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DEC 07, 2011

Court of Appeals

Division III

State of Washington

NO. 29910-4 III

**COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON

RESPONDENT

v.

ANDRES BARRAGAN ESTRADA

APPELLANT

RESPONDENT'S BRIEF

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecuting Attorney Office, is the Respondent herein.

II. RELIEF REQUESTED

Reversal is not warranted and Appellant's conviction must be affirmed.

III. ISSUES

- A. The Appellant's claim that the statements by the Prosecutor were improper and prejudicial are not substantiated by a review of the record.
- B. The statement made by the Prosecutor in closing argument did not deprive Mr. Barragan of a fair trial.
- C. The trial court did not err when it denied the defense motions for mistrial.

IV. STATEMENT OF THE CASE

In November of 2008, ten year old M.B. was at her Dad's car repair shop with her younger sister, Martha, in Mattawa, Washington. RP 157, 158, 160. Adjacent to the repair shop was a single wide trailer which had been divided into multiple residences. RP 80, 100, 101, 161.

Approximately half of the trailer was accessible by one door which led into a bathroom, small hall, and single bedroom. The other portion of the trailer was inaccessible from this portion. *Id.*

In the course of the afternoon, M.B. went into the bedroom of the trailer to watch television. RP 160, 162. There were two beds located within the bedroom. When she entered, the appellant, Andres Barragan, was laying on one of the two beds. M.B. sat on the other. RP 162.

Andres Barragan did not say anything to M.B. at that time, but raised the volume of the television, got up off of the bed he had been laying on, and pulled M.B. up into a standing position. RP 162, 163. Andres Barragan then told M.B. to pull her pants down, which she refused to do. Andres Barragan then pushed M.B. to the bed and pulled her pants and underwear down. He then got on top of her and began kissing her neck. M.B. began screaming while Andres Barragan tried to cover her mouth and told her not to make any noise. RP 163.

M.B. testified that Andres Barragan was touching her legs, and then put his fingers inside of her "part." M.B. testified that her "part" was her vagina. She believed that he used two fingers "because I felt them really thick." RP 164. She estimated that his fingers were in her vagina

for approximately ten seconds. RP 165. The appellant then stood up, pulled his pants down, and then placed his "part" in her "part." M.B. went on to identify the appellant's "part" as being his penis. M.B. said that this second penetration had felt different than that first; that it felt "thicker" and hurt bad "like needles." RP 164, 165. M.B. estimated that Andres Barragan's penis was in her vagina for approximately one minute, and that the entire incident lasted for approximately five minutes. RP 166, 170.

M.B. believed that her father was in the shop during this incident and that no one else was present in the trailer. RP 170. M.B. testified that she heard the outside door open, and Andres Barragan then got up off of her and pulled up his pants. RP 171. M.B. did not know what Andres Barragan did after this point, or where he went. RP 172. M.B. got up and ran into the closed bathroom, where she encountered her sister, Martha. RP 171. M.B. was crying, scared, and in pain; she testified that it felt as if she had "needles in her stomach and in her part." RP 172, 173. She stated that she had told her sister that her stomach "hurt." When asked why she had not told her six year old sister what had actually occurred, M.B. testified that her "uncle" (Andres Barragan) had told her that he

would do something to her and her mother if she told and that she was scared. RP 173, 174.

M.B. then went back out to the shop where she told her father that her stomach “hurt.” RP 174. She declined his offer to go get medicine, but instead called her mother to come pick her and Martha up. RP 174, 175. When she arrived home, she told her mother that she could not do her chores because she didn’t feel good. 175. Her mother told her to go to bed. M.B. testified that she was not having her period, but that there was blood in her panties, which she threw away in the garbage so that her mother would not see them. RP 175, 176. She said that she was afraid of her mother finding out because of the threats that Andres Barragan had made. RP 176.

In March of 2009, M.B.’s father came to her school and told her that he was going to try to take her and her siblings away from her mother. RP 177. M.B. then told her mother what had transpired some five months earlier “because I didn’t want my uncle to do the same thing again.” *Id.*

M.B. testified that she was not afraid of her father, and that she had not made up the story to avoid living with him, but rather, that she was afraid of Andres Barragan. RP 178, 198. M.B. identified Andres

Barragan as the individual who had committed the acts which had transpired in the trailer. RP 157.

M.B.'s mother was the first person to whom M.B. disclosed the sexual abuse. RP 178. M.B. then relayed the information to a doctor in Moses Lake who performed a one to two hour examination which made her feel very uncomfortable. RP 179, 180. M.B. testified that she has been in counseling since the incident regarding the rape involving Andres Barragan. RP 183.

