

COURT OF APPEALS
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STATE OF WASHINGTON
BY JW NO. 35021-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

STANLEY SCOTT SADLER,

Appellant.

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

The Honorable Vicki L. Hogan, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REPLY TO THE STATE'S PRESENTATION OF FACTS.

The state devotes a substantial portion of its statement of facts to Mr. Sadler's relationship with Rachael Haughenberry. See Brief of Respondent (BOR) at 4-19. Mr. Sadler was not charged, however, with any criminal conduct involving Ms. Haughenberry. As set out in the Opening Brief of Appellant, Mr. Sadler's defenses at trial were not denial of sexual activity with K.T., but rather statutory defenses that (a) he reasonably believed K.T. was older because of her representations to him that she was nineteen years old, (b) he did not have facts leading him to reasonably know that K.T. was a minor and (c) he made a bona fide attempt to ascertain her age by requiring production of her birth certificate and other identification. CP 416, 427, 433. On these issues, Ms. Haughenberry confirmed that K.T. did represent herself as nineteen years old and that K.T. was not generally restrained at Mr. Sadler's house; Ms. Haughenberry confirmed that K.T. said she would get her identification because she wanted to go to an adult club, and that Mr. Sadler offered to take her home, but she declined. RP 1083, 1085, 1106, 1259.

To the degree that Ms. Haughenberry characterized herself as an unwilling participant, it should be remembered that she was not charged

with any crimes involving her own admitted sexual conduct with K.T. RP 1290.

The factual issues for the jury were what representations K.T.'s made about her age, whether Mr. Sadler reasonably believed that she was nineteen and whether she produced a copy of her birth certificate or either a Washington identification or driver's license showing her age as nineteen. The facts relevant to those issues which the state omitted are:

- Mr. Sadler and K.T. discovered one another through adult websites on the Internet. RP 1847, 1861, 1907-1910.

- Mr. Sadler testified that shortly before he met K.T. in person in late August, she showed him her Michigan birth certificate via webcam and either a Washington driver's license or ID card via webcam. RP 1917.

- K.T.'s mother, Debra Farnam, confirmed that K.T. visited at home from foster care and hooked up the webcam to the computer at that time. RP 2001-2003.

- Ms. Farnam confirmed that K.T.'s birth certificate was missing from the locked box where it was kept. RP 1997-1998.

- The Clark County Sheriff's Department confirmed that K.T. last logged into an adult website on August 22, and also that this was the last

date K.T.'s screen name appeared on Mr. Sadler's computer. RP 1834-1835.

- Although the evidence was excluded by the trial court, Exhibit 153, an Internet message between K.T. and a man who lived in Tennessee on August 22, included a statement by K.T. that she was nineteen and would show her birth certificate to prove it. RP 2385, 2422-2425

- Although excluded by the trial court, the defense investigator would have testified that Mr. Sadler told him K.T.'s birth certificate was from Michigan before Ms. Farnam disclosed this fact in an interview with the police. RP 2513-2517.

- The prosecutor was unable to locate K.T. and present her testimony at trial.

2. THE TRIAL COURT ERRED IN DENYING MR. SADLER'S BATSON CHALLENGE.

The state, on the Batson challenge issue, asks this Court to classify members of all minorities together and overlook the fact that the prosecutor used peremptory challenges to remove the only two African-Americans on the jury panel. No authority is cited for this proposition. BOR 30-31.

Second, the state argues that Juror No. 2's unfamiliarity with the word "sodomasochism" was a race-neutral reason for excusing him as well as the fact that he was in the military and did not have teenage daughters.

BOR 31. One indication that this reason is not race-neutral is the claim that Juror No. 2 "demonstrated that he did not understand what sadomasochism meant, and such term was a central theme to the State's case and theory." Although Juror 2 did not know the word, there was nothing to indicate that he could not understand if the term were explained or that an understanding of this precise word was in any way relevant at trial.¹ Other jurors were unfamiliar with the term as well, including Juror 17, whom the state tried to save as a juror. RP 674. Further, other jurors were in the military. "Peremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged." McClain v. Prunty, 217 F.3d 1209, 1221 (9th Cir. 2000). Finally, the fact that Juror 2 had sons did not establish that he did not have experience with teenage girls in his extended family or through friends.

¹ "Sadomasochism" means "gratification, especially sexual, gained through inflicting or receiving pain." Random House Webster's College Dictionary (2001). Although there was testimony about bondage and slave-master relationships, there was no testimony that pain was inflicted or received for sexual gratification and there was no expert or lay testimony on sadomasochistic gratification. The state stipulated that K.T. was examined at Mary Bridge Hospital and the doctors observed no signs or injury or physical trauma. Knowledge of the meaning of "sadomasochism" was, and is, a total red herring.

