

63914-5

63914-5

NO. 63914-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRANDON BROWN,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Brandon Brown was accused of an inappropriate ongoing sexual relationship with a 15 year-old family friend, but neither the charging document, the jury instructions nor the closing argument specified which of the multiple alleged incidents served as the basis for either of the third degree rape charges.¹ Moreover, the evidence was such that it was impossible for the jury to distinguish among the alleged acts and consider each act on its own. Because the evidence was therefore insufficient for the jury to agree unanimously that two particular and distinct acts occurred, it was insufficient to sustain the convictions.

In addition, the improper admission at trial of unduly prejudicial and irrelevant testimony from a police witness concerning the culture of prostitution was wrongly admitted, depriving Mr. Brown of his right to a fair trial. Mr. Brown was also prejudiced by prosecutorial conduct in this matter, including an incident in which the State defied a pretrial ruling, and by improper comment during the prosecutor's closing argument.

B. ASSIGNMENTS OF ERROR.

1. Mr. Brown was denied his constitutional rights to due process of law and jury unanimity where the evidence was insufficient to enable the jury to unanimously agree that Mr. Brown committed the same two distinct criminal acts.

2. Mr. Brown was denied his constitutional right to a fair trial where the court permitted police witnesses to testify as experts concerning the culture of prostitution, resulting in testimony that was irrelevant, causing undue prejudice to Mr. Brown.

3. The violation of a pre-trial ruling by a State witness tainted the jury and denied Mr. Brown his due process right to a fair trial.

4. The trial court erred in refusing to grant a mistrial.

5. The prosecutor committed misconduct by presenting improper closing argument.

6. Cumulative error denied Mr. Brown the right to a fundamentally fair trial.

¹Mr. Brown was charged with two counts of RCW 9A.44.079 and one count of RCW 9.68A.101(1).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The state and federal constitutions require that evidence be sufficient to enable a jury to unanimously agree beyond a reasonable doubt that the particular criminal act underlying each charged count was committed. Here, the complainant's testimony lacked differentiating factual details to the extent the jury could not consider each alleged incident on its own. It was therefore impossible for the jury to come to a unanimous agreement regarding whether a criminal act occurred on a particular occasion. Was Mr. Brown consequently denied his constitutional right to jury unanimity?

2. Evidence introduced at trial must be relevant to the underlying charges, and not unduly prejudicial, in order to preserve a defendant's right to due process and a fair trial. Did the admission of testimony from police witnesses in a quasi-expert capacity concerning the culture of prostitution in general, constitute reversible error?

3. The trial court issued pre-trial rulings in order to limit testimony that was unfounded, or that might tend to inflame or prejudice the jury during the trial. Where the prosecutor seemingly disregarded the trial court's order, eliciting this excluded testimony

from a police witness, did this prosecutorial misconduct deprive Mr. Brown of due process, requiring reversal and a new trial?

4. Where the prosecution's misconduct resulted in defiance of the trial court's pretrial rulings, was the trial court's failure to grant a mistrial due to the taint arising from this excluded testimony an abuse of discretion?

5. The State's duty to ensure a fair trial precludes the prosecutor from employing improper argument during closing. In the instant case, the prosecutor's tone throughout the closing argument was improper, including calling Mr. Brown a "real villain" and "evil." Did the prosecutor's misconduct during closing argument deprive Mr. Brown of his right to a fair trial?

6. Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find that the errors together created an enduring prejudice, denying the defendant a fair trial. Considering the many errors that occurred here, was Mr. Brown's right to due process violated, requiring reversal and a new trial?

D. STATEMENT OF THE CASE

On February 11, 2009, Brandon Brown was driving on the Alaskan Way Viaduct, giving a ride home to his friend, Daja Haulcy, when his car was suddenly pulled over. 5/18/09 RP 172-76, 255.² A motorist had seen what he believed to be an altercation between Mr. Brown, who was driving, and his passenger, 15 year-old Ms. Haulcy. 5/19/09 RP 461-62.³ After the responding officers separated Mr. Brown and Ms. Haulcy and questioned both, Mr. Brown was charged with two counts of rape of a child in the third degree and promoting the commercial sexual abuse of a minor. CP 1-5.

