

NO. 43199-8-II

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

STATE OF WASHINGTON, Respondent

v.

RONALD LEE SORENSON, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-01995-2

BRIEF OF RESPONDENT

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A. STATEMENT OF FACTS

I. Factual History

Sabrina Sorenson and Ronald Sorenson (hereafter referred to as Sorenson) were married and had 4 biological children they raised together. RP 130. They also raised a niece, A.N.H. together whom they considered a daughter. RP 130. Sorenson was born on June 28, 1971. A.N.H. was born on March 21, 1988. RP 131. B.E.S. was born on March 9, 1992. RP 131. B.L.S. was born on August 23, 1993. RP 131. B.J.S. was born on December 9, 1996. RP 131. A.K.B. is Sorenson's niece who was born on December 12, 1993. RP 132.

In July 2010 Sorenson's marriage was coming to an end. RP 133. Mrs. Sorenson testified one of the reasons she wanted to end her marriage was because she could not get over what B.J.S. told her had happened. RP 134. Mrs. Sorenson explained that B.J.S., when she was 13, told her that she woke up to her hand in her dad's pants or her dad's hands in her pants. RP 134. Mrs. Sorenson couldn't get past this and wanted to separate and she decided to tell their children. RP 133. Mrs. Sorenson arranged to have her girls meet with her the evening of July 22, 2010. CP 133-34; CP 169. They sat on the bed in her bedroom and she told her four daughters that she and their father were getting a divorce. CP 136. Mrs. Sorenson

explained that she “couldn’t get by” what B.J.S. had told her. CP 136. When the other girls heard what had happened to B.J.S., B.E.S. started to cry and put her head in the pillow, and A.N.H. also started to cry. RP 138. B.L.S. became quiet and withdrawn. RP 138. Mrs. Sorenson explained that Sorenson was persistent about being present during this conversation, but she kept telling him no. RP 138. Sorenson also tried to contact the girls during this meeting by calling each one of their cell phones repeatedly. RP 138.

It was common for Sorenson’s daughters to sleep in his bed with him and his wife. RP 139-40. Mrs. Sorenson observed a sudden change in behavior with regards to B.J.S. sleeping in their bed when she quit sleeping in the bed if Sorenson was present. RP 140. B.E.S. also stopped sleeping in the bed if Sorenson was there saying that he would “throw up his leg” on her. RP 140.

Mrs. Sorenson observed that B.L.S., who was usually a pretty “happy-go-lucky kid,” became withdrawn and depressed and she couldn’t figure out why. RP 141. Mrs. Sorenson testified she knew of no reasons her daughters would be angry with Sorenson, aside from the allegations of abuse. RP 141.

B.J.S. testified that when she was 6, 7, or 8 years old she was asleep in her parents’ bed and she woke up and her hand was inside

Sorenson's pants. RP 192-93. B.J.S.'s hand was on his penis, on the skin. RP 193.

B.E.S. testified that Sorenson touched her for the first time when she was 11 years old while they were on a beach trip. RP 235. During that incident, Sorenson put his hand in her pants and moved his hand around on her vagina. RP 235. B.E.S. testified that she feigned waking up by moving around and then rolling out of the bed and going to the bathroom. RP 236. B.E.S. indicated this type of touching happened multiple times, at least 10 times. RP 237. The other times occurred in his bed at their home in Clark County. RP 238. B.E.S. described another incident where she was 11 or 12 years old and he put his hands in her pants and she left his room and went into her bedroom, but he followed her and continued touching her. RP 239-40. B.E.S. also described incidents where she woke up to have her hand inside Sorenson's pants, and one time his penis was in between her butt cheeks. RP 241. When her hand was on his penis, B.E.S. felt that his penis was wet and hard. RP 241. This type of touching would occur about once a month. RP 246. B.E.S. told her best friend about the abuse before she told anyone else. RP 250-51. That friend, Desirae Cook testified at trial that she is friends with B.E.S. and that in 2007 B.E.S. told her that her father had sexually abused her. RP 366. B.E.S. was scared and upset while telling her about it. RP 367.

A.N.H. testified that she came to live with Sorenson and his family when she was 13 years old. RP 282. Sorenson was affectionate with her, as he was with his other girls. RP 286-87. A.N.H. described an incident when she was 13 years old where she was laying down with Sorenson, “spoon-style” on the couch watching TV. RP 287; 289. Sorenson began touching and rubbing her stomach and continued going lower on her body. RP 287. Sorenson’s hand then went to her side and to her leg, and then into her pants and “all the way down there.” RP 289-90. A.N.H. specified he touched her genitals. RP 290. Sorenson unbuttoned her pants to accomplish this. RP 291. A.N.H. testified she didn’t know what to do and just froze. RP 287. She then started to cry and got up off the couch and went to the bathroom, ending the touching incident. RP 287-88.

