

NO. 46603-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL BURRIS,

Appellant.

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

The Honorable Scott Collier, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>The Alleged Crime</u>	2
2. <u>Testimony On The Impact Of The Crime And Closing Arguments</u>	6
C. <u>ARGUMENT</u>	8
1. <u>EVIDENCE OF THE EMOTIONAL IMPACT OF THE ALLEGED CRIME ON MAYA DENIED BURRIS A FAIR TRIAL.</u>	8
a. <u>The Evidence Was Inadmissible Under ER 403</u>	8
b. <u>The Prosecutor Engaged In Misconduct During Closing Argument</u>	11
2. <u>THE PROSECUTOR MISSTATED THE LEGAL STANDARD DURING CLOSING ARGUMENT.</u>	14
D. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Belgarde</u> 110 Wn.2d 504, 755 P.2d 174 (1988)	12
<u>State v. Bourgeois</u> 133 Wn.2d 389, 945 P.2d 1120 (1997)	9
<u>State v. Charlton</u> 90 Wn.2d 657, 585 P.2d 142 (1978)	12
<u>State v. Clafin</u> 38 Wn. App. 847, 690 P.2d 1186 (1984) <u>review denied</u> , 103 Wn.2d 1014 (1985)	13
<u>State v. Copeland</u> 130 Wn.2d 244, 922 P.2d 1304 (1996)	13, 15
<u>State v. Cronin</u> 142 Wn.2d 568, 14 P.3d 752 (2000)	9
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984)	14
<u>State v. Gould</u> 58 Wn. App. 175, 791 P.2d 569 (1990)	9
<u>State v. Huson</u> 73 Wn.2d 660, 440 P.2d 192 (1968) <u>cert. den.</u> 393 U.S. 1096, 89 S. Ct. 886, 21 L. Ed. 2d 787 (1969)12	12
<u>State v. Johnson</u> 90 Wn. App. 54, 950 P.2d 981 (1998)	9
<u>State v. Neal</u> 144 Wn.2d 600, 30 P.3d 1255 (2001)	11
<u>State v. Reed</u> 102 Wn.2d 140, 684 P.2d 699 (1984)	12

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Saltarelli
98 Wn.2d 358, 655 P.2d 697 (1982) 11

State v. Smith
106 Wn.2d 772, 725 P.2d 951 (1986) 10

State v. Suarez-Bravo
72 Wn. App. 359, 864 P.2d 426 (1994)..... 14, 15

State v. Wilson
144 Wn. App. 166, 181 P.3d 887 (2008)..... 10

RULES, STATUTES AND OTHER AUTHORITIES

ER 401 8

ER 402 8

ER 403 1, 8, 11

RCW 9A.44.010 14

A. ASSIGNMENTS OF ERROR

1. The trial court erred under ER 403 when it permitted the alleged victim to testify to the emotional impact of appellant's actions, including the fact she will never trust another man again.

2. The prosecutor committed misconduct during closing argument by focusing on the emotional impact of appellant's actions when urging jurors to convict.

3. The prosecutor committed misconduct during closing argument by misstating the applicable law.

Issues Pertaining to Assignments of Error

1. Appellant was charged with Voyeurism for videotaping his girlfriend while they had sex. Over a defense objection, the alleged victim was permitted to testify that she had suffered long-term psychological harm and would never again allow herself to become involved with a man. Should this evidence have been excluded under ER 403?

2. During closing argument, the prosecutor used, and exaggerated, the alleged victim's testimony concerning the permanent psychological harm she had suffered in urging jurors to convict. Does this misconduct, which played on jurors' emotions, warrant a new trial?

3. The primary disputed issue at trial was whether the alleged victim had consented to being photographed. During closing argument, the prosecutor misstated the proper legal standard, thereby making it easier for jurors to find an absence of consent. Does this additional misconduct also warrant a new trial?

B. STATEMENT OF THE CASE

1. The Alleged Crime

The Clark County Prosecutor's Office charged Samuel Burris with one count of Voyeurism (Domestic Violence), alleging that he photographed himself having sex with Jennifer Maya, his girlfriend at the time, without Maya's knowledge or permission. CP 2, 8-9.

Burris and Maya met in December 2012, became sexually active in January 2013 and, by February 2013, were dating each other exclusively. RP 194-195, 292-293. Initially, the relationship was positive, and the two moved in together along with Maya's children. RP 195-196, 230, 255, 293. The relationship subsequently soured, in part, because of Maya's frequent continued contact with her ex-husband. RP 196-197, 256-257.

