

FILED
Court of Appeals
Division II
State of Washington
11/29/2017 2:36 PM
No. 500701

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

STATE OF WASHINGTON, Respondent

v.

ANDREW MORRILL, Appellant

APPEAL FROM THE SUPERIOR COURT
OF JEFFERSON COUNTY
THE HONORABLE JUDGE BRIAN COUGHENOUR

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR..... 1

II. STATEMENT OF FACTS..... 2

III. ARGUMENT 13

 A. The Prosecutor Committed Misconduct Violating Mr. Morrill’s Constitutional Right To A Fair Trial. 13

 1. It Was Improper And Unfairly Prejudicial For The Prosecutor To Question Mr. Morrill About Communications Protected By The Attorney-Client Privilege. 16

 2. It Was Improper And Unfairly Prejudicial For The Prosecutor To Disregard The Court’s Pretrial Ruling And Introduce Irrelevant and Inadmissible Statements. 20

 3. It Was Improper And Unfairly Prejudicial For The Prosecutor To Disregard The Court’s Pretrial Ruling And Question Mr. Morrill About An Alleged Prior Bad Act Without Providing An Offer Of Proof And Receiving Approval From The Court..... 23

 4. It Was Improper And Unfairly Prejudicial For The Prosecutor To Ask Argumentative Questions..... 27

 5. It Was Improper And Unfairly Prejudicial For The Prosecutor To Seek Vouching Testimony From A Witness.29

 6. The Cumulative Effect Of The Prosecutor’s Improper Conduct Requires A New Trial. 32

IV. CONCLUSION..... 32

TABLE OF AUTHORITIES

Washington State Cases

<i>Crippen v. Pulliam</i> , 61 Wn.2d 725, 380 P.2d 475 (1963)	27
<i>In re Glassman</i> , 175 Wn.2d 696, 286 P.3d 673 (2012).....	14
<i>Pappas v. Holloway</i> , 114 Wn.2d 198, 787 P.2d 30 (1990).....	17
<i>Rae v. Nelson</i> , 152 Wash. 10, 277 P.75 (1929).....	27
<i>Seattle Northwest Securities Corp. v. SDG Holding Co., Inc.</i> , 61 Wn.App. 725, 812 P.2d 488 (1991)	17
<i>State v. Avendano-Lopez</i> , 79 Wn.App. 706, 904 P.2d 324 (1995) 27	
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988).....	15
<i>State v. Boehning</i> , 127 Wn.App. 511, 111 P.3d 899 (2005)	14
<i>State v. Brett</i> , 126 Wn.2d 136, 154, 892 P.2d 29 (1995)	16
<i>State v. Case</i> , 49 Wn.2d, 66, 298 P.2d 500 (1956).....	15
<i>State v. Charlton</i> , 90 Wn.2d 657, 585 P.2d 142 (1978)	32
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009)	14
<i>State v. Foxhoven</i> , 161 Wn.2d 168, 163 P.3d 786 (2007)	24
<i>State v. Furman</i> , 122 Wn.2d 440, 858 P.2d 1092 (1993).....	18
<i>State v. Henderson</i> , 100 Wn.App. 794, 998 P.2d 907 (2000)	23
<i>State v. Ish</i> , 170 Wn.2d 189, 241 P.3d 389 (2010)	15
<i>State v. Jackson</i> , 150 Wn.App. 877, 209 P.3d 553 (2009)	32
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	30
<i>State v. Padilla</i> , 69 Wn.App. 295, 846 P.2d 564 (1993).....	32
<i>State v. Rafay</i> , 168 Wn.App. 734, 285 P.3d 83 (2012)	30
<i>State v. Ramos</i> , 164 Wn.App. 327, 263 P.3d 1268 (2011)	15
<i>State v. Ransom</i> , 56 Wn.App. 712, 785 P.2d 415 (1993)	20
<i>State v. Smith</i> , 189 Wash. 422, 65 P.2d 1075 (1937)	22
<i>State v. Stith</i> , 71 Wn.App. 14, 856 P.2d 415 (1993)	22

<i>State v. Stover</i> , 67 Wn.App. 228, 834 P.2d 671 (1992).	22
<i>State v. Suarez--Bravo</i> 72 Wn.App. 359, 864 P.2d 426 (1994).....	15
<i>State v. Thach</i> , 126 Wn.App. 297, 106 P.3d 782 (2005).....	29
<i>State v. Torres</i> , 16 Wn.App. 254, 554 P.2d 1069 (1976)	15
<i>State v. Vandenberg</i> , 19 Wn.App. 182, 575 P.2d 254 (1978)(.....	17
<i>State v. Walker</i> , 164 Wn.App. 724, 265 P.3d 191 (2011)	23
<i>State v. Walker</i> , 182 Wn.2d 463, 341 P.3d 976, 984 (2015).....	14
<i>State v. Weekly</i> , 41 Wn.2d 727, 252 P.2d 246 (1952)	18
 <u>Federal Cases</u>	
<i>Dunn v. U.S.</i> , 307 F.2d 883 (5th Cir. 1962).....	22
<i>Taliaferro v. United States</i> , 47 F.2d 699 (9 th Cir., 1931).....	20
 <u>Constitutional Provisions</u>	
Const. art. 1§ 22.....	14
U.S. Const. amend. VI.....	14
 <u>Other State Cases</u>	
<i>People v. Chatman</i> , 38 Cal. 4 th 344, 133 P.3d 534 (2005).....	27
 <u>Rules</u>	
ER 403	24
ER 404(b)	24
 <u>Secondary Sources</u>	
8 J. Wigmore, Evidence, § 2327	17