Defense counsel asked if this was the only time that the appellant had touched her inappropriately. M.B. then told, for the first time in the course of the trial, of three to four other incidents which had occurred in Seattle earlier in 2008. RP 197, 198. M.B. testified that Andres Barragan would touch her breast, and that she hadn't told of those incidents before because she was embarrassed and believed them to "be her fault." RP 198, 199, 200.

M.B. testified that she hadn't made up her story, but that the reason she was willing to tell what had happened to her at trial, was because she wanted Andres Barragan to pay for what he'd done to her. RP 199. M.B. said that she remembered the incident from November of 2008 "because it

really, what happened to me really like – well, I will never forget that day.” RP 159.

The victim’s mother, Lucia Salazar, testified that her daughter had been born March 23, 1997. RP 109, 110. It was her testimony that although Andres Barragan was actually the cousin of the victim’s father, Andres Barragan was commonly referred to as the “uncle” of her girls. RP 119, 110.

Lucia Salazar remembered an incident in the fall of 2008 when she had picked her daughter up at around 5:00 P.M. from her daughter’s father’s place of work. RP 111. Ms. Salazar testified that her daughter had looked sad and upset, and had told her mother that her stomach hurt. RP 115. When they returned home, M.B. went to lay down because she said she felt ill. *Id.*

It wasn’t until March of 2009 that her daughter had told her about what had occurred between herself and Andres Barragan. RP 112. Lucia Salazar testified that M.B. was crying and sad, and was kind of afraid to tell her mother what she was going to say. *Id.*

According to Ms. Salazar, M.B. never identified anyone other than Andres Barragan as the perpetrator, nor did she ever identify anyone other than Andres Barragan as a perpetrator. RP 112.

Upon learning what had happened to her daughter, Ms. Salazar contacted Officer Valdivia of the Mattawa Police Department, and then contacted Debbie with Neil Holm (sic) (it appears that the witness may be referring to New Hope, a local Domestic Violence Service Provider), and also took M.B. in for a physical exam. RP 113, 114, 78.

Ms. Salazar testified that the girls wanted to go visit their father and would go "every three days or every week." RP 116, 117. M.B. had told her mother about the sexual abuse the day prior to the custody hearing, telling her that she didn't want to go live with her father because she didn't want her uncle to continue to harm her. RP 128, 132.

Martha, M.B.'s younger sister, who had been six at the time of the incident, testified that only her father and uncle had resided in the portion of the trailer where this had occurred. RP 142. She testified as to having entered the trailer to go to the bathroom and seeing the bedroom door closed. RP 144. Martha didn't hear anything. *Id.* Martha recalled that she was in the restroom and "...then I was doing my business and then my

sister came in and she was like crying, and I told her, what was wrong, and she told me that her stomach hurted.” RP 150. It was the first time that the victim had told her that she had “had it (stomachache) really rough.” RP 145.

The issue of delayed reporting is initially raised somewhat tangentially by defense counsel. RP 7. The next reference appears to occur during *motions in limine* when counsel for Mr. Barragan, George Trejo, addressed the Court as to the testimony of Dr. Marta Beaubien:

MR. TREJO: And one other matter, your Honor. In regard to Dr. Beaubien’s testimony –
Beaubien’s?

THE COURT: Beaubien.

MR. TREJO: –Beaubien’s testimony, the state has made reference throughout the day regarding delayed reporting. That is an area of expertise that a lay witness would not be able to testify to. That particular concept is nowhere to be found within the confines of her written report that we received, and therefore we would move in limine to exclude any testimony concerning delayed reporting.

MS. HIGHLAND: Your Honor, if I could respond. I don’t intend to ask Dr. Beaubien about delayed reporting. I do intend to ask the victim why she waited to tell, which is certainly relevant and I believe that counsel’s had notice of. But I have no intention of asking Dr. Beaubien about delayed reporting and whether that’s common.
RP 43, 44.

It is clear from the judge's comments at the close of the trial, that the issue of delayed reporting was raised during the *voir dire* process. RP 264. However the *voir dire* process does not appear to have been transcribed.

Although M.B. was asked why she had waited to tell, and why she had told when she had, there was no trial testimony about "delayed reporting", nor was it referenced in the State's initial closing.

Defense counsel, in his closing, argued:

[M.B.], I believe I mentioned how she's claimed that she was embarrassed to disclose the incidents involving inappropriate touching that took place on three or four occasions in the past. But does that make sense? When she was strong enough to disclose an alleged rape to three separate strangers, to more than that, to the officer, to the prosecutor's investigator, to the prosecutor, to the doctor and to an alleged counselor, she can talk about a rape, but she can't talk about molestation, touching? And it wasn't until she took the witness stand in this courtroom with 20 or so strangers sitting about in the audience and here at counsel table and the jury box, that, oh, yeah, I remember this too.
RP 252.