Mr. Brown and Ms. Haulcy had been friends for over a year, and although Mr. Brown admitted that Ms. Haulcy often sought him out by telephone, he denied having a sexual relationship with her. 5/19/09 RP 473, 490; 5/20/09 RP 527. Mr. Brown stated that he knew that Ms. Haulcy was a runaway, but testified that he knew

² The verbatim report of proceedings consists of four volumes of transcripts from May 11, 2009, through June 26, 2009, and a supplemental volume from jury voir dire on May 14, 2009. The proceedings will be referred to herein by the date of proceeding followed by the page number, e.g. "5/11/09 RP ___." References to the file will be referred to as "CP."

³ This motorist, Richard Needham, called 911 to report what he saw through his rear-view mirror, but at trial he could not identify Mr. Brown as the driver he saw. He also stated that he thought the woman he saw involved in the altercation that day was white. The complainant, Ms. Haulcy, is black. 5/20/09 RP 568.

nothing about her being involved in prostitution, and clearly denied being involved in the business of prostitution himself. 5/19/09 RP 473; 5/20/09 RP 537-38. Mr. Brown explained that Ms. Haulcy told him she was 18 or 19 years old when they met, and he had not found out her true age until much later. 5/19/09 RP 474-75; 5/20/09 RP 522-23.⁴

Mr. Brown also explained that although he and Ms. Haulcy were not related by blood, he often referred to her as a “cousin,” in the way that this reference was typically used in the black community, which is what he had explained to the officers. 5/19/09 RP 481.

Ms. Haulcy testified to the contrary, describing a sexual relationship with Mr. Brown, and alleging that she worked for him as a prostitute. 5/18/09 RP 208-20; 246-48.

The jury convicted Mr. Brown of two counts of RCW 9A.44.079 and one count of RCW 9.68A.101(1). CP 63-74. Mr. Brown timely appeals. CP 91-103.

⁴ Mr. Brown was 24 years old at the time of the events discussed at trial.

E. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE TWO CONVICTIONS FOR VIOLATING RCW 9A.44.079, AS NO JURY COULD UNANIMOUSLY AGREE BEYOND A REASONABLE DOUBT THAT MR. BROWN COMMITTED BOTH OFFENSES ALLEGED

In this case, the State brought two criminal charges based on evidence of an alleged ongoing sexual relationship between Mr. Brown and the complaining witness. The State did not present evidence sufficient to prove that two distinct criminal acts occurred, however. Instead, the complaining witness simply described a generic scenario, suggesting that she and Mr. Brown had sex “almost every day.” 5/18/09 RP 246. The complaining witness provided few, if any, factual details that would serve to distinguish one alleged incident from another. Thus, the evidence was insufficient for the jury to agree unanimously on two distinct particular criminal acts. The constitution requires the jury agree unanimously on one act underlying each criminal charge, and those acts must be separate and distinct from each other.

5/19/09 RP 471.

Because the evidence was insufficient to achieve this result, it was insufficient to sustain the convictions.

a. The evidence must be sufficient for a jury to unanimously agree the defendant committed the particular alleged criminal act. The Fourteenth Amendment requires the prosecution prove, beyond a reasonable doubt, each element of a charged crime for a conviction to stand. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

In Washington, a defendant may be convicted only when a unanimous jury concludes beyond a reasonable doubt that the criminal act charged in the information has been committed. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (citing State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)); Const. Art. 1, §§ 21,⁵ 22.⁶ In “multiple acts” cases, where the State alleges several acts and any one of them could constitute the crime charged, the jury must be unanimous as to which particular act or

⁵ “The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.” Const. art. 1, 21.

⁶ Article 1, section 22 provides, “In criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury. . . .”

incident constitutes the crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Thus, to ensure jury unanimity, the evidence must be sufficient for the jury to agree the State proved the elements of the charged crime on a particular occasion. Id.

