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Court of Appeals
Division III
State of Washington
3/9/2020 1:21 PM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 37119-1-III

STATE OF WASHINGTON, Respondent,

v.

DANIELLE BRISENO, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

IV. STATEMENT OF THE CASE.....3

V. ARGUMENT.....5

 A. The sexual assault protection order must be modified so that it does not exceed the maximum sentence for the crime5

 B. By repeatedly telling the jury that the alleged victim was honest in her testimony, and by inflaming the jury to consider morality, virginity, and to protect the alleged victim from people like Briseno in the context of an alleged same-sex relationship, the prosecuting attorney committed flagrant and willful misconduct that likely prejudiced the trial9

VI. CONCLUSION.....16

CERTIFICATE OF SERVICE17

AUTHORITIES CITED

State Cases

State v. Arlene’s Flowers, Inc., 193 Wn.2d 469, 441 P.3d 1203 (2019).....14

Slattery v. City of Seattle, 169 Wash. 144, 13 P.2d 464 (1932).....10

State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009).....9

State v. Armendariz, 160 Wn.2d 106, 156 P.3d 201 (2007).....5, 7

State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988).....10

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997).....9

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012).....10

State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999).....9

State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006).....10

State v. Hamedian, 188 Wn. App. 560, 354 P.3d 937 (2015).....6

State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011).....10

State v. Navarro, 188 Wn. App. 550, 354 P.3d 22 (2015).....7, 8

State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984).....11, 13

State v. Roberts, 117 Wn.2d 576, 817 P.2d 855 (1991).....8

Statutes

RCW 7.90.150(6)(a).....6, 7

RCW 7.90.150(6)(c).....6, 7, 8

RCW 9A.20.021(1)(c).....5

RCW 9.44.079(2).....5

RCW 9.94A.030(48)(a)(i).....6

RCW 9.94A.505(9).....7, 8

Other Sources

Drake, Bruce, *How LGBT adults see society and how the public sees them* (Pew Research Center, June 25, 2013), *available online at* <https://www.pewresearch.org/fact-tank/2013/06/25/how-lgbt-adults-see-society-and-how-the-public-sees-them/> (last visited March 9, 2020)14

I. INTRODUCTION

A jury convicted Danielle Briseno of six counts of third degree rape of a child based upon her relationship with a 14-year-old girl she knew from school. Although third degree rape of a child is a class C felony with a maximum sentence of 60 months, the sentencing court entered a sexual assault protection order prohibiting Briseno from contacting the victim for 10 years. Because the no-contact restriction exceeds the maximum term for the crime of conviction, the sexual assault protection order should be modified.

Additionally, in closing argument, the prosecutor committed willful and flagrant misconduct by opining on the honesty of the witnesses and by arguing to the prejudices of the jury that the relationship was “immoral,” the law was designed to protect N.E. from people like Briseno, and Briseno took the witness’s virginity. Because the credibility of the witnesses was the critical issue for the jury to resolve to decide the case, and because the prosecutor’s injection of moral considerations into allegations of sexual conduct between two lesbians was irrelevant and inflammatory, the verdict was likely prejudiced and should be reversed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in entering a no-contact order restricting Briseno from contacting the victim for a period that exceeds the maximum sentence for the charge.

ASSIGNMENT OF ERROR NO. 2: The prosecuting attorney committed flagrant and willful misconduct in closing argument by repeatedly asserting that N.E. was an honest witness, by arguing that the relationship was “immoral” as well as illegal, by invoking N.E.’s virginity when it was not relevant to any disputed fact, and by telling the jury that the law existed to protect N.E. from people like Briseno.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the trial court has authority to impose a sexual assault protection order as a condition of the judgment and sentence when the order is effective for twice the length of the maximum sentence.

ISSUE NO. 2: Whether the prosecuting attorney’s arguments in closing improperly appealed to the passions and prejudices of the jury.

