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No. 62928-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON

Respondent,

v.

JAMES HORTON

Appellant.

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

STATEMENT OF ADDITIONAL GROUNDS
APPELLANT

JAMES ALLAN HORTON
Appellant

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Assignments of Error

1. No Written Facts & Conclusions in the Record to support an Exceptional Sentence.
2. State Entering Evidence During Voir Dire.
3. Officer Gendreau' Improper Testimony against a Court Order.
4. State Engaging in Burden shifting During Closing Arguments.
5. Confusing – Unclear Jury Instructions in Instruction # II.

1. **No Written Facts & Conclusions In The Record To Support An Exceptional Sentence.**

WASHINGTON CONSTITUTION article I, section 22, explicitly protects the right of appeal in all criminal cases, *see State v. Tomal*, 133 Wn.2d 985, 988, 948 P.2d 833 (1997), whereas article I, section 10, mandates that "[j]ustice in all cases shall be administered openly, and *without unnecessary delay*." (Emphasis added.) When read together, article I, section 22, and article I, section 10, guarantee each Defendant the right to an appeal which is disposed of without unnecessary delay. The constitutional text thereby expressly provides delay in and of itself is a constitutional evil against which we must guard: criminal justice must be prompt and not unnecessarily protracted. 5 *Cf. State v. Williams*, 85 Wn.2d 29, 32, 530 P.2d 225 (1975), *holding superseded by statute as stated in City of Kennewick v. Vandergriff*, 109 Wn.2d 99, 101, 743 P.2d 811 (1987). Nor is excessive delay excused merely because a case is on appeal. *State v. Smith*, 68 Wn. App. 201, 209, 842 P.2d 494 (1992).

In CrR 3.3 which provides for a prompt criminal trial, failing which the criminal charges against the defendant are dismissed with prejudice. CrR 3.3(c), (i).

In the case before us the source of the excessive delay was the failure of the State to fulfill its obligations, since the responsibility for ensuring that findings of fact and conclusions of law are accurately recorded lies primarily with the prevailing party. *See State v. Vailencour*, 81 Wn. App. 372, 378, 914 {964 P.2d 1192} P.2d 767 (1996); *State v. Portomene*, 79 Wn. App. 863, 865, 905 P.2d 1234, *review denied*, 129 Wn.2d

1016, 917 P.2d 576 (1996); *Peoples Nat'l Bank v. Birney's Enters. Inc.*, 54 Wn. App. 668, 670, 775 P.2d 466 (1989).

The necessity for speedy justice dates at least as far back as the MAGNA CHARTA of 1215, which at section 40 mandates, "To no one will we sell, to no one will we deny or delay right or justice." The principle that justice should be prompt has been incorporated into the legal tradition of this country and has been enshrined in the constitutions of many states.

See, e.g., COLORADO CONSTITUTION, article II, section 6 ("justice should be administered without sale, denial or delay"); INDIANA CONSTITUTION, article I, section 12 ("[j]ustice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay"); OREGON CONSTITUTION, article I, section 10 ("justice shall be administered, openly and without purchase, completely and without delay"). **The founding fathers of our State were also concerned that justice should be prompt, as expressed in the plain language of article I, section 10, of the WASHINGTON CONSTITUTION, which to this day retains its original language.**

See JOURNAL OF WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, at 499 (Beverly Paulik Rosenow ed., 1962). The *raison d'etre* behind the historical and widespread constitutional prohibition against unnecessary delay in the administration of justice is the right of the accused to dispose of pending charges so as to avoid the disruption, uncertainty, and emotional torment which surely must accompany life under the Sword of Damocles. This phrase originates in Greek mythology which tells of a sword suspended by a single hair over the head of Damocles while he was seated at a sumptuous banquet. The Sword of Damocles has come to represent impending disaster.

The majority's decision to remand means that if the trial court again convicts the accused, properly supported by written findings, and the defendant subsequently exercises his right to appeal from that new judgment of conviction, it will certainly be another year or more before the matter is finally put to rest. I posit a lapse of any amount of time by the State for failure to enter Written Findings & Conclusions of Law to Support the Exceptional Sentence against Mr. Horton is "unnecessary delay" and is prejudicial for the same reason that article I, section 10, condemns delay in and of itself.