The Supreme Court has recognized that in order to meet this requirement, the State must present evidence that allows the jurors to distinguish among the multiple incidents alleged. Originally, the court required the State to distinguish explicitly among the alleged incidents by electing which of the acts upon which it was relying for a conviction. Petrich, 101 Wn.2d at 570 (citing State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911)). In Petrich, however, the court recognized there would be occasions where it would be impractical for the State to elect a particular incident. Petrich, 101 Wn.2d at 572; Kitchen, 110 Wn.2d at 411. The Petrich court, therefore, announced a new rule: where the State chooses not to elect, unanimity must be assured by instructing the jury that all 12 jurors must agree the same underlying criminal act has been proved beyond a reasonable doubt. Petrich, 101 Wn.2d at 572. In that situation, it is up to the jury to distinguish among the alleged incidents. Id. Regardless of which option the State chooses, however, the evidence must be

such that the jury can agree that a particular act occurred. Id. (“when the State chooses not to elect, this jury instruction must be given to ensure the jury’s understanding of the unanimity requirement”).

b. Where the State brings multiple counts, alleging the defendant repeated an act of sexual abuse over a period of time -- generally involving children much younger than the complainant here -- the jury must be able to agree the defendant committed the act on particular occasions. This Court has recognized that in cases involving young victims, where a child witness alleges a defendant repeated the same act of sexual abuse over a period of time, the evidence outlines a series of *specific* incidents *each* of which could support a separate criminal sanction. State v. Hayes, 81 Wn. App. 425, 437, 914 P.2d 788 (1996) (citing People v. Jones, 51 Cal.3d 294, 792 P.2d 643, 270 Cal.Rptr. 611, 622 (1990)). Such cases are therefore “multiple acts” cases that are subject to the rules set forth in Petrich. See 101 Wn.2d at 571 (distinguishing cases where “several distinct acts” are alleged from cases involving “one continuing offense”). Thus, to ensure jury unanimity, the evidence must be sufficient to enable the jury to

agree unanimously that the particular act underlying the charge occurred. Id. at 572.

The difficulty arises where the State brings multiple identical charges based on a child witness's uncorroborated allegation that the same act of sexual abuse occurred more than once. If the child cannot describe any particular incident distinctly, it is impossible for a jury to agree unanimously that any particular incident occurred. The jury must be able to isolate distinct incidents, distinguish among them, and agree as to which incidents occurred. Kitchen, 110 Wn.2d at 411; Petrich, 101 Wn.2d at 572-73.

Thus, to ensure the defendant's constitutional rights to a unanimous jury verdict and to proof beyond a reasonable doubt, the prosecutor must provide some factual details that serve to distinguish one incident from another. This Court reaffirmed that principle in State v. Hayes, where it held that the evidence in such cases must "clearly delineate specific and distinct incidents of sexual abuse." Hayes, 81 Wn. App. at 431 (quoting State v. Newman, 63 Wn. App. 841, 851, 822 P.2d 308 (1992)).

Washington courts universally require the jury be instructed on the unanimity requirement in multiple acts cases, even those that consist only of evidence that shows the same act of sexual

abuse occurred more than once. Hayes, 81 Wn. App. at 431; State v. Holland, 77 Wn. App. 420, 424-25, 891 P.2d 49 (1995). In Holland, for example, the victim testified the defendant touched her private parts “[m]ore than three” times, but could not remember any other distinguishing details of any of the incidents. 77 Wn. App. at 422-23. The Court of Appeals reversed, holding it was error not to instruct the jury that they must unanimously agree as to which act or acts had been proved beyond a reasonable doubt. Id. at 424 n.3 (citing WPIC 4.25). In Hayes, this Court held the jury must be instructed not only that they must unanimously agree as to which act or acts had been proved, but also that they are to find “separate and distinct acts” for each count. Hayes, 81 Wn. App. at 431 (citing State v. Noltie, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991)). These cases recognize that, in order to ensure jury unanimity in a multiple acts case, the evidence must be sufficient to allow the jury to distinguish among the alleged incidents.

