

FILED
DECEMBER 8, 2016
Court of Appeals
Division III
State of Washington

No. 33886-0-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent

vs.

TRACEY EDWARD LYON,

Appellant

BRIEF OF RESPONDENT

DOUGLAS R. MITCHELL
WSBA #22877
Kittitas County Prosecutor's Office
205 W. 5th Ave, Ste. 213
Ellensburg, WA 98926
(509) 962-7520

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. Identity of Respondent.....	1
II. Statement of Relief Sought.....	1
III. Response to Issues Presented for Review.....	1
IV. Statement of the Case	2
V. Argument	2
VI. Conclusion	13

TABLE OF AUTHORITIES

Table of Cases

Page

Cases

DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126,
372 P. 2d 193 (1962)7
State v. Bahl, 164 Wn. 2d 739, 193 P. 3d 678 (2008)12, 13
State v. Barry, 183 Wn. 2d 297, 316 – 317, 352 P. 3d 161 (2015).....14
State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).....10
State v. Drum, 168 Wn.2d 23, 35, 225 P.3d 237 (2010).....6
State v. Emery, 174 Wn. 2d 741, 762, 278 P. 3d 653 (2012)12
State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995).....10
State v. Ish, 170 Wn.2d 189, 241 P. 3d 389(2010).....7, 10, 11
State v. Kirkman, 159 Wn. 2d 918, 936 – 937, 155 P. 3d 125 (2007)6
State v. Montgomery, 56 Wash. 443, 447 (1909)9
State v. Quaale, 182 Wn. 2d 191, 197, 340 P. 3d 213 (2014).....6
State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)10
State v. Thorgerson, 172 Wn. 2d 438, 258 P. 3d 43 (2011)12
State v. Warren, 165 Wn.2d 17, 195 P. 3d 940 (2008).....11
State v. Young, 62 Wn. App. 895, 901, 802 P. 2d 829 (1991).....5, 7

Evidence Rules

ER 702 5
ER 704 5

I. IDENTITY OF RESPONDENT:

The State of Washington was the Plaintiff in the Superior Court, and is Respondent herein. The State is represented by the Kittitas County Prosecutor's Office.

II. STATEMENT OF RELIEF SOUGHT:

The State is asking this Court to affirm the decisions of the Superior Court and uphold the Appellant's Conviction and Sentence.

III. RESPONSE TO ISSUES PRESENTED FOR REVIEW:

A. The testimony of Ms. Larrabee was not a comment on the credibility of the victim or other improper vouching and did not improperly bolster the victim's testimony.

B. The closing argument of the trial prosecutor did not ridicule the statements of the Appellant; did not ask the jury to speculate on the reasons for the acts committed by the Appellant, and was not and could not have been prosecutorial misconduct.

C. Condition 4 of the Judgment and Sentence, prohibiting the viewing or use of sexually explicit materials is not an improper restriction on a sex offender.

IV. STATEMENT OF THE CASE:

Appellant's summary describing the facts of the case (Br. of Appellant, at 2 – 9) is sufficient for the purpose of Respondent's response, and will be accepted as it is, unless otherwise noted below.

V. ARGUMENT:

A. Ms. Larrabee did not comment on the credibility of the victim and thus indirectly violate Appellant's right to a Jury Trial.

Appellant refers to a relatively small portion of the direct examination of Ms. Larrabee, without providing the full context of the exchanges leading up to that point. Ms. Larrabee was careful to use the label "alleged offender" in referring to the persons involved in the types of incidents that result in her conducting an interview. (RP, 539, l. 9) After that, the prosecutor asked her to explain the use of that term in this exchange:

Q: Okay. And I just heard you say the alleged offender. Is it your job as a child forensic interviewer to reach conclusions as to whether something did or didn't happen?

A: No, it is not.

