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NO. ~~51544-1~~

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

2009 JUN 29 AM 11:00

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COURT OF APPEALS  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JOSHUA J. ISLER,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Did the defendant receive ineffective assistance of counsel entitling him to a new trial when counsel made a strategic decision to not object to certain evidence, the evidence did not bear on a central issue at trial, and the defendant was not prejudiced by admission of that evidence?

2. Did defense counsel provide ineffective assistance when counsel did not object to a portion of the prosecutor's closing argument?

3. Did a portion of the prosecutor's closing argument constitute prosecutorial error?

4. If a portion of the prosecutor's argument was error, is the defendant entitled to a new trial when he failed to object and the argument was not so flagrant or ill intentioned that an instruction could not have cured the error?

5. When the defendant has failed to identify any prejudicial error committed at his trial, is he entitled to a new trial based on operation of the cumulative error doctrine?

## **II. STATEMENT OF THE CASE**

The defendant, Joshua Isler was born on February 12, 1989. He had known D.G., born January 1, 1993, since she was in second grade. 2 RP 3, 10, 204.

D.G. was friends with T.P., born 10-17-92 and S.R., born 10-21-92. About the time S.R. turned 14 in October 2006 she began dating the defendant. The defendant knew S.R. was 14 when she had her birthday. 2 RP 7, 9, 11, 59-60, 62, 95, 98.

D.G. spent the afternoon of November 8, 2006 with T.P. and S.R. They went to their Junior High School where they spent about one hour with the defendant and three other youths. The group went to the skate park. From there D.G., T.P., S.R., N. and the defendant went to D.G.'s home. S.R.'s mother picked her up about six p.m. N.'s mother picked him up around midnight. T.P. and the defendant spent the night at D.G.'s home. 2 RP 13-16, 63-65, 99, 132.

E.G., D.G.'s mother, gave the defendant permission to spend the night at her home on November 8, but she laid down some ground rules. E.G. told the defendant her daughter was 13 and there was to be no sex in her home. She further stated the doors were to remain open and the defendant was supposed to

sleep on the couch. At one point in the evening E.G. and the defendant were talking. E.G. asked the defendant why he wanted to hang around a bunch of 13 year olds. 2 RP 18, 132-135, 150.

During the course of that evening the defendant and D.G. kissed and T.P. and N. kissed. The defendant and N. talked about wanting to have sex with D.G. and T. P. The girls agreed that they did not want to have sex with those boys. 2 RP 23-24, 73, 82.

T.P. spent the next day and night with D.G. There was no plan for the defendant to spend a second night at D.G.'s home and he left some time during the day. About midnight when the girls were in D.G.'s bedroom, they heard the defendant knocking on the window. D.G. and T.P. let him in. The three hung out for a time. A couple of times while D.G. was out of the room the defendant asked T.P. if she thought that D.G. would have sex with him that night. T.P. told him she did not think so because he was older than D.G. T.P. said that she did not think D.G. wanted to give up her virginity to him. Eventually T.P. got bored and went into the living room where she watched television and fell asleep. 2 RP 21-22, 24-30, 68-71.

While T.P. was out of the room D.G. laid on her bed trying to go to sleep. The defendant was lying on the floor. Six or seven

times he asked D.G. to have sex with him. The defendant promised he would leave her alone if she agreed to have sex with him. He told her that she could sleep afterwards. D.G. kept telling the defendant that she did not want to have sex with him. Finally she gave in. The defendant and D.G. then had sexual intercourse on her bedroom floor. 2 RP 31-34, 179.

Shortly after having sex the defendant told T.P. that he had sex with D.G. T.P. did not believe him but D.G. confirmed the defendant's statement. D.G. and T.P. then slept on D.G.'s bed while the defendant slept on D.G.'s floor. 2 RP 74-76

The next day D.G., T.P., the defendant, and A.J, D.G.'s brother, took the bus from Marysville to the Alderwood Mall. They stayed until early evening when they returned home to Marysville by bus. A.J. and the defendant went to the store while D.G. and T.P. started walking home to D.G.'s home. 2 RP 37-38, 76-78,

E.G. came home from work early that day. She did not know that her daughter, son, and T.P. had gone to the mall and was worried when they were not home. She called and drove around looking for them. S.R. and her mom, J.M., helped look for the children. They came upon D.G. and T.P. as they were walking to the G.s' home. J.M. gave the girls a ride to the G.s'. When J.M.

left S.R. saw the defendant and A.J. She pointed them out to her mother. J.M. stopped to pick up A.J. and take him home. She told the defendant to stay away from her daughter. 2 RP 100, 138-139, 157-160.