I. ASSIGNMENTS OF ERROR

- A. The prosecutor's continued use of improper tactics, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 22 of the Washington Constitution, deprived Mr. Morrill of his right to a fair trial.

Issues Pertaining to Assignments of Error

1. Is it misconduct for a prosecutor to question a testifying defendant about attorney-client privileged communications?
2. Where the trial court has ruled evidence inadmissible, is it misconduct for the prosecutor to disregard the rulings and introduce irrelevant statements?
3. Is it prosecutorial misconduct to refer to an alleged prior bad act in disregard of the trial court's specific ruling requiring an offer of proof and approval before doing so?
4. Is it prosecutorial misconduct to ask unfairly prejudicial argumentative questions?
5. Is it prosecutorial misconduct to seek vouching testimony from a law enforcement witness?

6. Did the cumulative effect of this misconduct deprive Mr. Morrill of the constitutional right to a fair trial requiring reversal?

II. STATEMENT OF FACTS

Jefferson County prosecutors charged Andrew Morrill with one count of rape of a child first degree (RCW 9A.44.073) and two counts of child molestation first degree (RCW 9A.44.083), one count of communication with a minor for immoral purposes (RCW 9.68A.090(1)) and one count of indecent exposure. (RCW 9A.88.010(1)(2)(b)). Each charge included an aggravator of an ongoing pattern of sexual abuse. CP 1-3.

First Trial

The court appointed an attorney for Mr. Morrill. RP 8. While he awaited trial, he contacted the jail staff, requesting to speak with a detective about an unrelated matter. RP 315. Detective Stevenson met with him, and after giving Mr. Morrill his Miranda advisement immediately asked questions about the events leading up to his arrest. RP 300-304.

At the CrR 3.5 hearing the officer testified to the following:

I asked Morrill if he is sexually attracted to boys. Morrill stated that he is not and that Radcliffe had cut him off from

sex... Morrill went on to say Radcliffe won't even let him, Morrill, sleep in the same bed with her and that he has to sleep upstairs in a small sleeping area where they reside. RP 302.

He further testified that after Mr. Morrill reiterated he did not want to talk about the current charges, the detective stopped questioning him. However, he agreed that his notes showed he continued the questioning by asking Mr. Morrill if he could confirm everything he had already said. RP 305-308.

The court found that Mr. Morrill had counsel and although he wanted to discuss an unrelated matter, the officer directed the conversation and questioned him about the current charges. The questioning continued even after Mr. Morrill said he did not want to talk about the charges. RP 315-317. The court held the statements were inadmissible.

At a pretrial hearing, defense counsel made a motion to prohibit reference to any prior bad acts. RP 110. The state's attorney objected; she wanted to introduce a statement allegedly made by the defendant to someone else. The alleged statement implicated him as having been discharged from his employment as a teacher because he had distributed marijuana in a school. RP 111. The court granted the defense motion and stated it would

need an offer of proof, and the evidence could not be brought in without prior approval of the court. RP 112-113. The court specifically added:

So – so I’m going to grant that because there would have to be prior approval from the Court for that kind of evidence to be brought in. And I’m going to actually *add prohibit reference to* prior bad acts without prior approval of Court outside the timeframe in the Information.

RP 113 (emphasis added).

The matter proceeded to trial. RP 209. At its conclusion, the jury found Mr. Morrill guilty of a gross misdemeanor: communication with a minor for an immoral purpose. The jury did not reach consensus on the remaining counts. RP 601.

Second Trial

The same judge, Judge Coughenour, and prosecutor, Julie St. Marie, participated in the second trial. The court appointed a new defense attorney, Noah Harrison, to represent Mr. Morrill. RP 633, 688.

On retrial, the prosecutor filed a third amended information charging one count rape of a child first degree of D.F. (RCW 9A.44.073), and two counts of child molestation in the first degree of D.F. and A.F. (RCW 9A.44.083). All three charges included the aggravator of an ongoing pattern of sexual abuse (RCW

9.94A.535(3)(g)). CP 185-186. After the State rested its case in chief, the court dismissed count 3, the charge of child molestation of A.F. CP 248, RP 1057. The jury did not come to a consensus for count 1, child rape first degree, and the court dismissed it with prejudice. CP 309.

