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No. 65976-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GALMESA SHUBE ELEMO,

Appellant.

2011 JUN 22 PM 4: 32

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

The Honorable Susan J. Craighead
The Honorable Ronald Kessler

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERRORS

1. Mr. Elemo's art. I, § 22 rights under the Washington Constitution were violated when the prosecutor during closing argued Mr. Elemo tailored his testimony.

2. The admission of the identity of the alleged perpetrator violated the hue and cry doctrine.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Article I, section 22 of the Washington Constitution guarantees among other rights, the right to appear and defend the action, the right to testify, and the right to confront witnesses. Arguing to the jury at closing that the defendant tailored his testimony violates art. I, § 22. Here, the prosecutor argued on several occasions during closing that Mr. Elemo tailored his testimony. Is Mr. Elemo entitled to reversal of his convictions and remand for a new trial?

2. Under the hue and cry exception to the hearsay rule, testimony is limited to the disclosure by the victim; the identity of the perpetrator as well as details of the assault are not admissible. Where testimony admitted under the hue and cry exception exceeded that doctrine when the witness disclosed the victim identified Mr. Elemo as the perpetrator and also disclosed details of

the assault, is Mr. Elemo entitled to reversal of his conviction for first degree child molestation and remand for a new trial?

C. STATEMENT OF THE CASE

N.A., Galmesa Elemo's stepdaughter alleged that when she was 15 years old, Mr. Elemo attempted to have sex with her on several occasions. 7/12/2010RP 13-40. The State subsequently charged Mr. Elemo with one count of third degree child molestation once N.A. made her disclosure to the authorities. CP 1-2.

M.G., Mr. Elemo's wife, Asha Gobana's, stepsister, alleged on one occasion, Mr. Elemo escorted her into his room and rubbed against her until he ejaculated. 7/13/2010RP 107-29. Based upon information provided to the police indicating M.G. was 14 years old, the State initially charged Mr. Elemo with one count of child molestation in the third degree. CP 1. Prior to trial, medical evidence came to light that called into question M.G.'s age, suggesting she was actually 11 years old when the incident occurred. Over Mr. Elemo's objection, the State moved on the first day of trial to amend the information to charge first degree child molestation, and in the alternative, second and third degree child molestation. CP 16-17.

Following a jury trial, Mr. Elemo was convicted as charged of one count of third degree child molestation and one count of first degree child molestation. CP 19-20.

D. ARGUMENT

1. THE PROSECUTOR'S REPEATED ARGUMENTS IN CLOSING CLAIMING MR. ELEMO TAILORED HIS TESTIMONY VIOLATED MR. ELEMO'S RIGHTS UNDER ARTICLE I, SECTION 22 OF THE WASHINGTON CONSTITUTION

During closing argument, the prosecutor repeatedly attacked Mr. Elemo's testimony as lies, and inferred that he had tailored his testimony during trial:

And so then he comes in today and he says, well, you – you got the alibi; I didn't really know; let's blame the interpreter or let's blame the question, that I didn't understand the question. Ladies and gentlemen, you heard him. You heard what he said to you last week, last Thursday, six days, seven nights ago to figure out a new answer for this morning, and here's what happened. I'll tell you what happened.

...
That's what this morning was, the only way that he figured he could come up and dig himself out of that hole, because he didn't get it right, he didn't get the cover-up right, is to come back and tell you – blame it on the interpreter or blame it on all nights or nights [sic], and whatever that was.

...
The plan was, as you heard from the lead-off witnesses from the defense, from Asha and from Jafar, the plan was, say that [M.G.] wasn't there, and he got it wrong. He got it wrong and had seven days

and six nights to think up how he was going to dig his way out of that hole, and that is why he took the stand again and said, well, I didn't understand the question: it was the interpreter's fault, or your questions, or this is what I really meant. That, that, ladies and gentlemen, is a cover-up.

7/21/2010RP 122-23, 152.

a. Under article I, section 22, this form of argument is improper and unconstitutional because it burdens the right to be present and confront witnesses. Article I, section 22 of the Washington Constitution grants criminal defendants the right to present a defense and the right to confront and cross-examine adverse witnesses. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983).¹ Art. I, sec. 22 provides greater protection than the Sixth Amendment's provisions concerning these rights. *State v. Martin*, ___ Wn.2d ___, 2011 WL 1896784 (No. 83709-1, May 19, 2011).²

¹ Article I, section 22 states in relevant part:

"In criminal prosecutions the accused shall have the right to appear and defend, . . . to testify in his own behalf, to meet the witnesses against him face to face . . ."