On April 3, 2013, Burris sent Maya text messages containing two still images – from a video – of the two of them having sex in Maya's bedroom. RP 197-198, 206-210, 217. According to Maya,

she never consented to being filmed or photographed; nor was she ever asked to consent. RP 210. At trial, Maya testified that when she received the images, she confronted Burris and asked him why he would videotape her. RP 210. According to her, Burris responded that, had she known, she would have acted differently during sex. RP 210-211. She also testified that Burris knew she would never have given consent. RP 211.

In the few days that followed, the couple's relationship deteriorated further, with Maya accusing Burris of being disrespectful and controlling. RP 198. Things came to a head at a Buffalo Wild Wings restaurant, where Maya had gone without Burris. Burris showed up, accused Maya of flirting with another man, and the two argued publicly. RP 198-199, 258-260. Maya refused to come home, and Burris sent several insulting text messages to her. RP 200-206, 261. Maya eventually reported the sexual images to police, and Burris was arrested for suspected Voyeurism. RP 130-134, 217-218.

Burris testified and provided a very different version of events. According to Burris, he had taken many nude photos and videos of Maya, which she had always known about. RP 294. In support, the defense produced several photos of Maya – in various states of

undress.¹ RP 248-249, 294-298. Burriss also had recorded the two of them having sex on three or four occasions. RP 294. For the first several occasions, while the two were having sex, Burriss would stop, indicate he was retrieving his phone, get up, grab his phone, turn on the camera, and hold it in his hand while they continued to have sex. RP 298-300. Maya never objected. RP 300.

Maya had acted differently during sex when he held the phone in his hand. RP 300-301, 313, 323-325. Thus, Burriss took a different approach during their last recorded session, which led to the stills at issue. RP 298, 301. As before, he stopped during sex, got up, and grabbed his phone. This time, however, rather than hold the phone in hand, he positioned it on the dresser to capture them having sex before returning to bed. RP 301, 323, 328. Although Maya did not indicate at the time whether she knew the phone was recording during this last session, and he never asked for her express consent, he never tried to hide the fact he was recording and assumed she knew. RP 302, 324-327.

Burriss testified that he later sent Maya the intimate stills of the two of them because he could feel her pulling away and he wanted

¹ Maya also denied knowledge and/or consent regarding these photographs. RP 251-254.

to remind her that they had something beautiful together. RP 306-307. She did not react positively and, in fact, acted surprised at their existence. RP 311-312, 325. Things came to a head at Buffalo Wild Wings. The two had planned to have dinner and drinks together that night and then watch a movie. RP 304-306, 313. Instead, Maya left for the restaurant alone. RP 314. When Burris arrived, it seemed like Maya was flirting with another man, and she told him their relationship was over. RP 314-315. He was upset and hurt when he subsequently sent her the hateful texts. RP 315-317.

Once the relationship had ended, Burris deleted the sex videos from his phone and most of the nude photos of Maya.² RP 317-318. When Burris subsequently was arrested for suspected Voyeurism, an officer explained to him that it was Maya who was accusing him and described some of the ways in which that crime could be committed. In response, Burris indicated he should have obtained Maya's express consent on the recording, since it was now his word against hers. RP 171-175, 320-321.

² Police later confiscated Burris's phone, which did not contain any videos involving Maya. RP 153-154, 184.

2. Testimony On The Impact Of The Crime And Closing Arguments

Two additional circumstances during trial are relevant to the issues on appeal.

First, the State sought to have Maya discuss whether there was anything about the experience of being photographed without her permission “that stands out that you just cannot forget?” RP 212. The defense objected that Maya’s answer was irrelevant to the issues before the jury, inflammatory, emotional, and unduly prejudicial. RP 212-214. The objection was overruled. RP 214-215.

The following exchange then occurred:

Q: All right. So I’m just going to wrap up with: From this experience, is there anything that stands out or that you can’t forget about it?

A: I won’t forget the feeling I felt, the betrayal, the vulnerability of being vulnerable and not knowing it.

I’ve – I’m no longer confident in having a relationship with another individual, a man, because I’ve – you know, I was married for a long time and I got with Sam and I didn’t think that was possible.

I’m not going to risk having this happen again or have it being – my kids involved. I’m just – I’m not going to be involved with anybody else.

RP 219.