ISSUE NO. 3: Whether the prosecuting attorney’s arguments in closing were so egregious that an instruction would have been ineffective in curing the harm.

ISSUE NO. 4: Whether the prosecuting attorney's inflammatory comments likely affected the outcome of the trial.

IV. STATEMENT OF THE CASE

According to the State's trial testimony, N.E. met Danielle Briseno at school when she was 14 and Briseno was 19. RP 63, 65-66. They began dating in spring of 2017 when she was 14. RP 68, 91. Their relationship became sexual, which N.E. described as involving oral sex and mutual penetration and occurring at least once a month. RP 70, 72, 74. They used an app to text each other and occasionally sent nude pictures, but their conversation was rarely sexually explicit. RP 77, 80-81. They broke up once and reunited, but the second time they broke up, they did not see each other again. RP 89.

N.E.'s brother came into possession of her phone and saw text messages with Briseno that concerned him. RP 52, 53-54. He reported the messages to a school counselor, who in turn contacted police. RP 95-96. Police took possession of N.E.'s phone and, pursuant to a search warrant, retrieved conversations discussing a sexual relationship. RP 97, 99. The phone did not contain any pictures of a sexual nature. RP 109. Police also spoke with N.E., who told them about her relationship with Briseno. RP 102.

Briseno disputed much of the testimony. She said that she began hanging out with N.E. in 2018 and N.E. said she was 16 years old. RP 118, 123. They became friends because they were both experiencing discrimination for being gay. RP 124. She denied having a sexual relationship with N.E. and said that people believed they were together because they were both gay but it was not true. RP 125. She denied sending the messages to N.E. that police attributed to her. RP 125.

During closing argument, the State characterized Briseno's testimony as "ludicrous" and "asinine," stated on two occasions that N.E. was honest in her testimony, and repeated a third time that N.E. "did tell the truth about what happened." RP 178-80. The State continued by arguing that the relationship between Briseno and N.E. was "immoral" as well as illegal, and argued that the law was designed to protect girls like N.E. from people from Briseno "who take N.E.'s virginity." RP 184. The defense did not object to any of these arguments.

A jury convicted her of six counts¹ of third degree rape of a child but acquitted her of a charge of communicating with a minor for immoral purposes. RP 213-14, CP 59-65. Based on the resulting offender score,

¹ The counts were distinguished by month, alleging that each month during the relationship, Briseno committed an act constituting the crime. CP 25-26, 36-41.

both the standard range and the maximum sentence were 60 months. CP 105; RP 235-36. The trial court imposed 60 months on each count and noted that it was the maximum sentence, but thereafter entered a sexual assault protection order that lasted 10 years, expiring in 2029. CP 106, 110, 114; RP 235-36.

Briseno now appeals and has been found indigent for that purpose. CP 120, 125.

V. ARGUMENT

A. The sexual assault protection order must be modified so that it does not exceed the maximum sentence for the crime.

Rape of a child in the third degree is a class C felony. RCW 9A.079(2). As a result, the maximum sentence that can be imposed is 5 years. RCW 9A.20.021(1)(c).

A sentencing court can impose crime-related prohibitions, independent of any terms of community custody, up to the statutory maximum term for the crime. *State v. Armendariz*, 160 Wn.2d 106, 119, 156 P.3d 201 (2007). Except under limited circumstances, “the terms of a defendant’s sentence may not exceed the statutory maximum for [the] crime.” *Id.*

Sexual assault protection orders are specifically authorized under RCW 7.90.150(6)(a) when a condition of the sentence for a sex offense restricts the defendant from contacting the victim. Rape of a child in the third degree is a sex offense because it is a felony violation of chapter 9A.44 RCW. RCW 9.94A.030(48)(a)(i).

Under RCW 7.90.150(6)(c), a final sexual assault protection order entered to record a condition of sentence for a sex offense under subsection (a) “shall remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole.”

