

19356-5

NO. 54032-7-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD H. WARREN,

Appellant.

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

The Honorable Michael Hayden

APPELLANT'S REPLY BRIEF

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A. REPLY ARGUMENT CONCERNING CONVICTIONS FOR RAPE OF A CHILD (NS)

1. THE ADMISSION OF WARREN'S CHILD MOLESTATION CONVICTION AND THE UNDERLYING ALLEGATIONS VIOLATED HIS RIGHT TO A FAIR TRIAL

At Richard Warren's trial for sexual abuse of NS, the court admitted evidence that NS's sister SS also alleged Warren sexually abused her, the State pressed charges against Warren based upon SS's allegations, and Warren had a conviction for child molestation. 11/12/03 RP 3-7, 109-10; 11/17-03 RP 2-3, 7; 11/17/03 RP 149. Warren argues the evidence was improperly admitted as it does not tend to prove an element of the crimes charged against NS. Appellant's Opening Brief at 22-32.

The State responds that evidence of SS's allegation and Warren's subsequent prosecution was necessary to show "the context in which NS made her disclosure." Brief of Respondent at 44. The State bears a substantial burden when attempting to admit evidence of prior bad act and must demonstrate the evidence is "relevant to prove an element of the crime charged" or rebut a defense. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Accord State v. Powell, 126 Wn.2d 244, 248, 893 P.2d 614 (1995) (other misconduct must be relevant and necessary to prove

“an essential ingredient of the crime charged”). Propensity evidence is not admissible to prove the context in which the crime is discovered or investigated as the State claims.

The trial court admitted the evidence of SS’s allegation and prosecution as part of the *res gestae* of NS’s disclosure of abuse, but the State argues this Court should uphold the trial court’s ruling because the evidence could have been admitted to show a common scheme or plan.¹ Brief of Respondent at 49-54. The State’s argument consists mainly of reiterating the facts of DeVincentis, supra. But the DeVincentis Court cautioned the degree of similarity for the admission for evidence of a common scheme or plan must be “substantial.” 150 Wn.2d at 20. NS and SS were sisters, and there are minor similarities in the girls’ allegations. There were also significant differences, as NS alleged she was raped orally, vaginally and anally, whereas SS alleged touching. The similarities here do not show a “common plan,” and the admission of SS’s allegation in NS’s trial should not be upheld.

The State also argues Warren “opened the door” to the child molestation conviction by portraying himself as a good caregiver for

¹ The State raises this issue as cross-assignment of error, but never filed a notice of cross-appeal. Warren has moved to strike this portion of the prosecutor’s brief on this ground. Motion to Strike filed December 15, 2005.

his stepdaughters. Brief of Respondent at 54-57. But Warren did not present character evidence or try to establish his good name in the community. See State v. Renneberg, 83 Wn.2d 735, 736-38, 522 P.2d 835 (1974) (defendant testified as to prior work experience, college attendance and participation in Miss Yakima pageant, glee club, pep club, drill team and science club to show good character); State v. Avendano-Lopez, 79 Wn.App. 706, 904 P.2d 324 (1995) (testimony where defendant born and raised did not open door to cross-examination as to whether defendant illegal immigrant), rev. denied, 129 Wn.2d 1007 (1996); State v. Pogue, 104 Wn.App. 981, 986-87, 17 P.3d 1272 (2001) (defendant did not make sweeping assertions about his good character by implying police planted evidence; prior conviction for possession of a controlled substance was improperly admitted). Here, NS said Warren took showers with her and she did not like the way he touched her, although both were clothed. Warren then testified he did not touch NS's private areas. He was not putting his character in issue but simply responding to the State's allegations.

The State is incorrect that the error was harmless. NS's testimony was marred by her explanation in a prior trial that she forgot the abuse and her memory came back to her in bits and

pieces and even in dreams. 11/12/03 RP 93-94; 2/18/03 RP 71, 76-77. NS said she remembered incidents or details only after her mother's leading questions sparked her memory. 11/12/03 RP 83-87. This Court cannot conclude the evidence that the State was also prosecuting Warren for abusing SS and that he had a child molestation conviction were harmless in light of NS's weak and questionable testimony.

2. THE TRIAL COURT EXCLUDED EVIDENCE THAT SS SAID SHE SHOULD NOT HAVE REPORTED WARREN'S ABUSE AND THAT WARREN HAD A HEART ATTACK DURING THE CHARGING PERIOD

Warren argues the trial court prevented him from presenting his defense by excluding evidence of his heart attack and SS's statement that she should not have told the authorities she was abused. Appellant's Opening Brief at 33-36. The State's response that the evidence was not excluded by the trial court is incorrect. Brief of Respondent at 57-59.

