

71126-1
Statement of additional grounds

71126-1

No. 71126-1-I

In the court of appeals of the
state of Washington Division one

State of Washington,
Respondent,

v.

Pedro Navarro,
Appellant,

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 SEP -5 AM 11:47

Pedro Navarro
Appellant,

Coyote ridge corrections center
DOC 368301 PO Box 769
1301 N. Ephrata Ave
Connell, WA 99326

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A. Assignment of error's

1. The Prosecutor made several comments that were extremely prejudicial during closing rebuttal argument.

Issues related to assignment of error's

1. Was the comment the prosecutor made "lets pretend for a minute that this was a child molestation case," prejudicial, rising to the level of reversible error?

2. Was appellants constitutional due process right to remain silent violated when the prosecutor commented on appellants pre-arrest silence and refusal to respond or deny anything stated by arresting officers?

3. Was the comment the prosecutor made "let him go, send him home," prejudicial rising to the level of reversible error?

-1.B-

Issues related to assignment of errors -1.B-
(cont)

u. was the three comments prejudicial, cumulative, and improper, rising to the level of reversible error.

B. Statement of the case

In March 2012, the King County Prosecutor charged appellant, Pedro Navarro, with eight felonies; six counts of communicating with a minor for immoral purposes (communicating) and two counts of first degree extortion with sexual motivation (extortion). CP 1-13. The state subsequently added an additional five counts of communicating. CP 40-45. The state alleges appellant posed as a teenage girl and befriended several 12-14 year-old boys through cell phone text messages, and requested sexual favors and in at least a couple of instances

There are twelve volumes of verbatim reports of proceedings referenced as follows: 1 RP - January 23, 2013, June 11, 2013, July 17, 2013, and October 11, 2013; 2 RP - five-volume consecutively paginated set for the dates of July 18, 22-25, 29-31, 2013; 3 RP - July 30, 2013 (Am); 4 RP - August 5, 2013; 5 RP - August 6, 2013; and 6 RP - August 8, 2013

threatened boys with harm if they refused. supp CP (sup. no. 1220, states trial memorandum, filed 7/17/13).

The prosecutor made several prejudicial comments during her closing arguments that were cumulative.

Following a jury trial held July 17, 2013 through August 8, 2013 before the Honorable Theresa B. Dally, appellant was acquitted on three counts of communicating, but convicted as charged on the remaining counts. CP 55-67; 6RP.

on October 11, 2013, Appellant was sentenced to the statutory maximum sentence of 60 months for each of the communicating convictions, and 114 months incarceration and six months of community custody for each of the extortion convictions, all concurrent, with credit for time served as determined by the King County Jail. CP 127-38; 2RP 191-93. Navarro appeal. CP 112.

C. Argument

1. Prosecutor's comment, "let's pretend for a minute that this was a child molestation case," was prejudicial, requiring reversal of the convictions and remand for a new trial.

The prosecutor's comparison of the case-at-trial, to a child molestation case was prejudicial. SRP 100-101. It influenced the jury in that they are asked, none so subtly, to treat as equivalent to the trial at hand and a child molestation case, comparison to a charge that generally provokes moral indignation - if not outright rage - is likely to linger in the minds of jurors and influence their ultimate decision. As such it was wholly improper. Albeit, the trial judge correctly sustained ("in the context of this case"), defence attorney's objection to

Prosecutor's comments, the prejudicial effect is not undone and rises to the level of reversible error.

2. Appellant's constitutional due process right to remain silent was violated when the prosecutor commented on appellant's pre-arrest silence. This was prejudicial and improper, requiring reversal of the convictions and remand for a new trial.

Appellant's constitutional due process right to remain silent were violated when the prosecutor made a reference about appellant not answering the officers questions and by saying "he dose not deny it, he dose not deny that he is having sexual chats with these boys."

5RP 102-104.

Despite judges correct ruling and admonishment to the jury, prosecutors repeated attempts to circumvent judges ruling that

such mentions were improper and should be disregarded.

