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No. 35111-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

EMANUEL HUBBART,

Appellant

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

NO. 15-1-01373-8

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. (“The court improperly commented on the evidence, in violation of Wash. Const. art. IV, § 16.” Appellant’s Opening Br. at 1.) Response: The court did not comment on the evidence and the victim’s date of birth was proven by other means.
- B. (“The improper judicial comment violated Mr. Hubbard’s right to a jury trial under U.S. Const. Amend. VI and XIV and Wash. Const. art. 1, §§21 and 22.” Appellant’s Opening Br. at 1.) Response: The trial court made no comment about the evidence. All the jury instructions were correct.
- C. (“The trial court erred by admitting Ex. 6, a court order that listed C.W.’s date of birth as ‘10/26/88.’” Appellant’s Opening Br. at 1.) Response: There was no error, and the defendant did not object to the admission of Exhibit 6.
- D. (“Prosecutorial misconduct deprived Mr. Hubbard of his Fourteenth Amendment right to a fair trial.” Appellant’s Opening Br. at 1.) Response: There was no prosecutorial misconduct.
- E. (“The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by improperly vouching for C.W. and B.W.” Appellant’s Opening Br. at 1.) Response: The prosecutor’s closing argument was appropriate and did not personally vouch for the veracity of any witness.
- F. (“The prosecutor committed misconduct by alluding to ‘facts’ that were not in evidence.” Appellant’s Opening Br. at 1.) Response: The prosecutor’s closing argument was based on the facts admitted.
- G. (“The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by improperly suggesting that the trial was a search for truth and justice.” Appellant’s Opening Br. at 1.) Response: The prosecutor’s opening statement referred to the victim’s 20-year search for justice.

The prosecutor did not request the jury to convict the defendant to provide justice to the victim.

- H. (“Mr. Hubbart was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.” Appellant’s Opening Br. at 2.) Response: The prosecutor’s opening statement and closing argument were appropriate. That is the reason defense counsel did not object. In any event, the defendant was convicted because of the evidence, not statements from the prosecutors.
- I. (“Defense counsel provided ineffective assistance by failing to object to prosecutorial misconduct that prejudiced the defense and increased the likelihood of conviction.” Appellant’s Opening Br. at 2.) Response: See H above.

II. STATEMENT OF FACTS

A. The defendant begins molesting his stepdaughter when she is five or six years old.

The defendant started molesting his stepdaughter, Cynthia Walton (a pseudonym), when she was five or six years old. RP¹ 178. The first time involved the defendant bringing Cynthia and her younger sister, Bethany, (also a pseudonym) into his bedroom, while their mother was at work. RP 178. He had made them perform oral sex on him. RP 179. Bethany remembers this and states she and Cynthia had to play with the defendant’s penis until he climaxed. RP 225.

The sexual abuse continued and included attempts at penetration, RP 176, oral sex, RP 180, masturbation, RP 181, and his touching

¹ Unless otherwise indicated, RP refers to the verbatim report of proceedings transcribed by court reporter Renee Munoz, volumes I and II, paginated 1-364.

Cynthia's breasts and buttocks, RP 180. The final time was after the defendant assaulted his wife and broke her jaw in 2003. RP 172-73. While his wife was in the hospital, he pinned Cynthia down, pried her legs open, and had sex with her. RP 174. Cynthia wiped the semen from her with a sanitary napkin and put it in the back of her dresser drawer. RP 175.

She and her mother reported the sexual assaults to the police on August 25, 2003. RP 88. They gave the napkin to the police on August 29, 2003. RP 93. A DNA exam showed male DNA consistent with the defendant's with the chance of a random match with another man at 1 in 10 quadrillion. RP 269. Female DNA consistent with Cynthia's was found on the napkin with the chance of a random match with another woman at 1 in 2700. RP 270. Together the odds of a random match with DNA consistent with Cynthia's and the defendant's is one in 40 trillion. RP 270.

Cynthia and her mother both testified that her date of birth is October 26, 1988. RP 135, 170. Dawn testified that the defendant's date of birth is May 8, 1967, RP 136, making him 21 years older than Cynthia.

B. The charges are filed and dismissed in 2003 and 2004, and then refiled in 2015.

The relevant procedural history is as follows:

2003: Charge of Rape of a Child in the Third Degree filed in Benton County Superior Court. *See* Ex. 6 (note cause number).

