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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. RONALD JOHN BRENNAN, JR., Appellant.	)	No. 79508-2-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — Ronald J. Brennan, Jr. was acquitted of one count of rape in the third degree and one count of rape in the second degree, but was convicted of two counts of distributing a controlled substance to a person under the age of eighteen, each with a sexual motivation enhancement. Though he did not object at trial, he now argues that the prosecutor deprived him of his right to a fair trial by making statements during opening and closing argument that constituted misconduct. While we find some of the challenged statements prejudicial and likely to affect the jury's verdict, Brennan fails to demonstrate that this prejudice could not have been cured by an instruction from the judge and, as such, his claim fails. Brennan also raises a number of issues in a statement of additional grounds, but because he offers no argument or authority for the alleged trial irregularities, we decline to reach them. We affirm.

FACTS

Ronald Brennan was charged with one count of rape in the third degree, one count of rape in the second degree, and two counts of distribution of a controlled substance to a person under the age of eighteen with a sexual motivation. The State alleged Brennan had sexual intercourse with a 16-year-old male, A.H., against his will, and with R.F., a 17-year-old male, when he was incapable of consent by being physically or mentally incapacitated. The distribution charges were based on allegations that Brennan twice provided heroin to R.F. for the purpose of his own sexual gratification. Brennan entered not guilty pleas to all four of the charges and proceeded to a jury trial where both A.H. and R.F. testified.

The evidence at trial established Brennan was a methamphetamine user who lived in his car and gave people rides and did odd other jobs to support his drug use. R.F. was 17 years old when he first encountered Brennan and had been using heroin since he was nine. R.F. met Brennan when his mother arranged for Brennan to pick him up and drive him to his aunt's house. During the car ride, Brennan and R.F. discussed Brennan's cell phone background image which depicted two men engaged in a sexual act. R.F. briefly stayed at his aunt's home, but eventually stole items from her home and boarded a bus. He intended to sell or trade the items for heroin and go live with Brennan in his car. While on the bus, R.F. saw a friend who introduced him to A.H. The group talked and A.H. ultimately agreed to join R.F and stay with Brennan.

Brennan testified he used methamphetamine, not heroin, and that during his time with R.F., R.F. used heroin and obtained it without Brennan's assistance. Brennan further testified that he and R.F. were in a romantic relationship, they lived together in the car, both did drugs, and had consensual sex on a regular basis. R.F.'s testimony was that he primarily used heroin and Brennan used methamphetamine, and the two regularly used drugs together. Contrary to Brennan's testimony, R.F. asserted that he was using Brennan to obtain drugs and that, at times, Brennan gave him drugs directly. R.F. also described one instance when he awoke after using heroin to find Brennan having sex with him. R.F. indicated he pushed Brennan off, but never reported the incident to the police and continued living with Brennan. This was the basis for the rape in the second degree charge.

At trial, A.H. stated that Brennan and R.F. seemed to be in a relationship and then recounted an incident when the two had consensual sex in the back seat of Brennan's car while A.H. was in the front seat. He claimed that R.F. and Brennan invited A.H. to join them, but he declined. A.H. indicated he observed Brennan conduct drug transactions with various people and that Brennan paid cash, as opposed to doing odd jobs, for the drugs. A.H. testified he never saw R.F. buy drugs with cash.

The group later ended up at an abandoned house together with a fourth person, Douglas Sanders. A.H. testified that while at the house, Brennan anally penetrated him despite his protest. This was the basis for the rape in the third degree charge. A.H. also said Brennan told him to put R.F.'s testicles in his mouth

and although he didn't want to, he did as requested. R.F. and Brennan offered a different version of these events. They stated that after R.F. injected heroin at the house, he told Brennan he wanted to perform oral sex on A.H. Brennan left the room to discuss the topic with A.H. and after they returned, R.F. performed oral sex on Brennan and A.H. They claimed A.H. became embarrassed after the sex act with R.F. and left the room to contact his girlfriend on the phone.

Sanders testified that he was present in the house, that Brennan showed up with methamphetamine and opiates, and that the group used the drugs together. Sanders indicated he was "pretty high" and "fairly out of it." He recalled focusing on his drawing. He saw Brennan and the other two leave the room but did not witness any sexual acts.

R.F. admitted on the stand that he made false statements to law enforcement during the investigation of the case. R.F. initially told them that Brennan had repeatedly raped him and that their sex was never consensual, but he later admitted that was not true. R.F. stated his motive for lying was his fear that he was under investigation for raping A.H. and his desire to have law enforcement to focus on Brennan.

