

NO. 67857-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JERRY SMITH,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES E. ROGERS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the prosecutor's remarks in closing argument were proper because he simply re-stated the evidence and argued reasonable inferences from the evidence.

2. Whether the issue concerning unfiled CrR 3.6 findings is moot because the findings have now been filed and the Court can no longer provide any effective relief.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

By amended information, the State charged the defendant, Jerry Smith, with one count of Attempted Promoting Commercial Sexual Abuse of a Minor.¹ RCW 9.68A.101; CP 70. Following trial, a jury convicted Smith as charged.² CP 104. The trial court imposed 103.5 months of total incarceration. CP 161. Smith appeals. CP 168.

¹ The "minor" was a Seattle Police Department undercover police decoy. CP 4, 70.

² Post-trial, Smith's counsel filed a motion for a new trial on several bases. E.g., CP 105-08, 110-32, 133-54, 156-57. Before the court sentenced Smith, the trial judge reviewed each motion, heard argument from counsel, and then ruled. He denied each motion. 10/7/11 RP 2-21. The only claim renewed on appeal is alleged prosecutorial misconduct. The State fully addresses the claim in section C.1, *infra*, of the Respondent's brief.

2. SUBSTANTIVE FACTS

a. Operation Fast Track.

In January, 2010, the Seattle Police Department gang and vice units developed Operation Fast Track to identify juvenile prostitutes and the gang members who pimped out or controlled the girls. 6RP 29-30, 128; 10RP 96.³ Operation Fast Track had three phases. 6RP 30. Phase one occurred in February and March 2010. 6RP 32-33. During this phase, the police gathered intelligence and studied behavioral patterns to help identify the pimps and the prostitutes. 6RP 30-31, 132.

Phase two involved vice detectives, who posed as “johns,” and targeted specific girls. 6RP 34-35; 10RP 165. Post-arrest and with the prostitutes’ consent, the police downloaded data from the prostitutes’ cellular telephones. 6RP 34-35. The police then compared the prostitutes’ call history logs (which included calls to their pimps), photos and text messages with intelligence gathered during phase one. 6RP 35-36.

In the final phase, police decoys posed as under-aged prostitutes. 6RP 37. The decoys dressed provocatively, but also

³ The State adopts the appellant’s designation of the verbatim report of proceedings. See Br. of Appellant at 2 n.1.

wore covert recording devices.⁴ 6RP 38, 135. The decoys' assignment was to tell any pimp that tried to recruit her that she was 17 years old and working as a prostitute or looking for work as a prostitute. 6RP 134, 161; 7RP 28; 10RP 80-81.

Two or more decoys worked the "target zone."⁵ 6RP 135. The decoys rotated about every 15 minutes. 6RP 136; 7RP 25. While one decoy worked the target zone, the other decoy went on a "date" with a john (another undercover police officer) and was debriefed by the surveillance team. 6RP 40-44, 135-37. The intelligence gathered by the decoy – vehicle and suspect descriptions and telephone numbers – was then disseminated by radio to every team member.⁶ 6RP 43-44, 137-38.

b. June 13, 2010.

On June 13, 2010, two female decoys (Officers Azrielle Johnson and Daljit Gill) worked the track. 6RP 40-44, 167. Gill

⁴ Operation Fast Track obtained wire warrants that authorized the decoys to record conversations with the suspected pimps. Pre-trial, Smith challenged the warrants. After a suppression hearing, the trial court ruled that the warrants satisfied due process and did not violate the Washington State Privacy Act (RCW 9.73.030). 3RP 8-14 (court's oral ruling). Smith has not challenged those rulings on appeal.

⁵ The target zone is known as "the track." It comprises a four-square block area, north of Denny, bordered on the east by Aurora, on the west by Fourth Avenue and as far north as John or Thomas; the track includes an area just underneath the Space Needle. 6RP 28, 60, 130.

⁶ The decoys also sent text messages to team members to alert them about people or cars of interest. 6RP 166.

made contact with two men, "Elvis" and "Mike" – Anthony Woods and the defendant, Jerry Smith. 6RP 138.

Woods and Smith drove up to Gill and asked what she was doing. 7RP 29. Gill responded that she was "working."⁷ Id. Gill approached from the passenger's side and noticed Smith had an open beer. 7RP 30. Smith asked Gill why she was staring at his beer; Gill said because she was thirsty, but since she was 17 years old, she could not buy beer.⁸ 7RP 31. The men replied, "17," then drove away. Id.

