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NOTE: UNPUBLISHED OPINION. SEE RCWA 2.06.040

Court of Appeals of Washington,
Division 1.

STATE of Washington, Respondent,
v.
Jason David KINZER, Appellant.

No. 58069-8-I. Jan. 28, 2008.

Appeal from King County Superior Court; Honorable Palmer Robinson, J.

Attorneys and Law Firms

Prosecuting Atty. King County, King Co. Pros/App Unit Supervisor, John Robert Zeldenrust, Office of the Prosecuting Attorney, Seattle, WA, for Respondent.

Washington Appellate Project, Vanessa Mi-jo Lee, Attorney at Law, Seattle, WA, for Appellant.

COX, J., APPELWICK, C.J., and GROSSE, J.

Opinion

UNPUBLISHED

PER CURIAM.

*1 Jason Kinzer appeals his convictions of three counts of various degrees of child molestation and one count of third degree rape of a child. The trial court did not abuse its discretion in denying his second motion to continue the trial date. Moreover, the court properly exercised its discretion in admitting certain items of the victim's clothing seized at his apartment. Prosecutorial misconduct did not deny him a fair trial, and the additional grounds he raises are not persuasive. We affirm.

Jason Kinzer allegedly began having sexual contact with S.G. when she was 11 years old and he was 22. The contact continued until she was 17, when she first disclosed the contact to her mother and others.

Based on its investigation of her allegations, the State charged Kinzer with first degree child molestation, second degree child molestation, third degree rape of a child, third degree child molestation, and second degree rape. At trial, he admitted touching S.G. in ways that met the elements of third degree child rape and third degree child molestation. But he denied committing the acts supporting the other charges.

The jury found him guilty of all child molestation counts and the third degree rape count. But it acquitted him of second degree rape.

Kinzer appeals.

CONTINUANCE

Kinzer argues that the trial court abused its discretion in denying his second motion to continue the trial date. We disagree.

By statute, a court "may," upon a proper showing of materiality and diligence, grant a continuance for a defendant to obtain additional evidence or when otherwise required in the administration of justice. Whether to grant a continuance is within the trial court's discretion, and we will not overturn such a decision unless the court abuses that

discretion.[1] A court abuses its discretion when it is manifestly unreasonable or rests its decision on untenable grounds.[2] In exercising its discretion for a motion to continue, a court should consider factors such as diligence, due process, surprise, the need for orderly procedure, materiality, and redundancy.[3]

A criminal defendant's constitutional right to be represented by counsel includes the right to counsel who has had reasonable time to prepare for trial.[4] To establish that a constitutional right was violated by a denial of a continuance, the accused must show that the trial court's failure to grant the continuance was prejudicial or that the outcome of the trial would have been different.[5] In examining whether the accused was prejudiced, the reviewing court must examine the totality of the circumstances in each case and pay particular attention to the reasons presented to the trial court at the time of the motion.[6]

Here, on January 18, 2006, the trial court granted Kinzer's first motion to continue the trial date from February 1 to March 1 for the purpose of "interviews [and] DNA expert by defense." On February 3, the Defender Association reassigned the case from **Tim Johnson** to Richard Warner. Warner already had a vacation scheduled from February 17 through 27. On February 13, Warner moved for a second continuance because his office policy prohibited investigative interviews outside the presence of the assigned attorney. The trial court denied the motion, reasoning that the stated office policy was insufficient to preclude interviewing witnesses before the scheduled trial date.

*2 On reconsideration, the trial court stated:

> The matter was reassigned to a lawyer within the Defender Association with knowledge that the lawyer could not try the case on the trial date as counsel will be on leave for the ten business days immediately before the trial date, precluding counsel from interviewing witnesses.[7]

The court then suggested that the office conduct the interviews in Warner's absence or reassign the case to another attorney. By February 17, the case had been reassigned back to **Tim Johnson**, Kinzer's original attorney.

There was no abuse of discretion. The court granted one continuance so that **Johnson** could conduct the interviews Kinzer now argues neither **Johnson** nor Warner could complete in February. The court was within its discretion to deny a second motion to continue for the same purpose.

Further, **Johnson** previously represented Kinzer in this matter during the several months leading up to trial except for one period of no more than 14 days, during which Warner represented him. **Johnson** knew the case and was prepared to try it. Nothing in this record shows any adverse impact on Kinzer's Sixth Amendment rights by virtue of the denial of his second motion to continue the trial date.

State v. Bandura[8] and *State v. Hartwig*[9] do not persuade us otherwise. In *Bandura*, the defendant was unrepresented by any counsel during a critical stage of proceedings due to the trial court's ruling.[10] And in *Hartwig*, the trial court required the defendant to proceed to trial represented by an attorney whom the trial court had appointed less than one hour before.[11] In contrast here, Kinzer had competent counsel who was fully familiar with the case to represent him at trial.

