

COURT OF APPEALS
THURSTON COUNTY

COMPL -7 08/04/05

STATE OF WASHINGTON
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Court of Appeals NO. 38144-3-II
Thurston County No. 08-1-00267-9

STATE OF WASHINGTON,

Respondent,

vs.

ALLEN E. MORRIS

Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

I. MR. MORRIS WAS DENIED A FAIR TRIAL

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

I. REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT DENIED MR. MORRIS A FAIR TRIAL

C. STATEMENT OF THE CASE

Sixteen year-old Richeylea Morris is the step-granddaughter of Appellant, Allen Morris. RP Vol. I, p. 9-12. When she was in eighth grade, she told Erin Jones, one of her teachers (who is also her pastor's wife) that her grandfather had sexually abused her. RP Vol. I, p. 108. Richeylea was not specific about what happened and indicated that it happened back when she was in elementary school. RP Vol. I, p. 108-110. Richeylea was a part of a girls group led by Ms. Jones. RP Vol. I, p. 108. One day Ms. Jones told the group about her own experience having been sexually abused. RP Vol. I, p. 108. On the way home that day Richeylea told Ms. Jones about her grandfather molesting her. RP Vol. I, p. 108. This was about one year after the last alleged incident of sexual abuse. RP Vol. I, p. 21.

Richeylea alleged three specific incidents of touching by her grandfather. The first occurred when she was in kindergarten. RP Vol. I, p. 13. She was at her home and her grandparents were visiting. RP Vol. I,

p. 35. She went outside with her father and her grandfather was outside as well. RP Vol. I, p. 35. She was sitting on the hood of a car (she couldn't recall if it was her parents' truck or her grandparents' van) and her father walked away. RP Vol. I, p. 35. She claimed Mr. Morris then touched her under her dress in her genital area. RP Vol. I, p. 12-13. She couldn't recall what color her dress was at trial, but in a pre-trial interview she said it was blue, and she told her mother it was red. RP Vol. I, p. 12, 36-37. On another occasion Richeylea was at her grandparents' house and she went to her grandfather's work shop with him. RP Vol. I, p. 15. While there, she claimed her grandfather touched her again in her genital area. RP Vol. I, p. 15. Richeylea testified that before she reached the age of twelve, Mr. Morris touched her sexually more than ten times, but she couldn't recall a specific number of incidents. RP Vol. I, p. 15-16.

The third incident she recalled was when she was thirteen or fourteen. RP Vol. I, p. 17. Richeylea claimed that her grandfather raped her while she was visiting her grandparents. RP Vol. I, p. 17. Richeylea testified only about those three specific incidences. RP Vol. I, p. 38-40, 66-67. She couldn't be specific about any other instances, but was adamant that there were other incidents before she was twelve. RP Vol. I, p. 9-68. Richeylea could not recall if there were any other incidents of sexual touching after the age of twelve, other than the alleged rape. RP

Vol. I, p. 20. Three years passed between the alleged rape and Richeylea's report to police. RP Vol. I, p. 50. Richeylea testified that she and her parents agreed not to report the abuse because her grandmother was very ill. RP Vol. I, p. 23. Richeylea's mother said that wasn't true; the delay in reporting was because Richeylea didn't want to report it and was not because of her grandmother. RP Vol. I, p. 88-89.

Mr. Morris was charged with Count I: Child molestation in the first degree, Count II: Child molestation in the first degree, Count III: Child molestation in the second degree, Count IV: Child molestation in the second degree, and Count V: Rape of a child in the third degree. CP 3-4.

At closing argument during trial the prosecutor made the following arguments which are germane to this appeal:

What did we hear from the defendant? How does he respond to this? When Val [Richeylea's mother] calls him, and I'm sure she didn't have very many nice words for him, I can understand that, so he has his wife call back, speak to Val about what these allegations are, and instead of the defendant at that point, when he learns of those, calling his son to talk about what these allegations are, what's his reaction? He contacts a lawyer.

...

Examine how he responded when he learned of these allegations from his daughter-in-law. What did he do? How did he respond?

RP Vol. II, p. 204, 216. The prosecutor further argued:

You also heard from the defense attorney and somewhat from myself as well, that Richeylea provided numerous statements. She's been interviewed by the defense attorney, she's been interviewed by the police, she's gone through a number of—and then she's had to testify in court. Regarding the substantive portions of her testimony, the molestation, the rape, the sexual contact, the sexual intercourse, that has maintained consistency.

