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No. 50446-4-II

COURT OF APPEALS,
DIVISION TWO
OF THE STATE OF WASHINGTON

State of Washington, *Respondent*

v.

Carl Lee Domingue, *Appellant*.

BRIEF OF APPELLANT

Joseph O. Baker
Attorney for Appellant

Gehrke, Baker, Doull & Kelly, PLLC
22030 7th Ave S, Suite 202
Des Moines, WA 98198
Tel: (206) 878-4100
Fax: (206) 878-4101
WSBA No. 32203

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I. ASSIGNMENTS OF ERROR

1. The State committed prosecutorial misconduct in closing argument when it falsely claimed that there were “only two possibilities” in the case: *e.g.*, either the alleged victim (K.W.) was “making it up” or that she was telling the truth.

2. The trial court erred in giving Instruction no. 9, which informed the jury that “in order to convict a person of child molestation in the first degree ... it shall not be necessary that the testimony of the alleged victim be corroborated[.]”

Issues Pertaining to Assignments of Error

1. Whether the prosecutor’s closing argument to the jury that the only two possibilities were that the alleged victim was either telling the truth or “making it up” misstated the burden of proof and otherwise denied Mr. Domingue due process of law where it was in effect an argument that in order to acquit him the jury must find that the alleged victim was lying.

2. Whether the trial court’s non-corroboration instruction was a comment on the evidence forbidden by Article IV, sec. 16 of the Washington State Constitution.

II. STATEMENT OF THE CASE

This is an appeal from a judgment and sentence entered on following a jury trial resulting in a guilty verdict on April 7, 2017. CP at 48. On that date, the jury found Carl Lee Domingue (pronounced ‘doe-main’) guilty of the charged offense of Child Molestation in the First Degree, RCW 9A.44.083. CP at 48; RP VI at 465.

On October 21, 2015, the State of Washington charged Mr. Domingue with one count of Child Molestation in the First Degree, allegedly committed as follows:

On or between the 31st day of July, 2015 and the 1st day of August, 2015, [the defendant] ... being at least 36 months older than K.L.[sic]¹ [had] sexual contact with K.L., who [was] less than 12 years old and not married to the defendant[.]

See CP at 3 (emphasis added).

At trial, the State called the following five (5) witnesses in its case-in-chief: (1) the alleged victim (K.W.); (2) K.W.’s mother (Thaieka Anderson); (3) Marvin Harris, a friend of the mother; (4) Tacoma Police Department (TPD) Detective Cynthia Brooks; and (5) Jazalena Chhem, a school friend of the alleged victim. (The State called a sixth witness, TPD Officer Joseph Bundy, for ER 613 purposes during rebuttal.) CP at 47.

¹ After trial started, the information was amended without objection correcting the initials of the alleged victim. RP III at 227; CP at 25.

K.W. (DOB: 1/14/04), who was 13 years old at the time of trial, testified that in the summer of 2015 (when she was 11), she was living at 1428 S 94th St in Tacoma with her mother, two older sisters, uncle JoJo and the defendant, Mr. Domingue. RP II at 55. She testified that she had known Mr. Domingue her whole life and referred to him as her uncle. RP II at 61-62.

On the night in question (July 31-August 1), K.W. testified that in the early morning hours (“any time around 3 and up”) she was laying down on the couch of the living room. RP II at 63. K.W. had decided to sleep on the couch around midnight instead of her own room to watch T.V. RP II at 64-65. She was wearing shorts and t-shirt, underwear and bra, and had a blanket and pillow with her to sleep. RP II at 65.

K.W. testified that the first thing she remembered after falling asleep was Mr. Domingue leaning over the separator between the kitchen and living room with his hand in her shorts. RP II at 66 (“I woke up, and he was leaning over the hole in the separator that separates the living room and the kitchen, and he had his hand in my shorts.”) Mr. Domingue had his hand underneath her pajama shorts and “around the side” of her underwear. RP II at 69-71. Mr. Domingue had alcohol in his other hand and that she knows it was alcohol because she “had seen [her] mom drink it before, and because, like, you get drunk off of [it].” RP II at 71. However, she did not remember

what Mr. Domingue was wearing. RP II at 78.

