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NO. 72262-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

DANNY PARK,

Appellant.

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

The Honorable Bruce E. Heller, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's trial was rendered unfair when the prosecutor committed misconduct during closing argument by diminishing the burden of proof and offering personal opinions on appellant's guilt.

2. The court violated appellant's due process right to fair trial when it permitted the complaining witness to testify she wanted to hold "mommy's picture" during her testimony.

3. The court erred in entering a three-year sexual assault protection order.

Issues Pertaining to Assignments of Error

1. Prosecutors must confine their comments on the law to the law stated in the instructions and must refrain from offering personal opinions on guilt. Did the prosecutor commit misconduct in telling the jury it could convict appellant of attempting to lure a minor without proof of any mental state and opining that this "sounds like a luring case to me"?

2. Witness accommodations such as permitting a child to hold a toy or be accompanied by a dog can engender undue sympathy and prevent a fair trial. Here, the court permitted the complaining witness, a nine-year old girl who had already broken down crying on the stand, to clutch a photograph of her mother and testify that she wanted to hold "mommy's picture" while testifying. Did the court err in failing to

carefully balance the child's need for comfort against the prejudice to appellant and in failing to take steps to mitigate that prejudice?

3. By law, a sexual assault protection order must expire two years from expiration of the sentence of imprisonment or community supervision. Appellant was sentenced to time already served, and the court imposed no community custody. Did the court exceed its statutory authority in imposing a sexual assault protection order that expired three years from the date of the judgment and sentence?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Danny Park with one count of luring with sexual motivation. CP 1. After a 45-day commitment to Western State Hospital, the court found Park's competency to stand trial had been restored. CP 13, 25-26. The jury found Park guilty and answered "Yes" to the special verdict on sexual motivation. CP 44-45.

The court imposed sentence for time served and required Park to obtain evaluations for chemical dependency and sexual deviancy and follow any treatment recommendations. CP 65-67. The court reserved a decision about contact restrictions with minors until after the sexual deviancy evaluation. CP 66. Notice of appeal was timely filed. CP 72.

2. Substantive Facts

a. Lucas Schmidt's Testimony

Park was extremely intoxicated as well as elated on September 22, 2013 because the Seahawks had won that day. 3RP 34. Lucas Schmidt, the security guard at the apartment complex where Park lived, saw Park excitedly ranting and raving to himself about the victory. 3RP 28-29, 34. Schmidt found the spectacle so humorous that he used his cell phone to take a photograph and a video of Park. 3RP 28-29, 34. Schmidt testified Park was so drunk he could not light his cigarette and had a hard time standing up. 3RP 34.

Approximately 20 minutes later, nine-year-old E.H., who also lived in the apartment complex, approached Schmidt and told him a man had talked to her, saying he had beer and cigarettes at his apartment. 3RP 33. Schmidt asked her if the man said anything else, and she shook her head no. 3RP 33. Schmidt left E.H. and went to look for the man she had described, but found no one. 3RP 20.

When he returned to the front of the complex, Schmidt noticed King County Sheriff's deputies entering the property. 3RP 21. He followed them to an apartment where they spoke with E.H. and her mother. 3RP 23. E.H. appeared reluctant to discuss what had happened with her mother or the deputies, so Schmidt led her down a short hallway to talk with him alone.

3RP 24-25. Schmidt testified E.H. then told him the man asked her to have “S.” 3RP 24-25.

At the pre-trial child hearsay hearing, Schmidt testified that he asked E.H., “Did he say ‘sex?’” and she agreed that he had. 2RP 16. The trial court ruled not only that Schmidt’s suggestive question tainted her disclosure to Schmidt, but also later excluded that part of E.H.’s subsequent disclosure to the child interview specialist. 3RP 5, 135. The court specifically noted, “we saw today just how fragile this child was.” 3RP 135. Therefore, the court reasoned, “I can’t eliminate the possibility that what she told Ms. MacLeod was influenced by what she told Schmidt.” 3RP 135.

