

NO. 67258-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RICHARD RASMUSSEN,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE WESLEY ST. CLAIR

BRIEF OF RESPONDENT

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A. ISSUES

1. Witnesses are not permitted to comment of the credibility of another witness. The detective described the victim's demeanor during interviews but did not draw any conclusions about the victim's demeanor during testimony. Did the trial court properly permit the detective to testify about the victim's demeanor during interviews without expressing an opinion about her credibility?

2. A court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. The jury properly heard testimony from the victim that Rasmussen threaten her mother. During the trial L.R.'s mother testified that Rasmussen had told L.R. that if she disclosed the abuse her mother would get hurt. The trial court instructed the jury to disregard the remark. Jurors are presumed to follow the trial court's instructions. Did the trial court properly deny Rasmussen's request for a mistrial?

3. Alleged misconduct by the prosecutor is waived if there is no objection. Rasmussen did not object to the prosecutor's closing argument, failed to demonstrate any misconduct, and failed to show a substantial likelihood that the challenged questions affected the verdict. Has Rasmussen failed to demonstrate reversible error?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The defendant, Richard Rasmussen, was charged with two counts of rape of a child in the first degree. CP 2-4. The State alleged that Rasmussen had sexual intercourse with his daughter between 1998 and 2002 when she was less than twelve years old. CP 4. The jury found Rasmussen guilty as charged. CP 43-44. The court imposed a standard rape sentence of 216 months. CP 71.

2. SUBSTANTIVE FACTS.

L.R.¹ was the daughter of the defendant, Richard Rasmussen. RP 452.² Rasmussen married Rebecca Zuckerberg in 1984. RP 324. They had had two sons, E.R. and A.R., and one daughter, L.R. RP 23. Rasmussen and Zuckerberg separated in 1993 and divorced in 1995. RP 324-25. L.R. was two years old

¹ Initials are used to protect the privacy of minors and of victims of sexual abuse.

² The verbatim report of proceedings consists of nine consecutively paginated volumes that will be referred to as "RP," and two volumes of voir dire that will be referred to as 3/29/11 RP and 3/30/11 RP.

when her parents divorced. RP 452. They agreed that Rasmussen would have custody of the children and Zuckenburg would have visitation. RP 326-27.

L.R. loved her father, but she was also afraid of him. RP 461. Rasmussen would drink and become sad or angry. RP 462. L.R. described how Rasmussen would get drunk and call her mother a "slut" or tell L.R. how much he hated her mother. RP 463. He began touching her sexually when she was approximately five or six years old. RP 465. Initially the touching was limited to Rasmussen putting his hand under L.R.'s nightgown. He would tell L.R. "he created me and loved me. And it was okay." RP 467.

The following year, when L.R. was about six or seven years old, the sexual abuse progressed. Rasmussen got drunk and began telling L.R. that he loved her and that she reminded him of her mother. RP 469. He then took her nightgown off and performed oral sex on her. RP 471. He placed his penis in her mouth, then placed his penis inside her vagina. RP 472-73. L.R. did not tell anyone about the incident because she thought Rasmussen loved her. RP 475.

L.R. described a second incident when she was seven years old when she was alone with Rasmussen. RP 480. He told L.R. to

go to his room and said he was going to “help her be a better daughter.” RP 480. He made her perform oral sex on him, made her penetrate her own vagina with her fingers, and had vaginal intercourse with her. RP 482-85.

L.R indicated that the sexual abuse stopped when she was eleven years old. RP 503. L.R. testified there had been over twenty instances of sexual abuse. RP 480.

L.R. did not tell anyone about the sexual abuse. RP 486. Rasmussen had told her it was their secret and threatened to hurt L.R.'s mother if she told anyone. RP 486; 514. The first person L.R. told was her band teacher at school when she was fifteen years old. RP 515. She did not want to tell anyone else, but her brother learned about the abuse from talking to the band director's wife. RP 517-18.

