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COURT OF APPEALS
DIVISION II

10 DEC 27 AM 11:32

STATE OF WASHINGTON
BY 
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NO. 40845-7-II
COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MARK J. GOSSETT,

Appellant,

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Carol A. Murphy, Judge
Cause No. 08-1-02102-9

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in allowing the State during closing argument to deny Gossett a fair trial by creating a false choice and minimizing and shifting the burden of proof to Gossett.
02. The trial court erred in permitting Gossett to be represented by counsel who provided ineffective assistance by failing to object to the prosecutor's closing argument that created a false choice and minimized and shifted the burden of proof to Gossett.
03. The trial court erred in admitting the statement A.R.G. made to David Glidewell under the excited utterance exception to the hearsay rule.
04. The trial court erred in imposing a community custody condition prohibiting Gossett from purchasing, possessing or viewing any pornographic materials.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the prosecutor's closing argument, which created a false choice and minimized and shifted burden of proof to Gossett, constitutes prosecutorial misconduct that denied Gossett a fair trial? [Assignment of Error No. 1].
02. Whether the trial court erred in permitting Gossett to be represented by counsel who provided ineffective assistance by failing to object to the prosecutor's closing argument that created a false choice and minimized and shifted the burden of proof to Gossett? [Assignment of Error No. 2].

03. Whether Gossett was prejudiced requiring reversal of his convictions where the trial court abused its discretion in admitting the statement A.R.G. made to David Glidewell under the excited utterance exception to the hearsay rule? [Assignment of Error No. 3].
04. Whether the community custody provision prohibiting Gossett from purchasing, possessing or viewing any pornographic materials is unconstitutionally vague? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

01. Procedural Facts

Mark J. Gossett (Gossett) was charged by second amended information filed in Thurston County Superior Court on April 14, 2010, with two counts of rape of a child in the second degree, counts I-II, two counts of child molestation in the second degree, counts III-IV, and intimidating a current or prospective witness (domestic violence), count V, contrary to RCWs 9A.44.076, 9A.44.086, 9A.72.110(1)(a) and 10.99.020. [CP 68-69]. Count V was severed from the case. [RP 15-17].¹

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 18]. Trial to a jury commenced on April 14, the Honorable Carol A. Murphy presiding. Neither exceptions nor objections

¹ All references to the Report of Proceedings, unless otherwise indicated, are to the transcripts entitled Jury Trial Volumes I-VIII.

were taken to the jury instructions. [RP 1404].

The jury returned verdicts of guilty as charged on counts I-IV, Gossett was sentenced within his standard range and timely notice of this appeal followed. [CP 160-63, 184-198].

02. Substantive Facts²

In June 2000, A.R.G. (dob 11/26/89) and her biological sister S.G. (dob 12/09/87), were placed as foster children in the home of Gossett and his wife Linda [RP 272-74, 343, 830, 896, 963, 966, 992], who adopted the children in December 2001. [78, 830, 992].

A.R.G., had difficulty adjusting to the Gossetts' strict rules and discipline and was frequently reprimanded up until she reached the 10th grade. [RP 276-77, 279, 281, 304]. In January 2008, during her senior year in high school, A.R.G., following an argument with her mother [RP 120, 144], moved out of the Gossetts' residence, and the following June made her initial allegations of sexual abuse, telling Jennifer Myrick and Roberta Vandervort that since the eighth grade she had been sexually molested by Gossett and that it had gotten progressively worse over the years. [RP 122, 125]. It had started with uncomfortable hugging and

² The facts are limited to counts I-IV for which Gossett was convicted.

French kissing before advancing to “oral sex and things of that nature.”

[RP 126].

About a month later, in July 2008, A.R.G. was interviewed by Deputy Kurt Rinkel [RP 73, 342, 356-57], and disclosed what she had told Myrick and Vandervort, indicating on three occasions that the sexual abuse happened when she was between age 14 and 18 and continued until January 2008. [RP 369-70]. Similarly, when A.R.G. spoke with Sergeant Evans that October, she told him on two occasions that Gossett had started sexually abusing her when she was 14 and in the eighth grade. [RP 373-74].

