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WA State Court of Appeals, Division III

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

SHAWNA ROOKSTOOL and TODD ROOKSTOOL, husband and wife, individually and in their capacity as the parents and legal guardians of minor children, MRR, MKR, and CDR,	)	No. 35873-9-III
Respondents,	)	PUBLISHED OPINION
v.	)	
DONNA EATON, individually and JOHN DOE EATON, husband and wife and the marital community thereof,	)	
and	)	
QUINCY SCHOOL DISTRICT NO. 144, a political subdivision,	)	
Appellants.	)	

KORSMO, J. — Quincy School District (QSD) appeals from a jury verdict in favor of three children injured in a school bus accident, primarily arguing that it is entitled to a new trial due to misconduct of opposing counsel in closing argument. Although we agree that misconduct occurred, the deference owed the trial court in its posttrial rulings leads us to affirm.

FACTS

A bus accident injured several children, including three members of the Rookstool family—MRR, MKR, and CDR. QSD admitted liability and the parties only disputed damages. The crash caused spinal damage to MRR that is expected to require ongoing therapeutic care and possible surgery. MKR experienced bulging discs on her back that cause tingling and numbness in her legs. CDR and parents Shawna and Todd Rookstool experienced emotional trauma from the incident.

The parties agreed to several motions in limine, including the following:

> 6. The Court should preclude admission of any evidence that parties have not produced in response to valid discovery requests.
> 13. Any argument requesting the jurors to place themselves in the position of Plaintiffs must be excluded at trial.
> 14. Any argument that the jurors punish defendant, "send a message," or "make an example" of defendant should be prohibited.
> 21. There should be no reference to the "golden rule."

Clerk's Papers (CP) at 161, 171, 173-74.

The damages-only trial lasted eight days between October and November 2017. The parties stipulated to past medical damages for MRR and MKR in the respective sums of $142,014.26 and $6,482.01. Each party presented expert witnesses to evaluate MRR's and MKR's long-term injuries and ongoing care requirements. Dr. Cole Hemmerling, the Rookstool family doctor, testified about MRR's and MKR's initial diagnoses and treatment. Toward the end of his testimony, the court denied his request to speak frankly.

In continued questioning, Dr. Hemmerling opined that QSD's diagnosis for MRR was "disingenuous and petty."

In closing arguments, the family's counsel contended that MRR's medical damages, including past and future expenses, totaled $640,000 to $1,200,000 and MKR's medical damages totaled $37,240 to $106,626. Counsel asked the jury to award the Rookstool family $5,000,000, to be split $4,000,000 to MRR, $750,000 to MKR, $50,000 to CDR, and $200,000 to Shawna and Todd Rookstool. Counsel also suggested MRR might need surgery and stated his belief that opposing counsel agreed that the surgery would be terrifying. QSD's counsel immediately objected. The trial court reminded the jury that closing is argument and not to treat attorney statements as evidence.

The family's attorney then asked the jury to close their eyes and imagine MRR's fear and uncertainty about her future due to her injuries. Counsel reminded jurors the Rookstool family were members of their community and they should look after their own. QSD did not object to these arguments.

QSD asked the jury to award the Rookstool family $305,000 in damages, divided $250,000 to MRR, $20,000 to MKR, $10,000 to CDR, and $25,000 to Shawna and Todd. QSD argued that its evidence showed most injuries were not caused by the school bus accident and questioned findings presented by the family's expert witnesses.

In rebuttal, the family's counsel stated:

> You heard [QSD's counsel] talking about Dr. Hemmerling. He's one of our own. And you remember that day when Dr. Hemmerling was on the stand and [QSD's counsel] was chopping at him and he talked about disingenuous and petty.
>
> (As read): "Disingenuous and petty. I will tell you what I find disingenuous and petty. This is a farm family, not unlike the farm family I grew up in. We worked and played together on that family farm. I was taught most all of my life lessons worth knowing there. First and foremost, my mama taught me when you mess up the first thing you do is fess up. Say you're sorry; then you make it right if you can."
>
> The district has done the first two, messed up and fessed up, but failed miserably on the most important part, making it right. That has been the disingenuous and petty part of this whole affair. The district just needs to finish the apology and do what their mother taught them to do."
>
> I got this text at 7:56 in the morning, the morning after Cole Hemmerling testified on the stand. It kept him up all night.

Report of Proceedings (RP) at 2023. The court sustained an objection to this evidence outside the record and instructed the jury to disregard the statement.

QSD moved for a mistrial before the jury verdict, but the court did not hear arguments until after the jury returned its verdicts. QSD contended that counsel's conduct in closing unfairly prejudiced the district, focusing on (1) the reading of Dr. Hemmerling's text message, (2) wrongly suggesting that QSD's counsel believed MRR needed surgery, (3) use of a golden rule argument when asking the jury imagine to MRR's fears, and (4) the appeal to "home town" community sentiments.

The jury awarded the Rookstool family $1,210,000. The total was divided $1,000,000 to MRR, $100,000 to MKR, $10,000 to CDR, and $100,000 to the parents.

The court denied the mistrial motion on November 21, 2017. The court's oral ruling found that any prejudice caused by reading the text message to the jury was cured by the court's instruction. Likewise, any suggestion that QSD's counsel agreed with the Rookstool's counsel was disproved when QSD objected and any error was harmless. The judge also stated that if QSD had objected to the golden rule argument, the court likely could have cured any error, so the argument was waived by the failure to object. The trial court believed that the jury reached its verdict based on expert testimony and did not believe that the damages were the result of improper conduct. However, the court did order Rookstool's counsel to turn over the complete text message to QSD for further investigation.

QSD subsequently filed a motion for a new trial that raised the same issues as the mistrial motion. Cell phone records indicated that plaintiff's counsel informed Dr. Hemmerling by return text message that he planned to read the doctor's text message in closing, leading QSD to conclude that the conduct was premeditated, flagrant, and ill-intentioned. The trial judge denied the motion, but agreed that respondent's counsel planned in advance to read the text message. However, the court ruled appellant failed to show prejudice incurable by jury instruction. The court reemphasized the jury verdict fit within reasonable damages set out by expert witnesses and its belief that the jury followed the curative instruction.

QSD timely appealed the jury's verdict as well as the trial court's denial of its mistrial and new trial motions. A panel heard oral argument of the case.

ANALYSIS

This appeal revolves around the noted closing arguments by counsel for the Rookstools. Given the nature of our review, we consider the arguments as one.

Long settled standards govern our review of these issues. Appellate courts review a trial court's resolution of a mistrial motion for abuse of discretion. *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 136, 750 P.2d 1257, 756 P.2d 142 (1988). The same standards apply to a motion for a new trial under CR 59(a). *Id*.; *Teter v. Deck*, 174 Wn.2d 207, 222, 274 P.3d 336 (2012). A higher showing of abuse of discretion applies to an order granting a new trial than to an order denying such a motion. *Teter*, 174 Wn.2d at 222. Discretion is abused when it is exercised on untenable grounds or untenable reasons. *Id*.; *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Misconduct that results in prejudice is a basis for a new trial. *Aluminum Co. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537-38, 998 P.2d 856 (2000).

QSD acknowledges, and even embraces, the abuse of discretion standard while understandably focusing on what it considers the egregious nature of each instance of potential misconduct. However, that focus requires that we address another aspect of this appeal. QSD did not challenge the "home town" and alleged "golden rule" arguments when they were made at trial. Appellate review normally does not extend to arguments

not raised in the trial court. RAP 2.5(a); *Rash v. Providence Health & Servs.*, 183 Wn. App. 612, 625, 334 P.3d 1154 (2014). The purpose of this rule is to promote judicial economy by allowing the trial court to correct the error in the first instance. *Kitsap Co. Consol. Housing Auth. v. Henry-Levingston*, 196 Wn. App. 688, 385 P.3d 188 (2016); *Rash*, 183 Wn. App. at 625. Courts, however, have discretionary authority to consider issues of manifest constitutional error that were not raised in the trial court, provided that an adequate record exists to consider the claim. RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

The two noted issues presented here are not of constitutional magnitude. Both "golden rule"[1] and "hometown" arguments are common law doctrines involving trial fairness. *E.g.*, *Adkins*, 110 Wn.2d at 142 ("golden rule"); *Pederson v. Dumouchel*, 72 Wn.2d 73, 83-84, 431 P.2d 973 (1967) ("hometown" pride). The concern is that both arguments invite the jury to decide on the basis of sympathy or prejudice instead of on the evidence. *Id*. Typically, these arguments are waived absent timely objection in the trial court. *Adkins*, 110 Wn.2d at 142 ("golden rule"); *Lafferty v. Stevens Mem'l Hosp.*,

[1] We note that the Rookstools deny that their counsel made a golden rule argument (appellate counsel refered to it at oral argument as a "first person closing" (Wash. Court of Appeals oral argument, No. 35873-9-III (Dec. 5, 2019), at 17 min., 53 sec. to 30 min., 56 sec. (http://www.courts.wa.gov/appellate_trial_courts/appellatedockets/index.cfm?fa=appellatedockets.showDateList&courtId=a03&archive=ye=20191205.))) and that the trial judge stated he did not immediately characterize the argument as a golden rule argument. We need not classify the argument or decide whether such an argument is proper.

