

No. 49162-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS KIRBY,

Appellant.

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

The Honorable Gary R. Tabor, Judge
Cause No. 13-1-00143-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the prosecutor distorted or minimized the State's burden of proof during rebuttal argument.

2. Whether defense counsel provided ineffective assistance of counsel for failing to object to the prosecutor's rebuttal argument about abiding belief.

3. Whether the trial court's order that Kirby submit to plethysmograph monitoring as a condition of community custody constituted an abuse of discretion.

4. Whether this matter should be remanded to the trial court to correct the judgment and sentence to reflect the correct dates on which the crimes occurred.

5. Whether this court should impose appellate costs should the State substantially prevail on appeal.

B. STATEMENT OF THE CASE.

1. Substantive Facts.

According to Demetria Wesley, she and Douglas Kirby were in a romantic relationship for approximately 12 to 15 months. RP 225.¹ She said that he moved into her house shortly after they began dating and lived there for about a year. RP 225, 227. Kirby disputed the length and nature of their relationship; he testified at trial that they were together two or three months, RP 507, and never lived together. RP 508.

¹ All references to the verbatim report of proceedings are to the four-volume transcript dated February 27, 2014; November 30 and December 1, 2015; May 9, 10, 11, and 12, 2016; and July 16, 2016. Volume I includes the first trial, which ended in a mistrial on December 1, 2015.

At the time Wesley and Kirby were together, Wesley had four children. Cary Owens was the father of the younger two and Owens assumed a parental role with the older two, a role which continued after Wesley and Owens separated. RP 195, 219, 221, 355. The parenting plan between Owens and Wesley included all four children. RP 221.

Wesley testified that Kirby moved his rented furniture into her house and spent most nights there. RP 227. For a few months he worked at the downtown Olympia McDonald's but then stopped working. RP 227-28. Wesley was uncertain about the dates, but believed the relationship occurred in 2008 and 2009. RP 224-25. Kirby got along with three of her children but "buted heads" with her older son, J.W.² RP 228. During the 2008-2009 school year, when he was attending Madison Elementary School, J.W. had behavioral problems at school and was suspended a few times. RP 231, 233. Wesley was again hazy about the dates, but was sure that at least one of the suspensions occurred during the time she and Kirby were living together. RP 235. At some point during that school year, J.W. went to live with Owens. RP 204, 234. J.W.

² Although J.W. was eighteen years old at the time of trial, RP 353, the State is using his initials because he was a juvenile at the time the offenses were committed and he was the victim of sexual offenses.

eventually returned to live with Wesley. RP 205. When he returned, Kirby no longer lived with the family. RP 366.

In January of 2013, when he was a freshman in high school, J.W. confided to his girlfriend, by way of text messages, that Wesley had committed sexual offenses against him when he was in the fifth grade. RP 206, 436-437, 441. The girlfriend's parents checked her text messages every night, RP 310, and her father, a school teacher and coach, was a mandatory reporter of sexual offenses against children. RP 307, 311. The day following the parents' discovery of the text messages, J.W.'s girlfriend and her mother met him at River Ridge High School and as a result took him to speak to Owens at Owens's house. RP 206-210, 301, 305, 440-42. Wesley also spoke to J.W. and she called the police. RP 252-54. Detective Cori Schumacher investigated the case beginning on January 23, 2013. RP 259-60.

J.W. testified at trial that Kirby lived with his family when he was in elementary school. RP 357-58. J.W. and Kirby did not get along from the start. RP 360. J.W. said that he had numerous behavioral problems while he was in the fifth grade, including fighting, throwing chairs, and forging his mother's name to permission slips. RP 360. While this behavior began before Kirby

moved into his house, it escalated afterward. RP 361. J.W. testified that he was suspended at least ten times, but although he called them suspensions, sometimes he was just sent home, not formally suspended. RP 362, 460.

