NO. 46511-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRYCE SMILEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Philip K. Sorenson

No. 13-1-01284-9

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Has defendant failed to show Detective Helmcke's statements were improper opinion testimony constituting a manifest constitutional error as they were recounting the pretrial interview of defendant and made to investigate and challenge defendant's explanation for A.B.'s motivation in making the allegations? 1

2. Has defendant failed to prove any evidence of prosecutorial misconduct when the prosecutor's comments were in direct response to and anticipation of defense counsel's arguments, and discussed the evidence that was presented and how the law instructs the jury to evaluate that evidence? 1

B. STATEMENT OF THE CASE. 1

1. Procedure 1

2. Facts 2

C. ARGUMENT 7

1. DEFENDANT HAS FAILED TO SHOW DETECTIVE HELMCKE'S STATEMENTS WERE IMPROPER OPINION TESTIMONY CONSTITUTING A MANIFEST CONSTITUTIONAL ERROR AS THEY WERE RECOUNTING THE PRETRIAL INTERVIEW OF DEFENDANT AND MADE TO INVESTIGATE AND CHALLENGE DEFENDANT'S EXPLANATION FOR A.B.'S MOTIVATION IN MAKING THE ALLEGATIONS 7

2. DEFENDANT HAS FAILED TO SHOW ANY EVIDENCE OF PROSECUTORIAL MISCONDUCT AS THE PROSECUTOR'S COMMENTS WERE IN DIRECT RESPONSE AND ANTICIPATION OF DEFENSE COUNSEL'S ARGUMENTS AND DISCUSSED THE EVIDENCE THAT WAS PRESENTED AND HOW THE LAW INSTRUCTS THE JURY TO EVALUATE THAT EVIDENCE 15

D. CONCLUSION. 26

Table of Authorities

State Cases

City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993) 7, 8

Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960) 25

State v. Bautista-Caldera, 56 Wn. App. 186, 783 P.2d 116 (1989), *review denied*, 114 Wn.2d 1011 (1990) 19

State v. Binkin, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), (*overruled on other grounds* by ***State v. Kilgore***, 147 Wn.2d 288, 53 P.3d 974 (2002)) 17

State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) 8

State v. Demery, 144 Wn.2d 753, 759-760,

30 P.3d 1278 (2001) 8, 11, 12, 13, 15

State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967) 16

State v. Elmore, 154 Wn. App. 885, 897-98, 228 P.3d 760 (2010) 11

State v. Gentry, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995) 17

State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990) 16

State v. Gregory, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006) 16

State v. Jones, 71 Wn. App. 798, 808, P.2d 85 (1993) 17

State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) 11

State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) 15

State v. Monday, 171 Wn.2d 667, 679, 257 P.3d 551 (2011) 17

State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008) 11

State v. Notaro, 161 Wn. App. 654, 255 P.3d 774 (2011) 11, 12, 13, 14, 15

State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013 (1992) 19, 20

State v. Russell, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) 16, 17

State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) 16, 17

State v. Swan, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990) 17

State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied*, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009) 17

State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952) 15

Federal and Other Jurisdictions

Dubria v. Smith, 224 F.3d 995, 1001-02 (9th Cir.2000), *cert. denied*, 531 U.S. 1148, 121 S. Ct. 1089, 148 L.Ed.2d 963 (2001) 13

Rules and Regulations

ER 103 8

RAP 2.5(a)(3) 10

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show Detective Helmcke's statements were improper opinion testimony constituting a manifest constitutional error as they were recounting the pretrial interview of defendant and made to investigate and challenge defendant's explanation for A.B.'s motivation in making the allegations?

2. Has defendant failed to prove any evidence of prosecutorial misconduct when the prosecutor's comments were in direct response to and anticipation of defense counsel's arguments, and discussed the evidence that was presented and how the law instructs the jury to evaluate that evidence?

B. STATEMENT OF THE CASE.

1. Procedure

On March 28, 2013, the Pierce County Prosecutor's Office charged BRYCE EARL SMILEY, hereinafter "defendant," with one count of rape of a child in the first degree, two counts of child molestation in the first degree, two counts of rape of a child in the second degree and two counts

of rape of a child in the third degree. CP 1-4[1]. The case proceeded to trial before the Honorable Phillip Sorenson. 1RP[2] 4. The jury found defendant guilty of all counts except rape of a child in the first degree. 6RP 2-3. The court sentenced defendant to the mid range of the standard sentence range. 7RP 500-502; CP 112-127.