noted at 136 Wn. App. 1027, slip op. at 7 n.19 (2006) ("hometown").[2] We think that is the case here. Timely objection would certainly have forced a clarification of the golden rule argument QSD accused counsel of making, and we believe that the hometown argument also could adequately have been addressed by a curative instruction following a timely objection.[3]

That does not mean, however, that the waived claims could not, in the trial court's discretion, have been considered in the posttrial motions. *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 97, 231 P.3d 1211 (2010). To varying extents, all of the claims were addressed by the trial court in its posttrial rulings. Both the mistrial motion and the motion for a new trial were based on the same grounds; the only difference between the two motions was the existence of the text conversations that established that counsel's reading of Dr. Hemmerling's message was planned days in advance.

As both motions also are reviewed for abuse of discretion, we will treat them as one for our purposes. The question presented is whether the trial court had tenable grounds or reasons for rejecting the motions. We conclude that it did.

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[2] *Adkins* notes that an objection can cure a golden rule argument "in most cases," suggesting that in some instances such an argument is incurable and requires a new trial. 110 Wn.2d at 142.

[3] Even though it prevailed on a motion in limine to exclude any golden rule argument, QSD still had "a duty" to bring the violation to the court's attention. *A.C. v. Bellingham Sch. Dist.*, 125 Wn. App. 511, 525, 105 P.3d 400 (2004).

QSD argues that the two preserved misconduct arguments—the statement that opposing counsel agreed that the surgery was terrifying and the reading of Dr. Hemmerling's text message—each separately justify a new trial and that they can be combined with each other and the two unpreserved claims—the golden rule and hometown arguments—as a matter of cumulative error. The Rookstools argue that the cumulative error doctrine does not apply in civil cases. For the reasons that follow, we do not believe that the cumulative error doctrine is limited to criminal proceedings. Any trial can be made unfair by a series of errors that, individually, might not justify granting a new trial, but that cumulatively did wrongly affect the verdict.

> The cumulative error doctrine applies where a combination of trial errors denies the accused of a fair trial, even where any one of the errors, taken individually, would be harmless. *In re Det. Of Coe*, 175 Wn.2d 482, 515, 286 P.3d 29 (2012). The test to determine whether cumulative errors require reversal of a defendant's conviction is whether the totality of circumstances substantially prejudiced the defendant and denied him a fair trial.

In re Pers. Restraint of Cross, 180 Wn.2d 664, 690, 327 P.3d 660 (2014).

The first significant discussion of cumulative error appears to have occurred in *State v. Simmons*, 59 Wn.2d 381, 368 P.2d 378 (1962). The court began its opinion as follows:

> The issue here is whether a defendant convicted of assault with intent to commit rape had a fair trial.
>
> Our conclusion is that he did not. The accumulation of prejudicial incidents and misconduct, in a case where the factual issue was a very close

> one, tipped the scale so heavily against the defendant that any semblance of a fair trial was lost.

Id. at 382-83. Extensive misconduct in cross-examination and closing argument, coupled with vouching for the integrity of witnesses and calling a witness whose testimony had previously been excluded, was significant prosecutorial misconduct that was augmented by error in excluding evidence and in the seating of a biased juror. *Id*. at 383-92. The court had no difficulty concluding that the trial was unfair, requiring reversal of the conviction.

Similarly, other cumulative error cases have looked to the impact of multiple errors on the totality of the trial. *E.g.*, *State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (evidentiary and instructional errors, discovery violation, and prejudicial cross-examination all cumulated to require new trial); *State v. Lampshire*, 74 Wn.2d 888, 447 P.2d 727 (1968) (erroneous limitation on cross-examination, comment on the evidence, and excessive rebuttal testimony cumulated to require new trial).

Both sides dispute the meaning of a case from this court, *Storey v. Storey*, 21 Wn. App. 370, 585 P.2d 183 (1978). There the trial court had granted a new trial because of multiple instances of defense witness misconduct, primarily by the defendant, but also by her daughter. *Id*. at 371-73. The trial court expressly cumulated the errors and determined that curative instructions had not obviated the misconduct. *Id*. at 373. Although before this court on appeal from the order granting the new trial, we, too,

turned to the cumulative nature of the errors to affirm the order, citing to *Simmons*. *Id*. at 374.

Although the parties note cases indicating that cumulative error has not been applied in civil cases, no case has been cited that prohibits consideration of cumulative error in the civil context. Indeed, cumulative error is argued in personal restraint petitions as well as in sexually violent predator actions, both of which are civil in nature, although admittedly each type of case has a heavy criminal "flavor." *E.g.*, *Cross*, 180 Wn.2d at 690 (personal restraint); *In re Det. Of Coe*, 175 Wn.2d at 515 (sexual predator). In light of *Storey* and the use of the doctrine in quasi-criminal civil actions, we conclude that cumulative error applies to civil cases. Like criminal litigants, civil litigants are entitled to fair trials.

However, that does not mean that QSD has a case of cumulative error here. Cumulative error is not a method for considering unpreserved issues on appeal. It is simply a recognition that the net impact of multiple small errors can still result in a prejudicial impact on the trial. QSD argued all of its claims in the posttrial motions. The trial court was empowered to hear all of those claims, even if not preserved, in making its ruling. *A.C. v. Bellingham Sch. Dist.*, 125 Wn. App. 511, 525, 105 P.3d 400 (2004). Here, it did so. Accordingly, QSD has preserved its arguments through raising them in the mistrial and new trial motions. Although not all of them could be heard as individual claims on appeal, QSD has not attempted to do so.

Multiple instances of misconduct do not implicate cumulative error because the focus is on the totality of counsel's misconduct.[4] We do not parse misconduct claims and treat each and every objectionable statement of counsel as a separate misconduct claim. Here, for example, there is but one misconduct claim instead of four. *See Storey*, 21 Wn. App. at 373-74 (treating defendant's misconduct as one issue). Necessarily we look at the totality of the conduct in assessing the one argument. There is no need for cumulative error analysis.

We agree with appellant that counsel committed misconduct in closing argument. Introducing new evidence by reading the text message from the treating physician with its call for accountability—a consideration far outside the realm of the doctor's expertise as the treating physician—was significant error. This type of behavior long has been recognized as erroneous. *Carnation Co. v. Hill*, 115 Wn.2d 184, 186-87, 796 P.2d 416 (1990) (attorney mentioning lie detector test); *State v. Claflin*, 38 Wn. App. 847, 850-51, 690 P.2d 1186 (1984) (prosecutor reading poem by rape victim). Similarly, appeals to local prejudice against outsiders long has been considered improper. *State v. Reed*, 102

[4] The Washington Supreme Court applies the term "misconduct" to describe erroneous behavior or statements by counsel rather than distinguish between purposeful misconduct and attorney error. *State v. Ish*, 170 Wn.2d 189, 195 n.6, 241 P.3d 389 (2010). The word is considered a term of art. *In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 165 n.3, 410 P.3d 1142 (2018).

Wn.2d 140, 146-47, 684 P.2d 699 (1984) (improper to disparage out-of-town counsel and witnesses); *Pederson*, 72 Wn.2d at 83-84 (trial-long appeal to hometown pride).

Nonetheless, establishing misconduct is insufficient to require relief. QSD also has to establish that it was prejudiced by the misconduct. The trial court was satisfied that its remediation actions were adequate to ameliorate the harm resulting from the misconduct, and that it could easily have cured the unchallenged arguments. We believe that was a tenable basis for denying the mistrial and new trial motions. The total verdict was far closer to that proposed by QSD than that sought by the plaintiffs. As the trial judge noted, the verdict was also within the range articulated by the expert witnesses. QSD argues that the prejudice is seen in the fact that the damages for MRR were significantly greater than for her siblings, with particular emphasis on the fact that she received 100 times that given CDR. But MRR was more injured than her siblings and faced greater need for future medical services. It was understandable that her award was significantly larger than those for her siblings. But the important point is that the award also was within the scope of the expert testimony.

Trial judges are accorded great discretion in resolving posttrial motions because their presence in the courtroom allows them to read the jury and consider the misconduct with an understanding of its significance in the rough and tumble of a live trial. The trial judge here carefully distinguished between the flagrant behavior of counsel in reading the text message—much of which repeated what the doctor had said in his testimony—and

the issue of whether it significantly impacted the verdict. In the judge's considered opinion, striking the evidence and giving the jury an immediate curative instruction was adequate to remedy the most egregious of counsel's misconduct, and the judge found support in the ultimate verdict for that view.

The court had a tenable reason for concluding that QSD did not establish prejudice. The record supports that view of the case. The trial court did not abuse its discretion.

Affirmed.

Korsmo, J.

WE CONCUR:

Siddoway, J.

Pennell, A.C.J.