

FILED
Court of Appeals
Division II
State of Washington
4/30/2018 4:14 PM

NO. 50070-1-II

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

STATE OF WASHINGTON

Respondent,

vs.

ANDREW MORRILL,

Appellant.

BRIEF OF RESPONDENT

MICHAEL E. HAAS
Jefferson County Prosecuting Attorney
Attorney for Respondent
P.O. Box 1220
Port Townsend, WA 98368
(360) 385-9180

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. COUNTERSTATEMENT OF THE ISSUES..... 1

II. STATEMENT OF THE CASE..... 1

 A. Procedural History 1

 A. Facts 3

III. ARGUMENT 5

 B. Questions of an argumentative nature, objected to immediately, with the objection sustained, do not constitute a basis for reversal 5

 C. The Deputy Prosecutor did not violate a pre-trial ruling by introducing irrelevant and inadmissible statements 7

 C. The Deputy Prosecutor did not ask Defendant about prior bad acts..... 8

 D. The alleged argumentative questions asked by the Deputy Prosecutor do not constitute a basis for reversal... 8

 E. The State did not elicit vouching testimony 10

 F. There is not a basis for reversal of this case, assuming *arguendo*, the existence of cumulative errors based on the Deputy Prosecutor’s conduct 11

IV. CONCLUSION..... 13

TABLE OF AUTHORITIES

Washington State Cases

State v. Bourgeois, 133 Wn. 2d 389, 945 P.2d 1120 (1997).....6

State v. Froelich, 96 Wn. 2d 301, 635 P.2d 127 (1981)9

State v. Johnson, 124 Wn. 2d 57, 873 P.2d 514 (1994).....9

State v. Padilla, 69 Wn. App. 295, 846 P.2d 564 (1993)11

State v. Reed, 102 Wn. 2d 140, 684 P.2d 699 (1984)5

State v. Tharp, 96 Wn. 2d 591, 637 P.2d 961 (1981)6

State v. Thorgerson, 172 Wn. 2d 438, 258 P.3d 43 (2011)5, 10, 12

State v. Weekly, 41 Wn. 2d 727, 252 P. 2d 246 (1952).....9

Statutes

RCW 9.94A.120.....2

Other Authorities

WPIC 1.02.....9

I. COUNTERSTATEMENT OF THE ISSUES

- A. Whether Questions of an argumentative nature, objected to immediately, with the objection sustained, constitute a basis for reversal?
- B. Whether the Deputy Prosecutor violated a pre-trial ruling by introducing irrelevant and inadmissible statements?
- C. Whether the Deputy Prosecutor asked Defendant about prior bad acts?
- D. Whether the alleged argumentative questions asked by the Deputy Prosecutor constitute a basis for reversal?
- E. Whether the State elicited vouching testimony?
- F. Whether there is a basis for reversal of this case, assuming *arguendo*, the existence of cumulative errors based on the Deputy Prosecutor's conduct?

II. STATEMENT OF THE CASE

A. Procedural History

On February 1, 2016, the State charged Defendant in Jefferson County Superior Court with Rape of a Child First Degree (Count I) and Child Molestation First Degree (Count II) with respect to D.F. CP 1 – 3. The State also charged Defendant with Child Molestation First Degree (Count III) and Communication with A Minor for Immoral Purposes (First Offense and No Prior Felony Sex Offenses)(Count IV) with respect to A.C.F. *Id.* In all four counts the State alleged an ongoing pattern of sexual abuse. *Id.* The State also charged Defendant with one count of Indecent Exposure (Count V) with respect to A.F. *Id.* The Amended

information corrected a date issue. CP 53 – 54. Count V was later removed in the Second Amended Information. CP 98 -100

The State also filed a Notice of Intent to Seek Exceptional Sentence on February 1, 2016. CP 11.

Following a Child Hearsay Hearing per RCW 9.94A.120, the Court determined hearsay statements made by D.F. to Det. Shane Stevenson would be admissible. CP 46 – 52.

A jury heard the case on July 11 – 13, 2016. RP 2. The jury found Defendant guilty of Count IV, Communication with A Minor for Immoral Purposes, with respect to A.F., and hung with respect to Counts I, II, and III. RP 599, 601.

On November 16, 2016, the State filed a Third Amended Information. CP 185 – 186. This third amended information reflected the jury’s verdict with respect to the previous Count IV, and the three counts the jury remained hung on. The matter proceeded to trial on the three remaining counts on December 5 – 7, 2016. RP 2. Following a “half-time” motion, the Court dismissed Count III, citing a lack of evidence. RP 1057.