2. Facts

A.B. was born on August 15, 1997. 1RP 49. Her parents got divorced when she was little and when A.B. was in third grade, A.B.'s mother, Jennifer Smiley, got remarried to Jeff Smiley. 1RP 50-53; 2RP 175. A.B. spent the weekends at the home of her father, Greg Becker. 1RP 57. During the weekdays, A.B. lived in Tacoma with her mother, Mr. Smiley and his three kids, including the defendant, Bryce Smiley. 1RP 50-53; 2RP 175. The defendant was born on October 21, 1990 and is seven years older than A.B. 1RP 49, 54; 2RP 175; 4RP 48; 5RP 355, 366.

When she was in fourth or fifth grade, and defendant was in tenth or eleventh grade, the defendant started to touch A.B. inappropriately. 1RP 60-62. The abuse occurred weekly when they would get out of school and

---

[1] An amended information and second amended information were later filed which removed the domestic violence related designations and corrected some of the incident dates. CP 26-29; CP 30-33.

[2] The verbatim report of proceedings is contained in multiple volumes, some of which are paginated consecutively and which will be referred to as follows: 1RP – 5/5/14, 5/6/14, 5/7/14; 2RP – 5/8/14; 3RP – 5/12/14 (am); 4RP 5/12/14 (pm); 5RP – 5/13/14, 5/14/14. (am), 7/18/1; 6RP – 5/14/14 (pm) (this is the same as in defendant's opening brief for purposes of clarity).

were home alone before their parents returned from work. 1RP 62-63. Defendant would take off A.B.'s pants and touch her vagina. 1RP 61-62. Defendant told A.B. not to tell anyone what was going on and sometimes he would bribe her with candy or money in exchange for sexual activity. 1RP 69, 101-02.

Defendant started to penetrate A.B.'s vagina with his fingers when she was 11 years old in sixth grade. 1RP 67, 108. Defendant then started performing oral sex on her when she was 12 years old in sixth or seventh grade and defendant was a senior in highschool. 1RP 64-67, 73-74, 76; 2RP 129. Defendant would also make her perform oral sex on him, but occasionally she would refuse because she did not like the taste or feeling. 1RP 64-67, 73-74, 76, 83-85. Sometimes he ejaculated in her mouth, but it made her gag so sometimes he would ejaculate on her stomach. 1RP 85.

There were times when the abuse occurred at night or when her parents were home. 1RP 77-78. She described one incident when she was 13 and defendant came into her bedroom, woke her up, pulled her pajama pants down to her ankles, performed oral sex on her and then returned to the bedroom next door. 1RP 78-82. A couple of times when A.B. was in seventh or eighth grade, defendant tried to penetrate her vagina with his penis, but she would say it hurt and he would stop. 1RP 87-88.

Defendant moved out of the Smiley house in January of 2011 when he joined the military. 2RP 177. He was stationed at Fort Lewis in June of 2011 and although he lived on base, he would occasionally come home. 2RP 177-178. During winter break of her ninth grade year in 2011 when A.B. was 14 years old, defendant spent one night at the Smiley home. 1RP 89-91. They were alone in the spare bedroom and defendant was rubbing up against her vagina when he penetrated her with his penis. 1RP 89-92. A.B. pushed the defendant off and locked herself in her bathroom down the hall. 1RP 90-93. After the incident, A.B. was scared she was pregnant and texted defendant to let him know. 1RP 97-98. Defendant put a pill under A.B.'s pillow, but she got her period shortly after and never took it. 1RP 98-99.

The last time defendant performed oral sex on A.B. happened just before summertime in 2012. 1RP 99-103. When the abuse first occurred, A.B. would tell defendant to stop, but eventually accepted it was going to continue happening and felt like the abuse was her fault because she let it happen. 1RP 69-71. She said she was scared to tell anyone because she thought she would get in trouble and worried the abuse would happen more frequently or the defendant would become aggressive. 1RP 70-71.

A.B. eventually told a friend in eighth grade, and although the friend wanted to tell someone what was happening, A.B. told her not to.

