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

STATE OF WASHINGTON,	)	No. 30132-0-III
Respondent,	)	
v.	)	
	)	UNPUBLISHED OPINION
MICHAEL D. WINN,	)	
Appellant.	)	

Sweeney, J. — This appeal follows convictions for rape and molestation of a child. The defendant assigns error to a number of the trial court's decisions, including the failure of the police to properly apply for an order permitting them to record a conversation between the child victim and the defendant. We conclude that this record supports the necessary attestation to apply for the intercept. And we conclude that neither the prosecutor's conduct nor the court's rulings on the admission of evidence support reversal. We therefore affirm the convictions for first degree child molestation, rape of a child in the second degree, rape of a child in the third degree, child molestation

in the second degree, and child molestation in the third degree.

FACTS

Michael Winn became romantically involved with H.D.'s mother, Melisa Winn,[1] and moved in with her and her three daughters, Justine, H.D., and Mikayla, in June of 2001. Mr. Winn and Ms. Winn never married. But Mr. Winn assumed the role of stepfather to the girls. In July 2010, H.D. disclosed that Mr. Winn had sexually abused her between the ages of 7 and 16 years old.

Detective Chad Janis interviewed H.D. H.D. told Detective Janis that the first incident of abuse occurred when Mr. Winn took her and Mikayla camping. She said that during this trip, Mr. Winn rubbed her back and then started "French kissing" her. She reported that throughout the years that followed, she and Mr. Winn engaged in multiple sexual acts, including oral sex, digital penetration, and ultimately sexual intercourse when she was 13. According to H.D., she stopped telling her mother about the abuse because her mother blamed her for it.

After the interview, Detective Janis decided to have H.D. call Mr. Winn on the phone to see if she could get him to admit to the sexual abuse. He submitted an application for authority to record a telephone conversation. The application alleged that

[1] Ms. Winn testified at trial that she changed her last name from Pankey to Winn in April 2011. Report of Proceedings (June 21, 2011) at 253.

the detective had probable cause to believe that Mr. Winn had committed the felony crimes of second and third degree rape of a child, first degree sexual misconduct with a minor, and first degree child molestation. Detective Janis explained that other means of investigation would be unreasonable because H.D. was afraid of Mr. Winn and that due to the one year delay in H.D.'s disclosure, there was little likelihood of locating physical evidence through search warrants.

The court concluded that normal investigative techniques would be too dangerous and unlikely to succeed and authorized the detective to record the conversation.

H.D. called Mr. Winn and police taped the conversation. In the conversation, H.D. told Mr. Winn that she needed to talk to him because she had just been to the doctor and been told that she could not have children. She told him that she was really scared and that he was the only person she had ever had sex with. Mr. Winn responded that he did not understand what was going on and that he could not talk because he was at work. H.D. then said, "we should never have . . . made love or . . . touched each other." Ex. 15 at 12. Mr. Winn replied that "[w]e should've never had different feelings like that you know and . . . I want you as my daughter." Ex. 15 at 12. Toward the end of the conversation, H.D. asked Mr. Winn why he had had sex with her. He replied, "[w]hat are you talking about?" and repeated that he had to get back to work. Ex. 15 at 13-14.

The State charged Mr. Winn with child molestation in the first degree, rape of a child in the second degree, rape of a child in the third degree, child molestation in the second degree, and child molestation in the third degree.

Mr. Winn moved to suppress the recording of his phone conversation with H.D., and argued that the application for authorization to record did not meet the statutory requirements because Detective Janis did not attest to the application under oath and it lacked particularized facts showing that normal investigative procedures were unlikely to succeed. He argued that the detective mischaracterized and embellished the evidence by stating that H.D. possessed "unique [and intimate] knowledge of the defendant's anatomy" and that H.D.'s mother threatened her with physical abuse if she disclosed sexual abuse. Clerk's Papers (CP) at 7, 8. He claimed both of these assertions were unsubstantiated and therefore should not have been a basis for authorizing the phone call. Mr. Winn also argued that the detective could have investigated H.D.'s allegations by interviewing Ms. Winn or obtaining a search warrant for physical evidence.

The State responded that the application had been made under oath and attached an affidavit from the detective, stating that a judge had placed him under oath when he submitted the application. It also pointed out that a search warrant for physical evidence would not have been fruitful because H.D. had not had any contact with Mr. Winn in

over a year by the time the detective requested permission to tape a phone call.

