

64731-8

64731-8

NO. 64731-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN BINNS,

Appellant.

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

The Honorable Anita L. Farris, Judge

BRIEF OF APPELLANT

LENELL NUSSBAUM
Attorney for Appellant

Market Place One, Suite 330
2003 Western Ave.
Seattle, WA 98121
(206) 728-0996

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct and violated due process during jury selection by asking improper questions.

2. The trial court erred in failing to restrict the prosecution from asking improper questions during voir dire.

Issues Pertaining to Assignments of Error

1. May the state ask potential jurors questions during voir dire incorporating the facts of the case, inviting the jury to believe the charged crime had occurred, and essentially arguing its theory of the case before any evidence is presented?

2. Did the prosecution's improper questions in this case violate appellant's right to due process and a fair trial?

3. Should the court sua sponte have restricted the prosecution's questions during voir dire?

B. STATEMENT OF THE CASE

Justin Binns was acquitted of one count and convicted of three counts of child molestation in

the first degree for molesting E.D., his girlfriend's daughter.

1. Substantive Facts

In the summer of 2007, after a year of dating, Kimberly Dodd moved into Justin Binns's home in Marysville. She brought with her two daughters, E.D., almost 11, and K.D., age 15. They shared the home with Justin's mother, Jeanette. Justin's two daughters, ages 7 and 9, also were there on weekends. RPI¹ 181-85, 127-30; RPII 25-27.

The house had two stories and four bedrooms. Justin and Kim slept upstairs. E.D. and K.D. shared a room and bunkbeds downstairs. Jeanette also had a bedroom and sitting room downstairs. RPI 131-32; RPII 27, 38.

Kim would drive K.D. to and from high school in Bothell. RPII 26, 36. E.D. would walk to school in the morning, and either walk home from school or call Justin to ask for a ride. RPII 37; RPI 134.

¹ "RPI" indicates the two volumes (sequentially paginated) of the Report of Proceedings from October 5 & 6, 2009. "RPII" is the Report of Proceedings from October 7, 2009.

E.D. slept very heavily. RPII 40. She wrapped herself tightly, like a cocoon, in five to seven blankets every night. She rolled against the back wall to sleep. She slept surrounded by up to forty stuffed animals, including a sheep dog that measured two feet by three feet. She slept on the upper bunk, which was more than 5'4" off the ground. RPI 149-50, 163-65, 175.

K.D. slept on the lower bunk. Her mattress was about six inches wider than the upper bunk, projecting further into the room. RPI 164-65.

Typically Kim and Justin would tuck the girls into bed together at bedtime. After the adults had some time alone upstairs, Justin often went downstairs again to check on the girls. RPII 29-30. This was particularly true during the spring of 2008, after they had a prowler. RPI 233.

E.D. had problems with wetting the bed. RPI 140; RPII 39-40. Justin was the first member of the household up in the morning. He typically left for work at Boeing at 5:00 a.m. He would check whether E.D. had an accident before he left. Then Kim would have time to strip the bed and put the

sheets in the washer before she left for work. RPI 134; RPII 31.

2. "Nap" Incident

One evening late in 2007, E.D. claimed Justin put his hands on her private area while she was sleeping on his bed. Her recollection of the event differed significantly from that of her mother and sister.

E.D. recalled she took a nap on Justin's and Kim's bed because it was the "comfiest." RPI 133. At the time, she remembered Kim was in the living room, Justin was cooking on the patio. She remembered it was about 5:00 or 6:00 p.m. RPI 159.

E.D. testified she awoke at 6:30 p.m. to find Justin was in the bed with her under the covers. His hand was over her clothes but between her legs. She was lying on her side; he was snoring, lying on his side behind her. His hand did not move. She did not feel any other part of his body touching hers. She lay there 10-15 minutes before getting out of the bed. RPI 134-36.

E.D. testified she rolled over until she fell out of the bed. Then "I silently creeped around the bed until I got out of the door and closed the

door silently and went into the living room." She immediately told her mother what happened. After talking 5-7 minutes, her mother got upset and told E.D. to go downstairs while she went in to talk to Justin. RPI 167-69.

E.D. testified they had no more conversations about this incident. She did not talk to K.D. about it. RPI 137.

Kim, E.D.'s mother, recalled that evening she was working on the computer in the bedroom she shared with Justin. Justin had gone to bed to be able to get up early for work. It wasn't E.D.'s bedtime yet, so she was lying on the bed talking with Kim. Then E.D. fell asleep. Kim woke E.D. at 9:00 p.m. to go to her own bedroom to sleep. RPII 33-34.