Necessarily influence the jurives preception of evidence and constitutes a violation of appellants right to remain silent. It is burdan shifting and commenting on constitutional rights that appellant had.

A similar situation occurred in U.S. v. Baker, 999 F.2d 112 (1993).

Baker and Caban were convicted of bank robbery. The court reversed the conviction and remanded for a new trial because appellants due process rights were violated when the government impermissibly commented in closing, rebuttal argument on their Post-arrest silence. The court held: defendants due process rights were violated by comments on their Post-arrest silence during prosecutors closing rebuttal argument; error was not harmless; and it would reverse both convictions

despite one defendant's failure to raise issue on appeal.

Another similar situation occurred in State v. Henderson, 100 Wn. App. 794, 998 P.2d 907 (2000). On appeal Henderson contended that he was denied the right to a fair trial because the prosecutor commented on his right to remain silent and committed several instances of prosecutorial misconduct constituting cumulative error. The court held: reversal was warranted by the cumulative effect of incidents of prosecutorial misconduct.

In State v. Davis, 38 Wn. App. 600, 686 P.2d 1143 (1984). Davis was a juvenile and was found guilty of malicious mischief in the third degree at a juvenile fact finding hearing. Davis appealed, contending the trial judge impermissibly relied on his post-arrest silence in reaching a finding of guilty. The court held: use of juveniles post-arrest silence regardless of whether such

is

Silence followed Miranda warnings was fundamentally unfair and violated due process clause of the state constitution.

In State v. Knapp, 148 Wn. App. 114, 199 P.3d 505 (2009). Knapp appealed his conviction for residential burglary. The court reversed and remanded for a new trial. The court held: The Prosecutor committed misconduct during closing arguments when he commented on defendant's pre-arrest silence; and the Prosecutor's comment on defendant's pre-arrest silence constituted prejudicial error.

In State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988). Belgarde challenged his convictions for first degree murder and attempted first degree murder. Belgarde contended that prosecutorial misconduct during closing arguments deprived him of a fair trial. The court agreed and reversed the conviction. The court held: Prosecutors comments during closing argument mandated

retrial, and prosecutors comments on defendants post-arrest silence violated defendants due process rights.

3. The comment made by the prosecutor, "let him go, send him home," is prejudicial, requiring reversal of the convictions and remand for a new trial.

The comment the prosecutor made "let him go, send him home," SRP 106, is extremely prejudicial. To say "let him go, send him home," what it reveals is appellant is still in custody. The courts do a lot to make sure that juries are not aware of what someone's custody status is. The courts make sure the dose not peer behind and speculate about why someone may or may not be in custody. It says something about appellants custody status, and the jury should not be aware of that. It

allows the jury to speculate about why appellant is still in custody.

more importantly, what it does, is it invites the jury, the culmination of a closing argument, to base their decision on extreme emotion, fear, and prejudice to appellant. Because it places the jury ultimately in the position of being the entity that is responsible for basically protecting the public, that's what it calls for. If you think appellant is innocent, you let appellant go into the community. when you combine that with the idea that these are vulnerable victims. 5RP 18-19. The jury's consideration should not be whether or not, oh, my god, if we acquit appellant, we are going to let appellant go. we are going to let appellant go home. we are going to let appellant be in the community. It's like the greatest fear that the court's don't want the jury to be concerned with, and so now the

Jury thinks well it's just use, we are the stop gap, if we acquit appellant, gee, appellants going to be out there in the community.

That is exactly the kind of inflaming of emotions, and putting the jury in the wrong frame of mind, before the jury goes into deliberations, that is completely improper, and being particularly the last thing the jury heard before they are then asked to go deliberate about these 13 counts, that that is a factor, and it's weighing on their minds. When the courts talk about the fairness of a trial, these are not the kinds of considerations that a jury is permitted to use. They are also not the kinds of considerations that the prosecutor, especially in a case like this, is allowed to exploit.