At trial, while admitting she had told the investigating law enforcement officers at least five times that the sexual abuse had started after she turned 14 [RP 373], A.R.G. changed her story, saying that the abuse had started before she turned 14 [RP 314], again depicting how it had progressed from French kissing to the touching of her breasts to digital penetration of her vagina. [RP 296, 299-300]. “It would occur in the living room, in my bedroom, in the hallway, downstairs, on the tent - - in the tent, on the trampoline, everywhere.” [RP 314]. When asked why she never reported this behavior to her mom or anyone else, A.R.G. claimed that Gossett had told her that if she “ever told anybody, my life would be a living hell.” [RP 366].

Gossett denied that he ever physically or sexually abused A.R.G. [RP 883-84, 891]. S.G., A.R.G.'s biological sister [RP 963], asserted that A.R.G. had trouble adapting to the Gossetts' rules and required chores: "She was always pushing the limits to things, didn't want to listen, didn't want to be told to do stuff." [RP 969]. S.G. never observed anything in the way of inappropriate behavior between Gossett and A.R.G. and described her father as "(c)aring, sweet, soft, gentle. He never really yelled at anybody, just kind of goes with the flow with us." [RP 985]. When A.R.G. contacted S.G. after leaving the family residence in January 2008, she never mentioned that she'd been sexually abused. [RP 987].

Six other witnesses familiar with the Gossett household, including Gossett's wife Linda, echoed S.G.'s observation that there was never any indication of inappropriate behavior between Gossett and A.R.G. [RP 850-51, 953, 1178-79, 1304, 1327, 1356]. Linda Gossett confirmed that A.R.G. had struggled with the adoption process over the years [RP 1117], adding that A.R.G. "spent a good couple of years just being very belligerent. It was hard. I was intimidated by her a lot of times. I tried not to let that show." [RP 1122].

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D. ARGUMENT

01. THE PROSECUTOR'S CLOSING ARGUMENT, WHICH CREATED A FALSE CHOICE AND MINIMIZED AND SHIFTED THE BURDEN OF PROOF TO GOSSETT, CONSTITUTES PROSECUTORIAL MISCONDUCT THAT DENIED GOSSETT A FAIR TRIAL.

A criminal defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The defense bears the burden of establishing both the impropriety and the prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Where a defendant, as here, fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct was so flagrant and ill intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). In such a case, reversal of a conviction is required if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Belgarde, 110 Wn.2d 504, 509-10, 755 P.2d 174 (1988). In determining whether prosecutorial misconduct has occurred, this court first evaluates whether the prosecutor's comments were improper. Reed 102 Wn.2d at 145. If the statements were improper, the court considers whether there was a substantial likelihood that they affected the jury. Id.

During the State's closing argument, the prosecutor

told the jury:

Ladies and gentlemen, there's a lot of components to this whole trial. And what it comes down to are the elements. The elements of nine and ten, the to-convicts. It comes down to whether or not you really believe (A.R.G.)....

[RP 1456].

Although a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury, State v. Hoffman, 116 Wn.2d at 94-95, it is flagrant misconduct to shift the burden of proof to the defendant, which occurred in this case. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). If the jury believed A.R.G., it did not have to find Gossett guilty. This is a false dichotomy. An alternative would have been that it, the jury, had only to entertain a reasonable doubt as to the State's case. In this regard, to the extent that implicit in the prosecutor's closing argument is a false choice, i.e., that the jury could find Gossett not guilty only if it did not believe A.R.G., it was flagrant misconduct. State v. Miles, 139 Wn. App. 879, 889-90, 162 P.3d 1169 (2007). The jury was within its right to conclude that although it believed A.R.G., it was also not satisfied beyond a reasonable doubt that Gossett was guilty of the charged offenses.