E.D. went into the bathroom. When she came out, she was upset and crying. She told Kim that Justin had touched her in her private area. RPII 28.

Kim woke Justin and asked him what happened. He had been asleep and didn't know of anything that had happened. RPII 28-29.

They held a family meeting. K.D. recalled E.D. told her and their mother that Justin had touched her. Kim talked to Justin, then again with the girls. After this family meeting, they all decided it was an accident. RPI 198; RPII 28-29.

Kim explicitly told both girls if anything like that ever happened, to be sure and tell her. RPI 198. K.D. specifically remembered this discussion, what to do if something happened, and that E.D. was there when they discussed it. RPI 201.

3. Report to Coach

On a Monday in May, 2008, E.D. told her track coach that her mother's boyfriend was "harassing" her. When the coach asked if she meant joking or teasing her, E.D. said no, she meant touching her between her legs. E.D. said she'd told her mother and sister repeatedly what was happening, and she told her dad. She said the last time it happened was the night before, Sunday. The coach reported the conversation to CPS. RPI 8-10.

After making this report to her coach that day, E.D. called Justin and asked for a ride home. RPII 37.

4. Allegations

E.D. testified that in March, 2008, Justin came into her bedroom about 11:00, after she had gone to sleep. Standing on the floor beyond the wider mattress on the lower bunk, he reached 5'4" to the top bunk, over all her stuffed animals, pulled her blankets out from around her, reached under her pajamas, and touched her between her legs. After 10-15 minutes she sat up, told him to stop, and said she had to go to the bathroom. When she returned, he had gone. K.D. was asleep in the lower bunk while all this occurred. RPI 144-46.

E.D. testified the same thing happened two days later, but K.D. wasn't there. RP 148. Then again the next Monday, when K.D. was there again. RPI 151. Then it "kept happening." RPI 153.

Despite what she told her coach, E.D. had not told her family that Justin was touching her. RPI 147, 150, 153.

E.D. and K.D. were very close. E.D. shared her secrets with K.D. E.D. often told K.D. about things that bothered her. K.D. was very vocal and feisty; she was quick to talk or act if E.D. were wronged in any way. E.D. knew if K.D. heard that

Justin was molesting her, she would have told their mom and made it stop. RPI 139-40, 166-67; RPII 42.

But E.D. did not tell K.D. of any touching. K.D. was surprised to learn of the report to the coach. RPI 199. K.D. asked E.D. why she hadn't told her; E.D. didn't know why. RPI 192.

E.D. came to Kim immediately with complaints if Justin disciplined her or was "mean" to her. After the "nap incident," E.D. immediately told Kim. But E.D. never told her of any touching after that. RPII 36, 42.

E.D. had not told her father about these allegations. He did not hear of it until CPS contacted him. RPI 205-07.

There was no physical evidence. RPI 218-28.

A detective interviewed Justin Binns. Justin acknowledged he checked on the girls when they were asleep, and specifically to see if E.D. had wet the bed. But he denied any improper touching. RPI 230-38.

5. Charges

The state charged Justin Binns with two counts of child molestation in the first degree. When he

chose to go to trial, it added two more counts for the same charging period. CP 66-69.

6. Voir Dire

The court conducted jury selection by the "struck" method, permitting each counsel a block of time to question any and all members of the venire. RPI 14-17, 21-22.

During voir dire, the prosecutor asked:

Well, as you know when the judge read the charges, in this case Mr. Binns is charged with sexually touching an 11-year-old girl, and you'll hear in this case it was the daughter of his girlfriend at the time. Could anybody think why a 30-year-old man might want to touch an 11-year-old girl in a sexual way? Can anyone wrap their brain around that, why that might happen?

Several jurors responded they did not know why.

RPI 39. The prosecutor continued:

And this may sound like a silly question, but does anybody think it's okay for a man of that age to be touching a child of that age in a sexual way? Because there are some folks out there that think that's okay. Anyone in this room think along those lines?

RPI 40-41. No response shows on the record. Later the prosecutor became more specific:

The young girl in this case -- her name is [E.D.]. You heard the judge read that name a little while ago -- is now 13 years old. Who here has ever been 13 years old before? **Do you think it's easy**

for a 13-year-old girl to communicate in a room full of adults that she doesn't know? I see some heads shaking no. Juror No. 6, what do you think?

JUROR NO. 6: I think it would be very hard, very intimidating to come forth and talk about especially this subject matter.

MR. DICKINSON: Okay. Even if the subject matter wasn't what it is in this case, do you think when you were 13, sitting in a room full of strange adults, it would be easy for you to talk to them?

JUROR NO. 16: Depends on the 13-year-old. I have a niece who is very comfortable with it.

