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NO. 51874-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ANDREW HIEB,

Appellant.

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

The Honorable Bryan Chushcoff, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

THE PROSECUTING ATTORNEY’S ARGUMENTS WERE NOT PROPER FOR SEVERAL REASONS AND THE CUMULATIVE EFFECT OF THE IMPROPER ARGUMENTS DENIED HEIB HIS RIGHT TO A FAIR TRIAL.

1. Introduction

It has been long held that a prosecutor has a duty to “ensure a verdict free of prejudice and based on reason.” State v. Kroll, 87 Wn.2d 829, 835-36, 558 P.2d 173 (1977). Thus, during litigation a prosecutor may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. State v. Jones, 71 Wn. App. 798, 808, P.2d 85 (1993). It is also improper for a prosecutor to vouch for a witness's credibility. State v. Robinson, 189 Wn. App. 877, 892, 359 P.3d 874 (2015).

The State disagrees that these fundamental principles were violated in Hieb’s case. Brief of Respondent at 8. It incorrectly maintains its prosecuting attorney’s arguments, statements and comments to the jury were all proper. Id. Further, it makes no claim that Hieb was not denied his right to a fair trial if this Court finds its prosecuting attorney violated any of these principles for all or some of the reasons Hieb asserts.

2. Reply

The State contends its prosecuting attorney did not vouch for D.O.'s credibility when she told the jury that the "State submits she [D.O.] is credible" and "She told the truth" (RP 1001-1002). In support of its contention the State asserts the prosecuting attorney merely argued that the evidence supported D.O.'s credibility and she properly told the jurors that they were the judges of credibility. Brief of Respondent at 12.

First, that part of the record cited by the State belies the State's assertion the prosecuting attorney argued the evidence supported finding D.O. credible. Brief of Respondent at 11 (citing RP 1000-1002). The prosecuting attorney did not allude to any evidence as asserted by the State. The prosecuting attorney's statements "she is credible" and "told the truth" were unequivocal, declarative and unhinged from any evidence. The logical inference drawn from those statements is that it was the prosecuting attorney's opinion the D.O. was credible and her testimony was truthful.

Second, the State does not explain how informing the jury that it decides credibility makes a difference. It is because the question of whether a witness has testified truthfully is entirely for the jury to determine that an opinion on credibility is prohibited. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (plurality opinion).

The prosecuting attorney clearly conveyed the opinion D.O. was credible. Expressing her belief that D.O. was credible was improper. See Brief of Appellant at 12.

Defense counsel argued there was reasonable doubt because D.O. was not credible and the State failed to conduct an adequate investigation. RP 1055-1056, 1065-1067, 1069-1071. In rebuttal the prosecuting attorney stated:

Defense counsel makes the comments about the shortcomings of the law enforcement investigation. I submit to you that those shortcomings don't change what happened to [D.O.]. [D.O.] has been blamed for the defendant's actions by him telling her that it is her fault. She is the one in trouble. In shifting the spotlight to law enforcement and the potential shortcomings, the defense is essentially asking you to blame her again for what law enforcement...

RP1086-1087.

[D.O.] shouldn't pay for law enforcement's potential shortcomings.

RP 1087.

It is improper for the State to argue facts that are not in evidence. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704–05, 286 P.3d 673 (2012). The State claims its prosecutor's statements were supported by D.O.'s testimony that the "defendant told her not to tell her mom and that she didn't tell her mother because she thought it was her fault." Brief of Respondent at 22 (citing RP 529). D.O.'s testimony, however, does not logically support the inference that Hieb told D.O. it was her fault and she

was in trouble. Equating telling a person not to mention an incident to someone else with telling the person she is at fault for the incident or will be in trouble because of the incident is a non sequitur. The State's attempt to justify the argument on the basis that it was supported by the evidence fails.

The State dismisses its prosecuting attorney's other statement that "In shifting the spotlight to law enforcement and the potential shortcomings, the defense is essentially asking you to blame her [D.O.] again ..." (emphasis added)<sup>1</sup>, claiming the prosecutor was merely responding to defense counsel's argument. Brief of Respondent at 22. The prosecuting attorney's reason (responding to defense counsel) for her argument does not make the content of her statements immune from impropriety. As Hieb argued in his opening brief there are several reasons why this statement is improper. See Brief of Appellant at 13-14.