According to J.W., several incidents of sexual assault occurred while he was in the fifth grade. All of them happened at his house. RP 368. The first time Kirby was angry because J.W. had misbehaved at school and ordered J.W. to get a "switch" from a tree. He forced J.W. to disrobe and whipped him with the tree branch. RP 369. Wesley was present at the time, and when the whipping was over she directed J.W. to get into a bathtub filled with water. There were marks on J.W.'s hands and buttocks from the whipping. RP 371. Wesley was upset and left for a short time to call Owens. RP 373. Kirby then entered the bathroom and grabbed J.W.'s penis, told him he was special, and said that if J.W. screamed Kirby would do the same thing to J.W.'s siblings. RP373, 376-78. J.W. told Kirby to leave, a request which was ignored, but J.W. believed Kirby's threats. RP 377-79. The touching stopped when Wesley returned to the house. RP 379. J.W. did not tell Wesley what happened. RP 380.

The second incident occurred a matter of weeks after the first. RP 381. Kirby called J.W. into the room Kirby and Wesley shared and first tried to touch J.W. on the bed. He then took J.W. into the bathroom and had him disrobe and get into the bathtub. Kirby also took off his clothes and got into the tub. Facing each other, Kirby first kissed J.W. on the mouth and then touched his genitals. RP 383-85. Kirby forced J.W. to masturbate him and suck his penis. RP 386-88. When J.W. asked Kirby to stop, Kirby said, "Keep talking and I'm going to get your sister." Later Kirby told J.W. that if he told Ownes "it will be on your mom." RP 389. J.W. asked "Why me?" and Kirby said that it was because he was special and different from the rest of the children. RP 389.

The third incident occurred on the couch downstairs. Kirby removed J.W.'s pants and played with J.W.'s penis, then pulled down his own pants and forced J.W. to suck his penis. Dissatisfied with J.W.'s technique, Kirby then performed oral sex on J.W. Kirby stopped for reasons unclear to J.W. RP 390-95.

The fourth incident occurred during a time J.W. was suspended from school. RP 396. J.W. was sitting on the couch. RP 397. Both he and Kirby had their pants off and Kirby directed J.W. to suck his penis. This incident lasted longer than any of the

previous ones, and Kirby ended it by bringing himself to ejaculation on J.W.'s face. RP 406-08.

The fifth incident occurred soon after the previous incident and happened in J.W.'s bedroom at night when his two sisters were at home, his mother was at work, and his brother was at a friend's house. RP 416, 422. The lights in the room were off and J.W. felt Kirby get onto the bed. Kirby attempted to remove J.W.'s pants and put his fingers in J.W.'s anus, holding his other hand over J.W.'s mouth. RP 419, 421. J.W. squirmed enough to keep Kirby from succeeding, and Kirby left. RP 421, 424. When he got out into the hallway, Kirby said "If you tell your mom then I'm going to come for your little sister." J.W. believed him. RP 424.

The sixth and final incident occurred a couple of days later. RP 425. J.W. had been grounded and was in the house, the other children playing outside. RP 425. Kirby was angry with J.W. because he had washed the dishes incorrectly. Kirby approached J.W. from behind. J.W. broke a plate and when he bent over to pick up the pieces Kirby rubbed up against him. RP 425-26. Grabbing J.W. by the throat, Kirby, who was much taller than J.W., kissed his face and mouth, mussed his hair, and told J.W. he was special. RP 428. He let J.W. go, and J.W. cleaned up the mess

and sat on the couch. RP 429. Kirby forced J.W. to pull down Kirby's pants, revealing an erection, made J.W. get on his knees on the couch, and forced him to suck Kirby's penis. RP 430-31. Kirby ended the contact about fifteen minutes before Wesley returned home from work. RP 433.

All of the incidents of sexual abuse occurred over a period of approximately two months. RP 434. Shortly after the sixth incident J.W. went to live with Owens and he had no further contact with Kirby. RP 434-35.

Kirby testified, denying that he had lived with Wesley, RP 508, and denying any sexual abuse of J.W. RP 505. He called two former girlfriends and his sister to testify that he had never lived with Wesley, but none of them could establish any particular time period when he was with Wesley or had any opportunity to know where he spent nights. RP 465-475, 480-89, 490-502.

