

FILED: February 10, 2021

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

NIKOLAY AVDEYEV,
Defendant-Appellant.

Marion County Circuit Court
15CR56120, 15CR55011

A165643 (Control)
A165647

Donald D. Abar, Judge.

Argued and submitted on October 28, 2019.

Jason E. Thompson argued the cause for appellant. Also on the brief was Ferder Casebeer French Thompson & Stern, LLP.

Michael A. Casper, Assistant Attorney General, argued the cause for respondent. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Ortega, Presiding Judge, and Shorr, Judge, and James, Judge.

ORTEGA, P. J.

In case numbers 15CR56120 and 15CR55011, reversed and remanded.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant

- No costs allowed.
 Costs allowed, payable by
 Costs allowed, to abide the outcome on remand, payable by
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1 ORTEGA, P. J.

2 In this consolidated case, defendant appeals from a judgment of conviction
3 in case number 15CR56120 for first-degree rape and from a judgment of conviction in
4 case number 15CR55011 for one count of first-degree rape (Counts 1), one count of
5 second-degree rape (Count 5),¹ 11 counts of first-degree sexual abuse (Counts 9 to 18,
6 and 20), and one count of second-degree unlawful sexual penetration (Count 19).² On all
7 but two counts--Counts 9 and 11 in case number 15CR55011--the jury returned a
8 nonunanimous verdict. On appeal, defendant argues that the trial court erred in giving a
9 nonunanimous jury instruction and that all of his convictions should be reversed as a
10 result. The state concedes that defendant is entitled to reversal on the nonunanimous
11 counts under *Ramos v. Louisiana*, 590 US ___, 140 S Ct 1390, 206 L Ed 2d 583 (2020).
12 We agree, accept the concession, and reverse and remand the convictions that are based
13 on nonunanimous verdicts. As for the remaining two convictions by unanimous verdict,
14 we conclude that any error in giving the nonunanimous jury instruction was harmless as
15 to those two convictions. *State v. Flores Ramos*, 367 Or 292, 478 P3d 515 (2020).

16 Defendant asserts several additional assignments of error on appeal that

¹ By nonunanimous verdict, the jury also found defendant guilty of one count of second-degree rape (Count 6), which the court merged with the guilty verdict on Count 1, resulting in a single conviction for first-degree rape.

² The jury, by nonunanimous vote, also found defendant guilty of Counts 2 and 7. The trial court later acquitted defendant of those counts on defendant's post-verdict motion, because there was insufficient evidence at trial to support those charges.

1 apply to the two remaining convictions. In his seventh assignment of error, defendant
2 challenges the trial court's denial of his pretrial motion to prevent the prosecutor or
3 witnesses from referring to the complaining witnesses as "victims." Based on the
4 Supreme Court's decision in *State v. Sperou*, 365 Or 121, 442 P3d 581 (2019), we
5 conclude that the court erred when it denied defendant's motion with respect to witnesses,
6 because allowing such references is impermissible vouching. We further conclude that
7 the error in this case was not harmless with respect to Counts 9 and 11 and, as a result,
8 we also reverse and remand those remaining two convictions. That disposition obviates
9 the need for us to address any of defendant's remaining assignments of error.

10 The background facts relevant to our disposition are undisputed. In 2015,
11 defendant was charged with one count of rape of his wife that occurred in 2009 (case
12 number 15CR56120), and with multiple counts of rape and sexual abuse of his niece SD
13 that occurred between 1999 and 2002, and one count of sexual abuse of his niece IG that
14 occurred between 2000 and 2001 (case number 15CR55011). At the time of the alleged
15 conduct both SD and IG were under 14 years old, but at the time the charges were
16 brought, they were both adults. There was no physical evidence to corroborate the
17 charged crimes. Defendant did make statements to police that he had touched SD's
18 breasts, but he asserted that it happened only because SD would come up to him and
19 press her body against him or take his hand and put it on her. Defendant denied any other
20 physical touching and denied any wrongdoing. As to one count of sexual abuse of SD
21 (Count 12), a witness testified that she saw the touching, but there were no corroborating

1 witnesses as to Counts 9 or 11, or any other charged count.