November 7, 2003: Defendant signs an “Order Establishing Conditions of Release” listing his address as 1805 South Stewart Street, Kennewick, Washington. *See* Ex. 6.

There is no “Stewart Street” in Kennewick, Washington. RP 112.

The defendant moved to Kent, Washington, and lived with his wife and “Bethany,” although the Order prohibited him from doing so. RP 113; Ex. 6.

February 4, 2004: The defendant was brought before the Benton County Superior Court, and bail was reset. RP 128.

February 24, 2004: Dawn Hubbart, mother of Cynthia and Bethany, wrote a letter to the defendant’s then-attorney, stating that “my daughter (Cynthia) and her biological father have conjured all of this up.” RP 160.

Bethany also wrote a letter on the same date saying that she and Cynthia fabricated the charges. *See* Ex. 1.

August 27, 2004: The charges were dismissed without prejudice. Ex. 7. The prosecutor states, “The victim in this case has evidently moved to the Las Vegas area and this office is unable to contact at this time.” *See* Ex. 7.

June 2015: Detective Randy Maynard receives a phone call from Cynthia’s biological father asking about the charges. RP 81. The

Information is later amended to charge the defendant with Rape of a Child in the First, Second, and Third Degrees and Child Molestation in the First and Third Degrees. CP 9-11.

C. Trial testimony and arguments.

The defendant did not testify but his attorney argued that the sexual allegations were concocted by Cynthia, Bethany, and their father in order to be removed from the defendant's home. RP 337. The letters from Bethany and her mother were probably written while the defendant was in jail. RP 128.

Bethany admitted her February 24, 2004, claiming the sexual allegations were false was a lie. RP 198. Although the defendant was in jail when she wrote it, she stated she was afraid of the defendant. RP 198. "I did lie, but, I mean, I did what I was told. I was a kid, and I just did what they told me to do because, I mean, this has been goin' on for so long. It was very scary, so we did what we were told for a long time until we got away." RP 198.

Likewise, Dawn stated her letter was not correct, RP 148, and explained "even if he was in jail I was still scared . . . When you're in a relationship like that I don't know what it is . . . but you just continue to make excuses all the time." RP 144.

The defendant was found guilty of all counts. CP 47-51.

III. ARGUMENT

A. **State’s response to defendant’s argument number 1:**
 (“Mr. Hubbard’s convictions must be reversed because an unconstitutional judicial comment conclusively established an essential element of each offense.” Appellant’s Opening Br. at 7.)

1. **Standard on review.**

The Washington State Constitution does not allow judges to “charge juries with respect to matters of fact, nor comment thereon” Wash. Const. art. IV, § 16. The purpose of this provision is to prevent the jury from being influenced by knowledge conveyed to it by the trial judge as to the judge’s opinion of the evidence. *State v. Elmore*, 139 Wn.2d 250, 275, 985 P.2d 289 (1999). The prohibition on a judge commenting on the evidence usually has concerned instructions which tell the jury how to interpret facts. *State v. Brush*, 183 Wn.2d 550, 556-57, 353 P.3d 213 (2015). A jury instruction that accurately states the law pertaining to an issue does not constitute an impermissible comment on the evidence. *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001).

“To constitute a comment on the evidence, it must appear that the court’s attitude toward the merits of the cause are reasonably inferable from the nature or manner of the court’s statements.” *State v. Carothers*, 84 Wn.2d 256, 267, 525 P.2d 731 (1974).

2. **The questioned exhibit was admitted without objection, the trial court made no comment**

about it, and there was independent evidence about Cynthia's date of birth from her and her mother.

Exhibit 6 was admitted without objection. RP 122. Because there was no objection at trial, this Court need not consider the defendant's argument on appeal. ER 103; RAP 2.5.

Regarding the merits of the argument, there was no comment on the evidence. The trial court did not tell the jury to review Exhibit 6 more than any other and did not say anything to the jury about Cynthia's age. Based on *Elmore*, 139 Wn.2d at 276, where the defendant appeared in shackles on the first day of voir dire, there must be an actual comment, verbal or written, by the trial court.

