

NO. 71614-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

PAUL HOLLINGWORTH,

Appellant.

REC'D
OCT 20 2014
King County Prosecutor
Appellate Unit

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

The Honorable Elizabeth Berns, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

The prosecutor committed misconduct during the trial by showing the jurors a version of Paul Ashton Hollingworth's written statement with the handwritten word "confession" in the upper left corner. During the State's closing argument, the prosecutor also committed misconduct by inciting the jurors to base a verdict on their emotional response rather than reason. Taken alone or together, this egregious misconduct deprived Hollingworth of a fair trial. Accordingly, this court must reverse Hollingworth's convictions and remand for new trial.

B. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct by writing "confession"—thereby altering and commenting on admitted evidence—on the version of Hollingworth's statement that appeared in her PowerPoint presentation.

2. The prosecutor committed misconduct during her closing argument by suggesting jurors should base their verdict on personal offense and revulsion toward Hollingworth rather than the evidence.

Issues Pertaining to Assignments of Error

1. Did the prosecutor commit misconduct by introducing material through a PowerPoint presentation that called Hollingworth's

statement a “confession,” which did not match the version admitted as evidence?

2. Did the prosecutor commit misconduct by appealing to the passions and prejudices of the jury?

3. Did the prosecutorial misconduct, individually or collectively, result in prejudice that was substantially likely to affect the jury’s verdict?

C. STATEMENT OF THE CASE

Renton police officer Ryan Rutledge developed an online persona of 12-year-old Ashton Michaels, a fictitious seventh grader living in Renton. CP 83; RP 326. To go along with this ruse, Rutledge created the user name sounderchick12 so he could participate in Yahoo chat rooms. CP 83; RP 335.

On September 30, 2011, January 12, 2012, February 14, 2012, and February 28, 2012, Hollingworth engaged in online Yahoo chats (and on February 28, 2012, also in an MSN Live chat) with sounderchick12. CP 83; RP 333-36, 353-56, 373-74, 391, 431. During these chats, Hollingworth discussed sexually explicit matters with sounderchick12 and sent sounderchick12 pictures of himself naked. CP 83; RP 337-40, 342-52, 343, 356-57, 359-62, 375-84, 386, 392-402, 405-14, 423-31. On February 28, 2012, Hollingworth also transmitted a live video of himself using MSN Live

chat, during a portion of which Hollingworth was naked and masturbated on camera. CP 83; RP 422, 424, 428.

In response to Hollingworth's requests for photos during some of these chats, Rutledge sent Hollingworth pictures of 31-year-old Renton police officer Leann Whitney that had been "taken a few years ago," claiming the photos were 12-year-old sounderchick12/Ashton Michaels. RP 383, 399, 410, 531. Rutledge used photos of Whitney because she "appears young and she has shown interest in these investigations and wanted to assist." RP 358.

Rutledge thereafter executed search warrants to Internet service providers and found an address associated with Hollingworth. RP 455-56. On February 28, 2013, eight Renton police officers executed a search warrant at a Bremerton address; this residence resembled Hollingworth's February 28, 2012 location when he engaged in the MSN Live chat with Rutledge. RP 456-57. After two failed attempts to locate Hollingworth, the eight officers eventually found him at another Bremerton address and arrested him. RP 458, 471-72, 505. Police also seized Hollingworth's desktop computer. RP 472-73.

Based on the chats and live messenger video, the State charged Hollingworth with two counts of communicating with a minor for immoral purposes under RCW 9.38A.090(2). CP 1-2, 14-15.

After arrest, Hollingworth was taken from Bremerton to SeaTac and interrogated. RP 473-75, 507. This interview was recorded, admitted into evidence, and played for the jury. RP 474-76.

Following the police interrogation, Hollingworth wrote out a statement, which was read for the jury:

I admit to talking to someone over the Internet whom was not at the age of consent about indecent proposals. I infrequently use the Internet for lewd picture exchange and chat. I have never pursued anyone from the Internet, let alone a minor. I only chatted with them after because they kept pursuing me months later and I had forgotten who they were. I chatted with them after they said they were 13 as a joke.

I run into a lot of people that present to be someone, and I was not interested in them because of their age. I thought they were another fake, so I messed around. I have two children. I've been a youth sports official since 16 and only have the best recommendations of contact including minors or involving minors, excuse me. Everyone on the Internet says things that aren't true and I had thought this was just another.

I upon reviewing the chats were disgusted and do not carry over this attitude. I realized that getting my rocks off while chatting to anyone that would, and I have chatted with ten screens at once not caring who it was, just the interaction.

RP 480-81.

After Rutledge read this statement during his testimony, Hollingworth objected outside the presence of the jury, pointing out the version of the statement used in the State's PowerPoint presentation contained the handwritten label "confession" in the upper left corner. RP

482. Hollingworth moved to strike “confession,” arguing that the State was attempting to comment on and characterize the evidence in a self-serving manner. RP 482. The trial court granted Hollingworth’s motion to strike and instructed the jury, “The document that you viewed on the screen was intended to be a visual aid; [the statement] was the admitted evidence[;] anything inconsistent you must disregard.” RP 485-86. Consistent with its “confession” label, the State argued that the statement was a confession during its closing argument. RP 601, 607.