2 Defendant's defense theory at trial was that, when he and his wife filed for
3 divorce and began fighting over custody of their minor daughter, members of their
4 extended family supported either him or his wife. He asserted that his wife and nieces
5 were making false accusations or, in the case of his nieces, were manipulated to make
6 historically inaccurate accusations against him to assist his wife in the divorce
7 proceedings. To support that theory, defendant argued that the testimony of the
8 complaining witnesses was unreliable and pointed out inconsistencies in that testimony.
9 Defendant's theory further relied on the outcome-determinative nature of the
10 investigation conducted by the police, including that one of the detectives in the case,
11 Avetisyan, was related by marriage to defendant's wife's family.

12 Before trial, defendant brought motions to prohibit the prosecutor and
13 witnesses from referring to the complaining witnesses as "victim" or referring to their
14 statements as "disclosures." He argued that any such references would, under the
15 circumstances of the case, undermine the presumption of innocence for defendant and
16 constitute improper vouching for the credibility of his accusers. The state responded that,
17 because the state is seeking to prove that defendant victimized the complaining witnesses,
18 it should be allowed to call those witnesses a victim at trial. The trial court denied
19 defendant's motion, ordering that "the state may use the words 'victim' and 'disclosure'
20 during opening and closing statements" and further "reserve[d] it's ruling on the use of
21 the word 'victim' by witnesses during trial."

1 With respect to referring to complaining witnesses as "victims" at trial, the
2 prosecutor made multiple such references in closing argument. There were also several
3 instances when a complaining witness was referred to as a victim during witness
4 testimony--either by the prosecutor in her question put to the witness or by the witness
5 herself. We discuss those instances more particularly in our prejudice analysis.

6 Because, as explained above, we reverse and remand all of defendant's
7 convictions except Counts 9 and 11 under *Ramos*, we discuss defendant's other
8 assignment of error only as it relates to Counts 9 and 11.

9 On appeal, among other things, defendant assigns error to the trial court's
10 denial of his pretrial motion to prohibit the prosecutor and witnesses from referring to the
11 complaining witnesses as "victims" at trial. Our resolution of that assignment is
12 controlled by the Supreme Court's decision in *Sperou*. In that case, the defendant was
13 charged with unlawful sexual penetration of SC. SC was expected to testify at trial, as
14 well as other witnesses who would also testify to having been sexually abused by the
15 defendant. The defendant denied all wrongdoing, asserting that the accusations were lies
16 or false memories. Before trial, the defendant brought a motion to prohibit the prosecutor
17 or witnesses from referring to those complaining witnesses as victims. The trial court
18 denied the motion, and the prosecutor referred to those witnesses as victims throughout
19 trial, and two investigating detectives and another witness also referred to the
20 complaining witnesses as victims in their testimony. *Sperou*, 365 Or at 125-27.

21 In addressing the use of "victim" at trial to describe a complaining witness,

1 the court stated:

2 "In short, we agree with defendant that, under our reasoning in
3 *Lupoli*, the use of the term 'victim' to refer to the complaining witness or
4 other witnesses, in circumstances where the accusers' own testimony is the
5 only evidence that the alleged criminal conduct occurred, conveys the
6 speaker's belief that the accusers are credible."

7 *Id.* at 132. The court further stated:

8 "We also agree with defendant's contention that, where a defendant
9 denies that any crime occurred, references to the complaining witness as a
10 'victim' may undermine the presumption of defendant's innocence because
11 it assumes defendant's guilt, a fact that is necessarily not proved until the
12 jury finds the defendant guilty."

13 *Id.* at 133.

14 In applying those conclusions, the court drew a distinction between the
15 prosecutor referring to a complaining witness as a victim and a witness doing so. And,
16 when, as here, the defendant brings up the issue in a pretrial motion to prohibit all such
17 references, the court concluded that, "[i]n light of a prosecutor's dual responsibilities to
18 refrain from inflammatory remarks and personal commentary, on the one hand, but to be
19 an advocate for the state's cause, on the other, it is difficult to state a categorical rule
20 regarding a prosecutor's use of the term 'victim' to describe a complaining witness where
21 victimhood is disputed." *Id.* at 135. As such, the propriety of a prosecutor's use of the
22 term "victim" necessarily depends on the context, and if, in context, the comment is
23 inappropriate, the trial court has discretion to fashion an appropriate remedy, "subject to
24 the defendant's right to a fair trial." *Id.* at 136. In *Sperou*, because the defendant's
25 pretrial motion did not attempt to distinguish between appropriate and inappropriate
26 prosecutorial references to "victim," the court concluded that the trial court acted within

1 its discretion to deny the defendant's pretrial motion with respect to the prosecutor.

