

COURT OF APPEALS
DIVISION II

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No. 38144-3-II

STATE OF WASHINGTON
BY *[Signature]*

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

STATE OF WASHINGTON,

Respondent,

v.

ALLEN E. MORRIS

Appellant.

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

The Honorable Gary R. Tabor, Judge
Cause No. 08-1-00267-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Were the remarks of the prosecutor proper? In the alternative, if the remarks were improper, were they improper to the level to require a new trial?

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case except where noted in the argument.

C. ARGUMENT.

1. The Prosecutor's remarks were proper because they were all directly related to the evidence presented at trial and they were all in rebuttal to arguments and facts raised by the defense. In the alternative that the remarks were improper, they were not prejudicial to the level as to warrant a new trial. The defendant therefore waived his right to challenge the statements by failing to object at trial.

There are four separate allegations of prosecutorial misconduct on appeal in this case. The State maintains that all comments made by the prosecutor were proper because they all directly related to the properly-admitted evidence and were intended to rebut defense arguments against the credibility of the State's witnesses.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating the prosecutor's remarks or conduct was improper. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239

(1997), cert. denied, 523 U.S. 1008 (1998). Counsel are prohibited from intentionally arguing facts not in evidence, but are permitted a reasonable latitude in arguing inferences from the evidence. State v. Rose, 62 Wn.2d 309, 382 P.2d 513 (1963); State v. Reeder, 46 Wn.2d 888, 285 P.2d 884 (1955). Further, a prosecutor may argue that the evidence does not support the defense theory, and may respond to defense counsel's arguments, State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990); State v. Russell, 125 Wn. 2d 24, 87, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion. State v. LaPorte, 58 Wn.2d 816, 365 P.2d 24 (1961).

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983). However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and

conclusions to be drawn from the evidence. Id., at 400. Therefore, the appellate court, when evaluating a charge of prosecutorial misconduct, must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial because there is “a substantial likelihood the misconduct affected the jury's verdict.” State v. Russell, *supra*, at 87.

In deciding whether improper conduct warrants a new trial the court considers: 1) the seriousness of the irregularity 2) whether the statement was cumulative of evidence properly admitted and 3) whether the irregularity could have been cured by an instruction. State v. Crane, 116 Wn. 2d 315, 332-33, 804 P.2d 10 (1991) (superseded on unrelated grounds by In re Pers. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002)). The trial court is in the best position to assess the impact of the irregularities. State v. Mak, 105 Wn. 2d 692, 726, 718 P. 2d 407 (1986), (overruled in part on other grounds, State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994)). The court will disturb the trial court's exercise of discretion only when no reasonable judge would have reached the same conclusion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

In this case, defense counsel did not object to any of the remarks at trial. A defendant's failure to object to a prosecutor's improper remark constitutes a waiver unless the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" that could not have been cured by an instruction to the jury. State v. Russell, *supra*, at 719; see also State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d. 577 (1991).

a. Remarks about defendant obtaining counsel.

Morris argues that the prosecutor's closing statements improperly commented on the defendant's decision to exercise his Sixth Amendment right to counsel. The challenged remarks are as follows:

What did we hear from the defendant? How did he respond to this? When Val [the victim'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 him, 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?

[Vol II RP 203-4, 216]

Morris argues these remarks intended to suggest to the jury that only a guilty person would seek legal counsel. A prosecutor is prohibited 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. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984).

The State maintains the prosecutor did not directly comment on the defendant's decision to exercise a constitutional right but that the prosecutor's comment was a tangential reference which occurred in rebuttal to defense argument.

Because the defendant retained counsel prior to arrest and prior to any contact between the defendant and law enforcement, this action can be considered analogous to the exercise of his pre-arrest, pre-Miranda Fifth Amendment right to silence.