RP Vol. II, p. 205. The prosecutor argued:

What does Richeylea stand to gain in this case? Why would she come forward about these events? Why, as a society, do we doubt children? And the answer to those questions is still beyond me[.]

RP Vol. II, p. 214. The prosecutor, in rebuttal argument, spoke again about Mr. Morris' exercise of his right to counsel:

So he hears about allegations from his daughter-in-law, and instead of calling his son and saying, hey, I just got this upsetting phone call, what's going on? You know, I don't know. What does he do? Picks up a phone and calls a lawyer. Think in your minds, is that how you would respond if someone in your family said something to you?

RP Vol. II, p. 244. Speaking about defense counsel, Ms. Langley, the prosecutor said: "Ms. Langley throws around lies, lies, absolute lies." RP

Vol. II, p. 245. Last, the prosecutor said:

Ms. Langley wants to focus oh, well, this poor guy here. I say BS to that. I say what about this poor girl here. Where is her justice when she's been molested, when she's been raped, when she's come up and she's testified to that? Where is her justice?

RP Vol. II, p. 246.

The jury returned verdicts of guilty to counts I, II, and III. CP 22-24. The jury could not reach a decision on counts IV and V. CP 20-21.

The court declared a mistrial on those counts. RP (6-27-08), p. 7. The court imposed a sentence of life in prison on counts I and II, and a sentence of 75 months in prison on count III. CP 34. The court imposed life time community custody on counts I and II, and 36 to 48 months of community custody on count III. CP 35. The top of the community custody range on count III (48 months) exceeds the statutory maximum penalty for count III (120 months) by three months. This timely appeal followed. CP 28.

D. ARGUMENT

I. REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT DENIED MR. MORRIS A FAIR TRIAL

The prosecutor repeatedly committed misconduct when he thrice asked the jury to draw a negative inference from Mr. Morris' exercise of his right to counsel, when he argued to the jury that the alleged victim's statements to the police were consistent with her trial testimony, when he argued that society is wrong if it disbelieves children, when he called defense counsel a liar, and when he said that her argument to the jury was "BS."

"Every prosecutor is a quasi-judicial officer of the court, charged with the duty of insuring that an accused receives a fair trial." *State v. Boehning*, 127 Wn.App. 511, 518, 111 P.3d 899 (2005).

a. *exercise of right to counsel*

The prosecutor repeatedly argued to the jury that Mr. Morris' exercise of his right to counsel, after this accusation was leveled at him, was inconsistent with innocence and pointed to his guilt. This was flagrantly improper and caused enduring prejudice that a curative instruction could not have cured. "A prosecutor is prohibited from, however, from arguing unfavorable inferences from the exercise of a constitutional right and may not argue a case in a manner which would chill a defendant's exercise of such a right." *State v. Johnson*, 80 Wn.App. 337, 339-40, 908 P.2d 900 (1996), citing *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984), and *State v. Fiallo-Lopez*, 78 Wn.App. 717, 728, 899 P.2d 1294 (1995). "It is well settled that prosecutorial misconduct which is so flagrant and ill-intentioned that it could not be remedied by a curative instruction may provide grounds for reversal in the absence of an objection. *Boehning* at 903 (2005); *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

Here, appellant cannot conceive of a single legitimate reason for the State to make this argument. The sole purpose of this argument is to suggest to the jury that only a guilty person would seek legal counsel after hearing such an accusation; that speaking to a lawyer is inconsistent with innocence. The prosecutor's *motive* in making such an argument is more

obvious: The evidence against Mr. Morris was not strong. Richeylea did not tell anyone about the supposed abuse until a year after it ended. Her disclosure was initially made to a teacher she admired, who herself chose to disclose sexual abuse to a group of girls at an impressionable age. She waited a full three years to make a police report, and evidently lied about the reason for the delay (she said her parents wanted the delay because of her grandmother's health, and her mother disputed that). Further, the jury was unable to reach a verdict on counts IV and V. It is unsurprising that these are the types of cases in which prosecutor's resort to improper, inflammatory arguments that are wholly unrelated to the evidence.

b. consistency of statements

During closing argument, the prosecutor argued that Richeylea's statements at trial were consistent with her statements to the police and to defense counsel. In fact, Richeylea's statements to defense counsel were not fully consistent with her statements at trial, and her statements to the police were not admitted at trial because they were inadmissible (Richeylea was sixteen at the time). See RP Vol. I, p. 113-18. A similar situation occurred in *Boehning*, where the prosecutor referenced statements which were not admitted at trial and which were inadmissible, for the purpose of bolstering the alleged victim's credibility and masking an incredibly weak case.

