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Court of Appeals
Division III
State of Washington
5/8/2020 4:17 PM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III
No. 37119-1-III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

Ms. Danielle Briseno,
Defendant/Appellant

Respondent's Brief

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The State concedes that the sexual assault protection order should be modified so that it does not exceed the maximum sentence for the crime, a Class C felony.
2. The State did not focus its closing on the same-sex nature of the relationship between Ms. Briseno and the victim, and Appellant's argument to the contrary is an example of an ad hominem/straw man fallacy.
3. The State's references to the credibility of various witnesses was premised on the evidence presented and was proper inference for closing argument.

II. ISSUES PRESENTED

- A. THE SEXUAL ASSAULT PROTECTION ORDER SHOULD BE MODIFIED SO THAT IT DOES NOT EXCEED THE FIVE-YEAR STATUTORY MAXIMUM FOR A CLASS C FELONY.
- B. CONTRARY TO APPELLANT'S ASSERTION, THE PROSECUTOR DID NOT BASE HER CLOSING ARGUMENTS ON THE SAME-SEX NATURE OF THE RELATIONSHIP BETWEEN THE APPELLANT AND THE VICTIM, BUT RATHER ON THE RELEVANT ASPECTS OF THEIR RESPECTIVE AGES AND THE APPELLANT'S PREDATORY ACTS TOWARDS A VULNERABLE ADOLESCENT.
- C. THE PROSECUTOR'S STATEMENTS IN CLOSING REGARDING THE CREDIBILITY OF THE STATE'S WITNESSES WERE MADE IN THE CONTEXT OF THE TESTIMONY AND EVIDENCE AND CONSTITUTED PERMISSIBLE INFERENCE RATHER THAN PERSONAL OPINION.

III. STATEMENT OF THE CASE

Nathan Edgar, who was eighteen years old at the time of trial on June 11, 2019, has a younger sister, N.E.¹, who was born on October 11, 2002. RP 10, 51, 64. Mr. Edgar, N.E., and the defendant, Danielle Briseno, all attended Kittitas Middle School/High School during the same period of time. RP 51-52, 62, 74, 119. Mr. Edgar testified that there were 40 people in the graduating class, and N.E. testified that there were fewer than 400 students in the entire school. RP 52, 64. Danielle Briseno estimated the number at about 300 students. RP 119. At the time that N.E. and Ms. Briseno met, N.E. was in the middle school, and Ms. Briseno, who has a birthdate of October 5, 1996, was in the high school. RP 62, 126. They shared no classes. RP 90. The two had met at a basketball game when N.E. was fourteen years old, in the seventh grade, and Ms. Briseno was nineteen (sic) years old and a second-year senior. RP 66-67, 127. Initially the two were just friends, but then began dating on April 23, 2017. RP 68. N.E. testified that Ms. Briseno “absolutely” knew how old she was when

¹ The victim in this case was referred to as “N.E.” throughout the trial, the State will continue to refer to her in that manner. No disrespect is intended.

they began their relationship. *Id.* She also testified that she was 100% sure that Ms. Briseno knew how old she was; that she had never told Ms. Briseno that she was older; and that both of them decided to keep their relationship a secret because Ms. Briseno was older than N.E. RP 68-69, 84.

In 2016 (sic)², Nathan Edgar found a phone which he was able to get into and access the messages contained within. RP 53. He knew of his sister's relationship with Ms. Briseno, and knew that they were not supposed to be around each other because N.E. was in the middle school, and Ms. Briseno was in the high school. RP 61-62. The school had contacted his grandmother, with whom Nathan and N.E. lived, and told them that they were concerned having seen the two hanging out and holding hands. RP 62.

When Nathan Edgar read the messages, he knew at the time of reading them that they were between his sister and Ms. Briseno as they referenced things that the two used to do. RP 56, 59. He also testified to being struck by the manipulative and abusive nature of the texts. RP 56. Mr. Edgar believed that the messages were worth saving, and

² Nathan Edgar testified that he found the phone in 2016, however testimony about its contents showed that the events had occurred in 2017. *Passim.*

notified his counselor, who notified law enforcement. RP 58, 95-96. It was Kittitas County Sheriff's Office Detective Drew Sinclair who contacted N.E., showed her the phone, and received confirmation regarding the texts. RP 102-103. N.E. also confirmed at trial that the cellphone was hers and that she had used it to communicate with Ms. Briseno. RP 76, 80.

