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NO. 65067-0-1

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

REC'D  
AUG 18 2010  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

MIKAIL RASHID,

Appellant.

FILED  
COURT OF APPEALS DIVISION ONE  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Brian Gain, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The prosecution engaged in flagrant misconduct when it used evidence expressly excluded by the trial court.

Issue Pertaining to Assignment of Error

Appellant was charged with assault for excessively disciplining a child. The State made clear its desire to demonstrate that appellant had also abused the alleged victim's siblings. The trial court granted a defense motion to exclude this evidence as violating ER 404(b). Despite the court's ruling, the prosecutor used the evidence while examining a key defense witness. Did the trial court err when it denied appellant's motion for mistrial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Mikail Rashid with Assault of a Child in the Third Degree – Domestic Violence. CP 1-4. A jury found Rashid guilty, the trial court imposed a standard-range three-month sentence, and Rashid timely filed his Notice of Appeal. CP 39, 45, 49-56.

2. Substantive Facts.

a. Facts pertaining to the offense

In July of 2008, eight-year-old R.W. attended summer

school. 3RP<sup>1</sup> 3-4; 4RP 50. On July 28, his teacher noticed bruises on R.W.'s wrist and ankle. 3RP 6-8. The injuries were visible because R.W. was dressed in shorts and a short-sleeved shirt. Based on the shape of the bruises, it looked as though he had been hit with a belt. 3RP 8, 13-15. After discussing the bruises with R.W., the teacher notified the principal, who called Child Protective Services on July 30. 3RP 8-9, 20.

CPS Social Worker Brad Stout interviewed R.W. at school on July 31. 3RP 70. Stout saw bruising and scars on R.W.'s arm and bruising on an ankle and right upper thigh that appeared to be caused by a belt. Stout attempted to document the injuries with photographs, but had limited success. 3RP 71-79; exhibit 2-5.

At the time, R.W. lived in Federal Way with his mother, Sirrether Latoya Lanier, and her two older children – Chardon (a boy) and Jori (a girl). 3RP 29-30. Ms. Lanier's boyfriend, Mikail Rashid, also stayed with the family at times. 3RP 30. Following the discovery of R.W.'s bruises, Brad Stout contacted Ms. Lanier, who told him she would not assist in the investigation. 3RP 87-88.

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – January 20, 2010; 2RP – January 21, 2010; 3RP – January 25, 2010; 4RP – January 26, 2010; 5RP – January 27, 2010.

Nor did she speak to a police detective regarding the matter. 3RP 43-46.

R.W. alleged that Rashid had caused the bruises by hitting him with a belt. 4RP 12. Following R.W.'s claim, Lanier took R.W. to her father's house. Lanier was upset with R.W. and, based on what Lanier said and her relationship with her children, her father did not believe R.W.'s allegation. 3RP 33-35. R.W. only stayed with Lanier's father for a short time. R.W.'s paternal grandparents, who live in Ocean Shores, took him to their house to live. 3RP 35-36, 104-106. Upon speaking with R.W. and seeing the bruises, they also called CPS and more photos were taken of the injuries. 3RP 22-26, 107-110; exhibits 6-9.

Both R.W. and his mother testified at trial. According to R.W., the same week he spoke to his teacher about the bruises, Rashid repeatedly struck him with a belt. 4RP 12. Someone had taken Rashid's personal property and Rashid threatened that all three children would be in trouble if the culprit did not come forward. Although R.W. claimed at trial he was not the culprit, he told Rashid that he was. 4RP 21, 25-26. In response, Rashid hit him with the belt more than 10 times. 4RP 12-14.

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R.W. testified that he was laying down on his mother's bed for the spanking and Rashid was hitting him on the butt. But because R.W. was "moving around," Rashid also ended up hitting him on the thigh, arms, and ankles. 4RP 14-17. R.W. did not believe that Rashid intended to hit him in these areas. 4RP 28. R.W. admitted he did not like Rashid and had wanted to move to Ocean Shores and live with his paternal grandparents. He also hoped his parents would reconcile. 4RP 26-27, 30-31.

Lanier testified that R.W. had a hard time accepting his parent's divorce. 4RP 38. His father also lived in Ocean Shores and in the months before July 2008, R.W. said that he wanted to live there and would "keep on being bad" until his mother relented. 4RP 39-40, 62. Lanier sought help from Rashid, believing that R.W. might show more respect to a male authority figure. She gave Rashid permission to discipline R.W. 4RP 44-45.

According to Lanier, spanking was always a last resort, she was always present when R.W. was disciplined, and Rashid punished R.W. in a reasonable manner. 4RP 47-49. She never saw Rashid hit R.W. on the thigh, ankle, or arm, but if he did, it was because R.W. moved. 4RP 67-68. Nor had she ever seen any bruises as a result of a spanking. 4RP 50. She overheard R.W.

tell his older brother that he had shown old bruises and scars, rather than fresh bruises, when claiming that Rashid hurt him. 4RP 62.