CLOTHING EVIDENCE

Kinzer argues that the trial court abused its discretion in admitting 11 exhibits, which were items of S.G.'s clothing seized at his apartment. He argues on appeal that the evidence was needlessly cumulative and unfairly prejudicial.[12] We disagree.

In a criminal case, the State has the right to present "ample evidence to prove every element of the crime," subject to the rules of evidence.[13] Relevant evidence, that having a tendency to make a material fact more or less likely, is admissible unless otherwise prohibited.[14] Even if relevant, evidence is inadmissible if its cumulative effect is inflammatory and unnecessary and outweighs its probative value.[15] In a case involving alleged improper sexual contact, evidence of prior sexual contact between the defendant and the victim may be relevant to prove that the defendant had a lustful

disposition toward the victim .[16] Such prior contact may make it more likely that the defendant committed the sexual acts charged in the current case.[17] Decisions as to the admissibility of evidence, including the allowable time frame of lustful disposition evidence, are within the discretion of the trial court and are reversible only for abuse of that discretion.[18]

*3 Here, Kinzer moved in limine below to exclude admission of articles of the victim's clothing that were found at Kinzer's apartment and stained with his semen. The basis of the objection below was that the evidence was not relevant. The trial court rejected the argument, indicating that the evidence was admissible under ER 404(b) to prove that Kinzer had a lustful disposition toward S.G. and that its probative value outweighed the prejudicial effect.

On appeal, Kinzer properly concedes that the evidence was admissible as evidence of his lustful disposition toward S.G during the time period of the related charge, but disputes that theory applies to any earlier periods. Kinzer fails to cite any authority to support the proposition that the court abused its discretion by admitting all the exhibits on the basis argued below. We assume he has found none.[19]

Kinzer's new argument on appeal is that the evidence was needlessly cumulative and unfairly prejudicial. We again disagree.

The stained clothing corroborated the testimony of S.G. that Kinzer had ejaculated on her and/or her clothing while she was wearing it or just after he removed it from her. Kinzer's argument was that he stained the clothing when she was not there, which stood in direct conflict with her testimony that he stained the clothing while having sexual contact with her. He also seems to argue that the evidence ceased being relevant simply because other relevant evidence was available.[20] In view of the disputed charges and the conflicting evidence, the clothing was relevant and its admission was neither unduly cumulative nor unfairly prejudicial.

Kinzer relies on *State v. Kinchen,*[21] but that case is distinguishable. There, the balance tipped against the admission of 31 photographs of an alleged crime scene in a parent's trial for unlawful imprisonment of his children. Only three or four of the pictures were relevant to any issue in the case, and all of them were "extremely inflammatory" because they illustrated locked areas, which only tended to prove the State's "irrelevant" argument that Kinchen was a bad father.[22] In contrast here, the clothing evidence was all relevant to prove Kinzer's lustful disposition toward S.G. Moreover, it was neither needlessly cumulative nor unfairly prejudicial.

PROSECUTORIAL MISCONDUCT

Kinzer alleges that the prosecutor's improper statements during closing argument denied him a fair trial. We disagree.

A prosecutor's comment deprived a defendant of a fair trial if: (1) the statement was improper, and (2) there is a substantial likelihood that the statement prejudiced the defendant by affecting the jury's verdict.[23]

Appealing to the jury's "passion and prejudice" through the use of inflammatory rhetoric and prejudicial allusions to matters outside the record constitute misconduct because they encourage the jury to render a verdict based on something other than admitted evidence.[24] Prosecutors are likewise not permitted to express their personal beliefs about the credibility of witnesses.[25]

*4 It is also misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are lying.[26] Such a comment mischaracterizes the burden of proof, when a jury is actually required to acquit unless it had an abiding conviction of the truth of the State's witnesses.[27] Similarly, it is improper for a prosecutor to falsely state that in order to believe the defendant, it would have to find that the State's witnesses are *lying.*[28] In fact, the jury could believe the defendant but think the State's witnesses are merely *mistaken.*[29]

It is proper, however, for the prosecutor to draw inferences from evidence admitted at trial and in doing so, to state that in order to believe a defendant, the jury would have to find that the State's witnesses were mistaken.[30]

In determining whether prejudice has occurred, a court must examine the context in which the statements were made, including defense counsel's own statements.[31] Prejudice exists if there is a "substantial likelihood" that the misconduct affected the jury's verdict.[32] A defendant may only raise the issue of prosecutorial misconduct for the first time on appeal if the improper remark was so "flagrant and ill intentioned" that it causes prejudice that could not have been cured through a jury instruction.[33]

Here, Kinzer assigns error to several of the prosecutor's statements during closing argument. Kinzer did not object below to any of the statements.

