 74143-8

No. 74143-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JESSE THOMAS FULLER, Appellant

v.

STATE OF WASHINGTON, Respondent

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Jesse Fuller filed his Opening Brief of Appellant on March 24, 2016. The State responded June 29, 2016, with a Brief of Respondent (hereinafter "BOR"). This reply is now submitted to address the arguments therein.

II. ARGUMENT

A. The Trial Court Erred in Providing the Jury With a Reading of a Transcript of the Alleged Victim's Entire Trial Testimony During Deliberations and this Error was not Waived or Harmless.

The State argues there was no error in repeating the alleged victim's testimony herein, if there was error it was waived, and if there was error and it was not waived it was harmless. Each of these arguments is addressed in turn below.

In arguing there was no error in reading the transcription of AMF's testimony in its entirety to the jury during deliberations, the State first notes appellant's citation to *United States v. Binder,* 769 F.2d 595 (9th Cir. 1985), where the Ninth Circuit reversed a conviction because the trial court replayed videotaped testimony after deliberations had begun. BOR at 15. Because the testimony repeated in Mr. Fuller's case was not videotaped as was the testimony in *Binder*, the State argues that the Fuller

trial court's repetition of the alleged victim's testimony by reading a transcript was a "preferred procedure." BOR at 16. The State argues:

> The *[Binder]* court noted that the 'preferred procedure' is to prepare a transcript of the videotaped testimony, and read the transcript to the jury in the courtroom with all parties present.

Id. By focusing on this *dicta* from the *Binder* decision,[1] the State neglects the point that repetition of a particular witness' testimony in any form should always be disfavored due to the obvious danger the jury will unduly emphasize such testimony at the expense of the other evidence. *State v. Koontz,* 145 Wn.2d 650, 654, 658, 41 P.3d 475 (2002). Regardless of the procedure employed, it "is seldom proper to replay the entire testimony of a witness." *Id.* at 657.

Contrary to the State's assertions, these general principals apply to both playing videotaped testimony and reading transcribed testimony. *Compare id.* (videotaped testimony), *with, State v. Monroe,* 107 Wn.App. 637, 643, 27 P.3d 1249 (2001) (transcribed testimony), *rev. denied,* 146 Wn.2d 1002 (2002). As the *Monroe* Court reasoned, while a transcript is different in form than a videotape, both repeat testimonial evidence. 107 Wn.App. at 643.

1 *See, Binder,* 769 F.2d at 604 (Wallace, J., dissenting) ("the question of a satisfactory, alternative procedure is not before us.").

For these reasons, the preferred practice is always to require jurors to rely on their collective memory. *See, e.g.,* WPIC 1.01 (advance oral instruction: "It is your duty as a jury to decide the facts in this case based on the evidence presented to you during the trial. . . . When witnesses testify, please listen very carefully. You will need to remember testimony during your deliberations because testimony will rarely, if ever be repeated for you."), WPIC 151.00 (basic concluding instruction, "[y]ou will need to rely on your notes and memory as to the testimony presented in this case."). If this preferred practice is not to be followed, "the determination to allow a rereading or rehearing of testimony must be based on particular facts and circumstances of the case." *Binder,* 769 F.2d at 600.

Here, the trial court allowed a reading of the entire transcript of AMF's testimony because she was the crucial witness in this case and she was difficult to hear. 08/05/15 VRP 338 line 13-15. By allowing this repetition, the trial court allowed the jury not just to rehear AMF's testimony, but also to hear an articulate, definitive reading of her words as transcribed by the court reporter devoid of visible or audible indicia of credibility such as a tremor in her voice, stammers, pauses, inflection or pronunciation that might indicate whether AMF was correctly using or

understanding the words in the transcript, incongruous gestures, eye contact or lack thereof, fidgeting, facial expressions etc. In these respects, a videotape "may provide a *more* faithful" record of the actual evidence presented at trial. *Koontz,* 145 Wn.2d at 654. As our state Supreme Court has recognized, nonverbal communications matter. *See, id.* at 655 (collecting law review and journal articles). By repeating AMF's testimony devoid of her nonverbal communications and necessarily imbued with the law-clerk reader's nonverbal communications, the trial court unduly emphasized this testimony and introduced this new evidence during the jury's deliberations.

Defense counsel objected to this procedure. 08/05/15 VRP 334 line 23-25. But because the court orally instructed the jury regarding the reading of AMF's testimony, *see,* 08/05/15 VRP 341 line 5-18, and the defense did not additionally formally take exception to this colloquy, the State argues this "claim should be rejected as waived." BOR at 17-18; *citing, State v. Bailey,* 114 Wn.2d 340, 787 P.2d 1378 (1990); *State v. Salas,* 127 Wn.2d 173, 897 P.2d 1246 (1995).