Evidence Presented At The Second Trial

Andrew Morrill (“Morrill”) lived in a small cabin-like structure with his partner, Maggie Radcliffe (“Radcliffe”). RP 859-860, 870. It consisted of one room, a long, low sleeping loft, and no bathroom. RP 871, 1092. He worked as a pianist for retirement homes. RP 877. Radcliffe worked as a nanny/caretaker for two boys, A.F. and D.F. who lived on the same property. RP 867-68. About once a month Morrill took care of the boys while Radcliffe and the boys’ mother, S.W.¹, went to a casino. RP 877.

While S.W. was at work, Radcliffe regularly transported the children to and from school, fed, bathed, and dressed them. RP 867. Radcliffe had observed the boys often touched their private parts and instructed they should do so privately. RP 869.

¹ To shield the identity of the children, the mother’s initials will also be used in this brief. No disrespect is intended.

On the morning of January 30, 2016, early in the day. RP 873. Radcliffe and S.W. left the children in Morrill's care while they went to the store. RP 862. Morrill testified he sent D.F. outside to play with other children because D.F. was talking inappropriately. Morrill locked the door. RP 1078.

Within 30 minutes the women returned home. Radcliffe found the door to the cabin locked and the curtains drawn. RP 862. She knocked, and Morrill opened the door. RP 862, 875. She saw that A.F. was fully clothed and Mr. Morrill was wearing pajama bottoms or possibly sweatpants. RP 862-863, 915. Radcliffe saw a massaging device² near A.F. RP 876. She sent A.F. to play outdoors and learned from Morrill that A.F. had been using the massager to stimulate himself³. RP 875-76.

Radcliffe yelled at Morrill and called for S.W., who had gone to put away groceries. RP 876. Radcliffe said it took S.W. about three minutes to make her way down to the cabin. RP 876. S.W. questioned Morrill, and then beat him and his car with a baseball bat she had retrieved from her car. RP 937.

² Mr. Morrill regularly used the device to relieve pain in his left shoulder, back, and neck, after playing the piano. RP 1067.

³ A.F. and D.F. had learned to use a massager on their genitals from a cousin they had lived with for a short period. RP 926, 997.

At the end of the first day of trial, the court instructed Radcliffe to return the following morning to finish her testimony⁴. RP 885-886. The following morning the prosecutor told the court she had excused the witness. RP 893. The court said it was inappropriate for the prosecutor to do so. RP 895. Defense counsel told the court he believed it was mismanagement and prosecutorial misconduct to for the prosecutor to excuse a witness who had not been subject to cross-examination. RP 894. The court agreed that if Radcliffe did not return to testify the prosecutor had created a very significant problem. RP 894. Radcliffe returned later in the day for cross-examination by defense counsel. RP 895.

During the questioning of D.F., the prosecutor asked the following:

Q...Tell me about what happened when you slept up there in the loft with Andrew?

A. A. I just don't want to say it.

Q. You don't want to say it?

A. No.

Q. Do you remember talking with Detective Stevenson about what happened up there?

⁴ Her testimony had ended with an objection, and she had not been subject to cross-examination. RP 893-894.

A. Yeah.

Q. And when you talked to Detective Stevenson did you tell Detective Stevenson?

A. Yeah.

Q. Did you tell Detective Stevenson the truth?

A. Yes.

Q. So I know it's really hard, but I need you to be brave and go ahead and tell me the truth, even though you don't want to tell me, okay? Did Andrew ever touch you in the loft upstairs?

A. Yes.....

Q. So I need for you to tell me what you told Detective Stevenson....

Qwhen you told Detective Stevenson what happened did you tell him everything that happened?

A. Yes.

Q. And you told him the whole truth?

A. Yes.

RP 993-94.

The prosecutor asked the following of the forensic interviewer, Detective Stevenson:

Q. When you asked D.F. questions about what had happened between he and the defendant, did you ask him to promise to tell the truth?

A. Yes.

Q. And did he promise to tell the truth?

A. Yes, he did.

Q. Did you ask him any questions to figure out whether D.F. understood the difference between the truth and a lie?

A. Yes. I also asked him if he planned on telling me any lies, and he said no....

RP 962.

And

Q. Based on the responses that DF gave you during this child forensic interview, did you have any reason to believe that DF was motivated to fabricate these -- what he told you?

A. No.

MR. HARRISON: Objection.

THE COURT: Nature?

MR. HARRISON: Vouching. Vouching. Part of a preliminary motion. Truthfulness.

THE COURT: Okay.

MS. ST. MARIE: The question concerned motivation. Apparent motivation.

THE COURT: Okay. At this point, I'm going to sustain that.

RP 965.

During cross-examination, the state's attorney asked the following questions of Mr. Morrill:

Q. Who told you to look at the jury when you testified. Did defense counsel tell you to do that?

MR. HARRISON: Objection, Your Honor. Relevance.