b. Kelli Thompson’s Testimony

Kelli Thompson, who also lived in the apartment complex, noticed Park talking loudly and with slurred speech, asking E.H. if she knew about love. 3RP 40-41, 53. She also heard him say something about cigarettes, and E.H. looked frightened, holding onto a pole, so Thompson stepped in. 3RP 41-43. She asked E.H. if she knew Park, and E.H. shook her head, no. 3RP 46. She told E.H. to go home, and when E.H. had left, she began calling Park a “pervert,” accusing him of being inappropriate with E.H., and threatening to call the police. 3RP 47. Because he lived in the same building, Park then walked the same way as Thompson and told her he was

just trying to be friendly. 3RP 48-49. Later, Thompson's husband heard Park yelling on his balcony. 3RP 50.

Instead of going home, as Thompson had told her, E.H. went to tell Schmidt. 3RP 78. After he had left in search of Park, Thompson again spotted E.H. and this time walked her home. 3RP 78, 86-87.

c. E.H.'s Mother's Testimony

E.H.'s mother described Thompson as "frantic" when the two arrived. 3RP 95. E.H. was timid and frightened. 3RP 102. She mumbled but did not say anything clearly. 3RP 99. E.H. was present and heard what Thompson told her mother. 3RP 111. After hearing what Thompson had to say, E.H.'s mother called 911. 3RP 103-04. In E.H.'s presence, she told the dispatcher someone had been talking to her daughter making sexual comments. 3RP 111. E.H.'s mother testified she has never met Park and never gave him permission to talk to her daughter. 3RP 109.

When the police arrived, E.H. was also present when her mother told the officers what had happened. 3RP 111. Before the hallway interview with Schmidt, E.H. had said nothing about sex to anyone, but had heard the situation summarized by once by Thompson and twice by her mother. 3RP 111-13.

d. E.H.'s Testimony

The first time the prosecutor asked E.H. on direct examination what the man said to her, she was unable to answer and began to cry. 3RP 71. After a brief recess, she returned, and the following dialogue ensued in front of the jury:

Q. [Y]ou appear to have something in your hand; is that right?

A. Yeah.

Q. And what is in your hand?

A. My mommy's picture.

Q. Okay. Would you like to hold on to that? Is that a yes?

A. Yes.

3RP 73. Direct examination then continued.

Afterwards, the court put on the record a sidebar discussion about the photograph, a "DMV photo" of E.H.'s mother. 3RP 104-06. The court believed the photograph was akin to a dog that would be permitted as a comfort to a vulnerable witness and the photograph was reassuring E.H. and helping her to calm down. 3RP 105. The court did not feel the card "crossed the line in the sense that it would unduly inflame the passions of the jury." 3RP 105. The court also concluded the jury would probably figure out what it was but that the prosecutor should simply ask her. 3RP 105. Defense counsel objected to permitting E.H. to hold anything. 3RP 105.

The prosecutor noted E.H. looked at the photograph occasionally during her testimony, described by the court as “whenever she needed to.” 3RP 106.

E.H. testified she was playing by herself near the Park when she saw a man looking in her direction while talking to himself loudly about love, and even spelling it. 3RP 74. A few minutes later she saw him again by the road, where, she testified, he began talking to her, asking if she wanted to go to his house because he had candy and cigarettes and if she wanted to have sex with him. 3RP 76-77. E.H. testified she was holding onto a pole because she was frightened. 3RP 77. She identified Schmidt’s photograph of Park as the man who talked to her, but did not recognize him in the courtroom. 3RP 67-68, 80-81.

There was no objection to E.H.’s testimony that Park asked her to have sex. Later, the prosecutor asked whether this testimony should also have been excluded because of the suggestive questioning by Schmidt. 3RP 134. The court declared, “I certainly thought that might come up,” but because there had been no objection at the time, the court let the testimony stand. 3RP 134.

e. Law Enforcement Investigation

The arresting officer noticed Park was drunk, smelled of alcohol and was “wobbly on his feet.” 4RP 23. Detective Christine Elias met Park at the

precinct and noticed he was still intoxicated, alternating between calm and belligerent. 3RP 117-18.