Although purportedly mandatory, however, nothing in the statutory language reflects a legislative intention to extend the term of a sexual assault prevention order beyond the statutory maximum term for the crime, and read in context of the statute as a whole, it is clear that the maximum sentence is a limit on the permissible length of the order. *See State v. Hamedian*, 188 Wn. App. 560, 563, 354 P.3d 937 (2015) (“In determining the plain meaning of a statute based on statutory language, we look at the context of the statute, related provisions, and the statutory scheme as a whole.”).

The statute operates only in conjunction with RCW 9.94A.505(9) to formalize conditions of sentence imposed under the Sentencing Reform Act. RCW 7.90.150(6)(a) (“When . . . a condition of the sentence restricts the defendant’s ability to have contact with the victim, the condition shall be recorded as a sexual assault protection order.”). As recognized by *Armendariz*, conditions of sentence are authorized under RCW 9.94A.505(9) and may not exceed the statutory maximum for the crime. 160 Wn.2d at 119. Consequently, any condition of sentence being recorded by a sexual assault prevention order under RCW 7.90.150(6)(a) necessarily expires at the conclusion of the maximum sentence term.

It should be noted that one court has considered a sexual assault protection order that exceeded the statutory maximum term for the underlying offense based upon RCW 7.90.150(6)(c) and did not expressly invalidate the order for that reason. *State v. Navarro*, 188 Wn. App. 550, 354 P.3d 22 (2015), *review denied*, 184 Wn.2d 1031 (2016). However, *Navarro* is readily distinguishable because that court did not rule on whether the legislature intended to allow the order to exceed the statutory maximum for the crime. Instead, the *Navarro* court invalidated a 12-year sexual assault protection order because it failed to account for credit Navarro would receive for time served prior to conviction and because Navarro’s release date could not be pinpointed at the time of sentencing.

188 Wn. App. at 555. Instead, the *Navarro* court held that a sexual assault protection order should not state a fixed expiration date but should merely restate the statutory language that the order expires two years following the expiration of the longest sentence served. *Id.* at 555-56. This holding, however, fails to consider the interplay between RCW 7.90.150(6)(c) and RCW 9.94A.505(9) in establishing conditions of no contact, and should not be considered a binding determination of that issue here.

At worst, the plain language of RCW 7.90.150(6)(c) is ambiguous as to whether a sexual assault protection order that formalizes a condition of sentence may nevertheless exceed the maximum term of confinement for that sentence. In such a case, however, the reviewing court applies the rule of lenity and adopts the interpretation that favors the criminal defendant. *State v. Roberts*, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). Here, the rule of lenity dictates that the maximum sentence term limits the effective length of a sexual assault protection order.

Under either interpretation, the order entered in this case exceeds the permissible length. Because the most time Briseno could actually serve for the conviction is five years, the longest effective period for the order is seven years. However, as noted by *Navarro*, the actual time Briseno serves is likely to be less than the maximum, and the precise date

marking two years from her release from confinement is unlikely to be ascertainable ahead of time. Under Briseno's interpretation, the order should not exceed five years. In either case, the order must be modified.

B. By repeatedly telling the jury that the alleged victim was honest in her testimony, and by inflaming the jury to consider morality, virginity, and to protect the alleged victim from people like Briseno in the context of an alleged same-sex relationship, the prosecuting attorney committed flagrant and willful misconduct that likely prejudiced the trial.

Courts review claims of prosecutorial misconduct for abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). In doing so, it considers the prosecutor's remarks in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

The defendant bears the burden of showing that a prosecuting attorney's arguments are both improper and prejudicial. *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010). Failure to object to the misconduct at the time of trial waives the issue, unless the misconduct is so flagrant and ill-intentioned that it could not be cured by an appropriate instruction. *State*

v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). The defendant must also show that the misconduct cause prejudice that had a substantial likelihood of affecting the jury verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). “The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?” *Id.* at 762 (*quoting Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932)).