While S.R. and her mother were at the G.s' house D.G. told S.R. that she had sex with the defendant the night before. When S.R. got home she told her cousin, A., what D.G. said. A. and S.R. then told J.M., who then called E.G. J.M. went to E.G.'s home and told her that D.G. and the defendant had sex. When her mother confronted her D.G. initially denied having sex with the defendant, but she eventually admitted that it had happened. 2 RP 40-41, 79, 101-103, 141, 152,162-163.

After E.G. found out she took her daughter to the hospital for a rape exam. She then took her to the police where a report was taken. Detective Shackelton was assigned to investigate the case. She contacted the defendant for an interview on December 1. The defendant failed to appear for his appointment. Detective Shackelton then arrested the defendant on December 5. After advice of rights the defendant agreed to talk to her. The defendant admitted that he had sex with D.G. When asked if he knew how old

she was the defendant stated that he did not know and "did not care." 2 RP 41-42, 125-126, 142, 172, 191-196, 198-201.

The defendant was charged with Rape of a Child 2<sup>nd</sup> degree. 1 CP 81-82. At trial the defendant testified that he had sex with D.G. but that it was consensual. The defendant said that D.G. told him the second day that they were together that she was 16 years old. He said he only found out that she was 13 after S.R. told him when he left with S.R. 2 RP 221, 225.

The defendant's testimony was contradicted by D.G., T.P., S.R., and E.G.. The girls testified that everyone in their group knew each other's ages because they had talked about it. It was also contradicted by E.G.'s testimony that she specifically told the defendant that her daughter was 13 the first night he stayed at their house. D.G. denied telling the defendant that she was 16. 2 RP 43-44, 56, 71, 109, 150.

The State also introduced evidence of a letter the defendant had written S.R. after the report was made to the police. The letter was found in a locked box under S.R.'s bed. J.M. found it there and gave it to the police because the defendant had left with S.R. and J.M. was looking for clues to her daughter's whereabouts. 2 RP 105, 108-109, 166.

In the letter the defendant said:

I was talking to my homey about and it and I was like, bro, if I raped a girl, she would have yelled rape, because her mom's room is right across the hall from her room. So she wouldn't have laid there and moaned. She would have got attention brought to her so it wouldn't have happened, you know, or she would have fought, you know.

I need you to dye my hair, ASAP because my dad isn't going to do it. He thinks I did the crime so I should do the time for it. You know, that is what I F'ing hate. I wish I could just go to another state and stay there forever and never come back, you know. But I want to know, do you want to be with me forever, or no, [S] because I need -- because I will take you if you don't F'ing tell anybody where we are, because I am not going to F'ing jail for this BS. So pretty much I want to know, are you with me or against me, baby.

I want you to know is that , if you and I -- or if you and Cory both leave with me, you better not F'ing snitch on me, because that would put me in jail for a while, you know, and then that would prove to me you don't care about me, because you snitched, you know.

[D] doesn't even know what she is going to get if she doesn't just back the F off.

2 RP 106-108.

### III. ARGUMENT

#### A. THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL ON THE BASIS THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL DID NOT OBJECT TO EVIDENCE THAT S.R. RAN AWAY WITH THE DEFENDANT.

The defendant asserts that his attorney provided him ineffective assistance of counsel. Specifically he alleges counsel should have objected to evidence that after the rape was reported to police the defendant offered to take S.R. with him when he ran off, and then ultimately did so. He argues that counsel's failure to object to this testimony entitled him to a new trial.

A defendant asserting ineffective assistance of counsel as a basis for a new trial must show (1) that counsel's performance was deficient, i.e. that it fell below an objective standard of reasonableness and (2) that he was prejudiced by counsel's deficient performance. A defendant is prejudiced when counsel's errors are so serious that the defendant has been deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Whether counsel's performance falls below an objective standard of reasonableness is measured by consideration of all of the circumstances. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Courts employ a strong

presumption that counsel rendered effective representation. In re Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689,

If counsel's conduct constitutes legitimate trial strategy or tactics it cannot be the basis for an ineffective assistance of counsel claim. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Whether to object falls firmly within the category of strategic or tactical decisions. State v. Johnston, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989).

Thus, counsel's decision not to object to evidence about the defendant running away with his 14-year-old girlfriend was a strategic decision. As the defendant concedes the evidence that he talked about running away and did run away after he found out the

rape was reported is relevant to establish his consciousness of guilt. Taking S.R. with him was intertwined with his attempts to avoid detection, such as asking her to dye his hair. Counsel's objection would likely have been overruled as the evidence constituted part of the res gestae. Counsel's performance is not deficient for failing to move to suppress evidence when that motion would not likely be granted. State v. McFarland, 127 Wn.2d 322, 337, n.4, 899 P.2d 1251 (1995).

