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NO. 71109-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KAREN MORGAN,

Appellant.

FILED
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King County Prosecutor
Appellate Unit

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

The Honorable Michael C. Hayden, Judge

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BRIEF OF APPELLANT

KEVIN A. MARCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. INTRODUCTION

Following a lengthy trial, Karen R. Morgan was convicted of third degree criminal mistreatment resulting from her care of an elderly patient, Hannah Sinnett. During its closing argument, the State exclaimed, “how dare [Morgan] imply that [Sinnett’s] life didn’t matter and that [Sinnett] was dying.” This improper emotional appeal to the jurors’ passions and prejudices was misconduct and substantially likely to affect the jury’s verdict. Despite the clear prejudice of this statement, the trial court refused to strike it or instruct the jury to disregard it. Given the prosecutor’s grave misconduct and the trial court’s refusal to correct it, Morgan was denied a fair trial. Accordingly, this court must reverse Morgan’s conviction and remand for retrial.

B. ASSIGNMENTS OF ERROR

1. The prosecutor’s misconduct during closing argument denied Morgan a fair trial.

2. The trial court erred by refusing to strike the prosecutor’s improper remarks and by refusing to instruct the jury to disregard the prosecutor’s improper remarks.

Issues Pertaining to Assignments of Error

1. Did the prosecutor’s appeal to the passions and prejudices of the jury constitute prosecutorial misconduct?

2. Did the trial court's refusal to strike the prosecutor's improper remarks or instruct the jury to disregard them result in prejudice that was substantially likely to affect the jury's verdict?

C. STATEMENT OF THE CASE

Morgan was independently contracted to provide nurse delegation services at the adult family home (AFH) in which Hannah Sinnett, a resident with Alzheimer's, lived. CP 3; 3RP¹ 79; 5RP 45, 52, 106-07, 149. On December 22, 2009, Morgan was called by the AFH director to obtain Sinnett's urine sample. CP 6; 3RP 62; 4RP 175-76; 5RP 149-50. When Morgan arrived, she observed multiple serious pressure sores on Sinnett's body. 3RP 63-64; 4RP 178. Morgan was shocked by the ulcers. CP 6; 4RP 177; 5RP 35.

Morgan phoned Sinnett's durable power of attorney, Sam Robison, to inform him of Sinnett's pressure sores, giving him the option of hospitalizing Sinnett or continuing to treat Sinnett at the AFH. 3RP 63-64. Robison decided to permit Morgan to care for Sinnett at the AFH, because Morgan "gave [Robison] confidence that she could take care of it," and because of the approaching Christmas holiday. 3RP 65-66.

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP – August 13, 2013; 2RP – August 14, 2013; 3RP – August 15, 2013; 4RP – August 19, 2013; 5RP – August 20, 2013; 6RP – August 21, 2013; 7RP – August 26, 2013; 8RP – August 27, 2013; 9RP – August 29, 2013; 10RP – October 21, 2013.

Morgan faxed an order to Sinnett's doctor requesting supplies and nutritional supplements to treat Sinnett. 5RP 37, 63-64, 95. Morgan also started a turning schedule intended to reduce the pressure from the wounds. 4RP 177; 5RP 38-39.

On December 27, 2009, Sinnett was taken to Swedish Hospital's emergency department. 3RP 8. Physicians and nurses noted large chronic and infected ulcers on Sinnett's buttocks and bilateral lower extremities. 3RP 15-16, 18; 4RP 35-40; 7RP 33. Given the advanced nature of the pressure ulcers, Robison opted against aggressive interventions, including surgery. 4RP 43-44. Sinnett was placed on comfort care, including pain medication. 4RP 44. Sinnett died in January 2010. CP 9; 3RP 70.

In December 2011, the State charged Morgan with criminal mistreatment in the second degree. CP 1-2. Specifically, the State alleged that during the period between December 22, 2009 and December 27, 2009, Morgan "recklessly create[d] an imminent and substantial risk of death or great bodily harm to [Sinnett] by withholding any of the basic necessities of life." CP 1-2.