The jury also hung again as to Count I, Rape of a Child First Degree, with respect to D.F. CP 270. However, the jury returned a guilty verdict as to Count II, Child Molestation First Degree, with respect to D.F. CP 271. The jury also returned a special verdict finding the crime was

“part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time.” CP 272.

On January 11, 2017, the Court entered its Judgment and Sentence. CP 290 – 305. In light of the jury response to the special interrogatory addressing an ongoing pattern of sexual abuse, the Court imposed an exceptional sentence of 85 months with respect to Count II of the Third Amended Information. The Court also imposed 364 days jail with respect to Count IV of the Second Amended Information and ordered that time to run consecutively with Count II for a total of 97 months (less one day).
Id.

B. Facts

The caretaker and mother of D.F. and A.F. returned home from an errand on January 30, 2016. RP 912 - 914. Accounts vary but the gist of the story initially presented to law enforcement was that Defendant had permitted A.F., age 10, to sexually stimulate himself with a vibrator/back massager. RP 862 – 865, 914 – 920, 934, 1081. D.F. and A.F.’s mother then proceeded to beat Defendant with a baseball bat. RP 1083. Defendant called law enforcement. RP 1084.

On arrival law enforcement determined the underlying basis for the altercation and arrested Defendant. RP 956.

As the investigation ensued, it was determined that Defendant had molested D.F. and A.F.¹ over a prolonged period of time while they lived on a Barclay Mustin's property with a number of other people in the Chimacum area of Jefferson County, Washington. RP. 912, 962.

D.F. was able to testify he slept in a loft with Defendant and that Defendant touched D.F. while they were in the loft. RP 992. D.F. reported that the touching occurred while Defendant was naked. RP 993. D.F. also reported that he was naked as Defendant had removed D.F.'s clothes. *Id.*

D.F. testified that Defendant placed his mouth on D.F.'s private parts. RP 995. D.F. also testified Defendant showed D.F. how to use a vibrator on his private parts. RP 1005.

D.F. described a drawing he made of Defendant that showed sperm coming out of Defendant's privates, by which he meant penis. RP 1006. The Deputy Prosecutor asked, "did you make that drawing off of your memory?" RP 1007. D.F. responded, "yes." *Id.* The Deputy Prosecutor then asked, "[a]nd have you ever seen Andrew's [Defendant] penis shooting sperm like that?" *Id.* Answer: "Yes." *Id.*

¹ Ten year old A.F. appears to have "frozen" while on the stand and was not able to provide sufficient facts to describe the abuse he suffered. As a result, the Trial Court was forced to dismiss the charge with respect to him. The remainder of this factual narrative will focus on D.F. for whom the jury was able to arrive at a verdict.

Additional testimony of Det. Shane Stevenson of the Jefferson County Sheriff's Office illustrated how the abuse had taken place frequently and over a prolonged period of time. RP 962.

III. ARGUMENT

A. Questions of an argumentative nature, objected to immediately, with the objection sustained, do not constitute a basis for reversal.

The Sixth Amendment to the United States Constitution guarantees a defendant a fair trial but not a trial free from error. *State v. Reed*, 102 Wn. 2d 140, 145, 684 P.2d 699 (1984).

In *State v. Thorgerson*, 172 Wn. 2d 438, 442 -443, 258 P.3d 43 (2011), the Court stated in pertinent part:

To prevail on a claim of prosecutorial misconduct, the defendant must establish “ ‘that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.’ ” ... The burden to establish prejudice requires the defendant to prove that “there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.” ... When reviewing a claim that prosecutorial misconduct requires reversal, the court should review the statements in the context of the entire case. ... Defendant correctly acknowledges “[a] defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced her defense.

In the context of the facts presented at trial, appellant fails to show a substantial likelihood the alleged misconduct affected the jury's verdict. In this case, D.F. testified that defendant touched D.F.'s penis and put his mouth on D.F.'s penis. Defense did not present any evidence to support an

inference that D.F.'s testimony was not credible. D.F.'s testimony at trial was consistent with what the State's investigator testified D.F. told him. Reversal is not required, 'unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.' ” *State v. Bourgeois*, 133 Wn. 2d 389, 403, 945 P.2d 1120 (1997) (quoting *State v. Tharp*, 96 Wn. 2d 591, 599, 637 P.2d 961 (1981)).