The court concluded that the detective's failure to sign the application for authorization did not invalidate the recording and admitted it. Mr. Winn then requested a hearing after the issuing judge could not recall whether Detective Janis had been placed under oath when he submitted his application. Mr. Winn also alleged that the detective made false material statements in his application. A judge (not the judge who authorized the recording) granted Mr. Winn's motion to examine whether the detective (1) was placed under oath and (2) made false statements in his application. After a hearing, the court rejected Mr. Winn's arguments and concluded that the facts set forth in the application were sufficient to admit the recording.

The case proceeded to trial. H.D. testified that Mr. Winn started sexually abusing her when she was 8 years old and that the abuse continued until she was 16. She stated that the abuse started with kissing, progressed to oral sex and digital penetration between the ages of 9 and 10, and then progressed to penile-vaginal intercourse when she was 13. She testified that this sexual activity occurred almost daily during those 9 years.

Mr. Winn took the stand and denied having sex with H.D. or engaging in any other sexual activities with her. H.D.'s younger sister, Mikayla, testified that she had never seen Mr. Winn kiss H.D. Ms. Winn testified H.D. had a good relationship with Mr.

Winn until high school when she began to run around with a crowd he disapproved of. She stated that H.D.'s and Mr. Winn's relationship began to decline in the spring of 2009 when H.D. refused to follow home rules. Ms. Winn denied ever seeing sexual activity between Mr. Winn and H.D.

The State called H.D.'s older sister, Justine, in rebuttal. She testified that when she was 14 years old and H.D. was 9, she walked into a room and saw H.D. sitting on Mr. Winn's face. She stated that both H.D. and Mr. Winn jumped when they saw her and that Mr. Winn threw H.D. off of him. According to Justine, her mother walked in a few minutes later, observed the same behavior, and then ran off to her bedroom yelling and screaming.

The jury found Mr. Winn guilty of all charges.

DISCUSSION

Recording Phone Conversation

Mr. Winn first contends that the court should have suppressed the recorded phone conversation between him and H.D. He argues that the application for the order authorizing the recording was deficient because it was not made in writing upon oath and did not establish a particularized need for the recording, as required by Washington's privacy act.

The privacy act, chapter 9.73 RCW, prohibits the interception and recording of private communications and conversations without the consent of all parties. RCW 9.73.030; *State v. Constance*, 154 Wn. App. 861, 877, 226 P.3d 231 (2010). A judge may, however, authorize interception and recording. RCW 9.73.090(2);[2] *Constance*, 154 Wn. App. at 878. Application for court approval to intercept must meet the requirements set out in RCW 9.73.130. The application must state (1) the authority of the applicant making the application, (2) the identity and qualifications of the law enforcement officer or agency seeking to record a conversation, and (3) a particular statement of the facts relied upon by the applicant to justify the issuance of an authorization. RCW 9.73.130(1)-(3).

A judge issuing an intercept order has considerable discretion to determine whether the statute has been satisfied. *State v. Porter*, 98 Wn. App. 631, 634, 990 P.2d 460 (1999). We do not review the sufficiency of the application de novo. And we will

[2] RCW 9.73.090(2) provides: "It shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication or conversation . . . , PROVIDED, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony."

affirm if the facts set forth in the application are minimally adequate to support the determination. *Id.* We then interpret this need requirement in a commonsense fashion and do not apply the more stringent probable cause standard required in the search warrant context. *Id.* at 635. And we review the court's decision to admit evidence for abuse of discretion. *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997).

Mr. Winn first contends that the application for the authorizing order is deficient because "there is no record of any oath or affirmation supporting the officer's account." Br. of Appellant at 10. He relies on *Williams* and *Costello* to argue that recordings under authority of RCW 9.73.130 must be made in strict compliance with the privacy act. *State v. Williams*, 94 Wn.2d 531, 617 P.2d 1012 (1980); *State v. Costello*, 84 Wn. App. 150, 925 P.2d 1296 (1996). He argues that Detective Janis's failure to sign the application invalidates it. *Williams* and *Costello* deal with different sections of the privacy act and therefore do not help. *See Williams*, 94 Wn.2d at 548 (RCW 9.73.030(2)(b)), and *Costello*, 84 Wn. App. at 153 (RCW 9.73.210).