THE COURT: Sustained.

BY MS. ST. MARIE:

Q. Why is it that you would want to speak directly to the jury?

MR. HARRISON: Objection. Relevance.

THE COURT: Sustained.

RP 1091.

Q. Isn't it true that Maggie Radcliffe had cut you off sex around this time?

MR. HARRISON: Objection. Relevance.

THE COURT: Sustained.

RP 1092.

Q. You like the finer things in life, don't you?

A. I do.

Q. Classical music?

A. I love classical music.

Q. And art?

A. Yes, I do.

Q. Literature?

A. Yes, I do.

Q. Beautiful sunny days?

A. A beautiful sunrise this morning.

Q. Uh-huh. All of those things you would not be able to enjoy should you be convicted of these crimes, correct?

MR. HARRISON: Objection, Your Honor.

THE COURT: Sustained.

RP 1096.

BY MS. ST. MARIE:

Q. Fair to say that you're -- you have a very strong self-interest in your testimony today, isn't that right?

A. Yes.

Q. How do we know that you're not lying?

A. Ask your conscience.

Q. Do you think the State has an obligation to bring these kind of these charges when little children --

A. Absolutely.

Q. -- make these kind of allegations?

MR. HARRISON: Objection. Relevance.

THE COURT: Sustained.

RP 1096-1097.

By Ms. St. Marie:

Q. You knew that that's what D.F. was likely to say today, didn't you?

A. No. I don't ---

Q. You haven't reviewed the discovery in this case with your attorney?

MR. HARRISON: Objection.

THE COURT: Sustained.

RP 1106-1107.

Q. And in preparation for trial today you decided the best thing to do would be to say that D.F. was lying, isn't that right?

A. He's lying.

Q. How long did it take you to come up with that defense?

RP 1107-1108.

On re-cross-examination, after Mr. Morrill had been asked on redirect whether he had talked to the children about puberty, the prosecutor asked the following:

BY MS. ST. MARIE:

Q. Is it true that you used to be a school teacher?

A. Yes.

Q. You were discharged from your position as a school teacher, weren't you?

MR. HARRISON: Objection. Relevance.

Outside the presence of the jury, the prosecutor explained.

A witness had told her that Morrill had told him that he had been discharged from his teaching position for selling marijuana to school children⁵. RP 1111. The state's attorney told the court she wanted to use the hearsay statement for impeachment. The court did not allow a further inquiry but did not instruct the jury to disregard the prosecutor's question. RP 1111-1112.

The jury found Mr. Morrill guilty of Count 2, first-degree child molestation of D.F. RP 1190, CP 271. The jury also found the charged aggravator. CP 272.

Mr. Morrill makes this timely appeal. CP 316-322.

III. ARGUMENT

A. The Prosecutor Committed Misconduct Violating Mr. Morrill's Constitutional Right To A Fair Trial.

An accused is guaranteed the right to a fair trial by an impartial jury. U.S. Const. amend. VI; Const. art. 1§ 22. Every

⁵ In pretrial motions the court had already ruled the question of discharge from a teaching position could *not* be introduced without an offer of proof and prior approval by the court. RP 111.

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

“[A] public prosecutor ... is ... presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.”

State v. Walker, 182 Wn.2d 463, 476, 341 P.3d 976, 984 (2015), *cert. denied*, 135 S. Ct. 2844 (2015)(internal citation omitted). The prosecutor must subdue courtroom zeal for the sake of fairness to the defendant. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009).

A prosecutor’s misconduct may violate the defendant’s right to due process and a fair trial. *In re Glassman*, 175 Wn.2d 696, 286 P.3d 673 (2012). A “[f]air trial’ certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office, information from its records, and the expression of his own belief of guilt into the scales against the accused.” *State v. Case*, 49 Wn.2d, 66, 71, 298 P.2d 500 (1956).

It is inappropriate to make prejudicial allusions to matters outside the evidence. *State v. Belgarde*, 110 Wn.2d 504,506, 755 P.2d 174 (1988). Inadmissible evidence and improper arguments must be avoided. *State v. Torres*, 16 Wn.App. 254, 263, 554 P.2d 1069 (1976). It is also misconduct for a prosecutor to elicit a witness's opinion on another witness's credibility or to ask the defendant if the alleged victim is lying or has a motive to testify untruthfully. *State v. Ish*, 170 Wn.2d 189, 241 P.3d 389 (2010); *State v. Ramos*, 164 Wn.App. 327, 335, 263 P.3d 1268 (2011); *State v Suarez-Bravo* 72 Wn.App. 359, 366, 864 P.2d 426 (1994).

