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Court of Appeals
Division III
State of Washington

No. 299104

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ANDRES BARRAGAN ESTRADA, Appellant

APPEAL FROM THE SUPERIOR COURT
OF GRANT COUNTY
THE HONORABLE EVAN SPERLINE

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Prosecutorial Misconduct Denied Mr. Barragan A Fair Trial.

B. The Trial Court Erred When It Denied The Defense Motions For A Mistrial Based On Prosecutorial Misconduct.

Issues Pertaining To Assignments Of Error

1. Did the prosecutor's continued elicitation of hearsay statements violate Mr. Barragan's right to a fair trial?
2. Did the prosecutor's reference to facts not in evidence during closing argument constitute reversible misconduct?
3. Did the trial court err when it denied two motions by the defense for a mistrial based on prosecutorial misconduct?

II. STATEMENT OF FACTS

Andres Barragan Estrada was charged by information with first-degree rape of a child. (CP 1).

On March 16, 2009, ten-year old M.B. told her mother that her uncle, Andres Barragan, had raped her some time during the

first week of November 2008. (RP 156, 164-65). She reported the alleged incident on the same day her father told her he was going to take her and her sister away from their mother, and the day before her mother was scheduled to seek a temporary protection order against her father. (CP 5; RP 122). M.B. did not want to live with her father and she reportedly disclosed to her mother because “I didn’t want my uncle to do the same thing again.” (RP 130, 177).

Shortly after Halloween in 2008, M.B. and her six-year old sister visited their father at his auto repair shop. (RP 158,160). At some point in the afternoon M.B. went into the onsite mobile home and sat down on a bed to watch television. Mr. Barragan was lying on the other bed. (RP 162). She testified that Mr. Barragan turned up the volume to the television and told her to take her pants off. When she refused, he pushed her to the bed and pulled down her pants. (RP 163). She screamed for help when he put his fingers and then his penis into her vagina. (RP 164). M.B.’s sister entered the trailer to use the bathroom. (RP 170). She did not recall hearing any screaming, testifying it was quiet. (RP 144). M.B. testified when her sister entered the trailer Mr. Barragan jumped up. M.B. ran to the restroom. (RP 172). She stayed in the bathroom and then went to her father’s shop with her sister. (RP 174). She

told her father she had a stomachache and wanted to go home. (RP 174-175). She later testified there was blood in her underwear, but she threw them away when she got home. (RP 175-176). During testimony, M.B. also reported, for the first time, that Mr. Barragan touched her chest three or four times before this alleged incident. (RP 197-198).

Questioned at trial, her sister testified:

Q. That day back in November of 2008, do you really remember what happened? Or not?

A. No.

Q. Okay. People have told you what happened and that's how you remember?

A. Yes. (RP 146).

And again:

Q. So why did you tell us about this, Martha?

A. Because I – my sister, she – she like last time she made me – like she—she told me if I remembered and I told her that I didn't. (RP 148).

During the re-direct examination of prosecution witness Officer Valdivia, the investigating officer in the case, state's counsel asked a series of questions objected to by the defense:

Q. Do you know on the date of this alleged incident where [M.B.'s] father was in the auto repair shop?

A. In the work area as noted.

Mr. Trejo: Objection, lack of foundation, speculation.

The Court: Thank you. Sustained. The question is do you know?

Q. Do you know?

A. No.

Q. Did [M.B.] ever indicate in the contacts that you had with her regarding this case, that – did she ever indicate that anyone other than the defendant had raped her.

Mr. Trejo: Objection, hearsay.

Ms. Highland: Your Honor, this is in direct response to cross.

Mr. Trejo: I don't know what ---

The Court: Just a moment. The objection is sustained. (RP 103).

Q. Did the—did [M.B.] specifically identify the defendant?

Mr. Trejo: Objection, your Honor.

The Court: Sustained.

Ms. Highland: Did she indicate to you whether or not there was a familiar relationship with the individual who was alleged to have raped her?

Mr. Trejo: Objection

The Court: Sustained. (RP 104).

Outside the presence of the jury defense counsel moved for a mistrial based on prosecutorial misconduct: asking questions

intended to bring out facts that were inadmissible as hearsay. (RP 105). The court denied the motion.

The parties stipulated to admission of State's Exhibit 4, a portion of the pediatric physician's sexual abuse examination report on M.B. (RP 215). The physician was unable to perform a complete gynecological exam on M.B. and the results were inconclusive. (RP 14, 45-46, 208). Prior to trial, the court ruled any testimony by the physician concerning delayed reporting by the child was to be excluded. (RP 44).

