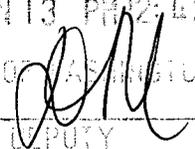


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 
DEPUTY

NO. 41302-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRUCE LEE FRITZ,

Appellant.

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

The Honorable John Nichols, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecuting attorney committed misconduct in closing argument by appealing to the jury's passion and prejudice.

2. The prosecuting attorney committed misconduct in closing argument by urging the jury to convict Mr. Fritz for reasons other than finding the state proved the elements of the charged offenses.

3. The prosecuting attorney committed misconduct by arguing to the jury that they would have to find the 9 year-old complainant "sick" and "twisted" in order to acquit Mr. Fritz.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The prosecutor commits misconduct when she urges the jury to convict the defendant for a reason other than the state's proof of the elements of the crime. Here the prosecutor appealed to the jury's passion and prejudice by arguing that Mr. Fritz had destroyed L.M.F.'s innocence. Was the prosecutor's argument so flagrant and ill-intentioned that no instruction would have cured the prejudice?

2. The jury is required to decide if the State proved every element of the crime beyond a reasonable doubt and is not required to determine the truth. Here the prosecutor argued that L.M.F. was sick or twisted if she were not telling the truth. Where this Court has repeatedly advised prosecutors this type of argument is improper, was the prosecutor's

argument so flagrant and ill-intentioned that no instruction would have cured the prejudice?

C. STATEMENT OF THE CASE

1. Procedural History.

Bruce Lee Fritz was tried on an amended information charging four counts of first degree rape of a child¹ (counts 1-4) and two counts of first degree child molestation² (counts 5-6). Clerk's Papers (CP) 3-6. The jury found Mr. Fritz guilty on all counts. CP 42-46. The jury also found two exceptional factors³ on each charge: (1) Mr. Fritz abused a position of trust⁴; and (2) Mr. Fritz engaged in an ongoing pattern of sexual abuse against the complainant, L.M.F.⁵. RP 47-58. The trial court also found the exceptional factor that Mr. Fritz committed multiple concurrent offenses and his high offender score resulted in some of the offenses going unpunished.⁶ 3RP⁷ at 437.

The standard minimum sentence range on counts 1-4 is 240-318 months. CP 61. The standard minimum range on counts 5-6 is 149-198

¹ RCW 9A.44.073

² RCW 9A.44.083

³ All of the exceptional factors used at sentencing were listed in the Amended Information under which Mr. Fritz was tried. CP 3-6.

⁴ RCW 9.94A.535(3)(n)

⁵ RCW 9.94A.535(3)(g)

⁶ RCW 9.94A.535(2)(c)

⁷ Several volumes of verbatim were prepared for this appeal. The number and/or letter before the "RP" – Report of Proceedings – identifies the volume where the specific pages cite is found.

months. CP 61. The court imposed a minimum sentence of 360 months on each count. 3RP at 439; CP 62. Mr. Fritz's maximum sentence on each count is life. CP 61.

Mr. Fritz filed a timely appeal of all portions of his judgment and sentence. CP 59-80.

2. Trial Testimony.

L.M.F. is the daughter of Regina Fowler. 2ARP at 158. L.M.F. was born on May 17, 2001. 2ARP at 126, 158. As of March 2010, Ms. Fowler and Bruce Fritz were a couple for four years. 2ARP at 158. They had lived together for most of that time. 2ARP at 158-60. Their first home was an apartment and they later moved to a house. 2ARP at 129-30, 160. L.M.F., who did not have a relationship with her biological father, called Mr. Fritz "Dad." 2ARP at 159. Mr. Fowler trusted Mr. Fritz with L.M.F. 2ARP at 161.

In March 2010, Ms. Fowler came home from work one afternoon to find L.M.F. and Mr. Fritz at home. 2ARP at 165. L.M.F. told her mother that she wanted to tell her something but wanted to do so in the bedroom. 2ARP at 165-66. Ms. Fowler and L.M.F. went into the bedroom. 2ARP at 166. L.M.F. started to cry. 2ARP at 166. L.M.F.

told her mother that Dad tried to have sex with her.⁸ 2ARP at 167. Ms. Fowler did not ask L.M.F. what she meant by that. 2ARP at 167. Ms. Fowler was shocked by what L.M.F. told her. 2ARP at 171. L.M.F. initially told her mother that it happened two or three times and then changed the estimate to fifteen or more times. 2ARP at 167-68.

