No. 46359-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JOE SEVERSON,

Appellant.

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

APPELLANT'S REPLY BRIEF

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I. ARGUMENT IN REPLY

The State gets it right when it writes in its Response that "In this case, as in all trials, there were some errors." BOR at 51. But, the State takes an inconsistent approach to looking at the record. On the one hand, the State faults defense counsel for waiving issue after issue. On the other hand, the State credits him with allegedly "strategic" or "tactical" decision-making. Both of these things cannot be true. Neither are claims such as "The prosecutor did not violate the trial court's ruling [barring the use of the term grooming]," where the prosecutor plainly asked a witness "[D]id you express any concern over grooming?" and went on to make this a central theme in closing. BOR at 36; RP 458.

The errors below were plentiful and real. Many were prejudicial standing-alone, and they were certainly prejudicial when looked at together. Severson did not get a fair trial. The convictions should be reversed. This reply brief answers a few things raised by the State's response. Undersigned counsel looks forward to discussing the case with the Court at oral argument.

A. The competency issue should be resolved in this appeal, and resolved in Severson's favor.

The State leans on defense counsel's belief that K.C.-J. was competent in an attempt to shield the substantive question from appellate

review. BOR at 9. This Court should reach this important issue despite the fact that defense counsel made such an unfounded concession.

The State misunderstands the relevance of Jenkins v. Snohomish Cnty. Pub. Util. Dist. No. 1, 105 Wn.2d 99, 102-03, 713 P.2d 79 (1986). Jenkins cannot be dismissed as inapplicable because K.C.-J. "testified before the trial court." BOR at 11. Like in Jenkins – where the appellate court had access to the deposition used by the trial court to assess that child's competence to testify – this Court has access to the video-recording of the pretrial interview. Ex. 1. Because the data about the child's lack of competency is so well-preserved, this Court may review the trial court finding de novo. Jenkins at 102. AOB at 19-22. Moreover, driving the result in Jenkins was a critical fact that applies equally to the case at bar: both children lacked the ability to have a memory sufficient to retain an independent recollection of the subject of the dispute because both adhered to mutually exclusive versions of "truth." AOB 20-22 (discussing K.C.-J.'s statements that she was touched over the clothes and others where she insisted she saw blood); Jenkins at 102-03 (discussing that such a level of contradiction goes to the credibility of the evidence, not admissibility).

Next, the State asks this Court to overlook the wealth of evidence in the record calling into question K.C.-J.'s competency and asks the Court to simply rely on the in-court questioning about truth and lies. AOB

at 23-25; BOR 15-17. (Notably, even that testimony is far from compelling, as K.C.-J. initially said that her mother had not discussed the concept with her and that it was the truth that a Disney character had brought her to court. RP 54-56, 75.) As argued in the opening brief, it is not enough that K.C.-J. agreed with a lawyer's suggestion that there is a difference between truth and lies and that telling lies is "bad." RP 54-55. The inconsistencies in her statements strongly suggested that she never had the mental capacity at the time of the occurrence "to receive an accurate impression of it," and/or lacked "a memory sufficient to retain an independent recollection." State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). See AOB 23-25.

B. A proper application of the child hearsay rule calls for exclusion of K.C.-J.'s out-of-court statements.

Here, the State again leans on defense counsel's ineffectiveness to attempt to shield the substantive question from appellate review. BOR at 19 (relying on defense counsel's indication that he has no specific arguments for why the Ryan[1] factors have not been satisfied). But, as required by RCW 9A.44.120, there is a judicial finding with respect to the admissibility of the child hearsay and the issue should be reviewed. RP 130-32. The evidence regarding the lack of reliability of what K.C.-J. is reported to have said is substantial. AOB at 27. Making no effort to go

[1] State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

through the actual Ryan factor analysis, the State tacitly admits that there are reliability problems. Compare AOB at 27-32 (detailing how like in Ryan, the initial statements were made to one upset parent, in an emotionally charged moment that created for the children a motive to please and lie, with pervasive competency concerns) with BOR at 22 (only emphasizing the legal rule that "not every Ryan factor must be met before a statement is reliable and that the factors must only be 'substantially met').

