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NO. 62743-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN E. GRATIAS,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUE

Where a trial error did not interfere with defendant's right to a fair trial, and the court took immediate corrective measures to ensure defendant was not prejudiced, did the court err by denying defendant's motion for a mistrial?

II. STATEMENT OF THE CASE

On April 3, 2008, the State charged defendant with one count of second degree child molestation. 1 CP 106. The charge arose while the victim, J.M.D. (DOB May, 1994), was baby-sitting for defendant's daughter. Defendant was working the night shift. He offered to let J.M.D. sleep in his bed while he was at work. J.M.D. accepted. When defendant came home, he got into bed with J.M.D. While J.M.D. was lying in bed after she woke up, defendant put his hand under her covers on her upper thigh. He then moved his hand to her "pubic area" on top of her underwear and rubbed her with his fingers. 10/14 RP 43-44, 48, 50-51.

Before trial, the State amended the information to add a second count of second degree child molestation and a count of communication with a minor for immoral purposes. 1 CP 102.

At a preliminary hearing, the State made several motions in limine. One was:

That the defense be precluded from mentioning or attempting to elicit evidence that the defendant's child(ren) have not disclosed any abuse, that he is still allowed to see them (or any other child), that they were interviewed, or that he has not been accused of child molestation in the past. This evidence is irrelevant and inadmissible as propensity evidence.

2 CP ____.¹

When discussing this motion in limine, the following exchange occurred:

State: There was an interview of his biological child. She was nine years old. She did not disclose any abuse. He also has another child who has never disclosed any abuse. I think any testimony regarding the fact that other people haven't disclosed abuse is irrelevant to this.

The Court: [Defense counsel]?

Counsel: I don't have a problem with that, although I would ask that it not even be – that the police officers never go into the fact that there was an interview of [defendant's daughter] because if the jury hears that there was an interview but didn't hear that she didn't disclose anything and the officer thought she was being very truthful, I think they'll just make assumptions and I think that's prejudicial.

State: I think that's okay.

The Court: All right. So the record would be that they'll be no mention of an interview of the defendant's own daughter.

¹ The State has designated the State's Trial Memorandum to be part of the clerk's papers. It has not yet been paginated.

Now, I guess just for clarification, are you saying did they interview her for purposes of abuse – of alleged abuse of the defendant with his own daughter or did they interview her to determine whether she saw anything going on between the defendant and the alleged victim?

State: It was an interview to determine if she had been abused. It was a safety interview, is my understanding.

Counsel: They did ask her one question, if she saw anything weird going on, her response was no. But they only asked her one --.

The Court: Okay. So everybody is in agreement that they'll be no mention of any interview?

10/13 RP 10-11. The detective who investigated the case was present during the discussion of this motion. 10/14 RP 136.

The victim testified about the events described in the Statement of the Case. The victim's aunt and mother testified about the disclosures the victim made to them. Then the detective who investigated the allegations of child molestation testified.

During his testimony, the following took place:

Q: Did you make a phone call to set up a child interview or anything like that?

A: I did, actually, that's correct.

Q: When was that?

A: I ended setting up two interviews, actually. In fact, the first place I spoke with [the victim's mother], now that I look at in report, was actually in August,

August 7, 2000. But I set up two different interviews. The first one was an interview to have [defendant's daughter] interviewed. The second one was the one I spoke with [the victim's mother] at the beginning of August to have [the victim] interviewed by Pierce County Sheriff's Office.

10/14 RP 134-35.

The jury was excused and defendant moved for a mistrial. The State opined that "I think an instruction to disregard would be sufficient[.]" 10/14 RP 136. Defendant's counsel concluded her argument by saying, "I think it's incredibly prejudicial to my client to hear that and not know what was the outcome of that interview."

10/14 RP 137 (emphasis added).

The court ruled:

Well, the way to easily cure this is to have the detective testify that in fact [defendant's daughter] said that she didn't see anything. End of interview. End of testimony.

* * *

That takes care of any inference of anything else. There is no prejudice to the defendant. In fact, it's what [defendant's daughter] said.

* * *

[The prosecutor] won't even mention did he ever touch you or anything else like that. The question will be from [the prosecutor], in the interview with [defendant's daughter], did she indicate that she had ever seen anything with the defendant and [the

victim]. [The detective's] answer will be she said she never saw anything.

* * *

The Court: Any problem with that, [counsel]?

Counsel: No, Your Honor.

10/14 RP 137. That testimony was given to the jury without objection. 10/140RP 138.

Before a recording of an interview with defendant was played, the court instructed the jury:

Ladies and gentlemen, in the course of listening to this statement, you're obviously going to hear various questions, comments, statements from the officers conducting the interrogation. I'm instructing you that the officers' comments, questions, and statements made during the course of this interview with the defendant are not themselves to be considered evidence. The officer's statements, comments, questions are only to be considered to put in context the statement of the defendant.

So, for instance, the officer may say, well, we have such and such evidence. That is not evidence, his statement. It's only to put in context the statements of the defendant that are then subsequently made.

10/14 RP 147-48.

During the playing of the recording, defendant asked to "take up something outside the presence of the jury[.]" Defendant repeated his motion for a mistrial. He argued that the mention of the interview with his daughter, coupled with statements by the

officer during his interview with defendant “about how there is other information from those interviews, implies to the jury and myself –.”

