

71246-2

71246-2

NO. 71246-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

LEBARON R. PRIM,

Appellant.

71246-2-1
JUL 11 2017
COURT OF APPEALS
DIVISION I
ST. PETER
ST. PETER
ST. PETER

BRIEF OF RESPONDENT

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I. ISSUES

1. Did asking a witness if she wanted to be in court violated defendant's right to confront the witness?
2. Was the trial court's denial of defendant's motion for mistrial an abuse of discretion?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIME.

JJ was born in March of 1999. She met RH in the seventh grade at the end of the school year in 2011. She was twelve years old. RH was fourteen years old. JJ and RH saw each other several times over the summer until RH moved to Alabama. They kept in touch through Facebook and Twitter. During the winter school break RH came back to Washington to visit his mother in Marysville. He and JJ arranged to meet at his mother's house on December 27, 2011, to have sexual intercourse. When JJ arrived at the house, RH and his older brothers Aaron and Lebaron Rodney Prim, defendant, were there. JJ and RH went upstairs and according to their plan had sexual intercourse in the bathroom. After having sex, RH and JJ went back downstairs and JJ left

around 11:00 a.m. RP¹ 30-35, 37-39, 41-49, 51, 54, 95, 134, 106-111, 122, 127, 167-169, 171, 174-175, 180, 201-204.

After JJ left she communicated with both RH and defendant by texting. Later that night JJ snuck out of her house and went back over to RH's mother's house to see RH, Aaron, and defendant. RH and defendant were watching a movie when she arrived. A few minutes after she got there, defendant signaled JJ to follow him into the downstairs bathroom. When they were in the bathroom, they started kissing. Defendant took out a condom and asked JJ if she wanted to have sexual intercourse. She nodded yes. Defendant and JJ had sexual intercourse on the bathroom floor. JJ began bleeding and defendant asked her if she was a virgin. JJ ignored the question. Later defendant told JJ not to tell anyone because of his age and he was in the military. At the time, defendant was nineteen years old. RP 51-53, 55-56, 58-72, 77, 167, 201-202.

B. PROCEDURAL HISTORY.

On January 29, 2013, defendant was charged with one count of child molestation in the second degree. On June 19, 2013,

¹ RP refers to the continuously paginated three volume verbatim reports of proceedings October 28 – November 1, 2013. Other verbatim reports of proceedings are referenced by date, e.g. RP (12/10/13).

by amended information defendant was charged with one count of rape of a child in the second degree. CP 59, 64-65. The jury found defendant guilty as charged rape of a child in the second degree. CP 1, 27; RP 454-456.

III. ARGUMENT

A. THE PROSECUTOR'S CONDUCT WAS NOT IMPROPER OR PREJUDICIAL.

Defendant argues that it was "prosecutorial misconduct" to ask JJ if she wanted to be in court. Brief of Appellant 16-19. In a prosecutorial error² claim, the burden rests on the appellant to establish that the prosecuting attorney's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. State v. Thorgerson, 172 Wn.2d 438, 442,

² "Prosecutorial misconduct" is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937, 941 n. 1 (2009). Recognizing that words carry repercussions and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. See National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved 4/10/10), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Sept. 24, 2014); American Bar Association Resolution 100B (Adopted 8/9-10/10), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf> (last visited Sept. 24, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. See, e.g., State v. Fauci, 282 Conn. 23, 26 n. 2, 917 A.2d 978, 982 n. 2 (2007); State v. Leutschaft, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); Commonwealth v. Tedford, 598 Pa. 639, 686, 960 A.2d 1, 28-29 (Pa. 2008).

258 P.3d 43 (2011); State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The burden to establish prejudice requires proof that “there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.” Thorgerson, 172 Wn.2d at 442-443, citing State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The court reviews the statements in the context of the entire case. Thorgerson, 172 Wn.2d at 443.

1. The Prosecutor's Question And JJ's Answer That She Did Not Want To Be In Court, Did Not Violate Defendant's Rights Under The Confrontation Clause.

Defendant argues that by asking JJ, “do you want to be here today?” the prosecutor drew an adverse inference on defendant's exercise of his right to confront witnesses. Brief of Appellant 11-16. During her testimony JJ answered questions by stating that she did not or could not remember approximately 36 times. RP 37-40, 42, 44-49, 52, 53, 55, 59, 63, 65, 69, 74, 75, 77, 81, 107, 109, 114, 115, 121. Often she was referred to prior statements to refresh her recollection. At the conclusion of re-direct examination JJ was asked about being at RH's mother's house prior to December 27, 2011, and if she could remember when those times were, she responded she did not remember. The prosecutor asked, “Why don't you remember? JJ answered, “It's hard to remember

because it was a long time ago, and some things are kind of vague.” The following dialogue then occurred between the prosecutor and JJ:

Q. Do you want to remember?

A. No.

Q. How come?

Defense counsel: Object as to relevance.