² Mr. Elemo did not object, but may still raise the issue on appeal. Appellate courts will consider manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a). The error in *Martin* involved a violation of the rights to appear and defend, the right to confront witnesses, and the right to testify, all fundamental constitutional rights under the Washington Constitution. *Martin*, ___ Wn.2d ___.

A claim of the denial of a constitutional right is reviewed *de novo*.
State v. Drum, 168 Wn.2d 23, 31, 225 P.3d 237 (2010).

In *Martin*, the Supreme Court held that a prosecutor violates a defendant's art. I, § 22 rights when the prosecutor accuses the defendant in closing argument of tailoring his testimony when the defendant exercises his right to testify. *Id.* slip op. at 15. The Court distinguished closing argument from cross-examination and held that suggesting that the defendant was tailoring his testimony through questioning on cross-examination did not violate the Washington Constitution. *Id.* slip op. at 15-16.

Here, the prosecutor did not cross-examine Mr. Elemo about the possibility he was tailoring his testimony, but waited to make such a suggestion during closing argument, thus violating Mr. Elemo's art. I, § 22 rights.

b. The prosecutor's repeated claims of tailoring violated Mr. Elemo's art. I, § 22 rights. In *Martin*, the Supreme Court adopted United States Supreme Court Justice Ginsberg's dissent in *Portuondo v. Agard*, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000), in which she concluded a prosecutor's argument that the defendant tailored his testimony violated the Sixth

Amendment.³ *Martin*, slip op. at 14-15. Justice Ginsberg noted that alleging tailoring during closing argument was improper because the jury was unable to

measure a defendant's credibility by evaluating the defendant's response to the accusation, for the broadside is fired after the defense has submitted its case.

Portuondo, 529 U.S. at 78 (Ginsberg, J., dissenting).

This is precisely what occurred in Mr. Elemo's case. The prosecutor did not challenge Mr. Elemo with a tailoring accusation during his cross-examination of Mr. Elemo. Rather, the prosecutor waited until closing argument to argue to the jury that Mr. Elemo tailored his testimony. Under *Martin*, the argument violated Mr. Elemo's art. I, § 22 rights.

c. The violation of Mr. Elemo's constitutionally protected rights was not harmless and requires reversal of his convictions. A constitutional error is presumed prejudicial and the State bears the burden of proving beyond a reasonable doubt that the jury would have reached the same result absent the error.

Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d

³ In *Portuondo*, the Supreme Court held that a defendant's Sixth Amendment rights were not violated by the prosecutor's closing argument which called attention to the fact the defendant had the opportunity to hear all of the witnesses testify and tailor his testimony accordingly. 529 U.S. at 64.

705 (1967); *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The error here was prejudicial.

The jury was forced to decide between two different scenarios: under the State's theory, Mr. Elemo preyed on these girls, while under the defense theory, the girls' claims were the product of Asha's family's enormous dislike of Mr. Elemo. The claim of tailoring undoubtedly caused the jurors to dismiss Mr. Elemo's proffer and enhanced the standing of the State's theory. Absent the error, the jury could have reached a very different conclusion. As a result, the error was not harmless and Mr. Elemo is entitled to reversal of his convictions.

2. MR. ELEMO'S RIGHTS WERE VIOLATED
WHEN TESTIMONY EXCEEDED THAT
ALLOWED BY THE HUE AND CRY
DOCTRINE

At the beginning of trial, the State moved *in limine* to admit evidence of M.G.'s disclosure of the molestation by Mr. Elemo under the hue and cry exception to the hearsay rule. 5/3/2010RP 7-18. The State correctly conceded that under the hue and cry doctrine, the evidence was limited solely to the disclosure and did not allow M.G. to testify who was responsible. 5/3/2010RP 18.

The court allowed the hue and cry evidence but limited it to two witnesses. 5/3/2010RP 18.

On September 9, 2009, 12 year-old E.N., M.G.'s niece, testified that she and M.G. were in E.N.'s mother's room talking and M.G. stated that Mr. Elemo had raped her: "She told me that Galmesa had raped her." 7/8/2010RP 145-46. Mr. Elemo immediately objected. 7/8/2010RP 146. The court subsequently gave the jury a limiting instruction regarding the hue and cry exception but did not specifically address the violation of the hue and cry doctrine. 7/8/2010RP 164.⁴

a. The limited exception under the hue and cry doctrine bars testimony regarding the alleged perpetrator. The hue and cry doctrine is an exception to the hearsay rule and allows the State to introduce evidence in sexual assault cases that the victim made a timely complaint to someone after the assault. *State v. Murley*, 35 Wn.2d 233, 236-37, 212 P.2d 801 (1949); *State v. Ackerman*, 90 Wn.App. 477, 481, 953 P.2d 816 (1998). The rule

⁴ The court instructed the jury:

Ladies and gentlemen, I want to give you an instruction at this time. Evidence concerning a statement made to this witness by [M.G.] has been admitted to show that a complaint was made. It is not to be considered by you for the truth of the matter asserted.