Mr. Fritz was in the garage. 2ARP at 168. Ms. Fowler left the bedroom and confronted him in the garage. 2ARP at 168. Mr. Fritz denied any such contact with L.M.F. 2ARP at 168. Mr. Fritz, Ms. Fowler, and L.M.F. then sat at the kitchen table and talked about the allegations. 2ARP at 169. Mr. Fritz continued to deny doing anything sexual with L.M.F. 2ARP at 169.

Ms. Fowler called her mother, Darcy Luce, who lives in Canby, Oregon. 2ARP at 170, 192. Mr. Fritz, Ms. Fowler, and L.M.F. then drove to Canby where they included Ms. Luce in the ongoing discussion. 2ARP at 171. Ms. Luce was surprised by the allegations. 2ARP at 193. She loved Mr. Fritz and felt that he had been a great father to L.M.F. 2ARP at 193. Ms. Fowler and Mr. Fritz were planning to marry soon. 2ARP at 193.

⁸ Prior to trial, the court found L.M.F.'s statement to her mother, grandmother, and Police Detective Aaron Holladay admissible under RCW 9A.44.120.

Mr. Fritz and Ms. Fowler left later that evening. 2ARP at 171. L.M.F. stayed with her grandmother. 2ARP at 171. The police were eventually called. 2ARP at 188.

Over time, L.M.F. said certain things to her grandmother about what Mr. Fritz had done. L.M.F. told her grandmother when she was six, she was naked on the bed with Mr. Fritz. 2ARP at 196. He rubbed his penis on her and tried to put his penis in her. 2ARP at 196. Sometimes Mr. Fritz would lick her vagina. 2ARP at 197. Another time, Mr. Fritz put his penis in her mouth and tried to shove it down her throat. 2ARP at 199. There were times when she and Mr. Fritz would watch movies together. 2ARP at 199. In the movies big people, would do sex with each other. 2ARP at 199. Mr. Fritz would then try to do the sex stuff with her. 2ARP at 199. This all started happening when she was 6 and when the family lived together at an apartment. 2ARP at 200. L.M.F. said the Mr. Fowler told her that if she told anyone, she and her mother would have to go and live under a bridge. 2ARP at 200.

The day after L.M.F. was left to stay with her grandmother, Ms. Fowler confronted Mr. Fritz about L.M.F.'s allegations. 2ARP at 172. Per Ms. Fowler, Mr. Fritz broke down in tears and admitted rubbing his penis on L.M.F.'s privates two times. 2ARP at 172.

L.M.F. was interviewed by Vancouver Police Detective Aaron Holladay. 2BRP at 279. She told Detective Holladay much the same information she told her grandmother albeit with greater detail. 2BRP at 281-93. The last time the activity between she and Mr. Fritz occurred was about a week before she told her mother what was happening. 2BRP at 292. It started when she was six and ended when she was eight. 2BRP at 282. It only happened in the apartment and the house. 2BRP at 293. It happened when Ms. Fowler was at work. 2BRP at 282. The incidents occurred all over: in the bedrooms, on the couch, in the bathroom. 2BRP at 287. Mr. Fritz touched her L.M.F.'s crotch inside at least 20 times. 2BRP at 290. He often touched her crotch with his mouth and put his fingers inside of her. 2BRP at 291-92. This sort of thing happened around 30 times. 2BRP at 291.

During the investigation, L.M.F. was also examined by nurse practitioner Marsha Stover.⁹ 2BRP at 235. Ms. Stover found no physical evidence of sexual assault but based upon what L.M.F. told her about the encounters, she did not necessarily expect to find any physical evidence. 2BRP at 244, 253-54. Ms. Stover explained that young bodies are pliable and heal quickly. 2BRP at 248-50.

⁹ L.M.F.'s statements to Ms. Stover were admitted under ER 803(a)(4) as statements for medical diagnosis or treatment. 2BRP at 211-234.

Mr. Fritz did not testify and did not put on any defense witnesses.
2BRP at 320.

D. ARGUMENT

MR. FRITZ'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT.

A public prosecutor is a quasi-judicial officer with a duty to act impartially and seek a verdict free from prejudice and based upon law and reason. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). Here the theme of the prosecutor's closing argument was that the jury was obliged to hold Mr. Fritz accountable for destroying "little [L.M.F.'s] innocence" and that the jury would have to find L.M.F. "sick and twisted before they could acquit Mr. Fritz. 3RP at 364, 405-06. The prosecutor's flagrant and ill-intentioned misconduct denied Mr. Fritz a fair trial. Mr. Fritz's convictions must be reversed.