N.E. testified that the relationship between her and Ms. Briseno had become sexual. RP 70. When being asked about the sexual relationship, she told the court that she didn't want to be there, and that she "...would prefer not to go into detail." stating that "I feel like that's kind of inappropriate." RP 71. In response to questioning from the prosecutor, N.E. acknowledged that she had used her hands to penetrate Ms. Briseno's vagina; that Ms. Briseno had used her hands to penetrate N.E.'s vagina; that N.E. had performed oral sex on Ms. Briseno; and that Ms. Briseno had performed oral sex on N.E. RP 72. She said that she did not recall how many times the two had had sexual intercourse, but that it had happened at least once in April, May, June, July, August, and September

of 2017, before she turned fifteen years old in October of 2017. RP 73-75.³

N.E. testified that when the school had contacted her grandmother, she was not allowed to talk with Ms. Briseno. RP 73. N.E. had stopped for a while but then began messaging her again. *Id.* N.E. also told of Ms. Briseno giving her a promise ring which meant a promise to be faithful. RP 82. N.E. acknowledged that the text messages that her brother had found had included a conversation about the promise ring which Ms. Briseno had later shown up at N.E.'s home to reclaim. RP 82-83, 97.

N.E. testified that she had used the cellphone to text pictures to Ms. Briseno, who had asked the victim to send her some. RP 76-77. N.E. had sent some without clothing, sometimes at Ms. Briseno's request. RP 80. Ms. Briseno had asked for pictures of N.E.'s bottom and/or "booty." RP 99. They discussed being girlfriends, and that they loved each other. RP 81-82. More than once Ms. Briseno told N.E. that she should delete their texts, but she did not. RP 82, 99.

³ Counts one through six of the information charging Rape of a Child in the Third Degree were distinguished by month, April, May, June, July, August, and September of 2017. CP 25-26, 36-41.

N.E. had asked Ms. Briseno “if she remembered the first time that the two of them had had sex?” RP 83. Ms. Briseno responded “...just don’t talk about it.” RP 84. Detective Sinclair testified that in response to the statement from N.E. that “I do and I also remember what I was wearing that night.” The person with whom N.E. was communicating replied something to the effect of, “maybe if I didn’t use drugs so much I might be able to remember better.” RP 101-102.

N.E. said that it had been helpful to talk with Ms. Briseno about being a lesbian. RP 88. She also testified that Ms. Briseno had been her first sexual encounter. RP 91. N.E. testified that the first time that they had broken up had been due to N.E.’s grandmother, and the second time because they were not getting along. RP 89-90.

When speaking with Detective Sinclair, N.E. indicated an acknowledgement that the phone messages were between her and Ms. Briseno. RP 103. N.E. seemed uncomfortable speaking with the detective about the sexual encounters. RP 114.

At all times, N.E. was adamant that Ms. Briseno had known that she was only fourteen years old. RP 66, 68-69,

84-85. She testified that the age gap between them was something that they had discussed in person. RP 84.

Ms. Briseno testified that she had met N.E. at a basketball game and that N.E. had told her that she was sixteen years old. RP 119-120, 123. She stated that the two of them had never had sex, and she had no idea why N.E. would say that. RP 125. Ms. Briseno stated that although some people at the school had thought that they were a couple, they were not, and that they had never held hands. RP 125, 127. She also testified that she served as a “mentor” to N.E. RP 125.

Ms. Briseno stated that N.E. had run away from her grandmother’s home and that the second time that had occurred, Ms. Briseno had called law enforcement. RP 128. That assertion was belied in rebuttal by both Detective Sinclair’s review of “Spillman,” the law enforcement contact database, in which he could find no report made by Ms. Briseno regarding N.E., as well as the testimony of City of Kittitas Chief Chris Taylor who had gone to Ms. Briseno’s home during a runaway call regarding N.E. in which Ms. Briseno had denied any knowledge of N.E.’s whereabouts. RP 135, 138-139. (However, neither Ms. Briseno’s testimony

nor Chief Taylor's indicated any specific incident date). Chief Taylor also stated however that he was unaware of Ms. Briseno ever having notified law enforcement as to N.E. being a runaway. RP 141.