When a prosecutor's comments affect a separate constitutional right, the remarks are subject to analysis under the standard of constitutional harmless error. State v. Contreras, 57 Wn. App. 471, 473, 788 P.2d 1114 (1990) (quoting State v. Traweek, 43 Wn. App. 99, 107-8, 715 P.2d 1148, review denied, 106 Wn.2d 1007 (1986)),

review denied, 115 Wn.2d 1014, 797 P.2d 514 (1990). Constitutional error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Jones, 71 Wn. App. 798, 812, 863 P.2d 85 (1993); State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986).

However, in deciding whether a defendant's right to silence has been violated, the Washington Supreme Court characterizes the relevant issue of analysis as "whether the prosecutor manifestly intended the remarks to be a comment on that right." State v. Gregory 158 Wn.2d at 807, quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991).

A prosecutor's statement will not be considered a comment on the right to remain silent if, standing alone, the remark is so subtle and so brief that it did not "naturally and necessarily" emphasize the defendant's testimonial silence. Id. A remark that does not amount to a comment is considered a "mere reference" to silence and is not reversible error absent a showing of prejudice. State v. Lewis, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996). By focusing largely on the purpose of the remarks, the courts distinguish between "comments" and "mere references" to a

defendant's pre-arrest right to silence. State v. Burke, 163 Wn.2d 204, 206, 181 P.3d 1 (2008).

In State v. Klok the Washington Court of Appeals Division One reasoned that "improper prosecutorial remarks can be described as 'touching on' a constitutional right, and still be curable by a proper instruction." State v. Klok, 99 Wn. App. 81, 84, 992 P.2d 1039; (2000) (quoting Belgarde, 110 Wn.2d 504, 507, 775 P.2d 174 (1988)). When the defense failed to object, as is the case here, it must be determined whether the argument was so flagrant and ill-intentioned that it resulted in an enduring prejudice that could not be obviated by a curative instruction. Stenson, *supra*, at 719.

The remarks in this case fall within the scope of "mere reference" rather than "comments" and were not so "flagrant and ill-intentioned" as to warrant the level of prejudice to warrant a new trial.

The prosecutor's remarks intended to draw the jury's attention to properly-admitted evidence in order to argue the credibility of the witnesses. In this case, the properly-admitted evidence led to conflicting testimony between the victim and the defendant, and in addition, the defense attacked the credibility of the State's witness throughout the trial. It was therefore reasonable

for the prosecutor to draw the jury's attention to the conflicting testimony and the respective credibility of the witnesses. Any mention of the defendant's constitutional right was tangential and remote to the thrust of the prosecutor's arguments. The remarks by the prosecutor therefore do not rise to the level of a "comment" on the defendant's rights.

It was the defendant who first raised the issue of contacting an attorney at trial.

Q: (Ms. Langley) When you understood what you were being accused of, what did you think?

A: I thought it was a bunch of BS, and my wife and I talked it over, and it was suggested that I get a lawyer, and someone said that there was someone in Yelm, and that's what I did. And you advised me not ---

Q: Let's not talk about what I advised you. But how did you feel, learning that your granddaughter had accused you?

A: Hurt and scared.

[Vol I RP 172]

The defendant's decision to retain counsel was therefore submitted as evidence before the court in the defendant's testimony. This evidence was included in the prosecutor's statement of the facts surrounding the victim's disclosure of sexual

abuse. This restatement of the facts was necessary to rebut the defense's attack on the delayed disclosure of the rape. The issue of delayed disclosure was raised by the defense during R.M.'s¹ testimony. Defense cross-examination of the State's witness sought to undermine R.M.'s credibility by focusing on circumstances surrounding her disclosure of sexual abuse. In cross-examination the defense focused on inconsistent statements regarding the duration between occurrence of the rape and the victim's disclosure of the rape to her teacher. [Vol I RP 53].

The prosecutor responded to this attack by restating the evidence relating to the disclosure. This description included facts relating to how and when the family decided to involve law enforcement:

. . . and she [Erin Jones] really encouraged [R. M.] to tell her family. And [R. M.] did, she told her family. And they made the decision based upon a number of factors to not report that at that time to law enforcement.