K.W. further testified that the touching stopped after she woke up. RP II at 71-72. Mr. Domingue then “sped walked” out the front door. RP II at 72. K.W. got up and went through the back door to tell her mom through her bedroom window. RP II at 73. K.W. testified that she was able to see Mr. Domingue’s face and that the room was lit by the T.V. RP II at 74. Twenty minutes after the touching, she saw Mr. Domingue once more in the backyard outside her mother’s widow laughing. See RP II at 75. Her mother locked the window and put down the curtains and told her try to get some sleep. RP II at 76.

On cross-examination, K.W. acknowledged making the following inconsistent statements in prior interviews on the subject:

- that when Domingue was reaching over the counter, she could not see his face (RP III at 185);
- that she was wearing button-up or blue jeans and a green sweatshirt during the alleged incident (RP III at 186), and that Domingue had unbuttoned her jeans (RP III at 187);
- that she was wearing basketball shorts and a tank top at the time of the incident (RP III at 187);
- that she saw the time on the TV clock, and that it was 1:00 am (RP III at 187).

K.W. also indicated that she did not like Domingue for many reasons (RP III at 187-188):

- (1) he sometimes played too rough with her;
- (2) she thought it was creepy that he had so many girlfriends and so many children; and
- (3) he would yell at her about putting her things away.

K.W. conceded that her mother did not impose any type of curfew restrictions on her nor did she impose any types of rules on her. RP III at 188. Despite being given the opportunity by defense counsel, K.W. could not explain why she explained various facts about her buttons being undone during a previous interview. RP III at 194.

Thaieka Anderson, K.W.'s mother, testified that after K.W. went to sleep, she smoked weed with Mr. Domingue and Matthew Turner, a family friend. RP II at 127-128. After they smoked, Anderson and Turner went and sat in her room and talked because he had just come from the bar. RP II at 129. Before she knew it ("not long at all"), K.W. was at her window scared and crying. RP II at 129-130. K.W. said, "*Mommy, Carl touched me.*" RP II at 130.

Anderson walked out of her bedroom, told K.W. to come back around, brought her into her room and put her in her bed and sat with her. *See id.* Anderson and Turner started closing every window and every door

and locked everything up. See *id.* She did not know where Mr. Domingue was at this point. See *id.* After locking the doors and windows and with K.W. in her bed, Mr. Domingue made his way back around the house and went to the window maybe ten minutes later, according to K.W. (Anderson did not see him come to the window.) RP II at 130-131.

Anderson next saw Mr. Domingue while she and Turner were standing in the living room talking. RP II at 131-132. Domingue was standing in front of the microwave bent down and then popped up. RP II at 132. Domingue asked Anderson, “*What, did she put you out of your room?*” RP II at 134. Anderson answered, “*Yeah.*” She did not confront him about what happened because he had a gun. See *id.* The next time she saw him was when she let Turner out of her house at 4:00 am; Domingue’s female friend had pulled up and he (Domingue) went and hopped in her truck. RP II at 134.

Anderson did not immediately call the police. RP II at 134. When asked why she did not immediately call the police, Anderson answered as follows: “Fear that what would happen. And being the fact that yes, I was drinking. I was, like, okay. And then it's never good, police and how, the way the police came the next day. Me being inebriated would not have been a good thing.” RP II at 135. She made the decision to sober up a little bit. See *id.* She called her brother, Marvin, at about 6:00 am after K.W. finally

went to sleep. RP II at 135. Marvin arrived at her house about ten minutes before the police were called; Marvin actually called the police at her house. RP II at 135. K.W. then stayed with Marvin's girlfriend, her aunt (Odessa Williams) and with Jazalena Chhem. RP II at 136. Anderson made the decision to move to Alaska with K.W. and her middle child "[w]hen the police basically laughed at [her] and told [her] there was nothing they could do to keep [them] safe." RP II at 136. K.W. was sad when they moved to Alaska because she had lived here her whole life. RP II at 138. Anderson never confronted Domingue about what happened. RP II at 139.

On cross-exam, Anderson clarified that she never saw Domingue touch K.W. She painted the scene as follows:

When I came out of my room [K.W.] was asleep. [Domingue] was sitting on the short couch like he was going to sleep, because he had an attitude because the girl hadn't showed up yet. So I started turning off TVs and everything else. And he said he was just going to sit there, so I went in my room. I smoke cigarettes in my home. So therefore, being [K.W.]'s on the couch, I close my door. He was on the couch, on the small couch like this, like he was going to sleep. So I was like, all right. Goodnight, bro.