Moreover, where the State brings multiple charges, double jeopardy principles also demand the State prosecute each charge separately. The evidence must show that one charged crime was completed before another began, and the State must present

different evidence to prove each crime. Hayes, 81 Wn. App. at 439 (citing Noltie, 116 Wn.2d at 848).

Thus, in a case of ongoing abuse where the State brings multiple charges, the witness must be able to testify about the particular factual circumstances of the incidents that underlie each charge. The prosecutor need not be able to identify the particular dates on which the incidents occurred. See, e.g., Valentine v. Konteh, 395 F.3d 626, 632 (6th Cir. 2005) (although prosecutor should be as specific as possible in delineating dates of alleged offenses, reality of cases involving young victims is that they often cannot identify particular dates). But the State must present some degree of factual detail to enable the jury to consider each count on its own. Id. at 633. This Court has recognized this principle. In Newman, for example, unanimity was assured because a reasonable trier of fact could single out specific incidents of sexual abuse as to each count charged. 63 Wn. App. at 851-52.

Thus, although the factual circumstances of the crime are not elements of the crime, see Hayes, 81 Wn. App. at 437, they are nonetheless an essential component of the State's burden of proof in this kind of case. Where the facts make it impossible for the jury to agree beyond a reasonable doubt the alleged criminal act

occurred on a particular occasion, the evidence is insufficient to sustain the conviction.

c. The evidence is insufficient where the complaining witness describes a generic act of sexual assault and merely estimates the number of times the act was committed. In the instant case, the complaining witness testified that she and Mr. Brown “would have sex ... almost every day.” 5/18/09 RP 246. In response to the prosecutor’s questions, the complainant responded with several “Yes” and “Yeah” answers, but never testified with a single date or any other defining information regarding her accusations. 5/18/09 RP 245-48. The question is whether the evidence was sufficient for the jury to unanimously agree that a criminal act occurred on a distinct and particular occasion for each count charged.

Jury unanimity cannot be assured in a case that consists only of a witness’s generic description of a criminal act and an estimate of the number of times the act occurred. This is so even if the jury is informed of the unanimity requirement. It makes little sense to give the jury such an instruction where the victim is unable to distinguish between a series of acts, any one of which could constitute the charged offense. Jones, 792 P.2d at 650. In such a

case, it would be impossible for the jury to unanimously agree the defendant committed the same specific act. Id. A unanimity instruction operates effectively only where the evidence discloses several specific acts. Id. at 651.

This is even more troubling here, where the witness was not a child, but a streetwise teenager who was quite competent to testify as to dates and times of events. The fact that the complaining witness here failed to provide a single date or other clarifying characteristic to set a timeline for her alleged liaisons with Mr. Brown distinguishes this case from the line of child witness cases in which multiple acts may form the basis of a charged crime.

The Washington Supreme Court has never wavered from the constitutional requirement that the jury be unanimous regarding the criminal act underlying each charge in a multiple acts case. To the contrary, the court has consistently required jury unanimity in cases where the State alleges multiple acts, any one of which could form the basis of the charged crime. E.g., Noltie, 116 Wn.2d at 846-47; Kitchen, 110 Wn.2d at 411; Petrich, 101 Wn.2d at 572-73. Thus, the evidence in such cases must be sufficient for the jury to distinguish among the charged incidents.

d. The evidence was insufficient in this case for the jury to isolate two separate incidents on which to base the two rape convictions. Although the State brought two rape charges against Mr. Brown, the State failed to allege and to prove each charge as a separate and distinct incident. The information did not specify when either of the alleged acts occurred, but merely stated they occurred at an unspecified time between January 1, 2009, and February 11, 2009. CP 1-5. Similarly, the “to convict” instructions merely required the jury to find each incident occurred at an unspecified time within the charging period.

The prosecutor acknowledged in closing argument that the two counts were based on the complaining witness’s testimony about her alleged sexual relationship with Mr. Brown, that “I have it almost every day.” 5/20/09 RP 598. Although the complainant testified that she and Mr. Brown had sex at different locations, she did not provide another detail of any single encounter. 5/18/09 RP 246-48.