. . . So a couple years after, she tells Ms. Jones and tells her parents, then that's when they'd go to the police. What did her parents do? They said, 'You know what, you're not going to see your grandfather anymore, we'll just put a stop to that.' And they did . . . What did we hear from the defendant? How did he

¹ Because the victim is a minor, the State uses her initials in this brief.

respond to this? When Val [the victim'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 him, 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.

[Vol II RP 203-4]

The context of the trial record therefore shows the prosecutor was not intending to focus on the defendant's constitutional right. Rather, he was drawing the jury's attention to the facts previously raised by the defendant regarding the victim's disclosure of sexual abuse to her family. The tone and context of these remarks demonstrate they did not intend to inflame passion or incite prejudice. Thus any improper element of this interpretation could have been corrected by a curative instruction clarifying the trial record.

In addition, there was no objection to the prosecutor's comments at trial. The choice of defense counsel not to request a curative instruction nor ask for a mistrial is a strong indication that the remark did not seem prejudicial at the time. State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993).; see also State v. French,

101 Wn. App. 380; 4 P.3d 857; (2000); State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990).

b. Consistency of the victim's statements.

The second challenge on appeal is that during closing statements “the prosecutor argued that R. M.’s statements at trial were consistent with her statements to the police and to the defense counsel.” [Appellant’s Brief at 7]. Morris argues that “in fact, [R. M.’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.” [Appellate Brief at 7] This is not an accurate depiction of the prosecutor’s statements nor is it an accurate statement of the facts regarding the admissibility of one of Richeylea’s recorded police statements.

The trial record shows the prosecutor argued the following:

You 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. The only issue that has gotten murky is the dates.

[Vol II RP 205, emphasis added]

It is recognized by Washington courts that counsel will present competing interpretations of trial testimony. Graham, *supra*. It is not misconduct for a prosecutor to argue that the evidence does not support the defense theory. State v. Pacheco, 107 Wn.2d 59, 71, 726 P.2d 981 (1986). As these statements make clear reference to the testimony before the court, any inferences from these statements fall within the scope of allowable interpretation.

The facts described by the prosecutor as “consistent” are not the same facts described by the defense as “inconsistent.” The “inconsistencies” raised by the defense at trial are the circumstances surrounding the various sexual encounters, including the color of the victim’s dress and the dates of sexual abuse. These potential inconsistencies were raised during cross-examination of R. M., beginning at page 36, Vol I of Report of Proceedings.

By contrast, the scope of the prosecutor’s statement is extremely narrow and clearly pertains only to the sexual allegations. The inconsistencies raised by the defense are explicitly

excluded from the prosecutor's statement because the prosecutor qualifies the scope of his argument to those consistencies which are "substantive portions" of R.M.'s testimony. He then explicitly identifies the specific elements that he is referring to (molestation, rape) as consistent throughout her testimony.

The prosecutor's remarks do not explicitly mention the content of R. M.'s statements to the police or defense except to the extent the statements are brought into argument by defense counsel during cross-examination of R. M.:

Q: (Ms. Langley) But you have now talked to a lot of people about it [the sexual abuse] haven't you?

A: Family.

Q: And you've told your mom about it?

A: Yes.

Q: And you've told the police?

A: Yes

Q: And Erin Jones [the teacher]?

A: Yes.

Q: And did you tell a doctor?

A: The doctor I saw when I went and saw [Detective] Ivanovich.

Q: Okay. And you've talked to me?

A: Yes.

[Vol I RP 34]

Further, not all police statements were "inadmissible" because defense introduced R.M.'s transcribed statement to Detective Invanovich into evidence as Exhibit 1. This is done in an attempt to impeach the witness and is found on page 47-8, Volume I of the trial record. The prosecutor's remarks were made during closing arguments, after R.M.'s recorded police statement was entered into evidence by the defense.