RP II at 147.

Anderson conceded that she turned off all the TV's, but said that the room was not pitch black because a light above the stove had been left on. RP II at 147-148 ("[K.W.] doesn't like the dark, so we don't do pitch black.").

Anderson also elaborated on her reasoning for not immediately calling 911:

Because I was fucked up. I was shot by a train. Do you know how hard it was for me not to go out the door and stab him? Do you know how hard it was for me not to do anything to jeopardize the fact that my child was hurt? We all know how to call the police. They would have took my kids because I was inebriated. So therefore, I had to be in my clear mind before I hurt somebody, because my first priority, yes, is my children. But if I'm not in my right mind how am I going to help them.

RP II at 149.

Anderson also conceded that it was possible for a person to walk through the unlocked gate that separates the backyard from the front. RP II at 150.

On redirect, the following exchange took place with regard to the ability of an individual to touch the couch from the area where Domingue was standing in the kitchen when the alleged touching occurred:

- Q. So if you wanted to reach the couch, you couldn't -- you weren't -- you wouldn't be unable to get on the counter. You just have to go through some -- the blender and that kind of stuff, right?
- A. Uh-huh.
- Q. So it's not impossible to get up on the counter.
- A. No. It's not impossible. But you would have to literally move something to have got on top of it.
- Q. Sure, okay.

See RP II at 152.

The defense called four witnesses regarding various interactions at

the house on July 31, 2015: Denise Barrett (RP IV at 259-279); Kendall Hagger (Domingue's cousin) (RP IV at 279-296); Ronchetta Battee (aka "Big Mama") (RP IV at 296-311); and Audrey Parker (RP IV at 311-339).

Hagger, who is Barrett's husband (both live at the residence), recalled actually seeing Domingue leave the residence between 12:45-1:00 am. RP IV at 290. However, he did not observe Domingue come back to the residence. RP IV at 291.

Mr. Domingue testified in his own defense. He testified that he was born in Lafayette, Louisiana, speaks with a Creole accent and has lived off-and-on in Washington state since 1995. RP IV at 339-340. He has 12 children, eight of whom reside in Washington. RP IV at 342-343.

On July 31, 2015, he was living with Thaieka Anderson on 1428 94th Street. RP IV at 343. His reasoning for living with Anderson was his kids. RP IV at 344. He testified that he woke up about noon. RP IV at 345. He acknowledged "drinking and smoking and just joking around, laughing and joking all day" with various company. RP IV at 345. He left around 8:30 pm to drop off his other girlfriend, Talisha Edwards, at her home. RP IV at 346. He got a ride from a friend, Chris, to do this. RP IV at 347. He returned back to the residence at almost 9:00 pm or a little bit after. RP IV at 348. When he returned, Audrey Parker, Thaieka Anderson, Anderson's middle child and Matthew Turner were present at the house. RP IV at 348.

K.W. had left with a friend and didn't return until almost 10:00 pm. RP IV at 349.

The group continued drinking and then went to get some liquor. RP IV at 349. They were drinking Seagrams gin. *See id.* Domingue was drinking beer and the women were drinking wine. *See id.* Parker, Anderson, Turner and Domingue also consumed cocaine, which Domingue provided. *See id.* Domingue was feeling buzzed, but he felt more alert from the cocaine. See RP IV at 350. The used cocaine several times throughout the day. RP IV at 351.

K.W. came back around 10:00 pm. *See id.* Anderson, Parker and Domingue were still hanging outside the house drinking and then decided to do some more cocaine in Anderson's room, but outside the presence of K.W. RP IV at 355. Parker left between midnight and 1:00 am. RP IV at 356.

Maria Gonzalez showed up to house around 1:00 am. RP IV at 353. Gonzalez and Domingue decided to go to the Emerald Queen Casino in Tacoma around 2:20-2:30 am. RP IV at 358. The duo were at the casino for a couple of hours or enough time to get the comp (i.e., playing for two hours or more grants a free food voucher for \$25.00.) RP IV at 358. Domingue lost about \$250.00 at the casino. RP IV at 359.

The duo then went back to the garage of the residence and had sex. *See id.* Domingue then fell asleep right after having sex and did not wake up until around 10:00 am. RP IV at 359-360.

Domingue later testified that he never engaged in foreplay with K.W. nor did he ever touch any part of her body that would be considered a private part. RP IV at 386.