There can be no question that the prosecutor's argument misstated the jury's role, and in the process misstated and minimized the

prosecutor's burden of proof by implying that the jurors were to figure out who they thought was telling the "truth" and decide based upon that choice. But that is akin to tasking them with choosing "which version of events is more likely true, the government's or the defendant's." See United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir.), cert. denied, 511 U.S. 1129 (1994). As a result, the jury is misled into thinking they simply must decide which version of events they think is more likely to be true and then rely on that "preponderance" standard in rendering their verdict. Id.

The State's argument forced the jury to choose between two conflicting versions of the events, thus presenting the jury with a false choice and shifting the burden of proof, which is troubling when considered in light of A.R.G.'s admission at trial that what she had told the investigating law enforcement officers at least five times prior to trial—that the sexual abuse had occurred after she turned 14 and thus outside the range of the charges of an act with a child who is "less than fourteen years old [CP 148, 152]"—was at odds with her trial testimony that the abuse started before she turned 14.

And while counsel did not object to the prosecutor's improper argument, in consideration of the above, it is but speculation to conclude that even a carefully worded curative instruction could have remedied the

prejudice. The prejudice engendered by the improper argument, which created a false choice and minimized and shifted the burden of proof, mandates a retrial.

02. GOSSETT WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT THAT CREATED A FALSE CHOICE AND MINIMIZED AND SHIFTED THE BURDEN OF PROOF TO GOSSETT.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). While an attorney's decisions are afforded deference, conduct for which there is no

legitimate strategic or tactical reason in constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Gossett satisfies both prongs of the Strickland test and therefore has demonstrated he received constitutionally ineffective assistance. There was no legitimate reason for counsel to fail to object to the prosecutor's argument set forth in the prior section. Counsel is presumed to know the law favorable to his or her client. See State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (effective assistance includes knowledge of relevant law).

There is also a reasonable likelihood that counsel's deficient performance affected the outcome of the case. As previously argued, it is nothing but rank speculation to entertain that even a carefully worded

curative instruction could have remedied the prejudice, with the result that the case should be remanded for retrial.

03. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING THE STATEMENT A.R.G. MADE TO DAVID GLIDEWELL OVER OBJECTION AND THE STATE'S RESPONSE THAT THE TESTIMONY WAS ADMISSIBLE UNDER THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE.

David Glidewell, A.R.G.'s self-proclaimed "surrogate grandfather [RP 207]," attended A.R.G.'s High School graduation in May 2008, some five months after A.R.G. had left the Gossetts' residence. [RP 120, 144, 212]. Over objection and the State's response that the pending testimony qualified as an "(e)xcited utterance(,)" the court, following an off-the record discussion, overruled the objection [RP 221], and Glidewell was permitted to testify that at the graduation, A.R.G., while nervous and almost in tears [RP 220], told him "that the reason that she had left home was because (Gossett) had sexually assaulted her" [221].

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless it falls within certain exceptions. ER 802. One such

exception is an “excited utterance.” ER 803(a)(2). There are three requirements that must be met before a statement may be admitted as an excited utterance: (1) a startling event or condition must have occurred; (2) the declarant must have been under the stress of excitement caused by the event or condition at the time the statement is made; and (3) the statement must relate to the startling event or condition. State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

The statement must be made while the declarant is still under the influence of the event and, as important, has not had time to “calm down enough to make a calculated statement based on self-interest.” State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997). What is more, the declarant must be so ““under the influence of the event ... that (the) statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.”” State v. Strauss, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (alteration in original) (quoting Johnston v. Ohls, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)), abrogated in part on other grounds, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A trial court’s determination on the admissibility of an excited utterance is reviewed under the abuse of discretion standard. State v. Strauss, 119 Wn.2d at 417. Thus, this court will not disturb the trial court’s ruling unless “no reasonable judge would have made the same

decision.” State v. Thomas, 150 Wn.2d 821, 854, 83 P.3d 970 (2004),
abrogated in part on other grounds, Crawford v. Washington, 541 U.S. 36,
124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

That a witness is merely “upset” does not establish that the witness is sufficiently under the influence of the startling event. State v. Dixon, 37 Wn. App. 867, 874, 684 P.2d 725 (1984). What is required is a showing that the stress of nervous excitement stills the reflective faculties and removes their control. State v. Brown, 127 Wn.2d 749, 758, 903 P.2d 459 (1995). In State v. Dixon, Division I of this court held that an alleged victim’s three-and-one half-page written statement was erroneously admitted under the excited utterance exception, even though she was described as “upset” while preparing the written description of the event, reasoning that there was no indication that the declarant’s “ability to reason, reflect, and recall pertinent details was in any way impeded.” State v. Dixon, 37 Wn. App. at 874.