The State, in closing, argued:

In *voir dire* we talked about why children might delay in reporting. Now, remember, this happened in November of 2008--
RP 257.

The defense objected and the Court noted the objection stating "It's consistent with argument. Go ahead." RP 257.

The State continued:

In voir dire we talked about why children might delay in reporting. Remember this happened in November 2008 and she told in November – excuse me, March of 2009. And she told and it's been consistent throughout that she told because she was afraid not of her father, she testified she wasn't afraid of her father, she was afraid of being with her father because it gave her uncle access. She was afraid of her uncle. She wasn't afraid of her father. There are adults who have been molested and raped who delay in reporting. Individuals–
RP 258, 259.

Defense counsel objected, the Court sustained the objection, and the State moved on. RP 259.

At the end of trial, defense counsel made a motion for a mistrial, based on the State's reference to delayed reporting. RP 262.

The Court's ruling in pertinent part stated:

It seems to me that the court's instructions are sufficient to inform the jury that arguments of counsel are not evidence and to imply pretty clearly that what is said during voir dire is not evidence. And so I intend to deny the motion. It is noted for the record.

(The Court then discussed the danger of both counsel using voir dire to impart information to the panel).

The Court continued:

Whether Miss Highland had made any mention that this subject was discussed during voir dire or not, it was discussed. As was the other example that I mentioned. So I think it's a dangerous practice.

During her argument, Miss Highland mentioned that that subject was discussed during voir dire, but did not exploit that or try to characterize it as evidence before the jury. So I do not find intentional misconduct, nor do I find a basis on which to grant a mistrial.
RP 263.

The aforementioned appears to constitute the references to delayed reporting within the record in their entirety.

V. ARGUMENT

A. THE APPELLANT'S CLAIM THAT THE STATEMENTS BY THE PROSECUTOR WERE IMPROPER AND PREJUDICIAL ARE NOT SUBSTANTIATED BY A REVIEW OF THE RECORD.

Allegations of prosecutorial misconduct are reviewed for abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997); *State v. Ish*, 170 Wn.2d 189, 241 P.3d 389 (2010). To prevail on a claim of prosecutorial misconduct, the defense must show that the comments were improper and that they were prejudicial. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); *State v. Ish*, 170 Wn.2d at 200. It is misconduct for a prosecutor to express personal belief as to the credibility of a witness. *State v. Warren*, 165 Wn.2d at 30. If the defendant proves the conduct was improper, the prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a

substantial likelihood the misconduct affected the jury's verdict. *State v. Stenson*, 132 Wn.2d at 718-719 (citing *State v. Brett*, 126 Wn.2d 136, 75, 892 P.2d 29 (1995)) (vacated on other grounds).

Appellant argues that four questions were asked of Officer Valdivia in sequence during re-direct which improperly prejudiced Mr. Barragan.

The first exchange is as follows:

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.

Appellant is clearly speculating when he argues as to the State's motivation in asking this question. BA 8. As the Court noted, it was a yes or no question to which the officer provided additional information not requested. RP 103. Additionally, defense counsel himself stated in opening that M.B.'s dad was right outside the trailer working on cars when this incident was allegedly occurring. RP 73. In any case, the father was never a suspect in the rape.

The following three inquiries then took place:

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?

Followed by:

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.

During an ensuing recess, the State argued that the basis for its questions of Officer Valdivia was to address counsel’s line of questioning during his cross of the officer. RP 107. Specifically, counsel had asked of Officer Valdivia, “couldn’t it have been another perpetrator?” RP 96. When the jury returned, the State asked the officer “(d)id your investigation of this case develop information about any other potential perpetrator?” to which, Officer Valdivia responded “(n)o”.

A reviewing court should look at the seriousness of the irregularity; whether it was cumulative of evidence properly admitted, and whether it could have been cured by an instruction. *State v. Escalona*, 49 Wn.App. 251, 254, 742 P.2d 190 (1987). In the instant case, M.B. testified that it was the appellant, Andres Barragan who raped her first with his fingers, and then with his penis. Both she and her mother referred to Andres

Barragan as her uncle, with M.B.'s mother explaining the actual relationship between the victim and Mr. Barragan. And contrary to appellant's argument, M.B.'s sister, Martha, did recall part of the incident where she (Martha) had been in the bathroom "doing her business" when M.B. came in crying and told her that her (M.B.'s) stomach "hurted".

B. THE STATEMENT MADE BY THE PROSECUTOR IN CLOSING ARGUMENT DID NOT DEPRIVE MR. BARRAGAN OF A FAIR TRIAL.

Where improper argument is charged, the defendant bears the burden of establishing the impropriety of the prosecutor's remarks as well as their prejudicial effect. *State v. Davis*, 141 Wn.2d 798, 840, 10 P.3d 977 (2000). Reversal is not warranted if the error could have been obviated by a curative instruction which the defense did not request. *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991), *State v. Dhaliwal*, 150 Wn.2d 559, 79 P.3d 432 (2003).

