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DEC 28 2012

King County Prosecutor
Appellate Unit

NO. 69132-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

ABRAHAM ULLOA-DURAN,

Appellant.

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

The Honorable Brian D. Gain, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The prosecutor committed misconduct during closing argument that requires reversal.

Issue Pertaining to Assignment of Error

During closing argument, the prosecutor implied that to honor their oath and "do the right thing," jurors should return guilty verdicts. The prosecutor also contended it would be easy for the jury to "turn your back on" the complainant in this child sexual abuse case. Did the prosecutor's remarks constitute prejudicial misconduct that could not be cured by a jury instruction?

B. STATEMENT OF THE CASE

M.G. was born in Argentina in March 1995. She moved with her family to the United States when she was five years old. 6RP 7.¹ M.G.'s uncle, Abraham Ulloa-Duran, was already in the United States, having arrived from his native Chile in 1996. 8RP 4.

Ulloa-Duran met Kippy Weinhold, a married woman, in 1997. 7RP 83; 8RP 5. They remained friends and became sexual partners in

¹ Citation to the verbatim report of the 2012 proceedings is as follows: 1RP – 6/5; 2RP – 6/6; 3RP 6/11; 4RP – 6/12; 5RP – 6/13; 6RP – 6/14; 7RP – 6/18; 8RP -- 6/19 (testimony and closing arguments); 9RP – 6/19 (verdicts); 10RP -- 7/27.

March 2006. 7RP 83-84. Until he had to leave the country in November 2008 because of visa problems, Ulloa-Duran and Weinhold remained partners and had two children together. 7RP 83-84; 8RP 5, 8.

During that time, Ulloa-Duran, the brother of M.G.'s mother, visited M.G.'s family almost daily. 5RP 17-18; 8RP 6-8. He regularly spoke with M.G. and her siblings and bought them gifts for their birthdays. 6RP 14-15; 7RP 24-26; 8RP 6-8.

M.G. got along very well with Ulloa-Duran because both of them were "playful" and often teased each other. 5RP 14-15. Ulloa-Duran gave M.G. more gifts than the other children. 5RP 16, 33. They also did many things together alone outside the family home. 5RP 15-16. M.G. admitted she was always Ulloa-Duran's "favorite" and received most of his attention. 6RP 17-19.

In contrast, according to M.G.'s brother, Jorge, M.G. had a "hard time" at home, often fighting and arguing with her siblings. 5RP 38. M.G. did not talk much with her mother, who was clearly the disciplinarian of the family. 5RP 28-29, 37; 6RP 15-16. M.G. said she and her mother were "isolated from each other." 6RP 15-16. She described her father as "kind of a stranger." 6RP 16.

Jorge did not detect a change in M.G.'s relationship with Ulloa-Duran over the years before he left the country. 5RP 17. But M.G. did. Her uncle began to spend more time with her when she was in seventh grade. 6RP 19-20. She had no one to talk with, and began to see Ulloa-Duran more as a friend than an uncle. 6RP 20.

During the summer after seventh grade, M.G. accompanied her uncle to a movie. After the movie, Ulloa-Duran drove with her to his apartment complex. He told M.G. to call her mother and tell her they were going to watch another movie. Surprised, M.G. called her mother and received her permission. 6RP 20-22. Rather than going to another movie, however, Ulloa-Duran took M.G. to his apartment. This was the first time M.G. had been to the apartment alone. 6RP 22. Ulloa-Duran grabbed M.G.'s arms and tried to kiss her, but she pulled back. He assured her it was "okay," and said he was "preparing [her] for the future." 6RP 24-26. Nothing more happened. 6RP 26. M.G. told no one about the incident because she felt no one would believe her. 6RP 26-27.

Less than a week later, the same thing happened. 6RP 27. After it happened a couple times, M.G. relented and kissed Ulloa-Duran. 6RP 27-30. On the way home, as they had done before, they stopped at a store and Ulloa-Duran bought M.G. clothes. 6RP 27-31. He told her people had

secrets, and "this is the kind of secret [she has] to keep to [her]self." 6RP 31.

