

71109-1

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NO. 71109-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KAREN MORGAN,

Appellant.

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The victim in this criminal mistreatment case was elderly Hannah Sinnett. In the middle of closing, the prosecutor addressed the evidence that defendant Karen Morgan created an imminent risk of death or great bodily harm to Sinnett. The prosecutor asserted that it was inappropriate to discount the days of the life of a human being, even one close to death, stating, "every day mattered, and how dare [Morgan] imply that the person's life didn't matter and that she was dying." Has Morgan established that this was an improper appeal to decide the case based on passion or prejudice?

2. The jury was instructed to act impartially and to decide the case based on the facts proved and on the law provided, not based on sympathy or prejudice. When Morgan objected to the prosecutor's statement that it should not be debated that each day of victim Hannah Sinnett's life had value, the court sustained the objection but declined to further instruct the jury. If the argument was improper, has Morgan established that this single statement deprived her of a fair trial?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Karen Morgan, was charged with criminal mistreatment in the second degree, contrary to RCW 9A.42.030, relating to her failure to provide necessary care for elderly Hannah Sinnett, a dependent person, between December 22 and December 27, 2009. CP 1-9. The Honorable Michael Hayden presided over a jury trial that began on August 13, 2013. 1RP 1-2.¹ The jury found Morgan guilty as to the lesser crime of criminal mistreatment in the third degree, a gross misdemeanor, contrary to RCW 9A.42.035. CP 56, 67. The court imposed a suspended sentence, on conditions including that Morgan spend four months on Electronic Home Detention and that she provide no care to vulnerable adults, with the exception of family members. CP 67-69.

¹ The Report of Proceedings is referred to in this brief as it is in the appellant's brief, as follows: 1RP – 8/13/13; 2RP – 8/14/13; 3RP – 8/15/13; 4RP – 8/19/13; 5RP – 8/20/13; 6RP – 8/21/13; 7RP – 8/26/13; 8RP – 8/27/13 (the date on the cover of this transcript incorrectly lists the year as 2012); 9RP – 8/29/13; and 10RP – 10/21/13.

2. SUBSTANTIVE FACTS

In December 2009, 92-year-old Hannah Sinnett resided at Seattle Heights, an adult family home (AFH)² for vulnerable adults, which was run by Regina Daniels. Ex. 1 at p. 2-3; 3RP 52-53; 5RP 112. Sinnett's power of attorney was held by her brother-in-law, Sam Robison. 3RP 46, 53; 4RP 172. Sinnett suffered from dementia. 3RP 51.

Defendant Karen Morgan was the nurse delegator for Sinnett. 5RP 117. A nurse delegator is a registered nurse who acts as an independent liaison between an AFH resident and care providers. 5RP 106-07. Under the Washington Administrative Code, her responsibility was to examine residents at least every 90 days, and if appropriate, delegate specific nursing care to trained nursing assistants with specific instructions. 5RP 107-08, 121 (90 days). She also had the responsibility to train and monitor the caregivers. 5RP 120.

Morgan became Sinnett's nurse delegator in 2006. 3RP 55-57; 4RP 188-90. Morgan saw Sinnett on December 22, 2009, when Daniels asked Morgan to take a urine sample from Sinnett. Ex. 9; 3RP 62-64; 4RP 175. Morgan at that time saw that Sinnett

² An adult family home is a residential setting licensed to provide care for fewer than six persons, and regulated by the state. 4RP 157-58, 161.

had several serious pressure ulcers. 4RP 176; 6RP 13. Morgan later reported that she was stunned and shocked when she saw the wounds. 4RP 177.

On December 22, Morgan called Robison, who was responsible for making decisions about Sinnett's health care, and told him that Sinnett had serious bedsores. 3RP 53, 63-65. Morgan did not say that the wounds were open or that they were infected. 3RP 64. Morgan said that she could treat the wounds at the AFH, if that is what Robison wanted. 3RP 64. Morgan did not say that Sinnett was dying. 3RP 65.

On December 23, Courtney Tarr, a registered nurse, came to Seattle Heights AFH to attend to another resident. 6RP 28, 40. She smelled a terrible odor, asked the caregiver where it came from and was directed to Sinnett's room. 6RP 41-42. When the caregiver pulled back the sheet, Tarr saw that Sinnett had two pressure ulcers, observing "[d]eep tissue injury, black, dead tissue, lots of yellowish drainage, horrible odor." 6RP 44. There was no dressing on the wounds. 6RP 44. The wounds should have been covered to prevent infection. 6RP 47. Sinnett was moaning, apparently in pain. 6RP 46. Tarr believed Sinnett needed to be

hospitalized to provide appropriate care for the wounds. 6RP 50-51.