Morris draws a parallel between the remarks of this prosecutor and the facts of State v Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005), a case that found prosecutorial misconduct based on closing arguments. "A similar situation occurred in Boehning, where the prosecutor referenced statements which were not admitted at trial and which were inadmissible. . ." [Appellate Brief at 7].

The facts of this case are clearly distinguishable from those of Boehning. First, in Boehning, the prosecutor referenced police statements by the victim that were never introduced as evidence at

trial. Second, the prosecutor drew an inference of the defendant's guilt from similar criminal charges that were previously dismissed and thus not before the court. State v Boehning, 127 Wn. App. 511; 111 P.3d 899; (2005). In Boehning, the prosecutor argued during closing statements that the victim was not able to "talk with this group of strangers [the court] *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.*" Id., at 517 (emphasis added).

In the present case, all evidence referenced by the prosecutor had been put before the court during witness testimony. All statements by the prosecutor related to the charges the defendant was facing at trial and were in direct rebuttal to a fact or an argument raised by the defense. These comments therefore fall within the scope of a reasonable inference and can be clearly distinguished from those of Boehning.

c. Comments "disparaging defense counsel".

The third argument in this appeal is that the prosecutor's closing statements included statements "disparaging defense counsel." [Appellate Brief at 9]. The appeal argues that "The prosecutor

called defense counsel a liar and called her argument 'BS.'"

[Appellate Brief at 9]. The statements in dispute are as follows:

. . . Ms. Langley throws around lies, lies, absolute lies. You saw this girl testify. You are the determiners of her credibility. And I would submit to you this girl was doing her very best to tell the truth to everything.

[Vol II RP 245]

And the second remark is placed in context:

I put forth the question, and Ms. Langley attempted to answer it. Why would – why would [R. M.] say these things if they weren't true? And her theory is that [R. M.] developed an attachment for her teacher and to get the love of her teacher, according to Ms. Langley, she fabricated this elaborate story. Unfortunately, it doesn't really fit the facts of the case

. . . The facts of this case are that this man, who describes his granddaughter as a nuisance, who wouldn't talk to his son about these charges, who responded to the allegations by not doing any of that, touching his granddaughter [R. M.] And [R. M.] talked about those things, and [R. M.] talked about that rape. And when I talked about the courage and strength of character it took to do that, now you understand a little bit. This is what a young person in our society goes through when they go through the court system.

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

[Vol II RP 245 – 246, emphasis added]

This argument is a complete mischaracterization of the prosecutor's statements. These remarks were made in rebuttal argument. They were a response to defense counsel's closing arguments that attacked the credibility of the victim. The prosecutor was in no way characterizing Ms. Langley's statements or arguments as lies, but is rather referencing the language used in defense closing statements (as in, "Ms. Langley throws around 'lies, lies, absolute lies.' ").

This interpretation is substantiated by the trial record. At closing, defense counsel repeatedly characterized R. M.'s testimony as "lies". For example, the defense responded to inconsistent testimony as to the color of the victim's dress with the argument, "So now she [the victim] doesn't know what color of dress she was wearing. A little lie? Maybe. A huge lie? I submit it is." [Vol II RP 226]. Further in her statement, the defense continued to attack the credibility of R. M. when she stated, "The prosecutor says, well, we need to believe her because why would she lie. She is lying. She's being caught in endless lies. But why would she lie?" [Vol II RP

228]. In this context it is clear the prosecutor was not intending to call defense counsel a liar.

In addition, the prosecutor did not introduce the term “BS” to the court; rather, this term was first introduced by Morris on redirect examination of the defendant.

Q: (Ms. Langley) When you understood what you were being accused of, what did you think?

A: I thought it was a bunch of BS, and my wife and I talked it over, and it was suggested that I get a lawyer . . .