“We review a prosecutor’s comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions.” *Boehning* at 519, citing *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). A prosecutor may not make statements that are unsupported by the record and which prejudice the defendant. *State v. Jones*, 71 Wn.App. 798, 808, 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018, 881 P.2d 254 (1994).

Here, Richeylea’s testimony was inconsistent with her pretrial statements at several points, and inconsistent with her mother’s testimony on the highly significant question of why she waited so long to report the alleged abuse to the police. The entire case against Mr. Morris hinged on the testimony of Richeylea. There was no corroborating evidence presented and there were no witnesses. It was improper and prejudicial for the prosecutor to argue that her trial testimony was consistent with her statements to police, particularly when coupled with the other incidents of misconduct identified herein.

c. society should believe children

When the prosecutor opined that Richeylea had no reason to fabricate this story about Mr. Morris, he crossed the line by vouching for her, and for all children, and trying to guilt the jury into convicting Mr. Morris. It is improper for a prosecutor to vouch for the credibility of a

witness, state his personal opinion about the guilt of a defendant or the justness of a cause. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); *State v. Fiallo-Lopez* at 730. Here, the prosecutor argued to the jury that children, to include Richeylea, should be believed because society has an obligation to believe them. The prosecutor essentially told the jury that he believed Richeylea, and that he would be disappointed if they didn't as well. This argument is improper and could not have been obviated with a curative instruction when coupled with the other numerous instances of prosecutorial misconduct.

d. disparaging defense counsel

In referring to defense counsel, the prosecutor said she told the jury “lies, lies, absolute lies.” The prosecutor further said “Ms. Langley wants to focus oh, well, this poor guy here. I say BS to that. I say what about this poor girl here. Where is her justice when she’s been molested, when she’s been raped, when she’s come up and she’s testified to that? Where is her justice?” These statements were outrageous. The prosecutor called defense counsel a liar and called her argument “BS.” What’s more, defense counsel never made any such statement (about Mr. Morris being a “poor guy”). It is highly improper for a prosecutor to disparage defense counsel during closing argument. *Reed* at 145-46. What’s more, it serves no legitimate purpose.

If the State's case was worthy of a guilty finding, then a prosecutor should not need to resort to outrageous and childish name-calling. That defense counsel did not object is understandable: The prosecutor jumped into the mud with a personal attack and once the jury heard it, the better course was to ignore it in the hope it would be forgotten rather than meet it with an indignant response. Responding would have carried the risk that the jury would penalize defense counsel (and her client) for engaging in a personal argument rather than focusing on the evidence. Defense counsel should not have been placed in this position in the first place. Advocating for one's client should not carry the risk of vicious name calling by someone who is a quasi-judicial officer, a government actor, and (supposedly) a fellow professional. Mr. Morris submits that these comments alone warrant reversal of his conviction in light of the inherent weakness of the case. Coupled with the other instances of prosecutorial misconduct, and the fact that the conviction was based entirely on the testimony of one witness who arguably disclosed the alleged abuse in an attention-seeking endeavor and who waited a full three years before filing a report with law enforcement, the result of this trial likely would have been different had the prosecutor refrained from flagrant, ill-intentioned and repeated misconduct. When a prosecutor makes several error, each constituting misconduct, the cumulative effect of the errors may become

“so flagrant that no instruction or series of instructions can erase it and cure the error.” *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). Mr. Morris should be granted a new trial.

E. CONCLUSION

Repeated instances of prosecutorial misconduct denied Mr. Morris a fair trial and his conviction should be reversed and remanded for a new trial.

RESPECTFULLY SUBMITTED this 5th day of May, 2009.


ANNE M. CRUSER, WSB#27944

COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON,)	Court of Appeals No. 38144-3-II
)	Thurston County No. 08-1-00267-9
Respondent,)	
)	
vs.)	AFFIDAVIT OF MAILING
)	
ALLEN E. MORRIS,)	
)	
Appellant.)	

ANNE M. CRUSER, being sworn on oath, states that on the 5th day of May 2009,
affiant placed a properly stamped envelope in the mails of the United States addressed to:

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AND

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