Court: Overruled. That means you can –

Q. You can go ahead and answer the question, [JJ].

A. What was the question again?

Q. I asked you do you want to remember and you said no, and I said how come.

A. Because it’s painful to think about.

Q. Why?

A. Because I can’t go back and change things.

Q. [JJ] do you want to be here today?

Defense counsel: I’d object as to relevance.

Court: Overruled.

A. No.

Q. How come?

A. It’s uncomfortable.

RP 128-129.

The rights guaranteed under the Confrontation Clause include the right to have the witness physically present, to have that testimony offered under oath and subject to cross examination, and

to provide the trier of fact with an opportunity to observe the demeanor of the witness. State v. Foster, 135 Wn.2d 441, 456, 957 P.2d 712 (1998); Maryland v. Craig, 497 U.S. 836, 845-846, 110 S.Ct. 3157, 3163, 111 L.Ed.2d 666 (1990). Indeed, a primary interest secured by the Confrontation Clause is the right of cross-examination, the “principal means by which the believability of a witness and the truth of his testimony are tested.” State v. Martin, 171 Wn.2d 521, 536, 252 P.3d 872 (2011); Foster, 135 Wn.2d at 456. Here, JJ was present, testified under oath, was subject to cross examination by defendant, and the jury had opportunity to observe her demeanor.

The record clearly reflects that JJ was having difficulty testifying, she repeatedly answered questions by saying she did not remember. The prosecutor asked about why she was having difficulty remembering. She replied that it was hard to remember because it happened a long time ago and it was painful to think about because she could not go back and change things. RP 51, 128-129. In the context of the entire record and the circumstances at trial, the prosecuting attorney's questions were not improper.

To determine whether a trial irregularity deprived a defendant of a fair trial, a reviewing court considers the following

factors: “(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.” State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). Claims of prejudice are reviewed “against the backdrop of all the evidence.” Escalona, 49 Wn. App. at 254. Here, the question did not focus on defendant's exercise of his constitutional rights to trial or to confront witnesses. Instead they focused on JJ's credibility. Therefore, they were not improper. State v. Gregory, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006), overruled on other grounds, State v. W.R., Jr., ___ Wn.2d ___, 336 P.3d 1134, 1138 (2014). Defendant did not request a curative instruction.

Further, defendant simply presumes prejudice; he makes no effort to demonstrate actual prejudice. Brief of Appellant at 11-12. Defendant's reliance on State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993) is misplaced. In Jones on cross examination the prosecutor questioned Jones about being frustrated by the prosecutor blocking Jones' view of the victim so he could not stare at her as she testified, and made remarks in closing argument

regarding Jones staring at the victim during her testimony. Id. at 805-806. The court found that while the prosecutor's comments constituted an impermissible use of defendant's exercise of his right of confrontation, they were harmless beyond a reasonable doubt because the untainted evidence in the case was overwhelming. Jones, 71 Wn. App. at 812.

Here, like in Jones, the untainted evidence was overwhelming that defendant had sexual intercourse with JJ. Defendant has failed to show that the prosecuting attorney's question or JJ's answer regarding whether she wanted to be in court was either improper or prejudicial, or that they engendered an incurable feeling of prejudice in the mind of the jury.

2. The Prosecutor's Statement During Rebuttal Closing Argument Was Neither Improper Nor Prejudicial.

Defendant argues that the prosecutor further emphasized the issue in closing argument. Brief of Appellant 15-16. During rebuttal argument, addressing defendant's claim that JJ's statements were inconsistent, the prosecutor said:

The entire defense's argument rests on statement made to Colette Dahl. Where are all inconsistencies? Did [JJ] seem like she wanted to share all this information with all of you? Was she all that forthcoming? You were here, you had an opportunity to observe. Was she just spilling all this information

out? She told Colette Dahl she didn't want to talk about it. She told her, I gave a statement to the police, I don't want to discuss this. She would only answer direct questions to Colette Dahl, who, by the way, only has a report to rely on. Does that report indicate every single thing that was discussed during that time period, seriously?