When the police detectives took SS and NS from their mother and were driving to Child Protective Services, SS said she should not have said anything, and NS told her to be quiet. 12/2/02 RP 86-87. The court clearly ruled this was not admissible in the trial on the charges involving NS. 11/12/03 RP 30-32.

Mr. Carney: I am sorry, either my memory is failing me or I didn't – was it your ruling that I can establish what SS said in the car on the way to the interview as long as I leave it alone? My only issue is the context for NS's statements. It has nothing to do with SS. I will not say anything further about SS. I will not touch the issue of SS's credibility or truth or falsity of her allegations or what they might have been, only that she gave NS indication that she didn't want to cooperate and that was the last NS saw of SS before she made the statements that she did.

Ms. Snow: The problem is –

The Court: I am going to keep it out.

Ms. Snow: -- it is not a complete picture.

The Court: That's your inference from it that she didn't want to cooperate and that's the reason NS made the statements because she didn't think she was going to cooperate. That's one inference. The other inference is that she was lying.

Ms. Snow: Factually, what's accurate is NS knew that once SS got to our office she had been talking to us for an hour about the allegations. So it's not even factually accurate as an inference to that.

The Court: It stays out.

. . . .

The Court: I am going to stand by my ruling. Comments that SS has made about her willingness to cooperate will not be allowed into this case unless the whole picture of SS comes in, including the conviction. SS's lack of cooperation, cooperation, truthfulness, lack of truthfulness will not come in because I have ruled that SS's claims stay out, except for the fact that it was during the course of that investigation that NS disclosed.

11/12/03 RP 30-32. (emphasis added).

Evidence of Warren's heart attack was also discussed shortly before this, and the trial court held the evidence would impeach SS's credibility although SS was not a witness in the case. 11/12/03 RP 23-28. Warren may raise this issue on appeal.

3. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED WARREN A FAIR TRIAL

The prosecutor committed misconduct in closing argument by (1) arguing facts not in evidence, (2) improperly vouching for a witness's credibility, and (3) disparaging Warren's attorney. Appellant's Opening Brief at 41-48. The State argues the prosecutor's "ring of truth" argument was a proper "rhetorical concept." Brief of Respondent at 65-66. The State appears to concede the prosecutor's other comments were improper, but argues Warren may not raise them because he did not object in the trial court. Id. at 66-68.

The trial court made it clear that it would not sustain objections on the grounds that a party was arguing facts not in evidence. 2/20/03 RP 7-8, 94-95; 11/18/03 RP 44; 12/12/03(opening) RP 15. For example, when the prosecuting attorney objected in an earlier trial to what she believed was a

misstatement of the facts by Warren's attorney, the trial court
overrule the objection:

Members of the jury, as I have instructed you, and I have obviously instructed counsel, what counsel say is not evidence. So the objection is overruled because it is up to the jury to decide what the evidence is. If counsel misstate the evidence I'm sure you will correct it in the jury room. An objection to mischaracterizing the evidence during closing argument is not a well founded objection. You may proceed.

11/18/03 RP 44. (emphasis added). Similarly, after sustaining Warren's objection to a portion of the prosecutor's argument in opening, the trial court brushed aside his motion to strike the offending argument, holding the jury had been instructed the attorneys' argument was not evidence. 11/12/03(opening) RP 15-16. Any objection to the State's closing argument would thus have been fruitless.

Additionally, even unobjected-to misconduct may be raised on appeal. This Court simply uses a different standard of review – whether the misconduct was so flagrant and ill-intentioned that the resulting prejudice would not have been cured by a proper instruction to the jury. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). See Appellant's Opening Brief at 42. This Court should reject the State's argument that Warren cannot challenge the prosecutor's misconduct in closing argument in this appeal.

B. REPLY ARGUMENT CONCERNING CONVICTION FOR CHILD MOLESTATION (SS)

1. THE STATE'S WITNESSES IMPROPERLY VOUCHERED FOR SS'S CREDIBILITY

Detective Rylands and King County Prosecutor's Office employee Farrell both related the contents of their interviews of SS. The jury heard that each witness first determined that SS was capable of telling the truth, secured her promise to tell the truth, and Farrell also confirmed that SS had told the truth at the end of her interview. 2/11/03 RP 7, 12-13, 19-20, 32-33, 59-60; 2/12/03 RP 105-06, 134, 142. In addition, when Detective Rylands related SS's interview with the deputy prosecuting attorney handling the case, she related the prosecutor told SS it was important to tell the truth. 2/12/03 142. During that interview SS asserted, "I told everybody the truth." Id. at 135.