The State's analysis of witness Michael Thomas' interpretation of K.C.-J.'s statement "Mikey does it," confirms, as argued in the appellant's opening brief, that the utterance is outside the purview of the child hearsay statute altogether. AOB at 33; BOR at 23. The law is clear that only statements describing an actual act of molestation could be admitted. RCW 9A.44.120, RCW 9A.44.010(2). The State correctly notes the statement was "ambiguous" and could only be made relevant and admissible through "interpretation." BOR at 23. But, the State cannot cite to anything in the record to substantiate Thomas' supposition that Severson was masturbating while molesting K.C.-J., and this is why the trial court erred in admitting this hearsay. BOR at 23.

C. The perpetrator profile testimony was improper and prejudicial.

The State again lays fault at defense counsel's feet for allegedly inadequately objecting to the lead detective testifying that Severson is just like the other child molesters unwilling to admit their misdeeds. BOR at 24-25. This one time, however, Severson's lawyer did object and the trial court overruled. RP 664-65. The initial objection is sufficient to bring what was said about Severson shortly later within the purview of appellate review. RP 684 (detective telling the jury that "only one" of the "hundreds and hundreds and hundreds" of child molesters he has investigated confessed to what they had done). AOB 36-38. Furthermore, the State's reliance on State v. Demery, 144 Wn.2d 753, 30 P.3d 753 (2001) and State v. Nataro, 161 Wn. App. 654, 255 P.3d 774 (2011) is not well-taken, as those cases did not involve police making sweeping generalizations about lies told by all suspects under investigation for the charged type of offense.

D. Prosecutorial misconduct prejudiced Severson.

Appellant stands by the assertion that Severson's trial was replete with flagrant and ill-intentioned prosecutorial misconduct that was incurably prejudicial. AOB at 38- 48. It is curious that the State asks this Court to refer to what transpired as "error," but fails to cite, let alone

discuss, the fact that our State Supreme Court calls misconduct, *misconduct,* and does so for good reason.[2]

The assertion that the State did not elicit witness opinions about Severson's credibility because the State only wanted "to explain to the jury how and *why he believed* that defendant's interactions with J.C. and K.C.-J. *went beyond innocent touching*," begs reason. BOR at 32 (emphasis added). What Campbell and Thomas thought or believed had no place in the courtroom. A pretrial ruling barred witnesses from opining that the complainants had been sexually abused. CP 16, RP 29. The prosecutor violated this ruling – after promising to abide by it – which is why the misconduct was flagrant and ill-intentioned. AOB 39-42 (discussing prosecutor's approach of getting Thomas and Campbell to agree they believed Severson had harmed the girls, including asking Thomas "it didn't make them happy to talk about being abused?" RP 481).

The State now shifts blame to defense counsel, arguing that the "defendant did not object to any of these questions as posed by the State," but it was the prosecutor who was eliciting this improper opinion testimony in violation of a pretrial ruling. BOR 33. And, these defense

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[2] State's response fails to cite – let alone acknowledge the authority of – two recent seminal prosecutorial misconduct cases. In re Personal Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012) (reversing because Pierce County prosecutor committed "misconduct [which] was flagrant, ill intentioned"); State v. Walker, 182 Wn.2d 463, 341 P.3d 976, 985 (2015) (reversing murder, and other convictions, also because Pierce County prosecutor engaged in "egregious" misconduct).

counsel failures to enforce a successful pretrial motion in limine do not demonstrate the absence of prosecutorial misconduct, but rather, the presence of both misconduct and ineffective assistance of counsel. Again, it begs reason that defense counsel's failure to object "likely meant that defense counsel did not believe they were improper questions or answers." BOR 33. The motion had been made and granted. CP 16, RP 29. The reasonable inference is that defense counsel was asleep at the proverbial wheel.