During opening statements, the prosecutor laid out the State's theory of the case and stated:

> Ronald Brennan is a sexual predator who preys on vulnerable teenage boys who are drug users, homeless, runaways, or otherwise just down on their luck and vulnerable. He supplies them with drugs, gets to know them, grooms them, and then has sex with them, whether they consent or not, or whether they're able to consent or not.

In closing argument, the prosecutor returned to that theme:

> As I stated before to you in opening, Ronald Brennan is a sexual predator. He preys on vulnerable teenage boys who are homeless, drug users, runaways, or otherwise down on their luck. He supplies them with drugs, grooms them, gives them a place to stay, and then has sex with them, whether they consent or not, or whether they're able to consent or not.

The prosecutor later continued and expanded on her narrative of events:

> And we only heard, right, sort of this maybe one-month, one-month to two-month time period; right? I mean, Ronald Brennan said he's been a drug user in this culture for 30 years. We only got this one-to-two-month sort of snapshot into his life, and that's what you're deciding things on here is that snapshot. But even that, right, I mean, consider that culture. Consider if he does want to have sex with younger boys, who is he going to choose; right? Who is he going to single out?
>
> It's not going to be your school valedictorian kid from a good home, stable environment, does good in school, has a supportive family. No. It's going to be these kids who are on the street, right, homeless, vulnerable. They need drugs. He has drugs. That's how he gets them to him. Gives them drugs, and that keeps them with him; right? They need the drugs. He wants the sex from them. It works out for him.

In rebuttal closing, the State reiterated its argument yet again that Brennan was preying on particularly vulnerable youth:

> Like I said, if they were good kids from strong families with support, weren't sort of either drug users or runaways out on the street, needing a place to stay or needing drugs or needing both, they wouldn't have ended up in the hands of Mr. Brennan; right? They wouldn't have ended up there. Of course they're troubled. These are the exact people that, if you are somebody who wants to have sex, engage in a sexual relationship with young boys, these are the exact people that you would choose. Of course they're troubled, you wouldn't expect them not to be. Of course it makes sense that they're troubled youth.

Brennan's counsel did not object to any of these statements at trial.

The jury acquitted Brennan on both rape charges, found him guilty of both controlled substance delivery charges and further found by special verdict form

that he made both deliveries with sexual motivation. The trial court found that Brennan had an offender score of 21, which made his sentencing range 124+ to 144 months in prison, with a mandatory term of 36 months of community custody.[1] The sexual motivation enhancements carried an additional 24 months, consecutive to the base sentence imposed. The trial court imposed an exceptional sentence by ordering 105 months on each count, followed by the mandatory enhancement time, and running those sentences consecutively for a total of 258 months in prison. Brennan timely appeals his conviction.

ANALYSIS

I. Opening and Closing Argument by the State

Brennan avers the State committed prosecutorial misconduct by making comments in opening and closing statements designed to inflame the jury and decide the verdict on improper bases, and that such conduct deprived him of his right to a fair trial.

In a prosecutorial misconduct claim, the burden is on the defendant to establish that the challenged conduct was improper and prejudicial in the context of the entire record. State v. Thorgerson, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011). To demonstrate prejudice, Brennan must prove that there exists a substantial likelihood that the misconduct affected the jury's verdict. Id. "Defense counsel's failure to object to the misconduct at trial constitutes waiver on appeal unless the misconduct is 'so flagrant and ill-intentioned that it evinces an enduring

[1] 124+ refers to 124 months and one day as the low end of the sentencing range for this offense, based on an offender score of nine or higher, under the Sentencing Reform Act of 1981, Chapter 9.9A RCW.

and resulting prejudice' incurable by a jury instruction." State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). Here, Brennan did not object at trial, so we must determine whether each challenged statement was improper, and if so, whether it was prejudicial. If the statement was prejudicial, we must then decide whether it could have been cured by instruction to the jury.

A. Prejudicial Nature of the Conduct by the Prosecutor

"[A] prosecuting attorney represents the people and is presumptively to act with impartiality 'in the interest only of justice.'" Id. at 746 (quoting State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984) (internal quotations omitted)). "Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). A prosecutor is required to "seek convictions based only on probative evidence and sound reason." State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991).

"[A] prosecutor engages in misconduct when making an argument that appeals to jurors' fear and repudiation of criminal groups or invokes racial, ethnic, or religious prejudice as a reason to convict." State v. Perez-Mejia, 134 Wn. App. 907, 916, 143 P.3d 838 (2006). "[I]nflammatory remarks, incitements to vengeance, exhortations to join a war against crime or drugs, or appeals to prejudice or patriotism are forbidden." Id. "A prosecutor may not suggest that evidence not presented at trial provides additional grounds for finding a defendant

guilty." State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). "References to evidence outside of the record and bald appeals to passion and prejudice constitute misconduct." Fisher, 165 Wn.2d at 747. "Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument and the instructions given." Russell, 125 Wn.2d at 85-86.