During closing argument, the prosecutor stated: " There are adults who have been molested and raped who delay in reporting." The defense objected on the basis of arguing facts not in evidence and the court sustained the objection. (RP 258). The defense made a second motion for a mistrial after closing arguments, citing the prosecutor's intentional reference to the delayed reporting by M.B., which violated the earlier agreed order, as well as the state placing itself in a position of being a witness. (RP 262). The court denied the motion. (RP 263).

After a jury trial, Mr. Barragan was found guilty of first-degree rape of a child. (CP 45). He makes this appeal. (CP 70).

III. Argument

A. Prosecutorial Misconduct Denied Mr. Barragan A Fair Trial.

A prosecutor's duty is not merely to zealously advocate for the State, but also to ensure the accused receives a fair trial. *State v. Huson*, 73 Wn.2d 660,663, 440 P.2d 192 (1968). Only a fair trial is a constitutional trial. *Id.*

Prosecutorial misconduct is grounds for reversal if the conduct was both improper and prejudicial. *State v. Fisher*, 165 Wn.2d 727,747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d 759,858, 147 P.3d 1201 (2006)). Prejudice exists where there is a substantial likelihood the instances of misconduct affected the jury's verdict. *State v. Dhaliwal*, 150 Wn.2d 559,578, 79 P.3d 432 (2003). In determining whether the misconduct warrants reversal, the reviewing court considers both its prejudicial nature and its cumulative effect. *State v. Boehning*, 127 Wn. App. 511,518, 111 P.3d 899 (2005).

1. Repeated Instances of Elicitation of Hearsay Statements.

As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only

of justice. See *State v. Reed*, 102 Wn.2d 140,147, 684 P.2d 699 (1984). Prosecutorial misconduct may occur where the prosecutor repeatedly seeks inadmissible testimony from a witness and draws repeatedly sustained objections from the defendant. *State v. Alexander*, 64 Wn. App. 147,154, 822 P.2d 1250 (1992).

In *Alexander*, the court considered, among other issues, whether prosecutorial attempts to elicit testimony beyond that allowed under the ‘fact of complaint’ exception constituted misconduct; specifically, attempts to elicit from a witness who the victim named as her abuser. *Id.* at 155. The court there concluded the prosecutor’s questions were improper, as the prosecutor’s questioning elicited inadmissible evidence of the details of the abuse, that is, the identity of the perpetrator. *Id.* at 153.

Similarly here, the prosecutor committed misconduct by asking obviously objectionable questions that sought to elicit inadmissible testimony from Officer Validivia. The prosecution may present evidence that a complaint of a sexual assault was made to someone. However, evidence of the details of the complaint, including the identity of the offender, is not admissible. *State v. Ferguson*, 100 Wn.2d 131,136, 667 P.2d 68 (1983). Here, the prosecutor asked:

Q. Do you know on the date of this alleged incident where [M.B.'s] father was in the auto repair shop?

A. In the work area as noted.

The question was designed to establish that M.B.'s father could not have been the perpetrator of the alleged abuse because he was in his shop, not the trailer. The officer clearly had no personal knowledge of where M.B.'s father was on the day M.B. claimed she was assaulted. The objection was sustained.

The prosecutor then asked:

Q. Did [M.B.] ever indicate in the contacts that you had with her regarding this case, that – did she ever indicate that anyone other than the defendant had raped her?

Followed by:

Q. Did the—did [M.B.] specifically identify the defendant?

And again,

Q: Did she indicate to you whether or not there was a familiar relationship with the individual who was alleged to have raped her? (RP 103-104).

The defense objected to, and the court sustained, each objection. As in *Alexander*, the prosecutor's questions here were designed to indicate to the jury that M.B. had identified Mr.

Barragan as the alleged abuser, as well as to undergird M.B.'s credibility. This was improper.

Reversal is appropriate where there is a substantial likelihood the misconduct affected the verdict of the jury. *State v. Mak*, 105 Wn.2d 692,726, 718 P.2d 407 (1986), *overruled on other grounds* by *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). Here, the credibility of the complaining witness was at issue. There was no physical evidence of an assault and no expert testimony of evidence of an assault. Further, the corroborating testimony of M.B.'s younger sister was not based on any independent recollection of the alleged events, and Mr. Barragan denied any guilt.