A.K.B. testified that Sorenson is her uncle, her mother’s brother. RP 370. A.K.B. was close with Sorenson’s family when she was younger. RP 369. A.K.B. described incidents where she was laying on the couch with Sorenson “spooning style” watching TV when she was in the fourth grade. RP 370-71. While laying with Sorenson, he touched her on her breasts and crotch areas, rubbing them. RP 371. A.K.B. testified this touching occurring on fifteen to twenty occasions.

B.L.S. testified that she was close with her father growing up and thought he would “never do anything like that” to her. RP 404. She was

11, 12 or 13 years old the first time she woke up with her hand in her father's pants, on his penis. RP 405. B.L.S. described another incident when she was 13 or 14 where she was asleep and then woke up to her hand on her father's penis, and his hand down her pants resting on top of her underwear. RP 407-08. A third incident occurred where Sorenson put his hand inside her pants, inside her underwear. RP 409-10.

Sorenson testified he had no inappropriate sexual contact with any of the girls. RP 495.

Detective Oman of the Clark County Sheriff's Office testified that she did not obtain any physical evidence or have the victim's examined for evidence because in her experience the delay in time and the type of allegation, fondling, would not produce any physical evidence for her to obtain. RP 185-87.

II. Closing Arguments

At trial, the State gave an initial closing and a rebuttal argument, and defense gave a closing argument. Pertinent portions of statements in the closing arguments are set forth below:

Prosecutor: "And as—and as mentioned in the 'beyond a reasonable doubt' instruction, if you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt. So if you have an abiding belief that these girls testified truthfully, you have an abiding belief in what they said, you are satisfied beyond a reasonable doubt."

RP 577-78.

Prosecutor: "I want to go through each girl and submit—and show you how they are credible and how you should have an abiding belief in what they are saying."

RP 578.

Prosecutor: "So I want to talk to you now about each girl and why you should be satisfied beyond a reasonable doubt that the Defendant molested each girl."

RP 579

Prosecutor: "And you saw, you were able to look them in the eye. You were able to see their demeanor. You could see the emotion. And you should have an abiding belief that they told you the truth. You should have an abiding belief that he is guilty. And if you do have an abiding belief in the truth of what those girls said, then it is your sworn duty, your sworn obligation, and your sworn responsibility to find him guilty."

RP 594.

Prosecutor: [A]nd you have a jury instruction that tells you what beyond a reasonable doubt is. I've already went over it with you. I ask you again to go back to it, because nothing I say changes what that law is and what the definition is, and nothing the defense attorney says changes that definition. It is what it is."

RP 648-49.

Court: "Jury, you're going to follow the instructions I've given to you. That's the law."

RP 649.

Prosecutor: “The evidence has shown that those girls are credible, and that they are telling the truth, and that you should have an abiding belief in the truth of the allegations. You should be convinced beyond a reasonable doubt.”

RP 662.

III. Procedural History

Sorenson was charged by Fifth Amended Information with 11 counts of Child Molestation in the First, Second and Third Degrees. CP 29-33. The charges spanned a time period between 2001 and 2007 and involved 5 alleged victims. CP 29-33. The defendant was convicted of 9 of the 11 charges after a jury trial, and for each of the 9 counts the jury returned a special verdict that Sorenson violated a position of trust. CP 78-99. After the trial, Sorenson filed a Motion for a new trial or for arrest of judgment. CP 100. The court denied his motion. CP 110. The court sentenced Sorenson to an exceptional term of 240 months to Life on Counts 1, 2, 10 and 11 on the basis of the aggravating factor found by the jury, and his high offender score caused some crimes to go unpunished, and sentenced him to standard range terms for the remaining counts. CP 122-34.

B. RESPONSE TO ASSIGNMENT OF ERRORS

I. The Prosecutor's comments were appropriate and did not constitute misconduct

Sorenson argues the prosecutor committed misconduct by arguing that if the jury had an abiding belief in the truth of the charge, then they are satisfied beyond a reasonable doubt. This claim fails. The prosecutor's statements are supported by law, accurately reflect the burden of the State and the jury's duty in deciding the case. There was no misconduct.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgeron*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting

State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a 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, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.*

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court’s instructions. *State v. Burton*, 165 Wn. App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a prosecutor to misstate the court’s instruction on the law, to tell a jury to acquit you must find the State’s witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to

everyday decision-making. *Id.* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)).

Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn. App. at 885. In *Burton*, the court found the prosecutor's statements were misconduct, but noted the prosecutor never re-characterized the burden of proof in any other part of the argument, and the misconduct was not substantially likely to have affected the verdict and it did not create an enduring or resulting prejudice that a curative instruction could have cured. *Id.*

In Sorenson's case, the prosecutor did not undermine the presumption of innocence, or relieve the state of its burden of proving him guilty beyond a reasonable doubt. The jury instruction defining reasonable doubt tells the jury if you have an abiding belief in the truth of the charge, you are convinced beyond a reasonable doubt. WPIC 4.01; CP 39.

The prosecutor accurately stated the law when she told the jury they could convict if they believed the victims' testimony. RCW 9A.44.020(1) states that "in order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged

victim be corroborated.” Taking that at face value, it is true that a jury can convict a defendant of Child Molestation if they believe the victim beyond a reasonable doubt, and the victim establishes all elements of the crime. Taking the court’s definition of reasonable doubt as “hav[ing] an abiding belief in the truth of the charge” then it is fair and accurate for a prosecutor in this situation to tell a jury if they have an abiding belief in the truth of the victim’s testimony, (and that testimony established the elements of the crime) then they are convinced beyond a reasonable doubt.

The abiding belief instruction, WPIC 4.01, used in this case has been upheld. *See State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995); *State v. Lane*, 56 Wn. App. 286, 299-301, 786 P.2d 277 (1989); *State v. Mabry*, 51 Wn. App. 24, 751 P.2d 882 (1988); *State v. Price*, 33 Wn. App. 472, 655 P.2d 1191 (1982). The United States Supreme Court has also upheld the use of this type of instruction. *See Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L.Ed.2d 583 (1994). As the use of the instruction clarifying that a jury is convinced beyond a reasonable doubt if they have an abiding belief in the truth of the charge is proper, then a prosecutor’s reference to that instruction and to the term “abiding belief” as a way to characterize the state’s burden is also proper.

In *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011), the court found it was not misconduct for a prosecutor to tell a jury during

closing argument, “if you believe her, you must find him guilty unless there is a reason to doubt her based on the evidence in the case.”

Thorgerson, 172 Wn.2d at 454. In *Thorgerson*, the defendant appealed a conviction for four counts of Child Molestation. On appeal he argued that the prosecuting attorney committed misconduct by making the statement about believing the victim and if you do then you must find him guilty. The court found this was not misconduct, “particularly given the latitude that a prosecutor has in arguing from the evidence during closing argument.” *Id.*

When taken as a whole, the prosecutor’s comments in closing argument did not shift the burden of proof to the defendant, did not “dumb down” the standard of proof, and did not misstate the law. The prosecutor read the entire reasonable doubt instruction to the jury in the beginning of her closing argument. RP 576. Throughout the argument, the prosecutor referred back to the instruction and made it clear it was her burden to prove the elements of the crimes charged.

One of the statements Sorenson argues was improper and cites to in his brief was directly preceded by mention of the reasonable doubt instruction. The full statement of the prosecutor says: “And as—and as mentioned in the ‘beyond a reasonable doubt’ instruction, if you have an abiding belief in the truth of the charge, you are satisfied beyond a

reasonable doubt. So if you have an abiding belief that these girls testified truthfully, you have an abiding belief in what they said, you are satisfied beyond a reasonable doubt.” RP 577-78. When taken as a whole and read in the context of the entire closing argument and the entire case, this discussion of abiding belief does not amount to misconduct and does not misstate or downplay the law or the burden of proof.

Sorenson also argues a second statement the prosecutor made was improper, which is quoted by Sorenson as: “[I] want to go through each girl and submit—and show you how they are credible and how you should have an abiding belief in what they are saying.” RP 578. The prosecutor also stated very soon after, “[s]o I want to talk to you now about each girl, and why you should be satisfied beyond a reasonable doubt that the Defendant molested each girl.” RP 579. The prosecutor then proceeded to detail each victim’s testimony and their demeanor while on the stand and why the jury should find them credible. RP 579-593. She summarized her initial closing argument by telling the jury that “[a]nd you saw, you were able to look them in the eye. You were able to see their demeanor. You could see the emotion. And you should have an abiding belief that they told you the truth. You should have an abiding belief that he is guilty. And if you do have an abiding belief in the truth of what those girls said, then it

is your sworn duty, your sworn obligation, and your sworn responsibility to find him guilty.” RP 594.

Defense counsel also referred to “abiding belief” in his discussion of proof beyond a reasonable doubt during his closing argument. RP 602. Defense counsel’s theme throughout was the victims were not credible. RP 644. He argued there was no physical evidence, and the State wanted the jury to convict only on the victims saying it happened. *Id.* at 644-45.