First, the prosecuting attorney told jurors Hieb is asking them to blame D.O. again. In doing so the prosecuting attorney emphasized her earlier improper and unsupported statements that Hieb blamed D.O. for the abuse she said she suffered.

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<sup>1</sup> RP 1086-1087.

Second, it is a blatant jab at defense counsel's integrity because it planted the seed that defense counsel's proper reasonable doubt argument based on an inadequate investigation was a subterfuge and that counsel's argument amounted to blaming D.O. for the abuse she testified about. The State does not cite anything in defense counsel's argument blaming D.O. because counsel never did. "The tactic of misrepresenting defense counsel's argument in rebuttal, effectively creating a straw man easily destroyed in the minds of the jury, does not comport with the prosecutor's duty to 'seek convictions based only on probative evidence and sound reason.'" State v. Thierry, Wn. App. 680, 694, 360 P.3d 940 (2015) (quoting State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)). The prosecuting attorney's misrepresentation of defense counsel's argument was improper.

Third, and perhaps even more egregious, the statements implied that if jurors did not convict Hieb based solely on D.O.'s testimony, despite counsel's reasonable doubt arguments, they too were guilty of blaming D.O. for being sexually abused. The State contends "The prosecutor never made any sort of comment to the jury that a failure to convict would make this D.O. 's fault.'" Brief of Respondent at 22. How else could the prosecuting attorney's comments be interpreted? The State does not answer that salient question. "A prosecutor may not properly invite the jury to decide any case

based on emotional appeals." State v. Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). The statements were designed to do just that. It is hard to imagine an appeal to convict more loaded with emotion than one assigning jurors with guilt for blaming a minor for the sexual abuse she alleged she suffered.

A prosecutor's closing statement is improper if it appeals to the passion and prejudice of a jury or references prejudicial allusions outside of evidence. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). It is reversible error for a prosecutor to urge a jury to decide a case based on evidence outside the record. State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). "Prosecutors often use matters outside the record to appeal to a jury's passion; thus, the two rules are closely related." Id.

"Who is to say that torn hymen is from the defendant? There is nothing to say that. There's other ways for those things to happen." RP 1080. The State does not claim these statements by its prosecuting attorney statements alluding to evidence that D.O. suffered a torn hymen were supported by any evidence. Instead, it contends that it was "hypothetical evidence to show that there could always be more evidence" and therefore a proper response to the defense reasonable doubt arguments. Brief of Respondent at 23. It was not proper argument.

The prosecuting attorney's comments did not reference the torn hymen as hypothetical evidence. The comments indicated that D.O. suffered a torn hymen, and by employing the rhetorical device of suggesting that although there was no evidence Hieb was the cause, it could nonetheless be inferred. "Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony." Ish, 170 Wn.2d at 196. The comments impermissibly invited jurors to convict on evidence that was not admitted and that vouched for the credibility of D.O.'s testimony that Hieb penetrated her with his fingers. See RP 521.

The prosecuting attorney argued "What is before you is justice that is due the accused is also due the accuser." RP 1082. "When you look at that [justice to the accuser], you look at what does the victim, [D.O.], experience in this? And you consider everything carefully. You consider what she went through and what she was able to tell you." RP 1083. "You are always going to want more [evidence]. I submit to you that the State has proven beyond a reasonable doubt that he is guilty -- do you have enough to be confident in that decision?" RP 1087.

In his opening brief, Hieb cited State v. Feely, 192 Wn. App. 751, 762, 368 P.3d 514, *review denied*, 185 Wn.2d 1042, 377 P.3d 762 (2016),

and other cases for the proposition that these statements improperly mischaracterized the burden of proof standard. See Brief of Appellant at 14-15. The State responds that because the Feely court ruled that requiring “anything less than an abiding belief that the evidence presented establishes the defendant's guilt beyond a reasonable doubt” (192 Wn. App. at 762), and Hieb successfully convinced the court to remove the abiding belief language from the reasonable doubt instruction, that the issue is governed under the invited error doctrine. Brief of Respondent at 19-21. The issue is whether the prosecuting attorney’s argument misstated the reasonable doubt standard. The State’s invited error assertion is a red herring.

