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Division I
State of Washington

NO. 69132-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ABRAHAM ULLOA-DURAN,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE BRIAN D. GAIN

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUE</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	6
1. THE PROSECUTOR'S REMARKS WERE NOT INCURABLY PREJUDICIAL; ULLOA-DURAN WAIVED ANY PROSECUTORIAL MISCONDUCT CLAIM BY FAILING TO OBJECT	6
D. <u>CONCLUSION</u>	17

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

United States v. Mandelbaum, 803 F.2d 42
(1st Cir. 1986)..... 11, 12

United States v. Young, 470 U.S. 1,
18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)..... 11, 12

Washington State:

State v. Brown, 132 Wn.2d 529,
940 P.2d 546 (1997)..... 9

State v. Coleman, 74 Wn. App. 835,
876 P.2d 458 (1994), rev. denied,
125 Wn.2d 1017 (1995)..... 11, 13

State v. Hoffman, 116 Wn.2d 51,
804 P.2d 577 (1991)..... 10

State v. Jones, 71 Wn. App. 798,
863 P.2d 85 (1993)..... 16

State v. Magers, 164 Wn.2d 174,
189 P.3d 126 (2008)..... 7

State v. McKenzie, 127 Wn.2d 44,
134 P.3d 221 (2006)..... 15

State v. Russell, 125 Wn.2d 24,
882 P.2d 747 (1994)..... 8

State v. Swan, 114 Wn.2d 613,
790 P.2d 610 (1990)..... 8

State v. Thorgerson, 172 Wn.2d 438,
258 P.3d 43 (2011)..... 7, 8, 14

State v. Warren, 134 Wn. App. 44,
138 P.3d 1081 (2006), aff'd,
165 Wn.2d 17, 295 P.3d 940 (2008)..... 16

Other Jurisdictions:

State v. Adams, 292 Kan. 60,
253 P.3d 5 (2011)..... 8, 9

State v. Brunson, 132 N.J. 377,
625 A.2d 1085 (1993)..... 12

State v. Musser, 721 N.W.2d 734
(Iowa 2006) 13

State v. Pennington, 119 N.J. 547,
575 A.2d 816 (1990)..... 12

State v. Tosh, 278 Kan. 83,
91 P.3d 1204 (2004)..... 9

A. ISSUE

The failure to object to a prosecutor's improper remark waives a claim of error on appeal unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. The prosecutor's remarks in closing argument of which Ulloa-Duran complains were isolated, brief, and largely proper. Moreover, any prejudice they might have caused could easily have been cured with a simple jury instruction. Has Ulloa-Duran waived any error by failing to object at trial?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Abraham Ulloa-Duran was charged with two counts of rape of a child in the second degree. CP 17-18. A jury found him guilty as charged. CP 20-21. The trial court imposed concurrent, indeterminate, standard range sentences of 108 months to life and 36 months of community custody. CP 47-57; 10RP 16.¹

¹ The verbatim report of these 2012 proceedings contains 10 consecutively-numbered volumes, referred to in this brief as follows: 1RP = 6/5; 2RP = 6/6; 3RP = 6/11; 4RP = 6/12; 5RP = 6/13; 6RP = 6/14; 7RP = 6/18; 8RP = 6/19 (testimony and arguments); 9RP = 6/19 (verdict); 10RP = 7/27.

2. SUBSTANTIVE FACTS

As a child, M.G. was very close to her maternal uncle, Ulloa-Duran. 6RP 17. Of all of her siblings, she was Ulloa-Duran's favorite. Id. He gave her more attention and more gifts than her siblings. 6RP 19; 5RP 16. As M.G. became older, her relationship with Ulloa-Duran changed. 6RP 19-20. He became "more playful and touchy," and started spending more time with M.G. than with her parents. Id.