- a. Prosecutorial misconduct may violate a defendant's constitutional right to due process of law.

A criminal defendant's right to due process of law ensures the right to a fair trial. U.S. Const. Amend. XIV; Const. Art. I, §§ 3, 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. *State v. Reed*, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). When a prosecutor commits

misconduct, the defendant's constitutional rights to due process and a fair trial may be violated. *Charlton*, 90 Wn.2d at 664-65.

To determine if a prosecutor's comments or argument constitute misconduct, the reviewing court must decide first if the comments were improper and, if so, whether a "substantial likelihood" exists that the comments affected the jury verdict. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where the defendant does not object to the improper argument, the reviewing court may still reverse the conviction if the misconduct is so flagrant and ill-intentioned that the resulting prejudice would not have been cured with a limiting instruction. *Id.*

b. The prosecutor made improper arguments in closing.

The prosecutor began her closing argument:

There are few things in this world that we value more than the innocence and purity of a young child. We, as a society, entrust parents with the responsibility of safeguarding that innocence and purity. A father, in particular, has the duty and obligation to protect his children from harm, to keep them safe and to safeguard them from the evils of this world, to protect their innocence.

That defendant, Bruce Lee Fritz, horribly abused that ultimate position of trust. He destroyed the very thing that he was entrusted to protect, little [L.M.F.'s] innocence.

3RP at 363-64.

Defense counsel did not object. The prosecutor continued in this same vein appealing to the jury's emotions and prejudices:

A little child had to come in here and tell all of you about these horrible things that happened to her and be cross-examined by the defense attorney. Do you think that was fun for her? Obviously, it wasn't. And you saw her demeanor and you saw a frightened little girl up here. This is not fun for her. None of it is fun.

3RP at 371.

Defense counsel again did not object. Undeterred, the deputy prosecutor left the jury with these thoughts at the end of her initial closing argument:

And, I know that the testimony that you have had to hear in this case is extremely unpleasant, horrible, disturbing. But let us not forget that L.M.F. lived it. She had to live that. That man used his position as protector, guardian to destroy her innocence. And, he needs to be held accountable for that. The only verdict in this case is guilty and I respectfully ask you to do the right thing and to find him guilty and hold him accountable for taking her innocence.

3RP at 373-74.

The prosecutor left the jury with this at the end of her rebuttal closing:

I know that you have a hard job but you should have an abiding belief that he is guilty based on the evidence that you have heard. And, I ask you to hold him accountable for destroying L.M.F.'s innocence and find him guilty for what he did.

3RP at 409. Still there was no objection from defense counsel.

- c. The prosecutor committed misconduct by urging the jury to convict Mr. Fritz on grounds other than the evidence presented at trial.

As part of the state's duty to ensure the accused is given a fair trial, the prosecutor may not invite the jury to convict the defendant on improper grounds. *State v. Boehning*, 127 Wn. App. 511, 518, 522, 111 P.3d 899 (2005). The prosecutor may not make heated partisan comments that appeal to the jury's passions or prejudices. *Reed*, 102 Wn.2d at 147. Thus, in *Boehning*, the court reversed the defendant's conviction because the prosecutor's suggestion that the child victim's out-of-court statements actually supported convictions for uncharged crimes. *Boehning*, 127 Wn. App. at 522-23.

Here the prosecutor urged the jury to hold Mr. Fritz accountable for "taking [L.M.F.'s] innocence." 3RP at 374. This call for justice and to decide the case on grounds other than the evidence was an impermissible appeal to the jury's passions and prejudices.

- d. The prosecutor committed misconduct by arguing that the jury could only find Mr. Fritz guilty if they found L.M.F. "sick" and "twisted."

The issue in this case was whether the state proved Mr. Fritz had sexually abused his fiancée's daughter. To decide the issue, the jury was required to look at the evidence. But the prosecutor went way beyond the evidence in urging the jury to convict.

In order to believe that that defendant is not guilty, in order to not believe that what [L.M.F.] is saying is true, you have to believe that she is a master manipulator, really sick and twisted, academy

award winning actress, I mean, really smart because how else has she been able to maintain what she is saying all -- with all these people that have talked to her?.... Man she's good. If she not telling the truth, she is good.

3RP at 402-03.

Defense counsel did not object to the argument. Neither did defense counsel object when the prosecutor kept up her tirade:

And, she has also got to be pretty sick to come up with all of that, to tell everyone all of that, to go through a medical exam and have her genitals probed, to come here and testify in front of you. You've got to believe that she pretty messed up.

