

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

STATE OF WASHINGTON,

Respondent,

v.

BRUCE TOWNSEND,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Jerry Costello

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Bruce Townsend established during *voir dire* that a potential juror showed actual bias. The trial court denied his for cause challenge and the juror ultimately sat on the jury. Further, during the trial, and over Mr. Townsend's objection, a police officer offered his unsolicited opinion regarding the truthfulness of the complainant's claims. Based upon these violations of his constitutionally protected rights to a fair and unbiased jury, Mr. Townsend asks this Court to reverse his convictions.

B. ASSIGNMENTS OF ERROR

1. Mr. Townsend's right to a fair trial by an unbiased jury was denied when the trial court failed to exclude Juror 1 for cause.

2. Deputy Moss's opinion regarding the truthfulness of S.G.'s allegations impermissibly invaded the province of the jury and violated Mr. Townsend's constitutionally protected right to a fair trial and right to a jury trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant has a constitutionally protected right to be tried by an unbiased jury. A trial court commits reversible error when it fails to dismiss a juror who shows actual bias. During *voir dire*, Mr.

Townsend established that Juror 1 was actually biased and moved to challenge Juror 1 for cause, which the trial court denied. Where Juror 1 was a member of the jury that convicted Mr. Townsend, is he entitled to reversal of his convictions for a denial of his right to an unbiased jury?

2. A witness may not comment or opine about the credibility of another witness. Such improper vouching violates the defendant's right to a fair trial and right to a jury trial. Here, the investigating detective stated his opinion regarding the truthfulness of S.G., thus bolstering the credibility of the witness. Did the detective's opinion constitute improper vouching, thus violating Mr. Townsend's right to a fair trial and right to a jury trial?

D. STATEMENT OF THE CASE

1. Juror 1's actual bias.

Bruce Townsend was charged with third degree child rape and giving marijuana to his girlfriend's teenage daughter, S.G. CP 4-5. Prior to jury *voir dire*, the trial court issued a juror questionnaire to be completed by the potential jurors and used by the attorneys during jury selection. Based upon the answers in the juror questionnaires, the court

and the attorneys selected several prospective jurors for individual *voir dire* questioning prior to general *voir dire*.

One of the prospective jurors who participated in the individual questioning was Juror 1. Juror 1 stated that she had two cousins and a friend who were sexually assaulted when they were children.

7/8/2015RP 65. When asked in the questionnaire whether she could be fair and impartial, Juror 1 wrote: "I'm not sure. They were lifelong -- there were lifelong effects from their assaults, but I wasn't involved directly much with their lives and the events. They are all adults now."

7/8/2015RP 76. Juror 1 was also asked whether there was any reason she could not be a fair juror in a criminal case, to which she answered: "Not sure. Might depend on the case." 7/8/2015RP 76.

Juror 1 said she did not know the details involving her cousins, but related that her friend had stated she had been sexually abused by her father and a family member. 7/8/2015RP 65-67. Juror 1 repeatedly expressed her doubts about whether she could be fair and impartial:

[Defense Counsel]: [A]m I correct in saying you feel hesitancy in whether or not you can be a fair and an impartial juror meaning basing your decision absolutely only on the evidence that you hear in the case, not based on any residual feelings or thoughts that you may have regarding people that you know who have also been molested. Is that a fair statement? Am I correctly stating or articulating how you are feeling at this time?

PROSPECTIVE JUROR NO. 1: Yeah, I would say so.

[Defense Counsel]: Do you think that if this was a case involving a theft or another drug charge, you would have no doubts about whether or not you could be fair and impartial; is that right?

PROSPECTIVE JUROR NO. 1: Yes.

[Defense Counsel]: But right now as you sit here, because of the allegation in this case, you have doubts about whether you can be fair or impartial; is that a fair statement?

PROSPECTIVE JUROR NO. 1: Yes, possibly.

[Defense Counsel]: [P]lease correct me if I'm wrong, . . . -- is it fair to say you would rather be on a different case that did not involve any child sexual assault because you know that you could be absolutely fair and impartial on a case of that kind; is that a fair statement?

PROSPECTIVE JUROR NO. 1: Probably, yes.