Ms. Briseno testified that N.E. came to her home frequently, and N.E. testified that she would sneak out to see Ms. Briseno during their relationship. RP 74, 131.

In closing argument, the prosecutor stated that:

“...at the time she (N.E.) met Danielle Briseno she could not decide to be in a relationship with somebody who was seventy-two months older than her. The decision is put on the adult in the situation and in this case is put on Danielle Briseno. And, that's why Ms. Briseno has been charged with the six counts of rape of a child in the third degree and one count of communicating with a minor for immoral purposes.” RP 173.

The prosecutor then went on to explain the elements of Rape of a Child in the Third Degree. *Id.*

Later in the initial closing, the prosecutor went on to say:

The law says look, if you're fourteen to sixteen, you shouldn't be having sex with people who are eighteen to twenty or shouldn't be having sex with people who are older than that, that age gap above you. Eighth graders, ninth graders who are going to school with twelfth graders, the law isn't trying to penalize those kids. Although in this case, it's clear that the law was designed to

protect people like N.E. and I want to emphasize that. The law is designed to protect people like N.E. a girl who is obviously having some troubles with her identity, with her life, with her grandma. You heard evidence of her being a runaway. The law is designed to protect people like N.E. from people like Danielle Briseno by saying that should be protected from having to even make a choice in your ability as a fourteen old who you should be having sex with. RP 176.

Later, in wrapping up her closing, the prosecutor again stated:

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. Don't do it. Don't start an inappropriate sexual secretive relationship with a minor. And don't send text messages to them on electronic devices that they have at their access 24/7. That's what the law says not to do and that's exactly what Danielle Briseno did. RP 184.

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. Somebody who is six years her older. While N.E. is in seventh grade, starts a relationship with her, mentors her and her sexual identity and starts having sexual relationship with her over the course of months of time. N.E. is not able to protect herself. Whether she's not able, not willing, not wanting to, but the law does. RP 184-185.

And in summing the State's rebuttal up, the prosecutor closing words were "[t]he law is designed to protect her because she's a kid. Find the defendant guilty." RP 201.

During its preliminary remarks, its reading of the jury instructions to the jury, and once in response to an objection by the prosecutor in closing, the Court reminded the jury that the lawyer's remarks are not evidence. RP 34, 160, 188-189.

IV. ARGUMENT

A. THE SEXUAL ASSAULT PROTECTION ORDER SHOULD BE MODIFIED SO THAT IT DOES NOT EXCEED THE FIVE-YEAR STATUTORY MAXIMUM FOR A CLASS C FELONY.

The State concedes that the sexual assault protection order entered in Ms. Briseno's case exceeded the statutory maximum and that this matter should be remanded for entry of a corrected order.

B. CONTRARY TO APPELLANT'S ASSERTION, THE PROSECUTOR DID NOT BASE HER CLOSING ARGUMENTS ON THE SAME-SEX NATURE OF THE RELATIONSHIP BETWEEN THE APPELLANT AND THE VICTIM, BUT RATHER ON THE RELEVANT ASPECTS OF THEIR RESPECTIVE AGES AND THE APPELLANT'S PREDATORY ACTS TOWARDS A VULNERABLE ADOLESCENT.

The jury was instructed that to convict the defendant of the crime of rape of a child in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- 1) that between _____1, 2017 and _____30, 2017, the defendant had sexual intercourse with N.E.;⁴
- 2) that N.E. was at least fourteen years old, but was less than sixteen years old at the time of the sexual intercourse and was not married to the defendant;
- 3) that N.E. was at least forty-eight months younger than the defendant; and
- 4) that this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty. RP 164-168.

Appellant creates an ad hominem/straw man argument by alleging that the prosecutor inflamed the jury by reference to the same-sex nature of the relationship between the appellant and the victim. The prosecutor did no such thing, but rather argued what would be relevant in any rape of a child case in which the adult predator gains the confidence and trust of the

⁴ The jury was given six separate "to convict" instructions for the crime of rape of a child third degree, one for each count and month charged.

child victim and exploits his or her position as the victim's confidant.