RP 447. The prosecutor's argument focused on JJ's credibility and defendant's argument she made inconsistent statements. There was no improper reference or inference to defendant's right to a jury trial or his right to confront witnesses.

Defendant did not object to the prosecutor's rebuttal closing argument. Where there is no objection to alleged misconduct during trial, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." State v. Emery, 174 Wn.2d 741, 760-761, 278 P.3d 653 (2012); State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Nor did defendant request a mistrial for the comments made during closing argument. "The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event 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).

In a challenge to a prosecutor's statement during closing argument, the defendant bears the burden of establishing that the prosecutor's conduct was both improper and prejudicial. Emery, 174 Wn.2d at 756; Stenson, 132 Wn.2d at 718; State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991) (defense has the burden of showing both the impropriety of the prosecutor's remarks and their prejudicial effect). In analyzing prejudice, courts do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. Emery, 174 Wn.2d 762 n.13; State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007); State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Remarks of the prosecutor, even if improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to defense counsel's acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective. Russell, 125 Wn.2d at 86. Defendant's closing argument began by stating:

The question here does come down to the single element of whether or not Rodney Prim had sexual intercourse with [JJ] on the date in question, on or about the date in question. The real question is which telling of the story do you chose to believe.

RP 437. After reciting various reasons to doubt JJ's credibility, at the end of closing argument defendant stated:

The State has to prove each and every element beyond a reasonable doubt. And the evidence fails, and it fails because the only evidence that could establish the necessary element that Rodney Prim had intercourse with [JJ] is her account of what happened, and there are many different accounts and they don't fit together. The evidence doesn't fit.

RP 445-446.

The prosecutor may attack a defendant's exculpatory theory. State v. Barrow, 60 Wn. App. 869, 872, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). Moreover, closing argument is, after all, argument. In that context, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. Stenson, 132 Wn.2d at 727; Brown, 132 Wn.2d at 568-569 (counsel may use dramatic rhetoric in arguing inferences supported by the evidence); State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281, review denied, 100 Wn.2d 1008 (1983) (counsel has latitude in closing argument to draw and express reasonable inferences from the evidence). If impropriety is present, reversal is required only if a substantial likelihood exists that the misconduct affected the jury's verdict, thereby depriving the defendant of a fair trial. State v. Finch, 137 Wn.2d 792, 839, 975

P.2d 967 (1999); State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). Defendant has not shown that the prosecutor's argument was improper.

B. THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR MISTRIAL WAS NOT AN ABUSE OF DISCRETION.

Defendant argues that the trial court erred in denying his motion for a mistrial for violation of his right to testify [sic] and his right to confront witnesses. Brief of Appellant at 11-12. After JJ's testimony defendant renewed his objection to the prosecutor's question regarding whether JJ wanted to be in court and moved for a mistrial arguing that the question shifted the burden of proof and was a comment on defendant's right to trial by implying that it was his fault that JJ had to be in court to testify. The trial court denied the motion. RP 131-133.

A trial court should a grant a mistrial "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Rodriguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002). Because the trial judge is in the best position to determine the impact of a potentially prejudicial remark, a trial court's decision to grant or deny a mistrial is reviewed for an abuse of discretion. Escalona, 49

Wn. App. at 254-255. A trial court's denial of a motion for mistrial will only be overturned when there is a 'substantial likelihood' that the error prompting the mistrial affected the jury's verdict. Rodriguez, 146 Wn.2d at 269-270.

Here, viewed in context of the entire record and against the backdrop of all the evidence, the question and JJ's answer that she did not want to be there was not so serious as to deprive defendant of a fair trial. The statement was cumulative of other evidence before the jury that JJ was having difficulty testifying. The question and answer did not suggest that defendant was traumatizing JJ by exercising his right to confront her at trial. While no curative instruction was given, the remark was sufficiently vague about whether the statement referred defendant's right to confrontation. Defendant has not shown how he was prejudiced. The trial court did not abuse its discretion in determining that the statement was not so prejudicial as to deprive defendant of a fair trial.

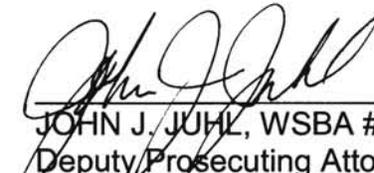
IV. CONCLUSION

For the reasons stated above, defendant's conviction should be affirmed.

Respectfully submitted on December 5, 2014.

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