State v. Estrada

Court of Appeals of Washington, Division Three

June 14, 2012, Filed

No. 29910-4-III

Reporter
2012 Wash. App. LEXIS 1421; 2012 WL 2160083

THE STATE OF WASHINGTON, *RESPONDENT*, v. ANDRES BARRAGAN ESTRADA, *APPELLANT*.

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Subsequent History: Reported at *State v. Estrada, 2012 Wash. App. LEXIS 1484 (Wash. Ct. App., June 14, 2012)*

Prior History: [*1] Appeal from Grant Superior Court. Docket No: 09-1-00570-5. Judgment or order under review. Date filed: 04/11/2011. Judge signing: Honorable Evan E Sperline.

Counsel: *Marie Jean Trombley*, Attorney at Law, Graham, WA, for Appellant(s).

D. Angus Lee, Grant County Prosecuting Attorney, Ephrata, WA; *Carole Louise Highland*, Attorney at Law, Grant Cnty Pros Atny Offc, Ephrata, WA, for Respondent(s).

Judges: AUTHOR: Kevin M. Korsmo, C.J. WE CONCUR: Stephen M. Brown, J., Teresa C. Kulik, J.

Opinion by: Kevin M. Korsmo

Opinion

¶1 KORSMO, C.J. — Andres Barragan Estrada argues that his conviction for first degree child rape was tainted by the prosecutor's questioning of a witness and her closing argument. The trial court denied two motions for a mistrial. We conclude the court did not abuse its discretion and affirm.

FACTS

¶2 M.B., age 10 at the times relevant to this case, lived with her mother and occasionally visited her father. Mr. Estrada is her father's cousin, although M.B. refers to him as her "uncle." [1] The incident that resulted in this charge occurred after Halloween 2008, during the first week of November.

¶3 M.B. and her then six-year-old sister visited their father at his automobile repair shop. M.B. went [*2] to his adjoining trailer and sat on a bed watching television. She testified that her "uncle" came in, sat on the other bed, and watched television for awhile. He then told her to remove her pants. She refused; he removed her pants and underwear. He then engaged in sexual intercourse with M.B. over her objections until her sister entered the trailer. He got up and M.B. ran into the bathroom. Telling her father that her stomach hurt, M.B. and her sister went back to their mother's house.

¶4 M.B. told her mother about the rape several months later when she learned that she might have to go live with her father, whom Mr. Estrada frequently visited. The doctor who examined M.B. was unable to complete the

[1] Report of Proceedings at 157.

examination due to her reticence. The prosecutor agreed in limine that she would not ask the doctor to discuss delayed reporting of sexual assaults.

¶5 During trial, defense counsel successfully objected to a series of questions of a detective and then moved for a mistrial based on prosecutorial misconduct in attempting to elicit hearsay statements concerning M.B.'s identification of her assailant. The trial court denied the motion, and then permitted the prosecutor to ask the detective if his [*3] investigation had ever developed evidence of other suspects.

¶6 In closing argument, the prosecutor reminded jurors that they had discussed during voir dire reasons why children might delay reporting incidents of sexual assault. Defense counsel unsuccessfully objected to the statement. The prosecutor then told jurors that adults often delay reporting. Defense counsel successfully objected to that statement. The defense subsequently moved for a mistrial, arguing that the prosecutor had engaged in misconduct by violating the motion in limine and discussing facts not in evidence. The court denied the motion; it reasoned in part that the instructions given the jury to disregard the lawyer's remarks that are unsupported by evidence would suffice.

¶7 The jury convicted Mr. Estrada as charged. A midrange sentence was imposed. Mr. Estrada then timely appealed to this court.

ANALYSIS

¶8 This appeal challenges the prosecutor's questioning and argument statement on two separate bases. We will address jointly both the claim of misconduct and the claim of error in the mistrial rulings. We conclude there was no prejudicial error and, thus, the trial court did not abuse its discretion by denying the motions.

¶9 Well [*4] settled law governs this review. When inadmissible testimony is put before the jury, the trial court should declare a mistrial if the irregularity, in light of all of the evidence in the trial, so tainted the proceedings that the defendant was deprived of a fair trial. *State v. Weber, 99 Wn.2d 158, 164, 659 P.2d 1102 (1983)*. A ruling on a motion for a mistrial is reviewed for an abuse of discretion. *Id. at 166*. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)*.

¶10 A similar standard of establishing prejudicial error applies when it is alleged that a prosecutor erred. “To prevail on a claim of prosecutorial misconduct, a defendant must show,” (1) “the prosecutor's comments were improper,” and (2) “the comments were prejudicial.” *State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008)*. In analyzing prejudice, the comments are not examined in isolation; rather, the entire context of the trial is considered, including the evidence and instructions to the jury. *Id. at 28*. When assessing error in closing argument, courts afford prosecutors “wide latitude” in arguing inferences from the [*5] evidence presented. *State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)*.

¶11 The appellant has not established prejudicial error in either of the cited incidents. He successfully objected on hearsay grounds and prevented the detective from answering any of the three challenged questions; the prosecutor subsequently asked a question in a proper form and obtained the answer she was seeking. No inadmissible evidence was presented to the jury in the course of the challenged questions that may or may not have elicited hearsay answers if they had been answered. Similarly, defense counsel successfully challenged the foundation for one of the detective's answers. However, the question asked by the prosecutor (whether the detective knew where the father was at the time of the assault) could have been (and subsequently was) properly answered (“no”) and was not an improper question. These examples do not establish prejudicial error by the prosecutor.

¶12 The challenged statement from the closing argument similarly does not establish prejudicial error. The defense initially and unsuccessfully challenged the prosecutor's comment about what had been discussed during voir dire. Contrary to the argument [*6] at the mistrial motion, there was no violation of the order in limine. The order prohibited the prosecutor from inquiring of the doctor about delayed reporting. It did not rule the topic off limits

totally.

¶13 The second defense challenge to the statement that adults too delay reporting of sexual assaults was sustained on the basis that there was no evidence in the record on the topic. Without deciding whether there needs to be evidence to support such a statement, we can easily state that the comment was not prejudicial error. The court sustained the objection and the prosecutor went no further with the topic. Whether adults delayed reporting of sexual assaults had no special significance in this case of a child victim and this brief statement did not prejudice the defendant at trial.

¶14 Neither of the claimed bases for prosecutorial error establishes prejudicial error.

¶15 The challenges to the trial court's rulings on the two mistrial motions similarly fail. First, for the reasons just stated, there was no showing of prejudicial error. Second, the trial court was confident—as are we—that the alleged errors were more than adequately addressed by the court's instruction to the jury to disregard [*7] statements by counsel that were not supported by the record. This was a very tenable reason to deny the second mistrial request. There was no abuse of discretion.

¶16 Neither of the challenged matters justifies the granting of a new trial. The trial court did not err in denying the mistrial motions. [2]

¶17 The conviction is affirmed.

¶18 A majority of the panel has determined 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*.

Brown and Kulik, JJ., concur.

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[2] Mr. Estrada also filed a statement of additional grounds. He contends that trial counsel was ineffective, the evidence was insufficient because there was only one witness against him, and that the jury was prejudiced against him. He cites no relevant authority in support of his claims and does not allege facts establishing how his counsel erred, so we will not further address these claims. RAP 10.10(c).