MR. DICKINSON: Okay. What about you when you were that age?

JUROR NO. 16: I wouldn't have been comfortable with it.

MR. DICKINSON: Juror No. 12, sir, what do you think?

JUROR NO. 12: It's hard enough just being here right now talking in front of people. **So yeah, that would be awful.** That would just be hard to share something like that.

...

MR. DICKINSON: Okay. Well, let's talk a little bit about 13-year-olds. **Does anyone think that a 13-year-old is any less credible or any less believable than an adult in general?** We're just talking in general here. Juror No. 15, ma'am, what do you think?

JUROR NO. 15: I think that when you're that age, you're pretty honest. At least I was. I don't know about other 13-year-olds.

RPI 43-45 (emphases added). Other jurors responded sometimes they were and sometimes not. The prosecutor continued:

MR. DICKINSON: Let's focus a little narrower. **Let's talk about a 13-year-old**

talking about something that was sexually done to her by a grownup in her life. Juror No. 1, sir, do you think that would be difficult for a child of that age to talk about, generally speaking?

JUROR NO. 1: **Very definitely, yes.**

MR. DICKINSON: And why do you say that?

JUROR NO. 1: **Well, it's out of the ordinary. It's something very personal and private and embarrassing to talk about.**

MR. DICKINSON: Juror No. 7, ma'am, what do you think?

JUROR NO. 7: I think it's difficult for adults to talk about **when they've been sexually violated**, so I think it would be worse for a 13-year-old who has no experience with that.

...

MR. DICKINSON: Juror No. 26, ma'am, what do you think, a 13-year-old talking about a sexual subject involving a grownup?

JUROR NO. 26: I think, generally speaking, that would be the most difficult. She's still maturing, her body is maturing, and usually you find that very, very difficult.

MR. DICKINSON: Juror No. 27, ma'am, what do you think?

JUROR NO. 27: I think it would be very humiliating.

RPI 47-48 (emphases added).

7. Verdicts and Sentence

The jury found Mr. Binns not guilty of Count I. It found him guilty of Counts II-IV. The Court sentenced him to an indeterminate sentence of life in prison with a minimum term of 114 months. CP 42-45, 21-36.

This appeal timely follows. CP 4.

C. ARGUMENT

1. THE PROSECUTOR'S QUESTIONS DURING VOIR DIRE WERE IMPROPER.

The United States and Washington Constitutions guarantee a defendant the right to a fair and impartial jury. U.S. Const., amends. 5, 14; Const. art. I, §§ 21, 22. To ensure this right, a party may excuse any prospective juror for cause. RCW 4.44.150, .190; CrR 6.4(c). Additionally, each party may exercise a specified number of peremptory challenges against potential jurors without giving a reason. RCW 4.44.140; CrR 6.4(d); State v. Vreen, 99 Wn. App. 662, 666, 994 P.2d 905 (2000), aff'd, 143 Wn.2d 923, 26 P.3d 236 (2001).

(b) 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. ... The judge and counsel may ... ask the prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

CrR 6.4(b).

The courts have explained what is a proper purpose of voir dire:

The voir dire scope should be coextensive with its purpose, which is to enable the parties to learn the state of mind of the prospective jurors, so that they can know whether or not any of them may be subject to a challenge for cause, and determine the advisability of interposing their peremptory challenges.

State v. Frederiksen, 40 Wn. App. 749, 752, 700 P.2d 369 (1985) (citations omitted). But the court continued to describe the improper use of voir dire:

Moreover,
it is not "a function of the [voir dire] examination ... to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law."

Id.

From the earliest days, our courts have held it is improper to question potential jurors about how they would assess the credibility of specific witnesses in the particular case. For example, it was improper to question jurors how they would view the testimony of the defendant, given his interest in the outcome of the case.

...[W]hen the defendant enters a witness stand he enters it under the same rules and on the same footing as any other witness, and he has no right to attempt to ascertain in advance what the jury may think of his credibility as a witness.

State v. Everitt, 14 Wash. 574, 575, 45 P. 150 (1896). The Supreme Court observed the trial court would instruct the jury on how to consider the credibility of witnesses.

It must be presumed that the jury will obey this instruction of the court and the counsel has no right to ask a juror in advance of the instruction which the law imposes upon the court as a duty to give, what the juror's opinion is concerning such instruction. The juror is not presumed to know the rules of criminal procedure nor what the legal effect of the conduct of the defendant on the trial will be. Information on this point is conveyed to him by the court. To the court he must look for instruction and by the court he must be guided in matters of this kind.