On April 6, 2017, the trial court instructed the jury on the charged offense of Child Molestation in the First Degree. *See* RP V at 434.

Over the defense's objection, the trial court gave Instruction No. 9, to wit:

In order to convict a person of child molestation in the first degree, as defined in these instructions, it shall not be necessary that the testimony of the alleged victim be corroborated. The jury is to decide all questions of witness credibility.

See CP at 60; RP IV at 393-395 (court's ruling); RP V at 432 (continuing objection noted), 434 (read to jury).

During closing argument, the prosecutor stated the following:

The evidence that you have in this case, you've been instructed that there's no corroboration requirement. And something in voir dire that we talked about was weighing credibility. And now that you've heard the facts of the case, you really know that that's what it's going to come down to, is a he said-she said; Khalilah said it happened to her and the defendant said he didn't do it. So now what? Now what.

What you have to do is you have to weigh the credibility of

the witnesses. And I urge you to not get lost in the weeds. There's a lot of testimony from other people about the surrounding circumstances and facts and where they were and what time it was and so on and so forth.

And you heard that that testimony was from a lot, almost every individual was tainted by controlled substances; marijuana, cocaine, as well as excessive consumption of alcohol, which goes to credibility, ability to recall, so on and so forth.

But keep in mind, Ladies and gentlemen, that Khalilah was the only one, the only one that hadn't consumed any controlled substances that evening. So her ability to recall is better than her mother's, to be honest with you. It's better than the defendant's, and it's better than everyone else who had consumed controlled substances that evening or had the opportunity to see something.

So what do you -- what do you do? If she said it happened and he said it didn't happen, there's no percentage of weight assigned to what reasonable doubt is. But I mean, that's 50/50, and that's not it. So you've got to go one way or the other.

Let me focus just for a moment on who Khalilah is. She's a straight A student, who came home that evening, laid down on the couch and fell asleep to the Disney channel. What bias does she have? Her and the defendant got along just fine.

There's really only two possibilities. One, she's making it up; or two, she's telling the truth.

Why would she make it up? What reasons would she have to make up an allegation that somebody who was her uncle, her mother's brother, who took care of her, who babysat for her, who cooked for her, who even roughhoused a little bit with her, why? What a sinister, cynical plot that had to have been for her to make this up.

See RP V at 440-441 (emphasis added).

The jury returned a verdict of guilty on the following day, April 7, 2017. CP at 48; RP VI at 465. Mr. Domingue was sentenced to an indeterminate sentence of 108 months to life in prison on June 9, 2017. CP at 84. This timely appeal followed. CP at 72-73.

III. ARGUMENT

A. The State committed prosecutorial misconduct in its closing argument.

“[I]t is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken.” *See State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); *State v. Wheless*, 103 Wn. App. 749, 758, 14 P.3d 184 (2000); *State v. Wright*, 76 Wn. App. 811, 825-826; *State v. Barrow*, 60 Wn. App. 869, 875-76, 809 P.2d 209 (1991).

"A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt." *See Fleming*, 83 Wn. App. at 215. As the court stated in *Fleming*, the jury *had to acquit* unless it had an abiding belief in the testimony of prosecution witnesses:

The prosecutor's argument misstated the law and misrepresented both the role of the jury and burden of proof. The jury would not have to find D.S. was mistaken or lying in order to acquit; instead, it was required to acquit unless it had an abiding conviction in the truth of her testimony. Thus,

if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened . . . it was required to acquit.

See Fleming, 83 Wn. App. at 214.

Moreover, “the failure of the defense to object contemporaneously does not preclude review.” *See Fleming*, 83 Wn. App. at 216.

In *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010), this Court noted that in *Fleming*, Division One held that improper prosecutorial arguments were flagrant and ill intentioned where that court had previously recognized those same arguments as improper in a published opinion. *See Johnson*, 158 Wn. App. at 685. This Court declined to follow the holding in *Fleming* “suggesting that it is necessary to have a published opinion holding that certain prosecutorial conduct is flagrant and ill intentioned before such conduct warrants reversal of a conviction.” *See Johnson*, 158 Wn. App. at 685.

Rather, this Court followed its holding in *State v. Venegas*, 155 Wn. App. 507, 228 P.2d 813 (2010) that “such arguments are flagrant and ill intentioned and incurable by a trial court's instruction in response to a defense objection.” *See Johnson*, 158 Wn. App. at 685.