During closing argument, the prosecutor used this testimony to the State's advantage. While focusing on one of the photos of Maya in which she is topless, the prosecutor argued:

I would propose that this is something that you will never see again from Jennifer Maya. She will never sit there in a room topless with a significant other, comfortable. She will never again sit in a room and not question, What is somebody doing? What are they up to? She will never again sit in a room –

RP 385. Defense counsel interrupted with an objection and argued the prosecutor was attempting to inflame the jury. The court told the prosecutor to "move on." RP 385. Before doing so, however, the prosecutor added, "That's what I would argue that photo depicts. She testified the impact that this has had on her." RP 385.

The second incident of note also took place during closing arguments. Defense counsel argued that Burris did not have to seek Maya's express consent to videotape their sex during the incident in question because he knew she was consenting based on past experiences and the fact she surely saw him setting up the phone on the dresser before resuming their activities. RP 362-375, 378-381. In rebuttal, the prosecutor told jurors that consent required an "affirmative act," verbally or otherwise, on Maya's part at the time of the filming or there could be no consent. RP 382. Defense counsel

objected and argued there was no such requirement, but the court simply told jurors to rely on the jury instructions. RP 382.

Jurors convicted Burris as charged. CP 40-41. The Honorable Scott Collier imposed a standard range 180-day sentence, and Burris timely filed his Notice of Appeal. CP 46-47, 60-61.

C. ARGUMENT

1. EVIDENCE OF THE EMOTIONAL IMPACT OF THE ALLEGED CRIME ON MAYA DENIED BURRIS A FAIR TRIAL.

a. The Evidence Was Inadmissible Under ER 403

Evidence must be relevant to be admissible. ER 402. To be relevant, it must have a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401.

Even if relevant, however, evidence may be excluded where “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . or needless presentation of cumulative evidence .” ER 403. Unfair prejudice “is that which is more likely to arouse an emotional response than a rational decision by the jury,” or an undue

tendency to suggest a decision on an improper basis. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (quoting State v. Gould, 58 Wn. App. 175, 183, 791 P.2d 569 (1990)).

The trial court's balancing of probative value and prejudicial impact, and its decision to admit evidence, is reviewed for abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997); State v. Johnson, 90 Wn. App. 54, 62, 950 P.2d 981 (1998).

To convict Burris of Voyeurism, the State had to prove each of the following elements beyond a reasonable doubt:

(1) That on or between January 1, 2013 and April 5, 2013, the defendant knowingly photographed or filmed Jennifer Maya as depicted in the images sent on April 3, 2013;

(2) That the photographing or filming was for the purpose of arousing or gratifying the sexual desire of any person;

(3) That the photographing or filming was without Jennifer Maya's knowledge and consent;

(4) That Jennifer Maya was photographed or filmed in a place where she would have a reasonable expectation of privacy; and

(5) That any of these acts occurred in the State of Washington.

CP 35.

Below, the prosecutor argued that Maya's testimony that she would never forget the feelings of vulnerability and betrayal, that she was no longer confident in having a relationship with a man, and she would never again expose herself or her kids to a relationship, made it more likely that she did not know she was being filmed. RP 213-214. Under the State's theory, the alleged victim's self-assessment of the emotional impact is always relevant because it makes the fact of the crime more likely.

Even assuming some minimal relevance to this evidence, however, it is far outweighed by the danger of unfair prejudice (evoking jurors' sympathies), confusion of the issues or misleading the jury (jurors may knowingly or unknowingly permit such sympathies to impact their verdict), and its cumulative nature (Maya had already consistently denied knowledge of the photos or consent to their creation; evidence of her long-term emotional response was cumulative).

The erroneous admission of evidence requires reversal if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Wilson, 144 Wn. App. 166, 178, 181 P.3d 887 (2008) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). The

error is harmless “if the evidence is of minor significance when compared with the evidence as a whole.” Wilson, 144 Wn. App. at 166 (citing State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)).

The improper evidence was not harmless at Burris’s trial. The jury’s verdict turned on whether Maya knowingly consented to being filmed. Burris said she had. Maya said she never would. Evidence that Maya has suffered permanent emotional harm provided an inviting and heart-rending incentive to find Burris guilty. The evidence was not of minor significance and may have materially affected the outcome in an otherwise close case. Burris should receive a new trial. See State v. Saltarelli, 98 Wn.2d 358, 366-367, 655 P.2d 697 (1982) (improper admission of evidence under ER 403; reversal required).

b. The Prosecutor Engaged In Misconduct During Closing Argument

Even if this Court concludes the trial court did not commit reversible error by permitting Maya to testify to the emotional impact of the alleged conduct on her and her children, the prosecutor’s use of this testimony – divorced from the basis on which it was supposedly relevant – constitutes misconduct and

warrants a new trial.