In addition the evidence was not central to the State's case. The sole contested issue at trial was whether the defendant reasonably believed that D.G. was at least fourteen years old or that she was less than 36 months younger than he was based on what D.G. had told him. 1 CP 60. Whether the defendant ran away with D.G.'s friend, S.R., or not has no bearing on what D.G. may have affirmatively told the defendant regarding how old she was before he had sexual intercourse with her.

It did give S.R.'s mother, J.M., a reason to be biased against the defendant. Defense counsel capitalized on this when she asked whether J.M. did not think the defendant was a very good person "because of what happened." 2 RP 168. Although counsel had been questioning J.M. about the rape just before she asked the

question, it was vague enough to encompass the defendant's conduct with her own daughter. The jury was instructed that in evaluating the credibility of the witness the jury was entitled to consider any bias or prejudice against the witness may have. 1 CP 52. While the jury may believe J.M. would dislike the defendant for what he did to D.G., it could believe J.M.'s testimony even more suspect for what the defendant had done to J.M.'s own daughter. Counsel highlighted the reasons to distrust the evidence produced by the State's witnesses including J.M. 3 RP 26-29. Thus, counsel's decision not to object to the evidence was a reasonable trial strategy that does not justify granting the defendant a new trial.

Finally, even if defense counsel's performance was deficient for failing to object to that evidence, the defendant cannot show the requisite prejudice. It is not enough that had she objected the trial court would have sustained it as to the evidence that defendant now argues should have been excluded. The defendant must show that "the results of the trial would have been different if the evidence had not been admitted." Davis, 152 Wn.2d at 714.

The evidence at issue included the defendant's offer to S.R. to take her when he ran away. It also included evidence that S.R. ran away, that her mother reported her missing to the police, and

while looking for clues to her daughter's whereabouts, J.M. found a letter written by the defendant to S.R. talking about the rape allegations. By inference it also included evidence that the defendant and S.R. were not gone for very long. The incident was reported on November 13. 2 RP 124-125. Detective Shackelton talked to the defendant on December 1. 2 RP 192. The evidence that the defendant offered to take S.R. with him when he ran away and then did so was very brief and not highlighted. The defendant used it to his advantage to support his affirmative defense when he testified that he only found out "after I left with [S.R.], [S.R.] told me that she was only 13" 2 RP 221.

In contrast there was substantial evidence that the defendant did not reasonably believe D.G. was more than 14 years old based on D.G.'s statements. The defendant himself told police that he "didn't know and didn't care" how old she was when he had sex with her. 2 RP 201. D.G.'s mother told the defendant that her daughter was 13 the night before he had sex with her and even asked him why he wanted to socialize with a group of 13 year olds. The group had discussed their relative ages. The defendant had known D.G. since she was in second grade, which should have led him to know that she was significantly younger than he was.

Given this evidence it is not likely that the jury would have convicted him on the basis that he had temporarily run away with his 14 year old girlfriend. When assessing the prejudice the court should presume that the jury acted according to the law. "the assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision." Strickland, 466 U.S. at 694-695, 104 S.Ct. at 2068. Jurors were instructed not to base their decision on emotion but to render their decision based on the evidence. 1 CP 51-53. The evidence showed that even by the defendant's admission he had had sex with D.G., she was under 14 at the time, and he had not proved that D.G. had led him to believe that she was older. The defendant has not shown that admission of the evidence he now claims should have been excluded prejudiced him.

**B. THE PROSECUTOR DID NOT COMMIT ERROR IN CLOSING ARGUMENT.**

**1. The Argument Was Based On The Evidence. The Defendant Failed To Preserve The Issue For Review.**

The defendant next argues that he is entitled to a new trial because the prosecutor's argument that the jury would be asked to hold the defendant responsible for his actions was improper. When

a defendant claims the prosecutor's argument is improper he bears the burden of establishing the impropriety of the prosecutor's comments as well as their prejudicial effect. A prosecutor's remarks during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and jury instructions. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). Prejudice resulting from a prosecutor's closing remarks is established only when "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). Failure to object and request a mistrial or curative instruction strongly suggests to a court that the argument in question did not appear critically prejudicial to an appellant in the context of the trial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991).

The defendant did not object to either of the arguments he identifies as improper. Where a defendant fails to object he waives any claim of error unless the remark is so flagrant and ill intentioned that it creates an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v.