Here, the prosecutor questioned Mr. Morrill about (1) the existence and content of private conversations he had with his attorney regarding discovery, defense preparation, and how to behave with the jury; (2) statements the court had previously ruled as inadmissible; (3) deliberately asked Mr. Morrill about prior bad conduct in violation of a pretrial ruling; (4) posed argumentative questions by asking Mr. Morrill if he enjoyed the "finer things in life" implying he was lying to avoid prison, asked how the jury would know that he was *not* lying, and if he thought the State was obligated to bring charges when "little children" made these types of allegations; (5) sought inadmissible opinion testimony by the law

enforcement forensic interviewer regarding the credibility of D.F. Such improper conduct demands reversal of the conviction and remand for a new trial.

1. It Was Improper And Unfairly Prejudicial For The Prosecutor To Question Mr. Morrill About Communications Protected By The Attorney-Client Privilege.

To prove prosecutorial misconduct, the defendant must first establish that the question posed by the prosecutor was improper. *State v. Brett*, 126 Wn.2d 136, 175, 154, 892 P.2d 29 (1995). Cross-examining the defendant about confidential and privileged communications he had with his attorney is improper.

The purpose of the attorney-client privilege is to "encourage free and open attorney-client communication by assuring the client that his communications will be neither directly nor indirectly disclosed to others." The same privilege afforded the attorney extends to the client under the common law rule. *Seattle Northwest Securities Corp. v. SDG Holding Co., Inc.*, 61 Wn.App. 725, 812 P.2d 488 (1991); *Pappas v. Holloway*, 114 Wn.2d 198, 203, 787 P.2d 30 (1990).

“A client’s offer of his own testimony in the cause at large is *not* a waiver for the purpose of either cross-examining him to the communications or of calling the attorney to prove them. Otherwise the privilege of consultation would be exercised only at the penalty of closing the client’s own mouth on the stand.” *State v. Vandenberg*, 19 Wn.App. 182, 186, 575 P.2d 254 (1978)(quoting 8 J. Wigmore, Evidence, § 2327 at 637-638 (McNaughton Rev. 1961)). (emphasis added).

Here, the prosecutor cross-examined Mr. Morrill about the content of privileged communications:

“Who told you to look at the jury when you testified. *Did defense counsel tell you to do that?*”

After the sustained objection, it was immediately followed by:

“Why is it that you would want to speak directly to the jury?”

And later,

“You haven’t reviewed the discovery in this case with your attorney?”

The questioning by the prosecutor was more than just irrelevant; it improperly crossed the line into an inquiry of privileged and confidential conversations between client and attorney. After

the court sustained the first objection, the prosecutor deliberately asked two more questions protected by attorney-client privilege.

A defendant bears the burden of establishing both the impropriety of the prosecutor's conduct and its prejudicial effect. *State v. Furman*, 122 Wn.2d 440, 445, 858 P.2d 1092 (1993). To prevail on this claim, the defendant must show that counsel did not act in good faith and that *asking the question itself was prejudicial*. *State v. Weekly*, 41 Wn.2d 727, 728, 252 P.2d 246 (1952)(emphasis added).

In *Weekly*, the Court held that the good faith of counsel could be tested by asking (1) whether the question was based upon facts established by the record; (2) whether the question(s) were material and relevant; (3) Whether counsel had any basis for a belief that the court would overrule an objection to it; (4) whether counsel abided the ruling of the court and did not pursue the inquiry after the objection was sustained. *Weekly*, 41 Wn.2d at 728-729.

Here, the questions are each answered in the negative. The questions were not about facts established by the record. Asking if Mr. Morrill's attorney told him to look at the jury and whether he had reviewed discovery with him alluded to matters outside of the record. The answers had no bearing on his guilt or innocence.

The court sustained each of the objections on the basis of relevance. The prosecutor had no basis from which to believe the court would overrule the objections because the questions were not only irrelevant and immaterial but inquired into privileged matters. And despite the court's ruling about whether defense counsel had told Mr. Morrill to speak directly to the jury, counsel just rephrased the question and asked it again. And the court again sustained the objection. The questions were not asked in good faith.

The asking of the questions was in itself prejudicial. The argumentative questions left the jury with the distinct impression that Mr. Morrill and his attorney were attempting to manipulate them into finding him credible. The insinuation becomes apparent in the following exchange between the prosecutor and Mr. Morrill:

Q. And in preparation for trial today you decided the best thing to do would be to say that D.F. was lying, isn't that right?

A. He's lying.

Q. *How long did it take you to come up with that defense?*

RP 1107-1108.

The argumentative parting shot was not designed to elicit an answer. The remark was intended to belittle Mr. Morrill and his defense counsel and to insinuate that neither were to be trusted by

the jury. "It is improper for counsel to make unwarranted inferences or insinuations calculated to prejudice the defendant." *Taliaferro v. United States*, 47 F.2d 699 (9th Cir., 1931). The prosecutor's conduct was improper, and prejudicial. The improper questioning violated Mr. Morrill's right to a fair trial.

