

30638-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KURT D. BONSER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S BRIEF

FILED
June 18, 2012
Court of Appeals
Division III
State of Washington

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A. ASSIGNMENTS OF ERROR

1. The prosecutor engaged in misconduct by focusing the jury's attention on Mr. Bonser's failure to testify.
2. The court erred in overruling defense objection to improper prosecutorial argument.
3. The court erred in imposing an indeterminate term of community custody.

B. ISSUES

1. The accused, charged with third degree child rape presented a defense of reasonable reliance on alleged victim's repeated misrepresentations of her age, but chose not to testify. Prosecutor argued to the jury: "[W]e don't have any evidence of what he actually believed" Did this argument violate the defendant's constitutional right not to testify?
2. Defense counsel objected to prosecutor's improper argument, indicating to the court that defendant's right to remain silent was being violated. Did the court err in overruling the objection?

3. The court imposed the maximum sentence of 60 months' incarceration plus community custody during any period of earned early release. Did this sentence violate the statutory requirement of a determinate sentence?

C. STATEMENT OF THE CASE

RMJ (the complaining witness) gave birth to a son on March 1, 2008. (RP 284) Kurt Bonser acknowledged that he was the child's father. Since RMJ was born on January 3, 1992, the State concluded she was likely less than sixteen years old at the time of conception, and charged Mr. Bonser with third degree rape of a child on or about May 1 to June 30, 2007. (RP 284; CP 1, 55, 86)

RMJ told a jury that she first met Mr. Bonser when she was eleven years old. (RP 285) They became friends. (RP 285) She said that when she was 15 or 16 they began living together and became "more than friends." (RP 286) During the time they were living together they had sexual intercourse. (RP 287) She had no idea when she conceived the child, but she felt they were not living together as a couple while she was pregnant. (RP 288-89) She did not remember whether she had sex with Mr. Bonser during May or June or 2007. (RP 287-88)

During that time, she explained, she was living in motels and she was more worried about getting high. (RP 289) She was using heroin, cocaine, and “meth” on a daily basis. (RP 290, 302) She lived an erratic life, staying awake for days and passing out when her body stopped. (RP 290) Sometimes the drugs would cause her to slip in and out of reality. (RP 303) She occasionally had memory lapses. (RP 303, 307) The days all ran together. (RP 307)

RMJ testified that when she first met Mr. Bonser she had lied and told him she was sixteen. (RP 291) Some time later, police officers came to a hotel room where she was and said “[W]hat are you doing running around with her, don’t you know she’s twelve?” (RP 292) The police had come for Mr. Bonser and, according to RMJ, he was more worried about why the cops had come for him than about RMJ. (RP 293) She said eventually he asked her why the police had said she was twelve. (RP 294) She couldn’t remember how she responded except that she assured him she was not twelve and told him she was seventeen. (RP 294, 317) She told the jury that she continued to lie to him and to others until after she became pregnant, when her age came out. (RP 295, 306, 310-11, 314, 316)

The court’s instructions to the jury included the following:

Instruction 8: . . . It is, however, a defense to the charge of rape of a child in the third degree that at the time of the acts the defendant reasonably believed that RMJ was at least sixteen years of age based upon declarations as to age by RMJ.

...

Instruction No. 9: The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

(RP 447-48)

During closing argument, the prosecutor told the jury:

See, that's the thing. This -- this law puts the burden on the adult to figure out the age of the younger person, except -- except for the one exception of when they say something to them about their age. We have evidence of that, that she said something and [defense counsel] emphasizes that a lot in doing his job, which is probably a great way to do it; but the thing that he ignores is that we don't have any evidence of what he actually believed and all of the evidence --

(RP 484-85) Defense counsel objected, drawing the court's attention to the defendant's right to remain silent and seeking a curative instruction, but the court overruled the objection. (RP 484)

The prosecutor went on to argue:

Mr. Scott says there's no evidence that he ever -- that Mr. Bonser ever heard the officer say she was twelve. Well, actually that's what all of the evidence is. She says the police came in and told Mr. Bonser she was twelve. It's uncontroverted, no other evidence on that point, that is the evidence in this case.

(RP 485)

The jury found Mr. Bonser guilty of third degree rape. The court imposed a standard range sentence of 60 months, the maximum term for this offense. (CP 149) The court also imposed community custody for “any period of earned early release.” (CP 150)

D. ARGUMENT

1. PROSECUTORIAL CLOSING ARGUMENT DRAWING ATTENTION TO DEFENDANT’S FAILURE TO TESTIFY WAS IMPROPER AND HIGHLY PREJUDICIAL.

It is a defense to a charge of third degree rape of a child “that at the time of the offense the defendant reasonably believed that the alleged victim” was “at least sixteen.” RCW 9A.44.030(2) and (3)(c). The defendant bears the burden of proving this defense by a preponderance of the evidence. RCW 9A.44.030(2).