Zuckerburg learned about the sexually abuse in 2006. RP 329. L.R. was having emotional problems and was diagnosed with an eating disorder. RP 330-31. L.R. was in counseling and Zuckerburg waited until 2007 to report the abuse to the police. RP 331-32. However, initially L.R. was not ready to talk to the police about the abuse. L.R. said she did not want to call the police because she “did not want to let my Dad down.” RP 520. L.R. did

participate in an interview with Detective Castro in 2009 when she was seventeen years old and disclosed the sexual abuse. RP 333, 530.

L.R. was 19 years old when she testified at trial. RP 323.

The jury found Rasmussen guilty of both counts of rape of a child. CP 43-44.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY PERMITTED THE DETECTIVE TO DESCRIBE L.R.'S DEMEANOR DURING INTERVIEWS WITHOUT EXPRESSING AN OPINION ABOUT L.R.'S CREDIBILITY.

Rasmussen argues that Detective Castro improperly commented on L.R.'s credibility. Rasmussen's argument is not supported by the record. Detective Castro described L.R.'s demeanor during interviews, but did not interpret that demeanor or express any opinions about L.R.'s credibility. The detective's testimony was proper.

A trial court's decision to admit or exclude testimony is reviewed for an abuse of discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). The decision to admit or exclude opinion testimony generally involves the routine exercise of

discretion by the trial court under applicable evidentiary rules.

State v. Barr, 123 Wn. App. 373, 380, 98 P.3d 518, 521 (2004).

Indirect testimony about the credibility of a witness is not manifest error of constitutional magnitude. State v. Kirkman, 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007).

As to the victim, even if there is uncontradicted testimony about a victim's credibility, the jury is not bound by it. Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); State v. Cerny, 78 Wn.2d 845, 850, 480 P.2d 199 (1971), *vacated on other grounds*, 408 U.S. 939, 92 S. Ct. 2873, 33 L.Ed.2d 761 (1972). The constitutional role of the jury requires respect for the jury's deliberations. See Const. art. I, § 21. The assertion that the province of the jury has been invaded may often be simple rhetoric. Kirkman, 159 Wn.2d at 927-28.

In determining whether a potential comment on a witness' credibility is impermissible, the court will consider the circumstances of the case, including the following factors: "(1) 'the type of witness involved', (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense,' and (5) 'the

other evidence before the trier of fact.” Demery, 144 Wn.2d at 759, 30 P.3d 1278 (quoting City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)), Kirkman, 159 Wn.2d at 928.

Testimony that indirectly touches upon the victim’s credibility is not necessarily improper. For example, in Kirkman the Supreme Court examined expert testimony from physicians and police officers in cases of sexual abuse of minors. Kirkman, 159 Wn.2d at 918. In one instances a doctor who had performed a physical exam testified “I found nothing on the physical examination that would make me doubt what she’d said, or was there anything that would necessarily confirm it.” The Supreme Court held the doctor was not clearly commenting on the victim’s credibility. Id. In addition, in Kirkman there was testimony from police officers about their protocols to determine competence of child victims, and they testified about the child’s promises to tell the truth. The Supreme Court held that allowing testimony about the protocols “merely provided the necessary context that enabled the jury to assess the reasonableness of the ... responses.” Id. at 931, (citing Demery, 144 Wn.2d at 764, 30 P.3d 1278).

In the present case Rasmussen cites only two references in the trial where he claims that the detective commented on L.R.’s

credibility. However, the record shows that Detective Castro described L.R.'s demeanor, but did not express nor imply any opinion about her credibility:

Q: Without telling us anything that [L.R.] said, can you describe for the jury what her demeanor was like when she was talking to you?

A: She was very quiet. At times she got tearful, and her voice would crack a little bit. She's obviously –

Defense: Objection. At this point, making a personal opinion.

Court: Overruled.

A: May I continue?

Court: Please do.

A: She appeared very distressed and upset that she had to speak to me.

RP 207. During cross examination the defense suggested that L.R.'s interview was flawed because of the way the detective conducted the interview. In response the prosecutor asked:

Q: So what was your understanding when she did not come in on October 21, 2009?

A: That she had – it was very difficult for her to come talk to me at that time.

