

No. 66995-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

ARNOLDO ZARATE CORIA,

Appellant.

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

The Honorable Mariane C. Spearman

BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON
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A. ASSIGNMENTS OF ERROR

1. Mr. Zarate Coria's constitutional right to a fair trial, free of undue sympathy or prejudice, was violated when an eleven year-old witness for the State testified while accompanied by a dog provided by the prosecutor's office.

2. Mr. Zarate Coria's right to a fair trial was further violated by prosecutorial misconduct when, without prior notice, and without a meaningful opportunity to object, a witness for the State testified while accompanied by a dog provided by the prosecutor's office.

3. The trial court abused its discretion by failing to inquire into the necessity and lack of prior notice for a State's witness to testify while accompanied by a dog provided by the prosecutor's office.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The constitutional right to a fair trial includes a trial free of undue sympathy or prejudice. Was Mr. Zarate Coria's right to a fair trial violated when an eleven year-old witness for the State testified while accompanied by a dog provided by the prosecutor's office and there was no evidence the dog was necessary to secure the child's testimony? (Assignment of Error 1)

2. The constitutional right to a fair trial also includes a trial free of prosecutorial conduct that is improper and prejudicial. Was Mr. Zarate Coria's right to a fair trial further violated when an eleven year-old witness for the State testified while accompanied by a dog provided by the prosecutor's office, in the absence of prior notice of the dog's presence and a meaningful opportunity to object?

(Assignment of Error 2)

3. A trial court abuses its discretion when it fails to exercise its discretion. Where the court failed to inquire into the necessity of the dog's presence or into the failure of the State to give notice of the dog's presence, did the trial court abuse its discretion?

(Assignment of Error 3)

C. STATEMENT OF THE CASE

On June 27, 2010, Arnaldo Zarate Coria went to the apartment of his estranged wife, Veronica Duarte Antunez, in violation of a court order that prohibited him from contacting his wife or their three children, F.D., J.D., and B.D. 1/31/2011 RP 347; Ex. 26. At the time, Ms. Duarte Antunez was at work, F.D. and J.D. were in the apartment with their aunt, Maria Angeles, and B.D. was with a neighbor. 1/31/2011 RP 314, 347. Ms. Angeles called Ms.

Duarte Antunez who immediately left work and called 911 on her way home. 1/31/11 RP 315.

When Ms. Duarte Antunez arrived at the apartment, Mr. Zarate Coria was lying on her bed. 1/31/11 RP 317, 339. She told him to leave and walked outside. 1/31/11 RP 318, 339. At trial, the witnesses differed on the next sequence of events. Ms. Duarte Antunez testified that Mr. Zarate Coria followed her outside, where he assaulted her. 1/31/11 RP 318, 321, 323. According to F.D., however, Mr. Zarate Coria "punched" Ms. Duarte Antunez inside the apartment and dragged her outside where he continued to assault her. 1/27/11 RP 268-69. Then again, Ms. Angeles testified that Mr. Zarate Coria pushed Ms. Duarte Antunez inside the bedroom then followed her outside where he assaulted her. 1/31/11 RP 348-50. The police arrived and Mr. Zarate Coria fled but he was quickly arrested nearby. 1/27/11 RP 229, 284; 1/31/11 RP 326. Ms. Duarte Antunez did not speak English, but eleven year-old F.D. gave a report to the officers and interpreted for his mother. 1/27/11 RP 228-29; 1/31/11 RP 307.

Mr. Zarate Coria was charged with burglary in the first degree, assault in the second degree, felony violation of a court

order protecting Ms. Duarte Antunez, and misdemeanor violation of a court order protecting F.D., J.D., and B.D. CP 7-10.