The rule in the cases relied upon by the State derives from Civil Rule 51(f). *See, Bailey,* 114 Wn.2d at 345; *Salas,* 127 Wn.2d at 181. Civil Rule 51(f) mirrors Criminal Rule 6.15(c) and provides specific

procedures to be followed allowing counsel an ample and specified opportunity to object to jury instructions previously served and filed. CR 51(f); CrR 6.15(c). These procedures were not followed herein. The instruction regarding the reading of AMF's trial testimony transcript was only given orally and not included in any packet of instructions proposed by the parties or provided to the jury. *See,* CP 152-72 (Court's Instructions to the Jury). The State filed a copy of the annotated instruction given orally to the jury as authority for the argument to allow the repetition of the testimony, but only *after* the verdict had already been reached. *See,* CP 173-75 (verdict forms filed August 5, 2015), 176-79 (State's Authority in Response to Jury Question Concerning A.M.F.'s Trial Testimony filed August 6, 2015). Under these circumstances, the waiver doctrine should not apply.

Finally, the State argues that if there was error here, it was harmless. BOR at 18-19. In support of this harmless error argument, the State posits that the effect of reading the transcript of AMF's testimony was inconsequential considering AMF's out-of-court statements. BOR at 19. But AMF's out-of-court statements were contradictory and at times difficult to understand. *Compare,* CP 74-78 (when questioned by her mother, AMF said she and Mr. Fuller "rub our butts together," and "he

takes me in your bed sometimes . . . but he only do that when we, when we rub our butts together"); *with,* CP 98-100 (questioned by Carolyn Webster, a less partial participant whose stated interest was to take a statement from AMF in her own words and to gather as much detail as possible, *id.* 07/30/15 VRP 92 line 15-18, AMF did not disclose any abuse even when asked repeatedly, "I heard that you told your mom about something that happened with your dad" . . . "Well I heard that you told your mom about something that happened with dad. Tell me about that" . . . "I heard that you told your mom about something else that happens when mommy leaves" . . . "Okay well I heard that you told your mom about something that happens with dad when [your sister] cries."); *and* 08/04/15 VRP 271 line 16-21 ("Q. Did daddy ever touch you in your mom and dad's bedroom? A. No. Q. No, okay. Did you and – did daddy ever want you to rub butts with him? A. No."). These out-of-court statements were not so powerful standing alone that undue emphasis and repetition of AMF's trial testimony necessarily had no effect on the verdict.

Although the State now argues on appeal, "there was substantial evidence independent of A.M.F.'s trial testimony," BOR at 19, this argument is belied by the State's own closing argument at trial which

focused very specifically on AMF's trial testimony. Then, the State pointedly argued, "[w]hen you heard her testify to these things, I think you knew that she was telling you what happened" and "if you believe [AMF] when she tells you what her father did, you are satisfied beyond a reasonable doubt." 08/05/15 VRP 301 line 1 – 312 line 16.

As in *Koontz,* there was no physical evidence in this case and the defense argued the alleged victim and her mother were displeased with Mr. Fuller for reasons having nothing to do with sexual abuse. *Id.* at 313 line 10 – 328 line 8. AMF's credibility was a crucial issue. Under these circumstances, as in *Koontz,* the reading of the entire transcript of AMF's testimony during deliberations may have taken on great significance, unduly emphasizing that testimony to the detriment of the other evidence in the case. Reversal is required as a result.

B. The Prosecutor Committed Misconduct Going Far Beyond any Permissible Characterization Reasonably Drawn from the Evidence or Acurate Statement of the Law that was So Flagrant and Ill-Intentioned an Instruction Could not have Cured the Resulting Prejudice.

During closing argument, the State invited the jury to put themselves in the place of a four-year-old child they alleged was about to be raped, again, by her father and beaten if she refused him sexually:

> Think for a moment about the powerlessness of that little girl in that environment when she saw her mom getting her purse, grabbing her shopping list, getting her keys, and getting ready to go.

08/05/15 VRP 292 line 22-25. The State acknowledges as much but argues this is "a far cry from other statements held to have improperly appealed to the passions or prejudice of the jury." BOR at 25. A careful analysis shows the difference is really not so great at all.

For example, in *State v. Bautista-Caldera,* cited in BOR at 25, the Court found an argument imploring the jury to "[t]hink of [R, the alleged victim], think of all the children who do not talk that well who unfortunately don't remember everything in precise order in which it happens but whose only hope is people like yourself who are willing to take this case seriously, understand why it is that this happened." 56 Wn.App. 186, 194, 783 P.2d 116 (1989). The *Bautista-Caldera* Court found this emotional appeal was improper. *Id.*

The State also argues this argument inviting the jury to focus on AMF's powerlessness in the face of her father's alleged abuse was an accurate characterization reasonably drawn from the evidence. BOR 20-23. A prosecutor may have wide latitude to draw reasonable inferences from the evidence but it is still true that bald appeals to passion and

prejudice constitute misconduct. *State v. Fisher,* 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The argument here is akin to imploring a jury to imagine the terror of a helpless murder victim just before the fatal blow, to put themselves in the shoes of a hopeless repeat victim of domestic violence when her abusive husband came home drunk and angry again, etc. The reason such arguments are improper is not because they are necessarily inaccurate or unsupported by the evidence. The reason is because such arguments are nothing more than base appeals to passion and prejudice and do not permissibly add to the relevant determination of whether the State has carried its burden to prove each and every element of its case beyond a reasonable doubt.