Id., cited with approval in State v. Bromley, 72 Wn.2d 150, 432 P.2d 568 (1967) (improper for defense counsel to ask potential jurors whether a defendant's prior criminal conviction would prejudice him or her in determining guilt or innocence).

In State v. Holedger, 15 Wash. 443, 46 P. 652 (1896), the court disapproved the following questions in voir dire:

"Would you attach more importance or credibility to the word of a preacher outside of court than any other gentleman?"

"Would you attach more credence to the testimony of Dr. McInturff, a minister of the gospel, than that of any one else?"

The court dispensed with the issue summarily. "These questions are so apparently improper and irrelevant that we do not feel called upon to enter into a discussion of them." Id., 15 Wash. at 448.

In Horst v. Silverman, 20 Wash. 233, 55 P. 52 (1898), the court similarly excluded questions asking the jurors about witness credibility:

For the purpose of enabling counsel to intelligently exercise his right of peremptory challenge, it was proper enough to permit the question to be asked of the juror whether he entertained any prejudice against the people of the Jewish faith. This the court permitted, but the next question, viz., "Would the testimony of witnesses who professed that faith receive as much credit as members of any other faith?" was, we think, very properly ruled out on the authority of State v. Holedger

Id., 20 Wash. at 234.

Here the prosecutor asked if jurors would think a 13-year-old was more or less credible than

an adult, eliciting a response that at least one juror believed 13-year-olds were quite honest -- at least she was at that age.² But asking jurors to consider credibility based on age is prohibited by Holedger and Horst, supra.

The prosecutor also asked the jurors whether they thought there was any reason for an adult man to have sexual contact with a child, why a man would do it, and whether they believed "it's okay" for a man to sexually touch a child. These questions have no way of eliciting a response useful for jury selection.

As a matter of law, there is no valid reason for an adult to sexually touch a child. It is not "okay." State v. Abbott, 45 Wn. App. 330, 334, 726 P.2d 988 (1986) (Legislature imposed strict criminal liability upon adult perpetrators of sexual contact with children). But, as in Everitt, the court would instruct the jury on this law. It was improper for the prosecutor to ask these questions during voir dire.

² The prosecutor already had asked the jurors to think of when they were 13. RPI 43.

The prosecutor's later questions were even more improper and more prejudicial: whether jurors believed a child would find it difficult to testify in general, and specifically to testify about "something that was sexually done to her by a grownup in her life." The responses varied from "very intimidating" and "awful," to "very personal and private and embarrassing," to incorporating "when they've been sexually violated." RPI 43-48.

By asking these questions, the prosecutor succeeded in eliciting enormous sympathy for the complaining witness. He also succeeded in getting the jury to think of the crime as completed: "something that **was sexually done to her by a grownup in her life;**" "when they've been sexually violated."

The issue in this case was whether a crime occurred. There was no physical evidence. There were no eye witnesses to any crime. The jury had the task at trial to consider only the credibility of the witnesses, and of the complaining witness in particular.

In State v. Claflin, 38 Wn. App. 847, 690 P.2d 1186 (1984), the court roundly condemned the

state's closing argument that served no purpose but to evoke sympathy for the child witness in that case. These questions were not as blatant as the argument in Claflin, but jury selection is not a time for any argument at all. It is not a time to evoke the jury's sympathy for the state's witness. It is not the time to inform the jury that the crime has occurred. It is not the time to suggest a jury begin by thinking the crime has occurred. That is a matter the state has to prove, with evidence, not with questions in voir dire.

The only other reason the state had for asking these questions of potential jurors was to indoctrinate them to reasons why they should believe the state's witness. If the jury would perceive aspects of the witness's demeanor as otherwise giving reason to doubt her credibility, it would now simply attribute those aspects as "difficulty" because having to testify to "something that was sexually done to her by a grownup in her life" was "awful" and "humiliating."

These were improper purposes for voir dire:

to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for

or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law.

State v. Frederiksen, supra. There can be no other purpose for the state to ask these questions, and nothing else was possibly accomplished.

2. THE STATE'S IMPROPER QUESTIONS WERE MISCONDUCT AND DENIED APPELLANT DUE PROCESS AND A FAIR TRIAL.

The prosecutor's duty is to ensure a verdict free of prejudice and based on reason.

The district attorney is a high public officer, representing the state, which seeks equal and impartial justice, and it is as much his duty to see that no innocent man suffers as it is to see that no guilty man escapes. In the discharge of these most important duties he commands the respect of the people of the county and usually exercises a great influence upon jurors. In discussing the evidence he is ... given the widest latitude within the four corners of the evidence by way of comment, denunciation or appeal, but he has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.