The State may not make a comment about a defendant’s silence or suggest that guilt can be inferred from such silence. *See State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). A defendant has no duty to present evidence. *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). Even where the defendant bears the burden of proving an affirmative defense that involves the defendant’s knowledge or belief, the defendant cannot be compelled to testify so long as some evidence has

been presented in support of the defense. See *State v. George*, 146 Wn. App. 906, 915, 193 P.3d 693 (2008)

“A prosecutor violates a defendant’s Fifth Amendment rights if the prosecutor makes a statement ‘of such character that the jury would “naturally and necessarily accept it as a comment on the defendant’s failure to testify.” ’ ” *State v. Fiallo-Lopez*, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995) (quoting *State v. Ramirez*, 49 Wn. App. 332, 336, 742 P.2d 726 (1987) (quoting *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978))). The State is permitted to comment on the fact that certain testimony is undisputed, so long as it does not refer to who may or may not be in a position to dispute it. *State v. Crawford*, 21 Wn. App. at 153.

The deputy prosecutor told the jury, “we don’t have any evidence of what he actually believed” This was a comment on his silence at trial because he was the only one who could have presented testimony on the issue, thereby violating his right not to testify. See *State v. Fiallo-Lopez*, 78 Wn. App. at 729. Only one person could testify to Mr. Bonser’s actual beliefs, namely the defendant. The testimony of the complaining witness stating that she had repeatedly told him she was sixteen years old, or older, provided substantial evidence from which a jury could infer that Mr. Bonser believed she was at least sixteen. The prosecutor’s argument

undeniably suggested to the jury that Mr. Bonser's testimony as to that belief was essential to proving it by a preponderance of the evidence.

The deputy prosecutor told the jury "She says the police came in and told Mr. Bonser she was twelve. It's uncontroverted, no other evidence on that point" Again, only Mr. Bonser could have told the jury that he had not heard this comment; by stating that the evidence was uncontroverted, the deputy prosecutor effectively told the jury that Mr. Bonser's failure to testify was evidence of his guilt.

The prosecution's argument in this case was improper and the trial court erred in overruling defense counsel's objection. Both the objectionable argument and the court's erroneous ruling would "naturally and necessarily' cause the jury to focus on [the defendant's] failure to testify." *See Ramirez*, 49 Wn. App. at 337.

Generally, to prevail on a prosecutorial misconduct allegation, a defendant must show both improper conduct and prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *State v. Emery*, -- P.3d --, 2012 WL 2146783 (June 14, 2012) (*citing State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009)).

The prejudicial effect is obvious. Whether Mr. Bonser reasonably believed the complaining witness was over sixteen was the essential issue of his defense. The only person whose testimony provided any evidence on this question was the complaining witness, who repeatedly acknowledged lying to Mr. Bonser about her age, and repeatedly demonstrated to the jury grounds to distrust any or all of her testimony. By suggesting to the jury that the defendant needed to testify in order to prove his defense, the deputy prosecutor effectively demolished that defense.

2. COURT ERRED IN IMPOSING AN INDETERMINATE TERM OF COMMUNITY CUSTODY.

“A trial court may impose only a sentence which is authorized by statute.” *State v. Barnett*, 139 Wn.2d 462, 464, 987 P.2d 626 (1999) (citing *In re Personal Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980)). Third degree rape of a child is a class C felony, for which the maximum sentence is five years. RCW 9A.20.021(c); RCW 9A.44.079(2). In sentencing a sex offender, the court is generally required to impose a term of three years’ community custody. RCW 9.94A.701(1)(a).

A sentencing court’s application of the community custody provisions of the Sentencing Reform Act of 1981, chapter 9.94A RCW, is

reviewed *de novo*. *State v. Motter*, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007).

The community custody term specified by RCW 9.94A.701 “shall be reduced by the court whenever an offender’s standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime.” RCW 9.94A.701(9). The trial court is required to reduce the defendant’s term of community custody to avoid a sentence in excess of the statutory maximum. *State v. Boyd*, -- Wn.2d --, 275 P.3d 321, 322-323 (2012). RCW 9.94A.030(18) “requires courts to impose a determinate sentence, defined as ‘a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, [or] of community custody.’ ” *State v. Winborne*, -- Wn. App. --, 273 P.3d 454, 456, n. 4 (2012). A sentencing notation imposing a term of community custody equal to any period of early release is not a determinate sentence.

“RCW 9.94A.701(9) plainly presents as a three-step process (impose the term of confinement, impose the term of community custody, then reduce the term of community custody if necessary).” 273 P.3d at 458. The trial court failed to follow these steps and the resulting sentence is not authorized by the statutes.

When, as here, the trial court exceeds its sentencing authority under the SRA, the appropriate remedy is to remand for resentencing. *Id.*

E. CONCLUSION

Prosecutorial misconduct violated Mr. Bonser's constitutional right to remain silent. This conviction should be reversed and the matter remanded for a new trial. Alternatively, the case should be remanded for resentencing because the court-imposed sentence failed to comply with statutory requirements.

Dated this 19th day of June, 2012.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 30638-1-III
)	
vs.)	CERTIFICATE
)	OF MAILING
KURT D. BONSER,)	
)	
Appellant.)	

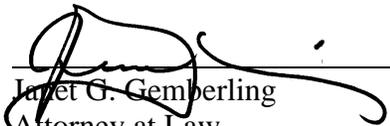
I certify under penalty of perjury under the laws of the State of Washington that on June 19, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on June 19, 2012, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on June 19, 2012.


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