A couple of minutes later, Woods and Smith drove by Gill again. 7RP 32. Smith yelled out, "Man, for real, you're 17?" 8RP 54. Gill replied, "Well, I am almost 18."⁹ 7RP 33. Woods parked the car. Id. After Gill reached the front passenger's window, and in Woods's and Smith's full view, she stuffed a

⁷ All of the June 13 conversations are contained in exhibit 7, which Smith designated to the Court.

⁸ Gill said that when she saw Smith's open container of beer, she initially went into her "cop mode," *i.e.*, Gill knew an open container in a vehicle is illegal. Gill was unaware that she was staring at the beer before Smith asked her, "What, you ain't (*sic*) seen a beer before?" 7RP 30-31. Gill then responded as a 17-year-old prostitute.

⁹ Multiple times Gill told Woods and Smith that she was a 17-year-old prostitute. Gill said that she made that information "crystal clear." 9RP 136.

condom in her bra strap.¹⁰ 7RP 36-37. Woods asked Gill if she had been “ho’ing” at night. 8RP 57. Smith told Gill to, “Hop in, baby, before the police come.” 8RP 55.

Gill said that she needed to work – to earn some money. Woods and Smith asked Gill how much money she wanted to make. Gill said about five hundred dollars for the night. 7RP 38. Woods asked her how much money she had already earned. Gill replied about one hundred and sixty dollars. Smith asked Gill how many dates she had that night – two? 8RP 61. Gill said, “Three.” Id. Smith stated, “Well, damn, you fuck for, what, \$20 (*sic*).” Id.

Before Gill walked away, Woods obtained Gill’s (Operation Fast Track’s) cell phone number. 7RP 35-36. Gill then contacted her undercover team, who picked her up and drove her to the “safe station,” where she was debriefed. 7RP 40.

Officer Johnson rotated in as the new “renegade” prostitute; she walked the track with the cell phone that she and Gill shared.¹¹ 6RP 139-40; 7RP 26, 41, 111. Twice Smith called and asked for “17.” 6RP 169; 7RP 112, 115. Smith said, “Hey, where you at,

¹⁰ Smith heard Gill ask if she was going to need the condom and although he replied, “You better use some kind of protection out here,” Smith testified that he meant against a gun or knife, not from sexual contacts. 11RP 223; 12RP 81-82.

¹¹ The decoys posed as “renegade” prostitutes, *i.e.*, a free-lance prostitute who pimps would recruit.

17?" 7RP 115. Johnson told Smith that he had the wrong girl, but she would give the other girl the phone and ask her to call him back. 6RP 169.

Gill contacted Woods. 7RP 113-18. Woods wanted to know where she was so that he and Smith could "protect" her. 7RP 119. Gill agreed to meet Woods and Smith at the intersection of the track where they first spoke. 7RP 45, 119.

At this second meeting, Woods and Smith spoke to Gill about wealth and adventure. 7RP 47; 8RP 45. Woods encouraged Gill to come and work for him. 8RP 89. Smith said, "[Y]ou know what I'm saying, yeah, I like 17 and mean. And all about the green. You know what I'm talking about?"¹² 9RP 127-28. Smith continued: "Do you know what I mean for real? Yeah. I can see, I can see it, Vegas living, outrageous. And we can go to the bay area, okay? Do you know what I'm talking about?" Id.

Woods's, Smith's and Gill's conversation ended when a van pulled up with three males inside. 7RP 47, 124. Word had gotten out that Gill was a renegade. 7RP 47. When Woods approached the van, the occupants got out to confront him. 7RP 47-49, 124-27.

¹² During Smith's testimony, he said that he was "just being sarcastic . . . just playing a role" when he made the remark. 11RP 238-39; 12RP 27.

Smith told Gill not to get involved; Woods would take care of it.

7RP 47-49. Gill became concerned for her safety. She signaled her surveillance team to pick her up. 7RP 49.