(RP, 539, l. 12 – 16) The words chosen and further question by the trial prosecutor show the effort to be objective and not provide testimony that could impinge upon the jury’s role. The prosecutor made further efforts to provide information to the jury about the interview process and steps taken by Ms. Larrabee to accept and address the possibilities of alternative hypotheses or motives to make a false statement, ending with the objection by defense counsel. (RP, 542, l. 15 – RP 544 l. 8) The portion of the transcript at this point quoted by Appellant (Br. Of Appellant, at 6) did not include any response from Ms. Larrabee that commented favorably on the credibility of the child witness. In relevant portion, Ms. Larrabee’s answer was “So, I think, at that point what I – what I was kind of trying to focus on more was a possible motive for – for lying and I – and I did ask questions in an effort to try and explore that”. (RP, 543, l. 7 – 10) Ms. Larrabee did not give an opinion as to anything that would be within the jury’s province, but was explaining the background for the steps she took in the interview.

Thereafter, the prosecutor shifted to addressing alternative hypotheses. The final answer by Ms. Larrabee to that line of inquiry was “Who knows. There might have been – yeah, there,

there could be other things. So I'd gather more details about it.”

RP, 544, l. 6 – 8) After the objection was overruled, the prosecutor sought not an opinion or commentary from Ms. Larrabee about the child victim, but a review of her own conduct in performing the interview.

Q: And last, as a trained and experienced child forensic interviewer, in looking at your interview, how would you compare this interview to four hundred and eighty – four hundred and forty others you conducted.

A. I'd say it was technically sound. The child was forthcoming. She seemed like she wanted to provide accurate information. I think it was a little long, longer than most.

(RP, 546, l. 7 – 15) Further on, Ms. Larrabee described the length as resulting from her own actions in the interview, and also described the victim as average for her age in her ability to provide details. (RP, 546, l. 19 – 23) None of Ms. Larrabee's testimony is capable of being accurately described as a commentary on the victim's credibility when viewed in context. The testimony is about the process of conducting the interview and her own performance; neither Ms. Larrabee's testimony nor the questions

that resulted in that testimony were directed at providing or obtaining an opinion as to Appellant's guilt.

Appellant asserts that Ms. Larrabee qualified as an expert witness at trial. (Br. Of Appellant, at 11) There does not appear to be an explicit pronouncement of her as such by the Court, but she is implicitly treated as such. ER 702 provides that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Certainly the record made of Ms. Larrabee's credentials and experience and the rest of her testimony is consistent with her being treated as an expert. She was, without question, as objective as anyone can be expected to be, and professional in her performance both in the interview and her testimony. *State v. Young*, 62 Wn. App. 895, 901, 802 P. 2d 829 (1991). Further, ER 704 provides that "Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." "An opinion that embraces an ultimate issue, however, must be 'otherwise admissible.' When opinion testimony that embraces

an ultimate issue is inadmissible in a criminal trial, the testimony may constitute an impermissible opinion on guilt.” *State v. Quaale*, 182 Wn. 2d 191, 197, 340 P. 3d 213 (2014).

Even if this Court were to conclude that the questions and testimony were improper in some manner, the law requires that the statement as to ultimate fact be explicit or almost explicit. *State v. Kirkman*, 159 Wn. 2d 918, 936 – 937, 155 P. 3d 125 (2007.) A clear example of such testimony is that given in *Quaale*, at 195, in which the witness was asked if he had formed an opinion, and replied “Absolutely. There was no doubt he was impaired”. Even if this Court were to conclude that Ms. Larrabee’s testimony did invade the jury’s fact finding role, which the State assertively disputes, it is not anywhere near the kind of testimony that would violate the *Quaale* rule.