In the context of jury unanimity, the question is not whether the State can prove how many times a criminal act occurred, but whether the jury can unanimously agree it occurred on a particular

occasion. The State did not meet that burden of proof in this case. The complainant could never identify when any of the incidents occurred, although the testimony revealed that she was by all accounts a 15 year-old teenager of normal intelligence. Although she provided some factual details that could serve to distinguish one incident from another, the evidence was nonetheless insufficient. The question is whether the evidence was such that the jury could unanimously agree that *two* particular distinct acts occurred. That test was not met.

e. Mr. Brown's convictions for rape of child in the third degree must be reversed and dismissed. The State did not meet its burden of proving beyond a reasonable doubt that the elements of the crime occurred on two particular occasions upon which the jury could unanimously agree. The convictions must therefore be reversed. Where a conviction is overturned on appeal for insufficient evidence, a person may not be retried for that offense without violating the constitutional prohibition against double jeopardy. Hudson v. Louisiana, 450 U.S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981); Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); State v. Souza, 60 Wn. App.

534, 538, 805 P.2d 237 (1991). Thus, the convictions must be reversed and the charges dismissed.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING TESTIMONY FROM AN ALLEGED EXPERT WITNESS ON STREET PROSTITUTION, AS THIS TESTIMONY WAS IRRELEVANT, CUMULATIVE, AND CREATED UNDUE PREJUDICE.

Mr. Brown was denied his right to a fair trial where the court permitted a police witness to testify as an apparent expert concerning the culture of prostitution, despite the fact that this witness had no personal knowledge of the instant case.

a. Testimony at trial must be relevant to the crimes charged. Evidence is only relevant if it has “the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401.

Here, the prosecutor called Sergeant Ryan Long to testify as a State’s witness. 5/18/09 RP 295-310. This witness was not asked a single question concerning the complainant or the defendant, Mr. Brown, since he had never met either. Rather, he was simply asked to describe his work as the head of the Vice Unit for the City of Seattle. 5/18/09 RP 295. Sergeant Long’s testimony

consisted of a lengthy discussion of police enforcement strategies, popular psychology and sociology terms, and theories related to street prostitution and pimps. 5/18/09 RP 295-307.

When defense counsel objected based upon relevance, the trial court overruled the objection and the court's reasoning is inaudible. 5/18/09 RP 307. Defense counsel later stated: "And again, I'm going to object to the whole line of questioning." The court's reply was, again, inaudible. 5/18/09 RP 310. The prosecutor's examination had concluded, however, and the damage was done.

b. The probative value of the witness's testimony was substantially outweighed by the danger of unfair prejudice.

Although relevance is not conceded, even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. In a doubtful case, the scale should be tipped in favor of the defendant and exclusion. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (noting that the careful weighing of prejudice and relevance under ER 403 takes on particular importance in sex cases, "where the potential for prejudice is at its highest").

Here, this witness was permitted to testify broadly, including pop psychology theories about why prostitutes join the sex trade, and why others remain with their pimps. 5/18/09 RP 305-10. There was no attempt to link his testimony to Mr. Brown or to the complaining witness, making the testimony relevant to these proceedings.

c. The testimony did not meet the standards required for expert witnesses. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. ER 702.

First, Sergeant Long was not properly qualified as an expert witness. See, e.g., State v. Wilber, 55 Wn. App. 294, 299, 777 P.2d 36 (1989) (officers' purported expert opinions were inadmissible when they did not elaborate on the nature of specialized training, and when there was no evidence that officers' opinions were based on a theory generally accepted by the scientific community).

Second, the testimony offered by Sergeant Long was not necessary to assist the jury in understanding any issue of fact

during the trial. Rather, the testimony presented by this witness was cumulative to that previously offered by the complaining witness, Daja Haulcy, and permitted the prosecutor to bolster the witness's usage of such street vernacular as "bottom bitch" and "out of pocket." 5/18/09 RP 302-04.