2 The court came to a different conclusion with regard to witnesses "where
3 the factual question of an accuser's victimhood turns on the credibility of that accuser's
4 claims." *Id.* at 138-39. In those circumstances, use of the word "victim" by a witness
5 amounts to vouching and is categorically inadmissible. *Id.* at 139. Thus, the court
6 concluded that it was legal error for the trial court to permit that testimony, and, because
7 it was apparent that it was error at the time of the pretrial motion, the defendant was not
8 required to renew his objection to witness vouching during trial. *Id.*

9 Applying *Sperou* to this case, we conclude that the trial court did not err
10 when it ruled that "the state may use the words 'victim' and 'disclosure' during opening
11 and closing statements." However, it was error for the trial court to deny defendant's
12 pretrial motion with respect to witnesses' use of the word "victim" to refer to complaining
13 witnesses. Although the trial court nominally reserved its ruling as to witness testimony,
14 because it was equally apparent at the pretrial stage as it would have been during trial that
15 witness use of "victim" to refer to the complaining witness would be impermissible
16 vouching, the trial court committed legal error when it failed to grant defendant's motion
17 as to witnesses.

18 To determine if that error warrants reversal, we must determine whether
19 that error had more than a little likelihood to affect the jury's verdict. *State v. Davis*, 336
20 Or 19, 32, 77 P3d 1111 (2003). In making that assessment, we consider the nature of the
21 evidence in the context of the trial as a whole. *Id.* at 33-34. Generally, witness vouching

1 is prejudicial. *See Sperou*, 365 Or at 140 ("In general, witness vouching in Oregon is
2 considered prejudicial, so much so in fact that it sometimes requires intervention by the
3 trial court even when parties fail to object to it."). *But see State v. McConnell*, 308 Or
4 App 29, 36, ___ P3d ___ (2020) (one witness's one-time use of "victim" to describe a
5 complaining witness was harmless in a bench trial because it was a single statement, it
6 was minor in the context of the whole trial, and the trial court did not rely on it in making
7 its speaking credibility assessment). In the circumstances of this case, we do not depart
8 from that general path.

9 Defendant argues that the trial court's error in denying his pretrial motion
10 was prejudicial, because it led investigating police officers to implicitly refer to SD as a
11 victim, signaling to the jury that those officers believed SD. Defendant further argues
12 that we should consider the prosecutor's pervasive use of the word "victim" in closing
13 argument as part of our prejudice analysis, because that use was premised on the use of
14 "victim" during the witness examinations.

15 The state responds that the witnesses' use of the word "victim" in this case
16 is harmless, because it occurred only five times during a lengthy trial with 30 witnesses.
17 In arguing there were only five instances, the state asserts that we can only consider those
18 times that the word "victim" was said by a witness to directly refer to one of the
19 complaining witnesses--that is, the state argues that we must ignore any of the times the
20 prosecutor used the word "victim" when putting a question to the witness, because, under
21 *Sperou*, it is not categorical error for a prosecutor to refer to a complaining witness as a

1 "victim." Rather, the state urges that, under *Sperou*, defendant was required to separately
2 object anytime the prosecutor used the word "victim," which defendant did not do in this
3 case. The state argues that, in the context of the whole trial, the isolated instances of a
4 witness saying the word "victim" had little likelihood of affecting the verdict.