2. Procedural Facts.

Trial in this case began on November 30, 2015. It ended in a mistrial on December 1, 2015, because Wesley testified to a fact which had been suppressed by the court in an order in limine. RP 153. The retrial began on May 9, 2016. RP 164. On that date, Kirby was arraigned on a first amended information, amending the

dates of the offenses to a period from March 5, 2008, to May 22, 2009. RP 164; CP 6-7. The trial concluded on May 12, 2016, with guilty verdicts for two counts of first degree rape of a child and two counts of first degree child molestation. RP 644-45; CP 8-11.

C. ARGUMENT.

1. The prosecutor neither distorted nor minimized the State's burden of proof during closing argument.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Id. A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. "Counsel may not remain silent,

speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." Jones v. Hogan, 56 Wash. 2d 23, 27, 351 P.2d 153 (1960). The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Rebuttal argument is treated slightly differently than the initial closing argument. Even if improper, a prosecutor's remarks are not grounds for reversal when invited or provoked by defense counsel unless they were not a pertinent reply or were so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." Id., at 85.

As a general rule, remarks of the prosecutor, including such as would otherwise be improper, are not grounds for reversal where they are invited, provoked, or occasioned by defense counsel and where [the comments] are in reply to or retaliation for [defense counsel's] acts and statements, unless such remarks go beyond a pertinent reply and bring before the jury extraneous matters not in the record, or are so prejudicial that an instruction would not cure them.

State v. La Porte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961).

Kirby claims that the prosecutor, in closing argument, minimized the State's burden of proof from beyond a reasonable doubt to "mere belief in the evidence." Appellant's Opening Brief at 7. He apparently challenges the following portion of the State's rebuttal argument:

Abiding belief is the basis for a reasonable doubt. For you it may be different than the person next to you, but what it comes down to is do you believe that everything on those checklists that we talked about earlier happened, and if you have that belief, I would submit to you you are convinced beyond a reasonable doubt. And if you are convinced beyond a reasonable doubt, I'm going to ask you to do what your oath and the jury instructions say you have to do, and that's find Douglas Kirby guilty.

RP 639; Appellant's Opening Brief at 9.

While conceding that this is "technically a correct statement of the law," Appellant's Opening Brief at 9, Kirby still maintains that somehow the argument is misleading and shifts the focus from reasonable doubt to abiding belief in the truth of the charges. *Id.* While a criminal trial "may in some ways be a search for the truth," it is not the jury's job to determine the truth. Rather, the question before the jury is whether the party with the burden of proof has met that burden. It is misconduct for the prosecutor to argue to the jury that it should search for the truth, not reasonable doubt. State

v. Berube, 171 Wn. App. 103, 120-21, 286 P.3d 402 (2012); *see also* State v. Emery, 174 Wn.2d 741, 751, 278 P.3d 653 (2012).

Here, however, the prosecutor was not asking the jury to determine the ultimate truth. He was asking the jury, in the language of Jury Instruction No. 3, to decide whether or not the charges on which Kirby was being tried were true. CP 37. The prosecutor was correctly telling the jury that if it believed that the elements of the crime (the checklists) had been proven, then they were convinced beyond a reasonable doubt. That is merely a rephrasing of Jury Instruction No. 3.

Kirby argues that somehow the prosecutor told the jury that a “simple belief” is different from being convinced beyond a reasonable doubt. Appellant’s Opening Brief at 8. The logic is not entirely clear. The prosecutor never used the term “simple belief,” nor said anything other than the jury must be convinced beyond a reasonable doubt that the State had proved every element of the charges beyond a reasonable doubt. Contrary to Kirby’s argument, the State’s rebuttal argument neither diminished nor distorted the burden of proof, nor did it undermine the presumption of innocence.

Kirby also argues that the claimed misconduct was so flagrant and ill-intentioned that a curative instruction would have

been useless. But he has not even adequately explained how there was any error at all, and certainly not why, if there had been, a curative instruction would not have eliminated any potential prejudice.

Nothing the prosecutor said was incorrect, nor was it misleading. There was no error and no prejudice.