Two days later, Shana MacLeod interviewed E.H., after making a point of telling her police were watching through the one-way glass. 4RP 35-36, 43-44. During MacLeod's testimony, the prosecutor asked leading questions trying to avoid violating the court's ruling excluding that E.H. had written down the word "sex" in response to questions about what "S" was. 4RP 38.

When MacLeod initially asked E.H. why she was there, E.H. said only that a drunk man was talking to her. 4RP 40-41. MacLeod testified E.H. described something that was said but hesitated to say the whole phrase. 4RP 38. Defense counsel's objection was overruled. 4RP 38. Then MacLeod testified she asked E.H. if she would write out the word. 4RP 38-39. At this point, defense counsel's objection was sustained and the jury instructed to disregard. 4RP 38-40. In summary, MacLeod answered yes when asked if E.H. told her "something about an 'S' word." 4RP 39. After the jury had left, the court noted MacLeod seemed to be willfully trying to violate the ruling in limine. 4RP 50.

f. Closing Arguments

During closing argument, the prosecutor specifically relied on the "attempt" prong of luring: "We don't have to wait until [E.H.] is walking

with Mr. Park, at least even into the building. The mere fact that Danny Park was attempting to lure her is enough.” 4RP 67-68. He continued, arguing, “Again, enticing or attempting to lure a child is enough.” 4RP 68. After referring to Kelli Thompson’s intervention, he returned to the theme, “So it includes even the attempt to lure.” 4RP 68.

Despite relying on the “attempt” prong of the definition, the prosecutor argued he did not need to prove any particular mental state such as knowledge or intent: “The other things that I would also need to prove to you – that I do not need to prove you beyond a reasonable doubt is also whether Mr. Park did this act knowingly or with intent.” 4RP 68. Defense counsel’s objection to improper argument was overruled. 4RP 69.

Defense counsel argued this was “not a luring case.” 4RP 80. Park was just a loud, drunk, rambling man, which was naturally frightening to E.H. 4RP 82. The defense argued none of E.H.’s initial disclosures mentioned sex, and she only brought up sex after hearing Thompson’s frantic discussion with her mother and her mother’s subsequent report to the 911 dispatcher and after Schmidt’s suggestive questioning. 4RP 89-90.

On rebuttal, the prosecutor rhetorically asked, “Why would we say this is a luring case? 4RP 94. Answering his own question, he continued, “Right. You sort of have to ask yourself the next question. Well, if I remember the evidence and the testimony, I’m sure there was discussion of

beer and cigarettes from Lucas Schmidt, who we also know directly from E.H. that there was mention of cigarettes and candy.” 4RP 94. After discussing E.H.’s testimony that he asked if she would have sex with him, the prosecutor argued, “It sounds like a luring case to me.” 4RP 94.

C. ARGUMENT

1. DURING CLOSING ARGUMENT, THE PROSECUTOR MISSTATED THE LAW REGARDING AN ELEMENT OF THE OFFENSE AND ARGUED HIS PERSONAL OPINION THAT PARK WAS GUILTY OF LURING.

A prosecutor is a quasi-judicial officer whose zealous advocacy must be tempered by the responsibility to ensure that every accused person receives a fair trial. State v. Jones, 144 Wn. App. 284, 295, 183 P.3d 307 (2008); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). A prosecutor who subverts or evades the constitutional safeguards protecting the rights of accused persons can render a criminal trial unfair. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). In reviewing prosecutorial misconduct, courts consider the context of the entire trial. Id. at 704. Here, the prosecutor incorrectly told the jury it could convict Park of luring without proof of any mental state whatsoever and injected his personal opinion that this “sounds like a luring case to me.” This misconduct requires reversal because it was likely to influence the verdict.

a. The Prosecutor Incorrectly Told the Jury It Need Not Find Park Had Any Guilty Mind in Order to Convict Him of Luring.

A prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. State v. Walker, 164 Wn. App. 724, 736, 265 P.3d 191 (2011). "A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury." Id. (citing State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984)). When the prosecutor mischaracterizes the law and there is a substantial likelihood the misstatement affected the verdict, the right to a fair trial is violated. Id. (citing State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988)). Here, the prosecutor misstated the law regarding the mental state required for the offense of luring.