Warren argues the above testimony was indirect, improper vouching for SS's credibility and a comment on his guilt. Appellant's Opening Brief at 50-58. Warren's argument relies in part upon State v. Kirkman, 126 Wn.App. 97, 107 P.3d 133, rev. granted, 155 Wn.2d 1015 (2005).² The State argues Warren's case

² Since the opening and response briefs in this case were filed, the Washington Supreme Court accepted review of Kirkman, Supreme Court

is distinguishable because the detective in Kirkman said he thought the child witness understood the difference between the truth and a lie and was capable of telling the truth. Kirkman, 126 Wn.App. at 104-05. The witnesses in this case did not offer that particular opinion, but Farrell said she immediately recognized she did not need to assess SS's competency and ability to tell the truth both because SS was 8 years old and because SS was bright, articulate, and mature. 2/11/03 RP 13-14. Farrell also said research showed children SS's age are not suggestible. 2/11/03 RP 5-6.

Farrell and Ryland's testimony mirrors that of the detective in Kirkman because both elicited SS's agreement to tell the truth. 2/11/03 RP 19-20; 2/12/03 RP 105-06. Farrell went even further by ending the interview with SS's confirmation that she had been truthful about everything she said and everything she said about Warren. 2/11/03 RP 32-33. This Court should reject the State's attempt to distinguish Kirkman on its facts.

The State also attempts to analogize the vouching in this case to the taped police interview of a defendant at issue in State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001). Brief of Respondent at 26-27. In Demery the jury heard a tape-recorded

Number 76833-1 and State v. Candia, Supreme Court Number 77596-6. The cases are set for oral argument on February 7, 2006.

interview of the defendant during which the interrogating officers accused him of lying. 144 Wn.2d at 756-57. The trial court concluded the officers' comments were necessary to show the jury the context in which the defendant made the statements. Id. at 757.

The State cites the plurality opinion in Demery to say statements within a tape-recorded interview cannot be opinion testimony. Brief of Respondent at 26, citing Demery, 144 Wn.2d at 760. In fact, a majority of the court concluded the officers' statements were improper and should have been redacted. Demery, 144 Wn.2d. at 765 (Alexander, C.J., concurring), 757 (Sanders, J., dissenting). The Chief Justice's concurring opinion finds the statements were improper comments on the child's veracity, but determined the error was harmless under the non-constitutional harmless error standard asserted by the parties. Id. at 765-66. Thus, Demery actually supports Warren's argument and not the State's.

An witness's opinion as to the defendant's guilt invades the province of the jury and thus raises a constitutional issue. State v. Dolan, 118 Wn.App. 323, 329-30, 73 P.3d 1011(2003); State v. Alexander, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992). The State

nonetheless argues Warren has not raised a constitutional issue that falls within RAP 2.5(a). Appellant's Opening Brief at 50-58; Brief of Respondent at 22-24.

The purpose of RAP 2.5(a) is simply to prevent appellate courts from wasting judicial resources on newly raised constitutional issues "when those claims have no chance of succeeding on the merits." State v. WWJ Corp., 138 Wn.2d 595, 603, 908 P.2d 1257 (1999). Here, SS's credibility was essential to the prosecutor's case against Warren, since medical testimony could not establish whether the young girl had been sexually abused. Testimony that SS understood the difference between the truth and lie, agreed to tell the truth in her interviews, and ended one interview confirming that she told the truth was of great significance in this case. As was SS's hearsay statement that she told "everyone" the truth. And the testimony came from two government employees -- a child witness specialist employed by the King County Prosecutor's Office and a Bellevue Police detective. Both witnesses explained their training in interviewing young children and Farrell especially took great care to explain her professional credentials and compliance with state guidelines.

2/11/03 RP 3-9, 11, 15-16, 62.

The State nonetheless claims the testimony had no consequences in the trial, asserting, "Where the limitations of testimony are clear to the jury, prejudicial error is difficult to prove." Brief of Respondent at 24. The cases cited, however, do not stand for that proposition. See State v. Halstein, 122 Wn.2d 109, 857 P.2d 270 (1993) (reviewing juvenile conviction, bench trial); and State v. Ferguson, 100 Wn.2d 131, 667 P.2d 68 (1983) (reviewing various evidentiary rulings). Nor was the jury instructed to limit its consideration of the testimony about SS's agreements to tell the truth and confirmations that she had.

Two respected government employees indirectly vouched for SS's credibility by relating her ability to tell the truth, her promises to tell the truth, and her confirmations that she told the truth. The entire State's case rested upon SS's credibility. The error was not harmless, and Warren's conviction for child molestation of SS must be reversed and remanded for a new trial.