The court should review the prosecutor's remarks in the context of the entire trial. *Warren*, 165 Wn.2d at 27. (In analyzing prejudice, a court does not look at a prosecutor's improper comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury). This court should consider the remarks the

prosecutor made in his rebuttal statement in the context of the defense's closing argument.

In closing remarks, defense counsel stated:

[M.B.], I believe I mentioned how she's claimed that she was embarrassed to disclose the incidents involving inappropriate touching that took place on three or four occasions in the past. But does that make sense? When she was strong enough to disclose an alleged rape to three separate strangers, to more than that, to the officer, to the prosecutor's investigator, to the prosecutor, to the doctor and to an alleged counselor, she can talk about a rape, but she can't talk about molestation, touching? And it wasn't until she took the witness stand in this courtroom with 20 or so strangers sitting about in the audience and here at counsel table and the jury box, that, oh, yeah, I remember this too.
RP 252.

Defense counsel raised an argument concerning M.B.'s delayed reporting of what Andres Barragan had done to her to which the prosecutor was entitled to respond to in rebuttal. Contrary to appellant's assertion, defense counsel did not object to the prosecutor's remark about delayed reporting based on an earlier court ruling, but rather, that the prosecutor had begun arguing facts not in evidence. The objection was timely made, sustained by the court, and the State moved on. RP 257, 258.

Ultimately, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is

a substantial likelihood that the defendant did not receive a fair trial. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

The cases cited by appellant are inapposite. In *State v. Alexander*, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992), the court overturned defendant's conviction, finding that there had been vouching and opinion evidence on the ultimate issue of fact as to whether the victim had been raped, after the victim had testified that the abuse had not occurred. In *Alexander*, the court held that the prosecutor's questions, which were objected to, and disallowed, left the jury with the impression that the witness had knowledge with would have been favorable to the State, and which, "but for the court's rulings, would have been revealed."

Similarly in *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987), the defendant's conviction was overturned due to the admission of testimony regarding "rape trauma syndrome" which the reviewing court held to be an expression of an opinion on the ultimate issue of whether the victim had been raped.

Dissimilar from *Alexander* and *Black*, there was no other witness who opined either that the rape had occurred or that Andres Barragan was the perpetrator. The jury was in the best position to assess the credibility

of M.B. when she relayed to them how she had been raped by the appellant. She was subjected to cross examination by counsel and consistently maintained that it was Andres Barragan who had committed the assault against her.

C. THE TRIAL COURT DID NOT ERR WHEN IT DENIED THE DEFENSE MOTIONS FOR MISTRIAL.

The trial court is in the best position to assess the impact of irregularities and an appellate court will disturb the trial court's exercise of discretion only when no reasonable judge would have reached the same conclusion. *State v. Hopson*, 113 Wn.2d 273, 778 P.2d 1014 (1989), *State v. Mak*, 105 Wn.2d 692, 701, 719, 718 P.2d 407 cert. denied 479 U.S. 995, 93 L.Ed 2d 599, 107 S.Ct. 599 , (1986), *State v. Post*, 118 Wn.2d 596, 826 P.2d 172 (1992), *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979), *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983), *State v. Gregory*, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006).

In this case, there was an innocuous question about the location of M.B.'s father, which the State would argue had no effect upon the proceedings whatsoever. Additionally, there were three questions which were not responded to, and which were few and of little consequence since they were cumulative of other evidence. Finally, there was a statement

made in closing which was objected to, sustained, and abandoned. At worst, even cumulatively, such was harmless error.

The jurors in this case heard the testimony of M.B. who described the incident where Andres Barragan raped her in the trailer at her father's place of work, as well as having heard the corroborative testimony of both her mother and her sister. A defendant is not entitled to a perfect trial, there is no such thing. A defendant is entitled to a fair trial, which the State would argue appellant Andres Barragan received.

VI. CONCLUSION

For the foregoing reasons, the State would respectfully request that appellant's appeal be denied and that his conviction for Rape of a Child in the First Degree in violation of RCW 9A.44.073 be affirmed.

DATED: _____ 1206 _____, 2011.

Respectfully submitted:
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 29910-4-III
)	
vs.)	
)	
ANDRES BARRAGAN ESTRADA,)	DECLARATION OF SERVICE
)	
Appellant.)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the *Respondent's Brief* in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Marie J. Trombley
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That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the *Respondent's Brief* in the above-entitled matter.

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Dated: December 7, 2011.



Kaye Burns