No. 90268-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PETER CARR,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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A IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Carr, No. 68815-4-I, filed February 18, 2014 (unpublished).

C. ISSUES PRESENTED FOR REVIEW

If this Court accepts review of this case, the State seeks cross-review of the following additional issues the State raised in the Court of Appeals, which were either not reached by the Court or were decided adversely to the State:

1. The Court of Appeals concluded that Carr did not establish ineffective assistance of counsel because there were legitimate tactical reasons not to renew his motion to sever, so the performance of counsel was not deficient. As an alternative ground to affirm, the State renews its argument that Carr did not establish ineffective assistance of counsel because there is no reason to believe that the trial court would have reversed its initial ruling.

2. The Court of Appeals concluded that a statement of the prosecutor in closing argument improperly shifted the burden of proof, but there was no objection to the remark and the Court concluded the error could have easily been remedied by a curative instruction, so the error was not reversible. As an alternative ground to affirm, the State renews its argument that in the context in which the statement was made, it was not improper.

3. The Court of Appeals concluded that the prosecutor's reference to the defendant as "the guy that parents warn their kids about" was improper because it was inflammatory, but there was no objection to the remark and the Court concluded the error could have easily been remedied by a curative instruction, so the error was not reversible. As an alternative ground to affirm, the State renews its argument that given the facts of this case, this remark was a fair response to the defenses offered by Carr, and was not improper.

D. STATEMENT OF THE CASE

The defendant, Peter Carr, was convicted of child molestation in the first degree, based on his assault on 8-year-old

ML,[1] and of communicating with a minor for immoral purposes, based on his communication with 9-year-old KW, both occurring in June 2011. CP 47-48, 68-69. The relevant facts are set forth in the State's briefing before the Court of Appeals. Brief of Respondent at 3-11.

The Court of Appeals affirmed the convictions in a unanimous unpublished opinion. State v. Carr, 68815-4-I (Wash. Ct. App. Feb. 18, 2014).

E. ARGUMENT

The petition for review misstates one of the holdings of the Court of Appeals. In the list of issues presented, the petitioner represents that the Court of Appeals "held that the prosecutor did misrepresent the facts of the case." Pet. at 2. The Court of Appeals actually held that the prosecutor did not misrepresent the facts of the case, stating:

> The prosecutor did not misrepresent facts. Carr's claim of error stems from his misapprehension of the evidence in the record.

Carr, slip opin. at 18-19.

[1] The children who are named victims are referred to by initials in an attempt to protect their privacy. For the same reason, the State has not used the names of the relatives of the children, instead identifying each relative by that relationship.

The State's briefing at the Court of Appeals adequately responds to the issues raised by Carr in his petition for review, which comprise all of the issues raised in the Court of Appeals. If review is accepted, the State seeks cross-review of corresponding issues it raised in the Court of Appeals but that the Court's decision rejected or did not address. RAP 13.4(d). The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review, and believes that review by this Court is unnecessary. However, if the Court grants review, in the interests of justice and full consideration of the issues, the Court should also grant review of the alternative arguments raised by the State in the Court of Appeals, which it believes are consistent with existing law. RAP 1.2(a); RAP 13.7(b). Those arguments are summarized below and set forth more fully in the briefing in the Court of Appeals.

1. CARR DID NOT ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

The Court of Appeals properly concluded that Carr did not establish ineffective assistance of counsel because there were legitimate tactical reasons not to renew his motion to sever the charges, so the performance of counsel was not deficient. State v. Carr, slip op. at 12-15. If this Court grants review on this issue, the

State cross-petitions to preserve its argument that Carr has not established that failure to renew the motion was deficient performance, or that it was prejudicial, because he has not demonstrated that there was a reasonable chance the court would have reversed its ruling, and because the court had ruled the evidence of the two crimes was cross-admissible, so evidence of both would have been heard even in separate trials.

To prevail on a claim of ineffective assistance of counsel that is based on the failure to renew a motion to sever, Carr must show that the failure to renew the motion was deficient performance and must show both that the motion would likely have been granted and that, if severance had been granted, there is a reasonable probability that the jury would not have found him guilty. State v. Sutherby, 165 Wn.2d 870, 884, 204 P.3d 916 (2009).

