RP 609-10. See State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991) (holding that prosecutors are granted wide latitude in closing argument to draw reasonable inferences from the evidence).

Additionally, although Reyes points out that his objections to the prosecutor’s “his arrogance” and “aren’t you glad” statements were sustained but not stricken, Reyes never moved to strike the comments. In addition, on both occasions the prosecutor’s arguments were cut off before they could fully be expressed, such

that the jury would only have the proper arguments made before and after those statements to consider for context. As the prosecutor's argument neither improperly appealed to the passions and prejudices of the jurors nor invited the jury to convict Reyes based on uncharged crimes, Reyes has failed to show that the prosecutor's statement constituted misconduct.

b. The Prosecutor Did Not Contravene The Court's Limiting Instruction.

Reyes further alleges that the contested statement made by the prosecutor contravened the trial court's limiting instruction regarding sex acts outside the charging periods (offered for the limited purpose of explaining the victim's delay in reporting). Contrary to Reyes' claim, the prosecutor never discussed sexual acts outside the charging period in her closing argument.

While the contested statement does not specify what period of time the prosecutor is referring to, the context of the statement is clear. As she specifically referenced the charging period alleged in count three immediately before this statement (RP 605-06), the "every day that he had sex with N.H." obviously was a reference to the numerous acts of sexual intercourse that occurred when Reyes

and N.H. lived together in SeaTac park. As the prosecutor was speaking about sexual acts that occurred within the charging period, the statement did not contravene the court's limiting instruction, which only applied to acts outside the charging period.

Reyes attempts to liken this case to State v. Fisher, where the prosecutor made an improper propensity argument when he argued that Fisher committed a pattern of abuse on children even before he abused the charged victim. 165 Wn.2d 727, 738, 202 P.3d 937 (2009). Fisher is inapposite, as the prosecutor here made no such propensity arguments. Because the prosecutor did not contravene the court's limiting instruction, Reyes cannot establish that the prosecutor's statements constituted misconduct.

c. Even If The Remarks Were Improper Reversal Is Not Appropriate.

Even if this Court finds that the challenged remark by the prosecutor was improper, reversal is nonetheless inappropriate because Reyes cannot establish that the trial court abused its discretion in denying his motion for a mistrial and that he suffered any prejudice from the prosecutor's remark.

An abuse of discretion exists when a trial court's ruling is manifestly unreasonable or based upon untenable grounds or reasons. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court's denial of a motion for mistrial will be given deference because "the trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial." Id. at 719.

The defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial. Id. at 718-19. Prejudice is established only if the defendant demonstrates that there is a substantial likelihood that the misconduct affected the jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Thus, even if the prosecutor commits error, a conviction will not be reversed "unless, within reasonable probabilities, the outcome of the trial could have been materially affected had the error not occurred." State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006) (citations omitted), cert. denied, 551 U.S. 1137 (2007).

At trial Reyes, through counsel, moved for a mistrial, claiming that the prosecutor was improperly appealing to the passion and prejudice of the jury by referring to the defendant's

arrogance and arguing that Reyes had tracked down N.H. RP 608. The trial court denied the motion, finding that the prosecutor did not commit misconduct. RP 609-10. The judge found that using the term "arrogant" to describe Reyes was not improper "name calling" and that the argument that Reyes had tracked down N.H. was not improper. RP 609-10. The court expressly found that the prosecutor was making reasonable arguments and inferences from the evidence introduced at trial. RP 610. In response, defense counsel referred to the prosecutor's comment "aren't you glad," and argued that the prosecutor was going to say that the jury should be glad that the State charged Reyes and brought him to trial, and that this was an improper appeal to the passions of jurors. The court found that the prosecutor had not made such an argument, that the objection had been sustained, and that the argument had been thus cut off such that there was nothing to rule on. On the whole, the court found that the prosecutor in closing argued reasonable inferences, and did not commit prosecutorial misconduct. RP 610. As Reyes has not established that the trial court's ruling was manifestly unreasonable or based on untenable grounds, he cannot prevail on appeal.

Additionally, as the contested statement was made in closing argument, and consisted of one allegedly improper comment, it is unlikely that the challenged statement had any effect on the outcome of the trial. To begin with, the trial court correctly instructed the jury that (1) the lawyers' statements are not evidence, (2) the jurors must disregard any statement or argument not supported by the evidence, (3) the jurors must not let their emotions overcome rational thought, and (4) the jurors should reach their decision based on evidence proved and not on sympathy, prejudice or personal preference. CP 33-34. The jury is presumed to follow the court's instructions. State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997). There is nothing inherent in the facts of this case or the challenged remark to overcome that presumption. Thus, it is unlikely that this isolated remark influenced the jury's decision.

Second, while Reyes, moved for a mistrial after the prosecutor's closing argument, the motion was limited to the prosecutor's references to Reyes' "arrogance," the fact that he had tracked N.H. down, and the "aren't you glad" statement. Counsel

did not argue that the prosecutor's statement that Reyes could have been charged for every day he had sex with N.H. was a basis for his mistrial motion, and she did not refer to that statement in arguing the motion. Reyes' failure to move for a mistrial based on the statement he contests on appeal indicates that he did not think that remark was prejudicial in the context of the trial. See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Finally, it should be noted that there was overwhelming evidence of the charges, such that it is unlikely that the prosecutor's isolated comment affected the verdict. While the charges were largely based on the credibility of the victim, the observations of Melchor, Deputy Hodge, and Sarah Martinez, and the presence of Reyes' sperm cell in the underwear N.H. was wearing overwhelmingly corroborated her account of sexual abuse. As the trial court did not abuse its discretion in denying Reyes' motion, and as the allegedly improper remark was not reasonably likely to affect the verdict, Reyes' prosecutorial misconduct claim fails.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Reyes' convictions.

DATED this 20 day of December, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jared B. Steed, 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. JOSE REYES, Cause No. 68503-1-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.

Eileen Miyashiro  
Name  
Done in Seattle, Washington

12/20/12  
Date