Defendant calls into question the deputy prosecutor's acts of asking him who asked him to look at the jury, why would he want to address the jury directly, you haven't reviewed the discovery, how long did it take you to come up with that defense? While perhaps argumentative, these questions were raised in a staccato type cross-examination, were immediately objected to, and the objections were sustained.

The damning questions were: “You allowed AF to use the vibrator on his ... penis?” Answer: “Yes.” Question: “And you were there to see it?” Answer: “Yeah.”

Read in the context of the entire trial, these transgressions or argumentative questions, if they were such, were *de minimis* and it is impossible to see how it prejudiced the defense. This is particularly true in light of the fact the jury came back hung on the most serious remaining charge.

There is no showing that the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. Defendant fails to demonstrate the alleged instances of misconduct affected the jury's verdict. For those reasons reversal is inappropriate.

B. The Deputy Prosecutor did not violate a pre-trial ruling by introducing irrelevant and inadmissible statements.

The Deputy Prosecutor's question of Defendant as to where Defendant slept did not violate the court's pretrial rulings prohibiting inquiry into Defendant's statements to Detective Stevenson. CP 241 – 247. D.F. testified that Defendant slept in the loft with D.F.

The Deputy Prosecutor's question of Defendant as to whether he had sexual relations with his wife was not in violation of the trial court's pretrial ruling (Deputy Prosecutor did not ask about Defendant's statements to Detective Stevenson about sexual relations with his wife, which the court had excluded.) The question went to the fact that Defendant slept in the loft with D.F., rather than with his wife, as D.F. testified at trial. Furthermore when the Deputy Prosecutor asked Defendant about being cut off from sex, Defense Counsel objected immediately and the objection was sustained.

Once again there is no showing the Deputy Prosecutor's conduct was both improper and prejudicial in the context of the entire record and

the circumstances at trial. Specifically, there was no misconduct when it came to questions about whether Defendant was cut-off from sex from his significant other. Defendant fails to demonstrate the alleged instances of misconduct affected the jury's verdict. For those reasons reversal is inappropriate.

C. The Deputy Prosecutor did not ask Defendant about any prior bad acts.

The Deputy Prosecutor's question on cross examination of the Defendant about having been discharged from prior employment did not refer to any prior bad act. (The court's ruling prohibited inquiry as to alleged distribution of marijuana at school.) She may have been headed in that direction but the Court essentially directed the Deputy Prosecutor not to pursue that angle of attack and she did not. More specifically, Defense Counsel objected to the question about discharge on the grounds of relevance. RP 1110. The State then abandoned that line of inquiry following a hearing outside the presence of the jury. RP 1111 – 1112. Immediately thereafter the Defense rested as did the State. RP 1112.

Per Thorgerson there was no misconduct, no prejudice, and no impact on the verdict.

D. The alleged argumentative questions asked by the Deputy Prosecutor do not constitute a basis for reversal.

While certain questions of Defendant by the Deputy Prosecutor may have been argumentative, the defense did not object and the

misconduct was not so flagrant and ill-intentioned that a curative instruction could not have obviated potential prejudice.

The prosecutor's questions to defendant about his enjoyment of the finer things in life go to defendant's motive to testify in a self-serving manner. A witness' credibility is always at issue. See, e.g., *State v. Froelich*, 96 Wn. 2d 301, 307, 635 P.2d 127 (1981). Avoiding incarceration may have motivated defendant's testimony. In any event, the ultimate question of whether Defendant would be able to enjoy the finer things in life if convicted, was objected to and the objections was sustained. RP 1096.

The jury was instructed that the attorneys' statements are not evidence. Wash. Pattern Jury Instruction No. 1.02. A jury is presumed to follow instructions. See, e.g., *State v. Johnson*, 124 Wn. 2d 57, 77, 873 P.2d 514 (1994). There is no reason to presume the jury failed to follow instructions in this case.

Further, it is assumed that juries understand that, when a question is asked, and an objection sustained, the court believed the question improper for some good and sufficient reason. See *State v. Weekly*, 41 Wn. 2d 727, 729, 252 P. 2d 246 (1952).

With respect to the State's question of Defendant about whether the State had an obligation to bring these types of charges, defense counsel

objected. The objection was sustained and the State moved on to a more fruitful area of inquiry. RP 1096 – 1097.

The prosecutor's question of defendant, "how do we know you are not lying" may be characterized as argumentative. However, defense did not object. When a defendant has failed to either object to the impropriety at trial, request a curative instruction, or move for a mistrial, reversal is not required unless the misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice.