The State also recognizes the repeated refrain in closing argument that a belief in AMF's trial testimony was sufficient to support a guilty verdict regardless of any other evidence in the case but argues this was nothing more than "a proper statement of the law." BOR at 20. In this respect, the trial prosecutor's arguments were similar to arguments recently disapproved by this Court in *State v. Smiley,* No. 74130-6-I , 2016 Wash.App. LEXIS 1727 (Div. I July 25, 2016). In Mr. Smiley's closing arguments, the State argued in part:

> [The victim's word] is enough for proof beyond a

> reasonable doubt. Nothing more is required. . . . There's nothing that says there needs to be corroborating evidence of any kind, some kind of physical evidence, some kind of eyewitness. . . . The law does not require it.
>
> * * *
>
> All you need is someone telling you it happened, and if you believe that person, if you believe [the girl], that's enough, you are satisfied beyond a reasonable doubt of the defendant's guilt.

Id. at *7. In *Smiley,* the State defended the argument as they have done here, reasoning it was a proper statement of the law. *Id.* at *6. The Court disagreed:

> The State defends the prosecutor's remarks on the basis that it was premissible to explain to a jury why corroborating evidence is not required. We disagree. A proper argument stays within the bounds of the evidence and the instructions in the case at hand. It is unnecessary to explain why the law is the way it is. Such explanations tend to lead into policy-based arguments that divert the jury from its fact-finding function.

Id.

Similarly, the State argued here:

> The law concerning this kind of case and this kind of crime notably does not require the State to prove the specific date. And that makes sense, doesn't it? Because what child could or would keep track of dates? Particularly in a case like this where the abuse was systematic, where it happened in much the same way in the same place, under the desk. It's very difficult for children with the passage of time and similar acts to distinguish between them. . . .
>
> Testimony is evidence. . . . And that makes sense, doesn't it, because these kinds of crimes are committed in

> secrecy. The person that commits these kinds of crimes selects the time, the place, the manner, and the victim. And they go to great lengths to make sure that there aren't any eyewitnesses or evidence. These crimes don't leave marks or injuries that can be seen, at least not physical injury. And it's the child, in this case it's [AMF], who was the only eyewitness to what her father did to her. So make no mistake about it, if you listened to [AMF] and you believed her, that is enough in this case for you to find the defendant guilty.
>
> * * *
>
> [I]n a case like this, it's simple, if you believe [AMF] when she tells you what her father did, you are satisfied beyond a reasonable doubt. The law doesn't require corroboration. The law doesn't require medical evidence. The law doesn't require eyewitnesses. When you heard [AMF] testify to these things, I think you knew that she was telling you what happened. . . .
>
> And the State is confident that after you've reviewed all the evidence and the testimony because, remember, testimony is evidence, that you will hold this man, this father, accountable for what he did to that little girl, his daughter.

08/05/15 VRP 299 line 24 – 301 line 3; *Id.* at 311 line 24 – 313 line 1.

As in *Smiley,* this argument was improper. *See,* 2016 Wash.App. LEXIS 1727 at *12-13. The question then, is whether the misconduct requires reversal even though defense counsel did not contemporaneously object. In *Smiley,* a bare majority held reversal was not required in part because "Smiley picked up the theme in his own closing argument and made it his own." *Id.* at *16. Here, defense counsel did no such thing.

The prosecutor's argument in Mr. Fuller's case relied on passion,

misstated the law, and misrepresented the jury's role and the State's burden of proof. By first demanding the jury "[t]hink for a moment about the powerlessness of that little girl," then reducing the court's instructions to the simple question of whether the jury believed AMF, the State's improper argument created pervasive and insidious prejudice that could not have been cured with any simple instruction from the Court. It warrants reversal as a result.

III. CONCLUSION

For all of these reasons and in the interests of justice, Mr. Fuller respectfully asks that this Court reverse his convictions for Rape of a Child in the First Degree and remand these charges for a new trial in accordance with the authorities cited herein.

RESPECTFULLY SUBMITTED this 28th day of July, 2016.

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CERTIFICATE OF SERVICE

I certify that I emailed and mailed a copy of the foregoing Reply Brief of Appellant to poaappellateunitmail@kingcounty.gov and to 516 Third Avenue W-554, Seattle, Washington 98104 and to appellant Jesse Fuller, at the Washington State Penitentiary at Walla Walla, Washington, postage prepaid, on July 28, 2016.

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