2. It Was Improper And Unfairly Prejudicial For The Prosecutor To Disregard The Court's Pretrial Ruling And Introduce Irrelevant and Inadmissible Statements.

Where a court makes a ruling excluding evidence, the attorneys are expected to abide by that ruling. *State v. Ransom*, 56 WnApp. 712, 713 n.1, 785 P.2d 415 (1993). Here the court held that statements Mr. Morrill made to a detective, including that Ms. Radcliffe had "cut him off from sex" were inadmissible. RP 302-317.

During cross-examination at trial, the prosecutor asked Mr. Morrill a series of questions: whether he babysat the children, played games with them, and whether he slept upstairs in the loft with D.F. RP 1092. Each of these matters had been raised in direct examination. RP 1064-65, 1070, 1072,

The prosecutor then asked Mr. Morrill, “*Isn’t it true that Maggie Radcliffe had cut you off from sex around this time?*”⁶ (emphasis added). This marked the second deliberate attempt by the prosecutor to circumvent the court’s ruling on the matter and elicit otherwise inadmissible irrelevant evidence. The prosecutor had earlier questioned Ms. Radcliffe:

Q. And I hate to ask you this, but, as of that day – date and time were you having sexual relations with the defendant?

MR. HARRISON: Objection. Relevance. And I’d ask it be –

THE COURT: Relevance?

MS. ST. MARIE: Well, it’ll tie into ---.....

THE COURT:....What’s the relevance?

MS. ST. MARIE: *I think the relevance would become clear after other witness’s testimony, in particular, the defendant.*

But I can move on.

THE COURT: Okay. Move on.

MS. ST. MARIE: *I’ll establish that later.*

RP 942.

It is flagrant, prejudicial misconduct when a prosecutor violates an in limine ruling. *State v. Smith*, 189 Wash. 422, 428-429, 65 P.2d 1075 (1937); *State v. Stith*, 71 Wn.App. 14, 22-23, 856 P.2d 415 (1993). A prosecutor has no right to call to the

⁶ The court sustained the objection on the basis of relevance. RP 1092.

attention of the jury matters which they have no right to consider. *State v. Case*, 49 Wn.2d at 71. An answer to the prosecutor's question was unnecessary: the notion that Mr. Morrill was attracted to children because he and Ms. Radcliffe were no longer having sexual relations was already before the jury. The court sustained the objections both times, but as so aptly stated in *Dunn*:

In every case involving improper argument of counsel, we are confronted with relativity and the degree to which such conduct may have affected the substantial rights of the defendant. It is better to follow the rules than to try to undo what has been done. Otherwise stated, one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it'.

Dunn v. U.S., 307 F.2d 883, 886 (5th Cir. 1962)

Mr. Morrill was unfairly prejudiced because the jury was left to speculate on matters not properly before it. The "isn't it true" presumptuous and argumentative cross-examination question not only violated the court's order, but it encouraged the jury to consider facts, not in evidence. *State v. Stover*, 67 Wn.App. 228, 230-31, 834 P.2d 671 (1992).

A reviewing court considers both the prejudicial nature and the cumulative effect when determining whether misconduct warrants reversal. *State v. Henderson*, 100 Wn.App. 794, 805, 998

P.2d 907 (2000). Even if this court were to determine that this instance of prosecutorial misconduct, standing alone, did not warrant reversal, the cumulative effect of the multiple instances of misconduct combined unfairly prejudiced Mr. Morrill. *State v. Walker*, 164 Wn.App. 724, 737, 265 P.3d 191 (2011).

3. It Was Improper And Unfairly Prejudicial For The Prosecutor To Disregard The Court's Pretrial Ruling And Question Mr. Morrill About An Alleged Prior Bad Act Without Providing An Offer Of Proof And Receiving Approval From The Court.

In a pretrial hearing, the court prohibited the prosecution from even *referring* to prior bad acts outside the timeframe in the information without the approval of the Court. RP 113. Nevertheless, on re-cross-examination, the prosecutor asked Mr. Morrill if he had been discharged from his employment as a school teacher. RP 1111. Upon objection by defense counsel, the court excused the jury and asked the prosecutor what rule would allow her to use a hearsay statement to “go into this sort of impeachment at this late date, based on cross-examination⁷ on the issue of

⁷ In context, it appears the court meant to say redirect examination rather than cross-examination.

describing puberty.” RP 1111. The prosecutor remarked, “I won’t take the Court’s time with that.” RP 1112.

There was no need to “take the court’s time,” the damage had already been done. Asking the improper question violated the court’s earlier ruling, and placed unduly prejudicial suggestive information before the jury without the safeguards offered by ER 404(b) and ER 403.

Prior to the admission of any misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). Evidence of prior misconduct is inadmissible to demonstrate an accused’s propensity to commit the crime charged. ER 404(b); *Fisher*, 165 Wn.2d at 744. Here, in disregard of the court’s ruling, the prosecutor’s action precluded the court from considering the existence, purpose, relevance, or prejudicial effect of the alleged misconduct by pre-emptively introducing it.

