

No. 75077-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

SCOT CUPPLES,

Appellant.

FILED

Nov 03, 2016
Court of Appeals
Division I
State of Washington

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court denied Mr. Cupples his right to present a defense in violation of the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution.

2. The State committed misconduct when the deputy prosecutor urged the jury to consider matters not in evidence, misstated the law, and vouched for State witnesses in closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment's guarantee of the right to present a defense and the Fourteenth Amendment guarantee of due process, along with similar guarantees of the Washington Constitution, are violated where a trial court bars a defendant from presenting relevant evidence. Washington courts have concluded that so long as evidence is minimally relevant, the refusal to admit it violates a defendant's rights unless the State can establish the relevance is outweighed by prejudice to the fairness of the fact-finding process. Where the trial court restricted defense cross-examination of State witnesses, did the court violate Mr. Cupples's rights under the federal and state Constitutions?

2. The State's duty to ensure a fair trial precludes a prosecutor from employing improper argument and tactics during trial. Where the deputy prosecutor engaged in repeated misconduct, and where such conduct was met by proper objection, was there a substantial likelihood that the comments affected the jury verdicts, requiring reversal?

C. STATEMENT OF THE CASE

Scot Cupples has been in a romantic relationship with Lakeisha Colvin for over ten years. RP 488-89.¹ Ms. Colvin has been separated, but not legally divorced, from her husband Guadalupe Gonzalez, since approximately 2005. Id. At the time of trial, Ms. Colvin and Mr. Gonzalez informally shared custody of their two children, H.G. and A.G. RP 321-23.² H.G. is a girl, who at the time of trial was 14 years old, and A.G., a boy, is approximately three years younger. Id.

In 2012-03, Mr. Cupples and Ms. Colvin were living together in an Auburn apartment, and the two children would generally stay with them from Wednesday or Thursday through the weekend. RP 327.

¹ The verbatim report of proceedings is consecutively paginated, and is referred to as "RP." The sentencing hearing is contained in a separate volume, and is referenced by date.

² Due to the age of the complaining witness and the nature of the allegations, initials are used to refer to H.G. and her brother.

The children lived with their father, Mr. Gonzalez, during the rest of the school week. Id.

One afternoon in April 2013, as Mr. Gonzalez was reviewing missing homework and grades with his then 12 year-old daughter, H.G., he asked why her grades had slipped. RP 333-37. H.G. told Mr. Gonzalez that the atmosphere at her mother's apartment was interfering with her ability to study and focus on her schoolwork. RP 337-38. Mr. Gonzalez asked H.G. if anyone was hurting or touching her inappropriately at her mother's home. RP 338-41. Mr. Gonzalez said he had initiated this "inappropriate touching" conversation on a regular basis with his daughter, and he had previously brought up the topic "maybe half a dozen times to ten times" with H.G. Id. at 341. When H.G. asked her father what he meant by inappropriate touching, he became concerned. Id.

H.G. told her father that Mr. Cupples, her mother's boyfriend, had touched her "bottom" and rubbed her, while pointing to the front of her private area. RP 344. H.G. said this conduct occurred on the couch in the living room, where Mr. Cupples generally slept; on certain nights H.G. would go downstairs to sleep there as well, while her mother and younger brother slept upstairs. Id. at 346.

Mr. Gonzalez put H.G. to bed and immediately called Child Protective Services (CPS), as well as 911, which resulted in a visit by an officer from the Auburn Police Department. RP 349-50. During the resulting investigation, the children experienced a dramatic reduction in their custody with their mother, Ms. Colvin. RP 352-53.

At trial, H.G. testified that she had never told her mother about these allegations, because of her sense that her mother would not be supportive. RP 617. H.G. also expanded her original allegations, claiming Mr. Cupples had improperly touched her, not only in the Auburn apartment, but also in Ms. Colvin's subsequent apartment in Kent. RP 623.³

Mr. Cupples was charged with two counts of rape of a child in the first degree, as well as two counts of child molestation in the first degree. CP 7-8.

