Supreme Court No. 97106-4

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

JOHNNY NARVIN TALBERT, JR.,
Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

J.Q., the seven-year-old daughter of the defendant's girlfriend, testified that he touched her sexually, including penetration with a finger and orally. The defendant denied this and testified that he had threatened to evict the girlfriend about two weeks before J.Q. made the allegation. At trial, the prosecutor pointed out that he did not say this during a police interview and did not claim that J.Q. was acting in revenge. The defense attorney requested to play the audio of the defendant's police interview to show he consistently denied molesting J.Q. The trial court sustained the prosecutor's objection to playing the tape.

This petition is nothing more than a challenge to the trial court's ruling on the objection. The objection does not present any constitutional issues and did not interfere with the defendant's right to present a defense.

There are no constitutional issues, issues of a public interest, and the ruling was consistent with prior decisions. The petition should be denied.

II. ISSUES PRESENTED FOR REVIEW

A. Should the case be accepted for review under any of the prongs in RAP 13.4 (b)?

1. Does the defendant's attempt to bolster his testimony by introducing the audio of his police interview create a

constitutional issue, and does the decision of the Court of Appeals conflict with any other decision of the Court of Appeals or Supreme Court?

2. Does the case present an issue of substantial public interest?

III. STATEMENT OF THE CASE

The defendant's petition has very nicely summarized all issues before the Court of Appeals, including the charges, the defense, the trial evidence, the jury instructions, and the closing arguments. However, the only issue raised by the defendant in this petition concerns an objection by the prosecutor to the defendant's request to play an audio tape of his interview during his re-direct examination. RP[1] at 489. While the testimony before the jury covered RP at 120 to RP at 497, the petition concerns about 20 pages, from RP at 476 to RP at 489, during which the State cross-examined the defendant regarding whether he told police about a motive for the alleged victim to not be truthful and the defense asked to play the entire audio of the interview.

The background to this dispute is that the defendant elected to testify, and denied inappropriately touching J.Q., the seven-year-old alleged victim, in any way, denied ever showing her pornography, denied

[1] Unless otherwise indicated, "RP" refers to the verbatim report of proceedings from jury trial on 02/13/2017 to 02/17/2017.

using body parts including his tongue, finger, or penis on her, and denied ever engaging in oral sex with her. RP at 447, 465-66.

As a possible explanation of the allegations by J.Q., the defendant testified that he told J.Q.'s mother about two weeks before he was arrested that she would either have to get a job or get out of his house. RP at 463. The defendant stated that his testimony was consistent with what he told the police in an interview. RP at 468.

In cross-examination, the prosecutor cited four times he had the opportunity to say that J.Q. made the sexual abuse allegations as revenge for threatening to evict her and her mother from his house. RP at 476-78, 480. In fact, far from stating that J.Q.'s allegation was the result of her seeking revenge, the defendant told the police that J.Q. may have thought it would "help get rid of her mom." RP at 480-81.

On redirect, the defense attorney asked to play the entire audio of the defendant's police interview stating that

> [G]iven the nature of [the prosecutor's] cross-examination . . . defense should be allowed to play the recording as a prior consistent statement in that [the prosecutor] has specifically pointed to various locations in the interview as inconsistent, and it would be patently unfair for defense then not to be able to have the jury hear the consistent statements that were a part of that same interview.

RP at 489.

The trial court denied the defendant's motion to play the audio tape. RP at 490-91.

The jury did not believe the defendant's denials and convicted him as charged of Rape of a Child in the First Degree, Child Molestation in the First Degree, and another count of Child Molestation in the First Degree. CP 49-51. The Court of Appeals found a double jeopardy violation in the second Child Molestation conviction and reversed it.

IV. ARGUMENT

A. The petition should be denied because it does not meet any of the prongs under RAP 13.4 (b)

1. The issue is not constitutional, and the Court of Appeals' decision is consistent with other cases.

Trial court rulings relating to the admission of evidence are reviewed for abuse of discretion. *State v. Ruiz,* 176 Wn. App. 623, 634, 309 P.3d 700 (2013). The defendant argues that the standard of review should be de novo because the trial court ruling was a violation of the defendant's constitutional right to present a defense. He cites *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010), *State v. Duarte Vela*, 200 Wn. App. 306, 402 P.3d 281 (2017) and *State v. Darden,* 145 Wn.2d 612, 41 P.3d 1189 (2002). None of these cases are directly on point.

The question in *Darden* was "whether a criminal defendant's right to cross-examine adverse witnesses is trumped by the State's interest to

avoid disclosure of a secret law enforcement surveillance location." *Darden*, 145 Wn.2d at 615. The court reversed the conviction but affirmed that the question is still whether or not a trial court's ruling on admissibility was an abuse of discretion. *Id.* at 619.

Duarte Vela was a murder case in which the defendant claimed self-defense. The defendant wanted to introduce evidence that the victim had threatened him two or three years earlier, had abducted his younger sister about seven years earlier, and had battered his wife—the defendant's sister—throughout their marriage. *Duarte Vela,* 200 Wn. App. at 313, 315. He argued that this evidence was probative of his degree of fear of the victim.