In *Fisher*, the trial court held an ER 404(b) hearing to determine whether evidence of the defendant's physical abuse of other children was admissible for the limited purpose of explaining why one child delayed in reporting the abuse. *Fisher*, 165 Wn.2d at 745-46. The trial court expressly conditioned admissibility if defense counsel made an issue of the delayed reporting. *Id.* at 746. However, at trial, the prosecutor preemptively introduced the prior abuse in his opening statement and evidence of the abuse during the examination of the alleged victim. *Id.* at 748.

The Court held the prosecutor violated the court's pretrial ruling and used the evidence to demonstrate the defendant's propensity to commit the crimes. The Court concluded that using the evidence in such a manner "after receiving a specific pretrial ruling regarding the evidence clearly goes against the requirements of ER 404(b) and constitutes misconduct." *Id.* at 749. The Court concluded the prosecutorial misconduct denied Fisher a fair trial. *Id.*

Here, the introduction of the evidence served no purpose other than to create a suspicion of the propensity to commit crimes against children. Whether and why he had been discharged from his employment was utterly irrelevant and at best, remotely

collateral to the matter being tried; and if the trial court had been able to conduct the appropriate hearing before its introduction, it most likely would have held it inadmissible.

In *Stith*, the prosecutor violated a direct court order to exclude any evidence of prior drug convictions. *Stith*, 71 Wn.App. at 16. The Court held that two of the statements raised on review were egregiously prejudicial and concluded the mandatory remedy was a mistrial and remand for retrial. *Id.* at 21, 23.

Here, the cumulative instances of misconduct raised on appeal show the jury was given highly prejudicial bits of information, which had been excluded by court order. These bits of information were excluded precisely because they were either blatantly unfairly prejudicial or potentially unfairly prejudicial. A prosecutor may not intentionally elicit inadmissible or irrelevant information in front of the jury. *Glassman*, 175 Wn.2d at 705. Counsel “cannot ask questions of a witness that have no basis in fact and are merely intended to insinuate the existence of facts to a jury.” *State v. Avendano-Lopez*, 79 Wn.App. 706, 713, 904 P.2d 324 (1995 (internal citations omitted)). The prosecutor’s misconduct violated Mr. Morrill’s right to a fair trial.

4. It Was Improper And Unfairly Prejudicial For The Prosecutor To Ask Argumentative Questions.

An argumentative question is one which does not seek facts, but instead, is posed to obtain agreement with the examiner's inferences, assumptions or reasons. *Crippen v. Pulliam*, 61 Wn.2d 725, 380 P.2d 475 (1963); *Rae v. Nelson*, 152 Wash. 10, 277 P.75 (1929). Here, the prosecutor posed irrelevant, argumentative questions which had nothing to do with fact seeking to aid the jury in determining guilt or innocence. "An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony. Often it is apparent that the questioner does not even expect an answer." *People v. Chatman*, 38 Cal. 4th 344, 384, 133 P.3d 534 (2005).

Asking Mr. Morrill whether he enjoyed the finer things in life, classical music, art, literature, and beautiful sunny days, and then asking, "[A]ll of those things you would not be able to enjoy should you be convicted of these crimes, correct?" was not relevant to any question properly before the jury⁸. RP 1096.

⁸ In closing argument, the prosecutor stated: Ask yourself, what does the defendant gain by lying? People choose what they tell others. They choose what they want to project in terms of the image that they show the world. And you heard from the defendant in his testimony, he's a spiritual-minded guy with a taste for finer

Similarly, asking whether Mr. Morrill thought the State had an obligation to bring charges “when little children make these kind of allegations” (RP 1096-97) was irrelevant and argumentative. The prosecutor insinuated, and the jury was left with the distinct impression that the State did the right thing by bringing charges against Mr. Morrill, who would lie to continue enjoying “the finer things in life.”

Lastly, asking Mr. Morrill how the jury would know that he was *not* lying to them was the most egregious and disturbing of the improper questions. There is no answer to that question, and the State didn’t want one. It was enough to place the question before the jury and shift the burden to Mr. Morrill to prove his innocence.

These improper questions viewed in isolation may not have undermined Mr. Morrill’s right to a fair trial, but taken together with the other misconduct, they are consistent with a design to stain the jury with insinuations and introduce unfairly prejudicial information. The danger of this type of misconduct is that it may deprive a defendant of a fair trial.

things. He enjoys literature. He enjoys art. And he reads spiritual philosophy such as Eckhart Tolle. RP 1143.

5. It Was Improper And Unfairly Prejudicial For The Prosecutor To Seek Vouching Testimony From Witnesses.

"Improper opinion testimony violates a defendant's [constitutional] right to a jury trial [by] invading the fact-finding province of the jury." *State v. Thach*, 126 Wn.App. 297, 312, 106 P.3d 782 (2005).