The next time they got together, Ulloa-Duran showed M.G. a portion of a pornographic video depicting a woman performing oral sex on a man. He told her they would try the same thing. Ulloa-Duran took off his pants and exposed his penis. M.G. got on her knees and was close to her uncle, but did nothing. Ulloa-Duran grabbed the back of her head and put her mouth on his penis. 6RP 32-35. He then stopped, forwarded the video to a scene showing vaginal intercourse, and said they were going to try that. Ulloa-Duran put on a condom and penetrated M.G.'s vagina with his penis. 6RP 36-37. He then stopped and took a shower. 6RP 37-38.

When he finished, he told her to put her clothes on. He said if she told anyone, he would kill her family and take her somewhere where no one would find her. 6RP 38. The threat made M.G. feel powerless. 6RP 38-39. On the way home, they again stopped to shop and Ulloa-Duran bought her a couple of shirts. 6RP 39. He stayed at M.G.'s house for awhile and visited with her parents. 6RP 40. M.G. did not disclose the incident because she did not believe she could talk with any of her family members. 6RP 39.

Despite the incident, M.G. saw Ulloa-Duran "[a] lot more times." 6RP 40. They had intercourse at Ulloa-Duran's apartment three more times, but without the video. 6RP 40-41, 44. During one of those times, M.G.'s younger brother, Nicolas, accompanied M.G. and Ulloa-Duran to the apartment. Ulloa-Duran told the boy to stay in the car, while he and M.G. went inside and had sex. 6RP 42-43. When they returned to the car, M.G. said nothing to her brother because he was very young and would not understand. 6RP 44-45.

Nicolas had a "random memory" of the event. 7RP 27-28. He said he waited in the car for 10 or 20 minutes while his uncle and sister got some things inside. 7RP 27. They were quiet when they returned to the car, which was unusual because they were normally talkative. 7RP 28-29. M.G.'s eyes "were kind of red." 7RP 28.

Ulloa-Duran seemed to like M.G. more that summer 2008, Nicolas recalled. He bought her a lot of clothes during that period, as often as twice a week. 7RP 32-33. M.G. acknowledged she continued to go places alone with Ulloa-Duran after their first sexual encounter because she "liked the new things [she] was getting." 6RP 47. M.G. said the sexual relationship ended after about three months. 6RP 45.

Ulloa-Duran returned to the United States in August 2010. 7RP 51, 86; 8RP 9. M.G. met Tobias Hauser in spring 2011, during her sophomore year in high school. 5RP 44-45; 6RP 47-48. On their first date, they shared stories about their families. After Hauser told M.G. his sister had been raped by a relative, M.G. revealed she had been molested by her father's brother in Argentina when she was three years old to five years old. 5RP 49-50, 66-67.

About two months into their relationship, Hauser told M.G. he had been molested by a family member as a child. 5RP 48, 67-68. M.G. then told him she had been raped by Ulloa-Duran. 5RP 48-49; 6RP 49-50, 77.

They continued dating, but Hauser came to feel overwhelmed and wondered what to do about M.G.'s disclosure. 5RP 55. At times he noticed M.G. got depressed and he tried to support her. Then one night in July 2011, M.G. became upset over a conversation she and Hauser had about "something sexually that she was really insecure about." 5RP 56. When Hauser decided to go home despite M.G.'s pleas to stay, she "blew up" and cussed at him. 5RP 56. Hauser left. 5RP 56, 86.

Feeling she "had nothing else to be here for," M.G. called Hauser and said she was going to kill herself. 6RP 51. Hauser rushed back to M.G.'s house and called the police. 5RP 57; 6RP 51-52. M.G. was

furious with Hauser for calling the police. He had ruined her plan, which was to turn 18, move out of her parents' house, and send them a letter disclosing the sexual abuse. 6RP 52. The police and ambulance arrived, and M.G. was taken to the hospital. 5RP 58; 6RP 52-53.

While there she met with a psychiatric nurse. 6RP 53; 7RP 4-5. M.G. told the nurse she had been cutting herself for about four years. 7RP 7. She said she had been sexually abused by Ulloa-Duran when she was 11 and 12 and by a different uncle when she was five years old. 7RP 8, 15. M.G. feared her parents would not believe her if she told them about Ulloa-Duran. 7RP 8. The nurse diagnosed M.G. with depression and possible post-traumatic stress disorder. 7RP 10.