Q: Did that have an impact on how you conducted the interview with her?

A: Yes.

Q: How so?

A: I knew that [L.R.] at the time was 17. And I knew that she wanted to talk to me, but was still very upset and scared.

RP 261. The detective went on to describe how she adjusted her interview technique in response to L.R.'s demeanor. RP 261-263. Detective Castro did not comment on L.R.'s credibility. She simply described L.R.'s demeanor during her interview. The demeanor of the victim during the interview is highly relevant for the jury to consider assessing the credibility of the witness. Detective Castro did not express any opinion about the credibility of L.R. and left any conclusions to be drawn from L.R.'s demeanor to the jury. Furthermore, the defense attacked Detective Castro's method of interviewing L.R. opening the door to Detective Castro's testimony that she adjusted her interview approach based on her observations that L.R. seemed scared and upset. The testimony was not improper.

Rasmussen relies upon State v. Barr, 123 Wn.App. 373, 380-84, 98 P.3d 518 (2004) and State v. Jones, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003). Both cases are readily distinguishable. In Barr a police officer described his interview technique and

observations of the defendant's reactions and testified that the defendant was being deceptive. Barr, 123 Wn. App. at 380-84. In Jones, a police officer directly communicated his opinion that he did not believe the defendant. Jones, 117 Wn. App. at 91. In each case the detective went beyond describing the defendant's demeanor and concluded that the defendant was deceptive.

Rasmussen argues that the facts of the present case are more similar to Barr than Kirkman. Rasmussen is wrong. In Barr a police officer directly commented on the credibility of the defendant, whereas in Kirkman the doctors only indirectly touched upon the credibility of the victim. In the present case the detective did not make any reference to L.R.'s credibility of L.R., or draw any conclusion from her observations of L.R.'s demeanor. The trial court properly overruled Rasmussen's objections.

Even if Detective Castro's testimony should have been excluded, Rasmussen cannot show prejudice. Erroneous admission of evidence under ER 404(b) is reviewed under the non-constitutional harmless error standard. State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). Reversal is not required unless there is a reasonable probability that the outcome of the trial was

materially affected by the error. Id. The Supreme Court has held that an indirect comment of a witness's credibility is not a constitutional error. Kirkman, 159 Wn.2d at 936-37.

Rasmussen cannot show any prejudice from the detectives two brief passages describing L.R.'s demeanor during her interview. The detective did not come close to making a direct endorsement of L.R.'s credibility. Rasmussen complains about testimony describing L.R. as upset and scared. However, during L.R.'s testimony she was emotional and described how she was upset and scared during the interviews. RP 488, 529. If the jury believed her emotional state on the stand was staged, it is highly unlikely that the detective's brief description of L.R. as upset would have much impact on the jurors.

Furthermore, the record establishes that the jury received specific instructions that they were the sole triers of fact and the sole deciders of the credibility of witnesses. CP 26. Jury Instruction One stated that jurors "are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each." CP 26. Jurors are presumed to follow the court's instructions. The Supreme Court has even found such

instructions relevant (and curative) in claims of judicial comment on the evidence. See State v. Ciskie, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988).

2. THE TRIAL COURT PROPERLY DENIED RASMUSSEN'S MOTION FOR A MISTRIAL.

Rasmussen argues that he should have received a new trial because of Zuckerberg's testimony that Rasmussen threatened to hurt her if L.R. disclosed his sexual abuse. The trial court sustained an objection by Rasmussen and instructed the jury to disregard the testimony. RP 354. The trial court properly denied Rasmussen's motion for a mistrial.

Rasmussen argues that Zuckerberg's testimony warranted a mistrial. Rasmussen is incorrect. A reviewing court applies the abuse of discretion standard when reviewing a trial court's denial of a motion for a mistrial. State v. Lord, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). Testimony that violates a ruling in limine can be grounds for a mistrial if it prejudiced the jury. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). Reversal is required only if there is a substantial likelihood that the testimony in question

affected the verdict. Lord, 117 Wn.2d at 887. To determine whether a trial irregularity warrants a new trial, a court considers three factors: “(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which the jury is presumed to follow.” Escalona, 49 Wn. App. at 254 (citing State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)).