The definition of luring includes the "attempt" to lure a minor into an area inaccessible to the public. RCW 9A.40.090. In other words, a person need not succeed in order to be convicted of luring. State v. Dana, 84 Wn. App. 166, 173-74, 926 P.2d 344 (1996). Luring includes two components: invitation and enticement or attempted enticement. Id. at 175. The statute also proscribes ordering a child into an area inaccessible to the public. RCW 9A.40.090.

In this case, the only aspect of the statute that can apply is the "attempt" to lure. There is no evidence of an order and E.H. was not actually

enticed. On the contrary, E.H. and Kelli Thompson both testified she was frightened. 3RP 43, 77. Moreover, the prosecutor expressly relied on the “attempt” to lure during closing argument. 4RP 67-68. Under these undisputed facts, the only possible definition of luring that could be applied to Park’s conduct is the “attempt” to lure.

Nevertheless, the prosecutor argued the State need not prove any particular mental state with regards to Park. 4RP 68. He effectively told the jury luring is a strict liability offense. *Id.* While this may be true when actual completed luring is at issue, *see Dana*, 84 Wn. App. at 175 n. 28 (quoting Senate Bill Report, Senate Committee on Law & Justice, ESSB 5186 at 2 (stating that the “crime of luring is made a crime of strict liability”), it cannot be logically true when the charge is an attempt.

When attempt is part of the definition of an offense, courts look to the dictionary definition of the word, rather than the elements of a criminal attempt. *State v. Gallegos*, 73 Wn. App. 644, 650, 871 P.2d 621 (1994). The dictionary defines attempt as “make an effort to accomplish.” *Webster’s Third New International Dictionary* 140 (Philip Babcock Gove et al. eds. 1993). This definition suggests the same goal-oriented or purposeful behavior that is also reflected in the legal definition of intent. *See* RCW 9A.08.010 (“A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a

crime.”). Thus, in order to be convicted under the “attempt” prong of the statute, there must be proof beyond a reasonable doubt of an intentional or goal-oriented mindset.

Park’s defense was that he was too intoxicated to understand the effect that his drunken ranting might have on E.H. and was not attempting to lure her. 4RP 80-82. If the jury believed this characterization of events might be accurate, it would have to find Park not guilty. But the prosecutor deprived Park of the benefit of this defense. By arguing the jury need not find intent or knowledge, the prosecutor told the jury it could convict regardless of Park’s intent, *i.e.*, what he was attempting to do. 4RP 68.

By incorrectly arguing that Park could be guilty regardless of his intent or knowledge, the prosecutor misstated the law and subverted the jury’s common sense understanding of an attempt to lure. Under the prosecutor’s argument, the jury could convict even if it believed Park’s was merely on a drunken rant and did not intend to lure E.H. This was prejudicial misconduct that made the jury far more likely to convict.

b. The Prosecutor Offered Improper Personal Opinions on Guilt When He Argued in Rebuttal That This “Sounds Like a Luring Case to Me.”

To ensure a fair trial and a verdict based on the law and the evidence, prosecutors must not offer personal opinions on the guilt of the defendant or the credibility of witnesses. State v. Coleman, 155 Wn. App. 951, 957, 231

P.3d 212 (2010), rev. denied, 170 Wn.2d 1016 (2011) (citing United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980)). Opinions by a prosecutor are improper when “the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation.” State v. Ish, 170 Wn.2d 189, 197, 241 P.3d 389 (2010) (quoting Roberts, 618 F.2d 530).

During rebuttal closing argument, the prosecutor improperly focused on his own personal opinion:

Why would we say this is a luring case? Right. You sort of have to ask yourself the next question. Well, if I remember the evidence and the testimony, I’m sure there was discussion of beer and cigarettes from Lucas Schmidt, who we also know directly from E.H. that there was mention of cigarettes and candy.

4RP 94. Several aspects of this argument encouraged the jury to rely on the prosecutor’s opinion and the prestige of his office. First, he referred to why “we” would say this is a luring case. Next, he referred to his own personal recollection of the evidence and declared, “I’m sure” there was discussion of beer and cigarettes and what “we know” due to E.H.’s testimony. 4RP 94. After discussing E.H.’s testimony that Park asked if she would have sex with him, the prosecutor summed up his personal opinion, “It sounds like a luring case to me.” 4RP 94.