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096, 89 S. Ct. 886, 21 L. Ed. 2d 787 (1969). A prosecutor has a special duty in trial to act impartially in the interests of justice and not as a "heated partisan." State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). Prosecutors may not urge a guilty verdict on improper grounds. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

During closing argument, rather than argue the emotional impact made it more likely Maya was telling the truth (the basis for admission), the prosecutor used Maya's testimony as a general appeal to jurors' passions by focusing on the severity of the impact itself and embellishing that impact:

I would propose that this is something that you will never see again from Jennifer Maya. She will never sit there in a room topless with a significant other, comfortable. She will never again sit in a room and not question, What is somebody doing? What are they up to? She will never again sit in a room –

RP 385. Even after a defense objection and admonishment to

“move on,” the prosecutor added, “That’s what I would argue that photo depicts. She testified the impact that this has had on her.” RP 385.

The effect of crime can be a proper topic for closing argument, but not when designed to appeal to the prejudice and passions of the jury and not when it assumes facts not in evidence. State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985).

Here, the prosecutor did not focus on the evidence based on the reason for its admission (that such an emotional reaction made it more likely she did not consent). Rather, it was discussed simply as a sympathetic ploy in the hope jurors would consider it when deliberating. (“And I just want to close with one last thought for you.”). Moreover, there was no evidence indicating that Maya would never again sit in a room with another person without questioning their motives and intentions; this was an exaggeration. The prosecutor’s argument distracted jurors from the evidence and law and appealed to their sympathies.

Prosecutorial misconduct requires a new trial where there is a substantial likelihood that the conduct affected the jury's verdict. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996);

State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994).

As already discussed, the jury's verdict came down to whether Maya knowingly consented to being filmed. The prosecutor's improper appeal to sympathy and passion made it substantially more likely jurors would side with Maya. Therefore, reversal is necessary.

2. THE PROSECUTOR MISSTATED THE LEGAL STANDARD DURING CLOSING ARGUMENT.

Prosecutors must not misstate the law or otherwise mislead the jury. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984) ("misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury.").

The primary disputed legal issue for jurors was whether Maya consented to being filmed. Jury instruction 7 provided, "Consent means that at the time of the act there are actual words or conduct indicating freely given agreement for the act."³ CP 32.

³ Instruction 7 is based on the definition of "consent" for cases involving sexual intercourse or contact. See RCW 9A.44.010(7); RP 330.

The prosecutor's closing rebuttal argument, that consent required an "affirmative act" – an example of which was express verbal permission – misstated the proper legal standard. Nowhere did instruction 7 require an affirmative act. Rather, all that was required was "words or conduct indicating" agreement to the filming. Under *that* standard, simple awareness of the camera and continued sexual conduct would suffice to indicate agreement, particularly since she had consented to being filmed before. Indeed, this was defense counsel's argument. See RP 362-375, 378-381.

As previously discussed, a new trial is required if there is a substantial likelihood the misconduct affected the jury's verdict. Copeland, 130 Wn.2d at 284; Suarez-Bravo, 72 Wn. App. at 366. That standard is met because the prosecutor's misstatement was aimed at the critical trial issue. In response to the defense objection, the court did not strike the improper argument. And, if jurors believed the prosecutor was providing them with a proper interpretation of "words or conduct" from instruction 7, they were substantially more likely to find an absence of consent based on the lack of something more affirmative from Maya. Indeed, if jurors followed the prosecutor's misinterpretation of the law, they could have believed Burris' version of events, but still convicted him.

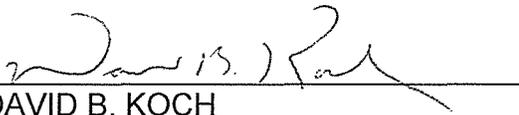
D. CONCLUSION

The court's admission of Maya's testimony that she had suffered permanent psychological harm, and the prosecutor's subsequent misuse of this evidence, denied Burris a fair trial. Moreover, the prosecutor's misstatement of the law concerning consent had this same impact. This Court should reverse and remand for a new trial.

DATED this 30th day of December, 2014.

Respectfully submitted,

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DIVISION TWO

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Respondent,)	
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v.)	COA NO. 46603-1-II
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SAMUEL BURRIS,)	
)	
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 30TH DAY OF DECEMBER 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] SAMUEL BURRIS
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SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF DECEMBER 2014.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

December 30, 2014 - 2:14 PM

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