The prosecutor's argument clearly indicates that N.E. was vulnerable because she was an adolescent, had problems with her identity, with her life, with her grandmother, and with her self-esteem. N.E. had problems with her grandmother, fighting at home, and running away. Many, if not all, of these problems, are symptomatic of "adolescent angst," and many an adult predator, such as Ms. Briseno, realize that that presents an opportunity to exploit an adolescent victim through "friendship," and/or in being a mentor. In her last words of rebuttal, the prosecutor emphasized that the law protected people like N.E. "because she's a kid." (emphasis added). Similarly, earlier in her argument, the prosecutor stated, "don't start an inappropriate sexual secretive relationship with a minor." (emphasis added).

As to the taking of N.E.'s virginity, it should be the decision of an adult who his or her first sexual partner will be, not an adult's decision who an adolescent child's first sexual partner will be. This is not some "sexist trope of female sexual purity," but an acknowledgement that whether to engage in a sexual

relationship is a physical and emotional decision for an adult, not a child. The law which prohibits such behavior, *i.e.*, sexual intercourse with a minor under sixteen with an individual at least 48 months older, recognizes that. In any case, the prosecutor's reference to this issue was brief.

Despite earlier opportunities to do so, defense counsel notified the Court and the State after both parties had rested that Ms. Briseno intended to raise an affirmative defense asserting that she had believed N.E. to at least sixteen years old. RP 143-146.

Therefore, the jury was also instructed:

It is not a defense to the charge of a rape of a child in the third degree that at the time of the acts the defendant did not know the age of N.E. or that defendant believed her to be older. It is, however, a defense to the charge of rape of a child in the third degree that at the time of the acts the defendant reasonably believed that N.E. was at least sixteen years of age or was less than forty-eight years, excuse me, forty-eight months younger than the defendant based on declarations as to age by N.E. The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded considering all of the evidence in this case that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of

not guilty as to the charge of rape of a child in the third degree. RP 168-169.

Given the late notice of the issue, the State was put into the position of needing to argue that Ms. Briseno could not have reasonably believed that N.E. was sixteen when the two went to an extremely small school, and had been according to both parties, at least friends during the course of their relationship. Therefore, it was not improper argument for the State to point out that Ms. Briseno's "belief" that N.E. was sixteen years old in those circumstances was both asinine and ludicrous.

As to count seven, communicating with a minor for immoral purposes, the Court instructed the jury:

To convict the defendant of the crime of communicating with a minor for immoral purposes, each of the following elements of the crime must be proved beyond a reasonable doubt:

- 1) that on or between April 29, 2017 and May 3, 2017 the defendant communicated with N.E. for immoral purposes of a sexual nature;
- 2) that N.E. was a minor; and
- 3) that this act occurred in the State of Washington; and
- 4) the defendant sent N.E. an electronic communication for immoral purposes.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty. RP 210.

Contrary to Appellant's argument that the State used the word immoral to refer to the same-sex nature of the relationship between herself and N.E., the prosecutor used the term "immoral" only in the context of the specific charge itself which required that the purpose of the communication between the defendant and N.E. be immoral.

Another conversation on the phone that's important, don't delete or don't tell anyone and delete the texts. That's the conversation and what that shows to you is that this was an immoral purpose. And even defendant (sic) knew it was an immoral purpose. RP 182-183.

Even the defendant admits, we were having a friendship at that time. We were communicating. 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 pictures 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. RP 183-184.⁵

⁵ Also see RP 172, 182, State referring specifically to the name of the charge

It was defense counsel, not the State, who repeatedly brought up the sexual identity of N.E. and Ms. Briseno. RP 59-60, 86-88, 186, 192. In fact, the ten times that the word “lesbian” is used in the course of the trial, it is defense counsel who is using it. If the jury focused at all on the same-sex nature of the relationship, it would have been brought about by defense counsel’s emphasis.

To succeed on a prosecutorial misconduct claim, an appellant has the burden of establishing that the prosecutor’s conduct was improper and was prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718-719, 940 P.2d 1239 (1997). Ms. Briseno’s failure to object deprived the trial court of an opportunity to remedy any error and to caution the jurors. Had defense counsel objected, the court could have eliminated any possible confusion, and addressed any potential prejudice.