5 We first reject the state's suggestion that we should not consider what the
6 prosecutor said in its questioning to determine if the error here is harmful. The context of
7 the questions here is important because it informs whether the premise of the question--
8 the complaining witness's victimhood--is adopted and asserted by the witness in their
9 answer as their own reference. For example, it would be absurd to suggest that the
10 answer "yes" to the question "Is SD a victim of defendant?" would not be witness
11 vouching under *Sperou*. That must be so, because the general rule is that witness
12 vouching is prohibited whether the vouching opinion is express or implied in the
13 witness's testimony; that is, the rule "prohibits a witness from making a direct comment,
14 or one that is tantamount to a direct comment, on another witness's credibility." *State v.*
15 *Black*, 364 Or 579, 585, 437 P3d 1121 (2019) (emphasis added); *see also State v. Brand*,
16 301 Or App 59, 66-67, 455 P3d 960 (2019), *rev den*, 366 Or 259 (2020) (a police officer's
17 testimony that a witness delayed reporting because she was under fear of continued
18 assaults constituted impermissible vouching because it signaled to the jury that he
19 believed the witness's account). Moreover, to hold otherwise would allow the holding in
20 *Sperou* to be easily side-stepped through careful questioning that would keep the word
21 "victim" out of the mouth of the state's witness but would nonetheless have the very

1 vouching affect by a witness that *Sperou* held is categorical error. As the court in *Sperou*
2 noted:

3 "Counsel's latitude in making comments *during* questioning, on the other
4 hand, is narrower, given that counsel's job at that time is to present
5 evidence in anticipation of summation. The state, in arguing generally that
6 reference to a defendant's accusers as 'victims' falls within the scope of
7 legitimate advocacy, does not explain why such a reference would be
8 justified during questioning."

9 365 Or at 136 n 4 (emphasis in original). As a result, we also consider the instances in
10 which the prosecutor referred to the "victim" in questioning.

11 Here, the impermissible witness vouching through the use of the word
12 "victim" occurred largely during the testimony of Nelson, one of the lead investigating
13 officers. There was also a reference by another officer, Simons, and an instance when SD
14 referred to other witnesses in the case as "victims."

15 We start by describing the testimony of the investigating officers,
16 beginning with Nelson. During that testimony, the prosecutor and Nelson had exchanges
17 emphasizing that Nelson was investigating whether SD was a "victim":

18 "A. This was on November 5th of 2015. I advised [SD] that we had
19 received a complaint alleging that she was possibly a victim in a case and
20 that I would like to speak with her.

21 "Q. At that time, did you give her the name of [defendant]?"

22 "A. I don't believe I did at that time. And I don't think I even
23 advised her, at that time, who the original complainant was.

24 "Q. You mentioned just that she was a victim?"

25 "A. Correct.

26 "Q. Did you tell her what type; a victim of what type of crime?"

1 "A. I don't believe I did at that time."

2 That theme was repeated with an exchange about Nelson contacting IG:

3 "Q. And do you remember what you said to [IG] when you
4 contacted her?"

5 "A. Yes. I contacted her and explained to her that I was
6 investigating a case involving her sister being a victim of sex abuse, and
7 then I proceeded to ask her some questions."

8 Those instances constitute impermissible vouching, because the repeated use of "victim"
9 in questioning communicated that Nelson believed SD to be a victim of a crime, and not
10 merely his intention to *determine* if that was so.

11 The prosecutor also asked, and Nelson testified, about his experience
12 interviewing "victims" in the context of his interview of SD:

13 "Q. And so Lieutenant Nelson, have you received training on best
14 practices for interviewing victims of suspected abuse?"

15 "A. Yes.

16 "Q. And did your interview with [SD] follow the best practices?"

17 "A. Yes."

18 That topic was revisited in Nelson's testimony with regard to his initial interview of SD:

19 "THE WITNESS: My purpose was just to get a general idea of what
20 [SD] recalled at that time.

21 "BY [THE PROSECUTOR]: (Continuing)

22 "Q. And is that consistent with your training and experience on
23 interviewing victims of child sex abuse?"

24 "A. Yes; really interviewing any victim in any particular case, even
25 a witness. Many times their information is somewhat limited when they

1 first provide a statement, and then over time, as they refresh that incident in
2 their mind, they recall things later on.

3 "And then typically it's been my experience that either witnesses or
4 victims will notify me after the initial interview and provide more
5 information about something.