[Vol I RP 172]

Once these statements are read in context, it is impossible to reasonably interpret them as directed at defense counsel. The trial court apparently did not construe these remarks to be targeted toward defense counsel, nor was there an objection made at trial.

The other challenged statements listed in the Appellate Brief were all designed to respond to defense counsel’s repeated attacks on the credibility of R. M., the State’s principal witness. Defense counsel argued throughout the trial and at closing that R.M.’s testimony was inconsistent and this was because she was lying. At

closing, the defense repeatedly characterized R. M.'s statements as "lies". For example, defense counsel attacked the credibility of R. M. when she stated, "The prosecutor says, well, we need to believe her because why would she lie. She is lying. She's being caught in endless lies. But why would she lie?" [Vol II RP 228].

The defense explained the motivation of the victim's alleged dishonesty by arguing that the victim's life circumstances, including her economic and domestic situation, were unfortunate and she sought the attention of her teacher by making allegations of sexual abuse. The defense argued that R. M.'s life was "not a nice life" . . . that they "don't even have a car" . . . "she's not popular" . . . "it's kind of a sad life." [Vol II RP 229]. The defense went on to argue:

She was lying to her aunt and uncle. It was clear she was lying . . . How can her testimony be so credible that you can believe every word? How? She has contradicted herself . . . Can we believe this girl? No, you can't believe this girl. The girl is fabricating the story.

[Vol II RP 231, 238, 241]

The defense ended her closing argument by stating:

. . . Never mind the dates that are inconsistent or the two possible dates. The rape didn't happen because it couldn't have happened. And if she'd sit here and lie to you about the rape, she'd sit here and lie to you about everything else.

[Vol II 242]

Faced with this characterization of the victim, the prosecutor asked the jury to critically examine the defense's portrayal of the victim as dishonest and disadvantaged, and instead focus on the facts as they related to the charges of rape and molestation. Given the language used in the defense's closing, the trial court could not have reasonably construed the deputy prosecutor's remarks as a personal opinion or a personal attack on the defense, unrelated to the context and the evidence before the court. The prosecutor was plainly responding to the theme of the victim's credibility and in particular, responding to the characterization of the State's evidence as "lies." Washington courts recognize that attacks by the defense on the credibility of State evidence require an appropriate rebuttal. "[T]he prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." Russell, *supra*, at 87. Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective. State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967).

d. “Vouching” for children.

The prosecutor employed several tactics in order to mitigate the attacks of defense counsel on the credibility of the State’s witness. The prosecutor asked the jury to consider the credibility of R. M. and to seriously consider if any evidence had been presented to refute her testimony beyond a reasonable doubt. The prosecutor then rebutted the allegations made by the defense as to the truthfulness of R. M.’s testimony. Finally, the prosecutor drew the jury’s attention to the defense’s closing statements and countered them with a request for the jury to consider all evidence presented at trial, including the testimony of R. M. One element of this argument was to address the young age of the victim.

What does [R. M.] stand to gain in this case? Why, as a society, do we doubt children? And the answer to those questions is still beyond me, but this young girl, there was not one reason put forth by any witness, including the defendant, of why she would say this if it were not true.

[Vol II RP 214]

Morris’s appeal challenges these statements as “vouching” for the credibility of the victim “and for all children, and trying to guilt

the jury into convicting Mr. Morris.” [Appellate Brief at 8]. He argues that it is not permissible for the prosecutor to “vouch” for the credibility of a witness, citing State v. Reed, 102 Wn. 2d 140, 145, 684 P.2d 699 (1984); State v. Fiallo-Lopez, 78 Wn. App. 717, 730, 899 P.2d 1294 (1995).

This argument overlooks the fact that current Washington law recognizes that “a prosecutor may comment on a witness's credibility so long as the remarks are based on the evidence and are not a personal opinion.” Graham, *supra*, at 427.