To protect Gill and Operation Fast Track, the police engaged in a ruse – a fake arrest. Sergeant Dymont and one other police officer went to Gill's location and asked everyone on the street, including Smith, to provide identification (Woods drove away and left Smith when the patrol car arrived). 6RP 61, 153; 7RP 49-50, 54-55. Gill acted nervously; she told Smith that she was a runaway and had a warrant. 7RP 54. Smith advised Gill to stay calm. 7RP 54. Smith told the police officers that he was just talking to his "girlfriend" and "[w]aiting for a ride" when "you guys pulled up." 9RP 135. Sergeant Dymont announced that everybody except Gill, whom he had to arrest on a *juvenile* warrant, was free to go. 6RP 45-46; 7RP 54-55. Dymont handcuffed Gill in Smith's presence. 6RP 47.

c. June 21, 2010 (The "Take-Down").

On June 21, 2010, Operation Fast Track and another ruse culminated in Smith's arrest.¹³ 6RP 50.

¹³ Operation Fast Track resulted in many other arrests, none germane to Smith's case. 6RP 59. Police officers located and arrested Woods after Smith's trial. 9RP 34-35; 16RP 13-17.

Gill called Woods; she wore a recording device.¹⁴ 6RP 51-53. Gill said that she had just been released from juvenile detention and did not want to go home. 6RP 51. Woods told Gill that he would send someone for her. 7RP 81-82. Gill said she would only go with him (aka "Elvis") or "Mike" (Smith).¹⁵ Id.

After several telephone calls between Woods and Gill, Smith and Gill, and Woods and Smith (including an eight and one half minute call between Woods and Smith), Woods told Gill that he would send Smith to pick her up. 7RP 83-101, 137-39; 8RP 9-18. Smith told Gill to "stay put, I'll come and get you." 7RP 81-101, 137-39; 9RP 137-39. Smith and Gill agreed to meet in a convenience store parking lot. Ex. 16 at 22-24.

During Woods's calls to Gill, he instructed her how much to charge for various sex acts. 7RP 12; 9RP 109. Woods ordered Gill to give the money that she had already earned to Smith, who would drive them to a Western Union and wire the funds to him. 7RP 101; 9RP 66-68, 71. He told Gill that Smith would put her out to work

¹⁴ The June 21 conversations are contained in exhibit 13, which Smith designated to the Court.

¹⁵ During one telephone call between Woods and Gill, Woods inadvertently identified Mike as Jerry. 9RP 96-97.

that night. 9RP 71. Woods said that he would pick Gill up when he got into town later that night. 9RP 71.

About two hours later, Smith arrived at the agreed location; he looked around nervously and, after he saw Gill, he said, "Get in. Get in." 7RP 104. Gill signaled the arrest team. 7RP 103-04; 9RP 124. Uniformed patrol officers placed Smith under arrest. 6RP 58.

d. Smith's Testimony.

The defense theory was that Smith was guilty only by his association with Woods, who was the "big fish."¹⁶ 13RP 9-19, 25, 29-30, 36-38, 41-43. Smith insisted that he did not *know* Gill was a prostitute because he had never seen her do an act of prostitution. 11RP 222-26. Smith conceded that he "made statements that made it sound like [he] assist[s] pimps, and help them get young girls" but he insisted, "I never do that. It's not even in my repertoire." 11RP 29-30.

¹⁶ An undeclared defense was entrapment. Although voir dire has not been transcribed, it is evident from the record that entrapment was discussed. See 13RP 4-5 (the trial court ruled that comments about entrapment made by the prosecutor during closing argument were not improper). In defense counsel's closing argument, she lauded Operation Fast Track and the impact it had on reducing juvenile prostitution, but reminded the jury that Woods was the "big fish," and Smith was "brutally used by Woods and by Officer Gill." 13RP 12-14, 17, 29-30, 42.

Smith stated that on June 13, 2010, Woods (Smith's step-cousin who he had not seen for about fifteen to twenty years) came to Seattle to find his brother, Leroy. 11RP 36-38. Woods's brother had run away and Woods wanted Smith to help find him. 11RP 36-37. The men drove around the Central District, West Seattle and downtown Seattle but they were unsuccessful. 11RP 44-49.

When Woods drove near the Space Needle, he noticed Gill before Smith did.¹⁷ 11RP 51-52. Gill approached the car in a "fast trot." 11RP 56. Gill asked them if they were interested in "tag-teaming" her for anal sex. Smith said, "Hell, no." Id.