The first time M.G. spent time alone with Ulloa-Duran was during the summer before she entered seventh grade. 6RP 20. Ulloa-Duran took M.G. to a movie. Id. at 21. Afterward, Ulloa-Duran told M.G. to tell her mother they were going to see another movie. Id. But instead of taking M.G. to the theater, Ulloa-Duran took her to his apartment. Id. There, he tried to kiss her. Id. at 24-25. When she resisted, he told her he was "preparing [her] for the future." Id. at 26. Ulloa-Duran unsuccessfully tried to try to kiss M.G. on a couple of other occasions, insisting that there was nothing wrong with it. Id. at 27. He then took her shopping and bought her lots of clothes and shoes. Id. at 27-28.

Eventually, M.G. "gave up" and stopped refusing Ulloa-Duran's kisses. Id. at 29-30. After they kissed the first time, Ulloa-Duran took M.G. out to eat and bought her more clothes. Id. at 30-31. When he took her home, he told her that "people have secrets they tell certain people and some people have secrets they keep to themselves, and he told me this is the kind of secret I have to keep to myself." Id. at 31.

The next time M.G. visited her uncle's apartment, "he had porn tapes by the TV and ... a bag from Lovers. And inside the bag it had lubricants and things that go on the penis, and he had condoms." 6RP at 32. Ulloa-Duran played a video "of a girl performing oral sex and he said that's what we're going to try." Id. He took his pants off, applied cherry-flavored lubricant to his penis, and then "grabs my head and makes me do it." Id. at 34-35. After some time, Ulloa-Duran fast-forwarded to a part of the video where the actors were having intercourse and told M.G. that they would try that next. Id. at 36. He removed her pants, put on a condom, and tried to penetrate her vagina with his penis. Id. It hurt, and M.G. told him to stop. Id. Instead, he applied more lubricant "and just force[d] it in." Id. M.G. cried and told him to stop. Id. at 36. Ulloa-Duran withdrew, masturbated to ejaculation, disposed of the

condom in the garbage, showered, and took the garbage out. Id. at 37-38. Afterward, he took M.G. shopping again. "But before we went shopping, he threatened me and told me that if I told anyone, he would kill my parents, kill my family, and take me somewhere where no one would find me." Id. at 38. M.G. did not tell anyone what had happened because she felt isolated in her family and did not think she would be believed. Id. at 26, 39.

Ulloa-Duran and M.G. had sex about four more times over the next three months. 6RP 41, 45. Once, Ulloa-Duran attempted anal penetration, but stopped when it hurt M.G. and she told him no. Id. On another occasion, Ulloa-Duran left M.G.'s little brother in the car while he took M.G. into his apartment for sex. Id. at 42-43. M.G.'s brother recalled being left in the car for 10-20 minutes, and testified that M.G.'s eyes were red when she returned and that she and his uncle were unusually quiet. 7RP 27-29. He asked her what was wrong, but M.G. did not tell him because he was too young and would not understand. 7RP 28; 6RP 44-45.

The abuse continued until Ulloa-Duran had to return to his home country, Chile. 6RP 45-46. When he came back to the United States in August 2010, he did not visit M.G.'s family as much. 5RP 17; 7RP 51, 86; 8RP 9.

After the abuse ended, M.G. felt suicidal "a lot." 6RP 51. In 2011, M.G. disclosed the abuse to her high school boyfriend. Id. at 47-50; 5RP 48-49. Her boyfriend became overwhelmed by the situation and, when she threatened to kill herself, he called 911. 6RP 51; 5RP 55, 57. M.G. was taken to the hospital, where she disclosed the abuse to a psychiatric nurse, and eventually to her mother and older brother. 6RP 53-54; 7RP 4-5, 8, 15.

M.G.'s mother appeared supportive at the hospital. 6RP 54; 7RP 11, 14-15. But once they were home, she forced M.G. to confront her uncle in front of the family. 5RP 59-60; 6RP 56-57. M.G.'s mother verbally harassed her, told her it was all her fault, and blamed her for costing her uncle money and forcing him to hire an attorney. 6RP 60. When M.G.'s brother came to her defense, he was kicked out of the house. Id. at 61.