If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor’s misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. Under this heightened standard, the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury

verdict.”⁶ *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). (internal cites omitted).

“In the context of closing arguments, the prosecuting attorney has ‘wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.’” *State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009). In context, the prosecutor in Ms. Briseno’s case can be understood as suggesting a logical inference the jurors could draw from a summation of the testimony to include that Ms. Briseno’s testimony about her belief regarding N.E.’s age was unreasonable given the circumstances, as well as the close nature of their relationship which both had testified to.

C. THE PROSECUTOR’S STATEMENTS IN CLOSING REGARDING THE CREDIBILITY OF THE STATE’S WITNESSES WERE MADE IN THE CONTEXT OF THE TESTIMONY AND EVIDENCE AND CONSTITUTED PERMISSIBLE INFERENCE RATHER THAN PERSONAL OPINION.

Prosecutors are not to express a personal opinion as to a defendant’s guilt or a witness’s credibility independent of a belief jurors may arrive at based on evidence in the case.

State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014).

⁶ The jury found Ms. Briseno not guilty of Communicating with a Minor for Immoral Purposes, the charge for which the prosecutor used the term “immoral.” RP 214. This would tend to belie Appellant’s assertion as to the inflammatory effect upon the jury of the prosecutor’s use of the word.

They may “argue inferences from the evidence, including inferences as to why the jury would want to believe one witness over another.” *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). When determining whether a prosecutor improperly expressed a personal opinion, the reviewing court looks at the ostensible statement of opinion in the context of the entire argument. *State v. Papadopoulos*, 34 Wn. App. 397, 662 P.2d 59 (1983).

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion. *Papadopoulos*, 34 Wn.App. at 400.

The jury was repeatedly told in the course of the trial that “the lawyers’ remarks, statements and arguments are intended to help you understand the evidence and apply the law. However, the lawyers’ statements are not evidence or the law.” RP 34, 160, 188-189. This was stated by the Court

during its preliminary remarks, the reading of the jury instructions to the jury prior to closing, and once in response to an objection made by the prosecutor to the defense closing.

In *State v. Lewis*, 156 Wn.App. 230, 233 P.3d 891 (2010), the Court held that the prosecutor's arguments regarding credibility were based on inference, not personal opinion. In Ms. Briseno's case, the prosecutor pointed out the unwillingness of the victim to talk about the sexual interactions that she had had with the defendant, an unwillingness that N.E. stated on the record by saying that she didn't want to be there, and that she "...would prefer not to go into detail. I feel like that's kind of inappropriate." RP 71. The prosecutor also pointed out that it was not N.E. who had brought the relationship to the attention of law enforcement, but rather Nathan Edgar, who had initially found the phone containing the conversations between Danielle Briseno and N.E. RP 172. The prosecutor pointed out that N.E. had no notice that law enforcement was going to speak with her about the phone, yet corroborated many of the specific details that Detective Sinclair had asked her about. RP 180-181.

Prosecutors have “wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. Prejudicial error will not be found unless it is clear and unmistakable that counsel is expressing a personal opinion. A prosecutor’s remarks must be reviewed 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. Allen*, 161 Wn.App. 727, 255 P.3d 784 (2011), quoting *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006).

Again, as stated *supra.*, had defense counsel objected, the Court would have had the opportunity to give the jury a curative instruction. The State disputes that the prosecutor’s statements were improper. However as earlier stated, since the defendant did not object at trial, she is “deemed to have waived any error, unless the prosecutor’s misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” *Stenson*, 132 Wn.2d at 618-619.

V. CONCLUSION

Contrary to Appellant’s argument, there was no “flagrant and willful misconduct that likely prejudiced” her trial. For the

foregoing reasons, the State would ask that Appellant's six convictions for Rape of a Child in the Third Degree be affirmed, but that this matter be remanded to the trial court for entry of an amended Sexual Assault Protection Order.

Respectfully submitted this 8th day of May, 2020.

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PROOF OF SERVICE

I, Carole L. Highland, do hereby certify under penalty of perjury that on Friday, May 08, 2020, I had mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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May 08, 2020 - 4:17 PM

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

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