[Defense Counsel]: My next question, it's very important, what I need to know -- we need to know is if you were selected as a juror and you were sitting and deliberating, do you have concerns that somewhere in the back of your mind you may be thinking about this cousin who's had a very difficult life because of the trauma that she suffered, that somehow that might influence or color your decision? Do you have concerns that may be -- that those thoughts would be in the back of your mind as you are deliberating?

PROSPECTIVE JUROR NO. 1: There's a possibility of that, yeah, it would be there.

7/8/2015RP 69-73.

Mr. Townsend moved to challenge Juror 1 for cause. 7/8/2015RP 76-77. Without addressing Juror 1's stated doubts about fairness and impartiality, the court merely denied the challenge: "In considering the answers in the written questionnaire and the answers here in open court, I am going to deny the motion." 7/8/2015RP 78. Juror 1 ultimately sat on the jury. CP Supp ___, Sub No. 48.

2. The lead detective's opinion of guilt.

The allegations against Mr. Townsend were based solely on S.G.'s claims. During the direct testimony of Pierce County Sheriff's Detective Darren Moss, the prosecutor asked about leads the detective failed to follow up on and why:

Q: Did you ever interview or contact the cousin or the cousin's boyfriend?

A: No.

Q: Why did you not do that?

A: Probably because I didn't have a name.

Q: What is the point of contacting disclosure witnesses in these types of cases?

A: To seek additional information, to look for consistency in the story.

Q: Would it have been helpful for you to have contacted the cousin and the cousin's boyfriend?

A: I can only guess.

Q: Is that kind of information always dispositive?

A: I'm sorry?

Q: Is it always dispositive?

[Defense Counsel]: Objection to the form of the question. Dispositive of what?

THE COURT: I am going to sustain the objection. Please rephrase it.

[Prosecuting Attorney]: Sure. *How -- what role do those interviews play in your investigation in these types of cases?*

A In most cases it supports the story of the victim.

7/20/2015RP 767-68 (emphasis added). The trial court overruled Mr. Townsend's objection to this answer. *Id.*

At the conclusion of the jury trial, Mr. Townsend was found guilty as charged. CP 52-53.

E. ARGUMENT

1. **The failure to dismiss Juror 1 for cause denied Mr. Townsend's right to an unbiased jury.**

a. *A defendant is entitled to an unbiased jury.*

A fundamental element of a fair trial is the right to an unbiased jury. *City of Cheney v. Grunewald*, 55 Wn.App. 807, 810, 780 P.2d 1332 (1989). “Under the Sixth Amendment and article 1, section 22 of the state constitution, a defendant is guaranteed the right to a fair and impartial jury.” *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987).

In Washington, jury challenges may be peremptory or for cause. RCW 4.44.130; *Ottis v. Stevenson-Carson School Dist. No. 303*, 61 Wn.App. 747, 751, 812 P.2d 133 (1991). A prospective juror must be excused for cause if the trial court determines that the juror is actually or impliedly biased. RCW 4.44.170; *State v. Gosser*, 33 Wn.App. 428, 433, 656 P.2d 514 (1982). Actual bias must be established by proof. RCW 4.44.180, .190; *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991).

“Actual bias” is “the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and

without prejudice to the substantial rights of the party challenging.”
RCW 4.44.170(2). “Under this definition, the issue of actual bias goes
to whether a particular juror’s state of mind is such that he or she can
try a case impartially and without prejudice to a party.” *State v.*
Jackson, 75 Wn.App. 537, 542-43, 879 P.2d 307 (1994), *review denied*,
126 Wn.2d 1003 (1995).

“[E]quivocal answers alone do not require a juror to be removed
when challenged for cause, rather, the question is whether a juror with
preconceived ideas can set them aside.” *Id.* at 839. More than a
possibility of prejudice must be shown. *Id.* at 840.

The key inquiry for the trial court in deciding whether to excuse
a juror for cause is “whether the challenged juror can set aside
preconceived ideas and try the case fairly and impartially.” *Hough v.*
Stockbridge, 152 Wn.App. 328, 341, 216 P.3d 1077 (2009). If a
potential juror demonstrates actual bias, the trial court must excuse that
juror for cause. *Ottis*, 61 Wn.App. at 754.