Elmore also held that any possible misinterpretation was averted by the standard instruction that "The law does not permit me to comment on the evidence...if it appears to you that I have made a comment during this hearing or in giving these instructions, you must disregard the apparent comment" 139 Wn.2d at 276. The same instruction was given in this case. CP 19-20.

State v. Jackman, 156 Wn.2d 736, 132 P.3d 136 (2006), is not on point. In *Jackman*, the trial court stated the victim's date of birth in the jury instructions. 156 Wn.2d at 740-41. The "to-convict" instructions included: "That on or about June 1, 2002, through October 9, 2002, the

defendant aided, invited, employed, authorized, or caused B.L.E., DOB 04/21/1985 to engage in sexually explicit conduct,” and “That B.L.E., DOB 4/21/1985, was a minor.” *Id.* at 740 n.3.

Here, the trial court’s instructions did not list Cynthia’s or the defendant’s dates of birth.

Finally, while Exhibit 6 does state Cynthia’s date of birth, both Cynthia and her mother testified as to her birthday. RP 135, 170. The State never argued that the jury consider Exhibit 6 as proof of Bethany’s birthdate. Even accepting the defendant’s argument that admitting Exhibit 6 constituted a judicial comment, it was harmless.

B. State’s response to defendant’s argument number 2:
 (“The prosecutor committed misconduct that prejudiced Mr. Hubbart.” Appellant’s Opening Br. at 10.)

1. Standard on review.

Because the defendant did not object to the prosecutor’s opening statement or closing argument, he must establish on review that there was misconduct, it was so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice, and that the misconduct affected the jury’s verdict. *State v. Jackson*, 150 Wn. App. 877, 882-83, 209 P.3d 553 (2009).

2. Response to specific arguments.

a. “The prosecutor improperly vouched for C.W. and B.W. and relied on ‘facts’ not

in evidence.” Appellant’s Opening Br. at 11.

i. Standard on review regarding “vouching.”

For “vouching” to occur, it must be clear and unmistakable that counsel is expressing a personal opinion. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Vouching occurs when the prosecutor expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). However, the prosecutor has wide latitude to argue reasonable inferences from the evidence and may freely comment on a witness’s credibility, especially after credibility is challenged by the defendant. *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010).

ii. The prosecutor did not express any personal opinions about Cynthia or Bethany and argued only reasonable inferences from the facts in the record.

With all due respect to the defendant, he has not provided any specific example of the prosecution vouching for a witness. The defendant complains that the prosecution stated Cynthia had “no interest but the truth,” that her motive was “to just tell you the truth” and that Bethany “has no motive to lie.” *See* Appellant’s Opening Br. at 12. But, examining

the motives of a witness is allowed under the jury instructions (CP 18-19) and case law. *See, e.g., Lewis*, 156 Wn. App. at 241.

The defendant also argues that the State incorrectly argued that Cynthia could have declined to cooperate with the prosecution. RP 342. Correct, but this was just a snippet of the prosecution's argument. The fuller argument is:

I would submit to you that if [Cynthia] made all this up in 2003 when she was a teenager, when she was mad, when she was upset, when she just -- couldn't believe that her mom was siding with her abuser, if that was her motive then and she lied about it all, well guess what? She's got 15 years behind her. She's got a new life.

If it was all a lie, as an adult she could have said, "No, I don't want to cooperate. Please, let's let sleeping dogs lie." That's not what she did. Kennewick police got in touch with her, and they said, "This is still viable. We have DNA evidence. Do you want to cooperate? Do you want to come to trial? Do you want to face the man that did this to you?" And she said, "Yes."

RP 342.

This is an appropriate argument and does not express any personal opinion.

Likewise, the defendant claims that the prosecution expressed a personal opinion by arguing that Cynthia has consistently told the same story over the years. Appellant's Opening Br. at 13. But, this is a statement based on the record and only points out to the jury a factor to be considered in determining the defendant's guilt.

b. The prosecution stated that Cynthia had been on a 20-year search for justice, but told the jury that it must decide the case on the evidence.

i. Standard on review.

The defendant has the burden of proving there was prosecutorial misconduct and that it was prejudicial. *State v. Curtiss*, 161 Wn. App. 673, 698, 250 P.3d 496 (2011). Rather than reviewing snippets from an argument, the reviewing court considers the prosecutor’s argument in context of the total argument, the jury instructions, the issues in the case and the prosecutor is given wide latitude to argue reasonable inferences. *Id.* at 699.