6 "Q. And Lieutenant Nelson, are you familiar with the term 'trauma
7 informed' interviews?

8 "A. Not necessarily.

9 "Q. Okay.

10 "A. Can you refresh my memory or explain?

11 "Q. Are you familiar with the concept of interviewing victims of
12 crimes and trying not to pin them down on details?

13 "A. Yes.

14 "Q. Okay. And have you received any training on the trauma that
15 the brain goes through regarding victims of all types of abuse?

16 "A. I have had training before in that.

17 "* * * * *

18 "Q. And at the end of your interview, or towards the end of your
19 interview, did you ask [SD] if she was aware of any other victims?

20 "A. Yes.

21 "Q. And did she--do you recall, did she tell you that she was not
22 aware of any other victims?

23 "A. That is correct; she was not aware of any other victims at the
24 time."

25 That testimony constitutes impermissible vouching because, again, the use of "victim"

26 and "victims" in the questioning communicated that Nelson believed that SD was a

1 victim of defendant.

2 Another police detective, Simons, who had interviewed SD in Lane
3 County, stated the following on questioning by the prosecutor:

4 "Q. Did [SD] indicate that she was fearful of [defendant]?"

5 "A. Yes.

6 "Q. And based on your training and experience in investigating
7 child abuse investigations, is that a common theme with child victims?"

8 "A. Yes, it is."

9 That type of testimony is impermissible vouching because it directly communicated that
10 Simons believed SD was fearful because she was a victim of sex abuse. *See Brand*, 301
11 Or App at 66-67 (police officer's testimony that witness delayed reporting because she
12 was under fear of continued assaults constituted impermissible vouching because it
13 signaled to the jury that he believed the witness's account).

14 Finally, in an exchange between the prosecutor and SD, SD referred to the
15 other "victims" of defendant:

16 "Q. And was it finding out that there--that your sister and that there
17 were concerns about other family members, did that motivate you in
18 agreeing to talk to the police?"

19 "A. Yes. I wanted to speak out to all the victims and to support
20 them."

21 In the context of vouching testimony, we have found such vouching to be
22 harmful when the case, in large part, is about the complaining witness's credibility. This
23 is particularly true when the vouching is done by a police officer, because such testimony
24 can be couched in terms of the officer's expertise in interviewing victims and suspects.

1 *See State v. Lowell*, 249 Or App 364, 370, 277 P3d 588, *rev den*, 352 Or 378 (2012)
2 (officer testimony that the defendant was untruthful was not harmless where the case
3 boiled down to credibility and the officer's testimony was couched in terms of his
4 expertise in identifying truthfulness). Admitting impermissible vouching also typically
5 will be harmful when it goes to a central factual issue in the case or rebuts a key part of
6 the defendant's trial strategy. *See Sperou*, 365 Or at 141 (an investigating officer's use of
7 "victim" was prejudicial because it rebutted a key part of the defendant's trial strategy).

8 Here, whether or not SD was a victim and whether her account of her
9 victimhood was credible were central to the state's case and key to defendant's trial
10 strategy. In particular, Nelson's testimony, in which the prosecutor and Nelson had
11 several exchanges that emphasized Nelson's belief that SD was a "victim" from the
12 beginning of his investigation, and that he had expertise in interviewing such sex abuse
13 victims, created a significant risk that the jury would rely on Nelson's belief, rather than
14 its own assessment of credibility. This was a close case with the vast majority of the
15 counts involving SD resulting in a nonunanimous verdict (Counts 1, 2, 5, 7, and 9 to 19),
16 with two of those counts resulting in a post-verdict acquittal by the court for insufficient
17 evidence (Counts 2 and 7). Under those circumstances, the witnesses' references to SD
18 as a "victim," particularly the references in Nelson's testimony, was not harmless with
19 respect to Counts 9 and 11. Because we conclude that the trial court's error was not
20 harmless based on the witness testimony, we do not address defendant's argument that we
21 should also take into account the prosecutor's closing argument in our analysis.

1 Accordingly, we also reverse and remand the unanimous jury convictions, Counts 9 and
2 11, in case number 15CR55011.

3 In case numbers 15CR56120 and 15CR55011, reversed and remanded.