At trial, witnesses testified that Morgan should have hospitalized Sinnett immediately given the severity of Sinnett's pressure ulcers. 4RP 46, 60-61; 5RP 13, 80; 6RP 47-48, 51; 7RP 67-68. However, several witnesses also indicated that the pressure ulcers had reached a stage where it probably

would not have made a difference to Sinnett's overall health to be hospitalized on December 22, 2009. 3RP 38; 4RP 72-74; 5RP 11; 7RP 123. In addition, witnesses unanimously indicated that the pressure sores developed before Morgan became involved in caring for Sinnett's wounds. 3RP 29-30; 4RP 71-72; 5RP 43-44, 71, 84; 7RP 80.

The State made the following argument during its closing:

The defendant may argue to you in closing, "Well, Hannah [Sinnett] was dying anyway. The defendant really didn't create a risk, because it was already too late."

Ladies and gentlemen, Hannah [Sinnett], we know, got better when she went into the hospital, not for a long time, but for a couple of weeks she was better. Her appetite improved, her mental state improved, and her lab tests showed improvement. That in itself is evidence that she wasn't dying on the 22nd [of December], when she took control of her care.

Yes, Hannah [Sinnett] probably didn't have long to live anyway, but at that stage of her life every day mattered, and how dare she imply that this person's life didn't matter and that she was dying.

8RP 24. Defense counsel objected for improper argument, which the trial court sustained. 8RP 24. Defense counsel also moved the trial court to strike or to give a curative instruction to the jury. 8RP 24. The trial court refused, merely repeating, "I'll sustain your objection." 8RP 24.

The jury returned a verdict of guilty on the lesser included offense of criminal mistreatment in the third degree. CP 56. The trial court sentenced

Morgan to a 364-day suspended sentence with four months of electronic home detention. CP 67; 10RP 18-20. Morgan timely appeals. CP 71.

D. ARGUMENT

THE TRIAL COURT'S FAILURE TO STRIKE THE PROSECUTOR'S APPEALS TO THE JURY'S PREJUDICES AND PASSIONS DURING CLOSING ARGUMENT ENTITLES MORGAN TO A NEW TRIAL

During her closing argument, the prosecuting attorney castigated Morgan: "how dare she imply that this person's life didn't matter and that she was dying." 8RP 24. This was an improper appeal to the jury's sympathies, and encouraged the jury to ignore the evidence in this case. Because the trial court failed to strike the prosecutor's argument or provide a curative instruction to the jury, the prosecutor's misconduct resulted in prejudice that likely affected the jury's verdict. Accordingly, this court must reverse Morgan's conviction and remand for a new trial.

1. The prosecutor's closing argument unquestionably constituted misconduct

"Mere appeals to the jury's passion or prejudice are improper." State v. Gregory, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006). The prosecutor has a duty to "ensure a verdict free of prejudice and based on reason." State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984); accord State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). This duty derives from the prosecutor's position as a quasi judicial, impartial officer. State v. Kroll, 87

Wn.2d 829, 835-36, 558 P.2d 173 (1977). In this case, the prosecutor failed to comply with her duty.

In anticipation of the defense's closing argument, the prosecuting attorney stated, "The defendant may argue to you in closing, 'Well, Hannah [Sinnett] was dying anyway. The defendant really didn't create a risk, because it was already too late.'" 8RP 24. The prosecutor, referring to Morgan's potential arguments, then stated, "Yes, Hannah [Sinnett] probably didn't have long to live anyway, but at that stage of her life every day mattered, and how dare she imply that this person's life didn't matter and that she was dying." 8RP 24.

The prosecutor's rhetoric—how dare Morgan imply that Sinnett's life did not matter—was designed to prejudice the jury against Morgan by appealing to emotion rather than reason. Indeed, the prosecutor meant to invoke a sense of shame and ire toward Morgan among the jurors, encouraging the jury to render a verdict based on its feelings rather than the evidence. Because these appeals to sympathy and emotion violated the prosecutor's quasi judicial function of impartiality, the prosecutor's remarks constituted misconduct.