2. There was no ineffective assistance of counsel because there was no misleading argument by the prosecutor.

Kirby claims that his attorney rendered ineffective assistance because he failed to object to the prosecutor's argument about the burden of proof. Appellant's Opening Brief at 13-15. First, as discussed above, the prosecutor's argument was not misleading or incorrect. There was nothing to object to. Second, he claims ineffective assistance of counsel for failing to seek a curative instruction that he previously claimed would have been useless.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132

Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). “Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the ‘wide range’ of permissible professional legal conduct.” United States v. Necochea, 986 F.2d 1273, 1281 (1993), *citing to Strickland v. Washington*, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 090, 639 P.2d 737 (1982). There is great judicial deference to counsel’s performance and the analysis begins with a strong presumption that counsel was effective. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

It is clear from the record as a whole that Kirby received a vigorous defense. The prosecutor did not make any misstatement

to which defense counsel could object. There was no ineffective assistance of counsel.

3. Because the court ordered Kirby to participate in sexual deviancy treatment, monitoring of that treatment by plethysmograph was an appropriate condition of community custody and did not exceed the authority of the sentencing court.

As a condition of community custody, Kirby was ordered to undergo a sexual deviancy evaluation and successfully complete any recommended treatment. CP 18. He was further ordered to abide by the conditions included in Appendix H, attached to the judgment and sentence. CP 18, 23-25. One of those conditions was to “submit to polygraph and plethysmograph examinations as directed by the CCO.” CP 24. Kirby argues that this condition exceeded the authority of the sentencing court. Appellant’s Opening Brief at 17.

Conditions of community custody are within the discretion of the sentencing court and will be reversed only for manifest unreasonableness. State v. Sanchez Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). A sentencing court has authority to order the defendant to submit to plethysmograph testing, but only if the court has also ordered sexual deviance treatment which is

crime related. State v. Johnson, 184 Wn. App. 777, 780, 340 P.3d 230 (2014). It is to be used only for treatment purposes. Id. at 781.

Kirby is correct that plethysmograph testing is “extremely intrusive.” State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782, *review denied*, 177 Wn.2d 1016, 304 P.3d 114 (2013). In Land, the court struck the condition of plethysmograph testing because it was left to the discretion of the community corrections officer. Id. at 605-06. The following year, however, in Johnson, the Court of Appeals affirmed the plethysmograph condition but clarified that the community corrections office’s authority was limited to ordering the testing for treatment purposes but not for monitoring. Johnson, 184 Wn. App. at 781. Based upon that case, the condition should not be stricken from Kirby’s judgment and sentence. Also based upon that case, it must be clear to the Department of Corrections that its authority is limited to using the plethysmograph for treatment purposes.

4. The judgment and sentence does reflect incorrect dates of crime for all convictions. Remand is appropriate to correct this error.

All four counts for which Kirby was convicted were charged as occurring between March 5, 2008, and May 22, 2009. CP 6-7. The same date range was used in the to-convict instructions. CP

39-43. The judgment and sentence, however, lists the date of crime for all four charges as January 1, 2008. CP 12. This is clearly a scrivener's error and remand to correct it is appropriate.

5. The State will not seek appellate costs should it substantially prevail.

This court has been regularly denying appellate costs. The State will not request such costs should it substantially prevail.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm all of Kirby's convictions. Remand is appropriate to correct a scrivener's error in the judgment and sentence. Appellate costs will not be requested.

Respectfully submitted this 29th day of March, 2017.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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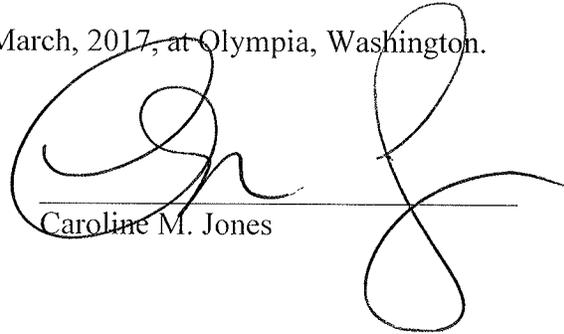
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 27 day of March, 2017, at Olympia, Washington.



Caroline M. Jones

THURSTON COUNTY PROSECUTOR
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