Following trial, the jury found Mr. Cupples guilty of two counts of child molestation in the first degree. CP 62-63. The jury could not reach a unanimous verdict as to the two counts of rape of a child, and a

³ As discussed, H.G.'s first allegation was made on April 2, 2013, during a discussion of her schoolwork with her father. RP 333. The Kent apartment lease began in April 2013, and the mother moved there on April 3rd. RP 519-21. Even H.G.'s father testified that the children had never slept at the Kent apartment. RP 330, 376-77.

mistrial was declared. CP 60-61; RP 907. These counts were dismissed without prejudice. 4/15/16 RP 15.

Mr. Cupples's motion to arrest judgment and for a new trial pursuant to CrR 7.4 and 7.5 was denied. CP 69-78; CP 124-25.

D. ARGUMENT

1. THE TRIAL COURT'S EXCLUSION OF RELEVANT EVIDENCE INFRINGED UPON MR. CUPPLES'S SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE.

a. The Sixth Amendment guarantees an individual the right to present a defense.

The Sixth Amendment guarantees a defendant the right to present a defense. Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). "[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

So long as evidence is minimally relevant,

“ . . . the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” The State's interest in excluding prejudicial evidence must also “be balanced against the defendant's need for the information sought,” and relevant information can be withheld only “if the State's interest outweighs the defendant's need.”

Jones, 168 Wn.2d at 720 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)) (internal citations omitted).

- b. The trial court may not arbitrarily abridge a criminal defendant's constitutional right to cross-examine a witness with relevant evidence.

A criminal defendant's right to confront the witnesses against him is guaranteed by both the United States⁴ and the Washington Constitutions.⁵ In addition, the right to confront witnesses has long

⁴ The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor.”

⁵ Article 1, section 22 of the Washington Constitution guarantees that “[i]n all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face, [and] to have compulsory process to compel the attendance of witnesses in his own behalf.”

been recognized as essential to due process.⁶ Chambers, 410 U.S. at 294.

The main and essential purpose of confrontation is to secure the opportunity for meaningful cross-examination of adverse witnesses. Davis, 415 U.S. at 315. The purpose of cross-examination is to test the perception, memory and credibility of the witness. Id. at 316. Confrontation therefore helps assure the accuracy of the fact-finding process. Chambers, 410 U.S. at 295. Whenever the right to confront is denied, the ultimate integrity of the fact-finding process is called into question. Id.

A defendant's constitutional right to confrontation is violated where he is unreasonably precluded from cross-examining a witness on a subject that is probative of the witness's motive to lie. Olden v. Kentucky, 488 U.S. 227, 231-32, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988). The defendant must be allowed to conduct reasonable cross-examination on a subject relevant to the witness's motive to lie, even if the subject matter is potentially inflammatory to the jury. Id. Such cross-examination is designed to expose a witness's motivation in testifying and thereby "expose to the jury the facts from which jurors . .

⁶ The Fourteenth Amendment provides no state shall "deprive any person of life, liberty, or property, without due process of law."

. could appropriately draw inferences relating to the reliability of the witness.” Id. at 231 (quoting Davis, 415 U.S. at 316-17); Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

c. The excluded evidence was relevant and admissible in this case.

At trial, counsel for Mr. Cupples established that the children’s biological father, Mr. Gonzalez, had previously assaulted the mother, Ms. Colvin; however, the court excluded evidence of the couple’s physical conflict. RP 5-8, 394. The court also excluded evidence related to prior CPS referrals made by the father, and the father’s own substance abuse history.

The evidence relating to Ms. Colvin and Mr. Gonzalez’s “history of violence” and their contentious relationship was relevant to motive, as argued by Mr. Cupples in his motion in limine. RP 5-8. The historical custody battle between the parents here, Ms. Colvin and Mr. Gonzalez, was highly relevant to the accusation of sexual misconduct against Mr. Cupples – which, importantly, was originally made by the father, Mr. Gonzalez. Mr. Gonzalez admitted that he regularly asked H.G., following visits with her mother and live-in boyfriend, whether anyone had touched her inappropriately. RP 339-

42. Mr. Gonzalez had led these interrogations with his daughter approximately ten times before H.G. told him what he apparently wanted to hear. RP 342 (calling these sessions “check-in’s”). Once H.G. made her allegations about Mr. Cupples, the mother essentially lost custody, and only periodically saw the children at the homes of relatives. RP 352-53, 463-64.