“A prosecutor has no right to call the attention of the jury [to] matters or considerations which the jurors have no right to consider.” *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Inflammatory comments intended to deliberately appeal to the jury’s passions and prejudices and encouraging it to render a verdict based upon characteristics of the defendant rather than the evidence are flagrant and highly prejudicial. *See id.* at 507-08; *see also State v. Monday*, 171 Wn.2d 667, 678, 257 P.3d 551 (2011) (noting that not all appeals to prejudice are blatant; subtle references can be just as insidious). Finally, a prosecutor may not “comment on the credibility of witnesses or the guilt and veracity of the accused.” *Monday*, 171 Wn.2d at 677. If a prosecuting attorney

lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly

represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.

State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984).

The prosecuting attorney's arguments in this case crossed the line. First, concerning the conflicting evidence as to whether Briseno believed N.E. was 16 years old, she stated:

The only person that testified that N.E. ever told the defendant that she was sixteen was the defendant, which is interesting and just shows that -- the ludicrously of the defendant's testimony in that she says both things. First of all, we never had sex. And second of all, I thought she was sixteen. Well, why does it matter that you thought she was sixteen if you never had sex? But, to show that it's not reasonable and she's just doing what people do when they're caught red handed and say it wasn't me. I didn't do it. Here's why. That belief or that assertion that she believed that N.E. was sixteen based on what N.E. told her is -- is asinine when put in context of the facts of this case and what N.E. and Nathan testified to about the school they go to.

RP 177. Explaining that the school was small, N.E. was in junior high, and Briseno was a second-year senior when they met, the prosecuting attorney contended that Briseno's belief in N.E.'s age was not reasonable. But then she continued:

And, the State would move one step further and say it's not even true. N.E. told you and N.E. was honest. You know, let's just tall [sic] about the credibility here.

The defense is gonna stand up and say you know you have to believe (indiscernible) with N.E. because (indiscernible). Well, N.E. wasn't super excited about being here and it's not like she was some vindictive you know victimized axe to grind person who came in here and was like that lady did X, Y and Z to me. Right? She was honest about the things that she could be honest with. She was uncomfortable in testifying about the things that would be uncomfortable for a fourteen, fifteen or sixteen year to talk about in front of thirteen strangers and a gallery full of people. She was willing and able to admit her own part in all of this. That she was hiding her relationship. That she didn't delete the texts even though the defendant told her to delete the texts and her -- her credibility speaks for itself.

RP 179. She continued:

And, although she did tell the truth about what happened, N.E. is not the one that crafted this grand design about this fake romantic relationship that she had with the defendant who was six years older than her.

RP 180.

After repeatedly disparaging Briseno's testimony and exalting N.E.'s truthfulness, the prosecuting attorney moved on to discuss whether the text messages recovered from N.E.'s phone were with Briseno and stated:

This is the communication between the two of them. Do you remember the first time we had sex? Send me a picture of that booty. N.E. told you the defendant requested photos of her and she even volunteered photos to the defendant that she was in a dating and romantic relationship with. A sexual relationship. That's immoral and it's illegal.

The law is designed to protect girls like N.E. who have enough problems with their self-esteem, that they can't get along with their grandma, they're fighting at home, they're running away. The law is designed to protect people like that from people like Danielle Briseno.

RP 183-84. Finally, she repeated, "The law is designed to protect N.E. from people like Danielle Briseno. People who take N.E.'s virginity. Take her first sexual encounter." RP 184.

First, the comments repeatedly emphasized the prosecuting attorney's belief in N.E.'s truthfulness and Briseno's lack thereof. Whether N.E. was telling the truth about the nature of her relationship with Briseno was precisely the issue the jury had to decide, and it was highly improper for the prosecuting attorney to rely upon "vituperation of the prisoner" and emphatic assertions of N.E.'s truthfulness in support of the verdict she requested. *Reed*, at 147. The prosecuting attorney's opinion that N.E.'s version of events was truthful while Briseno's was not crosses the line from arguing reasonable inferences from the evidence to placing the prestige of the State behind particular testimony.

