IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ALLEN EDGAR MORRIS, Appellant.	No. 38144-3-II UNPUBLISHED OPINION

Houghton, J. — Allen Morris appeals his convictions for two counts of first degree child molestation and one count of second degree child molestation, raising multiple arguments. We affirm.

FACTS

R.M. is the 16-year-old step-granddaughter of Morris. She described three specific instances of sexual abuse by him. Regarding the third incident, she recalled him raping her. Approximately one year after the rape, she reported the sexual abuse to a teacher. She then informed her parents of the molestation. Approximately three years after the rape, R.M. notified law enforcement of the sexual abuse.

By amended information, the State charged Morris with two counts of first degree child molestation, two counts of second degree child molestation, and third degree rape of a child. At trial, the State called R.M.'s mother, a former teacher at R.M.'s school, and the detective who

interviewed R.M. as witnesses. They testified to R.M.'s changed demeanor, her demeanor while describing the sexual abuse, and the investigatory methods used. The State presented no physical evidence or eyewitnesses to the abuse. Morris testified and called R.M.'s grandmother, aunt, and uncle as witnesses.

On redirect examination, Morris testified:

> [Defense Counsel]: When you understood what you were being accused of, what did you think?
> Morris: I thought it was a bunch of BS, and my wife and I talked it over, and it was suggested that I get a lawyer, and someone said that there was someone in Yelm, and that's what I did. And you advised me not —
> [Defense Counsel]: Let's not talk about what I advised you. But how did you feel, learning that your granddaughter had accused you?
> Morris: Hurt and scared.

I Report of Proceedings (RP) at 172.

During its closing, the State argued:

> What did we hear from the defendant? How does he respond to this? When Val [R.M.'s mother] calls him, and I'm sure she didn't have very many nice words for him, I can understand that, so he has his wife call back, speak to Val about what these allegations are, and instead of the defendant at that point, when he learns of those, calling his son to talk about what those allegations are, what's his reaction? He contacts a lawyer.
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> . . . .
>
> . . . Examine how he responded when he learned of these allegations from his daughter-in-law. What did he do? How did he respond?

II RP at 204, 216. The State further argued:

> You also heard from the defense attorney and somewhat from myself as well, that [R.M.] provided numerous statements. She's been interviewed by the defense attorney, she's been interviewed by the police, she's gone through a number of -- and then she's had to testify in court. Regarding the substantive portions of her testimony, the molestation, the rape, the sexual contact, the sexual intercourse, that has maintained consistency.

II RP at 205. The State also argued: "What does [R.M.] stand to gain in this case? Why would she come forward about these events? Why, as a society, do we doubt children? And the answer to those questions is still beyond me." II RP at 214.

During its rebuttal, the State argued:

> So he hears about allegations from his daughter-in-law, and instead of calling his son and saying, hey, I just got this upsetting phone call, what's going on? You know, I don't know. What does he do? Picks up the phone and calls a lawyer. Think in your minds, is that how you would respond if someone in your family said something to you?

II RP at 244. The State also said, "[Defense counsel] throws around lies, lies, absolute lies." II RP at 245. Finally, the State argued:

> [Defense counsel] wants to focus oh, well, this poor guy here. I say BS to that. I say what about this poor girl here. Where is her justice when she's been molested, when she's been raped, when she's come up and she's testified to that? Where is her justice?

II RP at 246. Defense counsel did not object to any of these statements.

The jury convicted Morris of two counts of first degree child molestation (counts I and II) and one count of second degree child molestation (count III). The jury could not reach a decision on one count of second degree child molestation (count IV) and the count of third degree rape of a child (count V). The trial court declared a mistrial on those counts. Morris appeals.

ANALYSIS

Improper Comment on Right to Counsel

Morris first contends that the State improperly commented on the exercise of his right to counsel. He argues that the State's comments invited the jury to infer that the exercise of his right to counsel was inconsistent with his innocence and constituted evidence of his guilt.