Appellant's defence attorney objected to the comment "let him go send him home," the court "sustained" the objection, the prosecutor repeated part of the comment "let him go" and

The court inadvertently reaffirmed appellant's custody status for the jury by saying "the jury doesn't have any involvement in letting of the defendant go." 5RP 106-107.

u. The comments made by the prosecutor, are individually prejudicial, taken cumulatively are collectively prejudicial and rise to the level of reversible error's, requiring reversal of the convictions and remand for a new trial.

The state and federal constitutions guarantee an accused the right to a fair trial. These provisions also guarantee an accused the right to due process of law. U.S. Const. amend. 5, 6, 14;
const. art. 1, sec. 22.

These comments are extremely prejudicial, improper, and cumulative. The comments were flagrant and ill-intentioned that

it denied appellant a right to a fair trial. It also inflamed the passions and prejudice of the jury. These comments could not be cured by the courts curative instructions.

In State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976). Torres was convicted of rape and burglary. The court reversed the convictions and remanded for a new trial because of ~~continued~~ prosecutorial misconduct. The court held:

Cumulative effect of instances of prosecutorial misconduct in opening statement, interrogation of witnesses, and closing argument; prejudiced defendant and effectively deprived him of constitutional right to a fair trial.

In State v. Jones, 144 Wn. App. 284, 183 P.2d 307 (2008). The court held: Prosecutor committed misconduct; there was substantial likelihood that numerous instances of prosecutorial misconduct had a

cumulative effect of depriving defendant of a fair trial.

In State v. Henderson, 100 Wn. App. 794, 998 P.2d 907 (2000). The court held: reversal was warranted by the cumulative effect of instances of prosecutorial misconduct.

D. Conclusion

This court should vacate appellants convictions and reman for a new trial because on three seperate occasions the prosecutor made prejudicial comment during closing rebuttal arguments that were cumulative, extremely prejudicial, and improper. These comments individually and collectively constitute grounds for reversal.

First, the prosecutor made a comment improperly comparing the trial - at - hand to a child molestation case in a transparent attempt to incite and prejudice the jury.

Second, the prosecutor made a

Comment infringing on appellants right to remain silent, encouraging the jury to view appellants post-arrest silence as an indication of guilt, and

Third, the Prosecutor made a comment intended to inform the jury of appellants custody status despite trial judges efforts to shield jury from the probable prejudicial effects of such information.

The fact that defence attorney's objections to these comments were sustained at trial lends significant support to the argument that each comment was, in fact, prejudicial. Yet the remedy - instructing the jury to disregard the comments was insufficient to lessen the prejudicial effect, and in one instance the trial judge reaffirmed the prejudicial remarks for the jury.

Dated this 2 day of sept. 2014.

Respectfully submitted
Appellant



Pedro Navarro

DECLARATION OF MAILING

GR 3.1 No. 71126-1-I

I, Pedro Navarro on the below date, placed in the U.S. Mail, postage prepaid, 3 envelope(s) addressed to the below listed individual(s):

Court of Appeals
Division one
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Seattle, WA 98101

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STATE OF WASHINGTON
2014 SEP 15 AM 11:46

I am a prisoner confined in the Washington Department of Corrections ("DOC"), housed at the Coyote Ridge Correctional Complex ("CRCC"), 1301 N. Ephrata Avenue, Post Office Box 769, Connell, WA 99326-0769, where I mailed said envelope(s) in accordance with DOC and CRCC Policies 450.100 and 590.500. The said mailing was witnessed by one or more staff and contained the below-listed documents.

- 1. Brief/Statement of additional grounds
- 2. _____
- 3. _____
- 4. _____
- 5. _____
- 6. _____

I hereby invoke the "Mail Box Rule" set forth in General Rule ("GR") 3.1, and hereby declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

DATED this 2 day of September, 2014, at Connell WA.

Signature [Handwritten Signature]