The failure to object to the prosecutor violating the pretrial motion in limine to preclude opinion testimony specifically regarding "grooming" confirms this sad reality. CP 16, 24. The State's response acknowledges that the trial prosecutor "asked Mike Thomas whether he had any concern over grooming." BOR at 35, RP 458. Inexplicably, the State writes: "*The prosecutor did not violate the trial court's ruling* and limited the amount of times "grooming" was used." BOR at 36 (emphasis added).

The trial ruling excluding this term could not have been any clearer. RP 27-28 ("grooming is the buzz word… it is an inflammatory word and it could lead the jury to prejudice"). The prosecutor is on the record promising: "I don't intend to elicit opinion testimony from either Mr. Campbell or Mr. Thomas *do you believe he was grooming the girls*." RP 24. The prosecutor then asked: "[D]id you express any concern over grooming?" RP 458. This question came right after reassuring the trial

court that the pretrial ruling would be honored. RP 448. This was objectionable misconduct.

The fact that on appeal, with the record as plain as it is, the State has put the words "[t]he prosecutor did not violate the trial court's ruling," to paper is alarming. BOR at 36. Engaging in conduct one was "clearly warned against" is the very definition of "flagrant and ill intentioned." Glasmann, 175 Wn.2d at 707. It is duplicitous for the State to go on and attempt to suggest that the misconduct be excused because the prosecutor "limited the amount of times" the ruling was violated. BOR at 36. The Court should unflinchingly reject the suggestion that the State gets to decide how often to violate a judicial ruling. It is as if the State is trying to live by Mae West's suggestion that "*It ain't no sin if you crack a few laws now and then, just so long as you don't break any*," except that the trial prosecutor did break a clear-cut judicial order, not to mention own promises, when questioning Thomas, and then many times over in closing argument. AOB at 43-46 (discussing how the witness opinion testimony – especially over "grooming" featured in the State's closing argument).

The notion that the inflammatory value of the term can be compared to the word "surveillance" excluded in State v. Edvalds, 157 Wn. App. 517, 237 P.3d 368 (2010), flies in the face of common-sense thinking and the trial court's conclusion that the term was "inflammatory… like gang affiliation." RP 28. With respect to the State's

response that a vague suggestion that the jury had not "heard everything the defendant did" must not have been that prejudicial is similarly unrealistic. RP 699, BOR at 38. State v. Boehning, 127 Wn. App. 511, 519–23, 111 P.3d 899 (2005), squarely held that referring to uncharged crimes during closing argument is improper. The fact that the jury did not hear details only heightens the attendant prejudice.[3]

The State again posits that the misconduct during closing argument went un-objected "probably because [Severson's counsel thought] they were proper." BOR 37. It is remarkable that the State flip-flops in its characterizations of defense counsel. Bent on defending a flawed conviction, some failures to object render whole issues unreviewable while others are evidence that defense counsel thoughtfully came to the realization that the couple of pretrial motions he managed to win for his client were not victories worth preserving.

The State's suggestion that there was no cumulative effect from the repeated misconduct (and other errors) misstates the overall weakness of the prosecution's case against Severson. The existence of two accusers does not change the fact that there was no corroboration, be it by some eyewitness or physical evidence. Severson's indication that it was "possible" that he touched one of the girls on accident is less meaningful

[3] "The oldest and strongest emotion of mankind is fear, and the oldest and strongest kind of fear is fear of the unknown" H.P. Lovecraft.

than his steadfast denial of having done anything wrong. See also AOB at 46-49.

E. Severson was deprived of his constitutional right to effective assistance of counsel.

The appellant's opening brief sets out, in detail, why Severson's counsel was deficient and how these deficiencies prejudiced Severson. AOB 49-65. Without repeating all those arguments in length, some of the State's response merits a reply. While it may be true that the law presumes counsel is effective, at a certain point, it becomes clear that this is a case where the "plethora and gravity" of these defense counsel's deficiencies "rendered the proceeding fundamentally unfair." Harris v. Wood, 64 F.3d 1432, 1438-39 (9th Cir. 1995). Defense counsel's failures here, were neither tactical nor strategic. Defense counsel's message on the record letting the Court of Appeals know he is "considering these issues and doing my job," while failing to launch a valid challenge to the admissibility of damning child hearsay, cannot be viewed as evidence that he "clearly thought about the issue." BOR at 44; RP 127-28. Undersigned counsel submits that those words likely demonstrate defense counsel's realization that he was unprepared or underprepared. Defense counsel filed one page of motions, on the day of trial, and the filing contained no response to the State's motion regarding child hearsay and does not address competency. CP 16. Defense counsel asked no questions of the