Hollingworth proceeded to cross-examine witnesses and argue that the statement was not a confession, and that it demonstrated that Hollingworth did not actually ever believe he was communicating with a minor. See RP 519-20, 540, 543, 547-50, 567-68, 570, 617-18.

During closing, the prosecutor argued, “I know it’s not comfortable to sit here and do it, but it’s kind of a wake-up call too just as to just how kind of sick it is it’s kind of stomach turning.” RP 605. In addition, the prosecutor invited the jurors “to decide which chats perhaps you find the most offensive and would like to have him found guilty of.” RP 597.

Following the State’s closing argument, defense counsel objected and moved for a mistrial based on the cumulative effect of prosecutorial misconduct during trial and the State’s closing argument. RP 622. The trial court denied Hollingworth’s motion. RP 625.

The jury returned guilty verdicts on both counts of communication with a minor for immoral purposes. CP 34-35. The trial court imposed concurrent low-end standard-range sentences of nine months for both counts. CP 71; RP 654. The trial court also imposed 12 months of community custody with numerous conditions. CP 71, 74-75; RP 654-55. The court authorized work release and permitted Hollingworth to move to California. CP 71, 75; RP 654-55.

Hollingworth timely appeals. CP 66-67.

D. ARGUMENT

PROSECUTORIAL MISCONDUCT DENIED HOLLINGWORTH
A FAIR TRIAL

Prosecutors have a duty to “ensure a verdict free of prejudice and based on reason.” State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984); accord State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). A prosecutor is a quasi judicial officer who possesses an independent duty to ensure a fair trial for the defendant. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). Misconduct by a prosecutor can deprive a defendant of his or her constitutional right to a fair trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). Even if there is not an objection to a prosecutor’s argument, prosecutorial misconduct requires reversal when it is so flagrant and ill intentioned that a jury

instruction cannot cure the resulting prejudice. Id. The prosecutor's multiple instances of misconduct in this case require reversal.

1. The prosecutor committed misconduct by writing "confession" on the version of Hollingworth's written statement she showed to the jury during her PowerPoint presentation

It is error to submit evidence to the jury that has not been admitted at trial. Glasmann, 175 Wn.2d at 705 (citing State v. Pete, 152 Wn.2d 546, 553-55, 98 P.3d 803 (2004)). "It is also well established that a prosecutor . . . may not express an individual opinion of the defendant's guilt, independent of the evidence actually in the case." Glasmann, 175 Wn.2d at 706-07 (collecting authorities). "[C]onsideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced." Pete, 152 Wn.2d at 555 n.4 (emphasis omitted in original) (quoting State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967)). Here, the prosecutor vitiated the verdict by including the handwritten word "confession" on the version of Hollingworth's statement she showed to the jury.

The prosecutor's PowerPoint presentation to the jury during Rutledge's testimony included a copy of Hollingworth's written statement that had been admitted into evidence as Exhibit 7. RP 475, 480-81. However, the State's PowerPoint included the handwritten label

“confession” in the upper left corner of Hollingworth’s statement, which differed from the admitted version. RP 475, 482-83.

Defense counsel objected outside the jury’s presence: “I think it’s a statement of Defendant; [the State’s] characterization is confession. It’s a statement on the evidence. I would move to strike that or block that out and I move to [dis]regard that portion of the evidence.” RP 482. Since this had already been shown to the jury, defense counsel also requested a limiting instruction, which the State agreed to and the trial court granted. RP 483-86. The trial court instructed the jury, “the document that you previously viewed on the screen was intended to be a visual aid only. Exhibit 7 is the admitted evidence and anything inconsistent, you must disregard.” RP 486.

In light of the prosecutor’s additional misconduct during her closing argument, defense counsel again objected to “confession” being written on a piece of evidence showed to the jury, and moved for a mistrial based on cumulative prosecutorial misconduct. RP 622. The trial court denied the mistrial motion, noting that the jury had been “instructed to disregard anything not supported by the evidence.” RP 625.

The prosecutor’s inclusion of the word “confession” on a piece of evidence was “calculated to influence the jury’s assessment of [Hollingworth’s] guilt and veracity.” Glasmann, 175 Wn.2d at 705. While this unadmitted evidence was not sent to the jury room, it “was made a part

of the trial by the prosecutor” during Rutledge’s testimony. Id. at 706. The prosecutor also argued to the jury in closing that Hollingworth’s statement was a confession, thereby allowing the State to gain from its misconduct. RP 601, 607.