Thorgerson at 443. As stated previously, when reviewing a claim that reversal is required, the appellate court should review the statements in the context of the entire trial. *Id.* The burden is on the defendant to establish that there is a "substantial likelihood" that alleged prosecutorial misconduct affected the jury's verdict. *Id.* In *Thorgerson*, also a child molestation case, the Washington State Supreme Court found that some of the prosecutor's remarks in closing argument rose to the level of misconduct, as they were flagrant and ill-intentioned. However, in the context of the evidence presented—the victim's testimony consistent with prior statements to witnesses, the *Thorgerson* court found that the misconduct did not affect the jury's verdict.

E. The State did not elicit vouching testimony.

The prosecutor did not seek vouching testimony from any witness.

The prosecutor asked D.F., "... when you told Detective Stevenson what happened did you tell him everything that happened?" Answer: "Yes."
"And you told him the whole truth?" Answer; "Yes." RP 994.

A prosecutor commits misconduct if his or her cross examination is designed to compel a witness to express an opinion as to whether other witnesses are lying. *State v. Padilla*, 69 Wn. App. 295, 299, 846 P.2d 564 (1993). Asking a witness if he told the truth to another witness does not call for improper vouching. A witness' affirmation of his own truthfulness to others does not constitute improper vouching.

The prosecutor asked Detective Stevenson, "Based on the responses that D.F. gave you during this child forensic interview, did you have any reason to believe D.F. was motivated to fabricate ... what he told you?" RP 965. It may be a subtle distinction but this question does not call for improper vouching of one witness for another. Whether Detective Stevenson knew of any motive for D.F. to fabricate goes to information gained in the investigation and does not call for an opinion as to D.F.'s truthfulness. The Deputy Prosecutor was simply trying to rule out any factors that might indicate D.F. was being untruthful. In any event, an objection was sustained as to that line of questioning. RP 965.

F. There is no basis for reversal of this case, assuming arguendo, the existence of cumulative errors based on the Deputy Prosecutor's conduct.

As stated previously in *Thorgerson*, the burden is upon Defendant to prove the prosecutor's conduct was both improper and prejudiced the Defendant's defense in the context of the entire record and the circumstances at trial. Specifically Defendant must prove there is a substantial likelihood that the instances of misconduct affected the jury's verdict.

Defendant raises a number of concerns related to questions asked by the Deputy Prosecutor. The vast majority of the questions he has concern about were objected to immediately and the objection was sustained.

To the extent any errors occurred, any error was harmless when the entire record is examined.

When D.F. took the stand it is obvious even from the cold hard record that he was struggling to provide answers but it no doubt made him appear just that much more credible. D.F. or Det. Stevenson discussed sperm coming from Defendant and landing on D.F.'s neck. They testified to Defendant's mouth being on D.F.'s penis. Defendant admitted he had slept with D.F. Defendant admitted to watching A.F. sexually stimulate himself. All this combined with the D.F.'s precocious knowledge is what the jury most likely focused on – not a few questions that were objected to – particularly when the objections were sustained.

Defendant has not met his burden.

IV. **CONCLUSION**

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

Respectfully submitted this 30th day of April, 2018.



MICHAEL E. HAAS, WSBA #17663
Jefferson County Prosecuting Attorney
Attorney for Respondent

PROOF OF SERVICE

I, Michael Haas, declare that on this date:

I filed the State's BRIEF OF RESPONDENT electronically with the Court of Appeals, Division II, through the Court's online filing system. I delivered an electronic version of the brief, using the Court's filing portal, to:

Marie J. Trombley, WSBA #41410
valerie.mtrombley@gmail.com
marietrombley@gmail.com

I declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct. Dated this 30th day of April, 2018, and signed at Port Townsend, Washington.



Michael Haas, WSBA #17663

JEFFERSON COUNTY PROSECUTING ATTORNEY

April 30, 2018 - 4:14 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:

- 500701_Briefs_20180430161253D2678902_1851.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- marietrombley@comcast.net
- marietrombley@gmail.com
- valerie.marietrombley@gmail.com

Comments:

Sanction Fee/Check for \$150 will go out tomorrow

Sender Name: Michael Haas - Email: mhaas@co.jefferson.wa.us
Address:
1820 JEFFERSON ST
PO BOX 1220
PORT TOWNSEND, WA, 98368-6951
Phone: 360-385-9180

Note: The Filing Id is 20180430161253D2678902