In this case the prosecutor was not speaking to his subjective belief in the victim’s testimony, but rather specifically and explicitly referencing the oral testimony and the witnesses presented at trial. R. M. was the State’s main witness in this case, and her testimony provided the core of evidence for the charges against Morris. It is therefore reasonable for the prosecutor to draw the jury’s attention to the testimony of R. M. and to argue for its credibility. This is in response to the defense strategy at trial, which repeatedly sought to undermine the credibility of the victim. This attack on the victim’s credibility is evident in both the testimony of the defendant and the closing statements by defense counsel. An example previously noted in this brief was during direct examination when the

defendant referred to the victim's allegations as "BS" [Vol I RP 172], and characterized the victim as "lying" at closing arguments [Vol II RP 228].

e. Even if any of the prosecutor's comments were improper, they do not require reversal.

In the alternative that this Court finds any of the prosecutor's remarks improper, none of the statements are improper to the level that would require a reversal of the defendant's conviction and remand for a new trial. Prejudice on the part of the prosecutor is established only where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn. 2d 628, 672, 904 P. 2d 245 (1995). The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks "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."

Id.

There are remarks similar in purpose and tone which were previously held by Washington Courts as improper yet not prejudicial to the level of requiring a new trial. One example of this is State v. Papadopoulos, *supra*, a consolidated appeal. Defendant

Kantas appealed a conviction for first degree armed robbery, arguing prosecutorial misconduct. At trial, defense counsel for Kantas strenuously attacked the credibility of her co-defendants, the Papadopouloses. In rebuttal, the prosecutor stated that "Patty and Theo have testified honestly before you", and, later, that "[T]he gist of what they have said has been the truth." State v. Papadopoulos, *supra*, at 400. These statements were characterized by the defendant on appeal as "vouching" for the witnesses. However, the Washington Court of Appeals, Division I, rejected this argument, concluding these comments, while improper, was not so prejudicial as to warrant a new trial. Id., at 400-1. The court stated that the entire argument "in context reveals the deputy prosecutor merely called the jury's attention to those facts and circumstances in evidence tending to support the credibility of Mr. and Mrs. Papadopoulos." Id.

The present case is similar on the facts because it is also a case where the defense sought to undermine the credibility of the State's witness. This required the prosecutor to respond by drawing the jury's attention to the trial evidence in support of R. M. The statements made by the prosecutor in this case, while they reflect a clear position as to the truthfulness of R. M.'s testimony,

are not outside the bounds of non-prejudicial conduct as illustrated by Papadopoulos.

Another similar example is State v. Graham, *supra*. In Graham, the defendant faced two counts of statutory rape and the evidence at trial consisted of two competing sets of testimony: that of the victim and that of the defendant. In closing argument, defense counsel attacked the victim's credibility, referring to her as an "admitted liar" and as a girl "who lies about everything." *Id.*, at 429. In rebuttal the prosecutor responded that the defense argument was not credible and the victim's testimony was credible. The prosecutor stated, "And in determining whether you believe her, the jury instructions tell you to think about motive. What is her motive to lie? There is none. Only the defendant has a motive to lie, ladies and gentlemen." Graham, *supra*, at 428.

On appeal the defendant contended that the prosecutor's comments during closing argument labeled him a liar, insinuated that defense counsel believed his client guilty, disparaged the right to present a defense, and demeaned the role of defense counsel. *Id.*, at 428. The Washington Court of Appeals, Division I, concluded that the State's remarks were not grounds for reversal because

they were invited or provoked by defense counsel and were in reply to his acts and statements. The Court concluded that “demonstrating that defense counsel's theory was not supported by the evidence did not disparage [the defendant]’s right to present a defense or demean defense counsel.” Graham, *supra*, at 429. The remarks in the present case were also made in reply to defense closing arguments and are no more prejudicial in purpose or in tone than those made in Graham.