Mr. Cupples’s ability to inquire about Mr. Gonzales’s prior interference in Ms. Colvin’s parenting, including his prior unfounded reports to CPS about Ms. Colvin’s home, was impermissibly limited by the trial court. RP 5-8, 392-96, 423-24.

The court also limited Mr. Cupples’s ability to cross-examine Mr. Gonzalez about his own substance abuse history, limiting the evidence to times the children were in the home. RP 423-24. The prosecution had initially stated Mr. Gonzalez was a recovered drug and alcohol user, whose “alcohol and drug abuse problems ended in 2005 or 2006, well, well in advance of this report.” RP 394. Pursuant to this proffer, the court limited Mr. Cupples’s cross examination of Mr. Gonzalez. Later in the trial, the prosecutor corrected the record to indicate that Mr. Gonzalez continued to struggle with substance abuse through 2011. RP 422-23. In light of this new evidence, the court’s

ruling that limited Mr. Cupples's cross-examination regarding the "competing households" theory, RP 423, was erroneous. Jones, 168 Wn.2d at 720.

Lastly, Mr. Cupples was denied the opportunity to cross-examine Mr. Gonzalez concerning another point of conflict between the two homes, a missing Nintendo game system belonging to Mr. Gonzalez. RP 451. This Nintendo device had disappeared during the children's visit to their mother's home, within a month of the rape report made by Mr. Gonzalez. RP 451. Mr. Gonzalez filed a police report concerning the video game, and then one concerning the rape. Id. The Nintendo was relevant to the history of conflict between the parents, as well as to the ongoing issues over child custody; it was erroneous for the court to preclude cross-examination on this area of recent disagreement between the parents. Jones, 168 Wn.2d at 720.

The trial court was required to apply the standard set forth in Jones -- specifically, that the evidence regarding the custodial history was admissible, unless it was "so prejudicial as to disrupt the fairness of the fact-finding process at trial." See Jones, 168 Wn.2d at 720. The State did not meet that burden. The State made no showing that admission of this relevant evidence would upset the fairness of the fact-

finding proceeding. The trial court's erroneous ruling deprived Mr. Cupples of his right under the Sixth Amendment and Article 1, section 22 to present a defense and his right of confrontation.

d. This Court should reverse Mr. Cupples's convictions so that he may have a trial that satisfies his right to present a defense and his right to due process.

A constitutional error requires reversal unless the State can establish beyond a reasonable doubt the error "did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United States v. Neder, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). To meet its burden here, the State must prove beyond a reasonable doubt that none of the jurors could have entertained a doubt as to Mr. Cupples's guilt after hearing evidence that Mr. Gonzalez had reason to fabricate these allegations due to other motivations -- specifically, in order to obtain full custody of his children -- something that had not been possible, despite his four previous fruitless CPS referrals against the mother. The State cannot meet that standard here; therefore, this Court should reverse Mr. Cupples's convictions.

2. MR. CUPPLES'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT.

a. Mr. Cupples has the right to due process.

The Due Process clause of the Fourteenth Amendment protects the right of every criminal defendant to a fair trial. U.S. Const. amends. V, XIV; Const. art. 1 §§ 3, 21, 22. The right to a fair trial includes the presumption of innocence. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d P.2d 1129 (1996); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

b. Prosecutors have special duties which limit their advocacy.

A prosecutor's improper argument may deny a defendant his right to a fair trial, as guaranteed by the Sixth Amendment and by article I, section 22 of the Washington Constitution. State v. Monday, 171 Wn.2d 667, 676-77, 297 P.3d 551 (2011). A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)). In State v. Huson, the Supreme Court noted the importance of impartiality on the part of the prosecution:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial ... We do not condemn vigor, only its misuse ...