Hoffman, 116 Wn.2d 51 93, 804 P.2d 577 (1991), affirmed, 67 F.3d 307 (9<sup>th</sup> Cir. 1995), cert. denied. 516 U.S. 1160, 116 S.Ct. 1046, 134 L.Ed.2d 192 (1996). The defendant contends that the remarks he identifies fall into this category, absolving him from his failure to object at trial.

The defendant cites no cases in which a prosecutor made a similar argument to the jury. Instead he relies on State v. Echevarria, 71 Wn. App. 595, 860 P.2d 420 (1993). There the defendant was charged with a drug delivery. In opening statements the prosecutor talked about the war on drugs, related the battlefield to neighborhoods and schools, and made oblique references to the Gulf War which was waging at the time of trial, and the Viet Nam war. This Court held these extensive statements were an obvious invitation to the jury to convict based on fear and repudiation of drug dealers in general instead of the evidence presented at trial. Given the climate of public fear of drugs in the community the comments were improper and no instruction could cure their prejudicial effect. Id. at 598-599.

The comments here in the context of the prosecutor's entire closing argument was no more than a request for the jury to convict based on all of the evidence. The first comment was made at the

end of the prosecutor's initial closing argument. The argument began with a discussion about why the State's child rape laws assign responsibility as they do. 3 RP 14. The prosecutor then talked about the evidence that supported the elements of the offense. 3 RP 16-17. The remainder of the argument was devoted to evidence which showed the affirmative defense was not proved. 3 RP 18-21. The prosecutor's final reference in his rebuttal argument that jurors knew "where the responsibility lies" was again a reference to the evidence.

The prosecutor's argument did exactly what the Court has required. It asked the jury to find the defendant guilty based on the evidence before it, and not based on an emotional response to the defendant. For that reason they were not improper.

Even assuming for the sake of argument it was improper an instruction could have cured any prejudice to the defendant. Unlike Echevarria the comments were brief. The comments did not attempt to associate the defendant with groups of people who were known to be violent or dangerous. They did not play on current events which cause the public fear. Thus the defendant is not entitled to a new trial on the basis the prosecutor made an improper argument in closing.

## **2. Defense Counsel Was Not Ineffective For Not Objecting To The Arguments.**

The defendant next argues that even if the error were not preserved counsel was ineffective for failure to object to the arguments. He argues the prosecutor's comments prejudiced him because there is a substantial likelihood that the statements led the jury to convict based on an emotional response sparked by the rape of a child, and a sense of responsibility to protect children from such crimes.

A defendant who asserts that counsel was ineffective for failing to object to the remarks of the prosecutor must show that the objection would have been sustained. Johnston, 143 Wn. App. at 19. Echevarria and the other cases the defendant has cited to illustrate when a prosecutor's argument is improper because it evokes the passions and prejudice of the jury are nothing like the prosecutor's remarks here. As discussed the prosecutor properly asked the jury to convict the defendant based on the evidence. The court would likely not have sustained an objection. Counsel was not deficient for not objecting to those remarks.

Lastly, the defendant suggests that he was prejudiced because the prosecutor's remarks led the jury to convict the

defendant based on strong emotions resulting from the rape of a child and a deep sense of social responsibility to protect children from that type of crime. The jury was instructed to make its decision solely on the evidence presented at trial. The lawyer's remarks are not evidence. The jury was further instructed that jurors must not let their emotions overcome their rational thought processes, setting aside any sympathy, prejudice, or personal preference the jurors may have. 1 CP 51-53. Presuming the jurors followed these instructions, the defendant was not prejudiced when counsel failed to object to the prosecutor's remarks.

In addition, the remarks were not inflammatory and did not suggest the jury should rely on outrage to render their verdict. They did suggest the jury should render its verdict based on the evidence. The evidence established that the defendant was guilty. The jury was entitled to accept the evidence which contradicted the defendant's claim that he reasonably believed that D.G. was 16 based on what she told him her age was. He was not prejudiced by the prosecutor's fleeting remarks.

**C. THERE WAS NO CUMULATIVE ERROR WHICH JUSTIFIES REVERSING THE DEFENDANT'S CONVICITION.**

Lastly the defendant relies on the cumulative error doctrine to argue that he should be granted a new trial. The cumulative error doctrine applies when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined, may deny the defendant a fair trial. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031, 94 P.3d 960 (2004). Absent any prejudicial error there is no cumulative error which deprived the defendant a fair trial. State v. Saunders, 120 Wn. App. 800, 826, 86 P.3d 232 (2004).

The defendant has failed to identify any prejudicial error that was committed at his trial. He is therefore not entitled to a new trial by operation of the cumulative error doctrine.

**IV. CONCLUSION**

For the forgoing reasons the State requests that the Court affirm the defendant's conviction.

Respectfully submitted on June 25, 2009.

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