In the weeks that followed, M.G., her boyfriend, and her younger brother all gave recorded statements to Detective Matthew Holmes. 5RP 61, 117-20, 123-24. Police arrested Ulloa-Duran after M.G.'s interview. 5RP 122. M.G.'s aunt was present at the arrest and became angry. Id. She called M.G. a "bitch" and threatened to have her and her family deported. 7RP 55-56.

Detective Holmes contacted M.G. to tell her about the arrest and her aunt's reaction. 5RP 123. Based on their conversation, Holmes told M.G. to meet him at the station and he contacted Child Protective Services. Id. Shortly thereafter, M.G. was placed in a foster home.² 6RP 7-8.

Ulloa-Duran presented a general denial defense. He acknowledged taking M.G. shopping alone several times, but testified that he was never alone with M.G. in his apartment and never sexually abused her. 8RP 14-17. He also presented testimony from family members and a close family friend who indicated that they never noticed anything strange about Ulloa-Duran's relationship with M.G. 7RP 51-52, 60-61, 87-88.

C. ARGUMENT

1. THE PROSECUTOR'S REMARKS WERE NOT INCURABLY PREJUDICIAL; ULLOA-DURAN WAIVED ANY PROSECUTORIAL MISCONDUCT CLAIM BY FAILING TO OBJECT.

Ulloa-Duran contends that the prosecutor committed reversible misconduct by appealing to the jury's sympathies and improperly suggesting that the jury would violate its oath by failing

² The trial court granted Ulloa-Duran's motion to exclude reference to M.G.'s new home as a "foster" home. 2RP 17-18; 4RP 9-10. M.G. testified that she was living with a "new family." 6RP 63.

to find him guilty. Because he made no objection to the argument, the claim is waived. And because the remarks were not incurably prejudicial in any event, his claim fails.

All of the alleged misconduct is contained in the following brief portion of closing argument:

But the easiest thing for all of you to do is to turn your back on [M.G.], to throw your hands up in the air and to say, I don't care, I don't know what happened. He denies it. You took an oath to determine – you took an oath to do what's fair and to evaluate the evidence from the testimony and the credibility of the witnesses. It's going to take courage to decide to convict someone. It's going to take courage to uphold the law. The State is asking, do you have the courage in this case to do the right thing, to hold this man accountable for what he did to [M.G.], and to find him guilty.

8RP 35.

To establish prosecutorial misconduct, Ulloa-Duran must show “that the prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). Prejudice is established only when “there is a substantial likelihood [that] the instances of misconduct affected the jury’s verdict.” Id. at 442-43.

Because Ulloa-Duran did not object to the argument at trial, he has waived the claim unless he can show that “the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Thorgerson, 172 Wn.2d at 443 (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)).

The absence of a motion 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 ... in the context of the trial. Moreover, counsel 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 a new trial or on appeal.

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

Ulloa-Duran contends that the prosecutor’s remarks amounted to flagrant and ill-intentioned misconduct because they violated well-established rules against appealing to the sympathy and passions of the jury. He relies on two Kansas cases to argue that the prosecutor’s exhortation not to “turn your back on [M.G.]” was such an appeal. In State v. Adams, the prosecutor argued that the trial was the murder victim’s “only chance” to have someone held accountable. 292 Kan. 60, 67-68, 253 P.3d 5 (2011). But

while the court held that the argument was improper, the passing reference was “not gross or flagrant” and did not constitute plain error warranting reversal. Id. Not so in State v. Tosh, where the court concluded that the cumulative effect of multiple improper comments – including arguing that defense counsel would “kind of rape [the victim] again” in closing argument, suggesting a nefarious motive for insisting on a trial despite Tosh’s confession, and asking whether there was “any evidence that the things she said didn’t happen” – deprived Tosh of a fair trial. 278 Kan. 83, 92, 91 P.3d 1204 (2004).

The conduct complained of here is plainly distinguishable from the egregious conduct in Tosh. As in Adams, even if the remarks at issue tended to appeal to the jury’s sympathy, the passing reference was not flagrant and does not warrant reversal.