Both the state and federal constitutions guarantee a criminal defendant the right to counsel. U.S. Const. amend. VI; Wash. Const. art I, § 22; *State v. Zhao*, 157 Wn.2d 188, 204, 137 P.3d 835 (2006). The defendant must show the prosecuting attorney's conduct was both improper and prejudicial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists where there exists a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Defense counsel's failure to object to the misconduct at trial constitutes waiver on appeal. We will reverse only where the misconduct is so flagrant and ill-intentioned as to be incurable by a jury instruction. *Fisher*, 165 Wn.2d at 747.

Here, the State argued based on the evidence adduced at trial. Morris himself "opened the door" to this argument when he referred to his seeking legal counsel. *State v. Jones*, 144 Wn. App. 284, 298, 183 P.3d 307 (2008) (quoting Karl B. Tegland, 5 Washington Practice: Evidence Law and Practice § 103.14, at 66-67 (5th ed. 2007)) (" 'a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence' "). The argument was not so flagrant and ill-intentioned as to require reversal.

Comment on Consistency of Statements

Morris contends, without citation to legal authority, that the prosecutor's remark that

R.M.'s statements at trial were consistent with her earlier statements also constitutes prosecutorial misconduct because her testimony was inconsistent regarding dates and the color of her dress during one incident.[1]

Here, the comment occurred directly before the prosecutor addressed the definition of "sexual contact" in the jury instructions and reiterated the sexual abuse described by R.M. Furthermore, the prosecutor argued in rebuttal that R.M. "talked consistently about being molested, being touched over and under her underwear, fondled nearly every time she went to visit her grandparents." II RP at 243. The remark, when viewed in context, only referred to R.M.'s testimony regarding her sexual abuse. Morris' argument fails.

Reference to Inadmissible Evidence

Morris further argues that the prosecutor's remark, that R.M's statements at trial were consistent with her statements to police, constitutes prosecutorial misconduct because it referred to police statements not admitted at trial. We disagree.

Nothing in the State's closing argument reflects that the prosecutor intended the remark as a reference to inadmissible evidence. When viewed in context of the "evidence discussed in the argument," the remark properly referred to R.M.'s admitted statement to the detective. *Dhaliwal*, 150 Wn.2d at 578.

Vouching

Morris contends that the prosecutor's remark of "[w]hy, as a society, do we doubt

[1] RAP 10.3(a)(6) requires citation to legal authorities. We do not review issues inadequately briefed or mentioned in passing. *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004). Nevertheless, in the interest of justice we do so here.

children?" constituted prosecutorial misconduct because the prosecutor vouched for the credibility of R.M. and all children. II RP at 214. We disagree.

It is improper for a prosecutor to vouch personally for a witness's credibility. *State v. Jackson*, 150 Wn. App. 877, 883, 209 P.3d 553, *review denied*, 167 Wn.2d 1007 (2009); *see also State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). But a prosecutor may argue reasonable inferences from the evidence, and we do not find prejudicial error absent a clear and unmistakable expression of personal opinion. *Brett*, 126 Wn.2d at 175.

The prosecutor made this remark in the context of arguing that testifying about R.M.'s sexual abuse was a traumatic event for her. Arguing that such trauma provides a disincentive for children, including R.M., to fabricate such evidence was an inference from the evidence. Morris's argument fails.

Disparaging Remarks Toward Defense Counsel

Morris argues that the prosecutor's rebuttal statements that "[defense counsel] throws around lies, lies, absolute lies" and that defense counsel's argument was "BS" constituted prosecutorial misconduct because it disparaged defense counsel. II RP at 245-46. Again, we disagree.

Even if improper, a prosecuting attorney's remarks do not require reversal when "they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1105 (1995).

In closing, defense counsel attacked R.M.'s credibility by calling her a liar and developing

her motive for lying. When viewed in context, these statements were both a pertinent reply pointing out R.M's disincentive to lie and a reasonable inference drawn from evidence presented at trial. Morris's argument fails.

Statement of Additional Grounds

Morris raises additional claims pro se in his statement of additional grounds.[2] He refers to R.M.'s behavior after testifying and statements made by a prosecutor referring to witness credibility. We defer to the fact finder on issues of credibility and do not review them on appeal. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

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 pursuant to RCW 2.06.040, it is so ordered.

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Houghton, J.

We concur:

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Quinn-Brintnall, J.

_____
Van Deren, C.J.

[2] RAP 10.10(a).