Juror 27, contrary to the state's argument at trial and on appeal, did discuss his criminal history openly and candidly when follow-up questions were asked of him. RP 372-375, 442-443, 497, 500-501. The prosecutor indicated that he was not the type of juror the state was looking for "from the perspective of open participation in jury selection, or from intelligence." RP 856-860. These were not race-neutral reasons and, to the degree that they may appear race-neutral, they are pretexts for purposeful discrimination.

The state's argument that the cases cited by Mr. Sadler in his opening brief are inapplicable because "unless discriminatory intent is inherent in the explanation offered by the State, the reason offered will be deemed race neutral," citing Purlett v. Elem, 514 U.S. 765, 768-769, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995), should not be well-taken. First, the reasons given by the prosecutor were not race-neutral, as they focused on a denigration of the intelligence and understanding of the challenged jurors. Second, even where reasons are race-neutral, the court must determine the the third Batson question -- whether the reasons are pretextual and racial discrimination has been established in spite of the superficially race-neutral reasons. United States v. Chinchilla, 874 F.2d 695, 698-699 (9th Cir. 1989) (although reasons given by the prosecutor might appear

neutral taken at face value, the fact that two of the four reasons do not hold up under scrutiny weighs against their sufficiency). The holding in Miller-El v. Dretke, 545 U.S. 231, 241, 125 S. Ct. 2317, 162 L. Ed. 2d 1962 (2005), for example, that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination" is applicable to the determination of whether the Batson challenge was properly denied. Miller-el v. Dretke is relevant even where race-neutral reason are given in step 2. See also, Opening Brief, at 25-28.

The trial court erred in denying Mr. Sadler's Batson challenge. His conviction should be reversed and his case remanded for retrial.

3. THE TRIAL COURT ERRED IN CONDUCTING THE HEARING ON THE BATSON CHALLENGE IN THE JURY ROOM RATHER THAN THE OPEN COURTROOM, DENYING MR. SADLER HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A PUBLIC TRIAL.

The state argues that Mr. Sadler was not denied his right to a public trial when the Batson hearing was conducted in chambers because (a) the courtroom was not closed, and (b) neither Mr. Sadler nor the public had a right to attend the Batson hearing because it was "a hearing on a 'legal matter.'" BOR 27.

Both of those arguments should be rejected. It is undisputed that the trial judge, the court reporter, the attorneys and Mr. Sadler moved in chambers to conduct the hearing. The general public was not invited to attend this hearing. Thus, the Batson hearing was a closed hearing, conducted outside the presence of the public.

Second, in In re Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994), the case cited by the state, the court held that a defendant did not have the right to be present at hearings on "purely" legal issues which did not involve the resolution of disputed facts. The Lord court cited People v. Dokes, 595 N.E.2d 836 (1994), for the proposition that the defendant had a right to be present at a hearing on the admissibility of his prior convictions. In In re Pirtle, 136 Wn.2d 467, 484, 965 P.2d 592 (1998), the court similarly held that the defendant did not have to be present at discussions on the wording of jury instructions or ministerial matters. The Pirtle court noted that in the matter of alleged juror misconduct, the defendant likely had the right to be present, but that his absence was cured by having the matter heard on the record. And, contrary to the representation of the state, a Batson challenge is not a purely legal matter. In Tolbert v. Page, 182 F.3d 677, 680 (9th Cir. 1990), the court held that whether the prosecutor's reasons are race neutral is a question of law, but

the other two aspects of the Batson inquiry-- whether a prima facie case had been made and whether purposeful discrimination has been proven -- were questions of fact.

Thus, under the authority cited by the state, the Batson issue involved the resolution of facts and Mr. Sadler and the public had a right to be present.

Moreover, as the United States Supreme Court noted in Waller v. Georgia, 467 U.S. 39, 47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984), in particular, the public should be present at hearings involving the conduct of prosecutors.

The error in denying Mr. Sadler a public trial by conducting the Batson hearing in chambers should require reversal of his convictions.

4. THE TRIAL COURT ERRED IN DENYING MR. SADLER'S MOTION TO SUPPRESS EVIDENCE AND HIS CUSTODIAL STATEMENTS.

a. CrR 3.5

At the CrR 3.5 hearing, Officer Norling testified that he asked Officer Rather to detain Mr. Sadler, that Rather called the fire department to check on K.T., and that then Norling read Mr. Sadler his Miranda rights. 1RP 17-18. Norling first testified that Mr. Sadler asked why Norling asked K.T. how old she was, indicated that K.T. had told him she

was 19 and then stated he wanted to talk to a lawyer. 1RP 20. A short while later, Norling testified that Detective Jackson asked Mr. Sadler if he would consent to a search of his house and *that* was when Mr. Sadler asked to speak to an attorney. 1RP 23. On cross-examination, Norling testified that Mr. Sadler asked to talk to a lawyer after he was told that K.T. was 14 years old. 1RP 41.