Here, the prosecutor set forth a false choice:

So what do you -- what do you do? If she said it happened and he said it didn't happen, there's no percentage of weight assigned to what reasonable doubt is. But I mean, that's

50/50, and that's not it. *So you've got to go one way or the other.*

...

There's really only two possibilities. One, she's making it up; or two, she's telling the truth.

RP V at 441.

This argument is fatally flawed. The jury was and is entitled to conclude that it did not necessarily believe the defendant, but was also not satisfied beyond a reasonable doubt that he sexually assaulted K.W. *See, e.g., State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 1169, 1174 (2007) (“[T]o the extent the prosecutor's argument presented the jurors with a false choice, that they could find Miles not guilty only if they believed his evidence, it was misconduct.”)

This argument instructed the jury that if it did not find K.W. was “making it up,” they must find she was telling the truth (and therefore, that Domingue was guilty.) Because this argument misstated the burden of proof, Domingue was denied due process of law. Reversal is appropriate.

B. The trial court erred in giving Instruction no. 9.

While considering jury instructions, the trial court wrestled with whether to give an instruction based upon RCW 9A.44.020(1), *e.g.*, “(1) In order to convict a person of any crime defined in this chapter it shall not be

necessary that the testimony of the alleged victim be corroborated." See RP, Vol. IV, at 395-397. The trial court eventually did give the instruction as Instruction No. 9 over the defendant's objection. *See id.*

The giving of this instruction was error because the instruction amounts to a comment on the evidence forbidden by Article IV, § 16 of the Washington State Constitution.

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Canst. art. IV, §16. This prohibits judges "from influencing the judgment of the jury on what the testimony proved or failed to prove." *State v. Zimmerman*, 130 Wn. App. 170, 174, 121 P.3d 1216 (2005) (quoting *Bardwell v. Ziegler*, 3 Wash. 34, 42, 28 P. 360 (1891)), review granted, 157 Wn.2d 1012 (2006).

See State v. Baxter, 134 Wn. App. 587, 592-93 (2006).

The instruction was a comment on the evidence because a declaration by the trial court that the allegations made by the alleged victim—by themselves—could be sufficient to convict undoubtedly created an instruction manual for the jury regarding how to return of verdict of guilty. That is, if any jurors were entertaining doubt(s) as to whether this horrible offense was committed (in which case, their duty would be to return a verdict of "not guilty"), they could properly rely upon this instruction in order to convict Mr. Domingue. The better practice, and the practice which should have been employed here, would be to give no instruction at all.

Although counsel is aware of Division One's opinion in *State vs. Chenoweth*, 188 Wn. App. 521 (2015), this issue has not been resolved in this Court. This issue is also being raised to preserve it for further review.

Because the giving of this instruction was error, this Court should reverse Mr. Domingue's conviction and order a new trial.

IV. CONCLUSION

For all the foregoing reasons, the appellant, Carl Domingue, respectfully requests that this Court reverse his conviction for Child Molestation in the First Degree. Mr. Domingue requests a new, fair trial.

Dated: January 5, 2018.

By s/Joseph O. Baker
Joseph O. Baker, WSBA #32203
Attorneys for Appellant
Law Offices of Gehrke, Baker, Doull
& Kelly, PLLC
22030 7th Ave S, Suite 202
Des Moines, WA 98198
Tel. 206.878.4100
Fax 206.878.4101

CERTIFICATE OF SERVICE

I certify that on January 5, 2018, I caused a copy of the foregoing **BRIEF OF APPELLANT** to be served on the following individuals by delivery to the same. Service was made by email:

Michelle Hyer
Pierce County Prosecutor
930 Tacoma Ave S Rm 946
Tacoma, WA 98402-2102
PCpatcecf@co.pierce.wa.us

And I further certify that on January 5, 2018, I caused a copy of the foregoing **BRIEF OF APPELLANT** to be served on the appellant, Carl Lee Domingue via first class mail, postage prepaid. The address of the appellant is as follows:

Carl Lee Domingue
DOC #890341
Coyote Ridge Corrections Center (CRCC)
PO Box 769
Connell, WA 99326

s/ Joseph O. Baker
Joseph O. Baker, WSBA #32203

GEHRKE, BAKER, DOULL & KELLY, PLLC

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