The State also responds that “the record clearly reflects that the State was referring to the appropriate standard of reasonable doubt.” Brief of Respondent at 18. But neither the court’s reasonable doubt instruction nor any other instruction instructed jurors to consider justice due the accuser because that is not the jury’s role.

The comments that the jury needed to consider the “justice” “due the accuser” is like telling jurors its role is to “declare the truth.” See State v. Lindsay, 180 Wn.2d 423, 436-437, 326 P.3d 1 (2014) (the prosecutor misstated the burden of proof by telling the jury that its job was to speak the truth); see also State v. Evans, 163 Wn. App. 635, 641, 644–645, 260 P.3d 934 (2011) (prosecutor's statement improper because it “suggested to the

jury that it had an obligation to determine the truth”). A jury’s role is to determine whether the State has proved every element of the charged offenses beyond a reasonable doubt. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Reasonable doubt “is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all the evidence or lack of evidence.” CP 46. The jury has no obligation to consider justice to the accuser under the reasonable doubt standard. In suggesting such an obligation, the prosecuting attorney not only misstated the reasonable doubt standard but improperly appealed to the juror’s sympathy. A prosecutor's argument misstating, minimizing, or trivializing the law regarding the burden of proof is improper.<sup>2</sup>

In addition, telling jurors that they would always want more evidence aggravated the improper argument by improperly suggesting it should disregard the weaknesses in the State’s case. Evans, 163 Wn. App. at 645. The argument was further aggravated by the prosecuting attorney’s appeal to jurors to consider what D.O. experienced and what she “went through”—a clear invitation to jurors to improperly permit their sympathy for D.O. to influence their verdict. It is improper for a prosecutor to provoke

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<sup>2</sup> State v. Johnson, 158 Wn. App. 677, 684–86, 243 P.3d 936 (2010), *review denied*, 171 Wn.2d 1013 (2011); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

a verdict based on emotion and not the evidence. Belgarde, 110 Wn.2d at 507–508.

The prosecuting attorney’s intent to invite jurors to decide the case on their emotional response began with her closing argument.

When it happened, I didn't understand what he was doing to me. I didn't understand the gravity of what was happening to me. I trusted him. I didn't want to make my mom mad. I thought it was my fault.

RP 995.

The State claims this argument was proper because it was supported by D.O.’s testimony that she thought it was her fault and that her mother would get mad at her. Brief of Respondent at 10-11. However, the argument is objectionable because by speaking in the “first person” the prosecuting attorney assumed the role of D.O. thereby acting as her personal representative. The comments played into the prejudice and passions of the jury because the prosecuting attorney assumed the role of D.O. thereby acting as her personal representative. This rhetorical device was found improper in Pierce and was no less improper in this case, despite the factual differences. Pierce, 169 Wn. App. at 554.

The State does not dispute the prosecution rested solely on D.O.'s credibility. Given the impeachment of D.O.'s testimony<sup>3</sup> the prosecuting attorney unfortunately stepped over the line in her understandable zeal to secure a conviction. This Court has recognized where credibility is a key issue, "the prosecutor's improper arguments could easily serve as the deciding factor." State v. Walker, 164 Wn. App. 724, 733, 265 P.3d 191 (2011), *adhered to on remand*, noted at 173 Wn. App. 1027 (2013). Here, there was a substantial likelihood that the cumulative effect of the prosecuting attorney's improper comments affected the jury's verdict and denied Hieb the right to a fair trial.

B. CONCLUSION

For the above reasons and reasons in Hieb's opening brief, the prosecuting attorney's arguments were improper for several reasons. The improprieties denied Hieb his right to a fair trial. His convictions should be reversed.

DATED this 10 day of June 2019.

Respectfully submitted,  
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<sup>3</sup> See Brief of Appellant at 20.

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