

No. 40845-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARK J. GOSSETT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge
Cause No. 08-1-02102-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the prosecutor, during closing argument, improperly shifted the burden of proof to the defendant when she said, "It comes down to whether or not you really believe [A.R.G.]."

2. Whether Gossett was prejudiced by his counsel's failure to object to the prosecutor's statement, "It comes down to whether or not you really believe [A.R.G.]"

3. Whether the trial court improperly allowed David Glidewell to testify regarding a statement A.R.G. made to him under the excited utterance exception to the hearsay rule.

4. Whether the condition of community custody which prohibits the possession or viewing of pornographic materials is unconstitutionally vague.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts.

C. ARGUMENT.

1. The State's closing argument did not improperly shift the burden of proof to the defendant, nor was the jury told it must find Gossett guilty if it believed A.R.G.

A reviewing court evaluates "a prosecuting attorney's allegedly improper remarks 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. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009), citing to State v. Russell, 125

Wn.2d 24, 85-86, 882 P.2d 747 (1994). A defendant claiming prosecutorial misconduct bears the burden of establishing both the impropriety of the prosecutor's comments and their prejudicial effect. Anderson, 153 Wn. App. at 427. In deciding whether misconduct occurred, the court first evaluates whether the comments were improper. If they were and an objection was made at trial, the second step is to determine whether there was a substantial likelihood that the comments affected the verdict. Unless there was an objection and a request for a curative instruction, however, the defense is deemed to have waived the issue unless the comment was "so flagrant or ill intentioned that an instruction could not have cured the prejudice." Id.

The State is given great latitude in making arguments to the jury and it may draw reasonable inferences from the evidence. Id., at 427-28.

Gossett argues that the prosecutor shifted the burden of proof to the defendant when she said, near the end of her closing argument:

Ladies and gentlemen, there's a lot of components in 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 you really believe [A.R.G.]. Her story makes sense. It fits together with

all of the things that are going on by other witnesses
that testified for the defendant himself. . . .

[RP 1456] Gossett contends that the jury was given an implicit choice—that it could find him not guilty only if it did not believe A.R.G. It is a stretch to find that implication in the prosecutor’s comment.

It is misconduct for a prosecutor to argue that before the jury can acquit the defendant it must find that the State’s witnesses are lying or mistaken. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). The prosecutor here did not do that. Gossett cites to State v. Miles, 139 Wn. App. 879, 162 P.3d 1169 (2007) to support his argument. In Miles, the prosecutor argued that there were two conflicting versions and if one was correct, the other could not be. Id., at 889-890. The court of appeals interpreted this as a statement to the jury that it could not acquit unless it believed Miles. Id., at 890. “The jury was entitled to conclude that it did not necessarily believe Miles and Bell but it was also not satisfied beyond a reasonable doubt that Miles was the person who sold the drugs to Wilmoth.” Id.

The situation in Gossett’s case is much different. The prosecutor here told the jury essentially that it must believe A.R.G.

in order to convict. She did not say that the jury could acquit only if they found A.R.G. to be either lying or mistaken, nor did she suggest that the jury could convict on anything other than the jury's belief in A.R.G.'s testimony and the corroborating evidence. The prosecutor merely stated the obvious, that if the jury accepted A.R.G.'s testimony as true, it could find the defendant guilty. It is clear from the record that if the jury did not believe A.R.G., it could not convict Gossett. The prosecutor's remark put the burden of proof squarely on the State, rather than shifting to the defense as Gossett claims.

The remark to which Gossett assigns error came very near the end of a 55-minute closing argument that takes up 38 pages of transcript. [RP 1419-1457; CP 88] As noted above, a reviewing court considers the challenged remarks in the context of the entire argument, the evidence the argument addressed, the issues in the case, and the jury instructions. Here the jury was instructed that the arguments were not evidence and were to be disregarded if they conflicted with the evidence and the instructions. [CP 139-40] Gossett has not challenged any of the jury instructions on appeal. Nor did his counsel, during his own closing argument, argue that this statement by the prosecutor was incorrect. Defense counsel

did challenge a number of statements made by the prosecutor, but not the one he now claims as error. [RP 1458-1460]

Gossett further argues that the jury was misled into thinking it must decide which version of the events was more likely true and decide on the preponderance of the evidence. Appellant's opening brief at 8. There is simply nothing in the record that substantiates any such conclusion. The prosecutor said nothing of the kind. The jury was instructed on the burden of proof. [CP 143] The presumption is that juries follow the court's instructions. Anderson, 153 Wn. App. at 428. It is glaringly obvious that if the jury did not believe A.R.G. it could not find Gossett guilty, and that is the gist of the remark made by the prosecutor. Gossett himself acknowledges that "this case essentially turned on the answer to whom the jury was to believe . . ." [Appellant's brief at 14]

The statement of the prosecutor was not error and did not carry the connotation that Gossett now claims. There was no shifting of the burden of proof. Even if the comment has been improper, it was one remark at the end of a lengthy argument, to which he has assigned no other error. It would not be reversible error even if it had been incorrect.

