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February 19, 2013
Court of Appeals
Division III
State of Washington

NO. 307891-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

RICHARD DEAN OCHOA, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-00497-1

BRIEF OF RESPONDENT

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I. ISSUES

1. What is the Standard on Review?

A. Who has the burden of proof?

B. What is the burden of proof?

1. *Improper conduct:* Since the trial court did not sustain the defendant's objections that the prosecutor's argument was improper, is an "abuse of discretion" standard appropriate?
2. *Prejudicial affect:* What constitutes prejudice?

2. Has the defendant met this burden?

A. Did the trial court abuse its discretion by not ruling that the prosecutor's closing argument was improper?

B. If so, has the defendant proven that there was a substantial likelihood that the argument affected the jury's verdict?

II. STATEMENT OF FACTS

T.E., H.E., and M.F. are sisters¹ with some things in common. Their parents were drug addicts who were unable to care for them (RP² 121, 232, 240-41). For about a year, starting in October 2001, they all lived with their maternal aunt, Lorna Ochoa and her husband, the

¹ M.F. is actually a half-sister of T.E. and H.E. (RP 140).

² "RP" refers to the Jury Trial Verbatim Report of Proceedings.

defendant. (RP 239-40). All state that the defendant molested or tried to molest them. (RP 123, 144, 168).

More specifically, T.E. and H.E. spent much of their young life bouncing back and forth between parents. (RP 121). After their father was sentenced to prison, T.E. and H.E. moved in with their aunt, the defendant, and their children. (RP 121-22). T.E., whose date of birth is 06/28/87, was 13 to 14 years old at the time. (RP 122). H.E., whose date of birth is 07/28/89, was 11 to 12 years old.

Both girls state that their aunt worked nights during this time. (RP 123, 142). The defendant let the girls drink alcohol. (RP 123, 142). One night, T.E. became intoxicated and became sick. (RP 123). She went into the defendant's (her uncle) bedroom, and woke up with his head in her vagina area. (RP 123).

T.E. told H.E. about this prior to M.F. revealing her sexual abuse by the defendant. (RP 124-25, 143).

One night the defendant came into H.E.'s bed and tried to unbutton her pants. (RP 144, 45). H.E. told him to leave her alone and that she would tell Aunt Lorna if he did not. (RP 144). H.E. also told T.E. about this prior to M.F. revealing her sexual abuse by the defendant. (RP 144-45).

M.F., whose date of birth is 08/20/95, stated that she remembers the abuse starting around age five or six, and it included her touching the defendant's penis, his touching her breasts and vagina, and her sucking his penis. (RP 168). M.F. had lived with her aunt and uncle since she was eighteen months old. (RP 232). M.F. stated that she loved her aunt too much to tell her about the abuse. (RP 171). M.F. also loves her uncle and was reluctant to state fully the abuse to the police, because she did not want to get her uncle into trouble. (RP 171, 187).

The court admitted the testimony from T.E. and H.E. under ER 404(b) to prove a common scheme or plan, noting that the testimony of the three sisters all involved a period of time when they lived with the defendant, episodes when the defendant's wife was working outside the home and entrusted their care to the defendant, and the sisters were isolated from other parental figures. (RP 5-6).

The defendant declined to request any limiting instruction concerning the ER 404(b) evidence. (RP 200). In his closing, the defendant argued that M.F. lied about the sexual abuse:

When grandma says what the heck is going on here she said he did it. That is a good way to get out of trouble when you are 13 years of age and say you did. You don't know the hurricane or avalanche that is about to start because it keeps rolling, rolling, rolling until you are standing here talking about it several years later. . . . She said she told the police officer lies because she didn't want

to get her dad in trouble but the lies that she -- the story that she was telling certainly got him into trouble and again you will have a copy of this transcript of the tape recording. . . . If you look to the tape you can hear her say, no, and the transcript goes on and repeats her answer, no, and then again the interviewer ask[s] her did it -- you said it was always[s] at the house. Did it ever happen somewhere else, no. So when [M.F.] took the stand she indicated, yeah, I didn't tell the truth to the police officer up there and the reason I didn't tell the truth was because I didn't want to get my dad in trouble. I would suggest to you that she was getting him in an awful lot of trouble. She didn't think this would get him into trouble. She didn't want him getting in trouble. . . . She has to make a good story. She has to win so she doesn't look like the fool. So she is not made fun of and if in fact she is in fact it is your decision that this did not happen she is not going to be pleased with that.

. . . .

She is struck with this mess here and it certainly is a tragedy for Richard who wanted to get up and hug her and say I forgive you. It's a tragedy for him a tragedy for her sisters, who get up on the witness stand and cry about this. It's a terrible thing. But I don't think there is sufficient evidence. (RP 376).

(RP 373-76).

As stated in the appellant's brief, the defendant objected to the rebuttal closing argument on several occasions, but those objections were not sustained. (RP 377, 78). A portion of the State's rebuttal is quoted below.