Smith was shocked – he had never had a stranger come up to him and talk about anal sex. 11RP 61. Woods and Gill conversed. Smith heard Gill say that she was 17 years old, but he did not believe her. 11RP 71, 221-22; 12RP 14-15, 24-25. Woods and Gill exchanged telephone numbers. 11RP 61-62. Gill then said she had to go back to work. 11RP 62. Smith said, "As far as I know, she could have been a bartender or anything." 11RP 62.

¹⁷ Smith stated that he had no idea that prostitution occurred on the track. He did not know there was a "track." 11RP 41.

Moments after Woods and Smith left, Gill called Woods. Gill wanted Woods to return. 11RP 68-69. Even though Smith told Woods that he wanted to go home, Woods drove back to see Gill. 11RP 72.

While Woods and Gill conversed (and Smith stood at the street corner), an SUV pulled up. 11RP 91-92. The driver yelled something at Woods and Gill. 11RP 92. Smith walked toward Woods because Woods was outnumbered. Id. Minutes later, the police arrived – and Woods hopped in his car and left. Id. A policeman asked Smith if he knew Gill. Smith said she was “my friend girl,” but the policeman “misquoted” him and thought Smith had said “girlfriend.” 11RP 94. Gill was upset about her warrant. Smith tried to comfort her. Id. The policeman told Smith that he could leave. 11RP 100. Sometime later, Woods returned for Smith. 11RP 101.

Much later that same day, Smith and Woods again searched for Leroy. 11RP 102. They found Leroy in the Central District. 11RP 104. Woods took Smith and Leroy to Smith's parent's house. 11RP 106. Smith had no contact with Woods until June 21, which surprised Smith because Woods had never called to thank him for helping to find Leroy. 11RP 106-09.

On June 21, Woods called Smith and asked him to give Gill a ride to her friend's house. 11RP 106-09. Smith agreed out of the "kindness of [his] heart." 12RP 47. Gill called Smith several times; she sounded scared. 11RP 115-17; 12RP 47. Gill said that she was near the juvenile detention facility. 11RP 115. Smith asked Gill if there were any police officers there – but he asked only because he thought there was a police precinct nearby that she could go to for help. 11RP 116. Smith suggested that they meet at an AM/PM parking lot. 11RP 118. He thought that Gill would be safe there because it had surveillance cameras and foot traffic. 11RP 119.

When Smith arrived at the AM/PM, he did not see Gill. 11RP 124. A few moments later, Gill called Smith and asked him what vehicle he was in. Id. Police officers arrested Smith. 11RP 126-27. Smith had no idea why he was arrested.¹⁸ 11RP 127.

At trial, Smith listened to several excerpts of the recorded conversations; Smith then conceded that Woods is a "classic pimp." 12RP 27-30. Smith acknowledged that Woods's discussion with Gill (about how the internet could make her more money), was a

¹⁸ Smith gave a tape-recorded statement to a Seattle Police Department detective. Ex. 36. Pre-trial, the court ruled that Smith's recorded statement was admissible at trial. 3RP 19-21.

classic pimp sales pitch. 12RP 55-56. Smith knew Woods wanted Gill to prostitute herself and give him the money. 12RP 58. After Woods had asked Gill what was wrong with sharing her money, Smith stated, "Sharing is the next best thing." 12RP 56-57. Smith said that what he meant was, "Sharing is [the] next best thing to caring." 12RP 56. Smith explained that sharing is "just a bond. . . . [W]hat person doesn't share?" Id.

C. ARGUMENT

1. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.

Smith asserts that the prosecutor committed misconduct during closing arguments by appealing to the jurors' "passions and emotions." Smith claims that the misconduct denied him his right to a fair trial. Br. of Appellant at 12. Because the record does not support this contention, the Court should reject this claim.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011).

A prosecutor's conduct is evaluated by examining it in the full trial context, including the evidence presented, the total argument, the

issues in the case, the evidence addressed in the argument, and the jury instructions. Monday, 171 Wn.2d at 675.

Without a timely objection, reversal is not required unless the conduct is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. State v. Warren, 165 Wn.2d 17, 43, 195 P.3d 940 (2008). Under this “heightened standard,” a defendant must demonstrate that (1) “no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” State v. Emery, __ Wn.2d __, 2012 WL 2146783, at *8 (slip op. 86033-5, filed June 14, 2012) (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

Appeals to the passion and prejudice of the jury while assuming facts not in evidence can constitute misconduct. See State v. Belgarde, 110 Wn.2d 504, 506-09, 755 P.2d 174 (1988) (prosecutor’s inflammatory remarks that the defendant belonged to a group of “butchers and madmen who killed indiscriminately,” included facts outside the record). However, a prosecutor may detail the circumstances of the crime provided that the argument does not invite an irrational or purely subjective response by the

jury. State v. Gentry, 125 Wn.2d 570, 644, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995). “A prosecutor is not muted because the acts committed arouse natural indignation.” State v. Fleetwood, 75 Wn.2d 80, 84, 448 P.2d 502 (1968).

a. The Prosecutor Did Not Appeal To The Jurors’ Passion And Prejudice.