It's not the adult. It's not him who is twisted. No, it's this little girl. It's ridiculous.

3RP at 406-07.

The prosecutor's argument is incorrect. The jury was required to look at all the evidence and decide whether the State had proved every element of the crime beyond a reasonable doubt. *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010); U.S. Const. Amends VI, XIV; Const. Art. I, §§ 3, 22. It is not the jury's job to determine the "truth" or solve the case, but to determine if the state proved its allegations beyond a reasonable doubt. *Id.*

It is misconduct for the prosecutor to argue the jury must find the state's witnesses are lying or mistaken in order to find the defendant not guilty. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996),

review denied, 131 Wn.2d 1018 (1997) (and cases cited therein). For example, it was misconduct in a prosecution for sale of cocaine to an undercover police officer for the prosecutor to argue that the defendant essentially called the police officers liars by giving testimony contrary to the officer's testimony. *State v. Barrow*, 60 Wn. App. 869, 874, 809 P.2d 209, *review denied*, 118 Wn.2d 1007 (1991). The argument mischaracterized both the evidence and the jury's role. The jurors did not need to "completely disbelieve" the officers' testimony in order to acquit Barrow; all they needed was to entertain a reasonable doubt that it was Barrow who made the sale to the undercover officer. *Id.* at 875-76.

Similarly, in *Fleming*, the prosecutor told the jury it could only acquit the defendant in a rape case if the jury found the complainant was lying, confused or fantasizing. *Fleming*, 83 Wn. App. at 213. The court explained the argument was improper because it misstated the law, the burden of proof, and the jury's function, as there were circumstances in which the jury would be required to acquit the defendant even if it did not believe the complaining witness was lying. *Id.*

It is not the jury's job to solve the case or determine the truth; rather the jury is required to determine if the state proved the elements of the crime beyond a reasonable doubt. *Anderson*, 153 Wn. App. at 429.

e. Mr. Fritz's convictions must be reversed. The prosecutor's case rose and fell on L.M.F.'s testimony.¹⁰ It was L.M.F. who testified to the events. And it was L.M.F. who told others – her mother, her grandmother, Detective Holladay, and nurse Stover – what supposedly happened. No physical evidence supported L.M.F.'s claims. L.M.F.'s precocious sexual knowledge could have come from her mother's porn DVDs. 2ARP at 173-74, 184-85.

Admittedly, Mr. Fritz's lawyer did not pose an objection to the any of the prosecutor's closing arguments taunting the jury to disbelieve L.M.F. This Court has, however, frequently cautioned prosecutors that an argument that suggests the jury must find certain witnesses are lying is improper. *Anderson*, 153 Wn. App. at 433-34 (Quinn-Brintnall, J. concurring); *Fleming*, 83 Wn. App. at 214. Given the clear state of the law and the argument in this case, the argument was so flagrant and ill-intentioned that no limiting instruction could cure the prejudice.

The cumulative effect of various instances of prosecutorial misconduct may violate the defendant's right to a fair trial. *State v. Reeder*, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955); *State v. Torres*, 16 Wn. App. 254, 262-63, 554 P.2d 1069 (1976). Because the prosecutor's closing argument was riddled with misconduct, and there is a substantial

¹⁰ Although Ms. Fowler did testify that Mr. Fowler told her he twice previously rubbed his penis on L.M.F.'s privates.

likelihood that cumulative effect affected the jury verdict, this Court should reverse Mr. Fritz's conviction. *Reed*, 102 Wn.2d at 146-47.

E. CONCLUSION

All of Mr. Fritz's convictions should be reversed in light of the prosecutor's misconduct during closing argument.

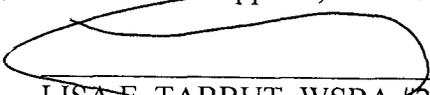
Respectfully submitted this 11th day of June 2011.



LISA E. TABBUT/WSBA #21344
Attorney for Bruce Lee Fritz Corona

CERTIFICATE OF MAILING

I certify that on June 10, 2011, I deposited in the mails of the United States, first class postage pre-paid, a copy of this document addressed to (1) Anne Mowry Cruser, Clark County Prosecutor's Office, P.O. Box 5000, Vancouver, WA 98666-5000; (2) Bruce L. Fritz/DOC#342644 Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326 and (3) the original, plus one copy, to the Court of Appeals, Division 2.



LISA E. TABBUT, WSBA #21344

STATE OF WASHINGTON
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DIVISION II