State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct can deny due process and a fair trial. U.S. Const., amend. 14; Const., art. 1, § 3; Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935);

Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983),
cert. denied, 469 U.S. 920 (1984).

The vast majority of prosecutorial misconduct cases arise from improper arguments of counsel. In this case, however, the prosecutor's questions during voir dire essentially amounted to improper argument. Prior case law clearly made such questions improper. Frederiksen, Holedger, Horst, supra. Thus the prosecutor was aware of the law.

In State v. Charlton, 90 Wn.2d 657, 660-61, 585 P.2d 142 (1978), the Court concluded the prosecutor was aware of spousal privilege:

Yet the prosecutor endeavored to suggest, by means of a comment to the jury, that petitioner was concealing or withholding testimony. The inference which he anticipated the jurors might draw was that the spouse's testimony would be unfavorable to petitioner and consistent with his guilt. ... **We can only conclude, therefore, that the comment upon which it was hoped the jurors would ground the desired, impermissible inference was mindful, flagrant, and ill-intentioned conduct.** Petitioner did not, therefore, waive his right to object to conduct of this sort by failing to request a curative instruction.

Charlton, 90 Wn.2d at 663-64 (emphases added).

Here, as in Charlton, the prosecutor was aware that the voir dire questions were improper. Yet he "endeavored to suggest, by means of comments to the

jury," that they should presume the child "had been sexually touched by a grownup in her life." By asking these questions, the prosecutor's comments were mindful, flagrant, and ill-intentioned conduct. As in Charlton, appellant did not waive his right to raise this issue although his counsel failed to object.

These questions denied Mr. Binns due process and a fair trial.

3. THE COURT ERRED BY FAILING TO LIMIT THE STATE'S QUESTIONS DURING VOIR DIRE.

A court may sua sponte raise an issue dealing with jury selection. State v. Evans, 100 Wn. App. 757, 998 P.2d 373 (2000) (may raise Batson³ issue sua sponte); State v. Vreen, supra.

Failure to act in such a situation runs the substantial risk of casting doubt on the fairness of the judicial process. Taking appropriate action in such a situation promotes respect for the law. And taking such action is consistent with a court's considerable discretion in conducting judicial proceedings in a way that is fair to all.

Evans, 100 Wn. App. at 767.

When the state begins arguing its case to the jurors during voir dire, and asks questions with no

³ Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

logical purpose but to evoke sympathy for the state's complaining witness and to presume the crime has been committed, a court must "take appropriate action." In this case, that action would have been to interrupt the state's questioning and redirect the prosecutor to the proper purpose of voir dire.

Furthermore, the court at no time instructed the jury to disregard the questions counsel asked during voir dire. Rather the court impressed on the jury the seriousness of the process: "the voir dire or jury selection process ... is an important part of the trial and the law requires that you be sworn before questions are asked of you." RP 20.

The court's failure to limit the state's questions, asked solely to evoke sympathy and to persuade the jury a crime had occurred, denied Mr. Binns due process and a fair trial.

D. CONCLUSION

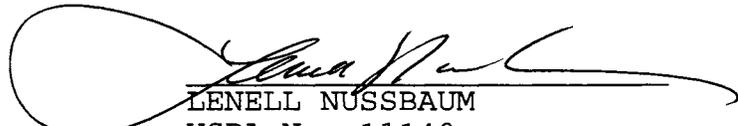
The state asked repeated questions during jury selection that were improper, geared to persuade the jury the charged crime had occurred and to be sympathetic to the state's complaining witness, instead of for valid purposes of jury selection.

This misconduct, and the court's failure to intervene and restrict such improper questioning, denied appellant due process and a fair trial.

For these reasons, Mr. Binns respectfully asks this Court to reverse his convictions and remand for a new trial.

DATED this 6th day of July, 2010.

Respectfully submitted,


LENELL NUSSBAUM
WSBA No. 11140
Attorney for Appellant

DECLARATION OF SERVICE

ALEX FAST declares to the Court:

On this date, I served the following parties by depositing in the United States Mail, postage prepaid, the attached Brief of Appellant addressed as follows:

Original and one copy to:

Mr. Richard Johnson, Clerk
Court of Appeals, Division One
One Union Square
600 University Street
Seattle, WA 98101

Copy to:

Mr. Seth Fine
Snohomish County Prosecutor's
Office
3000 Rockefeller
Everett, WA 98201

Mr. Justin Binns
334963
Coyote Ridge CC
P.O. Box 769
Connell, WA 99326

I declare under penalty of perjury under the laws of the state of Washington that the above statement is true.

July 6, 2010,
Seattle, Washington



ALEX FAST