RCW 9.73.130 provides that each application for an authorization to record a conversation "shall be made in writing upon oath or affirmation." Here the application for interception was made in writing. And the application was made under oath. The first sentence of the authorizing order signed by the trial court judge states that "sworn

application [was] made before me by Detective Chad Janis." CP at 40. Detective Janis declared that a judge had placed him under oath for his application. We are led then to conclude that the statutory requirements have been met, especially given the standard of minimal compliance.

Mr. Winn next contends that the application did not establish a particularized showing of need for the recording. Specifically, Mr. Winn argues that nothing in the detective's application explained why it was impractical to obtain evidence through other means such as a search warrant or interviewing Mr. Winn or family members.

To establish the particularized showing of need requirement under RCW 9.73.130(3)(f), the affidavit must contain a "particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ." Law enforcement officials need not make a showing of "absolute necessity" to satisfy RCW 9.73.130(3)(f), but must either "try or give serious consideration to other methods and explain to the issuing judge why those other methods are inadequate in the particular case." *State v. Manning*, 81 Wn. App. 714, 720, 915 P.2d 1162 (1996); *State v. Cisneros*, 63 Wn. App. 724, 729, 821 P.2d 1262 (1992). Again, the need requirement is interpreted in a "'common sense fashion.'" *Porter*, 98 Wn. App. at 635 (quoting *State*

v. Platz, 33 Wn. App. 345, 349-50, 655 P.2d 710 (1982)).

Detective Janis's application affidavit explained why recording the conversation was the preferred method of investigation:

> Due to the fact that this is a delayed disclosure and the victim has been out of the house for approximately a one year's time, the likelihood of locating evidence of sexual assaults would be unlikely by way of search warrants. The use of an interception and recording of conversations is a safer and more reasonable approach to the investigation of this case.

CP at 21.

The judge may consider the difficulty of proving the crime. *Constance*, 154 Wn. App. at 883 (citing *State v. Kichinko*, 26 Wn. App. 304, 311, 613 P.2d 792 (1980)). And that certainly was a relevant consideration here. The abuse started over 9 years before the State prosecuted Mr. Winn and ended a year before Detective Janis's application. One of the preferred "normal investigative procedures" for a sexual offense would be the collection of physical evidence and a sexual assault examination. But a sexual assault examination must be given within 72 hours of the sexual abuse. And any other physical evidence that could have been found after that amount of time would have been in common areas and compromised by the presence of other DNA.[3] It would not then have been possible for police to obtain physical evidence.

[3] Deoxyribonucleic acid.

Nor did an interview with Ms. Winn appear to be an option. According to the application:

> Multiple times during these years, [H.D.]'s mother caught Winn sexually abusing [H.D.]. [H.D.] also asked her mother to protect her. [H.D.]'s mother put the blame back on [H.D.] . . . [H.D.] fears that her mother will lie during this investigation. [H.D.] is also in a great fear for her life, because her mother has
> made physical threats to harm her if she ever told anyone about these incidents.

CP at 145. In view of this intra-familial abuse and the fact that Mr. Winn was living with Ms. Winn at the time the detective submitted the application, it was reasonable for the detective to conclude that interviewing H.D.'s mother would not be helpful. H.D.'s mother ignored her daughter's sexual abuse and protected Mr. Winn. It then seems unlikely that she would be forthcoming with any evidence. Moreover, an interview with her could have compromised the integrity of the case if Ms. Winn decided to tell Mr. Winn about the investigation.

Detective Janis provided sound reasons to use a recorded conversation instead of other, more conventional investigative techniques. He considered other techniques and found them inadequate. The facts set forth in the application are at least minimally adequate to support the authorizing order here. The court then had solid reasons to admit the recording.

Prosecutorial Misconduct—Vouching

Mr. Winn contends that the prosecutor committed misconduct when he expressed a personal view of the evidence and vouched for H.D.'s credibility.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). The defendant bears the burden of establishing the impropriety of the statements. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). We evaluate a prosecutor's conduct by examining it in the context of the total argument, the evidence presented, the issues in the case, and the jury instructions. *Monday*, 171 Wn.2d at 675. The prosecutor has wide latitude to draw reasonable inferences from the evidence and to express his view of those inferences. *Stenson*, 132 Wn.2d at 727.

Our analysis varies depending on whether the defendant objected to comments during the trial. If, as here, the defendant objected at trial, the test is whether there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012).