Moreover, writing “confession” on a piece of evidence, showing it to the jury, and then arguing in closing that the statement was a confession, was improper because it expressed the prosecutor’s individual opinion on Hollingworth’s guilt. Indeed, jurors seeing the “confession” label would reasonably believe Hollingworth had confessed to committing the crime and was therefore guilty. The prosecutor’s expression of her opinion that Hollingworth had confessed was ill intentioned and flagrant misconduct.

The prosecutor’s “confession” notation on evidence also provides a reasonable ground to believe Hollingworth was prejudiced. Every juror had the opportunity to see the word “confession” on an enlarged screen as part of the State’s presentation of its case. It is highly probable, if not certain, that jurors noticed. Calling Hollingworth’s statement a confession weakened Hollingworth’s explanation of the reasons for and motivations behind making the statement; it also severely diminished Hollingworth’s argument that his statement did not qualify as a confession and that he never believed he was speaking with a minor. See RP 519-20, 540, 543, 547-50, 567-68, 570, 617-18. Labeling the statement as a confession let jurors know that the

prosecutor personally believed Hollingworth was guilty. In such circumstances, it is “establish[ed] that a prosecutor must be held to know that it is improper to present evidence that has been deliberately altered in order to influence the jury’s deliberations.” Glasmann, 175 Wn.2d at 706. The prosecutor committed egregious misconduct that deprived Hollingworth of a fair trial. This court must reverse.

2. The prosecutor committed misconduct by appealing to jurors’ emotions rather than reason

“Mere appeals to the jury’s passion or prejudice are improper.” State v. Gregory, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006). During closing, a prosecutor may make arguments “based only on probative evidence and sound reason.” Glasmann, 175 Wn.2d at 704 (quoting State v. Casteneda Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)). This is so because of the prosecutor’s quasi judicial duty to “ensure a verdict free of prejudice and based on reason.” Clafin, 38 Wn. App. at 850. The prosecutor in this case failed to comply with her duty.

During her closing, the prosecutor aligned herself with the jury, stating,

I know it’s not comfortable to sit here and do it, but it’s kind of a wake-up call too just as to just how kind of sick it is. Not in the moment, because when you’re in the moment, you’re like oh, hey, I’m just -- it’s kind of stomach turning.

RP 605. The prosecutor's rhetoric—calling this a “wake-up call” due to “just how kind of sick it is” and exclaiming that Hollingworth's conduct was “stomach turning”—was designed to prejudice the jury against Hollingworth by appealing to jurors' emotions rather than reason. Indeed, the prosecutor meant to invoke a sense of shame and disgust toward Hollingworth among the jurors, encouraging the jury to base its verdict on its feelings rather than the evidence.

Similarly, the prosecutor argued, “ultimately there are only two counts charged and five incidents to choose from, so you get to decide which chats perhaps you find the most offensive and would like to have him found guilty of.” RP 597. This argument invited the jury not to render a verdict based on whether the counts were supported by the evidence, but rather on what jurors personally found most offensive. Such an argument is improper because, again, it encourages the jury to reach a verdict based on feelings of revulsion rather than the evidence.

The prosecutor's appeals to emotion violated her quasi judicial function of impartiality because they asked the jury to base a finding of guilt on its emotional response. The prosecutor's remarks constituted misconduct.

3. Taken alone or cumulatively, the misconduct in this case prejudiced Hollingworth, denying him a fair trial

Once it is established that a prosecutor's conduct was improper, on review, the court considers its likely effect and whether instruction could have cured it. Emery, 174 Wn.2d at 762. The focus is on whether the misconduct created a "feeling of prejudice" that would prevent a fair trial. Id. "[T]he cumulative effect of repetitive prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." Glassman, 175 Wn.2d at 707 (quoting State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011)). Such is the case here.

The State altered a piece of evidence by writing the word "confession" on it and then later argued that Hollingworth's statement was a confession. Although the trial court provided a limiting instruction, this misconduct was extremely prejudicial because it directly told the jury that Hollingworth had confessed to a crime and also expressed the prosecutor's opinion on his guilt. The State also asked the jury to base its verdict on improper, emotional grounds. The prosecutor's improper comments and conduct were designed to minimize the State's burden by bolstering its own witnesses and evidence and appealing to emotion. The arguments would have had that very impact regardless of any attempted curative instruction.

Accordingly, this court should hold the prosecutor's misconduct deprived Hollingworth of a fair trial and reverse.

E. CONCLUSION

Repeated and egregious instances of prosecutorial misconduct deprived Hollingworth of his constitutional right to receive a fair trial. Hollingworth asks this court to reverse his convictions and remand for retrial.

DATED this 20th day of October, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

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

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| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| vs. |) | COA NO. 71614-0-1 |
| |) | |
| PAUL HOLLINGSWORTH, |) | |
| |) | |
| 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 OCTOBER, 2014, 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] PAUL HOLLINGSWORTH
5855 FREDRICKS ROAD
SEBASTOPOL, CA 95472

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF OCTOBER, 2014.

x Patrick Mayovsky

2014 OCT 20 11:44:19
CLERK OF COURT
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA