

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BRUCE LEE FRITZ,

Appellant.

No. 41302-7-II

UNPUBLISHED OPINION

Worswick, C.J. — Bruce Lee Fritz appeals his convictions for four counts of first degree child rape and two counts of first degree child molestation of his stepdaughter LMF.¹ Fritz argues that the prosecutor committed misconduct during closing arguments at his jury trial by (1) arguing that the jury had to find Fritz guilty unless it found LMF was lying about the abuse, and (2) repeatedly referring to Fritz having destroyed LMF's innocence. We hold that while the prosecutor's remarks were improper, Fritz failed to meet his burden on appeal to show that no curative instruction would have obviated any prejudicial effect on the jury. Accordingly, we affirm.

FACTS

When LMF was eight years old, she disclosed to her mother that Fritz had tried to have sex with her fifteen or more times. After LMF's mother confronted Fritz, he confessed to having rubbed his penis on LMF's privates twice. LMF also informed her grandmother that Fritz had

¹ We use LMF's initials to protect her privacy.

performed oral sex on her.

Detective Aaron Holladay interviewed LMF about the abuse after it was disclosed to the police. LMF gave additional details to Detective Holladay, including that the abuse began when she was six years old. She told Detective Holladay that Fritz sexually abused her approximately twenty times at an apartment where they used to live, and at least thirty times at the house where they lived more recently. LMF made additional statements about the abuse to a nurse practitioner who examined her, including that Fritz threatened that she would lose her family and live under a bridge if she told anyone.

The State charged Fritz with four counts of first degree child rape and two counts of first degree child molestation. At a jury trial, the above-noted witnesses testified as to LMF's statements to them about the abuse. LMF's mother testified about Fritz's confession. And LMF also testified about Fritz's sexual abuse. Fritz did not testify or put on any evidence.

During closing argument, the prosecutor made repeated references to how Fritz destroyed LMF's innocence. The prosecutor first argued:

There are few things in this world that we value more than the innocence and purity of a young child. We, as a society, entrust parents with the responsibility of safeguarding that innocence and purity. A father, in particular, has the duty and obligation to protect his children from harm, to keep them safe and to safeguard them from the evils of this world, to protect their innocence.

That defendant, Bruce Lee Fritz, horribly abused that ultimate position of trust. He destroyed the very thing that he was entrusted to protect, little [LMF's] innocence.

3 Report of Proceedings (RP) at 363-64. The prosecutor further argued at the end of her closing argument:

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I know that the testimony that you have had to hear in this case is extremely unpleasant, horrible, disturbing. But, let us not forget that [LMF] lived it. She had to live that. That man used his position as protector, guardian to destroy her innocence. And, he needs to be held accountable for that. The only verdict in this case is guilty and I respectfully ask you to do the right thing and to find him guilty and hold him accountable for taking her innocence.

3 RP at 373-74. And the prosecutor finally argued at the end of her rebuttal:

I know that you have a hard job but you should have an abiding belief that he is guilty based on the evidence that you have heard. And, I ask you to hold him accountable for destroying [LMF's] innocence and find him guilty for what he did.

3 RP at 409.

The prosecutor also argued that the jury was required to disbelieve LMF in order to find

Fritz not guilty:

In order to believe that that defendant is not guilty, in order to not believe that what [LMF] is saying is true, you have to believe that she is a master manipulator, really sick and twisted, academy award winning actress, I mean, really smart because how else has she been able to maintain what she is saying all—with all of these people that have talked to her? With her mom? With her grandma? Detective Holladay, with Nurse Stover? With the defense attorney interview? Here in court in front of all of you? Man, she's good. If she [sic] not telling the truth, she is good.

. . . .

And, she has also got to be pretty sick to come up with all of that, to tell everyone all of that, to go through a medical exam and have her genitals probed, to come here and testify in front of you. You've got to believe she [sic] pretty messed up.

It's not the adult. It's not him who is twisted. No, it's this little girl. It's ridiculous.

3 RP at 405-07. Fritz objected to none of these arguments.

The trial court properly instructed the jury as to the presumption of innocence, the

standard of proof beyond a reasonable doubt, and the need for the jury to decide the case based on the evidence rather than sympathy, prejudice, or personal preference. The jury found Fritz guilty of all four counts of first degree child rape and both counts of first degree child molestation. Fritz appeals.

ANALYSIS

Fritz argues that prosecutorial misconduct denied him a fair trial, warranting reversal of his convictions. We hold that the prosecutor's arguments that the jury must disbelieve LMF to acquit Fritz and the prosecutor's repeated references to Fritz destroying LMF's innocence were improper.² But we further hold that because Fritz failed to object to these comments below and because the comments did not result in prejudice incurable by a jury instruction, Fritz's arguments fail. We accordingly affirm Fritz's convictions.

A. *Comments Were Improper*

To establish prosecutorial misconduct, Fritz first bears the burden to establish that the prosecutor's statements were improper. *State v. Emery*, ___ Wn.2d ___, 278 P.3d 653, 663

² Fritz also incorrectly argues that the prosecutor committed misconduct by appealing to the jury's passion and prejudice when she argued that testifying was "not fun" for LMF:

A little child had to come in here and tell all of you about these horrible things that happened to her and be cross-examined by the defense attorney. Do you think that was fun for her? Obviously, it wasn't. And, you saw her demeanor and you saw a frightened little girl up here. This is not fun for her. None of it is fun.

3 RP at 371. This argument properly addressed LMF's credibility, asserting that she was truthful because she would not otherwise have put herself through the ordeal of testifying. A prosecutor has wide latitude to argue reasonable inferences regarding a witness's credibility. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). Fritz cites no authority for such statements constituting improper appeals to passion or prejudice and this argument fails.

(2012). This court reviews a prosecutor's purportedly improper remarks in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions to the jury. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006).

Fritz argues that the prosecutor's argument that the jury must disbelieve LMF to find Fritz not guilty was improper. The State concedes that this argument was improper, and we agree. It is well settled, per *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), that a prosecutor may not argue that the jury must disbelieve the State's evidence to acquit the defendant.

The jury here was required to acquit Fritz unless it found the State had proved its case beyond a reasonable doubt. The jury was not required to convict Fritz unless it believed LMF was a sick and twisted master manipulator, as the prosecutor argued. As such, this argument misstated the burden of proof and the jury's role. *Fleming*, 83 Wn. App. at 213. In accordance with *Fleming*, we hold that this argument was improper.

Fritz also argues that the prosecutor's repeated references to Fritz destroying LMF's innocence were improper. Again, we agree.

"Mere appeals to the jury's passion or prejudice are improper." *Gregory*, 158 Wn.2d at 808 (citing *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)). But "[a] prosecutor is not muted because the acts committed arouse natural indignation." *State v. Borboa*, 157 Wn.2d 108, 123, 135 P.3d 469 (2006) (quoting *State v. Fleetwood*, 75 Wn.2d 80, 84, 448 P.2d 502 (1968)). A prosecutor is not barred from referring to the heinous nature of a crime, but retains the duty to ensure a verdict "free of prejudice and based on reason." *State v.*

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Clafin, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984).

Here, the prosecutor's repeated references to Fritz destroying LMF's innocence were nothing more than appeals to the jury's passion and prejudice. The jury was required to determine whether the State had proved every element of the charged crimes, not to hold Fritz accountable for destroying LMF's innocence. These comments accordingly served no purpose except to evoke the jury's sympathy for L.M.F and arouse the jury's prejudice against Fritz. Hence, they were improper.

B. *Comments Did Not Result in Prejudice Incurable by a Jury Instruction*

Because Fritz did not object to the statements at trial, he is held to a heightened standard of review. Fritz 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.'" *Emery*, 278 P.3d at 664 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). Our query is, "[H]as such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" *Emery*, 278 P.3d at 665 (second alteration in original) (quoting *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932)).

Under *Emery*, our analysis focuses less on whether the conduct was flagrant or ill intentioned and more on whether a jury instruction could have cured the prejudice that the prosecutor's remarks caused. 278 P.3d at 665. While the prosecutor here made the same argument held improper almost 16 years ago in *Fleming*, the prejudice this argument created could have been cured by a jury instruction.

We reach this result under *Emery*, which addressed comments that analogously misstated the burden of proof and the jury's role. There, the prosecutor argued that the jury must be able to articulate a reason for any reasonable doubt as to the defendant's guilt, and argued that the jury's role was to "speak the truth" of what happened in the case. *Emery*, 278 P.3d at 659 (quoting 9 Verbatim Report of Proceedings at 830-32). The court held that these arguments were curable by a jury instruction because they were not "'inflammatory'" comments that caused an incurable prejudice in the minds of the jury. 278 P.3d at 665 (quoting *State v. Brett*, 126 Wn.2d 136, 180, 892 P.2d 29 (1995)). Rather, the court held that the comments carried the potential to confuse the jury about its role and the burden of proof, which would have been cured by the trial court explaining said role and reiterating that the State bears the burden of proof. 278 P.3d at 665-66.

Similarly here, the prosecutor's argument that the jury had a duty to convict unless it found LMF to be lying misstated the burden of proof. But just as in *Emery*, any prejudice resulting from this improper argument would have been alleviated by the trial court reiterating that the State bore the burden of proof and that the jury's role was to decide whether the State had met this burden. Because the prejudice that this argument caused was curable by a jury instruction, Fritz's argument that it warrants reversal of his convictions fails.

The same analysis holds for the prosecutor's references to Fritz destroying LMF's innocence. While these comments were improper appeals to the jury's passion and prejudice, they were not so inflammatory that an instruction from the trial court to disregard the prosecutor's improper comments would have failed to cure any prejudice. *Cf. Belgarde*, 110 Wn.2d at 506-07 (prosecutor appealed to passion and prejudice by claiming defendant was affiliated with terrorist

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organization); *State v. Reed*, 102 Wn.2d 140, 143-46, 684 P.2d 699 (1984) (prosecutor appealed to passion and prejudice by repeatedly calling defendant a liar and by implying witnesses should not be believed because they were from out of town and drove fancy cars). And while these arguments could have influenced the jury by suggesting it should find Fritz guilty if it concluded he destroyed LMF's innocence, a jury instruction would have cured any such confusion about the burden of proof.

Because Fritz failed to object to these arguments below, he is required to meet a heightened standard of review by showing that the comments engendered an incurable feeling of prejudice in the mind of the jury. And because Fritz cannot make this showing, his arguments fail. We accordingly affirm his convictions.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, C.J.

We concur:

Hunt, J.

Johanson, J.