1RP 103-104; 3RP 284-288. When she was in tenth grade, in the fall of 2012, A.B. told a few of her close friends and also asked them not to tell anyone. 1RP 105-106; 2RP 221-225; 3RP 266-267, 275-277. Then, on December 8, 2012, after the defendant had deployed to Afghanistan, A.B. told her boyfriend Tyler. 1RP 107; 2RP 194-195. Tyler called A.B.'s father, Gregory Becker, and told him what A.B. had said. 1RP 106; 2RP 215-216; 4RP 13-14. Mr. Becker asked A.B. about it who started crying and told him the defendant had been touching her and doing other things since fourth or fifth grade. 4RP 15, 18.

Mr. Becker called the police and A.B.'s mother, Jennifer Smiley, who is also the defendant's stepmother. RP 16. Jennifer and her husband, Jeff Smiley, the defendant's father, drove to the Becker's home. 2RP 188-189; 4RP 16; 5RP 349. On the way to the Becker's home, Jeff and Jennifer called the defendant who said that one time A.B. had texted him about possibly being pregnant, but that he did not do anything about it. 2RP 195.

Police arrived at the Becker's home and spoke with the four parents while A.B. was in another room. 3RP 297-303. A.B. was not interviewed that day. 3RP 303. On December 12, 2012, Jennifer took A.B. to see physician's assistant Laura Crabill who performed a gynecological examination. 1RP 106-107; 2RP 194, 229, 236. A.B. told

Ms. Crabill she had been forced into genital touching and oral intercourse since she was ten, and that her stepbrother had tried "mating" her in July of 2012. 2RP 237, 246-247. Ms. Crabill was unable to corroborate whether any sexual activity had occurred as the last reported incident was six months before. 2RP 238-244.

On January 11, 2013, detectives from the Pierce County Sheriff's Department sexual assault unit interviewed A.B. 4RP 32-33. She told detectives that when she was in fourth or fifth grade and about age ten or eleven, the defendant started touching her, described the progression of the sexual assault to oral sex and discussed the December 2011 incident of penile vaginal intercourse. 4RP 34-36. Detectives also spoke with the defendant who denied all of A.B.'s allegations and stated they got along well. 4RP 39-40.

One of the detectives and a child interviewer from the Pierce County Prosecutor's Office both testified during the trial that it is quite common for young children who suffer sexual abuse to delay in reporting until their teen or adult years. 4RP 28-29; 5RP 325-333. During her testimony, A.B. admitted that she had difficulty recalling the specific dates when some of the incidents occurred, specifically the incident involving sexual intercourse over winter break. 2RP 138-146, 163-165. Jeff Smiley

testified that the defendant did not spend the night at their residence during winter break in 2011. 5RP 352-354.

Defendant chose to testify during the trial and denied all of the allegations made by A.B. 5RP 378-387. He stated the first time he learned of them was in February when he was brought back from Afghanistan. 5RP 378-385. Defendant testified he never stayed the night at the Smileys' home over winter break in 2011. 5RP 378-385. A.B. and defendant have never been married or in a state registered domestic partnership. 1RP 108; 4RP 19; 5RP 387.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW DETECTIVE HELMCKE'S STATEMENTS WERE IMPROPER OPINION TESTIMONY CONSTITUTING A MANIFEST CONSTITUTIONAL ERROR AS THEY WERE RECOUNTING THE PRETRIAL INTERVIEW OF DEFENDANT AND MADE TO INVESTIGATE AND CHALLENGE DEFENDANT'S EXPLANATION FOR A.B.'S MOTIVATION IN MAKING THE ALLEGATIONS.

Generally, no witness may offer testimony in the form of a direct statement, an inference, or an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it invades the exclusive province of the jury." ***City of Seattle v. Heatley***, 70 Wn. App. 573, 577, 854 P.2d 658 (1993); ***State v. Black***, 109 Wn.2d

336, 348, 745 P.2d 12 (1987). "Opinion testimony" means evidence that is given at trial while the witness is under oath and is based on one's belief or idea rather than on direct knowledge of facts at issue. ***State v. Demery***, 144 Wn.2d 753, 759-760, 30 P.3d 1278 (2001).

