IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29169-3-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
ROOSEVELT MILLER,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, A.C.J. — Roosevelt Miller appeals his conviction for second degree rape, arguing that the prosecutor erred in closing argument and the trial court erred by including an Oregon sodomy conviction in his offender score. We disagree and affirm.

FACTS

The charge had its genesis in Mr. Miller's sexual relationship with 16-year-old T.T., a developmentally delayed individual. A school psychologist testified that T.T. functioned at the level of a seven or eight year old.

The case was charged on the theory that the victim was unable to consent to sexual

intercourse due to mental incapacity. A detective interviewed Mr. Miller and the recording of that session was played for the jury. Mr. Miller initially denied sexual contact with T.T., but subsequently admitted they engaged in acts of sexual intercourse; he stated that he believed T.T. was 17. He also admitted he knew about T.T.'s disability and her inability to make decisions about sexual activity. However, he succumbed to temptation because he had "asked [God] for a virgin and there she was."

An initial trial resulted in a mistrial. The prosecutor argued in his initial closing remarks at the retrial:

> And that's why, ladies and gentlemen, I am asking you to find him guilty. He had sex with this girl who was unable to consent.
>
> Your task is to get this right. I know this is—I know you're going to do the very best job you can in coming to the right decision. You want to serve justice, and sometimes there are competing interests. You have the defendant on one side. You have the need to hold people accountable on the other side. Your task is to get this right, and the right verdict is to find him guilty.

Report of Proceedings (RP) (April 7, 2010) at 255.

The prosecutor's rebuttal remarks included the following:

> Ladies and gentlemen, this was a kid; this was a child. He took advantage of her. You need to send a message to the defendant saying, "We're going to hold you accountable. You can't do that." That is why you should find him guilty.

Id. at 271. There were no objections to either of these statements.

The jury convicted Mr. Miller of second degree rape. The trial court sentenced Mr. Miller with an offender score of three, based on an Oregon sodomy conviction. He then timely appealed to this court.

ANALYSIS

This appeal presents challenges to the noted remarks of the prosecutor and to the use of the Oregon conviction in calculating the offender score.[1] We will address each argument in turn.

Prosecutor's Closing Argument. Mr. Miller argues that the prosecutor erred by asking the jury to "send a message" and "to hold him accountable." We believe in context that the remarks were proper and, even if not, were not so egregious that they were beyond cure from a timely objection.

The standards for reviewing this type of alleged error in closing argument are well settled. If there was no objection to the challenged argument at trial, relief can be granted only if the error was so egregious that it was beyond cure by the trial judge. *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991);

[1] In his *pro se* Statement of Additional Grounds, Mr. Miller also challenges the sufficiency of the evidence to support the conviction. Both Mr. Miller and T.T. testified to acts of sexual intercourse and the expert testimony amply supported the incapacity element of the charge. Accordingly, the evidence was sufficient to allow the jury to return the verdict that it did. RCW 9A.44.050(1)(b).

State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Moreover, a prosecutor has "wide latitude" in arguing inferences from the evidence presented. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

It is improper for a prosecutor to tell the jury that its verdict will reflect on society in general or send a message to others. *State v. Powell*, 62 Wn. App. 914, 918, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013 (1992). Similarly, arguments that make an emotional appeal to the jury to send a message to society are improper. *State v. Bautista-Caldera*, 56 Wn. App. 186, 783 P.2d 116 (1989), *review denied*, 114 Wn.2d 1011 (1990).

Mr. Miller argues that the noted statements improperly urged the jury to send a message and decide the case on policy grounds rather than the evidence. We disagree. The remarks here were tied to the evidence in the case and directed at sending a message to Mr. Miller, not society in general. In this regard, the case is more akin to *State v. Greer*, 62 Wn. App. 779, 815 P.2d 295 (1991). There the prosecutor had asked the jury to "send a clear message out from this box into this community that these two defendants are accountable. I'd ask that you find the defendants . . . guilty as charged." *Id*. at 786. Considering the remarks in the context of the entire argument, Division One of this court concluded that the remarks were not an erroneous appeal to passion or prejudice. *Id*. at 792-793.

Similarly here, the remarks were not an appeal to passion or prejudice. They were tied to the evidence in the case and asked the jury to find the defendant guilty, thus sending a message to the defendant that his conduct was unlawful. The remarks were not improper.

The remarks were also not so egregious that the defendant's obligation to object was waived. *Swan*, 114 Wn.2d at 661. A timely objection would have allowed the judge to correct any error. *Id*.

For both reasons, we conclude that the prosecutor's remarks did not deprive Mr. Miller of a fair trial. There was no error.

Scoring of Oregon Conviction. The other argument presented is a claim that the trial court had an insufficient basis for including the Oregon sodomy conviction in the defendant's offender score. The trial court correctly analyzed the issue and did not err by counting the conviction.

We review de novo the calculation of an offender score. *State v. McCraw*, 127 Wn.2d 281, 289, 898 P.2d 838 (1995). Out-of-state convictions are included in a Washington defendant's offender score if the foreign crime is comparable to a Washington felony offense. RCW 9.94A.525(3). The State must establish comparability of the offenses, typically by proving the out-of-state conviction exists and providing the

foreign statute for the court. *State v. Ford*, 137 Wn.2d 472, 479-482, 973 P.2d 452 (1999). The sentencing court compares elements of the potential comparable offenses. *Id*. at 479. Where the elements are not identical, or where Washington defines the offense more narrowly than the foreign state, the court must look into the record of the conviction to determine whether the proven conduct would have violated Washington law. *Id*. at 480.

That was done here. Mr. Miller pleaded guilty in Oregon to first degree sodomy. The elements of that offense, as described in the indictment, included "knowingly and unlawfully by forcible compulsion engaging in deviate sexual intercourse." This language tracks the sodomy statute. ORS 163.405(1)(a). The trial court considered both the indictment and the probationary sentence order from the Oregon trial court. It analyzed the facts of the conviction and concluded that it was similar to Washington's second degree rape statute, RCW 9A.44.050(1). That statute defines second degree rape as engaging in sexual intercourse by forcible compulsion.

The elements of the Washington offense are found in the Oregon sodomy statute. The two states have the same definition of "forcible compulsion" as involving either physical force or the threatened use of force against the victim or another. *See* RCW 9A.44.010(6); ORS 163.305(2).[2] The two states also have similar definitions of sexual

intercourse. Washington defines "sexual intercourse" in multiple manners, including "its ordinary meaning" and also "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another." RCW 9A.44.010(1)(a), (c). Oregon defines "deviate sexual intercourse" as "sexual conduct between persons consisting of contact between the sex organs of one person and the mouth or anus of another." ORS 163.305(1).

Thus, to convict Mr. Miller of first degree sodomy, Oregon had to prove that he forcibly engaged in sexual contact between the sex organs of one person and the mouth or anus of another. That evidence would also establish second degree rape in Washington by forcible sexual intercourse. RCW 9A.44.050(1)(a). The trial court correctly determined that the two offenses were comparable.

The court did not err by including the Oregon conviction in the offender score.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the

[2] In relevant part, the Oregon statute provides: "'Forcible compulsion' means to compel by (a) Physical force; or (b) A threat, express or implied, that places a person in fear of immediate or future death or physical injury to self or another person." ORS 163.305(2).

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, A.C.J.

WE CONCUR:

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Brown, J.

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Siddoway, J.