The trial court has wide discretion to cure trial irregularities. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992) (citing State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)). Ultimately, the Court must decide whether the remark, when viewed against the backdrop of all the evidence, so prejudiced the jury that there is a substantial likelihood the defendant did not receive a fair trial. Id. (citing Weber, 99 Wn.2d at 164-65). In reviewing a trial court’s decision whether a mistrial should have been granted, “[e]ach case must rest upon its own facts.” Escalona, 49 Wn. App. at 256. The trial court is best suited to judge how much prejudice a statement causes, and it should grant a mistrial “only when the defendant has been so prejudiced

that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Thompson, 90 Wn. App. 41, 45, 950 P.2d 977 (1998).

In the present case, the prosecutor asked Zuckenburg about L.R.'s reluctance to talk about the sexual abuse. Zuckenburg testified:

[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.

RP 353-54. Rasmussen objected. The trial court sustained the objection and instructed the jury to strike the response. RP 354. Rasmussen moved for a mistrial which the court denied. RP 361-365. Rasmussen argued that the L.R. would testify that she did not disclose because she was not ready to speak, not due to threats against her mother. RP 362. Rasmussen was incorrect; L.R. did testify that Rasmussen had said he would hurt her mother. RP 486, 514. L.R. indicated one of the reasons she did not report the abuse was because she was afraid that Rasmussen would hurt her mother. RP 486, 514.

Looking at the factors outlined in Escalona and Weber the trial court properly denied Rasmussen's motion for a mistrial.

Zuckerburg's isolated comment that L.R. believed she would "get hurt" if L.R. disclosed the abuse was relatively minor.³ The evidence was cumulative to L.R.'s testimony that Rasmussen had threatened her and her mother if she disclosed the abuse. RP 486, 514. Finally, the judge told the "I'm going to sustain that objection and find the response that was given by Ms. Zuckerberg as non-responsive and require the jury strike her answer to that question." RP 354. None of the factors in Escalona and Weber supported Rasmussen's request for a mistrial.

Furthermore, Rasmussen cannot show substantial likelihood that the testimony of the witness affected the verdict. The allegation of a purported threat that was never carried out is not so prejudicial that there is a substantial likelihood the defendant did not receive a fair trial. This is particularly true where the jury properly heard directly from the victim that Rasmussen threatened her mother. RP 486, 514. The trial court instructed the jury to disregard the evidence. The jury is presumed to follow the

³ Rasmussen characterizes this remark as a threat of violence, however, that is not entirely clear when placed in the context of Zuckerberg's testimony that L.R. knew the situation was "very painful for me." RP 353.

instructions. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). Rasmussen cannot show Zuckerberg's testimony affected the verdict.

Rasmussen relies heavily on State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), in arguing that reversal is required. In Escalona, the defendant was charged with assault in the second degree for threatening a person with a knife. Id. at 252. The trial court erred by refusing to grant a mistrial when a victim testified that the defendant had a "record" and had stabbed someone in the past. Id. at 253. The trial court instructed the jury to disregard the testimony. Id. at 253. However, in Escalona, the improper testimony was that the defendant engaged in the exact same type of crime. In the present case the isolated comment by Zuckerberg did not implicate Rasmussen of similar sexual abuse in the past. The testimony was cumulative to properly admitted evidence from L.R. There was little danger the jury would be unduly influenced by this isolated remark. The trial court did not abuse its discretion by denying Rasmussen's motion for a mistrial.

3. RASMUSSEN HAS FAILED TO SHOW ANY PROSECUTORIAL MISCONDUCT THAT AFFECTED THE VERDICT.

Rasmussen claims that the prosecutor committed misconduct by arguing that a reasonable doubt is a “doubt for which a reason exists.” Rasmussen’s claim is without merit. The prosecutor’s remark was a direct quote from the jury instruction defining reasonable doubt. Furthermore, Rasmussen did not object to any of the remarks at trial, nor can he show prejudice. Rasmussen has failed to demonstrate any prosecutorial misconduct.

a. The Prosecutor Did Not Commit Misconduct By Quoting The Jury Instructions.