Washington courts have "expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt." ***Demery***, 144 Wn.2d at 760 (*quoting* ***Heatley***, 70 Wn. App. at 579). In determining whether a challenged statement constitutes impermissible opinion testimony, the court should consider the circumstances of the case, including the following factors: the type of witness involved; the specific nature of the testimony; the nature of the charges; the type of defense; and, the other evidence before the trier of fact. ***Demery***, 144 Wn.2d at 758-59. "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury and is based on inferences from the evidence is not improper opinion testimony." ***Heatley***, 70 Wn. App. at 578. The Supreme Court has required compliance with ER 103 before considering claims of improper admission of opinion testimony. ***State v. Black***, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

In the present case, defendant argues that improper opinion testimony was elicited when Detective Helmcke testified that during his

suspect interview with defendant, defendant's explanation about A.B.'s motivation for making the allegations did not make sense. Detective Helmcke was describing the conversation he had with defendant that is part of the standard procedure in investigating these types of incidents and the following exchange took place:

> PROSECUTOR: Okay. And why would you ask [defendant] if [he and A.B.] got along or if there's any issues between them?
>
> HEMCKE: Just to make sure that, you know, there isn't something because we – you know, in a case like this, we don't have any physical evidence and, you know, in this line of work it comes down to he-said/she-said a lot of the times. And, you know, there have been times when people have lied and tried to, you know, get people in trouble for doing things. And so, you know, with this case there's no physical evidence; we have the victim saying one thing and, you know, well, if she's lying, what's her motivation?
>
> So I'm going to ask the suspect, you know, did you guys get along? Was there something between you? Because if there was something then, you know – I mean, it would help him out if there was some type of problem between them and, you know, maybe she was making it all up. But he said there was nothing.
>
> PROSECUTOR: Did you specifically ask [defendant] if he knew of any reason why [A.B.] would make it up?
>
> HEMCKE: Yes.
>
> PROSECUTOR: And what did he say?

HEMCKE:	He didn't have any reason other than he thought she might have been jealous that he was getting attention because he was going to be deploying to Afghanistan.
PROSECUTOR:	Okay. Did you confront him with the possibility about whether or not it made sense?
HEMCKE:	Yes.
PROSECUTOR:	Okay. How so?
HEMCKE:	Just that, you know, when I talked to the friends, the friends had said that, yeah, she did tell them that these things had happened or something had happened. And this happened – you know, she told a friend a couple of years ago, so really did she set this master plan in place where she told friends, you know, seeing into the future that he's going to get deployed and she's going to be jealous so I better start, you know, a year or so ahead and start telling my friends about this so that when he gets deployed I can keep the story going and make it look real. So it just didn't make sense to me.
PROSECUTOR:	Did he ever – did he have a response to that to help it make sense?
HEMCKE:	No.

4RP 40-42. Defendant did not object to any of Detective Helmcke's testimony on this subject.

When raised for the first time on appeal, a claim of improper opinion testimony will only be considered if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); ***State v. Kirkman***, 159 Wn.2d 918,

927, 155 P.3d 125 (2007). "Manifest error" requires a showing of actual and identifiable prejudice to the defendant's constitutional rights at trial. ***Kirkman***, 159 Wn.2d at 926-27. In regards to improper opinion testimony, a defendant can show manifest constitutional error only if the record contains "an explicit or almost explicit witness statement on an ultimate issue of fact." ***State v. Elmore***, 154 Wn. App. 885, 897-98, 228 P.3d 760 (2010)(*quoting* ***Kirkman***, 159 Wn.2d at 938). Courts construe the exception narrowly because the decision not to object to such testimony may be tactical. ***Kirkman***, 159 Wn.2d at 934-35. Also important in a court's determination whether opinion testimony prejudiced a defendant is whether the trial court properly instructed jurors that they alone were to decide credibility issues. ***Elmore***, 154 Wn. App. at 898 (*citing* ***State v. Montgomery***, 163 Wn.2d 577, 595, 183 P.3d 267 (2008)).

In the present case, because defendant did not object to the testimony at trial, he must demonstrate a manifest constitutional error. Defendant is unable to show Detective Helmcke's statements were improper opinion testimony that constitutes a manifest constitutional error. Detective Helmcke's statements were made during a pretrial interview with the defendant as part of a tactical interrogation strategy as in ***State v. Demery***, *supra*, and ***State v. Notaro***, 161 Wn. App. 654, 255 P.3d 774 (2011).

In ***Demery***, the court admitted, over objection, a taped interview of Demery's interrogation without redacting statements made by officers which suggested that Demery was lying during the interview. ***Demery***, 144 Wn.2d at 757. The court held that the officer's statements were solely designed to see whether Demery would change his story during the interview, and thus not opinion testimony. ***Demery***, 144 Wn.2d at 761. The court went further to say that "unlike those statements offered by a witness during trial to impeach the defendant's credibility, the officer's statements in this case were admitted solely to provide context for the responses offered by the defendant." ***Demery***, 144 Wn.2d at 761.

