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No. 50826-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE MORENO HERNANDEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF PIERCE

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. The prosecutor intentionally distorted Ms. Moreno's testimony to make it sound as though she had been told about a sexual assault when in fact she had not. This was preserved error.

- a. The prosecutor's direct examination of Ms. Moreno was improper and amounted to misconduct.

On appeal, the prosecutor attempts to minimize the trial prosecutor's attempts to directly insert the word "molestar" that had already been corrected by the interpreter, arguing that the "the prosecutor sought to clarify whether something as serious as an attempted rape had been conveyed to Ms. Moreno by her sister." Brief of Respondent at 15. But prior to questioning Ms. Moreno about her prior testimony, this confusion had already been clarified by the interpreter, who stated very clearly that the English word "molesting" had been mistranslated, and Ms. Moreno had only been told that her daughter reported that Mr. Moreno-Hernandez was "bothering" or "annoying" her. RP 1268. When the interpreter made this correction, the trial prosecutor stated he was aware of exactly where the mistranslation occurred in Ms. Moreno's testimony. RP 1260.

But after the interpreter clarified this mistranslation both for the court and the jury, the prosecutor attempted to undermine this clarity,

asking Ms. Moreno again about what her sister told her that night. RP 1269. Ms. Moreno testified, “my daughter had called my sister and that my husband was pestering or annoying her.” RP 1269.

Directly contradicting the interpreter’s clarification and Ms. Moreno’s testimony, the trial prosecutor then asked Ms. Moreno:

Q. And at some point during that conversation with your sister, you understood that the accusation that your daughter was making was that your husband had sexually molested her that evening, correct?

A. No. I didn't think that because she had never told me that he had annoyed her in that manner.

RP 1270.

The trial prosecutor then began questioning Ms. Moreno about how *his* question had been translated to her the day before, which for all the reasons stated in Appellant’s Opening Brief, was misconduct. Opening Brief of Appellant at 13-19.

It is thus entirely disingenuous for the prosecutor on appeal to claim that the extensive exchange during direct examination with Ms. Moreno, in which the trial prosecutor asked Ms. Moreno if she meant something different than what had already been clarified by the interpreter, was an exchange that “eliminated any ambiguity which could have resulted from the use of the term ‘molestar.’” Brief of Respondent at

18. The only ambiguity was the one created by the trial prosecutor by insisting Ms. Moreno meant something different than what had already been corrected by the interpreter.

b. Mr. Moreno-Hernandez objected to this prosecutorial misconduct.

Despite defense counsel's numerous objections to the prosecutor's improper questioning of Ms. Moreno, the prosecutor on appeal argues this is not preserved error. Brief of Respondent at 19.

It must first be noted that this type of error is not the type of "evidentiary error" that fits into a well-established evidentiary category such as hearsay and its exceptions as in the case of *Guloy* and *Boast*, cited by the prosecutor on appeal. Brief of Respondent at 20 (citing *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985); *State v. Boast*, 87 Wn.2d 447, 553 P.2d 1322 (1976)). The basis for Mr. Moreno-Hernandez's objection was the prosecutor's improper questioning and use of the Spanish language; thus his objection served the purpose of apprising "the trial court of the claimed error at a time when the court has an opportunity to correct the error." *Blomstrom v. Tripp*, 189 Wn.2d 379, 394, 402 P.3d 831 (2017).

Furthermore, an objection may preserve the issue if the "ground for objection is readily apparent from the circumstances." *Blomstrom*, 189

Wn.2d at 394. Here, counsel's repeated articulation of the on-going, multifaceted problem with the prosecutor's questioning of Ms. Moreno is certainly sufficient to preserve the issue for appellate review.

Defense counsel repeatedly objected to the various inappropriate ways the prosecutor questioned Ms. Moreno about how his questions were translated the previous day. Defense counsel noted that the prosecutor's interjection of the Spanish language required an interpreter and a record of the translation. RP 1271-1272. On appeal, Mr. Moreno-Hernandez argues this precise issue—that the prosecutor's reliance on his purported knowledge and memory, rather than the expert interpreter or an actual record of proceedings, constituted various forms of misconduct. Opening Brief of Appellant at 19-25.