Here, Brennan focuses on multiple comments made by the prosecutor in opening and closing statements. The first is the State's repeated reference to Brennan as a "sexual predator." In the context of this label, the prosecutor went on to argue that Brennan "preys on vulnerable teenage boys who are drug users, homeless, runaways, or otherwise just down on their luck and vulnerable," as opposed to a "school valedictorian kid from a good home, stable environment, [who] does good [sic] in school, has a supportive family."

Brennan likens these comments to those where a prosecutor compared the accused to an animal, which have been deemed improper by this court and others. See State v. Rivers, 96 Wn. App. 672, 981 P.2d 16 (1999). However, in a recent unpublished opinion, this court clarified that the holding in Rivers does not suggest that, without more, a prosecutor referring to a defendant as a "predator" is per se misconduct.[2] We adopt that interpretation of Rivers and do not find that the label of sexual predator was improper as it fit with the theory of the State's case against Brennan as to the possible exploitation of A.H. and R.F. for Brennan's sexual gratification, and was a reasonable inference based on some of the witness

[2] See State v. Leyva-Abitia, No. 76423-3-I, slip op. at 13-17 (Wash. Ct. App. Feb. 25, 2019) (unpublished), https://www.courts.wa.gov/opinions/pdf/764233.pdf

testimony elicited at trial. The same is true as to the comment regarding vulnerable youth. There was testimony about A.H. and R.F.'s turbulent home lives, experiences with poverty and drug abuse, and involvement in the juvenile justice system. The prosecutor's characterization of them as "down on their luck and vulnerable" is a reasonable inference based on the evidence in the record.

However, the prosecutor chose to go further and discuss who Brennan did not seek out, without any basis in evidence for such a claim that he made some sort of targeted choice of one type of individual to pursue sexually or socially over another. The responsibility of a prosecuting attorney is a heavy one as they are tasked with bringing the full weight of the State of Washington to bear on an individual and their liberty. See Reed, 102 Wn.2d at 146-47. While a prosecutor may, and should, vigorously argue their case, they are certainly constrained by the evidence presented and must balance what argument is necessary in the interests of justice with their obligation to ensure that convictions are secured only after a fair trial. See Monday, 171 Wn.2d at 676; See also Castaneda-Perez, 61 Wn. App. at 363.

The prosecutor argued that Brennan selected R.J and A.H. over other youth; "[w]ho is he going to single out? It's not going to be your school valedictorian kid from a good home, stable environment, does good in school, has a supportive family." There is no evidence in the record of a process by Brennan to single people out. The testimony clearly established how he came into contact with A.H. and R.J. through people they knew in common. There was no evidence presented that Brennan was even in contact with youth fitting the prosecutor's description as

valedictorians from good homes with stable families, much less that he declined to interact with them in favor of the more vulnerable A.H. and R.J. This statement by the prosecutor leaps beyond a reasonable inference and appears designed to inflame jurors and therefore is improper.

Next Brennan identifies as misconduct the following statement by the prosecutor: "I mean, Ronald Brennan said he's been a drug user in this culture for 30 years. We only get this one-to-two-month sort of snapshot into his life, and that's what you're deciding things on here is that snapshot. But even that, right, I mean, consider that culture." This statement is out of line with a prosecutor's duty to "seek convictions based only on probative evidence and sound reason." Casteneda-Perez, 61 Wn. App. at 363. The prosecutor is directly suggesting the jury should speculate about Brennan's life outside of the charging period for the case and to further contemplate "that culture" at large as a part of their deliberation process. The prosecutor offered a cursory acknowledgment that the jury is to only decide things on this "snapshot" of the timeframe established by the actual charges brought in the case, but argued well beyond such. There was no legal justification for such a statement. Further, it is impermissible to seek to convict someone based on their association with a culture, especially one as ill-defined as here. See State v. Ramos, 164 Wn. App. 327, 335-42, 263 P.3d 1268 (2011). We find the comment an improper attempt to both persuade the jury to inappropriately consider their own speculation as to events and experiences outside of the evidence presented at trial and to secure a conviction based on Brennan's association with a particular

culture, rather than proof beyond a reasonable doubt of the crimes charged by the State.

B. Whether the Prejudice was Able to be Cured with an Instruction

To prevail on his prosecutorial misconduct challenges, without having preserved them through objection at trial, Brennan must also establish prejudice from the improper comments by the State such that an instruction to the jury could not have cured it.

> If the defendant did not object at 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. Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict."