2. The trial court's failure to strike the prosecutor's improper argument or give a curative instruction to the jury prejudiced Morgan, necessitating retrial

When, as here, the prosecutor's statements are improper, courts "must consider whether there was a substantial likelihood the comments affected the jury verdict." State v. Echevarria, 71 Wn. App. 595, 597, 860 P.2d 420 (1993) (citing State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)). "Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). The trial court in this case refused to cure the prosecutorial misconduct. This failure prejudiced Morgan such that there was a substantial likelihood that the prosecutor's statements affected the verdict. Accordingly, this court must grant Morgan a new trial.

When a prosecutor resorts to improper argument, the defense has a duty to interpose a contemporaneous objection. Emery, 174 Wn.2d at 761. The purpose of requiring a contemporaneous objection is "to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks." Id. at 761-62 (quoting 13 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4505, at 295 (3d ed. 2004)). Indeed, where a court merely sustains an objection but does not strike an improper statement or instruct the

jury to disregard it, the improper statement remains in the record for the jury's consideration. State v. Swan, 114 Wn.2d 613, 659, 790 P.2d 610 (1990); see also State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (noting that trial court's refusal to overrule prosecutor's improper comments regarding accomplice liability "lent an aura of legitimacy to what was otherwise improper argument"). Thus, if a court refuses to instruct the jury or strike the improper argument, the court creates a serious risk that the improper statements will influence the jury's verdict.

In this case, after the offending comments, defense counsel properly objected on the basis of improper argument. 8RP 24. Although the trial court sustained the objection, it refused to grant the defense's motion to strike the prosecutor's comments or instruct the jury. 8RP 24. Because the trial court did not strike the improper argument or instruct the jury to disregard it, the prosecutor's improper appeal to jurors' emotions remained for the jury's consideration. Moreover, the trial court's refusal to instruct the jury or strike the prosecutor's argument despite defense counsel's specific request provided undue legitimacy to the State's improper argument. This resulted in prejudice to Morgan that substantially influenced the jury's verdict.

In the absence of the prosecutor's misconduct, and the court's failure to rectify it, Morgan had a legitimate argument that she had not created the

risk, but that she came into a situation where others who cared for Sinnett had already created the risk. 8RP 57-60. The defense also highlighted testimony that it would not have made a difference in terms of Sinnett's overall health had she been hospitalized on December 22, 2009 instead of December 27, 2009. 8RP 57, 59-61. But, by attributing to Morgan an opinion that Sinnett's life didn't matter and that she was dying anyway, the prosecutor overshadowed these arguments and the supporting defense evidence.

In response, the State may argue its misconduct did not influence the jury's verdict because the jury returned a guilty verdict on the lesser included offense of third degree criminal mistreatment. But second degree criminal mistreatment required a showing of recklessness, as opposed to criminal negligence, and evidence of recklessness was lacking at trial. Because Morgan ordered medical supplies and nutritional supplements and treated Sinnett's wounds, the jury was extremely unlikely to find Morgan guilty of the greater offense. Whether Morgan's delay in hospitalizing Sinnett was criminally negligent, however, would have been a much closer issue for jurors. Given the closeness of this question, the prosecutor's improper remarks likely persuaded the one of more of the jurors to return a guilty verdict based on its emotional response rather than on the evidence presented at trial.

The State's improper arguments encouraged the jury to ignore evidence and instead rely on emotional prejudice against Morgan, calling the fairness of the jury's verdict into question. Because there is a substantial likelihood the misconduct affected the jury's verdict, this court must reverse and remand for a new trial. State v. Lindsay, ___ Wn.2d ___, ___ P.3d ___, 2014 WL 1848454, at *11 (2014) (holding appropriate remedy for prejudicial prosecutorial misconduct is reversal and remand for retrial).

E. CONCLUSION

Prosecutorial misconduct, and the trial court's failure to rectify it, denied Morgan a fair trial. This court must reverse Morgan's conviction and remand for retrial.

DATED this 30th day of May, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read 'K. March', written over a horizontal line.

KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051

Attorneys for Appellant

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
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v.)	COA NO. 71109-1-I
)	
KAREN MORGAN,)	
)	
Appellant.)	

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 30TH DAY OF MAY 2014, 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 AND/OR VIA EMAIL.

[X] KAREN MORGAN
7709 S. 118TH STREET
SEATTLE, WA 98178

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF MAY 2014.

x *Patrick Mayovsky*