Officer Rather testified that he detained and handcuffed Mr. Sadler as he started to come down the stairs. 1RP 49-50. He completed his security sweep of the house and then called for medical assistance. 1RP 53. Rather did not believe that Mr. Sadler had been advised of his Miranda rights at the time. 1RP 71.

As defense counsel argued at the CrR 3.5 hearing, the state failed to establish that Mr. Sadler had been read his Miranda rights at the time he made his statements. Norling testified that he read the rights after the fire department had been called, but Rather did not believe that he had been read his rights at that time. 1RP 71, 104-106. As set out in the Opening Brief of Appellant, the state bears the burden of showing that the warnings were given before obtaining a custodial statement and the contradictory testimony was insufficient to meet this burden. Opening Brief of Appellant (AOB) 35-38. As further pointed out, Norling, in fact, did not recall the

timing or sequence of events, testifying that Mr. Sadler invoked his rights at different times. AOB 38-39.

Finally, Detective Jackson engaged in further "interrogation" -- actions reasonably likely to elicit an incriminating response -- after Mr. Sadler has asked to speak to an attorney. AOB 39-40.

Given the contradictory testimony and Norling's inability to recall the incident with an dclarity, the trial court erred in not suppressing Mr. Sadler's custodial statements.

b. CrR 3.6

First, the state argues that by knocking on the door and asking Mr. Sadler if K.T. was there, Officer Norling "impliedly" asked to come into the house to verify that she was there. BOR 51-52. This argument is neither logical nor supported by authority. Norling's asking if K.T. was at the house was nothing more than a request for information; it was not an explicit or implied request to enter and search for K.T. When Mr. Sadler turned to go upstairs to tell K.T. that Norling was at the door asking for her, he did not invite Norling inside; and, under the circumstances, his silence or failure to object cannot be construed as an invitation to enter. See AOB at 46-47.

Second, the state argues that the police were entitled to make a protective sweep of Mr. Sadler's home to determine whether someone other than K.T. was in bondage inside the home. BOR 62. This kind of speculation is insufficient to establish that there was a "specific person in actual need," in the house. State v. Johnson, 104 Wn. App. 409, 16 P.3d 680 (2001). In fact, there was no information of any kind suggesting that there was another person at the house or in danger.

There was no showing that there was a concern separate from a desire to look for evidence of a crime; the police were investigating whether Mr. Sader was engaging in illegal sexual conduct with K.T. State v. Link, 136 Wn. App. 685, 696, 150 P.3d 610 (2007). Officer Rather called Norling to look at the equipment room during the "protective sweep." IRP 71. This action alone demonstrates Rather's motivation in searching the house.

If a protective sweep extends beyond the immediate area of an arrest in a criminal investigation, the police must have facts warranting a belief that the area to be swept is harboring someone posing a danger to those at the scene. Maryland v. Buie, 494 U.S. 325, 334-335, 110 S. Ct, 1093, 108 L. Ed. 2d 276 (1980). There was no such showing in this case.

The cases cited by respondent, BOR 59-61, do not support the state's position. In those cases the police had specific information leading them to believe that a person was in need of immediate medical treatment. Here, the police had no reason to believe that there were persons other than K.T. and Mr. Sadler in the house.

Finally, the state asked this Court to uphold the search warrant based on the information obtained from the illegal search of Mr. Sadler's house. BOR 53-55. The state argues that the warrant was not challenged below and this Court should speculate that it was sufficient to justify a search without evidence from the initial warrantless search. BOR 53-55. At trial, however, it was implicitly agreed that the warrant was based on the initial warrantless search.² At no time did the state argue that the evidence was admissible for this reason. 1RP 123-128.

² Contrary to the argument of the state, statements -- such as K.T.'s statements to the police who interviewed her -- can be suppressed as the fruit of the illegal search. United States v. Wong Sun, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Moreover, although the state argues that K.T.'s statements represented an independent source for obtaining a warrant, BOR 55, in its next argument the state represents "there was no testimony elicited that K.T. implicated the defendant in any way. There was no testimony that probable cause for the warrant was ever established." BOR 66, 67.