There was a legitimate reason for Carr's counsel not to renew the motion to sever – the trial court already had denied the motion and there was no significant change in circumstances to suggest that the court would reverse its original decision. A claim of ineffective assistance cannot be based on a matter of trial strategy. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2011). Counsel is not ineffective for declining to pursue a strategy

that reasonably appears unlikely to succeed. State v. McFarland, 127 Wn.2d 322, 334-37 & n.2, 899 P.2d 1251 (1995).

The pretrial severance motion was fully litigated. The trial court concluded that the incidents were "clearly" cross-admissible, as "fairly strong evidence" admitted for a valid purpose: to establish motive, intent and common scheme or plan. 3/15/12 RP 4. The court concluded that cross-admissibility was not unduly prejudicial, and that the State had strong evidence as to each count. Id. at 5. The court also concluded that the jury would not consider the evidence for any improper purpose and offered to give a limiting instruction if requested by the parties. Id. Carr did not assert prejudice to his ability to present separate defenses. CP 155-56.

In the Court of Appeals, Carr argued a renewed severance motion would have been granted because it was "then clear the evidence of each count was not cross-admissible." App. Br. at 27. Carr cited no new evidence at trial that was relevant to cross-admissibility.[2] In this petition, he has abandoned that argument. If anything, the court's conclusion that the evidence was cross-admissible was strengthened when Carr claimed that he may have accidentally exposed himself to KW and that he always bumped

[2] The propriety of the original ruling as to cross-admissibility of the evidence of the two incidents has not been challenged in this appeal.

into people walking down the aisles at Deseret Industries, the store in which the incident with ML occurred. Each incident was relevant to rebut the defense of accident. ER 404(b); State v. Price, 127 Wn. App. 193, 205, 110 P.3d 1171 (2005), aff'd, 158 Wn.2d 630, 146 P.3d 1183 (2006).

Carr has not established deficient performance because the decision not to renew the motion was reasonable, where there was no reason to believe that the trial court would reverse its previous ruling. Even if defense counsel should have renewed the motion, Carr has not demonstrated prejudice: first, because he has not established that the trial court would have reversed its ruling, and second, because the court had ruled the evidence of the two offenses cross-admissible, so all of the same evidence would have been admitted at any separate trial and there is no reason to believe that the jury's verdicts would change.

2. THE PROSECUTOR'S ARGUMENT DID NOT SHIFT THE BURDEN OF PROOF.

The Court of Appeals concluded that one statement in the prosecutor's closing argument improperly shifted the burden of proof. State v. Carr, slip op. at 16-17. The court noted that there was no objection to that statement, and the jury had been properly

instructed as to the burden of proof. Id. The court concluded that because the error could easily have been remedied by a curative instruction, Carr is not entitled to reversal. Carr, slip op. at 17-18. If this Court grants review on this issue, the State cross-petitions to preserve its contention in the Court of Appeals that, based on the context of this statement, the prosecutor did not misstate the burden of proof.

In her initial closing argument, the deputy prosecutor twice reminded the jury that it was the State's burden to prove the elements of the crimes beyond a reasonable doubt. 4/3/12 RP 9-10, 24. The context of the statement at issue makes it clear that the prosecutor was not arguing that the jury was required to convict if they believed the victims, but that evidence beyond the testimony of the victims was not required to meet the burden of proof. That argument is not error.

This section of the argument, which is all in a single paragraph in the transcript, began with a statement of the State's burden of proof beyond a reasonable doubt:

> The State's burden of proof in a criminal case is proof beyond a reasonable doubt. And you have a definition in your instructions of what a reasonable doubt is. It's one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt that would exist in the

mind of a reasonable person after fully, fairly and carefully considering the evidence or lack of evidence.

4/3/12 RP 24. The prosecutor discussed that definition of reasonable doubt. Id. at 24-25. The prosecutor continued:

> When you go back into that jury room and you start deliberating, and finally you get to talk about this case with each other, you do not check your common sense at the door. You take that in there with you and you use it during your deliberations. It doesn't mean that you go back into the jury room and start making up possibilities about things that are not supported by the evidence. When the defense stands up before you and presents his arguments, listen to everything he has to say. And when you do, ask yourself, "Okay, well, is that reasonable? Is that possibly reasonable? Is it supported by any evidence at all?" And if not, that doesn't rise to a reasonable doubt. If, as you sit in that deliberation room, you can say, "I believe [ML]," and you can say, "I believe [KW]," that is enough to end your inquiry. That is enough to convict the defendant. You may be sitting there right now, reluctant to convict the defendant because there hasn't been any evidence that you see on CSI in this case; right? There is no DNA, there is no fingerprints. We had some video, but none of the video actually caught the crimes on tape, unfortunately. But the law doesn't require that. The law, I mean, it would be nice if we strapped cameras on to our children before they left the house every day, just in case they would be attacked by a predator that day, but it doesn't work that way. If you can accept the testimony of a credible witness, that's all that the law says that you need to do in order to convict somebody. In this case, you have got more than enough. You have got the testimony of [ML], her sister, her mother, all of the witnesses that you heard from Deseret. You have got the testimony of [KW], the testimony of her mother, the police officers, plenty of witnesses. All of them played parts in putting together this puzzle that shows that defendant is guilty.