Similarly, in ***Notaro***, the court held that an officer's testimony describing the pretrial interrogation of Notaro, including statements that the officer did not believe Notaro, were not expressions of personal opinion. ***Notaro***, 161 Wn. App. at 668-670. Rather, the court discussed how the statements were describing the police interrogation strategy and to explain why Notaro changed some parts of his story, but not others, halfway through the interview. *Id.* at 669. For instance, the court stated that the officer's statement that he did not believe Notaro's story that his mother moved the victim's body, was "functionally equivalent to "Notaro, your story does not make any sense. How could your mother be strong enough to put a full grown man into a freezer by herself if he was so big

that you had a difficult time pulling him out and taking him upstairs to buy,' or 'your story is inconsistent with the evidence that shows ..., can you explain this contradiction.'" *Id.* at 670.

In both cases, the Washington Supreme Court and Division II of the Court of Appeals, agreed with the Ninth Circuit's analysis in ***Dubria v. Smith***[3] that "an officer's trial testimony about statements made during a pretrial interview are not the types of statements that carry a special aura of reliability, and concluded that such statements are interrogation tactics and not opinion testimony." ***Notaro***, 161 Wn. App. at 668 (*citing* ***Demery***, 144 Wn.2d at 763-765).

Likewise, Detective Helmcke's statements in the present case were part of a pretrial interview with defendant wherein he questioned defendant's explanation for A.B.'s motivation in making the allegations. During the interview, when Detective Helmcke asked defendant about his relationship with A.B. and whether she may have any motivation to make false allegations about defendant, defendant's only explanation was that A.B. may be jealous that defendant was deploying to Afghanistan. Detective Helmcke's told defendant that explanation did not make sense in light of the fact that A.B. had told friends about the abuse years before defendant deployed. It was equivalent to saying "your story is

---

[3] 224 F.3d 995, 1001-02 (9th Cir.2000), *cert. denied,* 531 U.S. 1148, 121 S. Ct. 1089, 148 L.Ed.2d 963 (2001).

inconsistent with the evidence that shows ..., can you explain this contradiction" just like in ***Notaro***. ***Notaro***, 161 Wn. App. at 670. Such statements are not expressions of personal opinion. They are trial testimony that recounts the statements made during a pretrial interview designed to investigate and challenge defendant's initial explanation for A.B.'s allegations and elicit a response from defendant which could either be refuted or corroborated by other evidence.

Furthermore, the testimony during trial made it clear to the jury that Detective Helmcke's statements were made during the pretrial interview of defendant, not a comment on defendant's credibility in general. *See* 4RP 39-42. Detective Helmcke also testified how his initial reason for questioning defendant about A.B.'s motivation for making such allegations was to assist defendant in providing some form of explanation for the allegations. Detective Helmcke stated:

> So I'm going to ask the suspect, you know, did you guys get along? Was there something between you? Because if there was something then, you know – I mean, it would help him out if there was some type of problem between them and, you know, maybe she was making it all up. But he said there was nothing.

4RP 40-41. This placed Detective Helmcke's statements in context as being part of the investigation he conducted, not personal expressions of defendant's credibility. The jury was also instructed, both orally by the

Judge and in the written packet of instructions, that they are the sole judges of credibility. CP 79-104 (Instruction No. 1); 5RP 413.

Detective Helmcke's statements were not expressions of personal opinion. They were trial testimony which recounted statements made during the pretrial interview with the defendant. Those statements were made to investigate and challenge defendant's initial explanation for A.B.'s motivation in making the allegations. Like in ***Notaro*** and ***Demery***, such statements which are part of pretrial interrogation techniques, are not expressions of personal opinion. Defendant is unable to show a manifest constitutional error as Detective Helmcke's statements were not improper opinion testimony.