7/8/2010RP 164.

excludes details of the complaint, including the identity of the offender and the nature of the act, and only admits evidence that will establish whether or not a complaint was timely. *Murley*, 35 Wn.2d at 237.

The fact of complaint evidence “is not hearsay because it is introduced for the purpose of bolstering the victim’s credibility and is not substantive evidence of the crime.” *State v. Bray*, 23 Wn.App. 117, 121, 594 P.2d 1363 (1979). Evidence of when a witness complains is admissible because one of the underlying questions in a sexual offense case is the credibility of the victim. *Murley*, 35 Wn.2d at 237; *State v. Alexander*, 64 Wn.App. 147, 152, 822 P.2d 1250 (1992).

In *Murley*, the court explained the history of the fact of complaint or “hue and cry” doctrine:

This doctrine rests on the ground that a female naturally complains promptly of offensive sex liberties upon her person and that, on trial, an offended female complainant’s *omission of any showing as to when* she first complained raises the inference that, since there is no showing that she complained timely, it is more likely that she did not complain at all, and therefore that it is more likely that the liberties upon her person, if any, were not offensive and that consequently her present charge is fabricated. Thus, formerly, to overcome the inference, it became essential to the state’s case-in-chief to prove affirmatively that she made timely hue and cry.

35 Wn.2d at 237.

In applying the hue and cry rule, a witness' testimony about what the victim told them may include only the general nature of the act. *State v. Ragan*, 22 Wn.App. 591, 597, 593 P.2d 815 (1979) (allowing testimony by a witness who said the victim reported that he was raped by a man); *State v. Fleming*, 27 Wn.App. 952, 958-59, 621 P.2d 779 (1980) (allowing testimony from witness that victim reported she was raped).

b. The evidence adduced by the State exceeded the hue and cry exception. As noted above, when E.N. testified regarding M.G.'s "hue and cry," she testified that M.G. had reported the sexual assault, but went on to state that M.G. identified Mr. Elemo as the assailant and that he had "raped her," thereby exceeding the hue and cry exception.

c. The erroneous admission of the evidence which exceeded the hue and cry exception was not harmless. An erroneous evidentiary ruling is reversible if there is a reasonable probability that the error materially affected the outcome of the trial. *State v. Calegar*, 133 Wn.2d 718, 727, 947 P.2d 235 (1997).
Testimony about the identity of the perpetrator under the hue and

cry exception may be harmless error. *State v. Ferguson*, 100 Wn.2d 131,136, 667 P.2d 68 (1983).

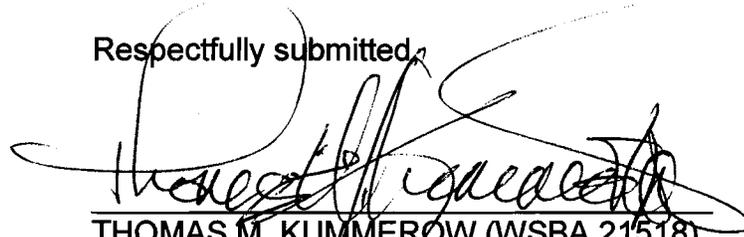
E.N.'s testimony reinforced to the jury the claims that Mr. Elemo assaulted these girls, thus bolstering the claims. Further, the court's generic limiting instruction did not instruct the jury to ignore the allegation regarding Mr. Elemo. Even if the instruction had included such an admonition, it was impossible to cleanse the taint from the jury. See *Easter*, 130 Wn.2d at 238-39 ("A 'bell once rung cannot be unring.'"), quoting *State v. Trickel*, 16 Wn.App. 18, 30, 553 P.2d 139 (1976). Mr. Elemo is entitled to reversal of his conviction for first degree child molestation involving M.G.

E. CONCLUSION

For the reasons stated, Mr. Elemo requests this Court reverse his convictions and remand for a new trial.

DATED this 22nd day of June 2011.

Respectfully submitted,



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DIVISION ONE**

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SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF JUNE, 2011.

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