In this case, the jury had already heard live testimony from the victim and watched the interview (less those portions excluded by agreement to avoid the risk of prejudicial information). It is the job of the finder of fact to assess the testimony of all of the witnesses, including here the child victim, and make their own determinations of credibility. Appellate courts defer to the finder of fact (here, the jury) on issues of witness credibility. *State v. Drum*,

168 Wn.2d 23, 35, 225 P.3d 237 (2010) (citation omitted). “...(A) jury evaluates a child's recollection by observing the manner in which the child witness recounts the events, the child's memory of contemporary events, and the child's demeanor.” *State v. Young*, 62 Wn. App. 895, 902, 802 P. 2d 829 (1991). There was no testimonial error by Ms. Larrabee, and the trial court properly overruled the objection.

B. There were no acts of prosecutorial misconduct.

Appellant makes an allegation of prosecutorial misconduct, and asserts that his due process rights were violated. Br. of Appellant, at 14 – 16. The assertion of Constitutional violation is not supported with authority. A court is entitled to conclude that the failure of counsel to cite authority means that no authority exists supporting counsel’s position. “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P. 2d 193 (1962). That lack of authority is likely related to the rejection of this Constitutional argument. *State v. Ish*, 170 Wn.2d 189, 241 P. 3d 389(2010).

Appellant takes two snippets of the closing argument out of context to support an assertion of prosecutorial misconduct in an effort to attract this Court's attention. As the trial prosecutor noted in argument, referring to instruction nine, the definition of sexual contact is relatively simple, and any amount of contact that the jury believes to have been for sexual gratification is sufficient. There is no minimum time. (See the quoted material from RP 620 in Br. of Appellant at 8.) The prosecutor is simply addressing one of the misconceptions that could exist in the mind of persons not familiar with the legal system, and utterly dependent on the process going on in front of them for the analytical framework needed.

So the fact when you think about why would anybody do this? I mean, why? Give me a break. You've got to be kidding me. There's got to be some psychoanalytical reason, something, OCD, something there. I submit to you as you make the decision based on the facts in evidence, who knows? Who really cares? Who knows why anybody does anything? Sometimes we do. And who really cares in the aftermath?

RP, 642, l. 7 – 14. Similarly, this material is not at all close to the misconduct standard. The prosecutor is now explaining to the jury that the standards to be considered are those provided by the facts and applying the law as given in the instructions. He is drawing a contrast between what the law demands and the questions that those not exposed to significant criminal behavior might have about the incentive to commit such a crime.

Jurors are not often exposed to various sorts of crime, and thus not as prepared for the unpleasant or even ugly facts of a case as regular participants in the system are. It one of the less well known, but amply important reasons why we have jurors in our system – it is a further protection for defendants from the likely jaded criminal justice practitioners. Such practitioners ... “ have to deal with all that is selfish and malicious, knavish and criminal, coarse and brutal in human life.” *State v. Montgomery*, 56 Wash. 443, 447 (1909). It is a simple reality that has likely been experienced by most, even all, attorneys, judges, and others in the system. Jurors are sometimes shocked, even traumatized, by their exposure to conduct that is foreign to their nature. It is one thing to read of such; another to sit through a trial in which the facts are provided in substantial detail. It is reasonable to expect them to

wonder just why an offender would do some acts – yet it not necessarily an element of the crime and generally need not and should not be considered.

“Trial court rulings based on allegations of prosecutorial misconduct are reviewed for abuse of discretion.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)(citations omitted). To prevail on a claim of prosecutorial misconduct, Appellant must show that the comments were improper and that they were prejudicial. *State v. Ish*, 170 Wn.2d 189, 241 P. 3d 389(2010). “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.” *Stenson*, at 718-719 (citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)) (vacated on other grounds).

A defendant's failure to object to a prosecuting attorney's purported improper remark constitutes a waiver of such error, unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Stenson*, at 719 (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)).

The court should review the prosecutor's remarks in the context of the entire trial. *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008). (In analyzing prejudice, a court does not look at a prosecutor's allegedly 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). Here, there were no improper comments when reviewed under the standards actually applicable to the comments. Even if one were to conclude for some reason that the comment complained of was in fact improper, any such error (not misconduct, as it is so often incorrectly labeled) is harmless, just as in *Ish*.