At some point M.G.'s mother arrived at the hospital. 6RP 53. The nurse told her about M.G.'s disclosure of sexual abuse and her concern she would not be believed. 7RP 11. M.G.'s mother appeared supportive. 6RP 54; 7RP 11, 14-15. The nurse concluded M.G. was safe to go home and she was released to her family. 7RP 14-15, 18.

Hauser and M.G. rode home with M.G.'s mother. 6RP 54. After a brief nap, M.G. was summoned to the living room, where her family and Ulloa-Duran sat. 5RP 24-25, 60; 6RP 56-58; 7RP 80-81. M.G.'s mother directed her to confront her uncle. 6RP 25-26; 58. M.G. yelled at Ulloa-

Duran, asking him why he would do that to her and telling him it was his fault. 5RP 26-27; 6RP 26. A shocked Ulloa-Duran asked why M.G. would say something like that, why she would make up such a lie, and that she would ruin his life. 5RP 26; 6RP 59. Ulloa-Duran left after 15 or 20 minutes. 5RP 27; 6RP 59.

In the weeks that followed, Hauser and -- after a few refusals -- M.G., gave a recorded statement to police. 5RP 103-05, 117-20, 127-32, 136-37. After the interview with M.G. on July 27, 2011, police arrested Ulloa-Duran. 5RP 122. Ulloa-Duran's sister, Maria Fritz, was present for the arrest and expressed her anger about it. 5RP 122. Fritz called M.G. a "bitch," then called her sister -- M.G.'s mother -- and yelled she would have them all deported. 7RP 55-56.

The detective who interviewed M.G. notified her that Ulloa-Duran had been arrested and that Fritz was angry about it. After speaking with M.G. on the phone, the detective summoned her and Hauser to the police station. He spoke with them at the station, then contacted Child Protective Services. 5RP 122-23. M.G. began to live with a different family shortly thereafter. 6RP 7-8.²

² Before trial, the trial court granted Ulloa-Duran's motion to exclude reference to M.G.'s home as a "foster" home. 2RP 17-18; 4RP 9-10.

The State charged Ulloa-Duran with two counts of second degree rape of a child. The State alleged that on two occasions between June 1 and December 15, 2008, Ulloa-Duran had sexual intercourse with the then 13-year-old M.G. CP 17-18.

Ulloa-Duran's defense was general denial. His sister, Fritz, testified that on the day Ulloa-Duran returned from Chile, M.G. welcomed her uncle home by running through the back door and happily leaping up onto him. 7RP 51-52. Maria's daughter, Yvonne Fritz, recalled an excited M.G. wrapping her arms around Ulloa-Duran's neck and hugging him. 7RP 60-61.

Ms. Weinhold, the mother of Ulloa-Duran's children, recalled an incident in June 2011 when she and Ulloa-Duran happened upon M.G., her mother, and Hauser at a store. 7RP 86. M.G. was happy to see Ulloa-Duran and ran up and ruffled his hair. 7RP 87-88.

Ulloa-Duran testified that when he returned, M.G. greeted him with a hug. He noticed nothing strange about the way she acted. 8RP 9-10. Ulloa-Duran also recalled the chance meeting at the store. He said M.G. looked happy and showed no animosity. 8RP 11-12. He was therefore "surprised" to learn of M.G.'s accusations against him. 8RP 12-13. He recalled the meeting at M.G.'s family's residence, when an upset

M.G. accused him of "many things" including abuse. 8RP 13-14. He asked her whether she realized that her allegations could ruin his life. 8RP 14, 18.

Ulloa-Duran remembered taking M.G. to a movie in summer 2008. 8RP 17. He said he went shopping with her alone several times, but denied ever being alone with her in his apartment. He testified he never raped or otherwise sexually abused M.G. 8RP 14-15.

The jury found Ulloa-Duran guilty as charged. CP 20-21. The trial court imposed concurrent, indeterminate, standard range sentences of 108 months to life and 36 months community custody. CP 47-57; 10RP 16.

C. ARGUMENT

PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT DEPRIVED ULLOA-DURAN OF A FAIR TRIAL.

1. Introduction

A prosecutor may not imply the jury will violate its oath if it disagrees with the State's theory of the case or exhort jurors to "do the right thing" by returning a guilty verdict. Nor may a prosecutor appeal to the jury's sympathy for the complainant. The prosecutor did all these things during closing argument at Ulloa-Duran's trial. The comments caused prejudice because the case was close and hinged on the credibility of M.G. and Ulloa-Duran. Reversal is warranted.