5. **THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT TESTIMONIAL HEARSAY IN VIOLATION OF MR. SADLER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONT THE WITNESSES AGAINST HIM.**

Contrary to the argument of respondent, BOR 63-69, the state was permitted at trial to put before the jury the substance of statements made by K.T. who was not available at trial to be confronted.

Officer Nordling testified that K.T. told him her stomach and head hurt and that she did not respond when asked how old she was. RP 1725. The state asked a series of questions to establish Norling's view that K.T. recognized him as a police officer when he touched her foot, moaned and then made "her statement" to him. RP 1723-1724.

Officer Villamor testified that he interviewed K.T. at the hospital and responded, "yes, I did," when asked "[d]id you pass the information that you obtained from her on the Detective Jackson for purposes of his investigation." RP 1602. Villamor testified that a search warrant was prepared for Mr. Sadler's house. RP 1602. He confirmed that K.T. provided information about particular items and that those items were collected during the search.

MR. NEEB (prosecutor): Did you in your conversation with [K.T.] at the hospital have information about particular items in this room that you would be looking for?

MR. SCHWARTZ (defense counsel): I will object because we can't cross examination [sic] this witness on those statements.

MR. NEEB: He can cross examine this witness.

MR. SCHWARTZ: Well, the witness who gave him those statements.

THE COURT: I am going to overrule the objection, and the witness can answer.

MR. NEEB: Sergeant Villamor, don't tell us what you were told, just whether or not there were particular items that you were looking for within this room?

A. Yes.

RP 1609. Villamor testified that he also collected "items outside of those particular items" as well, and described in detail the items he collected. RP 1609-1627. In questioning Villamor, the prosecutor clearly conveyed to the jurors that K.T., at the hospital, identified some of the items which were later collected during the search. In this way, the prosecutor tied K.T. to the items in the house, which were not in any independent way illegal. This was the information and implication the prosecutor sought to convey and there was no other purpose for asking the questions.

The premise that K.T. made statements incriminating Mr. Sadler at the hospital was further introduced to the jury when Detective Jackson testified about the need to establish probable cause in order to obtain a

search warrant ("You want to establish probable cause of why you want to go in, and what things you are trying to look for"), and that he "insured" that K.T. was interviewed as he was preparing the search warrant. RP 1651.

While K.T.'s statements were not quoted, the substance of her statements, that she had knowledge of the bondage and sex equipment in the room, was conveyed to the jury. These statements were statements made to the police for purposes of investigating and prosecuting Mr. Sadler. They were testimonial hearsay statements which Mr. Sadler could not confront.

The error was not harmless. K.T. did not appear as a witness at trial and any testimony implying that she cooperated with the police and aided in their investigation of Mr. Sadler was unfairly prejudicial and at odds with Mr. Sadler's defense that K.T. was a willing participant who told him that she was 19 years old.

Mr. Sadler's convictions should be reversed because of the denial of his state and federal constitutional rights to confrontation of witnesses.

6. THE TRIAL COURT'S EXCLUSION OF EVIDENCE DENIED MR. SADLER HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO APPEAR AND DEFEND AT TRIAL.

The state argues first that any potential error in the trial court's excluding evidence that K.T. had told other people that she was 19 and of information she provided on adult websites is irrelevant because Mr. Sadler was convicted only of the sexual exploitation of a minor charge. BOR 72-74. This argument should be rejected. Clearly the evidence was relevant to the charges for which Mr. Sadler was tried and it was constitutional error to exclude the evidence. Essentially, the state's argument is a harmless error analysis. The error, however, should not be deemed harmless, notwithstanding the jury's acquittal on a majority of the charges. Evidence of K.T.'s representations to others and her profile on adult websites did have a tendency to make it more likely that she had identification available and a means of showing people her identification over the Internet.

Certainly evidence that K.T. offered to show others her birth certificate could not have been more relevant to the sexual exploitation charges. Moreover, it was not excludable as hearsay because it was not admitted to show that K.T. had valid identification as she asserted, but simply to establish that she made the offer to show identification. Such an offer had a tendency to make it more probable that she also offered to show identification to Mr. Sadler and did, in fact, show it to him.

Finally, contrary to the argument of the state, BOR 76-77, the clear implication of the prosecutor's question to Mr. Sadler inquiring whether he had seen the taped statement of Ms. Farnam where she said K.T.'s birth certificate was from Michigan, was that this explained Mr. Sadler's trial testimony that the birth certificate he saw was from Michigan. RP 2393. Mr. Sadler had a right to rebut the implication that he knew the birth certificate was from Michigan because of Ms. Farnam's statement rather than from viewing it personally. Mr. Sadler had a right to rebut the implicit accusation in the question with evidence that he told the defense investigator before he saw the statement of Ms. Farnam that the birth certificate was from Michigan.