Curtiss noted that courts frequently state that a criminal trial’s purpose is a search for truth and justice and held that the prosecutor’s argument urging the jury to trust its gut and search for the truth was proper. *Id.* at 698-99. On the other hand, *State v. Berube*, 171 Wn. App. 103, 120-21, 286 P.3d 402 (2012), held while criminal trials in some ways involve a search for truth, the jury’s job is to determine reasonable doubt. *Berube* held the argument improper, but noted that any such error is “easily curable.” *Id.*

ii. The prosecution repeatedly told the jury that it had the burden to prove the elements of each crime.

The underlining is added in the below for emphasis:

“Let’s talk about the charge of rape of a child in the first degree. . . . The judge has gone over the elements, the things we need to prove” RP 330.

“[W]e’re charging the defendant with having sexual intercourse with [Cynthia]” RP 331.

“We have to prove . . . that [Cynthia] was less than 12 and not married to the defendant. She was 24 months younger than the defendant [and] . . . this was in the State of Washington” RP 331.

“Let’s go over the second degree rape of a child. . . . It’s from ages at least 12 but less than 14 We also have to show she was at least 36 . . . months younger than the defendant, [and] . . . [t]hat it occurred in the State of Washington” RP 332.

“Let’s go to third degree [child rape]. Again, the time frames are just a little bit different. [Cynthia] would be 14 but less than 16. . . . We also have to show she was 48 months younger than the defendant, and it was in the State of Washington, Benton County.” RP 333.

“Let me go over the child molestation [charges]. . . . We have to show that there was sexual contact, that she was 36 months younger than the defendant, and that it occurred in the State of Washington, with the additional requirement that it was in Benton County.” RP 333.

The phrase “search for justice” was used one time in the trial, on the first slide of the prosecutor’s power point in the Opening Statement. CP 90. But, that slide referred to Cynthia’s 20-year disclosure of sexual abuse, starting in 1996 with CPS (RP 102), continuing through 2003 (RP 187).

The slide was properly part of the opening statement and let the jury know the expected evidence. The slide was not an argument asking the jury to ignore the jury instructions and convict the defendant. The information in the slide let the jury know that Cynthia has consistently stated for years that the defendant sexually abused her.

The prosecution did not tell the jury that its job was to provide justice to Cynthia or search for the truth. The State’s opening statement and closing arguments were appropriate and focused the jury on its job of deciding whether the charges were proven beyond a reasonable doubt.

c. “If the prosecutor’s misconduct is not preserved for review, Mr. Hubbart was deprived of the effective assistance of counsel.” Appellant’s Opening Br. at 14.

i. Standard on review.

The defendant has the burden of showing that the defense attorney’s performance was deficient by falling below an objective standard of reasonableness. *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d

1260 (2011). This is a high bar because there is a strong presumption that the trial counsel's performance was reasonable and deference is given to trial tactics. *Id.* The defendant also must show that the trial counsel's errors prejudiced the defense. *Id.*

ii. The defendant has not met this burden.

First, there was nothing inappropriate about the prosecution's argument or opening statement. In context, it was clear that "search for justice" (CP 90) and "search for truth" in the closing argument (RP 343) referred to Cynthia's quest for justice and desire have people hear her testimony. If the trial attorney had objected, the objections would have been overruled and he may have appeared whiny or obnoxious to the jury.

Second, these were minor comments in a fairly long case. The defendant was convicted because Cynthia was consistently reporting his sexual abuse, Bethany's testimony corroborated her sister's, and the DNA evidence was overwhelming.

IV. CONCLUSION

The convictions should be affirmed.

RESPECTFULLY SUBMITTED this 5th day of December,

2017.

ANDY MILLER

Prosecutor

A handwritten signature in black ink, appearing to read "TJ Bloor", written over a horizontal line.

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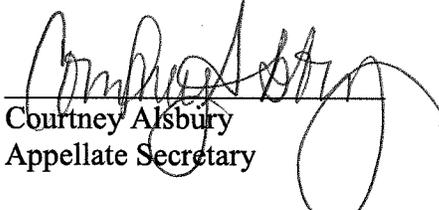
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I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on December 5, 2017.



Courtney Alsbury
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

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