Tarr immediately called Daniels, the owner of the home, demanding an explanation. 6RP 47-48. Daniels said she would come to the home but did not appear before Tarr left. 6RP 48. Later that day, Tarr received a call from a woman who identified herself as Karen Morgan, Sinnett's wound care provider. 6RP 48-49. Tarr said that she would call 911 unless Sinnett was taken to the hospital, and Morgan agreed to do that. 6RP 51.

Morgan did not have Sinnett taken to the hospital until four days later, on December 27. Ex. 1, 9. When Sinnett was admitted to Swedish Medical Center that day, she was treated in the emergency room by Dr. Seo, who observed that her largest pressure ulcers had an untreated covering of dead tissue; he provided "heavy-duty" antibiotics. 3RP 16-27. He concluded that Sinnett's wounds were not adequately treated at the AFH. Ex. 1 at p. 9; 3RP 26-28.

Nurse and certified wound specialist Laura Vadman examined Sinnett that day and identified seven pressure ulcers, which she described in detail. Ex. 7, 20; 4RP 13-18, 35-40. Vadman characterized Morgan's description of the wounds on

December 23, in a document Morgan provided to Sinnett's physician, as misleading as to the nature and cause of the wounds. 4RP 49-52.

Dr. David Shutte, who attended Sinnett at Swedish beginning on December 27, found that she had severe pressure sores that were infected. 5RP 9-10. Sinnett also was dehydrated. 5RP 9.

Robison, Sinnett's brother-in-law, saw the wounds when Sinnett was admitted to Swedish and described them as "the worst thing I ever saw." 3RP 69.

An experienced nurse who worked on an investigation of this case by the Department of Social and Health Services described Sinnett's wounds on admission to Swedish as "probably the worst pressure ulcers that I have seen, both, in size and in number." 4RP 149-55, 194. The pictures of the wounds that were taken at Swedish were admitted as exhibits. Ex. 7, 20.

The jury was informed that Regina Daniels pled guilty to criminal mistreatment in the second degree, based on her failure to provide adequate medical care to Sinnett between December 1 and December 22, 2009, while Sinnett was a resident of Daniels' AFH. 4RP 135-37.

In a November 2010 letter to a Department of Health investigator, Morgan said that Sinnett had multiple serious (Stage IV) pressure wounds when Morgan saw her on December 22, 2009. 6RP 9, 13, 17-20. Morgan said she felt that Sinnett was neglected and abused by the on-site caregiver. 6RP 13. As a nurse, Morgan was required to immediately report suspected neglect to a toll-free state hotline. 4RP 190. She did not report Sinnett's condition to DSHS until December 27, 2009. 4RP 191.

On December 29, Morgan billed Robison \$2385 for wound care to Sinnett that she provided between December 22 and December 27, 2009. 3RP 71.

On January 7, 2010, Sinnett was transferred to a nursing home. 5RP 12. On January 12, 2010, Sinnett died. 3RP 70; 4RP 125. On January 25, 2010, Morgan filed a small claims action, asserting that Robison owed her \$5000 for Sinnett's care for, among other things, wound care two to three times a day. 4RP 138-39.

When they become infected, pressure ulcers can be fatal. 3RP 15-16; 4RP 22-23. Dr. Laura Mosqueda, a specialist in geriatric medicine and neglect, concluded that the pressure ulcers contributed to Sinnett's death. 7RP 32. Dr. Mosqueda concluded

that Morgan's documentation of the wounds was inadequate and that Morgan was not providing adequate care between December 22 and December 27. 7RP 39-55, 68, 133. She described the quality of Sinnett's care as "awful, neglectful, obviously horrible." 7RP 134.

C. ARGUMENT

Morgan claims that the prosecutor's statement in closing argument that Hannah Sinnett's life mattered was an improper appeal to passion that warrants reversal of her conviction. This argument should be rejected. The remark was a brief expression of indignation warranted by the facts of the case and relevant to the issues. There is no reason to believe that the prosecutor's single, moderate expression of indignation would have overshadowed the court's instructions to act impartially and based on the evidence, and the remainder of the arguments by both parties. Morgan has not sustained her burden to establish that the argument was improper or that there was a substantial likelihood that the jurors were influenced by any impropriety.