First, the prosecutor stated several times that the victim's testimony had a "ring of truth," but that Kinzer's did not. She referred to specific aspects of their respective testimony that related to credibility. She did not express a personal opinion on their credibility, but simply urged the jury to find the victim credible based on her demeanor and corroborating testimony. This was not improper.[34]

The prosecutor also made several comments regarding the credibility of the other witnesses. She stated:

> .... If you believe the defendant, you cannot believe [the State's witnesses] because their stories don't match.
>
> ....
>
> He is basically claiming that all of these witnesses came together and formed some sort of plan or union to bring him down. This was an organized corroboration, this was an organized testimony. In order to believe him, you have to disbelieve everybody else.[35]

To the extent she suggested by these comments that the jury would have to find that the other witnesses formed a conspiracy to lie, she committed misconduct. However, they were not so egregious that a jury instruction, if one had been requested, would have been futile.[36] In short, Kinzer fails in his burden to show that any of the comments affected the verdict.

ADDITIONAL GROUNDS FOR REVIEW

Kinzer raises two additional grounds for review, neither of which is persuasive.

Citing errors and omissions in the trial court transcripts, Kinzer argues that the quality of the trial court record was insufficient to permit effective appellate review. But he fails to identify how any alleged error or omission in the record is relevant to any issue raised in his appeal. Thus, he has not shown that the record has prevented this Court from effectively reviewing his case on appeal.[37]

*5 Kinzer also argues that ineffective assistance of counsel denied him a fair trial. However, he fails to argue how the record that is before us shows that counsel either failed to meet the relevant objective standard or that any failure to meet such standard worked to his prejudice.[38]

We affirm the judgment and sentence. For the Court:

Parallel Citations

2008 WL 217395 (Wash.App. Div. 1)

Footnotes

1 *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).

2 *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

3 *Downing*, 151 Wn.2d at 273.

4 *State v. Hartwig*, 36 Wn.2d 598, 601, 219 P.2d 564 (1950).

5 *State v. Kelly*, 32 Wn.App. 112, 114, 645 P.2d 1146(1982).

6 *Id.* at 114-15.

7 Clerk's Papers at 14.

8 85 Wn.App. 87, 931 P.2d 174 (1997).

9 36 Wn.2d 598, 219 P.2d 564 (1950).

10 85 Wn.App. at 91.

11 36 Wn.2d at 600.

12 Appellant's Opening Brief at 14.

13 *State v. Crenshaw*, 98 Wn.2d 789, 807, 659 P.2d 488 (1983) (citing *State v. Adler*, 16 Wn.App. 459, 465, 558 P.2d 817 (1976)).

14 ER 401, 402.

15 *Crenshaw*, 98 Wn.2d at 807; ER 403.

16 *See State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991).

17 *Id.*

18 *Id.*

19 *See State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978).

20 Reply Brief at 1-3 ("[L]ustful disposition was a non-issue at this point...."). Of course, an issue does not become a "non-issue" simply because the State has offered some competent evidence to support it. The State maintains the burden throughout the trial to prove every element of each charged crime beyond a reasonable doubt. *Cf. State v. Pirtle*, 127 Wn.2d 628, 652-53, 904 P.2d 245 (1995) (Because of the State's burden of proof, a defendant's offer to stipulate does not "negate the relevance" of other evidence, and the prosecutor may prove the issue with any admissible evidence that is not prejudicial.).

21 92 Wn.App. 442, 963 P.2d 928 (1998).

22 *Id.* at 453.

23 *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

24 *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

25 *Reed*, 102 Wn.2d at 145.

26 *State v. Fleming*, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996).

27 *Id.*

28 *State v. Wright*, 76 Wn.App. 811, 826, 888 P.2d 1214 (1995), *superseded by statute on other grounds by* RCW 9.94A.360(6).

29 *Id.*

30 *Id.*

31 *State v. Ramirez*, 49 Wn.App. 332, 337, 742 P.2d 726 (1987) (citing *United States v. Young*, 470 U.S. 1, 12, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)).

32 *Reed*, 102 Wn.2d at 145.

33 *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

34 *See State v. Fiallo-Lopez*, 78 Wn.App. 717, 730-31, 899 P.2d 1294 (1995) (Comments on a witness' veracity are proper in closing argument if they do not state a personal opinion and do not shift the burden of proof, but rather argue that the evidence supports the finding.).

35 Report of Proceedings (Mar. 14, 2006) at 91.

36 *Compare Fleming*, 83 Wn.App. at 213-14 (It is flagrant misconduct to shift the burden of proof to the defendant by arguing that in order to acquit, the jury must find that the State's witnesses were lying.), *with Fiallo-Lopez*, 78 Wn.App. at 731 (Comments on a witness' veracity are proper in closing argument if they do not state a personal opinion and do not shift the burden of proof, but rather argue that the evidence supports the finding.), *and State v. Stover*, 67 Wn.App. 228, 232, 834 P.2d 671 (1992) (Any impropriety in comments that a witness "lied" could have been cured by a jury instruction.).

37 *See State v. Putman*, 65 Wn.App. 606, 611, 829 P.2d 787 (1992) (A record may be sufficient for review even if a verbatim report of proceeding is not available for each portion of the proceedings.).

38 *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) (To prevail on a claim of ineffective assistance of counsel, a defendant must show deficient performance and prejudice to the outcome of the trial.).

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