During trial, the parties discussed the relevance of a study concerning prostitutes’ mortality rates from disease and homicide. The prosecutor said the study was relevant to demonstrate the perils of prostitution.¹⁹ 7RP 4. The prosecutor also stated that he would argue in closing that jurors should treat promoting commercial sexual abuse of a child laws seriously “because of the dangers that face these young women who are working the street.” 7RP 4. The trial court said, “I think that’s in the case, and I think even Ms. Kenefick (defense counsel) talked about the dangers of prostitution [in her opening statement].” 7RP 4.

The jury heard evidence about the growing crisis from pimps promoting juvenile prostitution – a rampant problem that gave rise to Operation Fast Track. 6RP 21-36, 124-32; 10RP 53-55, 74-81.

¹⁹ Smith did not have opening statements transcribed. Apparently, in defense counsel’s opening statement, she commented that Smith’s heavy equipment hauling job was one of the most dangerous jobs in America. See 7RP 3-4. Undoubtedly, during the prosecutor’s closing argument, he wanted to juxtapose the dangers of Smith’s job with the dangers that juvenile prostitutes face.

The prosecutor and defense counsel elicited testimony about the perils that juvenile prostitutes face, such as violence used by pimps as a disciplinary measure, rape, murder, drug addiction and sexually transmitted diseases. 10RP 55, 136-37. Smith testified about dangers to juvenile prostitutes, such as other pimps trying to recruit them and johns who beat them up or rape them. 12RP 50. Smith said, "In that line of work, you could get killed, you could get beat (*sic*) up, you could get raped, you could get whatever." 12RP 51.

From the evidence that Smith concedes was before the jury,²⁰ the prosecutor began his closing argument by reminding the jurors about the "real problem" of "forced prostitution of children." 12RP 148. The problem, the prosecutor said, was here, in Seattle, as the jury had heard. 12RP 148. The prosecutor stated that there are three legs to this "underground commerce" – the children, the johns, and the pimps. 12RP 148-49.

These children under the age of 18, he said, are part of the "underground commerce." 12RP 149. The prosecutor reminded the jurors about forced juvenile prostitution and the serious dangers the girls face: "The risks of getting into that car and being

²⁰ Br. of Appellant at 11 n.2.

assaulted; having sex with a man who has sexually-transmitted diseases, and getting pregnant. Being raped. Being murdered.”
12P 149.

The prosecutor briefly mentioned the second leg (the johns who procure the girls) and the third leg, the pimp. The pimp, he said, is “the person who goes out and puts that child on the street, posts her online, gets her a motel room, takes her to the track, and Ladies and Gentlemen, as you heard, rule number one, collects all the money.” 12RP 149.

The prosecutor reminded the jury that it was the proliferation of this underground commerce in Seattle that was the genesis of Operation Fast Track. 12RP 149-50. The prosecutor emphasized that Officer Gill was backed up by a surveillance team, but the true juvenile prostitutes “don’t have fellow officers who are going to come out of the alley to protect them or help them.” 12RP 150-51.

In rebuttal, the prosecutor said:

Ask yourself this. What if Officer Gill really was 17 and really was a juvenile involved in prostitution? What next for her? What next for her if it’s not the police who’s (*sic*) arresting Mr. Smith on June 21st. What next? That’s why this case matters. And that’s why, when you look back at this evidence and you look at the role the defendant played. I’m saying (*sic*) he’s the primary actor, but he’s a key player.

That's why you should find him guilty, *and I hope you do.*

13RP 71-72.

With the exception of the italicized language above, Smith did not object to the prosecutor's remarks, nor should he have.²¹ The prosecutor did not appeal to the jury's emotions and prejudice; he simply re-stated the trial evidence. While it is likely true that the underground commerce of forced juvenile prostitution "arouse[s] natural indignation," it is not misconduct to speak about it.²² See Fleetwood, 75 Wn.2d at 84.