A trial court’s denial of a challenge for cause is reviewed for an
abuse of discretion. *Noltie*, 116 Wn.2d at 838. “[T]he trial court is in
the best position to determine a juror’s ability to be fair and impartial.”
Id. at 839. Specifically, “[t]he trial judge is able to observe the juror’s

demeanor and, in light of that observation, to interpret and evaluate the juror's answers to determine whether the juror would be fair and impartial." *Rupe*, 108 Wn.2d at 749. Reversal is the remedy for an erroneous for cause-challenge denial. *See, e.g., State v. Stackhouse*, 90 Wn.App. 344, 352, 361, 957 P.2d 218 (1998) (case remanded for cause-challenge errors).

b. *Juror 1 was biased and the trial court should have dismissed the juror for cause.*

Juror 1 honestly revealed her bias and its basis: people she cared about who had been victimized by sexual abuse. When a juror is challenged for cause based upon actual bias, "the question is whether a juror with preconceived ideas can set them aside." *Noltie*, 116 Wn.2d at 839. Juror 1 said she could not be unbiased or fair against Mr. Townsend because the offenses for which he was charged were of the same type as what had traumatized Juror 1's cousin and her close friend.

In *State v. Fire*, 100 Wn.App. 722, 998 P.2d 362 (2000), *rev'd on other grounds*, 145 Wn.2d 152 (2001), the defendant was charged with child molestation. The judge asked potential jurors if they had any reason for not wanting to sit on the jury. A juror raised his hand and responded:

The subject matter in this case. You know, if it was, you know, somebody stealing a car or even someone getting murdered, that's, you know, fine with me. But a case in this nature, you know, I consider him a baby raper, and it should just be severely punished.

I'm very opinionated when it comes to this kind of crime. I hold innocent—or children from conception [are] very dear, and they should be protected.

Id. at 724. The prosecutor attempted to rehabilitate the potential juror by asking him whether he would follow the court's instructions despite his strong feelings, and the juror responded affirmatively with one-word responses. *Id.* at 728. The trial court refused to excuse the challenged juror for cause, focusing on the juror's affirmative responses without recognizing that his initial responses demonstrated actual bias.

Id.

On appeal, the appellate court reversed, finding the juror's initial responses clearly indicated actual bias, requiring the trial court to remove the juror for cause. *Id.*

Here, Juror 1 consistently showed an actual bias, even when the prosecutor tried to rehabilitate her. Critically, Juror 1's preconceived notions against a defendant charged with rape, like Mr. Townsend, was more than just an abstract bias against the nature of such allegations. Juror 1's bias was based on the personal connection she had with the

victims of such crimes and knowledge of the damage their victimization caused. *See* 7/8/2015RP 76 (“There were lifelong effects from their assaults.”). The juror should have been excused for cause as she could not set her preconceived ideas aside. *Noltie*, 116 Wn.2d at 839.

Since the trial court erred in failing to excuse Juror 1, Mr. Townsend is entitled to reversal of his convictions. *Stackhouse*, 90 Wn.App. at 352.

2. The improper opinion of Deputy Moss concerning the truthfulness of S.G.’s allegations impermissibly invaded the province of the jury.

a. Improper vouching by a police officer violates a defendant’s rights to a fair trial and a jury.

The role of the jury is to be held “inviolable.” U.S. Const. amend. VI; Const. art. I, §§ 21, 22. The right to have factual questions decided by the jury is crucial to the right to trial by jury. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Under the Constitution, the jury has “the ultimate power to weigh the evidence and determine the facts.” *State v. Montgomery*, 163 Wn.2d 577, 589-90, 183 P.3d 267 (2008), *quoting James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971).

In addition, an accused is guaranteed the right to a fair trial by an impartial jury. U.S. Const. amend. VI; Const. art. I, §§ 3, 21, 22. Lay witness opinion testimony about the defendant's guilt invades that right. *State v. Johnson*, 152 Wn.App. 924, 934, 219 P.3d 958 (2009); *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985).

Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it 'invad[es] the exclusive province of the [jury].'" *City of Seattle v. Heatley*, 70 Wn.App. 573, 577, 854 P.2d 658 (1993), citing *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

Admitting impermissible opinion testimony regarding the defendant's guilt may be reversible error because admitting such evidence "violates [the defendant's] constitutional right to a jury trial, including the independent determination of the facts by the jury." *Carlin*, 40 Wn.App. at 701; see also *Dubria v. Smith*, 224 F.3d 995, 1001-02 (9th Cir., 2000) (suggesting that the admission of taped interviews containing police statements challenging the defendant's veracity may also violate the defendant's right to due process), *cert. denied*, 531 U.S. 1148 (2001).