2. DEFENDANT HAS FAILED TO SHOW ANY EVIDENCE OF PROSECUTORIAL MISCONDUCT AS THE PROSECUTOR'S COMMENTS WERE IN DIRECT RESPONSE AND ANTICIPATION OF DEFENSE COUNSEL'S ARGUMENTS AND DISCUSSED THE EVIDENCE THAT WAS PRESENTED AND HOW THE LAW INSTRUCTS THE JURY TO EVALUATE THAT EVIDENCE.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. ***State v. Manthie***, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (*citing* ***State v. Weekly***, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged

misconduct is both improper and prejudicial. ***State v. Stenson***, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. ***State v. Russell***, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994), (*citing* ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." ***Russell***, 125 Wn.2d at 86, (*citing* ***State v. Dennison***, 72 Wn.2d 842, 849, 435 P.2d 526 (1967)).

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. ***State v. Gregory***, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). An error only arises if the prosecutor clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence.

State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied*, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). A prosecutor may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. ***State v. Jones***, 71 Wn. App. 798, 808, P.2d 85 (1993). A prosecutor is allowed to argue that the evidence does not support a defense theory. ***Russell***, 125 Wn.2d at 87. The prosecutor is entitled to make a fair response to the arguments of defense counsel. ***Russell***, 125 Wn.2d at 87.

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. ***State v. Binkin***, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), (*overruled on other grounds* by ***State v. Kilgore***, 147 Wn.2d 288, 53 P.3d 974 (2002)). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." ***Stenson***, 132 Wn.2d at 719, (*citing* ***State v. Gentry***, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)). Failure to object or move for mistrial at the time of the argument "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." ***State v. Swan***, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990); *see also* ***State v. Monday***, 171 Wn.2d 667, 679, 257 P.3d 551 (2011).

In the present case, defendant alleges the prosecutor committed misconduct when she discussed how the law does not require physical evidence to prove a crime was committed and specifically, in cases of sexual abuse, the testimony of the victim, if believed by the jury, is enough. She described:

> So, back to the question of did these acts occur? What's your evidence? Well, as you may have guessed way back during jury selection, and now that you have heard the evidence, it's [A.B.]. Your evidence is [A.B.] and her testimony. There is no DNA to analyze. There's no videotape for you to watch. There's no fiber analysis, there's no blood spatter analysis, none of that exciting, interesting stuff. There are no eyewitnesses, and this is not surprising, is it? Because sex crimes committed against children, crimes of privacy and secrecy. They don't occur out in the open. They don't occur in front of other people. So your evidence is [A.B.] telling you what happened to her, and that, ladies and gentlemen, is enough.
>
> That is enough for proof beyond a reasonable doubt. Nothing more is required. You will not find anywhere in these instructions – and these instructions are the law that apply in this case – you will not find here that you have to find something else in addition to [A.B.]'s testimony. There's nothing that says there needs to be corroborating evidence of any kind, some kind of physical evidence, some kind of eyewitness, that is not required. The law does not require it.
>
> Can you imagine a system where it was required? ... Like when [A.B] told [the first friend she told], nothing happened for years later, so there isn't going to be any physical evidence left, if there was any to begin with.

> If you have molestation, which is touching, and that is a crime, just touching is a crime, you wouldn't have any anyway, the touching of a breast, the touching of a vagina with no penetration is not going to leave anything, and yet it is a crime.
> ... It doesn't matter that [physical evidence] does not exist in this case, just like in many other cases.
>
> If the system did work that way, **kids would have to be told, we're sorry, we can't prosecute your case, we can't hold your abuser responsible because all we have is your word, and that's not enough.** No one's going to believe a kid or a teen, and we need something else. We don't do that. That's not how the system works.
>
> **If the law required additional evidence, we couldn't prosecute so many of these cases, the majority of these cases. We couldn't hold the majority of sexual abusers responsible. We couldn't hold [A.B.]'s abuser responsible. So the law doesn't require it.** All you need is someone telling you it happened, and if you believe that person, if you believe [A.B], that's enough, you are satisfied beyond a reasonable doubt of the defendant's guilt.

5RP 423-426 (emphasis added)[4].

Defendant argues that this case is similar to several other cases where courts have found prosecutorial misconduct occurred when the prosecutor emotionally appealed to the jury by telling them to send a message to society about the general problem of child sexual abuse. *See* ***State v. Powell***, 62 Wn. App. 914, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013 (1992); *See also* ***State v. Bautista-Caldera***, 56 Wn. App. 186, 783 P.2d 116 (1989), *review denied*, 114 Wn.2d 1011 (1990).

---

[4] Bold indicates the portions quoted in appellant's brief.