This error, however, was magnified significantly by the prosecuting attorney's invocation of morality in evaluating the nature of the relationship between two lesbians. She sought to invoke the jury's sympathy for N.E. as merely a young girl with problems with her self-

esteem who couldn't get along with her grandmother,² and who needed to be protected from "people like that[,] from people like Danielle Briseno." RP 184. She further sought to demonize Briseno as someone who took N.E.'s virginity, which was entirely unrelated to any issue the jury needed to decide and sought only to inflame the jury's sympathies and its moral outrage over sexual impurity. *See* CP 36-41, 44 (to convict instructions).

Invoking considerations of morality in any case is improper and irrelevant, as jurors must expressly put aside their personal beliefs and decide the case solely on the facts and the law. *See* CP 28. Under the circumstances of the case, the arguments were particularly improper as they insidiously invoked prejudicial condemnation of homosexuality. Views on morality have long served to support discrimination against homosexuality. *See, e.g., State v. Arlene's Flowers, Inc.*, 193 Wn.2d 469, 441 P.3d 1203 (2019) (refusal to provide customer service to same-sex wedding violated Washington's anti-discrimination law notwithstanding sincerely held religious belief that marriage is between a man and a woman); Drake, Bruce, *How LGBT adults see society and how the public sees them* (Pew Research Center, June 25, 2013), *available online*

² N.E. testified at trial that her adult family members were not accepting of her sexuality and her grandmother considered it "just a phase," so she found it helpful to talk to Briseno about how to deal with her family and with being lesbian. RP 87-88.

at <https://www.pewresearch.org/fact-tank/2013/06/25/how-lgbt-adults-see-society-and-how-the-public-sees-them/> (last visited March 9, 2020) (finding that 45% of Americans report that they think engaging in homosexual behavior is a sin). The prosecuting attorney could not reasonably have been unaware of the coding embedded in language about “morality” in the context of an alleged same-sex relationship that a person with prejudices against homosexuality would be certain to hear.

Similarly, the prosecuting attorney’s characterization of Briseno as someone who “took N.E.’s virginity” had absolutely nothing to do with Briseno’s guilt, as it would not have mattered whether the alleged encounters were N.E.’s first sexual encounters or her 100th. Instead, the characterization sought merely to cash in on sexist tropes of female sexual purity, encouraging the jury to view N.E. as ruined and Briseno as her despoiler. Such tropes belong in the eighteenth century, not in a criminal courtroom.

Collectively, these arguments were inflammatory and improper in that they served to appeal to jurors’ prejudices, generated sympathy for N.E. as the confused victim of a lesbian predator, and threw the weight of the prosecuting attorney’s authority behind N.E.’s credibility. Under the circumstances of the case, where the credibility of N.E. and Briseno were

critical factors in evaluating the nature of their relationship and whether Briseno was guilty of a crime, the injection of incendiary and irrelevant considerations of morality and sexual purity encouraged the jury to act from passion rather than careful consideration of the evidence. Consequently, there is a substantial likelihood that the prosecuting attorney's improper arguments affected the verdict, and the convictions should be reversed.

VI. CONCLUSION

For the foregoing reasons, Briseno respectfully requests that the court REVERSE her convictions and REMAND the case for a new trial; or, in the alternative, to REMAND the case to modify the effective term of the sexual assault protection order.

RESPECTFULLY SUBMITTED this 9 day of March, 2020.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 9 day of March, 2020 in Kennewick, Washington.



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March 09, 2020 - 1:21 PM

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Appellate Court Case Number: 37119-1
Appellate Court Case Title: State of Washington v. Danielle Briseno
Superior Court Case Number: 18-1-00369-4

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