State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (quoting Thorgerson, 172 Wn.2d at 455) (internal citations omitted).

Brennan was acquitted of both rape charges and convicted of two counts of distribution of a controlled substance to a minor, each with a sexual motivation enhancement. In the context of the trial as a whole, it appears that, had the collective inflammatory comments by the prosecutor been entirely successful with the jury, the comments would likely have led to a conviction on the rape charges. The statements centered on Brennan's life within a particular culture associated with drugs, coupled with assertions that he preyed on vulnerable boys within that context in order to have sex with them. Due to the nature of the charges Brennan faced at trial, and particularly the nature of the sexual motivation enhancement

filed with those for which he was ultimately convicted, the misconduct identified here "'had a substantial likelihood of affecting the jury verdict.'" Id.

The court in Emery went on to explain that "[r]eviewing 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." Id. at 762. Here, the court did provide the standard jury instructions prior to closing argument. This included an instruction based on Washington Pattern Instruction 1.02, which includes general admonitions to decide the case on the evidence, that arguments of counsel are not evidence and not to let emotions overcome a rational thought process. This direction from the bench prior to closing argument is procedurally distinct from a curative instruction given by a judge directly in response to an improper statement and often shortly after it has occurred. When analyzing the impact of a curative instruction, we presume the jury will follow the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Had a jury been expressly instructed to disregard the State's invitation to "consider that culture," or speculate about a selection process by Brennan between "a school valedictorian kid from a good home" and "vulnerable teenage boys who are drug users, homeless, runaways, or otherwise just down on their luck," and directed them to restrain their deliberation to the evidence presented, we presume that they would have.

Brennan's argument on this issue rests on cases that are distinguishable. He primarily relies on this court's opinion in State v. Powell which, after reversing and dismissing on other grounds, determined that the improper comments by the

State in their rebuttal closing denied Powell a fair trial. 62 Wn. App. 914, 816 P.2d 86 (1991). There, the court determined that the State admonished the jurors "that a not guilty verdict would send a message that children who reported sexual abuse would not be believed, thereby 'declaring open season on children.'" Id. at 918. Here, the State's argument strayed outside of the acts it charged against Brennan and ultimately presented to the jury, by inviting speculation about Brennan's selection of a certain class of youth over another and to "consider that culture" in their deliberation of the charges, but unlike the prosecutor in Powell, did not go so far as to suggest the jury send a message or protect an entire class of victims with its verdict.

Brennan's reliance on State v. Belgarde is similarly misplaced. 110 Wn.2d 504, 755 P.2d 174 (1988). The prosecutor in Belgarde emphasized the defendant's membership in the American Indian Movement (AIM), described it as "a group of butchers and madmen who killed indiscriminately," and said "'the people are frightened of AIM,' and that AIM is 'something to be frightened of when you are an Indian and you live on the reservation.'" Id. at 508. The prosecutor further stated "I remember Wounded Knee, South Dakota. Do any of you? It is one of the most chilling events of the last decade. You might talk that over once you get in there." Id. at 507. The Supreme Court explained that these comments were prejudicial because they were intended to instill fear and to direct the jury to consider information that was improper, but also because the prosecutor's statements amounted to testimony that denied Belgarde "his right to confront and cross examine 'witnesses.'" Id. at 509. The challenged statements in Belgarde, a

mix of racially-charged generalizations about an entire social movement and express suggestion from an attorney representing the State to consider politically controversial events for which Belgarde was not on trial, went well beyond the improper statements by the prosecutor here.

While prejudicial and carrying a substantial likelihood of affecting the verdict, we are unpersuaded that the prosecutor's comments here were such that they could not have been cured by an instruction to disregard them and only consider the elements of the charges, evidence presented and the law of the case as provided by the judge. Brennan fails to overcome the presumption that a jury follows instructions from the court or demonstrate that the improper conduct by the State was so egregious that it could not be cured by instruction, as in Powell or Belgarde.

II. Statement of Additional Grounds

Brennan raises a number of other challenges by way of a statement of additional grounds, including selective prosecution, discovery violations, ineffective assistance of counsel, allegations of a number of purportedly erroneous evidentiary rulings, and an issue regarding a juror knowing a jail transport officer. While Brennan provides appropriate citation to the record, he does not offer any legal authority or argument sufficient to "inform the court of the nature and occurrence of [the] alleged errors" as required by RAP 10.10(c). This court will not search for support for his claims. See State v. Anderson, 9 Wn. App.2d 430, 461 P.3d 176 (2019). Because Brennan's claimed errors lack specificity, we decline to reach the issues in his statement of additional grounds.

Affirmed.

WE CONCUR: