

No. 67258-4-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD RASMUSSEN,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 DEC 28 AM 10:48

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

The Honorable J. Wesley St. Clair

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In Mr. Rasmussen's trial on two counts of rape of a child, the trial court erred in allowing a police witness to comment on the credibility of the complaining witness.

2. The trial court erred in denying the defendant's motion for a mistrial.

3. The deputy prosecutor committed misconduct in closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Detective Heather Castro was permitted to testify, over defense objection, in a manner that commented on the credibility of the complaining witness. Is reversal required under the constitutional error standard, where the offending testimony invaded the province of the jury in a trial that depended on the competing credibility of the complainant and the testifying defendant?

2. Did the trial court abuse its discretion in denying the defendant's motion for a mistrial where improper evidence that the defendant allegedly threatened the complainant's mother with violence could not have been ignored by the jury?

3. Did the deputy prosecutor commit flagrant and reversible misconduct in closing argument by telling the jury it had to have a “reason” to acquit Mr. Rasmussen?

C. STATEMENT OF THE CASE

The appellant, Richard Rasmussen, was ordered to serve concurrent 216 month terms of incarceration following his convictions on two counts of first degree rape of a child, RCW 9A.44.073. CP 69-80.

The original information filed in Mr. Rasmussen’s case stated charging periods of January 10, 1999 through September 1, 2001 (count 1) and September 2, 2001 through January 9, 2004 (count 2). CP 1-4. The information was later amended during trial to reflect the changing account of the time frame of the alleged events given by the complainant, L.R., who was the daughter of Mr. Rasmussen and his ex-wife, Rebecca Zuckerberg, who had been divorced several years before the events allegedly occurred. CP 2-4.¹

According to the affidavit of probable cause and the State’s

¹ The new charging period for both counts, reflected in a second amended information and in the jury instructions, was January 10, 1998, through June 30, 2002. CP 19-20; CP 23-42.

trial brief, the defendant allegedly engaged in intercourse with his daughter L.R., over a course of several years. These events allegedly transpired during a period encompassing the complainant's parents' divorce, her mother's re-marriage to Matthew Zuckerberg, and a post-separation custody dispute that resulted in the defendant having weekend custody of L.R. and her two brothers, at the home where he resided with the children's grandmother. CP 4; Supp. CP ____, Sub # 54 (State's Trial Memorandum).

Richard Rasmussen denied any sexual contact or intercourse with L.R. 4/6/11RP at 661, 667-71. He admitted that he was a poor father during the period of time where he was drinking alcohol, which was also during the time of the custody dispute with his ex-wife. 4/6/11RP at 684-89.

L.R. (d.o.b. 1/10/92) claimed that Mr. Rasmussen, during the time that she and her brothers lived in the family home before the divorce, and after custody arrangements changed, would touch her leg, or stroke her hair, and this led to sexual acts. 4/4/11RP at 466-68. This began when she was 5 or 6 years old. 4/4/11RP at 466. L.R. alleged that her father made her learn how to perform

oral sexual intercourse, and he also engaged in penile-vaginal intercourse, digital-vaginal, and oral-vaginal intercourse with her. 4/6/11RP at 471-476. L.R. was shocked. 4/4/11RP at 475. Mr. Rasmussen would often be crying, and would also tell L.R. that it was okay, and that he loved her. 4/4/11RP at 466-68.

According to Detective Heather Castro, these allegations were communicated to the police in August of 2007 by L.R.'s mother Rebecca Zuckerberg, at which time L.R. was 15 years old. 3/31/11RP at 201-02. Over two years later, in October of 2009, L.R. determined that she would make specific allegations, herself, to law enforcement. 3/31/11RP at 204.

L.R. was then interviewed by Detective Castro at the Federal Way Police Department. Detective Castro admitted that she employed leading questions when she spoke with L.R. 3/31/11RP at 333.

The defendant's mother, Nancy Rasmussen, never noticed any changes in behavior in L.R., and noted that she never left her young grandchildren alone in the home. 4/6/11RP at 629, 638-40.

Rebecca Zuckerberg, the defendant's wife, was the person who first claimed to police that her ex-husband had sexually

abused L.R. 4/4/11RP² at 330-32. During her testimony, she stated that L.R. told her that the defendant said he would hurt her mother, Ms. Zuckerberg, if L.R. said anything about what the defendant was doing to her. 4/4/11RP at 353-54.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING DETECTIVE CASTRO TO COMMENT ON L.R.'S CREDIBILITY.

a. Over objection, Detective Castro was permitted to testify in a manner that implied her opinion of the believability of the rape complainant. A prosecutor commits misconduct when he elicits a witness's comment on the credibility of another witness, including in particular the complainant, because the credibility of a witness is a jury question. State v. Whelchel, 115 Wn.2d 708, 724, 801 P.2d 948 (1990); U.S. Const. amend. 6. Additionally, no witness may express an opinion as to the guilt of the defendant, whether by direct statement or inference. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such an opinion improperly

² The volume of transcript containing the verbatim report of proceedings for April 4, 2011, which the minutes identify correctly as the court day on which Ms. Zuckerberg testified, is correctly dated on the cover, but is paginated with a header incorrectly stating "April 5, 2011."

invades the province of the jury and thereby violates the defendant's constitutional right to trial by jury. State v. Carlin, 40 Wn. App. 698, 701, 700 P.2d 323 (1985), overruled on other grounds by City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993); U.S. Const. amend. 6.

Here, the prosecutor inquired of the detective several times about L.R.'s "demeanor" and elicited testimony that she was distressed and upset. 3/31/11RP at 207. This testimony, admitted over the defense objection that the detective was being asked for her personal opinion, allowed the witness to comment that L.R. was acting in a way that was consistent with someone making truthful allegations of sexual abuse. 3/31/11RP at 207. The trial court also overruled Mr. Rasmussen's objections to Detective Castro's speculative testimony that L.R. was frightened before her interview and was scared to talk to the detective. 3/31/11RP at 261-62.

b. This opinion testimony, elicited from a police officer, was improper and requires reversal. This testimony was error. One witness cannot be asked, directly or indirectly, to express an opinion on another witness's credibility. ER 608(a); State v. Black,

109 Wn.2d at 348; State v. Jones, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003). Additionally, police officers of all people must not comment on the alleged victim's credibility. State v. Barr, 123 Wn. App. 373, 384, 98 P.3d 518, review denied, 154 Wn.2d 1009 (2004); State v. Farr Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999) ("Because it is the jury's responsibility to determine the defendant's guilt or innocence, no witness, lay or expert, may opine as to the defendant's guilt, whether by direct statement or by inference").

Notably, testimony that the witness was scared or upset is different from asking whether the witness' statements were consistent. See State v. Kirkman, 159 Wn.2d 918, 930, 155 P.3d 125 (2007). Here, the prosecutor was clearly asking for, and the jury heard, an authoritative police officer's improper opinion that the victim was acting like someone who had been sexually abused. Detective Castro's testimony was comparable to State v. Barr, supra, 123 Wn. App. at 382 (impermissible opinion where officer testified that defendant's behavior indicated deception and that he had the training to determine guilt from a suspect's behavior); and State v. Jones, 71 Wn. App. 798, 812, 863 P.2d 85 (1993)

2. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR A MISTRIAL.

a. The complainant's mother interjected inadmissible and unfairly prejudicial evidence that Mr. Rasmussen threatened L.R.'s mother with violence. During examination by the deputy prosecutor, Rebecca Zuckerberg, the complainant's mother, gave a non-responsive answer when asked what she meant by her immediately previous testimony that L.R. was "anxious to talk to" her about the alleged incidents by the defendant. 4/4/11RP at 353-54. The court overruled counsel's objection, which was lodged to this question and Ms. Zuckerberg's beginnings of a response stating that "[L.R.] knows that this was very painful for me, obviously." 4/4/11RP at 353. Counsel had objected that the question and answer had assumed facts not in evidence. 4/4/11RP at 353. When allowed to answer, Ms. Zuckerberg continued as follows:

[L.R.] has told me that she understands that this is a very painful thing for me to hear. And she has also told me that the reason she never said anything was because she was told that if she did, that I would get hurt.

4/4/11RP at 353-54. Mr. Rasmussen's counsel immediately sought

a side-bar. 4/4/11RP at 354. The trial court ruled that Ms. Zuckerberg's testimony was nonresponsive, and stated the court was requiring the "jury to strike her answer." 4/4/11RP at 354.

Counsel subsequently sought a mistrial. 4/4/11RP at 360-61. The parties and the court agreed that Ms. Zuckerberg's answer was non-responsive, and prejudicial so as to warrant an order by the court to strike the answer from the record and an instruction to the jury to disregard it. 4/4/11RP at 363, 365.

No additional instruction was given to the jury beyond the court's initial statement that it was requiring the jury to strike Ms. Zuckerberg's answer. 4/4/11RP at 353-54, 357-65.

The trial court denied the mistrial motion. The impropriety of Ms. Zuckerberg's interjection was not debated; rather, the trial court focused its concern on whether the jury could reasonably be expected to ignore it.

b. A mistrial should have been granted because this trial irregularity resulted in the interjection of an incurably prejudicial matter. Ms. Zuckerberg's interjection introduced a highly prejudicial aspersion against the defendant where no such similar matter or facts were previously at issue in the case.

Under Washington law, a trial court must grant a mistrial where an irregularity occurs and as a result the defendant's right to a fair trial is "so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

Thus, where a mistrial motion is made for an irregularity, the court must determine whether the irregularity prejudiced the defendant's right to a fair trial. State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983).

Here, the defense moved for a mistrial, after the complainant's mother stated L.R. told her that Mr. Rasmussen had threatened violence against the witness if L.R. "told" about the abuse. It is true that the court vaguely told the jury to disregard the matter, but the Washington courts have recognized that cautionary instructions can often focus the jury's attention even more closely on the prejudicial matter. See State v. Holmes, 122 Wn. App. 438, 93 P.3d 212 (2004); State v. Curtis, 110 Wn. App. 6, 13, 37 P.3d 1274 (2002).

The prejudice of this improper testimony was high. In assessing the degree of prejudice, a court should examine (1) the

seriousness of the irregularity; (2) whether it was cumulative of properly admitted evidence; and (3) whether it could have been cured by an instruction. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987) (new trial warranted where assault complainant testified that the defendant "already has a record and had stabbed someone"); State v. Weber, 99 Wn.2d at 165-66.

In addition, the inquiry is whether the testimony, when viewed against the backdrop of all the evidence, so tainted the trial that the defendant did not receive a fair trial. State v. Weber, 99 Wn.2d at 164.

Here, Mr. Rasmussen was alleged by the witness to have threatened violence against L.R.'s mother. The unfair prejudice of this interjection was two-fold – it made it appear as if the defendant was physically violent and dangerous, and bolstered the claim that the abuse occurred. Such an impression of the defendant cannot be ignored by the jury and precludes the accused from his entitlement to a fair trial by an impartial jury. U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 21, 22. Mr. Rasmussen's right to a fair trial included the right to the presumption of innocence. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126

(1976).

Applying the three part Escalona test discussed above, the trial court should have granted the defense mistrial motion. First, the violation was serious, as the parties agreed, and it portrayed Mr. Rasmussen as violent. See State v. Gonzalez, 129 Wn. App. 895, 905, 120 P.3d 645 (2005) (court's announcement to the jury that Gonzalez had to be in restraints required mistrial).

This improper comment was not cumulative or repetitive of any other evidence properly admitted at trial that Mr. Rasmussen was violent. And, finally, no curative instruction could have cured the resulting prejudice. Although rape of a child does not require forcible compulsion, Ms. Zuckerberg's interjected comment that the defendant had threatened violence portrayed him as a violent sexual abuser, and was irretrievably prejudicial. A mistrial was required.

3. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY TELLING THE JURY THAT ACQUITTAL REQUIRED A SPECIFIC REASON FOR DOUBT.

a. The State must not commit misconduct in closing argument by telling the jury it must have an articulable

“reason” to acquit the defendant. In closing argument, the prosecutor told the jury that a reasonable doubt is “a doubt for which a reason exists.” 4/7/11RP at 742. This was misconduct.

The prosecutor’s argument, although not extensive, was entirely improper. The gravamen of requiring the jury to find a reason for acquittal is that doing so shifts the burden of proof. U.S. Const. amend. 14. It is the State that bears the burden of proving that the defendant is guilty beyond a reasonable doubt.

It is therefore misconduct to argue to the jury in a way that requires that the defendant convince the fact-finder that there is a reason to find him not guilty. See State v. Johnson, 158 Wn. App. 677, 684–85, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011); State v. Venegas, 155 Wn. App. 507, 523, 228 P.3d 813, review denied, 170 Wn.2d 1003, 245 P.3d 226 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273

(2009), review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010).

The jury need not engage in any such thought process. By implying that the jury had to find a reason in order to find [the defendant] not guilty, the prosecutor made it seem as though the jury had to find [the defendant] guilty unless it could come up with a reason not to. Because we begin with a presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper. Furthermore, this argument implied that [the defendant] was responsible for supplying such a reason to the jury in order to avoid conviction.

State v. Walker, --- P.3d ----, 2011 WL 5345265 (Div. 2, Nov. 8, 2011, at 3). And as was stated in State v. Evans, 163 Wn. App. 635, 645, 260 P.3d 934 (2011), this improper argument

subverts the presumption of innocence by implying that the jury has an initial affirmative duty to convict and that the defendant bears the burden of providing a reason for the jury not to convict.

State v. Evans, 163 Wn. App. at 645.

Here, the prosecutor effectively engaged in argument employing the same mechanism and improper framing of the State's burden disapproved of in Walker and Evans. The prosecutor stated that "a reason [must] exist" in order to acquit, and specifically framed this requirement as the "formula" for applying the definition of reasonable doubt in the jury instructions. 4/7/11RP

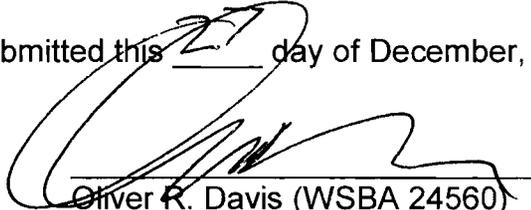
at 742. The prosecutor, as in Anderson and Venegas, told the jury that before it could find Mr. Rasmussen not guilty, it needed a reason. This shifted the burden of proof to Mr. Rasmussen.

b. The prosecutor's closing argument requires reversal of Mr. Rasmussen's convictions. Reversal is required. In Venegas, the case "turned largely on witness credibility." Venegas, 155 Wn. App. at 526. The same is true here, in this case where the complainant and Mr. Rasmussen, the accused, both testified for the jury. The Court held in Venegas that the cumulative effect of this and other error required reversal, see Venegas at 526–27, and the defendant here argues the same result is required. Given that this was a credibility contest, Mr. Rasmussen has shown that there is a substantial likelihood that the prosecutor's improper statements affected the jury. State v. Emery, 161 Wn. App. 172, 195–96, 253 P.3d 413, review granted, No. 86033–5, 172 Wn.2d 1014, 262 P.3d 63 (Wash. Sept. 26, 2011).

E. CONCLUSION

Mr. Rasmussen respectfully requests this Court reverse his judgment and sentence.

Respectfully submitted this 27 day of December, 2011.

A handwritten signature in black ink, appearing to read "O. R. Davis", written over a horizontal line.

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

| | | |
|----------------------|---|---------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | NO. 67258-4-I |
| v. |) | |
| |) | |
| RICHARD RASMUSSEN, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF DECEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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