Mr. Winn objected to the prosecutor's argument that, "I would suggest to you that the case itself is very, very strong. We have a young lady that testified very well, . . . I have no concerns about the evidence in this case," and "[n]o prosecutor would have any

concerns about the evidence in this case." Report of Proceedings (June 22, 2011) (RP) at 457. The court sustained defense objections to the use of the personal pronoun, "I," and reminded the prosecutor during a sidebar conference to refrain from personalizing his argument. Mr. Winn did not request a curative instruction or ask for a mistrial; in fact, during a sidebar discussion at the close of trial, Mr. Winn declined asking for a new trial based on the prosecutor's statements. RP at 480-81.

The general rule is that it is improper for a prosecutor to vouch for a witness's credibility or express a personal belief as to the credibility of a witness. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995); *State v. Jackson*, 150 Wn. App. 877, 883, 209 P.3d 553 (2009). The prosecutor may, however, argue the inference of credibility based on the evidence. *Brett*, 126 Wn.2d at 175; *State v. Stith*, 71 Wn. App. 14, 21, 856 P.2d 415 (1993).

We must look at the comments in the context of the entire arguments, the issues in the case, the evidence, and the instructions of the jury. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). When so viewed, it must be "clear and unmistakable" that counsel was expressing a personal opinion before reversal and retrial are warranted. *Brett*, 126 Wn.2d at 175 (finding no improper comment where the prosecutor argued from the evidence as to why the jury should believe one witness over another).

Here the comments were a response to Mr. Winn's theory of the case. Mr. Winn urged by both his presentation of evidence and argument that 16-year-old H.D. had fabricated allegations of sexual abuse after her mother asked her to leave the family home for refusing to follow rules. Counsel tried to elicit inconsistent statements from H.D. during cross-examination and then emphasized these inconsistencies during closing argument, to argue they were evidence of H.D.'s untruthfulness.

The prosecutor then, not surprisingly, noted the consistency of H.D.'s statements during several interviews with law enforcement and again during questioning at trial: "[H.D.] answered every single question she was asked in a straightforward, dignified manner, answered [defense counsel's] questions just the same as the way she answered my questions." RP at 456. The prosecutor then properly urged the jury to apply the law to the "credible facts of this case." RP at 456-57.

Significantly, the prosecutor did not explicitly state he believed H.D. as in *State v. Sargent*, "'I believe [the witness].'" 40 Wn. App. 340, 343, 698 P.2d 598 (1985). Rather, he was noting the veracity of H.D.'s testimony, emphasizing it had been "highly corroborated" by other witnesses. RP at 478. The challenged remarks were legitimate inferences from the evidence. Moreover, the prosecutor reminded the jury that in assessing credibility, it was required to disregard personal sympathies and prejudices and

focus on the evidence. Ultimately, the comments were appropriate responses to arguments of defense counsel and properly argued the State's theory of the case without expressing personal opinion.

We would also conclude that the remarks here did not prejudice Mr. Winn unfairly in any event. And significantly, there was no request for a curative instruction or a mistrial. The court also gave the standard instructions to the jurors that they "are the sole judges of the credibility of each witness," "the lawyers' statements are not evidence," and to "disregard any remark, statement, or argument that is not supported by the evidence." CP at 217. These "substantially mitigated" any undue prejudice that may have followed from a prosecutor's closing argument. *See, e.g.*, *State v. Papadopoulos*, 34 Wn. App. 397, 401, 662 P.2d 59 (1983), *overruled on other grounds by State v. Davis*, 101 Wn.2d 654, 682 P.2d 883 (1984). The jury is presumed to follow the court's instructions. *Stenson*, 132 Wn.2d at 729-30. The State's case here was strong. H.D.'s testimony throughout the trial was consistent. We are then unable to conclude that the prosecutor's comments, even if improper, caused any undue prejudice here.

Mr. Winn also takes issue with the prosecutor's rebuttal argument that "[defense counsel's] job is to get the best possible result that he can for his client." RP at 506. Specifically, he contends that this improperly suggested that defense counsel's role was

antithetical to the jury's role and therefore infringed on his constitutional rights to counsel.

A prosecutor should not make arguments that disparage or impugn the role of defense counsel. *State v. Thorgerson*, 172 Wn.2d 438, 451, 258 P.3d 43 (2011); *State v. Warren*, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008). Defense counsel plays a very important role in this process and he should not be demeaned, insulted, or denigrated for doing his job. Here, however, there was no objection. And so to warrant reversal Mr. Winn must show that the comments were so flagrant and ill-intentioned that a curative instruction would not have remedied them. *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

In *Thorgerson*, the court found misconduct based on the prosecutor's characterization of defense arguments as "'sleight of hand'" and "'bogus.'" *Thorgerson*, 172 Wn.2d at 450-52. There as here the defendant did not object. The court then concluded that the improper remarks were not likely to have affected the outcome of the case because they could have been cured by a curative instruction. *Id.* at 452.