10/14 TP 148.

After a brief discussion, the court ruled:

Well, again, I've already instructed the jury that none of the officers' statements are to be considered as evidence or anything else, and at this point I don't find that these statements are within the scope of prejudicial remarks or statements or anything else of that nature, and I'll deny any motion for a mistrial. If you want me to, I will reinstruct the jury that the officers' opinions, belief, et cetera, are not evidence. Do you want me to do that?

10/14 RP 149-50.

The detective described a second interview with defendant. During that interview, defendant admitted that had lied during his first interview. Defendant also told the detective that during the night in question, “he had discovered that his hand was under the covers on top of [the victim's] underwear.” 10/14 RP 159. Defendant told the detective that he rubbed the victim's vagina with two or three fingers, but it was not intentional. 10/14 RP 162, 10/15 RP 186, 191. Later he admitted that the touching “wasn't a complete accident.” 10/14 RP 163.

After the State rested, the court dismissed one count of second degree child molestation. 10/15 203, 1 CP 3. The defense rested without putting on any evidence. 10/15 RP 204.

III. ARGUMENT

A. STANDARD OF REVIEW.

This court has repeatedly stated that “[t]he granting or denial of a new trial is a matter primarily within the discretion of the trial court and [that the reviewing court] will not disturb its ruling unless there is a clear abuse of discretion.” An abuse of discretion will be found “only ‘when no reasonable judge would have reached the same conclusion.’” The trial judge, having “seen and heard” the proceedings is in a better position to evaluate and adjudicate than can we from a cold, printed record.

State v. McKenzie, 157 Wn.2d 44, 51-52, 134 P.3d 221 (2006)

(citations omitted).

B. THE REMEDY THE COURT APPLIED ENSURED DEFENDANT RECEIVED A FAIR TRIAL.

The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.

State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, 479

U.S. 995 (1986), overruled by State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994).

Here, the error defendant asserts entitled him to a new trial was the mention by the detective that he had arranged for

defendant's daughter to be interviewed. At trial, defendant voiced no objection to the court's remedy of having the State ask the detective if the daughter had seen anything, and the detective answering in the negative. He does not now explain why that remedy was inadequate.

Instead, citing State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987), defendant claims that he is entitled to a new trial based on (1) the seriousness of the irregularity, (2) that the statement was not cumulative, and (3) there was no instruction to disregard the remark. Brief of Appellant 5. As this Court pointed out, those factors were not set out as a specific test, rather, they are the considerations the Supreme Court used under the facts in State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). Escalona, 49 Wn. App. at 254. Put more succinctly:

In these cases [where a mistrial was requested based on a trial error], the court determined whether a new trial must be granted by asking whether the remark when viewed against the backdrop of all the evidence so tainted the entire proceeding that the accused did not have a fair trial.

Weber, 99 Wn.2d at 164.

Here, the analysis differs from Escalona. There, the comment was that the defendant had already been convicted of the

same as the crime he was then being tried for, second degree assault. This Court found the comment was "logically relevant" and:

the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past.

Escalona, 49 Wn. App. at 256.

Here, the detective merely said he arranged an interview with defendant's daughter, who was in the house when the crime occurred. The detective then stated that the daughter was asked if she had seen anything between defendant and J.M.D. He said "she had not witnessed anything unusual." 10/14 RP 138. The detective's comment did not refer to any specific acts or other crimes committed by defendant. Unlike the statement in Escalona, the detective's statement does not have any "logical relevance" to the charged crimes. The jury would not logically conclude from the detective's reference to an interview with defendant's daughter that defendant had a propensity for committing child molestation. As the trial court found, "that takes care of any inference of anything else. There is no prejudice to the defendant." 10/14 RP 137.

Next, unlike Escalona, the evidence against defendant here was overwhelming. J.M.D. gave a complete description of defendant's acts. She was not impeached with inconsistent statements. Defendant admitted the touching, and admitted it "wasn't a complete accident." 10/14 RP 163. Against this backdrop, it cannot be said that the detective's remark so tainted the proceeding that defendant did not receive a fair trial. Weber, 99 Wn.2d at 164.

Last, while there was no instruction to disregard the testimony, there was immediate, decisive action by the court to ensure defendant was not prejudiced. The detective's statement was open to an inference that defendant's daughter may have disclosed that she had been molested by defendant. The court's remedy was that the prosecutor and detective frame the interview as one where the information sought was about what the daughter may have seen between defendant and J.M.D. The efficacy of this remedy is shown by defendant's agreement with it. See, State v. Gregory, 158 Wn.2d 759, 900, 147 P.3d 1201 (2006) (absence of an objection strongly suggests that the event in question did not appear critically prejudicial in the context of the trial).

The court concluded that there was no prejudice. The trial court is in the best position to evaluate the possible prejudice of a trial irregularity. McKenzie, 157 Wn.2d 52.

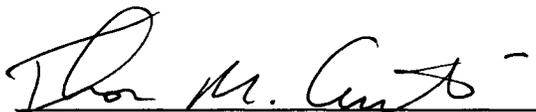
Here, the court took quick, decisive action that eliminated any possibility of prejudice. This Court should find that the court below did not abuse its discretion.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on September 3, 2009.

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