Smith claims that the prosecutor suggested he "sought to profit from forced child prostitution, thereby coldly disregarding the risk[s]" that juvenile prostitutes face. Br. of Appellant at 14. The prosecutor did not *suggest* anything. Smith did intend to profit from forced child prostitution. The evidence demonstrated that Smith, Woods's accomplice, was to pick Gill up, take the money that she

²¹ The objection – which came *after* the trial court excused the jury to deliberate – was based on a claim that the prosecutor had expressed his personal opinion when he said, "I hope you do." 13RP 73. The State addresses this contention further in section C.1.b of the Respondent's brief.

²² The trial court specifically instructed the jury to reach a decision "based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict." CP 81. Juries are presumed to follow the trial court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

had earned that night, and wire it to Woods. 7RP 101; 9RP 66-68, 71.

Furthermore, Smith coldly disregarded the risks that Gill would have faced, had she been the 17-year-old runaway Woods and Smith believed her to be. Even though Smith understood the risks to juvenile prostitutes (“In that line of work, you could get killed, you could get beat (*sic*) up, you could get raped, you could get whatever”),²³ he intended to pick Gill up and put her out to work the streets that night. See 9RP 71. The prosecutor’s remarks were not improper.

Smith next contends that the prosecutor exhorted the jury to convict Smith based on the “potential dangers of forced prostitution” and that the prosecutor’s argument was “misplaced” because there was nothing “forced” about anything Gill did. Br. of Appellant at 14. Smith misapprehends the prosecutor’s remarks. The prosecutor told the jury that this case mattered because the same risks that Gill would have faced if Smith “put her out to work,” are the same risks that juvenile prostitutes face. 13RP 71-72. It is precisely the argument that the trial court allowed the prosecutor to make

²³ 12RP 51.

because “it’s (the dangers that face these young women who are working the street) in the case.” 7RP 4.

The prosecutor told the jurors that they should convict Smith based on the evidence. The prosecutor conceded that Woods – not Smith – was the “primary actor,” but said that the evidence demonstrated Smith played a key role. 13RP 71-72.

Moreover, through witness examinations, defense counsel tried to minimize the crime because Gill was not a 17-year-old, not a prostitute and never really in danger. See, e.g., 9RP 98-100 (defense counsel asked Gill her age and confirmed that Gill had her service weapon with her as a decoy). So, even if the prosecutor’s remarks were improper, they are not grounds for reversal. Rather, the remarks were “invited or provoked by defense counsel and [were] in reply to . . . her acts and statements.” See State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

b. Belated Objection And Motion For A New Trial.

i. Facts.

As stated above, in the prosecutor’s rebuttal argument, he told the jurors to evaluate the evidence and conclude that Smith was a “key player” in the crime. The prosecutor then said, “That’s why you should find him guilty, and I hope you do.” 13RP 72.

After the trial court excused the jury to begin its deliberations, defense counsel (Ms. Kenefick) objected to the remark, "I hope you do." The remark was improper she said, because it was the prosecutor's personal expression of Smith's guilt. 13RP 73. Ms. Kenefick said her objection was late because she did not have enough time to say, "Objection," before the court excused the jury for its deliberations. 13RP 73-74.

The trial court asked Ms. Kenefick what relief she wanted. 13RP 76. Ms. Kenefick replied that she was "making a record," and "relief is something the Court of Appeals can grant." Ms. Kenefick said that if the Court of Appeals thought that the prosecutor's remark was "so egregious," the court could overturn the verdict. 13RP 77. The following exchange occurred:

The court: Well, actually, I think that the Court of Appeals considers curative instructions in making their (*sic*) decisions. So I'm asking you now: Are you asking for any relief or not?

Ms. Kenefick: [U]p till this point, I haven't had any of my objections sustained, so . . .

The court: I don't think that's of any moment. Are you asking me to do anything, or just you want to leave it as it is for the record?

Ms. Kenefick: Well, I, I think the fact that I've objected probably makes my record.

The court: Okay.

Ms. Kenefick: And it gives me the basis for appeal.

13RP 77.