Moreover, the impropriety and prejudicial impact of a prosecutor’s remarks “must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Here, the evidence was that most of M.G.’s family was unsupportive and antagonistic when she disclosed the abuse. Some members of her family testified

that they had never spoken with M.G. about the abuse and were angry with her for disclosing it. 7RP 54, 64. Her aunt called her a “bitch” and threatened to have M.G. and her family deported. 7RP 56. Her mother forced her to confront Ulloa-Duran in front of the family, blamed her for “costing [her] uncle a lot of money,” and screamed at her when Ulloa-Duran was later arrested. 6RP 58-63. The prosecutor’s remarks urging the jury not to turn their backs on M.G., and to have “the courage to uphold the law,” thus appear to respond to evidence suggesting that M.G.’s own family preferred to turn their backs rather than to confront the issue directly and thereby disrupt Ulloa-Duran’s life. Given a prosecutor’s wide latitude in closing argument to draw and express reasonable inferences from the evidence, the argument does not amount to flagrant misconduct. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

Ulloa-Duran also argues that it was flagrant misconduct for the prosecutor to state that the jury “took an oath to do what’s fair” and that it would take “courage to decide to convict someone.” He relies on authority holding that arguments suggesting that a jury violates its oath by failing to convict are improper. See Brief of

Appellant at 11-13. In United States v. Young, 470 U.S. 1, 5-6, 18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985), for example, the Supreme Court held that it was improper for a prosecutor to argue that the jury would not be "doing your job as jurors" if it acquitted the defendant of fraud charges. And in United States v. Mandelbaum, 803 F.2d 42, 43-44 (1st Cir. 1986), it was improper for the prosecutor to tell the jury, "Do your duty and return a verdict of guilty." In State v. Coleman, the court held that it was improper for the prosecutor to argue that convicting the defendant of a lesser included offense would "violate your oath as jurors." 74 Wn. App. 835, 838-39, 876 P.2d 458 (1994), rev. denied, 125 Wn.2d 1017 (1995).

But read in context, the prosecutor's argument in this case is distinguishable from those in the cited authority: "You took an oath to determine – you took an oath to do what's fair *and to evaluate the evidence from the testimony and the credibility of the witnesses.*" 8RP 35 (emphasis added). The argument was not that the jury's oath compelled a guilty verdict, but that it required careful consideration of witness testimony and credibility. This is an accurate description of the jury's obligation. See CP 23-24 (instructing the jury on its duty to evaluate witness credibility and

decide the case based on the evidence admitted and the law as provided by the trial court).

Additionally, the prosecutor's references to courage must be read along with the remarks that preceded them:

I get it, you guys have a difficult job ahead of you, that you're thrown into this process. ... But no one told you that this process was going to be easy, that being a juror it was going to be easy, it's not. It's a tough job. And this is a serious case.

8RP 34 (emphasis added). These comments represent a candid acknowledgement that the jury would have to make difficult credibility determinations. In this context, the "courage" argument can be seen as simply the fortitude to pass judgment.

To the extent that these remarks may have been improper, reversal is still inappropriate. None of the cases on which Ulloa-Duran relies reversed because of references to the jurors' oath.³ In Young, the Court held that the prosecutor's argument, while improper, did not constitute plain error warranting review absent an objection. 470 U.S. at 18. The Mandelbaum court similarly held that the argument did not constitute "severe

³ While a New Jersey court did reverse a capital murder conviction in State v. Pennington, 119 N.J. 547, 575 A.2d 816 (1990), overruled on other grounds, State v. Brunson, 132 N.J. 377, 392, 625 A.2d 1085 (1993), the prosecutor's argument suggesting that the jury would violate its oath by finding the defendant not guilty was only one component of a "persistent pattern of misconduct throughout the trial." Id. at 577.

misconduct” and even upheld the trial court’s denial of a belated request for a curative instruction. 803 F.2d at 44.