The matter proceeded to trial before a jury. In the afternoon of the second day, without any prior notice to the defense, F.D. appeared in court to testify with a dog provided by the prosecutor's office. 1/27/11 RP 251. The prosecutor characterized the dog as a "therapy dog" and a "trained service dog." 1/27/11 RP 251. However, the prosecutor offered no explanation for the dog's presence, but stated that, without her knowledge, a paralegal and a victim's advocate arranged for the dog to accompany F.D. during his testimony. 1/27/11 RP 251. The court did not question the prosecutor about the alleged necessity for the dog or about the failure to give notice to the defense. Rather, the court merely asked whether the defense objected. 1/27/11 RP 251. Defense counsel stated that she would normally object but for the fact that F.D. had already appeared and gone to the witness stand with the dog, all before she was given an opportunity to object. 1/27/11 RP 251. Without further inquiry, the court permitted F.D. to testify while accompanied by the dog.

The jury found Mr. Zarate Coria guilty of all four counts. CP 26-32. At sentencing, on the State's motion for "equitable reasons,"

the court vacated the conviction for felony violation of a court order, but imposed an exceptional sentence above the standard range based on two aggravating circumstances¹ found by the jury.

3/25/11 RP 2-3, 13; CP 82-83, 84-94.

D. ARGUMENT

1. THE PRESENCE OF A DOG PROVIDED BY THE STATE TO ACCOMPANY A PROSECUTION WITNESS DURING HIS TESTIMONY VIOLATED MR. ZARATE CORIA'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL, FREE OF UNDUE PREJUDICE OR SYMPATHY.

A criminal defendant has the constitutional right to a fair trial before an impartial trier of fact, free of undue prejudice or sympathy. U.S. Const. amend. VI, XIV; Wash. Const. Art. I, §§ 3, 22. “[A]n essential element of a fair trial is an impartial trier of fact - a jury capable of deciding the case based on the evidence before it.” State v. Momah, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). Courts accordingly must guard against courtroom procedures that may affect a juror’s impartiality.

The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Courts must do the best they

¹The jury found the aggravating circumstances of presence of children and a history of domestic violence. CP 27, 29, 32.

can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience (internal citation omitted).

Estelle v. Williams, 425 U.S. 501, 504, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).

Here, the very presence of the dog provided by the prosecutor's office improperly bolstered F.D.'s credibility, suggested unusual vulnerability, and implied he needed protection from Mr. Zarate Coria. By analogy, in State v. Bourgeois, the Court noted the impropriety of eliciting testimony from a witness regarding his or her fear or reluctance to testify:

While we feel certain that the testimony of a witness regarding his or her fear or reluctance to testify might have a bearing on a juror's evaluation of that witness's credibility, such evidence might also have another effect. It could lead the jurors to conclude that the witness is fearful of the defendant. In that sense, the testimony would have to be viewed as substantive evidence of the defendant's guilt because evidence that a defendant threatened a witness is normally admissible to imply guilt.

133 Wn.2d 389, 400, 945 P.2d 1120 (1996). Similarly, in the present case, the dog's presence also could be viewed as substantive evidence of Mr. Zarate Coria's guilt.

The vast majority of cases where a witness was allowed to testify with a "comfort" item involve a child complainant holding an

inanimate object, such as a doll or a teddy bear, while testifying in a sex offense trial. See, e.g., State v. Hakimi, 124 Wn. App. 15, 19-21, 98 P.3d 809 (2004) (nine year-old complainants in prosecution for child molestation held doll while testifying); State v. Dickson, 337 S.W.3d 733 (Mo. App. S.D. 2011) (seven year-old complainant in prosecution for rape, sodomy, kidnapping, who was left in a burning building, held teddy bear while testifying); Smith v. State, 2005 Wyo. 11, 119 P.3d 411 (2005) (15-year-old complainant in prosecution for sexual assault and indecent liberties held teddy bear while testifying). Prosecutions for sexual offenses involving children, however, are uniquely emotional and there are rarely any adult witnesses. See State v. Powell, 318 S.W.3d 297, 303 (Mo.App. W.D. 2010). By contrast, in the present case, there were no allegations of sexual misconduct and there were two adult witnesses to the incident. In addition, these “comfort” items were inanimate objects. There undoubtedly is a substantial difference between an inanimate child’s toy and a living dog that is commonly associated with a disabled person or protection and is trained to respond to human emotion. The cases involving an inanimate “comfort” item are not analogous.

Furthermore, the fact that the dog was provided by the prosecutor's office potentially impacted F.D.'s suggestibility and influenced his testimony. As the Connecticut Supreme Court noted when the prosecutor gave a stuffed animal to a three year-old complainant to hold during her testimony in a prosecution for sexual offenses:

[H]ad the victim simply brought a favorite object from home, there would have been no basis for objection.

The defendant's complaint at trial and on appeal is that giving the Barney doll to the victim prior to her testifying constitutes prejudicial misconduct that jeopardized the defendant's right to a fair trial. She further claims that the trial court's failure to appreciate the ramifications of such conduct as it might impact the victim's suggestibility, as evidenced by its restrictions on her ability to cross-examine the victim, necessitates that she be given a new trial. We agree with the defendant that the state's attorney's misconduct, compounded by the trial court's response, violated her due process rights.

State v. Aponte, 249 Conn. 735, 745, 738 A.2d 117 (1999).

The error here was not harmless. There was significant conflicting testimony as to whether an assault occurred inside the apartment, an essential element of burglary in the first degree as charged. Ms. Duarte Antunez testified the assault occurred outside the apartment. 1/31/11 RP 318. On the other hand, F.D. and Ms. Angeles testified Mr. Zarate Coria hit Ms. Duarte Antunez both

inside and outside the apartment and then he fled. 1/27/11 RP 268; 1/31/11 RP 348. It may be noted, although the prosecutor argued the assault also occurred while Mr. Zarate Coria was fleeing from the building, this argument is entirely unsupported by the record. 2/2/11 RP 468. Ms. Duarte Antunez and Ms. Angeles testified that Mr. Zarate Coria fled after the assault as police arrived. 1/31/11 RP 321, 351. F.D. was not present when Mr. Zarate Coria left the scene.

A constitutional error is presumed prejudicial unless the State can establish that the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). "A constitutional error is harmless if 'the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt.'" State v. Beadle, ___ P.3d ___, 2011 WL 5223072, at *11 (2011) (quoting State v. Koslowski, 166 Wn.2d 409, 431, 209 P.3d 479 (2009)). Here, given the significance of the conflicting testimony regarding an essential element of burglary in the first degree, it cannot be said that there was overwhelming untainted evidence of guilt on that charge. The very presence of the dog provided by the

prosecutor tainted F.D.'s testimony and undermined the impartiality of both F.D. and the jury. Reversal is required.

2. MR. ZARATE CORIA'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT WHEN A PROSECUTION WITNESS APPEARED IN COURT ACCOMPANIED BY A DOG PROVIDED BY THE STATE, WITHOUT A SHOWING OF NECESSITY, WITHOUT PRIOR NOTICE, AND WITHOUT A MEANINGFUL OPPORTUNITY TO OBJECT.

A criminal defendant has the constitutional right to a fair trial, free of prosecutorial misconduct. State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011). A prosecutor commits misconduct when his or her conduct is both improper and prejudicial. Id.

In the present case, the prosecutor committed misconduct when, without any notice to the defense, his office arranged for F.D. to testify while accompanied by the dog provided by the prosecutor's office.

[DEPUTY PROSECUTING ATTORNEY]: Your Honor, unbeknownst to me, my paralegal and the victim advocate arranged to have Elle [sic], the therapy dog sit with [F.D.]. Normally, I would want to give the court and counsel some more heads-up about that. She is the trained service dog that works in my office. I would ask permission of the court for her to sit close to [F.D.] in the witness stand.

1/27/11 RP 251. However, a prosecutor's obligation to disclose information to the defense includes "information within the knowledge, possession or control of members of the prosecuting attorney's staff. CrR 4.7(a)(4).

This conduct was both improper and prejudicial. The dog appeared in the afternoon of the second day of trial. As the prosecutor acknowledged, she should have provided notice to the defense. But by the time the defense was apprised of the dog's presence, it was a *fait accompli*, and obviated any meaningful opportunity to object.