Lanier believes R.W. felt that if she were not with Rashid, she and R.W.'s father might get back together. When R.W. lied about being abused, she had no choice but to let him leave the house for the sake of her other children. 4RP 40-43. She denied that Rashid ever abused R.W. or used anything beyond appropriate discipline. 4RP 62.

b. Prosecutorial misconduct

Prior to trial, defense counsel moved under ER 401, 403, and 404(b) to preclude the State from using evidence that Rashid had used excessive discipline against one of R.W.'s siblings, who would not be present for trial. CP 8; 1RP 7-8. The State confirmed that it intended to elicit evidence that R.W. had "heard the screams of his brother Chardon when he was spanked" to rebut the defense claim that the discipline used with R.W. was reasonable. 1RP 24-25. The defense argued such evidence was irrelevant to the charged conduct and improper character evidence. Moreover, Chardon would not be testifying or available for cross-examination. 1RP 27-28, 32.

The trial court granted the defense motion, finding evidence

pertaining to punishment inflicted on R.W.'s siblings inadmissible under ER 404(b). 1RP 32. Despite this clear prohibition, while examining Lanier, the prosecutor asked, "Did you know that [Jori] indicated that she had been abused by Mr. Rashid?" 4RP 60. A defense objection was sustained and jurors were told to disregard the information. 4RP 60.

At the next break, defense counsel moved for a mistrial because the prosecutor had mentioned Jori's claim that Rashid had abused her as well, pointing out the court had ruled this evidence inadmissible and arguing it could not be cured with a mere instruction to disregard. 4RP 72-73. Noting that jurors are presumed to follow the court's instructions, the motion was denied. 4RP 74.

Rashid now appeals.

C. ARGUMENT

PROSECUTORIAL MISCONDUCT REQUIRED A MISTRIAL.

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). A prosecutor has a special duty in trial to act impartially in the

interests of justice and not as a "heated partisan." State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

To establish prosecutorial misconduct, the defendant must prove the impropriety of the prosecutor's conduct and its prejudicial effect on the trial. A defendant establishes prejudice if there is a substantial likelihood the misconduct affected the jury's verdict. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998).

A prosecutor's violation of an in limine ruling may constitute misconduct warranting a mistrial. State v. Clemons, 56 Wn. App. 57, 62, 782 P.2d 219 (1989), review denied, 114 Wn.2d 1005 (1990). Denial of a motion for mistrial is reviewed for an abuse of discretion. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

In Rashid's case, although the prosecutor desired to convince jurors that Rashid had physically abused R.W.'s siblings, the trial court unequivocally excluded any such information. See 1RP 32 ("I am satisfied, as to any acts that pertain to other siblings, that the 404(b) evidence is not admissible."). Despite this clear prohibition, the prosecutor used this very information when questioning Lanier. See 4RP 60 ("Did you know that [Jori] had indicated that she had been abused by Mr. Rashid?").

This was serious misconduct. At issue in this case was whether Rashid used “reasonable and moderate” physical discipline on R.W., a defense to assault of a child.<sup>2</sup> CP 27; 5RP 29. R.W. alleged that Rashid used excessive force with a belt, physically abusing him and causing bruising. The defense – through Lanier – denied that accusation and argued that Rashid, with Lanier’s permission and under her supervision, lawfully disciplined R.W. 4RP 47-50, 62; 5RP 29-32. Moreover, R.W. had an incentive to implicate Rashid because he wanted to be with his father in Ocean Shores. 4RP 38-43, 62; 5RP 22-24. And there was evidence he used old injuries to convince others he had suffered serious physical abuse. 4RP 62.

But once jurors learned that Jori also had accused Rashid of physical abuse, conviction was assured. Under ER 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to

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<sup>2</sup> RCW 9A.16.100 provides:

the physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child. And any use of force on a child by any other person is unlawful unless it is reasonable and moderate and is authorized by the child’s parent or guardian for purposes of restraining or correcting the child.

prove the character of a person in order to show action in conformity therewith." Evidence relating to other criminal conduct is particularly unfair as such evidence impermissibly shifts "the jury's attention to the defendant's propensity for criminality, the forbidden inference . . . ." State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), review denied, 133 Wn.2d 1019 (1997).

The trial court told jurors to disregard Jori's claim that Rashid also had abused her. 4RP 60. And in denying the defense motion for mistrial, the court relied on the general presumption that jurors will follow curative instructions. 4RP 74. But some errors simply cannot be fixed with an instruction. See State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); State v. Escalona, 49 Wn. App. 251, 255-56, 742 P.2d 190 (1987). This was one of those errors.

The prosecutor's violation of the court's in limine ruling was misconduct. There is a substantial likelihood this misconduct affected the jury's verdict because it portrayed Rashid as a serial abuser. This is not something jurors could reasonably be expected to just forget. A mistrial was required.

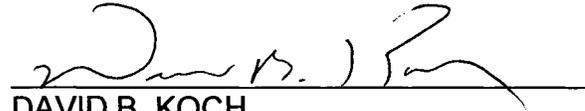
D. CONCLUSION

Rashid is entitled to a new and fair trial.

DATED this 18<sup>th</sup> day of August, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "David B. Koch", is written over a horizontal line.

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Attorneys for Appellant

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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
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v.	)	COA NO. 65067-0-1
	)	
MIKAIL RASHID,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18<sup>TH</sup> DAY OF AUGUST, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X]    MIKAIL RASHID  
       2613 S. 122<sup>ND</sup> STREET  
       SEATTLE, WA 98168

**SIGNED** IN SEATTLE WASHINGTON, THIS 18<sup>TH</sup> DAY OF AUGUST, 2010.

x. *Patrick Mayovsky*