Id. at 25-26.

The challenged remark must not be viewed in isolation, but "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), aff'd on other grounds, Uttecht v. Brown, 551 U.S. 1 (2007). The context of these remarks demonstrates that the prosecutor was arguing that no scientific evidence or recording of the crimes was necessary in order to satisfy the State's burden. The prosecutor was arguing that the testimony of the girls, if believed, was enough to support convictions. That is not incorrect or error.

Before the State's rebuttal closing argument, the trial court expressed concern that this remark could be burden shifting. 4/3/12 RP 39. Even when the court suggested the possibility of an error, Carr did not indicate that he believed that there was any error or request a curative instruction. This makes it apparent that even defense counsel did not believe the remark was misleading or prejudicial given the entire context of the instructions and the State's argument as a whole.

3. THE PROSECUTOR'S ARGUMENT WAS NOT AN IMPROPER APPEAL TO PASSION OR PREJUDICE.

The Court of Appeals concluded that the prosecutor erred when she concluded her rebuttal argument with the statement "He is the guy that parents warn their kids about. Find him guilty." State v. Carr, slip op. at 19-20. There was no objection to that argument in the trial court, however, and the Court of Appeals properly concluded that such an error was not incurable, so it was not reversible error. Id. If this Court grants review on this issue, the State cross-petitions for review of the holding of the Court of Appeals that this argument was improper.

The prosecutor's statement may have been inartful, but it made a legitimate point: that the defendant's motive was sexual gratification, that he did not brush by ML in a crowded store aisle and experience a wardrobe malfunction while standing in front of KW, as he claimed at trial.

The evidence at trial established that Carr targeted the two young girls who were the named victims, and had contact with ML for sexual gratification and with KW for the predatory purpose of sexual misconduct. A prosecutor is not prohibited from describing the defendant based on the crimes proven in the current case. The

Supreme Court has held that a defendant charged with child rape is properly referred to as a rapist if the evidence supports that inference. State v. McKenzie, 157 Wn.2d 44, 57-58, 134 P.3d 221 (2006) When sex offenses are the subject of a trial, any discussion of the facts could inflame passion and prejudice. There is no dispute that the victims in this case, who were 8 and 9 years old, were little girls. The evidence established that Carr preyed upon them for purposes of his sexual gratification.

This was rebuttal argument and the prosecutor was responding to the defense theory of the case, which was that there was an innocent explanation for everything that Carr did. 4/3/12RP 40-44. Just before making the challenged remark, the prosecutor described the defense theory as that Carr was "an incredible victim of unfortunate circumstance." 4/3/12RP 44. She continued by saying that Carr "is not the victim here" as the defense would have the jury believe, but "He is the guy that parents warn their kids about." 4/3/12RP 44. This was intended to convey that the defendant was not an innocent victim of circumstance but was sexually motivated, a proper subject of argument. In this context, it was not improperly inflammatory and the decision of the Court of

Appeals may be affirmed on that basis as well as the grounds upon which it did rely.

F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the State seeks cross-review of the issues identified in Section C and E, supra.

DATED this 4TH day of June, 2014.

Respectfully submitted,

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By: _____
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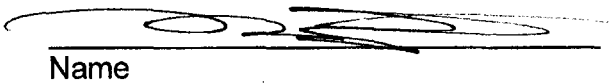
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Answer To Petition For Review And Cross-Petition, in STATE V. PETER JAMES CARR, Cause No. 90268-2, Court of Appeals No. 68815-4-I, in the Supreme Court for the State of Washington.

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



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Good afternoon:

Please accept for filing the attached document (Answer to Petition for Review and Cross-Petition) in

State v. Peter Carr, No. 90268-2

The certificate of service is attached to the document.

Thank you.

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