1. THE PROSECUTOR'S ARGUMENT THAT IT WAS UNREASONABLE TO DISCOUNT THE LIFE OF A HUMAN BEING WAS NOT MISCONDUCT.

Morgan asserts that the prosecutor's use of the phrase "how dare she imply that this person's life didn't matter" was an appeal to the jury's sympathy and prejudice and encouraged the jury to ignore the evidence. To the contrary, the remark was an expression of indignation warranted by the facts of the case. It anticipated a defense theory that had been signaled in Morgan's cross-examination of the State's witnesses. That single remark was proper and did not suggest that the jury should convict for any other reason than Morgan's behavior in failing to provide proper treatment to an elderly, ailing woman.

Arguments that are "mere appeals to the jury's passion or prejudice" are improper. State v. Gregory, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006). For example, the prosecutor in a rape case was held to have made such an improper appeal to passion, when the prosecutor in closing argument read a lengthy poem that very vividly described the emotional effect of rape on its victims. State v. Claflin, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984); see also State v. Pierce, 169 Wn. App. 533, 280 P.3d 1158 (2012) (prosecutor improperly fabricated inflammatory details of how brutal

home-invasion murders occurred and encouraged jurors to identify with the victims). Another example of such an improper appeal is a homicide case in which the prosecutor launched a passionate tirade against the defendant, including the argument that if the jury let the defendant get away with cold-blooded murder, it would be responsible for many killings of innocent people. State v. Huson, 73 Wn.2d 660, 661-63, 440 P.2d 192 (1968); see also State v. Perez-Mejia, 134 Wn. App. 907, 143 P.3d 838 (2006) (prosecutor improperly urged jurors to take part in a mission to end violence in the community and to return a guilty verdict to send a message to gangs, and improperly appealed to nationalism and ethnic prejudice); State v. Echevarria, 71 Wn. App. 595, 596-99, 860 P.2d 420 (1993) (prosecutor improperly made lengthy argument regarding the war on drugs and the “battlefield of our own streets”).

A defendant who claims on appeal that prosecutorial misconduct deprived her of a fair trial bears the burden of establishing that the conduct was improper. State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653 (2012); State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). To determine whether a prosecutor’s closing argument was improper, a reviewing court must examine the entire argument, the issues in the case, the

evidence addressed in the argument, and the court's instructions to the jury. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). In this context, Morgan has not met her burden to establish that the prosecutor's comment was an improper appeal to passion or prejudice.

In contrast to an argument that is merely an appeal to passion or prejudice, it is not improper for a prosecutor to include editorial comment or incorporate dramatic language in an otherwise relevant argument. State v. Brown, 132 Wn.2d 529, 566-69, 940 P.2d 546 (1997). It also is not improper for a prosecutor to express natural indignation when the circumstances justify it. State v. Borboa, 157 Wn.2d 108, 123, 135 P.3d 469 (2006) (citing State v. Fleetwood, 75 Wn.2d 80, 84, 448 P.2d 502 (1968)).

Morgan was charged with criminal mistreatment in the second degree. CP 1-2; RCW 9A.42.030. One of the elements of the crime was that Morgan recklessly created an imminent and substantial risk of death or great bodily harm to Hannah Sinnett by withholding any of the basic necessities of life. CP 48; RCW 9A.42.030. In her closing, the prosecutor reviewed the chronology of events, addressed the evidence that Morgan acted recklessly, then addressed the evidence that Morgan created an imminent risk

of death or great bodily harm. 8RP 4-12 (chronology), 14-22 (recklessness), 22-25 (imminent risk of harm).

After she reviewed the evidence that Morgan created a substantial risk of death or great bodily harm, the prosecutor anticipated a defense argument that Morgan did not create a risk of death because the victim already was dying. 8RP 22-24. The victim was an elderly woman. The prosecutor asserted that it was inappropriate to discount the life of a human being, even one close to death, concluding, "every day mattered, and how dare [Morgan] imply that the person's life didn't matter and that she was dying." 8RP 24. Morgan objected to this as "improper argument." 8RP 24. The court sustained the objection but declined to strike it or instruct the jury further. 8RP 24. After that objection, the prosecutor continued by summarizing the evidence that proved that Sinnett was not dying at the relevant times. 8RP 24-25.

The grounds for the objection was not specified, and it is not clear upon what grounds the trial court sustained it. 8RP 24. The court did not state that it believed the argument was an appeal to passion or prejudice. Given that the court declined to strike the argument or give a curative instruction, it appears that the court did not find the remark significant.