Here, the prosecutor committed misconduct by asking Detective Stevenson if and whether the detective had any reason to believe that D.F. was motivated to fabricate the accusations. The court sustained the defense objection on the basis of vouching. RP 965. Additionally, when describing the forensic interviewer protocol, the detective stated:

And then I'll also elicit a promise from them. *Studies show that if a child promises to tell the truth that they will tell the truth.*

RP 953.

The questions and answers both directly and indirectly communicated to the jury that the information D.F. provided was truthful. To determine whether a statement constitutes improper opinion testimony, the court must consider (1) the type of witness, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before

the trier of fact. *State v. Rafay*, 168 Wn.App. 734, 805-806, 285 P.3d 83 (2012); *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

First, testimony from a law enforcement officer regarding the truthfulness of another witness may be especially prejudicial because the officer's testimony often carries "a special aura of reliability." *Kirkman*, 159 Wn.2d at 928. Second, in *Kirkman*, the Court allowed that description of the protocol the detective administered was not a manifest constitutional error, but rather provided context. *Id.* at 934. Here, however, the questioning went beyond providing information about the protocol. By stating "Studies show that if a child promises to tell the truth that they will tell the truth" the detective vouched for the information about which he was going to testify.

The third factor, the nature of the suit involves sexual touching of a child. The credibility of D.F. and Mr. Morrill was the central issue.

The fourth factor, the nature of the defense rested on the credibility of the witnesses. The vouching testimony by Detective Stevenson was therefore especially significant.

The final factor is 'other evidence before the trier of fact.' The evidence consisted of D.F.'s reluctant testimony and the testimony of Mr. Morrill. The State had no physical evidence or other corroborating eyewitness testimony. The *Rafay* factors favor Mr. Morrill. The statements by Detective Stevenson were improper opinion testimony.

Lastly, the prosecutor improperly bolstered witness testimony by asking D.F. "Do you remember talking with Detective Stevenson about what happened up there?...And when you talked to Detective Stevenson did you tell Detective Stevenson?...Did you tell Detective Stevenson the truth?" RP 992. And again: "When you told Detective Stevenson what happened did you tell him everything that happened?...And you told him the whole truth?" D.F. answered all questions in the affirmative. RP 994.

In essence, the prosecutor led D.F. to affirm that whatever Detective Stevenson testified to was true. Testimony concerning the veracity of another witness is improper since it invades the province of the jury. *State v. Padilla*, 69 Wn.App. 295, 299, 846 P.2d 564 (1993). This vouching was particularly prejudicial because D.F. was not only a reluctant witness but did not testify to the details offered by Detective Stevenson.

6. The Cumulative Effect Of The Prosecutor's Improper Conduct Requires A New Trial For Mr. Morrill.

The cumulative error doctrine applies when several trial errors have occurred, and none alone warrants reversal, but the combined errors have denied the defendant a fair trial. *State v. Jackson*, 150 Wn.App. 877, 889, 209 P.3d 553 (2009). Here, the pattern of violating the court's rulings, presenting prejudicial, irrelevant information to the jury, and soliciting vouching testimony violated Mr. Morrill's right to a fair trial. "Only a fair trial is a constitutional trial." *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Morrill respectfully asks this Court to reverse his conviction and order a new trial in which the rules of evidence will be followed.

Dated this 29th day of November 2017.

Respectfully submitted,

Marie Trombley

Marie Trombley, WSBA 41410
PO Box 829
Graham, WA 98338

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the state of Washington, that on November 29, 2017, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Brief of Appellant to the following: Jefferson County Prosecuting Attorney (at mhaas@co.jefferson.wa.us) and

Andrew Morrill, DOC DOC#395650
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001

Marie Trombley
Marie Trombley, WSBA 41410
PO Box 829
Graham, WA 98338
253-445-7920

MARIE TROMBLEY

November 29, 2017 - 2:36 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50070-1
Appellate Court Case Title: State of Washington, Respondent v. Andrew Morrill, Appellant
Superior Court Case Number: 16-1-00009-1

The following documents have been uploaded:

- 1-500701_Briefs_20171129143500D2379781_6325.pdf
This File Contains:
Briefs - Appellants
The Original File Name was AOB500701.pdf
- 1-500701_Motion_20171129143500D2379781_9321.pdf
This File Contains:
Motion 1 - Extend Time to File
The Original File Name was 11-29-17 Morrill MTE AOB.pdf

A copy of the uploaded files will be sent to:

- mhaas@co.jefferson.wa.us

Comments:

Sender Name: Valerie Greenup - Email: valerie.mtrombley@gmail.com

Filing on Behalf of: Marie Jean Trombley - Email: marietrombley@comcast.net (Alternate Email:)

Address:
PO Box 829
Graham, WA, 98338
Phone: (253) 445-7920

Note: The Filing Id is 20171129143500D2379781