2. THIS COURT MUST EVALUATE THE PROSECUTOR'S
IMPROPER CLOSING ARGUMENT UNDER THE
CONSTITUTIONAL HARMLESS ERROR STANDARD

Warren's constitutional right to a fair trial was violated because the committed misconduct by misstating the burden of proof in closing argument. Appellant's Opening Brief at 58-62. The

State concedes the deputy prosecuting attorney's closing argument was improper, but claims this Court should not review the error under the constitutional harmless error standard. Brief of Respondent at 30-33. According to the State, the misstatement of the burden of proof only "indirectly" touched upon a constitutional right and thus the correct standard of review is whether the argument so flagrant and ill-intentioned as to create incurable prejudice. Id. at 32, citing State v. French, 101 Wn.App. 380, 385, 4 P.3d 857 (2000), rev. denied, 142 Wn.2d 1022 (2001).

The prosecutor's comment was a direct and incorrect statement of the burden of proof in a criminal case. This Court must therefore use the constitutional harmless error standard, and the State must demonstrate beyond a reasonable doubt that the evidence against Warren was so overwhelming that it necessarily lead to a finding of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The prosecutor made the improper argument three times and the court eventually instructed the jury as to the correct burden of proof but added, "we are playing with words here in a sense." 2/20/03 RP 105. The State cannot demonstrate the error did not contribute to the jury verdict, and Warren's conviction should be reversed.

3. THE COURT ADMITTED IRRELEVANT, PREJUDICIAL EVIDENCE

Warren argues the court improperly admitted evidence of the detective's opinion Mrs. Warren was more protective of her husband than SS. Appellant's Opening Brief at 62-63. The State argues Warren's objection to this evidence was not specific enough. Brief of Respondent at 39-40. The cases cited by the prosecutor, however, do not support this proposition. In State v. Padilla, this Court found an objection that a line of questioning was "improper" was sufficient when taken together with a subsequent objection and request for a sidebar where defense counsel referenced a "case." 69 Wn.App. 295, 300-01, 846 P.2d 564 (1993). And in State v. Loehner, the defendant moved in limine to exclude testimony concerning one prior incident without giving any reasons and did not even object to testimony of the other. 42 Wn.App. 408, 410, 711 P.2d 377 (1985), rev. denied, 105 Wn.2d 1011 (1986). The State has not demonstrated Warren's objection was not sufficient.

Warren also argues the trial court should have excluded evidence Warren owned a "penis pump." Appellant's Opening Brief at 63-65. The State's discussion of this issue misrepresents the

facts of this case. SS testified Warren had a “penis pump” in a brief case and never showed it to her. 2/19/03 RP 21-22. Her testimony was consistent with a prior statement to Detective Rylands.

2/13/03 RP 16-17. The prosecutor cites a portion of SS’s statement to Detective Rylands where the detective reported SS said, “he showed me a penis pump.” 2/13/03 RP 140. This is immediately followed with SS’s clarification that the penis pump was in a briefcase and Warren saw her notice it there. Id. Looking at the issue in light of what SS actually said, it is clear discussion of the “penis pump” was irrelevant and prejudicial.

C. REPLY ARGUMENT CONCERNING SENTENCE

Warren argues the court’s imposition of a life-long no-contact order with his wife is in excess of the sentencing authority granted the trial court by the Sentencing Reform Act and, in the alternative, interferes with his constitutional liberty interest in his marriage. Appellant’s Opening Brief at 65-70. In response, the State asserts the no-contact order was authorized by RCW 9.94A.505(8) and RCW 9.94A.700(5)(e).

These statutory provisions simply permit the trial court to impose “crime-related prohibitions.” RCW 9.94A.505(8) (conditions of sentence); RCW 9.94A.700(5)(e) (condition of community

placement). A “crime-related prohibition” is an order directly relating to the crime for which the defendant is being sentenced and not, for example, an unrelated domestic violence conviction. RCW 9.94A.030(12); State v. Riles, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998). Warren did not commit an offense against Mrs. Warren, and an order prohibiting him from contacting her is not crime-related.

Tellingly, the State does not mention RCW 9.94A.700(5)(b), which permits special conditions of community placement prohibiting contact with “the victim of a crime or a specified class of individuals.” RCW 9.94A.700(5)(b). Mrs. Warren is neither.

Finally, if Mrs. Warren wants a no-contact order she can easily obtain one through family court. State v. Ancira, 107 Wn.App. 650, 655, 27 P.3d 1246 (2001) (finding family court proper forum to address contact with defendant’s children, not court sentencing defendant for violating no contact order protecting wife). The rights of the various parties may be sensitively weighed in that forum. Id. This Court should strike the no-contact order with Mrs. Warren.

D. CONCLUSION

For the reasons stated above and in the Appellant's Opening Brief, this Court should reverse Richard Warren's convictions and remand for new trials. In the alternative, this Court should vacate the no contact order with Warren's wife.

DATED this 22nd day of December, 2005.

Respectfully submitted,


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