73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a “substantial likelihood” exists that the comments affected the jury. Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

c. The prosecutor engaged in misconduct when he urged the jury to consider matters not in evidence, lowered the burden of proof, and vouched for State witnesses, denying Mr. Cupples his right to a fair trial.

In rebuttal argument, the deputy prosecutor stated precisely the conclusion that the trial court had forbidden during pre-trial motions: that the forensic nurse, Joyce Mettler had concluded that the physical examination of the child was consistent with the allegations the child

described. RP 894; compare RP 49-50 (motion in limine), with RP 731 (testimony of Nurse Mettler).

Specifically, the prosecutor argued the following: “[Defense counsel] said the physical examination is not consistent with what happened here. Ms. Mettler disagrees, respectfully, to [defense counsel]. Ms. Mettler said that this is entirely consistent with what [the child] described.” RP 894. Mr. Cupples’s objection was overruled by the court, which stated, “this is argument.” Id. (also stating “the jury can recall what the testimony was.”).

The testimony did not, however, include anything resembling a statement from Ms. Mettler that the physical examination she had conducted was “entirely consistent” with the allegations here. In fact, when Ms. Mettler was asked at trial whether she had reached any conclusions as a result of her physical examination, the court ruled the question improper, sustaining an objection. RP 731.

By his argument, the deputy prosecutor urged the jury to consider evidence outside the record – and in direct violation of the court’s pre-trial ruling. RP 49-50. This misconduct cannot be condoned.

In addition, the deputy prosecutor vouched for the honesty and integrity of the State's witnesses, arguing that the CPS social worker and "the police officers. They have no personal interest in this." RP 854. The court sustained Mr. Cupples's objection to this improper argument and ordered the prosecutor to rephrase. Id. The prosecutor's next words, however, did nothing to dispel the personal endorsement he had just given to the State's witnesses – nor did his argument cure it.

Prosecutors may not vouch for the credibility of a witness. State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010). Whether a witness has testified truthfully is solely for the jury to decide. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). A prosecutor vouches when he or she places the government's prestige behind the witness. Id. It was misconduct for the deputy prosecutor to argue from his position of governmental authority that the CPS and police witnesses had "no personal interest" in this case. See id.

Lastly, the prosecutor diluted the burden of proof by equating it with jurors' common sense and personal experience. RP at 842. "When a prosecutor compares the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the

gravity of the standard and the jury's role.” State v. Lindsay, 180 Wn. 2d 423, 436, 326 P.3d 125 (2014).

Here, the deputy prosecutor argued the following: “So the reasonable inferences that you take from your commonsense and experience is just as good in the eyes of the law as the testimony of the witnesses.” RP 842.⁷ By so misstating the law, the prosecutor not only confused the jury, but diluted the burden of proof. Lindsay, 180 Wn. 2d at 436.

d. Reversal is required.

The cumulative effect of these various instances of prosecutorial misconduct violated Mr. Cupples’s right to a fair trial. State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955); State v. Torres, 16 Wn. App. 254, 262-63, 554 P.2d 1069 (1976). Due to the multiple instances of the deputy prosecutor’s misconduct in closing argument, there is a substantial likelihood the cumulative effect of the prejudice affected the jury’s verdict; therefore, this Court should reverse Mr. Cupples’s convictions. Reed, 102 Wn.2d at 146-47; see also United States v. Holmes, 413 F.3d 770, 778 (8th Cir. 2005) (reversing due to misconduct

⁷ The court overruled Mr. Cupples’s timely objection; thus, endorsing the State’s improper argument. RP 842.

in closing argument, which court found particularly egregious because comments were made during rebuttal, with no opportunity to respond).

E. CONCLUSION

For the reasons stated above, Mr. Cupples respectfully asks this Court to reverse his convictions and remand for a new trial.

DATED this 3rd day of November, 2016.

Respectfully submitted,

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DIVISION ONE**

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Respondent,)	
)	NO. 75077-1-I
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)	
SCOT CUPPLES,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF NOVEMBER, 2016, 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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