In *State v. Gonzales*, the court found that the prosecutor improperly disparaged defense counsel when she argued during closing: "'I have a very different job than the defense attorney. I do not have a client . . . I have an oath and an obligation to see that

justice is served.'" *State v. Gonzales*, 111 Wn. App. 276, 283, 45 P.3d 205 (2002). In *Gonzales*, defense counsel objected and the trial court overruled. *Id.* Although the trial court was reversed on other grounds, it noted the prejudicial effect of the improper remarks could have been neutralized by a curative instruction. *Id.*

Like *Thorgerson* and *Gonzales*, the prosecutor's remark here was not so flagrant and ill-intentioned that a curative instruction would not have dispelled any resulting prejudice. The prosecutor's statement here is less egregious than the prosecutors' characterizations of defense counsel in *Thorgerson* and *Gonzales*. The suggestions there were that the attorneys were deceptive and dishonest. In any event, had defense counsel objected, the court could have instructed the jury to disregard the prosecutor's remarks and explained the role of defense counsel, obviating any prejudice. The conduct here is not so egregious that this case needs to be tried again.

Cross-Examination—Uncharged Crimes

Mr. Winn next argues that the court violated his right to confront H.D. when it refused to permit him to cross-examine her regarding uncharged thefts and drug dealing. Specifically, he argues that evidence H.D. committed thefts, even if the thefts were uncharged, was essential to undermine her credibility. He also contends that the uncharged misconduct was relevant to show bias. He now argues, here on appeal, that

H.D. believed she would be immune from prosecution for thefts and drug dealing if she testified against Mr. Winn.

Of course, Mr. Winn has a right to confront his accuser. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). And that includes the right to meaningful cross-examination. *State v. Foster*, 135 Wn.2d 441, 456, 957 P.2d 712 (1998). But there are limits with all cross-examination. The judge does not have to permit examination that is calculated to only remotely show bias or prejudice of the witness; she need not permit evidence that is vague or examination that is argumentative and speculative. *State v. Knapp*, 14 Wn. App. 101, 107-08, 540 P.2d 898 (1975); *Darden*, 145 Wn.2d at 620-21. We review the court's decision on these questions for abuse of discretion. *Darden*, 145 Wn.2d at 619.

Here, Mr. Winn wanted to examine H.D. about uncharged thefts and drug dealing. The idea was to support his theory that H.D. was rebelling against her mother and therefore had a motive to lie about the sexual abuse. The court concluded that the prejudice that would follow these inquiries outweighed any probative value and it refused to allow the inquiry. The court did allow counsel to question H.D. about her rebelliousness. This included evidence that H.D. was running around with a crowd her mother disapproved of, was breaking the law, and was in possession of prescription

medications that did not belong to her.

There is, for us, only a most tenuous relationship between allegations of theft (apparently part of the alleged gang activity) and H.D.'s reason to want to lie about Mr. Winn's conduct. The judge made a thoughtful decision to prohibit evidence of uncharged allegations of theft and drug dealing but permitted extensive inquiry into the conflicts H.D. had at home over possession of drugs, poor grades, general law-breaking, and failure to follow home rules. The court carefully balanced Mr. Winn's right to confront his accuser against the potential for introduction of irrelevant and highly prejudicial evidence of uncharged crimes. The court did not abuse its discretion by refusing to allow defense counsel to cross-examine H.D. about the specific uncharged offenses.

Finally, Mr. Winn argues that a witness with charged or uncharged crimes may provide biased testimony with an expectation of favorable treatment from the State. He argues that in this case, "H.[D.] may have believed that the government would be interested in prosecuting her for the thefts and drug dealing if she changed her story and exonerated Mr. Winn in her testimony." Appellant's Br. at 25. The problem with this argument is that he did not raise the issue in the trial court and so, not surprisingly, there is no record to support the claim or for us to review. *State v. Jackson*, 36 Wn. App. 510, 516, 676 P.2d 517, *aff'd*, 102 Wn.2d 689, 689 P.2d 76 (1984); RAP 2.5(a).

We affirm the convictions.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Siddoway, A.C.J.

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Brown, J.