In State v. Musser, 721 N.W.2d 734, 756 (Iowa 2006), the court held that the prosecutor’s argument that convicting the defendant was “the right thing to do” was improper, but not prejudicial where the remarks were isolated, the evidence was strong, and the remarks did not go to the central issue in the case. And in Coleman, the court held that the prosecution’s inappropriate argument posed no substantial likelihood of affecting the verdict because the isolated remarks were tempered by other comments indicating that the verdict would be honored. 74 Wn. App. at 841.

As in Musser and Coleman, the remarks of which Ulloa-Duran now complains were brief and isolated, comprising only a handful of words in an otherwise unobjectionable closing argument. The remainder of the argument accurately described the law, the evidence, and the State’s burden. 8RP 24-35. It did not dwell on the jurors’ oath or on notions of fairness, courage, or “doing the right thing.” Additionally, the jury was properly instructed that the lawyers’ remarks were not evidence, that it must not let emotions overcome rational thought processes, and that it must decide the case based upon the facts and law, not sympathy,

prejudice, or personal preference.⁴ CP 23-26. The jury is presumed to follow the court's instructions. Thorgerson, 172 Wn.2d at 444.

Further, although the case depended upon the credibility of the witnesses, the evidence of guilt was nevertheless considerable. M.G.'s testimony that Ulloa-Duran favored her above her siblings, and richly rewarded her with extra attention and gifts, was corroborated by her two brothers. Her descriptions of Ulloa-Duran's initial attempt to kiss her and their first sexual encounter were detailed and thorough. M.G.'s younger brother

⁴ Instruction 1 provided, in part, as follows:

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case. ...

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions. ...

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought processes. You must reach your 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 23-26.

corroborated another of the incidents when he testified that he waited in the car for a lengthy period while Ulloa-Duran took M.G. into his apartment, that the two behaved strangely upon their return, and that M.G. was unusually quiet and her eyes were red. Finally, aside from minor discrepancies in the timing of M.G.'s disclosure of the abuse to her boyfriend, M.G.'s statements to her boyfriend, the psychiatric nurse, and the police were consistent with her trial testimony. Given the strength of the evidence, it is unlikely that the jury was influenced to any significant degree by the prosecutor's isolated remarks about the jury's oath, doing the right thing, or having the courage to uphold the law.

Even if the prosecutor's argument was prejudicial misconduct, Ulloa-Duran has not demonstrated that an instruction could not have neutralized the prejudice. He argues that the prejudice in this case was incurable simply because of the "inherently repugnant" nature of child sexual abuse. Brief of Appellant at 16. Of course if this, standing alone, were sufficient to demonstrate incurable prejudice, all instances of improper argument in child sex crime prosecutions would lead to reversal. Even cursory research plainly belies that proposition. See, e.g., State v. McKenzie, 127 Wn.2d 44, 60, 134 P.3d 221 (2006)

(holding that although prosecutor's arguments in a case involving rape of a child went "too far," they were not so flagrant and ill-intentioned that their prejudicial effect could not have been cured by an instruction); State v. Warren, 134 Wn. App. 44, 61, 138 P.3d 1081 (2006), aff'd, 165 Wn.2d 17, 295 P.3d 940 (2008) (holding that improper argument concerning reasonable doubt in case involving child sexual abuse was obviated by curative instructions and posed no substantial likelihood of affecting the verdict); State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993) (holding that while prosecutor's argument that concerning "a general societal problem of concern for children" improperly appealed to the passion and prejudice of the jury, "it does not rise to the level of flagrancy requiring reversal").

Had Ulloa-Duran objected, the court could easily have obviated any possible prejudice by repeating or elaborating on the instructions it had already given. Because he did not, this Court should conclude the issue has been waived.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Ulloa-Duran's convictions for two counts of Rape of a Child in the Second Degree.

DATED this 19th day of February, 2013.

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 P. 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. ULLOA-DURAN, Cause No. 69132-5 -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.

Dated this 20th day of February, 2013

W Brame

Wynne Brame
Done in Seattle, Washington