In light of that argument and that theme at trial, it is reasonable for the prosecutor to have made the argument that it came down to whether the jury believed the victims and whether they had an abiding belief in the truth of what they said. The prosecutor ended the trial with her rebuttal argument where she told the jury:

“and you have a jury instruction that tells you what beyond a reasonable doubt is. I’ve already went over it with you. I ask you again to go back to it, because nothing I say changes what that law is and what the definition is, and nothing the defense attorney says changes that definition. It is what it is.”

RP 648-49. This comment clearly summarizes the prosecutor’s argument and comments about reasonable doubt and refers the jury to the exact wording of the instruction. There is no misconduct when you read the closing arguments in their entirety and take the comments in the context of the surrounding statements and the evidence at trial.

The prosecutor kept her argument within the confine of the law while arguing to a jury in a case of he said/she said with no physical evidence, that they could convict a person on the word of a victim if they believed that victim. That is an accurate statement of the law and the prosecutor's statements to that effect and in discussing the beyond a reasonable doubt standard were not improper.

II. Any Improper Comments Were Not Prejudicial

Even if this Court finds the prosecutor committed misconduct during her closing argument, to prevail, Sorenson must also show that no curative instruction would have obviated any prejudicial effect on the jury, and that the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2011) (quoting *State v. Thorgerson*, 172 Wn.2d at 455). As the court stated in *Emery*, the question is: “[H]as 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)). As Sorenson did not object at trial to the prosecutor's comments regarding abiding belief, he must show the misconduct was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice” and is incurable by a

jury instruction. *Fisher*, 165 Wn.2d at 747 (quoting *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

The prosecutor's statements in Sorenson's trial do not rise to the level of flagrant and ill-intentioned conduct that the courts have previously found to result in prejudice. Her statements during closing are similar to the argument the prosecutor made in *State v. Larios-Lopez*, 156 Wn. App. 257, 233 P.3d 899 (2010). In *Larios-Lopez*, the prosecutor argued that "[a]biding belief is one that you can take out of this courtroom. In the end, you have to have a moral certainty. Whether you vote guilty or not guilty, you have to know that you did the right thing. That is an abiding belief" and also in rebuttal he argued, "[i]n the end, if you believe this officer is telling the truth, and you believe him to an abiding belief, I have proven to you beyond a reasonable doubt that the defendant is guilty of this crime, and I ask you to find him guilty of assault in the third degree." *Larios-Lopez*, 156 Wn. App. at 259. This Court, in reviewing for an allegation of prosecutorial misconduct, found when taken in context, these statements do not amount to an improper argument, and it did not constitute a flagrant and ill-intentioned conduct. *Id.* at 261. The prosecutor at Sorenson's trial did no more than the prosecutor did in *Larios-Lopez*. Both told the jury if they believed the victim of the crime, if they had an abiding belief in the truth of what the victim said, then they

were satisfied beyond a reasonable doubt. The Court in *Larios-Lopez* has already indicated this type of conduct is not even improper let alone so flagrant and ill-intentioned that it could not be cured by an instruction from the court. *Id.*

The prosecutor's statements did not prejudice the jury to the point of preventing the defendant from having a fair trial. It is important to note that the last argument the jury heard, the prosecutor's rebuttal included the prosecutor asking the jury to go back to the reasonable doubt instruction because "nothing I say changes what that law is and what the definition is, and nothing the Defense Attorney says changes that definition. It is what it is." RP 649. Soon after the judge told the jury "...you're to follow the instructions I've given to you. That's the law." RP 649. All of the statements Sorenson indicates are improper occurred before the judge gave that oral instruction to the jury. Juries are presumed to follow the courts' instructions. *See State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008) (citing to *State v. Smith*, 144 Wn.2d 665, 679, 30 P.3d 294 (2001)). If there was any misconduct by the prosecutor, then it was surely cured by the judge telling the jury that the instructions he gave them was the law.

The prosecutor's statements were not so flagrant and ill-intentioned to overcome the defendant's burden in showing that no

instruction could have cured the error and the improper statements were substantially likely to have affected the verdict. This claim fails.

C. THE STATE AGREES THE JUDGMENT AND SENTENCE CONTAINS A SCRIVENER'S ERROR WHICH SHOULD BE CORRECTED

As to counts 2, 3, and 9 in the Judgment and Sentence, CP 122-134, the dates the incidents are said to occurred are incorrect as the jury found in its verdicts. The State agrees with Sorenson that this court should remand to the trial court to correct the judgment and sentence as to the dates the crimes occurred on counts 2, 3, and 9.

DATED this 10 day of October, 2013.

Respectfully submitted:

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