A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). The prosecutor's comments are viewed in the context of the total entire argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Unless

a defendant objected to the allegedly improper comments at trial, requested a curative instruction, or moved for a mistrial, reversal is not required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice. State v. Smith, 67 Wn. App. 838, 847, 841 P.2d 76, 81 (1992). Prejudice occurs only if “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

Rasmussen alleges that the prosecutor committed misconduct by arguing a reasonable doubt is a “doubt for which a reason exists.” Rasmussen’s argument has no merit. The prosecutor’s remark was a direct quote from the jury instruction that defines a reasonable doubt. WPIC 4.01 defines a reasonable doubt as:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

WPIC 4.01 (emphasis added); CP 29. Rasmussen contends that the “the prosecutor stated that “‘a reason must exist’ in order to

acquit. . .” Brief of Appellant at 14. However, Rasmussen misstates the prosecutor’s argument. The full quotation in its proper context shows that the State’s argument was appropriate.

The prosecutor argued:

Your jury instructions, ladies and gentlemen, give you a definition of reasonable doubt. But they don’t give you a formula for reasonable doubt. **Reasonable doubt is a doubt for which a reason exists.** It is that sense that if you have an abiding belief in the truth of what [L.R.] told you, then you are satisfied beyond a reasonable doubt.

RP 742. The prosecutor’s argument correctly stated the law.

There is nothing in the prosecutor’s argument that suggests either the defense or the jury was obligated to search for a reasonable doubt. This was not misconduct.

Rasmussen relies primarily on State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009) and State v. Venegas, 155 Wn. App. 507, 523, 218 P.3d 813 (2010). Both cases are clearly distinguishable. In Anderson and Venegas the prosecutor used an improper “fill in the blank” argument to describe reasonable doubt. The argument placed the onus on the jury to find a reason to acquit the defendant.

In the present case the prosecutor did not use a “fill in the blank” argument. The prosecutor correctly stated that a reasonable doubt is one for which a reason exists. The prosecutor devoted most of his closing argument to explaining that L.R.’s account of the sexual abuse she suffered at the hands of her father was credible. The clear implication of the argument was that L.R.’s credibility should not cause a reasonable doubt. At no time did the prosecutor suggest that it was the defendant or the jury’s role to come up with a reasonable doubt. Rasmussen has failed to show any misconduct was committed.

b. Rasmussen Did Not Object And Any Error Was Harmless.

Lastly, even if the prosecutor's remarks were improper, Rasmussen failed to object and any error was harmless. Rasmussen did not make any objections during closing arguments. Unless a defendant objected to the allegedly improper comments at trial, reversal is not required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could

not have obviated the resulting prejudice. Smith, 67 Wn. App. at 847. As argued above, the prosecutor's remarks were not improper. To the extent that Rasmussen argues that the State's remarks could be interpreted as improper, had he objected the trial court could have instructed the jury to disregard them and cured any error.

Rasmussen relies on Venegas to argue that reversal is required. However, in Venegas the Court held that the prosecutors use of the fill in the blank argument was flagrant and ill intentioned because it was made after a published opinion clearly holding the argument was improper. Venegas, 155 Wn. App. at 523-24.

Finally, Rasmussen cannot show any prejudice from the prosecutor's remarks. Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict." Pirtle, 127 Wn.2d at 672. Rasmussen complains about a single remark that is a direct quote from the jury instructions. There is no substantial likelihood the prosecutor's limited remark that Rasmussen complains of affected the verdict.

Rasmussen has failed to demonstrate any prosecutorial misconduct that affected the verdict. This Court should affirm.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Rasmussen's convictions for rape of a child in the first degree.

DATED this 27th day of March, 2012.

Respectfully submitted,

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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 Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent , in STATE V. RICHARD RASMUSSEN, Cause No. 67258-4-I, in the Court of Appeals, Division I, 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.

U Brame
Name
Done in Seattle, Washington

3/28/12
Date 3/28/12