In *Jones,* the defendant claimed he and his niece had consensual sex at a cocaine and alcohol fueled party which included her having sex with two other men and dancing for money for the men. *Jones,* 168 Wn.2d at 717. The trial court refused to allow the defendant to testify to this under the Rape Shield statute. The Court reversed the conviction saying that the evidence was relevant and that the trial court misinterpreted the Rape Shield statute.

Here, the issue about playing the audio of the defendant's police interrogation arose after the defendant had testified on direct and been cross-examined. The defendant did not previously attempt to admit or play

the audio tape through other witnesses or in his direct testimony. This demonstrates that the audio was not a significant part of his defense. The defendant only sought to admit the audio tape after he was effectively cross-examined to reinforce his testimony denying he committed the offenses.

In contrast, in *Jones* and *Duarte Vela* there were restrictions on the topics the defendants were allowed to testify about. In *Darden*, the defendant was restricted in asking police about their ability to observe the events in question. *Jones, Duarte Vela,* and *Darden* dealt with balancing the probative value of evidence against its prejudicial effect.

Here, the decision to not allow the defendant to play his police interview was based on hearsay, rather than a balancing of probative versus prejudicial evidence. In other words, he was able to testify without restriction that he did not commit the offense. He could not articulate a reason why his out of court statements also denying that he committed the offense should be admissible.

The defendant criticizes the Court of Appeals decision for citing *State v. Aguirre,* 168 Wn.2d 350, 229 P.3d 669 (2010) for the proposition the right to present a defense "does not extend to the introduction of otherwise inadmissible evidence." *Id.* at 363; See Court of Appeals decision at 5. However, this is consistent with the *Jones, Duarte Vela,* and

Darden cases on which the defendant relies. In all three of those cases, the court stated, "Defendants have a right to present only relevant evidence, with no constitutional right to present irrelevant evidence." *Jones,* 168 Wn.2d at 720, *Duarte Vela,* 200 Wn. App. at 317, and *Darden,* 145 Wn.2d at 622.

Even if this court looked at the issue de novo, ignored the hearsay rules, and decided that the audio tape in fairness should have been played, there is no reason to reverse the conviction. As stated in *Duarte Vela*, "[w]hether the exclusion of testimony violated the defendant's Sixth Amendment right to present a defense depends on whether the omitted evidence evaluated in the context of the entire record, creates a reasonable doubt that did not otherwise exist." *Duarte Vela,* 200 Wn. App. at 327, citing *United States v. Blackwell,* 459 F.3d 739, 753 (6th Cir. 2006).

Here, the defendant testified that he did not commit the crimes. He testified that he told the police that he did not commit the crimes. The evidence on the audio tape of him denying the crimes was redundant. His police interview would not have "created a reasonable doubt that did not otherwise exist." *Duarte Vela,* 200 Wn. App. at 327.

Although he has not argued this point in this petition, the trial court and Court of Appeals were correct in holding that the defendant's police interrogation was not admissible at the defendant's request. The defendant

has wisely not suggested that his police interrogation should be admissible as a "prior consistent statement" under ER 801 (d)(1)(ii). A prior consistent statement is admissible only if it is made under circumstances minimizing the risk that the declarant foresaw the legal consequences of the statement, i.e. before the existence of any motive to fabricate a new story. *State v. Ellison*, 36 Wn. App. 564, 676 P.2d 531 (1984).

State v. McDaniel, 37 Wn. App. 768, 771, 683 P.2d 231 (1984) is on point. In that case, the victim in a sex case testified. A caseworker then also testified to consistent statements by the victim. The court stated, "There was no showing that the victim's consistent statements were made at a time when the motive to falsify was not present. Evidence which merely showed that the victim made similar statements to the caseworker . . . was of little probative value . . . ." *Id.* at 771.

Here, the defendant had been effectively cross-examined and he offered the audio tape to bolster his denials. Prior out-of-court statements consistent with a witness's testimony are not admissible to reinforce or bolster that testimony. *Id.*

2. The case does not present an issue of substantial public interest.

If evidence is inadmissible under Evidence Rules, statutes, or caselaw, should that evidence become admissible if the defendant claims

that it is part of his constitutional right to present a defense? Of course not. That would end all hearsay rules, all requirements of document authentication, all issues of relevancy. The defendant has not cited any authority for such a sweeping rule. See Petition for Review at 19-20.

Further, the issue of playing the audio tape of the defendant's police interview was not part of the defendant's main case. He did not attempt to play it during his direct examination. He sought to play the audio only after he was cross-examined.

V. CONCLUSION

The petition is based on a single evidentiary ruling in the trial court. The defendant does not argue that the trial court or the Court of Appeals incorrectly applied ER 801 (d)(1)(ii) regarding Prior Inconsistent Statements. There is no constitutional issue, the Court of Appeals decision is consistent with other cases, and there is no public interest in the case. Accordingly, the petition for review should be denied.

RESPECTFULLY SUBMITTED this 22 day of May, 2019.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on May 22, 2019.

Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

May 22, 2019 - 4:10 PM

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