To prevail on a claim of prosecutorial misconduct, the defendant must establish improper conduct and prejudice. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Prejudice occurs where there is a substantial likelihood the misconduct affected the jury's verdict. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). Absent objection to improper arguments, reversal is required only if the remarks are so flagrant and ill-intentioned they could not have been cured by instruction. State v. Dennison, 115 Wn.2d 609, 623, 801 P.2d 193 (1990).

2. The prosecutor engaged in improper conduct.

The prosecutor summed up closing argument with the following remarks:

[T]he easiest things for all of you to do is to turn your back on [M.G.], to throw your hands up in the air and to say, I don't care, I don't know what happened. He denies it. You took an oath to determine – you took an oath to do what's fair and to evaluate the evidence from the testimony and the credibility of the witnesses. It's going to take courage to decide to convict someone. It's going to take courage to uphold the law. The State is asking, do you have the courage in this case to do the right thing, to hold this man accountable for what he did to [M.G.], and to find him guilty.

8RP 35.

The implication is that to follow its oath and do the right thing, the jury would have to find Ulloa-Duran guilty. This type of argument is improper. See United States v. Young, 470 U.S. 1, 18, 105 S. Ct. 1038, 84

L. Ed. 2d 1 (1985) (prosecutor's attempt to exhort jury to "do its job" improper; "that kind of pressure . . . has no place in the administration of criminal justice."); United States v. Andujar-Basco, 488 F.3d 549, 561 (1st Cir. 2007) (following argument found improper: "[y]ou find him guilty, you uphold the law, your duty as jurors, make the logical choice and come back with one answer, and telling this man, Richard Andújar you are guilty."); United States v. Mandelbaum, 803 F.2d 42, 44 (1st Cir. 1986) ("There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty: impartiality."); State v. Musser, 721 N.W.2d 734, 756 (Iowa, 2006) ("whether a finding of guilt is 'the right thing to do' in an abstract sense is not the issue");

When the prosecutor urged the jury to "do the right thing" and convict Ulloa-Duran, she inappropriately diverted the jury's attention from its duty to decide the case solely on the evidence by injecting issues broader than the guilt or innocence of the defendant. This was improper.

As well, remarks implying that jurors will violate their oath if they fail to convict are improper. See State v. Coleman, 74 Wn. App. 835, 838-39, 876 P.2d 458 (1994) (improper to tell jury it would violate oath if it disagreed with State's theory), review denied, 125 Wn.2d 1017 (1995);

State v. Pennington, 119 N.J. 547, 576, 575 A.2d 816, 831 (1990) ("remarks implying that jurors will violate their oaths if they fail to convict or return a death sentence are improper"), overruled in part on other grounds by State v. Brunson, 132 N.J. 377 (1993). The prosecutor during closing argument in Ulloa-Duran's trial told jurors they took an oath to do what is fair, followed by the declaration that it would take "courage to decide to convict someone." 8RP 35. Reasonably construed, the remarks suggested that only a finding of guilty would honor the oath. This was improper.

It is also improper for the prosecutor to appeal to the passions of the jury and encourage it to render a verdict based on emotion rather than properly admitted evidence. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). See In re Personal Restraint of Glasmann, __ Wn.2d __, 286 P.3d 673, 677 (2012) ("The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.") (quoting, American Bar Association, Standards for Criminal Justice, std. 3-5.8(c) (2d ed. 1980)). This includes comments encouraging jurors to sympathize with the victim because of the emotional impact of the crime. State v.

Clafin, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985).

The prosecutor improperly played on the jury's sympathy and passion at Ulloa-Duran's trial when she said "the easiest thing" for jurors to do "is to turn your back on [M.G.]" 8RP 35. See State v. Adams, 292 Kan. 60, 67-68, 253 P.3d 5, 11-12 (Kan. 2011) (prosecutor's argument that "[t]his is the only chance [victim] will ever have to have someone held accountable for taking his life" improper); State v. Tosh, 278 Kan. 83, 92, 91 P.3d 1204, 1212 (Kan. 2004) (prosecutor's argument that jury can "protect" child rape victim by finding defendant -- victim's father -- guilty was improper appeal to jurors' passions). Reading the passage as a whole, the prosecutor insinuated that to find Ulloa-Duran not guilty would be to take the easy way out, rather to show the "courage" necessary to convict.