Defense counsel also objected to the prosecutor asking a question about Ms. Moreno's memory of the Spanish translation from the previous day,

Q. So I'm going to repeat my question. My question is, when I asked the followup [sic] question yesterday, the verb that was translated from my question was not *molestar*. It was *abuso deshonesto*, correct?

A. Well, I don't remember that you had -- if you asked me that question. Q. Okay. So you don't recall what you testified to yesterday afternoon?

MR. WICKENS: Your Honor, that's not what she said. She said -- THE WITNESS: Of course I --

MR. WICKENS: -- and I object --

THE COURT: Overruled. Overruled. I'm going to allow some latitude.

1273. This objection came after defense counsel had already objected to the prosecutor's use of Spanish, and the court summarily allowed the prosecutor continued "latitude" in the line of questioning that Mr. Moreno-Hernandez had objected to.

Mr. Moreno-Hernandez's objections continued to name the conduct he was objecting to. RP 1287 ("Objection to the use of Spanish in an English-speaking courtroom because I don't understand what he's saying, and I would need a translation for the jury. If he's going to start speaking in Spanish.").

Defense counsel named the specific problem, objecting to the prosecutor using Spanish in his examination of Ms. Moreno. RP 1286. The court overruled these objections to the conduct that Mr. Moreno-Hernandez now challenges on appeal. RP 1272, 1288. This is clearly not a case in which Mr. Moreno-Hernandez "remain[ed] silent" during trial and now raises the issue for the first time on appeal. *State v. Sullivan*, 69 Wn. App. 167, 170, 847 P.2d 953 (1993) (citing *Guloy*, 104 Wn.2d at 421). The trial court was adequately informed about the nature of the objection and overruled it. *See State v. Suarez-Bravo*, 72 Wn. App. 359, 365, 864

P.2d 426 (1994) (objections that covered the relevancy of the prosecutor's line of questioning adequately informed the trial court of the basis for the claim of error).

c. The prosecutorial misconduct that was not objected to was flagrant and ill intentioned and could not have been cured by an instruction, requiring reversal by this court.

Even if this Court did not find that counsel's repeated objections to the prosecutor's effort to insinuate the idea that Ms. Moreno was told that her daughter was sexually abused that night, it is certainly manifest error affecting Mr. Moreno-Hernandez's constitutional right to a fair trial under RAP 2.5(a), especially when considered in light of the other numerous instances of misconduct throughout trial.

The prosecutor's misconduct interjected the notion that Ms. Moreno had knowledge that her daughter was "molested" and did nothing when she heard this, which was highly prejudicial to Mr. Moreno-Hernandez because it entirely discredited his wife's disbelief of her daughter's allegations against him. If this false assertion were not prejudicial to Mr. Moreno-Hernandez, presumably the prosecutor would not have gone to such great lengths to insert this notion at trial, repeatedly harassing Ms. Moreno with this line of questioning, and even repeating this false claim in closing argument. RP 1510.

As argued in Mr. Moreno-Hernandez's opening brief, the same prejudice analysis applies to the prosecutor's misconduct that bolstered and vouched for R.Y.'s credibility. Brief of Appellant at 25-30.

The prosecutor on appeal admits the trial prosecutor should not have argued in front of the jury that the State's witness was "consistent to every person she's spoken to," in arguing for the admission of hearsay evidence, but faults Mr. Moreno-Hernandez for not requesting a curative instruction for this error. Brief of Respondent at 21 (citing RP 1125). This misconduct, like the prosecutor's expression of personal opinion that R.Y. told the truth, must be viewed "in the context of the entire record and the circumstances at trial." *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); RP 775, 1508. As argued in Appellant's opening brief, no instruction could have cured the prosecutor's repeated, blatant misconduct that permeated every part of the trial and showed a flagrant disregard for the prosecutor's duty to ensure that Mr. Moreno-Hernandez received a fair trial. Opening Brief of Appellant at 28-31; *State v. Jones*, 144 Wn. App. 284, 298, 183 P.3d 307 (2008).