The State's presentation of this so-called expert witness on street prostitution was unduly prejudicial, essentially providing the jury with a roadmap with which to convict him of promoting the commercial sexual abuse, and it was an abuse of discretion for the trial court to permit this testimony.

3. THE VIOLATION OF A PRE-TRIAL RULING BY A STATE WITNESS CONSTITUTED PROSECUTORIAL MISCONDUCT, TAINTING THE JURY, AND THE COURT'S FAILURE TO GRANT A MISTRIAL WAS AN ABUSE OF DISCRETION REQUIRING REVERSAL.

a. The prosecutor willfully violated the court's pre-trial order. Before the commencement of trial, the court made a detailed pre-trial ruling prohibiting any reference to a shooting incident witnessed by Mr. Brown at the Seal's Motel in January 2009, stating that any such reference would be "more prejudicial than probative." 5/11/09 RP 98.

Despite this pre-trial ruling, near the end of his direct examination of Officer Bruneau, the prosecutor elicited this inadmissible information from the officer. 5/19/09 RP 365. Officer Bruneau testified that Mr. Brown asked if the officers were going to shoot him “because he had been at the Seal’s when the officers were shooting people,” and that “he was at the incident when the North Precinct officers were in [sic] officer involved shooting.” 5/19/09 RP 365-66.

Defense counsel immediately asked for a sidebar, and stated that he wanted to make a motion. Id. at 366. The trial court directed the prosecutor to move on to something else. Id.

Shortly thereafter, the judge excused the witness and defense counsel promptly moved for a mistrial, noting that during pre-trial motions, all parties had agreed that testimony about the shooting at the Seal’s Motel was not admissible. 5/19/09 RP 372. Stating he was unable to “unring the bell,” defense counsel moved for a mistrial, arguing that the prosecutor had neglected to ask the trial court to reconsider its pre-trial ruling, and without any consequences against the State, there would be no incentive for the State to continue to follow the court’s rulings. Id. at 373-74.

The trial court denied the mistrial motion and instead gave a curative instruction that the jury was to disregard the officer's testimony concerning "an alleged incident of police misconduct at the Seal's Motel. 5/19/09 RP 378-79.

b. Mr. Brown was unduly prejudiced by this error. Prior to trial, the trial court agreed with the parties that any mention of the shooting at the Seal's Motel was "more prejudicial than probative." 5/11/09 RP 98. Defense counsel's primary concern was that the incident involved individuals with guns. 5/11/09 RP 69-71. The court's instruction to disregard evidence of police misconduct was thus wholly insufficient to lift the pervasive taint created by the misconduct of the prosecutor who elicited precisely the testimony that had been precluded pursuant to motions in limine.

This testimony – the implication that Mr. Brown spends his time in a motel surrounded by unsavory characters who participate in shootings -- created an enduring prejudice which so infected the proceedings that the curative instruction could not have been – and was not – effective. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997); see also U.S. v. Murray, 784 F.2d 188, 189 (6th Cir. 1986) ("Such an instruction ... is very close to an instruction to unring a bell"); Bruton v. U.S., 391 U.S. 123, 129, 88 S.Ct. 1620, 20 L.Ed.2d

476 (1968) (citations omitted) (“The naïve assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction”).

c. The trial court’s denial of the mistrial motion was an abuse of discretion; therefore, reversal is required. For these reasons, the trial court abused its discretion when it denied Mr. Brown’s mistrial motion. When a trial court’s exercise of its discretion is “manifestly unreasonable or exercised on untenable grounds, or for untenable reasons,” an abuse of discretion exists. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941). Since the court’s abuse of discretion resulted in an enduring prejudice to the entire proceedings, reversal is required.

4. MR. BROWN’S RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT.

a. Mr. Brown has a right to due process. The due process clause of the Fourteenth Amendment protects the right of every criminal defendant to a fair trial before an impartial jury. U.S. Const. amends. V, XIV; Const. art. 1 §§ 3, 21, 22. The

right to a fair trial includes the presumption of innocence.

Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d P.2d 1129 (1996). The Fourteenth Amendment also “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The requirement that the government prove a criminal charge beyond a reasonable doubt – along with the right to a jury trial -- has consistently played an important role in protecting the integrity of the American criminal justice system. Blakely v. Washington, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2000); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

b. Prosecutors have special duties which limit their advocacy. A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829,

835, 558 P.2d 173 (1976)). In State v. Huson, the Supreme Court noted the importance of impartiality on the part of the prosecution:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial ... We do not condemn vigor, only its misuse ...

73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a “substantial likelihood” exists that the comments affected the jury.” Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

c. The prosecutor’s misconduct in closing argument denied Mr. Brown a fair trial. The prosecutor made

improper comments during his closing arguments, tainting the jury and violating Mr. Brown's right to due process.

The prosecutor began his closing argument this way:

It should not be lost on any of us in this courtroom, but the real villain and the real evil that the laws of the State of Washington are designed to protect against (inaudible) criminalized that someone's profiting off of the back of a child who is engaged in prostitution.

5/20/09 RP 571 (emphasis added). Within a few additional lines of similar outrageous argument, defense counsel properly objected, noting that the prosecutor was appealing to the sympathies and emotions of the jury. Id. at 572.

This objection was overruled by the trial court, who responded to the prosecutor: "Well, you can cover this briefly, Mr. O'Donnell, but obviously we want to focus on the facts of the case." 5/20/09 RP 572. This prosecutorial misconduct was compounded by the fact that the prosecutor snapped back at the judge: "Well, from my perspective, these are the facts of the case." Id. at 572.

As in State v. Fleming, the prosecutor here repeatedly implied that because Mr. Brown was charged with an "evil" or "villainous" offense, he was not entitled to the same constitutional protections as others. 83 Wn. App. 209, 216, 921 P.2d 1076 (1996) (holding that

“the State must convict on the merits, and not by way of misstating the nature of reasonable doubt, misstating the role of the jury,... and improperly shifting the burden of proof to the defense”). When a prosecutor’s closing argument relies upon inflammatory comments designed to appeal to a jury’s passions and prejudices, rather than to properly admitted evidence, and “the misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.” State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing State v. Case, 49 Wn.2d 66, 74, 298 P.2d 500 (1956); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978).

d. Reversal is required. The cumulative effect of various instances of prosecutorial misconduct may violate a 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).

Due to the remarks constituting misconduct in the closing argument during Mr. Brown’s trial, there is a substantial likelihood the cumulative effect affected the jury’s verdict; therefore, this Court should reverse his conviction. Reed, 102 Wn.2d at 146-47.

5. CUMULATIVE ERROR CREATED AN
ENDURING PREJUDICE, DENYING MR.
BROWN THE FUNDAMENTAL RIGHT TO A
FAIR TRIAL.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may find that the errors combined together denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; Williams v. Taylor, 529 U.S. 362, 396-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (considering the accumulation of trial counsel's errors in finding cumulative error); Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) ("the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Here, Mr. Brown was tried and convicted based upon evidence insufficiently specific to sustain two distinct rape convictions with unanimity. In addition, he was prejudiced by

the admission of irrelevant and cumulative evidence from police witnesses regarding so-called expert testimony on the culture of street prostitution. Mr. Brown's fundamental right to a fair trial was also compromised by prosecutorial misconduct in two distinct ways: in the prosecutor's willful defiance of a pretrial order which resulted in the eliciting of excluded testimony, and in misconduct during closing argument.

Each of the errors set forth above, standing alone, merits reversal. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict. Even if this Court does not find that any single error merits reversal, this Court should conclude that cumulative error rendered Mr. Brown's trial fundamentally unfair.

F. CONCLUSION

For the foregoing reasons, Mr. Brown respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 9th day of February, 2010.

Respectfully submitted,



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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 BRANDON BROWN,)
)
 Appellant.)

NO. 63914-5
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DIVISION ONE
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| KING COUNTY COURTHOUSE | () | |
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