The challenged argument directly addressed an issue in the case: the creation of an imminent risk of death. The prosecutor argued that the proof on this issue should not be negated by the fact that Sinnett was to some degree close to death at the time the risk was created, noting that each day of Sinnett's life was significant. Arguing "how dare [Morgan] imply" that Sinnett's life did not matter was an expression of indignation that was appropriate to such an argument. The prosecutor's language was not vituperative, although it was strong language.

This defense theory warranted indignation, based on the evidence at trial and the crime charged. The evidence had shown that Sinnett was 92 years old, had horrifying wounds when she finally was admitted to the hospital, and died less than two months later. Ex. 1, 7, 20; 3RP 70; 4RP 125. An argument that acceleration of an elderly, ailing person's death could not be the basis for a conviction of criminal mistreatment is legitimately offensive in the context of this case.

Morgan claims that her legitimate arguments were "overshadowed" by the prosecutor's allegedly improper remark. App. Br. at 8-9. This claim illustrates that the prosecutor's remark did rebut a defense theory of the case. As explained in Morgan's

appellate brief, the remark was relevant to two defense theories: first, the theory that given Sinnett's already compromised condition when Morgan became her wound nurse, Morgan did not create a risk of death or great bodily harm; second, the theory that it would not have made a difference to Sinnett's "overall health" if she had been hospitalized when she was first seen by Morgan, on December 22. App. Br. at 8-9 (citing Morgan's closing, 8RP 57-61); see also 8RP 37 (defense closing, arguing victim's "health was declining"). Both theories rely on the premise that Sinnett's health was so bad on December 22 that Morgan could not have created a risk of death. The prosecutor properly argued that even under these circumstances, the defendant could create a risk of death, a speedier death, and that additional days of Sinnett's life should not be discounted.

Morgan's argument on appeal is that the prosecutor "meant to invoke a sense of shame and ire toward Morgan," or "rely on emotional prejudice against Morgan." App. Br. at 6, 10. However, the argument did neither – it only expressed indignation as to a potential argument that a risk of death or great bodily harm had not been proven. To the extent that shame and ire would be attributed to Morgan because she treated an elderly woman inhumanely, that

is the essence of the charge in this case. That her victim was a frail 92-year-old was not an irrelevant basis for argument – it was at the core of the case. See Fleetwood, 75 Wn.2d at 84 (prosecutor's emphasis that defendant had assaulted an 87-year-old woman was not improper, when that was the evidence in the case). The argument was not a mere call to rely on emotion and not reason, it was an argument that the advanced age or frail condition of a patient is not a defense to a criminal mistreatment charge. There was no appeal to any characteristic of Morgan or the victim that was not relevant to the charge; the argument was not improper.

2. MORGAN HAS NOT ESTABLISHED THAT THE PROSECUTOR'S STATEMENT, THAT IT SHOULD NOT BE DEBATED THAT SINNETT'S LIFE HAD VALUE, DEPRIVED HER OF A FAIR TRIAL.

Morgan has not established that there is a substantial likelihood that the argument of the prosecutor as to the value of Sinnett's life influenced the jury, even if that isolated remark was improper. There is no reason to believe that the prosecutor's single, moderate expression of indignation would have overshadowed the court's instructions to act impartially and based on the evidence, and the remainder of the arguments by both

parties. The statement was not highlighted by its placement in the argument, nor did indignation permeate the argument. Morgan has not sustained her burden to establish a substantial likelihood that the jurors were influenced by any impropriety.

A defendant who claims that prosecutorial misconduct deprived her of a fair trial generally bears the burden of establishing that any improper conduct was prejudicial.³ Emery, 174 Wn.2d at 764 n.14; Fisher, 165 Wn.2d at 747. If misconduct is proven, it is grounds for reversal if the defendant establishes a substantial likelihood that the improper conduct affected the jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). In analyzing potential prejudice, improper comments are not viewed in isolation, but in the context of the total argument, the issues, the evidence, and the instructions given to the jury. Emery, 174 Wn.2d at 764 n.14; State v. Rafay, 168 Wn. App. 734, 824, 829-30, 285 P.3d 83 (2012).

³ The exception to this rule is that if the defendant has established that the prosecutor flagrantly or apparently intentionally appealed to racial bias in a way that undermined the defendant's credibility or the presumption of innocence, the State must establish beyond a reasonable doubt that the misconduct did not affect the jury's verdict. State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). In this case, there is no claim that there was any appeal to racial bias at any point during the trial.