Here, five months had passed since A.R.G. had left the Gossetts’ residence. Under these facts, as in Dixon, there was little, if any, evidence that A.R.G.’s ability to reflect, reason or recall significant details was in any way impeded. Her statement as to why she had left the Gossetts’ residence was not a spontaneous response to the alleged events (Gossett’s alleged sexual abuse), rather it was an expression based on reflection.

Accordingly, and in consideration of how much time had elapsed between the alleged events and A.R.G.'s statement to Glidewell, the trial court abused its discretion in admitting the statement as an excited utterance.

Non-constitutional error is prejudicial only if within reasonable probability the outcome of the trial would have been materially affected. State v. Kelly, 102 Wn.2d 188, 685 P.2d 564 (1984). In this context, harmless error occurs when the evidence is of "minor significance in reference to the overall, overwhelming evidence as a whole." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). As with most cases of this nature, credibility is a crucial factor, and even more so here where there was a lack of physical evidence to support A.R.G.'s allegations. And it is on this point that the court's improper admission of A.R.G.'s statement to Glidewell cuts the deepest, causing prejudice, causing interference with the jury's duty to make relevant credibility determinations, and, in the process, precluding it from making a fair determination of Gossett's guilt or innocence.

In the end, this case essentially turned on the answer to whom the jury was to believe, and the likelihood that the effect of the admission of the testimony at issue having a practical and identifiable consequence on the jury's determination of this issue is substantial, with the result that Gossett's convictions must be reversed and the case remanded for retrial.

04. THE COMMUNITY CUSTODY PROVISION PROHIBITING THE PURCHASE, POSSESSION OR VIEWING OF PORNOGRAPHIC MATERIALS IS UNCONSTITUTIONALLY VAGUE.

At sentencing, as a condition of community custody, the court ordered that Gossett

not possess or peruse pornographic materials unless given prior approval by your sexual deviancy treatment specialist and/or community corrections officer. Pornographic materials are to be defined by the therapist and/or assigned community corrections officer(.

[CP 196].

A defendant may raise claims relating to unconstitutionally vague conditions of community custody for the first time on appeal. State v. Jones, 118 Wn. App. 199, 204 n.9, 76 P.3d 258 (2003); State v. Bahl, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008).

The term “pornography” or “pornographic material” is unconstitutionally vague. State v. Bahl, 164 Wn.2d at 754-56. In State v. Sansone, 127 Wn. App. 630, 638-641, 111 P.3d 1251 (2005), Division I of this court held that such a condition³ violated due process because it was unconstitutionally vague.

³ Sansone, as here, was “not (to) possess or peruse pornographic materials unless given prior approval by (his) sexual deviancy treatment specialist and/or (CCO). Pornographic materials are to be defined by the therapist and/or (CCO).” Sansone, 127 Wn. App. 642-43.

Additionally, in Bahl, our Supreme Court held that pre-enforcement challenges to similar conditions were properly raised, even if it was left to a third party to determine what satisfied the condition. Bahl, 164 Wn.2d at 754-52, 758.

Here, because the condition does not define pornography and is thus unconstitutionally vague, it must be stricken. See State v. Sansone, 127 Wn. App. at 643.

E. CONCLUSION

Based on the above, Gossett respectfully requests this court to reverse convictions or remand for resentencing consistent with the arguments presented herein.

DATED this 22nd day of December 2010.

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DIVISION II

10 DEC 27 AM 11:32

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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