Specifically, defendant argues that this case is similar to ***Powell*** where the court found the prosecutor committed misconduct in her closing argument by effectively telling the jury that "a not guilty verdict would send a message that children who reported sexual abuse would not be believed, thereby 'declaring open season on children.' " ***Powell***, 62 Wn. App. at 918. In that case, the prosecutor stated:

> But, ladies and gentlemen, what happens when we refuse to believe the children when we tell them, yes, if something happens you're supposed to tell? And then when they do, in fact, tell something has happened to them, what do we do? We don't believe them. We refuse to believe them. What does that tell the kids? What does that tell the children? It tells them it's fine. Yeah. You can go ahead and tell, but don't expect us to do anything because if it's an adult, we're sure as heck going to believe the adult more than we believe the child. I mean, we know adults don't lie; but, yeah, we know kids lie in things of that sort. Is that what we're going to be telling these kids here? Isn't that what we're telling them with regard to this? Are we opening -- or having -- declaring open season on children to say: Hey, it's all right. You can go ahead and touch kids and everything because--

Powell, 62 Wn. App. at 918, n.4. In ***Powell***, and many of the other cases where the court has found errors, the prosecutor is asking the jury to act and do something to correct a generalized societal problem by rendering their verdict. They focus on the impact of the jury's verdict, urging the jury to convict on the basis that future victims will be spared from child molestation. They are effectively telling the jury not to convict defendant

based on the evidence, but to convict him to send a message to society or out of an emotional appeal.

In contrast, the prosecutor in the present case never told the jury to send a message to society or asked that they render a guilty verdict out of the need to comment on something. Her closing did not focus on evidence that future harm would occur if the jury did not convict. The prosecutor's comments were in anticipation of and response to defense counsel's attack on A.B.'s credibility and argument pointing to the lack of direct, physical or corroborative evidence offered by the State. 5RP 423-436.

Defendant's theory of the case was that A.B. initially made up the allegations in order to get attention from her friends and continued to lie once her parents found out so she would not get in trouble. There was no physical evidence presented in the case and the State's case relied solely on the jury believing the testimony of A.B. In his closing, defense counsel argued:

> And I want to look at the evidence in this case, or possibly the lack of evidence in this case, and I want to go through some of that with you.
>
> What do we have in terms of evidence in this case? We've got [A.B.]'s allegations, and that's it. And I think the prosecutor essentially conceded that, that that's what they have in this case, is [A.B.]'s allegations.
>
> Now, I want to talk a little bit about her allegations, and I would submit to you that [A.B.]'s allegations are vague, they were inconsistent, and I would submit to you that they were simply not credible.

5RP 451. He went on to attack the credibility of A.B.'s story discussing her inconsistent testimony, specifically surrounding dates, and argued that her explanations for the delay in reporting did not make sense. 5RP 451-55. He also stated:

> What don't we have in this case? Well, we don't have anything else. We have nothing. There is nothing supporting or verifying [A.B.]'s statements at all. As the Prosecutor stated, there is no medical evidence, not just that [the defendant] had sex with [A.B.], but there's no evidence that [A.B.] ever had sex. There's no physical evidence, there's no eyewitness evidence, there's no admissions or confessions in this case. There's nothing.

5RP 456. He continued:

> The Prosecutor talked about motive, and I would submit to you that here's what happened. I would submit to you that [A.B.] never intended or wanted these accusations to become public. She never wanted to be in that chair the other day. She made these statements to her best friends, and she wanted those statements to stay with her best friends. She never intended or wanted the police to be involved, and I would submit to you that she never meant to involve her brother [the defendant] either. Probably had nothing negative or hostile against [the defendant]. Never thought [the defendant] would be in this situation.
> I would submit that she made these statements to her friends on days or at times where she needed or wanted some kind of feedback from a friend, some kind of attention or some kind of sympathy, and that's why, when she made these statements, which were very vague, they weren't specific.
>
> ...
>
> That all worked for her until [her boyfriend] hung the phone up and called her father, and once that happened.

> The cat was out of the bag. It was, at that point, out there, and there was very little she could do about it.
> I would submit to you that, at that point in time, it would have been very, very difficult for [A.B.] to admit to her friends, who she has told over the past several years that what she told them about this abuse wasn't the truth, was a lie.
>
> I think, and I would submit to you, that once her statements snowballed into her parents and the police being involved, it became nearly impossible for her to then step back and say, wait a minute, guys, wait a minute, mom, wait a minute, dad, wait a minute, step dad, wait a minute, friends, it didn't happen. It, in fact, was easier to her to go with the flow and just go along with the lie, the invention that she had created.