Further, none of the prosecutor’s remarks in the present case are inflammatory enough to constitute prejudicial statements and thus do not warrant a new trial. This is because the threshold set by Washington courts for a new trial based on prejudicial language is distinguished by spontaneous statements unrelated to the evidence, and of an inflammatory nature intended to appeal to jurors’ subjective passions and personal prejudices.

For example, in State v. Belgarde, *supra*, the Supreme Court of Washington ordered a new trial on the basis the prosecutor’s statements could not have been neutralized by curative instruction, even if there had been an objection at trial. In Belgarde, the prosecutor described members of the American Indian Movement (AIM) as “a deadly group of madmen,” “militant,” and “butchers, that

killed indiscriminately Whites and their own.” Id., at 506-07. He asked the jury to remember the AIM’s involvement in Wounded Knee and analogized the AIM to the Irish Republican Army’s Sinn Fein and Libya’s Kadafi. Id.

The comments found by the Supreme Court to be prejudicial in Belgarde are much more inflammatory than the comments made in this case. The statements made in this case are much more similar in purpose and in tone to the remarks from Graham and Papadopoulos, none of which were found to warrant a new trial.

In addition, all of the disputed remarks were made in the larger context of a proper argument which focused on the evidence presented at trial and the law according to the court. The jury instructions directed the jury to follow the law as stated by the judge. This included the instruction not to consider any arguments by the attorneys as evidence, and “the jury is presumed to follow the court’s instructions.” State v. Swan, *supra*, 662, citing State v. Kroll, 87 Wn. 2d 829, 835, 558 P.2d 173 (1976); State v. Fondren, 41 Wn. App 17, 25, 701 P.2d 810, review denied 104 Wn.2d 1015 (1985). Jury instructions minimize any potential prejudice resulting from an improper remark. State v. Negrete, *supra*, at 66.

Because the statements were not prejudicial and defense counsel did not object at trial, the defense waived the right to challenge the statements of the prosecutor. A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so "flagrant and ill intentioned" that it causes enduring and resulting prejudice that a curative instruction could not have remedied. Russell, *supra*, at 86.

Morris states that the defense's failure to object at trial was based on the reasoning that "the better course was to ignore it [the prosecutor's statements] in the hope it would be forgotten rather than meet it with an indignant response." [Appellate Brief at 10]. Morris argues there was a fear that the defendant would be penalized by the jury for this entering into a personal argument.

This argument ignores that the right to object is the procedural mechanism by which the court addresses any statement deemed inappropriate either in the context of the trial, or in law. Often, the choice of defense counsel not to request a curative instruction nor ask for a mistrial at trial is viewed at the appellate level as a strong indication that the remark did not seem prejudicial at the time. Negrete, *supra*, at 62.

Therefore, because remarks that are improper but fail to meet the threshold of prejudicial error can only be remedied at trial through curative instructions to the jury, Morris waived the opportunity for curative instruction, regardless of his underlying rational.

Finally, because several arguments in the Appellant's Brief are clearly without merit, namely the allegations of disparagement of counsel and the statements surrounding Richeylea's admitted police statements, there cannot be an instance of cumulative error in this case.

D. CONCLUSION

The strategy of the defense in the trial, in the testimony by the defendant as well as in the cross-examination of the victim, consistently sought to undermine the credibility of the State's witness R. M.. When the prosecutor's remarks are read in the context of the trial record, it is clear that the remarks seek to draw the jury's attention to the credibility of the State's evidence and rebut the arguments of defense counsel rather than prejudice the defendant.

The prosecutor's statements at trial relied on the testimony of the victim in drawing any inferences as to the criminal act.

Further, the remarks in this case fail to meet the high threshold, as reflected in past case law, of “flagrant and ill-intentioned prejudice” sufficient to require a new trial.

The State therefore respectfully asks this court to affirm the defendant’s convictions and sentence.

Respectfully submitted this 14th of July, 2009.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

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DEPUTY
KSC

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 15th day of July, 2009, at Olympia, Washington.

Chong H. McAfee
CHONG H. MCAFEE