Mr. Horton is therefore requesting that he be remanded to the King County Superior Court to be sentenced within the Standard Sentencing Range. Remanding for the Court to enter written findings and conclusion would only further delay and prejudice Mr. Horton.

2. State Entering Evidence During Voir Dire.

The Sixth Amendment to the United States' Constitution mandates that a criminal defendant shall enjoy the right to a trial by an impartial jury. U.S. Const., amends. VI and XIV. Our State constitution guarantees the same right. WASH. CONST., art I, § 22. Our Courts have adopted Criminal Rule 6.4 to govern the process of selecting a jury. Rule 6.4(b) defines the purpose of voir dire:

A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges.

Voir dire is not to be used for educating the jurors about the particular facts of the case. State v. Frederiksen, 40 Wash. App. 749, 700 P.2d 369 (1985) (citations omitted). Under

this rule, questioning jurors about a fact of a particular case draws undue attention to the fact, thereby educating the jury about that fact and inviting the jury to pay particular attention to that fact when adduced at trial. *See generally State v. Badda*, 63 Wash.2d 176, 385 P.2d 859 (1963) (during the voir dire the prosecutor stated it had no choice in cases it brings to trial so long as it believes a felony has been committed and know the persons who committed the offense; found improper). In finding the prosecutor's statement's during voir dire improper, the Badda court reasoned

The prosecuting attorney's assertion implies that there reposes in the state a wisdom or knowledge superior to and apart from that of it offers a knowledge, both impersonal and damning, which sets in motion the exorable process of prosecution where guilt is known.

Id. at 180.

Similar reasoning would apply in Mr. Horton's case. Here, the prosecutor's questioning in voir dire about whether a punched ignition would be an indicator of a stolen vehicle drew the jury's attention of the punched ignition in the case before the court. The question educated the jurors about the particular facts of this case, and thus invited the jury to conclude guilt before hearing all facts of the case. The State invited the jury to pay particular attention to the punched ignition when it was later introduced by the State at trial. This deliberate action denied Mr. Horton his right to an impartial jury.

3. State Witness, Officer K. Gendreau's Improper Testimony Against A Court Order.

This Court suppressed the mention of the make and model (Ford Mustang) of the vehicle from the 2004 incident. Officer Gendreau was the only officer to testify regarding this prior incident. Officer Gendreau has years of experience as a law enforcement officer.

The record reflects that the prosecutor informed the Court that she instructed Officer Gendreau^{NOT TO} mention the make and model from the 2004 incident. It was the same make and model as the vehicle before the Court in this case. Specifically mentioning the make and model of the 2004 vehicle, *despite the Court's express order not to do so*, raises the query that "if [the defendant] did it before, he probably did it this time." See State v. Pam, 98 Wn.2d 748, 761, 695 P.2d 454 (1983). His statement invited the jury to speculate if Mr. Horton was in possession of stolen Ford Mustang before, then he has the propensity to be in possession of a stolen Ford Mustang in the instant case.

The question is not whether the statement by Officer Gendreau and the question by the State during voir dire was inadvertent or deliberate. State v. Weber, 99 Wash.2d 158, 164, 659 P.2d 1102 (1983). The trial judge must consider the remark prejudiced the jury, thereby denying the defendant his right to a fair trial. Id. Relying on the Weber decision, the Court of Appeals enumerated the criteria for whether a remark prejudiced the jury and denied the defendant his right to a fair trial: the seriousness of the irregularity; whether the statement in question is cumulative of other evidence properly admitted; and, whether the irregularity could be cured by an instruction to disregard the remark. State v. Escalona, 49 Wash.App. 251, 244, 742 P.2d 19 (1987). In Escalona the

defendant was charged with assault 2nd degree with a deadly weapon. His only issue on appeal was the denial of his motion for mistrial at the trial level when the victim testified regarding Escalona's "records." The trial court granted the defense motion to exclude any mention or reference to Escalona's prior conviction for the same crime. The victim testified and volunteered that Mr. Escalona has a record and had stabbed someone. The defense counsel objected, moved to strike, and the court instructed the jury to disregard.

On appeal, Division One analyzed the victim's statement under Weber. It found: (1) the unsolicited statement that defendant had previously stabbed someone as extremely serious and (2) the victim's statement was not cumulative or repetitive of other evidence. The Court reasoned, in part, on point one that the rules of evidence embody an express policy against admission of evidence of prior crimes except for very limited circumstances and limited purposes. The Court wrestled with their point. The Court reasoned the jury would conclude the defendant acted in conformity with the assaultive character he demonstrated in the past. State v. Escalona, 49 Wash.App. 251 (1987). The weakness of the State's case in Escalona, the seriousness of the irregularity, and the logical relevance of the statement, led the Court to conclude that the court's instruction could not cure the prejudicial effect of the victim's statement.

In State v. Condon, while there was no reference to a prior crime, the statement at issue was that the defendant had been in jail. The Condon court observed that in State v. Escalona, *supra*, and , State v. Wilburn, 51 Wash.App. 827, 755 P.2d 842 (1988), *overruled on other grounds*, the improper statements indicated that the defendants had

committed crimes for which they were on trial. Thus, the statements were extremely prejudicial because it was likely that the jurors would conclude the defendant had a propensity for committing that type of crime.

In State v. Ragan, 22 Wash.App. 591,593 P.2d 815 (1979), the Court of Appeals found where a witness inadvertently and vaguely referred to defendant's felony-murder conviction in his partially responsive answer to prosecutors proper question where there was no evidence that significance of remark was clear to jury and where defense promptly objected, the jury instructed to disregard, *and* where defendant subjected himself to cross-examination on the inadmissible, prior conviction by taking stand for purpose of denying his guilt of the charged offense, it was not error to deny a defense motion for mistrial.

But Mr. Horton's is distinguishable. First, in Ragan the witness was a layperson. In this case, the witness was a professional law enforcement officer. This permits the inference that the officer, with his years of experience, knows how to abide by the Court's Order regarding limitations of testimony. Second, the significance between the statement by Officer Gendreau and the charged case was the exact make and model of the car. *See State v. Pam, supra*. And here, the Court noted that the Defense was forced into a position to let the statement pass without drawing further attention or draw more attention

to it by requesting a curative instruction. And finally, Mr. Horton did not testify and deny the prior incident.

The Ragan Court did not address the ramifications when a professional witness clearly and directly testifies about a prior bad act of a defendant that is significant to the case before the jury and where there are facts identical in the prior bad act to the charges before the jury. It is safe to reason that such testimony would impact a Defendant's right to a fair trial and be a basis for a new trial.

In the present case, the remark offered was that the car in the 2004 incident was a Ford Mustang. The seriousness of the irregularity - the reference to the 2004 stolen vehicle as a Ford Mustang together with the improper question made during voir dire regarding a punched ignition - underscored and emphasized the inclinations of Mr. Horton's behavior. The cumulative effect of these statements in the current case improperly invited the jury to conclude that Mr. Horton acted on this occasion in conformity with his prior behavior by possessing a stolen vehicle in the past. Not just any stolen vehicle but instead, a stolen Ford Mustang which is the make and model of the vehicle in this instant case. They are not cumulative of evidence properly admitted. Officer Gendreau was the only witness to testify about the 2004 incident. While it is not "legally relevant" (namely due to its prejudicial effect) it impressed upon the minds of the

jurors the logical relevance of the fact, and as such, despite any admonition from the Court, it was extremely difficult, if not impossible, for the jury to disregard this fact. Lastly, the Court observed at the time Defense made the argument for mistrial that the Defense was put in this position by the State. While the record contains the exact wording, the Defense recalls the Court mentioned that the Defense was put in the position by the State and any instruction would draw further attention to Officer Gendreau's improper comments.

For these reasons and the cumulative error exhibited by the State, the Appeal Court should dismiss this case against Mr. Horton or grant a new trial.