Post-trial, Ms. Kenefick made a motion for a new trial based, in part, on the prosecutor's "throwaway line that said, 'I hope you do.'" 16RP 10. Ms. Kenefick maintained that the remark, while not ill-intentioned, was an improper statement of the prosecutor's "personal belief." 16RP 10-11. She argued that the misconduct "very easily could have affected the jury's verdict," because the jury reached its verdict rather quickly. 16RP 11.

The court ruled,

[The prosecutor] had made the argument that the evidence supported a finding of guilt for Mr. Smith. And then he said, I hope you will. While he shouldn't have said that, I cannot find that frankly, this is anything like the typical instances of prosecutorial misconduct when a prosecutor gives an opinion on credibility or gives an opinion about the view of evidence. This in a way is a throw away line he said at the end. And so I deny the motion on that basis.

16RP 18.

ii. Standard of review.

A trial court may grant a new trial when it affirmatively appears that prosecutorial misconduct materially affected a substantial right of the defendant. CrR 7.5(a)(2). The decision of

whether to grant or deny a motion for a new trial is reviewed for an abuse of discretion. State v. McKenzie, 157 Wn.2d 44, 51, 134 P.3d 221 (2006). A trial court abuses its discretion “only when no reasonable judge would have reached the same conclusion.” Id. at 52 (internal quotation marks omitted).

- iii. The prosecutor did not express his personal opinion.

While a prosecutor may not express a personal opinion about the defendant's guilt, the prosecutor may argue the defendant is guilty based on the evidence presented. State v. Dhaliwal, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003). “[T]here is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.” McKenzie, 157 Wn.2d at 53 (quoting State v. Armstrong, 37 Wash. 51, 54-55, 79 P. 490 (1905)). A prosecutor may try to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. McKenzie, at 53. Reversible error occurs only when it is “clear and unmistakable” that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion. Id.

As a threshold matter, this Court should hold that Smith waived review of this claim unless the Court finds the prosecutor's remarks flagrant and ill-intentioned.²⁴ The trial court asked Ms. Kenefick what relief she sought. Ms. Kenefick declined relief; she did not seek a curative instruction or a mistrial. Rather, she objected "for the record" and to provide her with the basis for an appeal. 13RP 77. But a timely objection is required so that a party cannot "simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal." State v. Sullivan, 69 Wn. App. 167, 172, 847 P.2d 953 (1993). Here, the objection was untimely and Smith sought no relief at trial. The Court should not permit him to now seek a new trial.

Even if the claim is reviewable, Ms. Kenefick and the trial court recognized the prosecutor's remark, "I hope you do," as a "throwaway line." It was not a "clear and unmistakable" expression of the prosecutor's personal belief. Rather, the prosecutor argued that the evidence supported a finding of guilt and he then expressed his hope that the jury would convict Smith. The remark was not improper. See McKenzie, 157 Wn.2d at 52-53.

²⁴ Ms. Kenefick conceded that the remarks were not ill-intentioned. 16RP 10-11.

Even if the prosecutor should not have uttered the remark, as the trial court stated, there is not substantial likelihood the misconduct affected the jury's verdict. Certainly the jurors knew that the prosecutor hoped they would convict Smith. The jury had just sat through a three week trial during which the prosecutor presented a mountain of evidence for one purpose: to convince the jury beyond a reasonable doubt that Smith had attempted to promote commercial sexual abuse of a child. The trial court did not abuse its discretion when it denied Smith's request for a new trial. This Court should affirm the trial court.

2. BECAUSE THE TRIAL COURT FILED CrR 3.6 FINDINGS, THE ISSUE IS MOOT.

An issue is moot when an appellate court can no longer provide effective relief and the issue presented is purely academic. In re Marriage of T., 68 Wn. App. 329, 336, 842 P.2d 1010 (1993).

When Smith filed his opening brief, the trial court had not yet entered written findings, as required by CrR 3.6. On June 22, 2012, the trial court entered written findings of fact and conclusions of law.²⁵ Because this Court can no longer provide effective relief, the issue is moot.

²⁵ On July 10, 2012, the State designated the findings to this Court. CP 178-81.

D. CONCLUSION

For the reasons stated above, the Court should hold that the prosecutor did not commit misconduct during his closing argument. The Court should accordingly affirm Smith's judgment and sentence. The Court should also hold that the issue concerning unfiled CrR 3.6 findings is moot.

DATED this 25 day of July, 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 Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JERRY SMITH, Cause No. 67857-4 - 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.

UBrame
Name
Done in Seattle, Washington

7/25/12
Date