The unspoken message of this argument was that Park was guilty of luring because the prosecutor’s office “would say this is a luring case” and

because the prosecutor personally believed “it sounds like a luring case to me.” 4RP 94. This argument placed a thumb on the scales of justice, that thumb being the prestige of the elected prosecutor’s office and the opinion of his representative.

c. Reversal Is Required Because the Prosecutor’s Personal Opinions and Misstatement of the Law Pertaining to Park’s Mental State Were Likely to Affect the Verdict.

Prosecutorial misconduct violates the defendant’s right to a fair trial and requires reversal of the conviction when the prosecutor’s argument was improper and there is a substantial likelihood the misconduct affected the verdict. Glasmann, 175 Wn.2d at 703-04. Here, there is a substantial likelihood the jury was influenced by the prosecutor disclaiming any burden as to Park’s mental state.

First, the instructions encourage the jury to look to counsel’s arguments to help them understand the elements. CP 49. With no explicit instruction defining attempt or requiring proof of intent, the jury was likely to be swayed by the prosecutor’s reasonable-sounding interpretation of the law. In addition, the court appeared to agree. By overruling Park’s objection, the court placed its imprimatur on this argument, thereby making it even more likely to influence the jury. 4RP 68-69; see State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006) (citing Davenport, 100

Wn.2d at 764) (by overruling objection, court augmented prejudice and increased likelihood the misconduct affected the jury's verdict).

The prosecutor's personal opinions that this was a luring case, compounded the effect of the misstatement of the law. Although there was no objection, the court has discretion to consider the additional impact of these improper opinions in increasing the likelihood that the jury would not look closely at Park's mental state. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992) (court retains discretion to examine unpreserved errors when cumulative effect denies defendant a fair trial).

If not for the prosecutor's improper arguments, jurors could reasonably have concluded they could not convict without some evidence of intent because one cannot logically attempt to do something without also intending to do it. The jury could have found reasonable doubt as to Park's mental state, could have concluded, as defense counsel argued, that his drunken ranting accidentally frightened a little girl whose testimony was influenced by the accounts of adults who jumped to unwarranted conclusions. But the prosecutor essentially negated the intent that is part and parcel of the "attempt" definition of luring, thereby making an end-run around an otherwise valid defense. Reversal is required because the prosecutor misstated the law and deprived Park of the benefit of the law supporting his defense.

2. PERMITTING THE COMPLAINING WITNESS TO TELL THE JURY SHE WAS HOLDING HER “MOMMY’S PICTURE” INJECTED UNDUE SYMPATHY AND PREJUDICE INTO PARK’S TRIAL IN VIOLATION OF DUE PROCESS.

A person accused of a crime has the constitutional due process right to a fair trial before an impartial jury, free of undue prejudice or sympathy. U.S. Const. amend. VI, XIV; Const. art I, §§ 3, 22. “[S]ome trial procedures, such as providing a child witness with a toy on the stand or shackling a defendant at trial, may risk coloring the perceptions of the jury.” State v. Dye, 178 Wn.2d 541, 543-44, 309 P.3d 1192 (2013). Permitting a crying child witness to clutch a photograph and explain to the jury that it is “My mommy’s picture” engendered undue sympathy and was unfairly prejudicial to Park. While the prejudice might have been tempered if the court had instructed the jury, the court did not do so here. Park’s conviction should be reversed.

The use of E.H.’s mother’s photograph compromised Park’s right to a fair trial for two main reasons. First, the Court failed to carefully consider and balance the child’s needs with the prejudice to Park’s right to an impartial jury. Second, the court failed to consider or implement any procedures to mitigate the danger of prejudice and undue sympathy.

a. The Court Failed to Carefully Balance the Need for Accommodations Against the Risk of Prejudice.