2. The trial court erred in admitting the hearsay statements of Ms. Moreno and R.Y.'s aunt.

Mr. Moreno-Hernandez objected to the out-of-court of statements made by R.Y.'s aunt and mother on hearsay grounds. RP 840, 841, 846,

848. At trial, the prosecutor advanced the basis for their admission as “effect on the listener.” RP 840, 841. The court overruled defense counsel’s objection on that basis. RP 840, 841. The prosecutor on appeal now advances a new argument for admission of these statements that was not advanced below—that R.Y.’s testimony about what her aunt and mother told her were “threats,” and thus the hearsay rule did not apply. Brief of Respondent at 24-25. This Court should not entertain this new argument on appeal that was not presented to the trial court. *State v. Lazcano*, 188 Wn. App. 338, 355, 354 P.3d 233 (2015) (“A party may not generally raise a new argument on appeal that the party did not present to the trial court.”).

Regardless, whether these out-of-court statements are labeled “threats” or “effect on listener,” the admissibility of the statements still turns on the relevance of the threat to the controverted issue at trial. *State v. Edwards*, 131 Wn. App. 611, 614–15, 128 P.3d 631 (2006) (citing *State v. Roberts*, 80 Wn. App. 342, 352–53, 908 P.2d 892 (1996) (“The issue here was who sold the cocaine. Detective Quist’s state of mind simply is not relevant to whether Mr. Edwards committed the crimes charged.”)).

The prosecutor on appeal argues that Mr. Moreno-Hernandez did not preserve the relevance analysis that is required before a trial court admits an out-of-court statement to establish the statement’s effect on the

listener. Brief of Respondent at 26. However, under the case law cited by the prosecutor, out-of-court statements offered for a non-hearsay purpose must be relevant to the proffered use of state of the mind of the listener: “as with any other evidence, the offered testimony must be relevant to an issue in controversy.” *Roberts*, 80 Wn. App. at 352–53. Here the out-of-court statements made to R.Y. well after the alleged incident had no relevance to the controverted issue; rather, the prosecutor relied on these out-of-court statements to bolster R.Y.’s credibility and create sympathy for R.Y., neither of which was relevant to the charged act. The prosecutor argued in closing:

And Ms. Guzman, the person who was supposed to be there for her, who was going to help her, who told her how to call 911, eventually turned her back on her. You remember how [R.Y.] explained, ‘She was the last person that was supposed to help me. She was the last person who was there for me. She’s no longer there for me.’

RP 1513.

And the prosecutor used the evidence of the out-of-court statements to show that R.Y.’s testimony should be believed because she was pressured to recant and did not:

She’s [R.Y.] been given every chance to take it back, and she won’t, every reason to take it back, and she won’t. Every test of her credibility that someone could put on her, she’s gone through. And she’s been consistent and explained and asked in the midst of it, ‘Please listen to me. Please listen.’

RP 1513. Because R.Y. did not recant her allegation, these out-of-court statements urging her to recant her claim were not relevant to the central issue at trial—whether the crime occurred—and should have been excluded because the out-of-court statements were hearsay.

3. The sentencing condition of no contact with minors is unconstitutionally overbroad.

The trial court imposed a sentencing condition—no contact with minors—without analysis of the need or parameters of this overly broad restriction. The prosecution’s citation to *State v. Aguilar*, 176 Wn. App. 264, 277, 308, P.3d 778 (2013) only supports Mr. Moreno-Hernandez’s claim, because in *Aguilar*, the court carefully considered the evidence presented at trial when imposing a 10-year no-contact order, specifically considering the harm of contact on specific children. *Id.* at 279, Brief of Respondent at 32. Mr. Moreno-Hernandez’s case presents the inverse scenario—the court did not carefully conduct a factual analysis or specifically tailor the order to address the court’s concerns about contact. Rather, the court issued a blanket no-contact order against all children, which was overly broad and fails to apprise Mr. Moreno-Hernandez of the specific conduct which would violate the order.

In Mr. Moreno-Hernandez’s case, the no-contact order fails to provide him notice of what kind of contact with children is prohibited, and he would potentially violate the order if he was knowingly in the presence

of minor children in a group setting such as family events or gatherings where the children are supervised by other adults, for example. Such overly broad prohibited contact is not “reasonably necessary to accomplish the essential needs of the State” to protect children and is vague. *Aguilar*, 176 Wn. App. at 277 (citing *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008)).

B. CONCLUSION

The prosecutor’s repeated disregard for Mr. Moreno-Hernandez’s right to a fair trial through various forms of prosecutorial misconduct requires reversal. Reversal of the no-contact order is also required where its no-contact provision is vague and overly broad.

DATED this 31st day of August, 2018.

Respectfully submitted,

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