4. The State Engaged in Burden Shifting.

In a criminal case, the State bears the entire burden of proving each element of its case beyond a reasonable doubt. State v. Traweek, 43 Wash.App. 99, 106, 107, 715 P.2d 1148, *review denied*, 106 Wash.2d. 1007 (1986), *disapproved on other grounds*, State v. Blair, 117 Wash.2d 479, 491, 816 P.2d 718 (1991) (Citing In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25L.Ed.2d 368 (1970)). The defendant has no obligation to produce any evidence. "A prosecutor cannot comment on the lack of defense evidence because the defendant has no duty to present evidence." Under appropriate circumstances the prosecution may comment on a defense failure to call a witness under the missing witness

doctrine. *State v. Blair*, 117, Wash.2d 479,491,816, P.2d 718 (1991) Those circumstances were not present in this case.

During the State's closing argument, the State mentioned that the jury heard no other evidence of another person in the vehicle. The implication of this statement conveyed that Mr. Horton did not present any evidence of another person in the vehicle, and thus did not prove he was innocent. This statement invites the jury to infer that because Mr. Horton did not produce any evidence of another person in the vehicle on February 19th, 2008, that he must be guilty. This statement clearly shifts the burden of disproving the State's case.

5. Confusing and unclear jury instruction in jury instruction number II.

Criminal defendant in state court is guaranteed impartial jury by Sixth Amendment as applicable to states through Fourteenth Amendment, and principles of due process also guarantee defendant impartial jury. *Ristaino v Ross* (1976) 424 US 589, 47 L Ed 2d 258, 96 S Ct 1017 (criticized in *Hernandez v State* (1999) 357 Md 204, 742 A2d 952)

Officer Gendreau was a State witness. This Officer gave testimony regarding a prior bad act from 2004, where the Defendant Mr. Horton was observed by this officer exiting a stolen Ford Mustang. The Mustang was involved in a pursuit which ended in a wreck. Mr. Horton was injured and taken into custody and subsequently charged and convicted for this crime. Officer Gendreau collected photographic evidence. (Mr. Horton on a gurney; and pictures of the Mustang's punched ignition/steering column.) The Court in the instant case

allowed this Officer to testify regarding this past bad act and the photographic evidence was entered by the Court and was passed around to the jurors for review as the Officers gave his testimony however, the Officer was instructed by the Court to not mention the make or model of the vehicle in the 2004 arrest, as it was a Ford Mustang and the vehicle in the instant case was also a Ford Mustang. Against the Court Order Officer Gendreau did mention the make and model of the vehicle. Defense objected. As a result of this, the Court determined that the Officer's testimony was prejudicial and not only struck the testimony from the record but also removed the photographic evidence without notifying the jury that the photographs had been removed.

Jury instruction number 2 instructed the jury to disregard Officer Gendreau's Testimony, but failed to instruct the jurors to disregard the photographic evidence in relation to the testimony stemming from the 2004 incident. Jurors are presumed to follow a Courts Order to disregard evidence if instructed, but a juror cannot be expected to disregard evidence they have reviewed if the Court fails to give that specific instruction. And as such it is likely to conclude that a jury will consider these photographs they viewed as part of the case because they were not informed to disregard them.

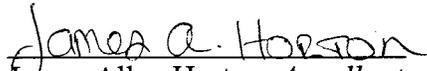
Mr. Horton has a right to an impartial jury. The fact that the jurors were not instructed to disregard evidence that the Court had struck from the record, tainted the jury and prejudiced Mr. Horton to his fundamental right protected by the Sixth Amendment. The right to fair trial.

CONCLUSION

1. The State failed to provide written findings and conclusions to support Mr. Horton's Exceptional Sentence. This Court will find this sentence is not supported by the record, and entering facts and conclusions at this point would prejudice Mr. Horton's right to *due process without delay*. Because of this, Mr. Horton must be remanded to the King County Superior Court to be sentenced within the standard range.

2. The cumulative error committed by the State during trial in this case has deprived Mr. Horton of his right to a fair trial. Accordingly, the Court should dismiss the case against Mr. Horton for government misconduct. Alternatively, the Court should set aside the verdict and grant a new trial.

Respectfully submitted this 11th, day of December 2009.


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