2. Defense counsel was not ineffective for failing to object to the comment discussed in section 1.

Gossett correctly states the law pertaining to ineffective assistance of counsel. The State disagrees that Gossett's trial counsel was ineffective for failing to object to the prosecutor's statement that "It comes down to whether or not you really believe [A.R.G.] . . . " [RP 1456] It is not ineffective assistance of counsel to fail to object to something that is, in fact, correct. Because the prosecutor's remark cannot be twisted to encompass the meaning that Gossett urges, it was not error on the part of the prosecutor and therefore not ineffective assistance of counsel for the defense to decline to object.

Even had the remark been error, Gossett himself admits that it would be pure speculation as to whether an objection and curative instruction would have been effective. The defendant bears the burden of establishing prejudice. To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A defendant must overcome the presumption of effective representation and demonstrate (1) that

his lawyers' performance in not objecting to the comparability of his offenses was so deficient that he was deprived of "counsel" for Sixth Amendment purposes and (2) that there is a reasonable probability that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Because the prosecutor's comment was not error, it was not ineffective assistance of defense counsel to fail to object to it. Even had it been error, Gossett admits that he cannot carry the burden of proving prejudice, and it seems unlikely indeed that eleven words out of a 55-minute argument would prejudice the defendant such as to render his trial unfair.

3. The court erred in admitting A.R.G.'s statement to David Glidewell as an excited utterance. However, the error was harmless.

A decision by the trial court to admit a statement as an excited utterance exception to the hearsay rule is reviewed for abuse of discretion. State v. Young, 160 Wn.2d 799, 805-06, 161 P.3d 967 (2007). To be admissible as an excited utterance, a statement must meet three criteria: (1) a startling statement event

or condition, (2) a statement made while the declarant was under the stress or excitement of that event or condition, and (3) the statement related to the event or condition. Id., at 806. The statement need not be contemporaneous with the event or condition; “the passage of time alone is not enough to make the statement inadmissible.” State v. Downey, 27 Wn. App. 857, 861, 620 P.2d 539 (1980). Nevertheless, the State concedes that sufficient time had passed that it was unlikely A. R. G. was still under the stress of the startling event, which would have occurred a minimum of five months before the statement was made to Glidewell. The fact that A. R. G. had given significant thought to her decision to tell Jennifer Myrick and Bobby Vandervort about the abuse, a disclosure that had happened shortly before her remark to Glidewell, weighs against characterizing it as an excited utterance. [RP 220, 366, 442] The trial court abused its discretion in admitting the statement as an excited utterance.

The State disagrees, however, that the admission of the statement likely had a substantial effect on the verdict. Rather, the error was harmless.

Because A. R. G. testified at trial, the Confrontation Clause was not violated, and the error requires reversal only if there is a

reasonable probability that the error affected the verdict. State v. Owens, 128 Wn.2d 908, 914, 913 P.2d 366 (1996). An error is harmless and not grounds for reversal if it does not prejudice the defendant. There is no prejudice unless, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981); State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). To determine prejudice, a reviewing court considers the inadmissible evidence against the admissible evidence viewed as a whole. Bourgeois, 133 Wn.2d at 403.

In this case, the only challenged statements are:

She mentioned that – she told us that the reason that she had left home was because Mark had sexually assaulted her and gotten into bed with her.

.....

[S]he mentioned that it was non-penetrating and that she got knocked off on the floor, and that’s about all I recall.

[RP 221-22]

The victim testified for more than six hours at trial. [RP 524] She was cross-examined extensively and described her abuse by the defendant in detail. There is simply no chance that the statements related by Glidewell had any significant effect on the

jury's determination of credibility or its decision to convict. He merely related the fact of the sexual assaults and the detail that they were non-penetrating. There was no information that the jury did not get from A. R. G. It is inconceivable that the outcome would have been any different if the hearsay evidence had not been admitted.

4. The State concedes that the condition of community custody prohibiting possession or viewing of pornographic materials is unconstitutionally vague.

The State concedes that the condition of Gossett's community custody which prohibits him from possessing or viewing pornographic materials is unconstitutionally vague. State v. Bahl, 164 Wn.2d 739, 758, 193 P.3d 678 (2008). His sentence should be remanded to strike that condition and instead impose one more clearly stated. A defendant "may be restricted in the material he may access or possess, but the restrictions implicating his First Amendment rights must be clear and must be reasonably necessary to accomplish essential state needs and public order." Id., at 757-58.

D. CONCLUSION.

There was no prosecutorial misconduct in this trial, nor was defense counsel ineffective. It was error for the court to admit the hearsay statement of A. R. G., but the error was harmless. The matter should be remanded to remove the condition regarding pornographic material and substitute a condition that passes constitutional muster. The State respectfully asks this court to affirm the convictions and remand for resentencing.

Respectfully submitted this 6th day of April, 2011.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

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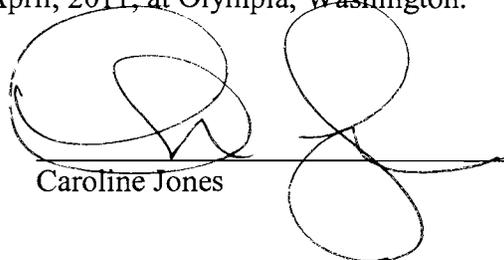
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 6 day of April, 2011, at Olympia, Washington.


Caroline Jones