In determining whether to permit accommodations for a child witness, the witness's need for accommodation must be balanced against the likelihood of undue prejudice against the accused. Id. at 557. The court must exercise "caution" and perform a "conscientious balancing of the benefits and the prejudice involved." Id. Caution is required because accommodations for a vulnerable witness can inject considerations unrelated to proof of the charged offense, thereby endangering the accused person's right to a verdict based solely on the evidence and law. Holbrook v. Flynn, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986) (citing Taylor v. Kentucky, 436 U.S. 478, 485, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978)). The trial court's discretion to manage the courtroom "ought not be used as a refuge wherein courts of review hide from the exigencies of due process." State v. Swenson, 62 Wn.2d 259, 277-78, 382 P.2d 614 (1963) overruled on other grounds by State v. Land, 121 Wn.2d 494, 851 P.2d 678 (1993).

The record here does not reflect cautious or conscientious balancing of the witness's needs against the risk of incurring undue jury sympathy. Instead, the court simply declared that it "didn't feel that the card crossed the line in the sense that it would unduly inflame the passions

of the jury.” 3RP 105. This blanket rejection of the idea of prejudice is insufficiently protective of the right to a fair trial and an impartial jury.

Even asking the jury whether it would be affected by a given accommodation, and the jury’s assertion that it would not, is insufficient protection. See Holbrook, 475 U.S. at 570. In Holbrook, the judge asked potential jurors during voir dire if they would be influenced by the presence of four uniformed state troopers who were called to provide added courtroom security in a case with several co-defendants. Id. at 562-65. Most claimed they would not be. Id. Nevertheless, the United States Supreme Court explained, “the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether ‘an unacceptable risk is presented of impermissible factors coming into play.’” Id. at 570.

In considering a similar issue, the Missouri Court of Appeals instructed, “courts must be cognizant of the possibility that comfort items . . . may unfairly engender sympathy for complaining witnesses.” State v. Powell, 318 S.W.3d 297, 304 (Mo. Ct. App. 2010). Washington’s Supreme Court has recognized the effect may be subtle and warned that such trial procedures “may risk coloring the perceptions of the jury.” Dye, 178 Wn.2d at 543-44. Here, the court rejected that possibility outright. It failed to acknowledge any risk that the child clutching her mother’s

photograph could permit impermissible factors such as undue sympathy to come into play.

b. The Court Failed to Take Any Measures to Reduce the Risk of Prejudice.

In People v. Chenault, the California Court of Appeals instructed courts to “take appropriate measures to reduce, if not eliminate, any prejudice to the defendant” when accommodations for vulnerable witnesses are necessary. People v. Chenault, 227 Cal. App. 4th 1503, 1517, 175 Cal. Rptr. 3d 1, 12 (2014), review denied (Oct. 15, 2014). Perhaps because it failed to carefully consider the risk, the court in Park’s case also failed to implement any safeguards against that risk.

One possible safeguard is a jury instruction or admonition. The Chenault court declared, “it generally will be the preferred practice for the court to give an appropriate admonishment to the jury.” 227 Cal. App. 4th at 1517-18. In that case, a dog was permitted to accompany the witness.

The court urged trial courts to instruct the jury in explicit terms that

. . . it should disregard the dog’s presence and decide the case based solely on the evidence presented, should not consider the witness’s testimony to be any more or less credible because of the dog’s presence, and should not be biased either for or against the witness, the prosecution, or the defendant based on the dog’s presence.

Id. at 1518.

Washington has also recognized the value of admonishing the jury. In Dye, the court concluded any prejudice from a dog who accompanied a witness was mitigated by the court's instruction that the jury was not to draw any inference whatsoever from the presence of the dog. 178 Wn.2d at 556-57. The court noted the jury is presumed to follow that instruction. Id. But no such instruction or admonition was given in this case.

Courts can also mitigate the risk of undue prejudice by minimizing the jury's exposure to witness accommodations. For example, in State v. Hakimi, the child witness was permitted to hold a doll while testifying, but the court instructed that the doll "will not be the subject of any questioning, at least in terms of the State's case in chief." State v. Hakimi, 124 Wn. App. 15, 20, 98 P.3d 809, 811 (2004) (quoting the trial court); see also Powell, 318 S.W.3d at 303-04 ("No reference was made to the teddy bears by any of the witnesses or counsel in the presence of the jury."). In Chenault, the court suggested that, when a dog is used, the witness and the dog can be already in place before the jury is brought in and the dog could lie out of the jury's view. Id. at 1517-18.