It is well established that a witness may not testify to his opinion as to the guilt of a defendant, whether by direct statement or inference. *State v. Black*, 109 Wn.2d 336,348, 745 P.2d 12 (1987). Questioning whether M.B. ever named anyone other than the defendant as the perpetrator and whether she had a familial relationship with him, had the effect of impermissibly lending credence to M.B.'s testimony. By asking the officer a series of questions about the identity of the alleged perpetrator, the jury was in effect given an answer, despite defense counsel's objections.

Any reasonable doubts the jury may have had about the alleged assault were unduly influenced by such questions. Reversal is the appropriate remedy where the defendant's right to a fair trial has been prejudiced. *State v. Suarez-Bravo*, 72 Wn. App. 359,367, 864, P.2d 426 (1994).

2. Improper Closing Argument

A prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Dhaliwal*, 150 Wn.2d at 578. If the prosecutor's statements were improper, and the defendant made a proper objection to the statements, then a reviewing court considers whether the statements prejudiced the jury. *Reed*, 102 Wn.2d at 145.

In a pretrial hearing, the prosecutor stated she did not intend to ask the medical expert about "delayed reporting" or whether it was common. (RP 44). The court granted the defense motion to exclude any testimony concerning "delayed reporting." (RP 43-44). Despite this ruling, in closing argument the prosecutor stated: "There are adults who have been molested and raped who delay in reporting." Counsel objected and argued the prosecutor set herself

as a witness in the case and offered information that was expressly excluded by the court's earlier order. The objection was sustained. (RP 258).

M.B. had not reported the alleged event to anyone for approximately four months. Her stated reason for speaking about it to her mother was her parent's scheduled court date and her fear that her father would obtain custody of her and her sister and she might be around Mr. Barragan.

A prosecutor has wide latitude in closing argument to draw reasonable inferences and relay such inferences to the jury. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). However, statements may not be made that are unsupported by the evidence and that prejudice the defendant. *Boehning*, 127 Wn. App. at 519. "[E]vidence" is "[s]omething (including *testimony, documents, and tangible objects*) that tends to prove or disprove the existence of an alleged fact." *Id.* at 522, quoting BLACK'S LAW DICTIONARY 595 (8th ed.2004) (emphasis added).

The timing of and reasons for the report were significant to Mr. Barragan's defense. References to evidence outside of the record, combined with an appeal to passion or prejudice constitute misconduct. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d

174 (1988). It was improper of state counsel to reference the normality of a delay in reporting, for which there was no evidence. Counsel created an explanation rather than drew a reasonable inference for the jury. Further, the mention of a new “fact” in a closing statement was fundamentally unfair as there was no opportunity for rebuttal by the defense.

B. The Trial Court Abused Its Discretion In Denying Defense Counsel’s Motions For A Mistrial.

A trial court’s decision to deny a motion for a mistrial is reviewed for abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). A trial court abuses its discretion in denying a motion for a mistrial only if its decision is manifestly unreasonable or based on untenable grounds. *State v. Allen*, 159 Wn.2d 1,10, 147 P.3d 581 (2006). Here, the trial court abused its discretion when it failed to grant either of the two defense motions for a mistrial after the prosecutor questioned a witness to elicit hearsay and after improper closing argument.

To determine whether the trial court has abused its discretion in denying a motion for a mistrial, the reviewing court examines three factors: 1) the seriousness of the irregularity; 2)

whether the statement was cumulative of other evidence properly admitted; and 3) whether the irregularity could be cured by a court instruction to disregard the remarks. *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983); *State v. Escalona*, 49 Wn. App. 251,254, 742 P.2d 190 (1987).

Attempting to influence the jury as to the credibility of the witness by eliciting multiple hearsay answers is a serious irregularity. *Alexander*, 64 Wn. App. at 154. While the court sustained the defense objections, the jury nevertheless got the impression that M.B. identified Mr. Barragan as the perpetrator. The jury also, despite the court's ruling, could not disregard the prosecutor's statement during closing that individuals often delay in reporting.

It was an abuse of discretion for the trial court to deny Mr. Barragan's motions for mistrial when there was a substantial likelihood that the prejudicial questioning and closing remarks by the prosecutor affected the verdict. *State v. Crane*, 116 Wn.2d 315, 333, 804 P.2d 10 (1991).

IV. Conclusion

Based on the foregoing facts and authorities, Mr. Barragan respectfully requests this court to reverse the judgment and dismiss his conviction.

Dated : October 3, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for appellant Andres Barragan Estrada, do hereby certify under penalty of perjury under the laws of the State of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid, on October 3, 2011, to Andres Barragan Estrada, DOC # 347491, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001; and emailed per agreement between the parties to D. Angus Lee, Grant County Prosecuting Attorney at kburns@co.grant.wa.us.

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