3. The misconduct was flagrant and prejudicial.

Ulloa-Duran did not object to the prosecutor's remarks. The question, therefore, is whether the comment was so flagrant and ill-intentioned that its prejudice could not have been cured by an instruction. State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010). A prosecutor's disregard of a well-established rule is flagrant and ill-intentioned misconduct. Glasmann, 286

P.3d at 679; Anderson, 153 Wn. App. at 433-34 (citing State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997)) (Quinn-Brintnall, J., concurring).

The rules the prosecutor violated here were not new. An experienced prosecutor would know these rules. The prosecutor's remarks were thus ill-intended. They were also prejudicial. The State's proof of Ulloa-Duran's guilt was far from overwhelming. There was no physical evidence to corroborate M.G.'s allegations. M.G. testified she continued going places alone with Ulloa-Duran after the first alleged rape because she enjoyed the new things her uncle bought her. 6RP 46. She admitted she was not comfortable with her family life and wanted to go to a different high school. 6RP 90-91. Her own mother apparently did not believe her; she screamed at M.G. when Ulloa-Duran was arrested. 6RP 62.

Yet the jury's assessment of her credibility was critical to its verdict. Under the circumstances, the prosecutor's comments caused prejudice. See, e.g., State v. Venegas, 155 Wn. App. 507, 526, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010) (finding reversal was necessary where errors, including prosecutorial misconduct, occurred in case that "largely turned on witness credibility" and where "[t]he parties

presented the jury with two diametrically opposed versions of the events.").

Finally, the prejudice would not have been neutralized by a curative instruction. The notion of child sexual abuse is inherently repugnant. See Rodriguez v. Williams, 42 Wn. App. 633, 636, 713 P.2d 135 ("The average person purchasing homeowner's insurance would cringe at the very suggestion that he was paying for such coverage [for stepfather's sexual contact with stepchild]."), aff'd, 107 Wn.2d 381 (1986); Patterson v. State, 747 P.2d 535, 540 (Alaska Ct. App. 1987) (reversing convictions for three counts of child sexual abuse because of prosecutorial misconduct; court observes, "Given the inherently emotional context of a criminal trial involving the sexual abuse of a young child, it hardly seems likely that the point of the state's argument was lost on the jury."); William D. Pithers & Alison Gray, The Other Half of the Story: Children with Sexual Behavior Problems, 4 Psychol. Pub. Pol'y & L. 200, 202 (1998) ("Calls for measures such as these [lengthier prison sentences] may be based not only on *society's anger at the inhumanity inherent in sexual abuse of children* but also on the stereotypical thinking that often supports actions later viewed with deep regret (e.g., racial discrimination).") (emphasis added).

At Ulloa-Duran's trial, the prosecutor tapped into that revulsion and exacerbated its prejudicial effect during closing argument. Washington courts recognize that trial improprieties "may not always be susceptible to a curative instruction." State v. Hager, 171 Wn.2d 151, 160, 248 P.3d 512 (2011) (citing State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). This is true of a matter of "such a nature as to be most likely to impress itself upon the minds of the jurors[.]" State v. Suleski, 67 Wn.2d 45, 51, 406 P.2d 613 (1965).

Although the prosecutor's improper comments were not "evidence," they were uttered by a government official in a particularly influential position. See Glasmann, 286 P.3d at 679 (noting that a prosecutor may not use his or her position of power and prestige to influence the jury). The remarks were therefore likely to impress themselves on the jurors' minds. At a trial in which the jury's assessment of credibility of M.G. and Ulloa-Duran was dispositive, it cannot be said an instruction would have removed the lingering taint of the comments. The result is Ulloa-Duran was denied his right to a fair trial. Reversal is warranted.

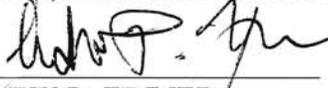
D. CONCLUSION

For the aforesaid reasons, this Court should reverse the convictions and remand for a new trial.

DATED this 28 day of December, 2012.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 69132-5-1
)	
ABRAHAM ULLOA-DURAN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF DECEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ABRAHAM ULLOA-DURAN
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SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF DECEMBER 2012.

X *Patrick Mayovsky*