Similarly, the state's further argument that Mr. Sadler's statement to the investigator was hearsay should not be well-taken. It was to rebut the hearsay statement by Ms. Farnam that the state introduced during examination of Mr. Sadler, and it was a prior consistent statement. ER 801(d)(1)(ii).

The exclusion of the evidence denied Mr. Sadler his state and federal constitutional rights to compulsory process and to appear and defend at trial. His convictions should be reversed.

7. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR MISTRIAL AFTER DETECTIVE JACKSON TESTIFIED THAT MR. SADLER HAD EXERCISED HIS RIGHT TO REMAIN SILENT AND TO COUNSEL.

The state properly conceded that Detective Jackson's testimony on Mr. Sadler's exercise of his right to remain silent and to counsel was improper, but argues that the error was harmless given the "overwhelming evidence." BOR 82. The error was not harmless. The evidence was obviously not "overwhelming" given the jury's verdicts. Given the importance of credibility to the resolution of facts, the error was not harmless. Detective Jackson's testimony implied to the jury that Mr. Sadler was uncooperative and had something to hide from the police. It asked the jury to infer his guilt from the exercise of a constitutional right. The error should result in the reversal of Mr. Sadler's convictions.

8. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR MISTRIAL AFTER THE PROSECUTOR ASKED MR. SADLER IF THE REASON HE DID NOT RECEIVE A PARTICULAR E-MAIL WAS BECAUSE HE HAD BEEN IN JAIL SINCE HIS ARREST.

The prosecutor's question to Mr. Sadler about his 18 months in jail was improper and, given the importance of credibility to the case, not harmless error. Contrary to the state's argument in its brief, this was not some passing reference to a short stay in jail on another insignificant

matter. BOR 86. The testimony denied Mr. Sadler his state and federal constitutional rights to the presumption of innocence and should require the reversal of his convictions.

9. THE PROSECUTOR COMMITTED MISCONDUCT BY ARGUING IN CLOSING REBUTTAL AN ERRONEOUS DEFINITION OF A CRITICAL WORD IN A JURY INSTRUCTION WITHOUT ANY LEGAL BASIS.

The trial prosecutor argued to the jury that "according to the law, that is not enough. The law requires production, not seeing it over a fuzzy webcam, production of the document." RP 2671. This argument was improper because it told jurors that as a matter of law, viewing a birth certificate over a webcam is insufficient to establish a defense to sexual exploitation of a minor. This is not merely an argument that such a procedure is insufficient; it is a misstatement of the law. No authority was cited at trial or on appeal that viewing the license via webcam does not, as a matter of law, constitute "requiring production."

The argument was improper and, given the jury's later question and verdict, the error was not harmless.

10. THE TRIAL COURT ERRED IN NOT GIVING MR. SADLER'S PROPOSED SUPPLEMENTAL INSTRUCTION DEFINING THE TERM FOR WHICH THE JURORS REQUESTED CLARIFICATION.

The jurors requested a definition of the words "requiring production" during deliberations. The jurors were confused because the prosecutor told them in rebuttal closing argument, after defense counsel no longer had any opportunity to respond, that as a matter of law, viewing a birth certificate by webcam did not constitute production. That this is not correct as a matter of law is demonstrated by the fact that the state does not argue on appeal that it is. BOR 90 ("The State is entitled to argue from the jury instructions, and advocate its theory of the case.")

The jurors likely sought guidance from the court so that they would not have to rely on the state's definition and representations about the law. The court should have given a definition supported by a dictionary definition. The court's failure to do so very likely resulted in Mr. Sadler's conviction under an erroneous legal standard and should require reversal of his convictions. Even if the court did not err in not instructing on the meaning of "requiring production" initially, once the jury indicated its confusion after the state's argument, the court had a duty to clarify and to offer a definition which correctly stated the law and properly allowed the defense to argue its theory of the case.

**11. CUMULATIVE ERROR DENIED MR. SADLER
A FAIR TRIAL.**

For the reasons set out here and in the Opening Brief of Appellant, the cumulative errors, as well as the individual errors, in the case require reversal of Mr. Sadler's convictions.

E. CONCLUSION

Appellant respectfully submits that his convictions should be reversed and remanded with instructions to suppress his custodial statements and the physical evidence seized from his house.

DATED this 16th day of November, 2007.

Respectfully submitted,


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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 16th day of Nov, 2007, I caused a true and correct copy of the ~~Opening~~ Brief of Appellant to be served on the following via prepaid first class mail:

Reply

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07 NOV 19 AM 9:26
STATE OF WASHINGTON
BY _____
DEPUTY
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