The challenged remark was one statement in the middle of the prosecutor's closing argument, expressing indignation at a potential defense argument, preemptively responding to the argument. There is no claim that the prosecutor appealed to any bias or prejudice that was unrelated to the charge.

The court repeatedly instructed the jury to decide the case impartially, based on the evidence presented at trial. Instruction 1 provided in relevant part:

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.

...

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. 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 31-34. Instruction 2 began with another reference to impartial consideration of the evidence:

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. ...

CP 35. The concluding instruction repeated the admonition to discuss each issue presented “fully and fairly.” CP 53. The jury is presumed to have followed its instructions. Emery, 174 Wn.2d at 764 n.14.

Morgan has cited nothing to rebut the presumption that the jurors followed the court’s instructions to decide the case impartially, based on the evidence presented. The single challenged remark was in the middle of the State’s closing argument, which addressed the evidence and the relevant law at length. The timing of a remark is relevant to its possible influence on the jury; a remark at the end of rebuttal is more likely to have a prejudicial effect because they are the last words heard before deliberations. State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014). Morgan had an opportunity to respond to the remark in her own closing and did argue that the prosecutor was appealing to emotion. 8RP 30. There is no allegation that any part of the State’s rebuttal in this case was an appeal to passion.

This Court’s analysis of the prejudicial effect of improper argument in State v. Rafay, supra, is instructive. In that case the prosecutor improperly and repeatedly compared the charged homicides with a recent terrorist beheading, and improperly

referred to his own reaction to his father's recent death and the jurors' reactions to the death of their parents, contrasting it with one defendant's response to the death of his murdered family. Rafay, 168 Wn. App. at 825-32. The Court nevertheless concluded that there was not a substantial likelihood that these comments affected the verdicts because the prosecutor did not directly compare the defendants to the terrorists or suggest political motives, the prosecutor was not exploiting misconduct that might have occurred during trial, the comments were a small portion of the lengthy argument, and in each instance the improper remarks were brief and the prosecutor immediately returned to an examination of the evidence admitted at trial. Id. at 831-32.

In contrast, in State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984), the court held that the presumption that the jury followed the instructions had been rebutted. In Davenport, the prosecutor in rebuttal described accomplice liability, although the jury had not been instructed on it. Id. at 758-59. The trial court overruled a defense objection to that argument. Id. at 759. During deliberations, the jury asked for a definition of accomplice liability, and the court's response to that inquiry did not clarify that the jury could not rely on accomplice liability to convict. Id. at 764. The

court concluded that the jury was influenced, if not misled, by the prosecutor's improper argument. Id. at 765.

The remark challenged by Morgan did not refer to matters outside the record, as the arguments in Rafay did, and the prosecutor in this case preceded and immediately followed the remark with reviews of the evidence at trial. 8RP 4-25. There is no evidence, as there was in Davenport, that the jury was influenced to act contrary to the instructions given.

Morgan suggests that the trial court lent an improper argument legitimacy because it declined to strike the argument. However, he cites Davenport to support that claim, and in that case the trial court overruled the defense objection to the argument. 100 Wn.2d at 759. Here, the trial court sustained the defense objection. 8RP 24. That ruling cannot have been considered an endorsement of the prosecutor's remark.

Morgan's claim on appeal that this single remark overshadowed the theories that she presented in closing argument gives too little credit to jurors' ability to act rationally. The jury's duty was to determine whether Morgan's inadequate care of Sinnett's wounds recklessly created an imminent risk of death or great bodily harm to this fragile woman. The prosecutor expressed

indignation in responding to defense theories that Morgan could not have created such a risk because of Sinnett's already declining health. That indignation was warranted by the evidence. There is no reason to believe that this single remark of the prosecutor would have overshadowed the evidence admitted during the trial, the court's instructions, and the remainder of the arguments by both parties. Morgan has not established that prejudice based on the challenged statement of the deputy prosecutor would have had a substantial effect on the jury in the context of this evidence, the proper instructions of the court, and the arguments as a whole.

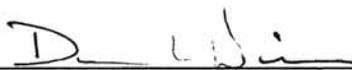
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Morgan's conviction.

DATED this 5 day of September, 2014.

Respectfully submitted,

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Certificate by 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 Kevin March, 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. KAREN MORGAN, Cause No. 71109-1 -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 5 day of September, 2014

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Name

Done in Seattle, Washington