The proper remedy for prosecutorial misconduct is reversal, even without an objection, where the misconduct is so prejudicial that it could not be cured by an instruction. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 932 (2009). As discussed above, the very presence of the dog prejudicially bolstered F.D.'s credibility, suggested unusual vulnerability and victimhood, and possibly influenced his testimony. Reversal is required.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE DOG TO ACCOMPANY F.D. DURING HIS TESTIMONY, IN THE ABSENCE OF PRIOR NOTICE OR A SHOWING OF NECESSITY FOR THE DOG'S PRESENCE.

A trial court is charged with conducting a trial with dignity, dispatch, decorum, and impartiality. State v. Johnson, 77 Wn.2d 423, 426, 462 P.2d 933 (1969). ER 611(a) provides:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

An alleged violation of ER 611 is reviewed for abuse of discretion. Hakimi, 124 Wn. App. at 19. A court abuses its discretion when it fails to exercise discretion. State v. Pettitt, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980).

Here, the court failed to exercise its discretion by failing to ask the prosecutor any questions about the surprise presence of the dog. Rather, the court turned to the defense for an objection.

THE COURT: Any objection?
[DEFENSE COUNSEL]: Normally, I would object. But the problem here is that [F.D.] had the opportunity to meet Elle [sic], to, apparently, go up on the witness stand with her now. I think that there

would be more problems associated with taking the dog away from the child at this point.

So I think the lesser of two evils at this point is for me to not object to having the dog remain with the child.

THE COURT: All right. So we will allow Elle [sic] to accompany [F.D.] to the witness stand.

1/27/11 RP 251.

This ruling was in error. First, the trial court failed to inquire into the failure to give notice of the dog's presence. But by failing to condemn this misconduct, the court simply rewarded it. Second, by merely asking the defense for an objection, the court skirted its obligation to control the courtroom by failing to determine whether the dog's presence was necessary and by further failing to inquire into the circumstances behind the sudden introduction of the dog. It may be noted that F.D. had no difficulty interpreting for his mother or giving a report to the police during their investigation of the incident. 1/27/11 RP 228-29; 1/31/11 RP 307. And there is nothing in the record to indicate he had any unusual difficulty discussing the incident in court.

In State v. Palabay, the defendant was charged with seven counts of sexual assault of the child, who was 12 years old at the time of trial. 9 Haw. App. 414, 844 P.2d 1, 3 (1992). During the complainant's testimony, defense counsel realized she was holding

a teddy bear and objected. 844 P.2d at 5. The trial court overruled the objection and invited counsel to question her about her need for the toy. Id. Counsel understandably declined the court's invitation but, shortly thereafter, renewed the objection. Id. The court then reversed itself and sustained the objection. Id. The complainant continued her testimony without the toy and apparently without difficulty. Id. On appeal, the Hawaii Court of Appeals ruled it was error to allow a child complainant to testify holding a teddy bear, in the absence of a finding of "compelling necessity." Id. at 7.

Similarly, here, the trial court failed to inquire into the necessity of the dog, but, rather, placed the burden on the defense. But the defense needed to cross-examine the witness. By requiring the defense to either to object or acquiesce to the surprise introduction of the dog, the court put the defense between Scylla and Charybdis: an objection would alienate the witness, yet acquiescence would garner undue sympathy for the witness and give the appearance that he required extra protection from Mr. Zarate Coria. Either way, the defense was in an untenable position.

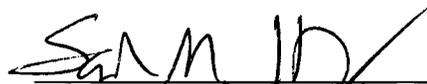
The trial court's abuse of discretion for failing to exercise any discretion requires reversal. See State v. Lormor, 172 Wn.2d 85, 94, 257 P.3d 624 (2011).

E. CONCLUSION

The surprise presence of a dog provided by the prosecutor's office to accompany a witness, in the absence of evidence of necessity, violated Mr. Zarate Coria's right to a fair trial. The trial court abused its discretion in failing to inquire about the necessity of the dog or about the failure to give notice to the defense. For the foregoing reasons, Mr. Zarate Coria respectfully requests this Court reverse his convictions and remand for a new trial free of prejudice and undue sympathy.

DATED this 18 day of November 2011.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66995-8-I
v.)	
)	
ARNOLDO ZARATE-CORIA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF NOVEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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X _____ 

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