In determining whether such statements are impermissible opinion testimony, courts consider the circumstances of the case, including the following factors: “(1) ‘the type of witness involved,’ (2) ‘the specific nature of the testimony,’ (3) ‘the nature of the charges,’ (4) ‘the type of defense, and’ (5) ‘the other evidence before the trier of fact.’” *State v. Demery*, 144 Wn.2d 753, 758-59, 30 P.3d 1278 (2001), quoting *Heatley*, 70 Wn.App. at 579.

There are some areas which are clearly inappropriate for opinion testimony in criminal trials, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. *Demery*, 144 Wn.2d at 759; *State v. Farr-Lenzini*, 93 Wn.App. 453, 463, 970 P.2d 313 (1999).¹ This is especially true for police officers because their testimony carries an “aura of reliability.” *Demery*, 144 Wn.2d at 765.

b. *Deputy Moss’s opinion regarding the truthfulness of S.G.’s allegations constituted improper opinion testimony.*

Here, Deputy Moss opined that, based upon his law enforcement experience, additional interviews of people the complainant spoke with

¹ This rule is grounded in the Rules of Evidence. Testimony that tells the jury which result to reach is likely not helpful to the jury (as required by ER 702), is probably outside the witness’s area of expertise (in violation of ER 703), and is likely to be unfairly prejudicial (in violation of ER 403).

after the alleged incident “supported the story of the victim.” RP 768. This was an improper opinion that invaded the province of the jury. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (police officer’s opinion testimony may be especially prejudicial because the “officer’s testimony often carries a special aura of reliability.”).

A similar answer by a police officer in *Kirkman*, was deemed an improper opinion. In *Kirkman*, the officer was asked: “Do you remember [the victim’s] demeanor or mood when he talked to you about these events that had occurred to him?” *Kirkman*, 159 Wn.2d at 936. The officer responded:

He seemed very responsive to my questions, he seemed very articulate about the events that happened and their sequence. And I felt he was-seemed to be pretty honest.

Id. The Court ruled that, although unsolicited, this was an “explicit statement by the witness that the witness believed the accusing victim.”

Id.

Deputy Moss’s answer to the prosecutor’s question here was as egregious. What Deputy Moss testified to – his incomplete investigation – should have helped Mr. Townsend. But, by his claim that collateral contacts generally bolster the complainant’s account, the

detective flipped a lack of evidence on its head and told the jury he knew and believed the victim, and that others did as well.

Mr. Townsend was charged with child rape and furnishing marijuana to a minor, which he generally denied. There was no corroborating physical evidence. As a consequence, Deputy Moss's opinion testimony that S.G. was a victim was improper.

This Court should reverse Mr. Townsend's convictions.

c. The error in admitting Deputy Moss's improper opinion testimony was not a harmless error.

Since improper opinions on guilt invade the jury's province and thus violate the defendant's constitutional right, the constitutional harmless error standard applies to determine if the error was harmless. *State v. Hudson*, 150 Wn.App. 646, 656, 208 P.3d 1236 (2009); *State v. Thach*, 126 Wn.App. 297, 312-13, 106 P.3d 782 (2005). Under this standard it is presumed that the constitutional error was prejudicial, and the State bears the burden of proving beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007); *Thach*, 126 Wn.App. at 313.

As noted, there was no physical evidence to corroborate S.G.'s allegations, thus, S.G.'s credibility was critical to the State in

attempting to prove Mr. Townsend's guilt. The detective's improper opinion regarding S.G.'s credibility, claiming S.G. was telling the truth rendered Mr. Townsend's trial patently unfair and must result in reversal of his convictions.

F. CONCLUSION

For the reasons stated, Mr. Townsend asks this Court to reverse his convictions and remand for a new trial.

DATED this 27th day of January 2016.

Respectfully submitted,

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|----------------------|---|----------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | NO. 48127-8-II |
| |) | |
| BRUCE TOWNSEND, |) | |
| |) | |
| Appellant. |) | |

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