III. ARGUMENT

1. **STANDARD ON REVIEW: The defendant has the burden of proving that the trial court abused its discretion by not sustaining objections to the prosecutor's closing argument and that there was a substantial likelihood that the argument affected the jury's verdict.**

A. **The defendant has the burden of proof.**

See *State v. Gregory*, 158 Wn.2d 759, 889, 147 P.3d 1201 (2006).

B. **The defendant must prove that the prosecutor's argument was both improper and prejudicial.**

See *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997).

1. *Since the defendant's objections to the prosecutor's closing argument were not sustained by the trial court, the defendant must prove that the court abused its discretion in allowing the prosecutor's argument to continue.*

Here, the defendant objected to the prosecutor's rebuttal argument. Those objections were noted by the trial court and not sustained. (RP 377). A claim of prosecutorial misconduct is reviewed in the context of the total argument, the issues in the case, the argument of opposing counsel, and the instructions given to the jury. *State v. Brown*, 132 Wn.2d at 561. The trial judge is in the best position to determine whether the prosecutor's argument was improper. *State v. Ish*, 170 Wn.2d 189, 241

P.2d 389 (2010). Therefore, the issue is whether the trial court abused its discretion in allowing the argument. *State v. Ramos*, 164 Wn. App. 327, 236 P.3d 1268 (2011).

So, at least regarding whether the prosecutor's argument was improper, the defendant must establish that the trial court abused its discretion.

2. *The defendant must also prove that the comments were prejudicial, that is, prove that there is a substantial likelihood that the comments affected the jury's verdict.*

State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

C. The defendant has not met this burden.

1. *The defendant has not proven that the trial court abused its decision by allowing the prosecutor's argument.*

An allegedly improper closing argument should be considered in the context of the total argument, the issues in the case, the evidence addressed in the defendant's closing, and the instructions given. *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994). Here, the defendant in closing argued that M.F. was a liar, that she accused the defendant of sexual abuse in order to deflect attention to her own behavior. (RP 373). The defendant's only mention of T.E. and H.E. was "It's a tragedy for him a tragedy for her sisters, who get up on the witness stand and cry about

this.” (RP 376).

In response, the prosecutor stated that the defendant abused M.F., as well as T.E. and H.E., that the three girls are sisters, that the abuse happened in the same time frame, while all three were living with the defendant. (RP 377). This is the essence of evidence admissible under ER 404(b) for common scheme or plan. *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). Prior bad acts may be admitted to establish that the defendant committed similar acts of misconduct against similar victims under similar circumstances.

The prosecutor’s rebuttal was appropriate and focused on the defendant’s common scheme of abusing his nieces while they were living with him. The prosecutor stated:

We have not one girl, saying that her uncle was an abuser, not two girls saying that the uncle abused her, but three different girls. All three girls living under the defendant’s roof. All three girls sisters. All three roughly the same time frame. Is that just a wild coincidence?

. . . .

Do we not have evidence of what was going on at the defendant’s residence with girls that were not his biological daughters? Do we not have evidence of his plan, his scheme. Do we not have evidence that there was a girl there living under the defendant’s roof, that she was in danger of being abused. This is -- it’s not one girl’s statement to you, it’s the three girls living under the same roof. All related. All sisters. All his nieces.

(Emphasis added). (RP 377-378).

The prosecutor responded to the defendant's argument that M.F. was a liar, by pointing out that she shared common traits with her sisters: when they lived with the defendant, while his wife was working, he tried to molest them. This was consistent with the trial court's reasoning and order. (RP 5). The prosecutor did not argue that because the defendant was accused by one female of molestation he must have also molested another female. The prosecutor's rebuttal focused on the defendant's molestation of three sisters, his nieces, who were living with him at the time during a similar time period.

The trial court did not abuse its discretion in allowing this argument.

2. *In any case, the defendant has not shown that the comments affected the jury's verdict.*

The defendant was convicted because he engaged in the common scheme of molesting M.F. and her sister's T.E. and H.E., while they were living in his residence. The defendant committed the sexual abuse while his wife was out of the residence working.

Although M.F. was not the most articulate witness, her testimony was powerful. Even though she had been repeatedly molested by the defendant, he was her only real father figure and she still loved him.

There was no reason for her to lie about the abuse. Nor was there any reason for T.E. and H.E. to fabricate a story.

The evidence convicted the defendant, not the prosecutor's rebuttal closing argument.

IV. CONCLUSION

The trial court correctly overruled the defendant's objection to the State's rebuttal closing argument. That argument properly focused on the defendant's common scheme or plan of abusing his nieces while they were living with him. In any event, the trial court did not abuse its discretion in allowing the argument.

Further, the defendant has not established that the outcome would have been different. If the prosecutor had waived the rebuttal argument, the jury would have still had powerful evidence from M.F., who loved the defendant as the only father figure she had, along with her sisters, T.E. and H.E., whose independent testimony about the defendant's sexual abuse supported M.F.

The defendant's conviction should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of February
2013.

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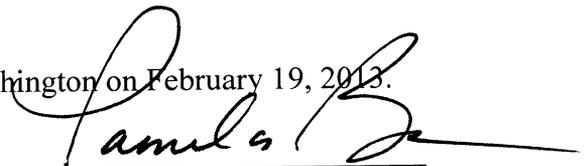
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