5RP 459-60. His concluding statement to the jury was "[t]he prosecutor did not prove their case beyond a reasonable doubt. They present absolutely no evidence of sexual contact at all outside of [A.B.]'s inconsistent statements, and I am imploring you to return a verdict of not guilty for [the defendant]..." 5RP 465.

Almost all of defense counsel's closing focused on the lack of physical evidence in the case and A.B.'s lack of credibility. That was the defendant's defense. The comments defendant argues were improper during closing and rebuttal were in anticipation of and direct response to that argument by defense counsel. The prosecutor told the jury their role is to follow the court's instructions on the law and base their decision on the evidence that had been presented as it applies to that law. 5RP 414-15. The prosecutor's comments were further explanations to the jury of the

type of evidence that was before them and what the law says about that evidence. Specifically, the prosecutor was explaining to the jury that the law does not require physical evidence and the jury is allowed to make reasonable inferences based on the circumstantial evidence that was presented to them. 5RP 415-16, 423-426. None of the prosecutor's comments in the present case ever ask the jury to decide their verdict on emotional grounds or to send a message to society as has routinely previously been held improper.

In rebuttal, it was apparent to the jury that the prosecutor's comments were in direct response to the defendant's argument. She stated:

> If you follow through with defense counsel's argument and reasoning, there's nothing beyond [A.B]'s allegations. The State has nothing to show you, no physical evidence. [A.B] was examined and there was no evidence. If you follow through with that, we could never hold so many people responsible for abusing children. It would be that system that I referenced in my initial closing, where we'd have to tell the kids, sorry, because there's nothing corroborating, because there's nothing confirming what you are telling us, we can't prosecute, we can't hold your abuser responsible, and that is not the way it is, folks. It is not. That is not our system. We don't need anything else. The law doesn't require it. Our system doesn't require it.

This made it clear to the jury that the prosecutor's argument was not asking the jury to convict to defendant to "send a message" or "prevent future harm." She was explaining to the jury what the law is, what it

requires and why it does not require anything more. There was nothing improper about that argument.

Further, courts have routinely cautioned defendants that "[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." ***Jones v. Hogan***, 56 Wn.2d 23, 27, 351 P.2d 153 (1960). Defense counsel never objected to any of the prosecutor's arguments during closing or rebuttal. Had defense counsel truly felt that any of the prosecutor's comments constituted misconduct, he would have objected to them. None of the comments can be considered so flagrant and ill-intentioned and evincing an enduring and resulting prejudice that could not have been cured by an instruction thus necessitating reversal, when defense counsel did not see it necessary to even object to them during the trial.

The jury in this case acquitted defendant of one of the charges. CP 105. This acquittal weakens the defendant's argument that the jury was so swayed by the State's comments that they felt it necessary to convict defendant based on their passion and prejudice rather than the evidence that was presented. The acquittal actually suggests that the jury carefully and fully considered the evidence that was presented to them and made their decision based on the evidence, not an overwhelming emotional response to the prosecutor's argument.

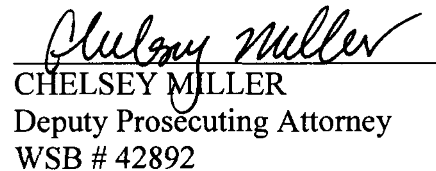
The prosecutor's comments were not improper. They were in direct response to defendant's arguments and were further explanations of the evidence that was presented in the case and how the law instructs the jury on that evidence. Defendant fails to prove not only any evidence of prosecutorial misconduct, but that any such evidence was so flagrant and ill-intentioned that it resulted in prejudice that could not have been cured by a curative instruction.

D. CONCLUSION.

The State respectfully requests this Court affirm defendant's conviction and sentence.

DATED: June 8, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



CHELSEY MILLER
Deputy Prosecuting Attorney
WSB # 42892

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Date Signature

PIERCE COUNTY PROSECUTOR

June 08, 2015 - 3:15 PM

Transmittal Letter

Document Uploaded: 2-465116-Respondent's Brief.pdf

Case Name: St. v. Smiley
Court of Appeals Case Number: 46511-6

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers   Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): ________

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: ________

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

glinskilaw@wavecable.com