Here, E.H. interacted with the photograph, looking at it "whenever she needed to" while testifying. 3RP 106. Moreover, the court drew attention to it by making it part of the child's testimony on direct examination. 3RP 73.

Having the child testify about holding the photograph was particularly inappropriate because it is inappropriate to elicit witness testimony about the witness's fear of or reluctance to testify. State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1996). Here, the child's fear or reluctance was already on display for the jury due to her crying. But rather than simply move on, the court drew further attention to her fragile emotional state by allowing her not only to hold the photograph, but to explain to the jury that she wanted to hold "mommy's picture." 3RP 73.

Explaining the accommodations in testimony amounts to the opposite of admonishing the jury to disregard it. The jury is instructed it should base its decision on the law in the instructions and the evidence presented. CP 47. That evidence includes witness testimony. CP 47. By permitting E.H. to testify about her need to clutch the photograph while testifying, the court effectively instructed the jury that it *could* properly consider it.

"[P]rejudicial images may sway a jury in ways that words cannot." Dye, 178 Wn.2d at 557-58 (Gordon McCloud, J., concurring) (quoting Glasmann, 175 Wn.2d at 707). Here, Park presented a viable defense that he was guilty only of an unintentional drunken rant that inadvertently frightened E.H. The jury was likely to be swayed by the image of a child

who was so traumatized she could not testify without looking at her mother's photograph. Rather than balancing the risk and taking steps to mitigate the prejudice, the court effectively made this prejudicial image a proper part of the jury's consideration, thereby greatly increasing the likelihood that the jury would be unduly swayed. The court's failure to effectively exercise its discretion resulted in a violation of Park's right to a fair trial, and his conviction should be reversed.

3. THE THREE-YEAR SEXUAL ASSAULT PROTECTION ORDER EXCEEDED THE COURT'S STATUTORY AUTHORITY.

A court's sentencing authority is limited; it may impose only those sentences authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A defendant may therefore challenge an illegal or erroneous sentence for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). "When a sentence has been imposed for which there is no authority in law, the trial court has the duty and power to correct the erroneous sentence, when the error is discovered." In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980) (quoting McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P.2d 848 (1955)). The three-year sexual assault protection order must be vacated because it exceeds the court's authority under RCW 7.90.150.

Under RCW 7.90.150, a sexual assault protection order entered pursuant to a criminal conviction “shall remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole.” In this case, the judgment and sentence was entered on July 3, 2014. CP 62. The court imposed imprisonment only for time served. CP 65-66. No community custody was ordered. CP 65-66. The only remaining penalties were conditions of sentencing prohibiting contact and requiring evaluations and any recommended treatment for sexual deviancy and substance abuse. CP 67. A review hearing was set for three months from the date of the Judgment and Sentence, October 14, 2014. CP 67.

With no community custody and a sentence of time-served, the court was limited to imposing a sexual assault protection order for two years from the date of the judgment and sentence. The order, which expires July 3, 2017, exceeds that by one year and must be vacated or reduced. Supp. CP¹ ___ (Sub no. 58, Sexual assault protection order filed July 3, 2014).

¹ A supplemental designation of clerk’s papers was filed on January 20, 2015.

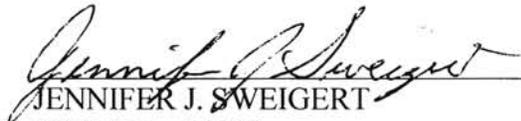
D. CONCLUSION

For the foregoing reasons, Park requests this Court reverse his conviction or, at a minimum, reduce the term of the sexual assault protection order.

DATED this 16th day of January, 2015.

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.)	COA NO. 72262-0-1
)	
DANNY PARK,)	
)	
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 26TH DAY OF JANUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIFE OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DANNY PARK
6241 S. 129TH STREET
APT. 202
SEATTLE, WA 98178

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF JANUARY 2015.

x *Patrick Mayovsky*