Appellant argues for the first time on appeal that the prosecutor committed misconduct closing argument by ridiculing Appellant's prior statements and "... asking the jury to speculate concerning the reasons for any contact ...". (Br. Of Appellant at 5) Even assuming without conceding that any portion of the argument was improper, Appellant cannot demonstrate that those comments were flagrant, ill intentioned, and incurable by instruction. Thus, he has failed to preserve these alleged errors for review.

If a defendant fails to object to purported misconduct at trial, he fails to preserve the issue unless he establishes that the

misconduct was so flagrant and ill-intentioned that it caused an enduring prejudice that could not have been cured with an instruction to the jury. *State v. Thorgerson*, 172 Wn. 2d 438, 258 P. 3d 43 (2011). The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remark. *State v. Emery*, 174 Wn. 2d 741, 762, 278 P. 3d 653 (2012). Here, based on the above quoted language, defense (trial) counsel understood what was being said, and knew that there was in fact no basis for objection.

C. The trial court may prohibit a sex offender from viewing or using sexually explicit materials as provided in Condition #4 of the Judgment and Sentence.

As a preliminary matter, the State will stipulate that it cannot show a proper basis for the imposition of Condition #10 of the Judgment and Sentence. The same cannot be said as to condition #4.

Appellant has overlooked the discussion by our Supreme Court in *State v. Bahl*, 164 Wn. 2d 739, 193 P. 3d 678 (2008) in which the Court concluded that a restriction on access to or possession of “pornographic materials” was unconstitutionally vague. However, in contrast to that, the Court found that the

definition of “sexually explicit” material was not, in part because there is a statutory definition of the term. *Bahl*, at 759 – 760. That term is sufficiently clear, when considered in light of the fact that Appellant has been convicted of a sex offense. Appellant must successfully complete sex offender treatment if he is to have any hope of being released before the statutory maximum term for this offense. The State is not aware of any sex offender treatment program that would permit possession or use of such materials. The condition is not vague and is sufficiently related to the crime of which Appellant was convicted that it can and should remain in place.

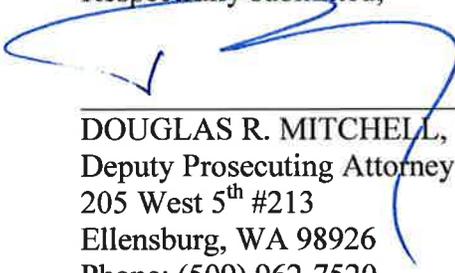
VI. CONCLUSION:

Appellant cannot and did not sustain his burden of proof on any issue related to his trial and conviction. This Court should uphold the trial court’s decisions and the jury’s verdict. The trial may not have been perfect, as there are no perfect trials, but the State denies that there were any errors. It was by analysis a fair trial, and that is what the Appellant was entitled to receive – a fair trial. “A judicial system which treats every error as a basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one.” *State v.*

Barry, 183 Wn. 2d 297, 316 – 317, 352 P. 3d 161 (2015)(citation omitted).

DATED this 7th day of December, 2016.

Respectfully submitted,



DOUGLAS R. MITCHELL, WSBA # 22877
Deputy Prosecuting Attorney
205 West 5th #213
Ellensburg, WA 98926
Phone: (509) 962-7520
Email: doug.mitchell@co.kittitas.wa.us
Fax: (509) 962-7022

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee of the Kittitas County Prosecutor's Office, over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed individuals by the method(s) noted:

Electronic mail, to the following:

Attorney for Appellant:

Dennis W. Morgan

Email: nodblspk@rcabletv.com

First-class United States mail, postage prepaid, to the following:

Appellant:

Tracey Edward Lyon

DOC #950969

Coyote Ridge Corrections Center

P.O. Box 769

Connell, WA 99326

DATED this 7th day of December, 2016.



Rebecca D. Schoos, Legal Secretary