complainant, K.C.-J. at the child hearsay hearing. RP 71. Accord State v. Jones, 183 Wn. 2d 327, 340, 352 P.3d 776 (2015) ("courts will not defer to trial counsel's uninformed or unreasonable failure to interview a witness") (holding that not calling a witness could not have been a strategic decision if counsel failed to first interview the witness).

Impeaching a witness under ER 609 is the bread and butter of criminal defense trial work. Here, defense counsel failed to impeach Shanna Carter with admissible priors. RP 19; AOB at 61-62. As the State acknowledges, defense counsel intended to challenge her credibility as a witness. RP 730; BOR 48. The failure to use a simple evidentiary rule to advocate for Severson cannot be overlooked as "a tactical decision… he determined that he had enough to impeach." BOR at 48. To the contrary, this particular defense counsel failure serves as an indicator that the multitude of other failures were not strategic at all.

The State writes, with respect to the unobjected-to physical assault detailed in K.C.-J.'s taped interview, that "defense counsel likely thought it was inconsequential." BOR at 45. Such a prior bad act – routinely subject to exclusion under ER 404(b) because of its high prejudicial value – cannot be so easily dismissed. The State's suggestion that defense counsel "thought… it helped show how K.C.-J. was a young child prone to exaggeration of events" does not square with defense counsel's failure to argue that K.C.-J. was not competent. BOR at 45. And, in closing,

defense counsel never made tactical use of this reference from K.C.-J.'s interview to argue she was unreliable as a witness. The simpler – and far more reasonable – inference is that this was deficient lawyering.

Likewise, asking the lead detective to tell the jury that he thinks Severson "did this" is not a justifiable "tactical decision," it is plainly deficient performance, for is it not every defense counsel's primary obligation to preserve the presumption of innocence? BOR at 47; RP 681-82.

Here, the defense was never that the police rushed to judgment or that there was some other potential suspect they overlooked. Defense counsel pointed this out pretrial: "Our position is nobody did it; they're making this up." RP 20-21. Like in State v. Saunders, 91 Wn. App. 575, 580, 958 P.2d 364 (1998), what counsel did was deficient, prejudicial, and warrants reversal. The failure to object to prosecutorial misconduct during closing was likewise deficient, prejudicial. State v. Horton, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003).

The State goes on to defend defense counsel, noting he "made motions in limine, made objections during trial, and otherwise acted appropriately." BOR at 49. This record does not square with these claims and they contradict the other instances in the State's response arguing that defense counsel's failures to object or enforce trial court rulings render issues unreviewable. See BOR at 9, 19, 24-25, 33. This Court should

decline the State's unreasonable invitation that a failure to object to the presentation of an alleged physical assault (where the jury heard an accusation K.C.-J.'s brain hurt) and the failure to keep out inadmissible hearsay attributed to J.C. (that shored-up what her much younger sister said) "were all minor decisions in the scheme of this trial." BOR at 50. The lawyerly deficiencies present in this record warrant reversal, not just standing alone, but certainly in combination with each other. Harris v. Wood, 64 F.3d 1432, 1438–39 (9th Cir.1995).

II. CONCLUSION.

Severson did not get a fair trial. The convictions must be reversed.

DATED this 16th day of October, 2015.

Respectfully submitted,

/s/ Mick Woynarowski

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DIVISION TWO

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	)	
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	)	NO. 46359-8-II
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	)	
MICHAEL SEVERSON,	)	
	)	
Appellant.	)	

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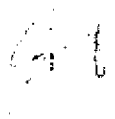

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