

NO. 39119-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY MARQUISE EMERY, JR.

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____

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

The Honorable Bryan E. Chushcoff

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to sever trials.
2. Appellant was denied his constitutional right to effective assistance of counsel if defense counsel waived any severance claim.
3. The trial court erred in denying appellant's motion for a mistrial.
4. The trial court erred in denying appellant's motion for a new trial.

Issues Pertaining to Assignments of Error

1. Did the trial court err in denying appellant's motion to sever trials when appellant's and co-defendant's defenses were irreconcilable and mutually exclusive?
2. Did the trial court err in denying appellant's motion for a mistrial where the co-defendant repeatedly accused appellant of lying during his testimony, which constitutes a serious irregularity incurable by a jury instruction?
3. Did the trial court err in denying appellant's motion for a new trial where the court erroneously refused to sever the trials and grant a mistrial?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On December 18, 2006, the State charged appellant, Anthony Marquise Emery, Jr., with one count of kidnapping in the first degree, one count of robbery in the first degree, one count of rape in the first degree, and one count of attempted robbery in the first degree. CP 1-3. The State amended the information on July 19, 2007, charging Emery with one count of kidnapping in the first degree, one count of robbery in the first degree, one count of rape in the first degree by alternative means, one count of attempted robbery in the first degree, and two counts of rape in the second degree. CP 17-20. On June 5, 2008, the State filed a second amended information, charging Emery with count one, kidnapping in the first degree; count two, robbery in the first degree; count three, rape in the first degree by alternative means; count four, rape in the first degree; count five, attempted robbery in the first degree; count six, rape in the second degree; and count six, rape in the second degree. CP 33-36. Trial commenced on January 6, 2009, before the Honorable Bryan E. Chushcoff, on counts one through four. 7RP 4-5. Emery was tried with co-defendant,

¹ There are 18 volumes of verbatim report of proceedings: 1RP - 12/18/06; 2RP - 12/27/06; 3RP - 02/01/07; 4RP - 07/09/07; 5RP - 07/19/07; 6RP - 06/05/08; 7RP - 01/06/09; 8RP - 01/07/09; 9RP - 01/08/09; 10RP - 01/12/09; 11RP - 01/13/09; 12RP - 01/14/09; 13RP - 01/15/09; 14RP - 01/20/09; 15RP - 01/21/09; 16RP - 01/22/09; 17RP - 01/23/09; 18RP - 04/02/09.

Aaron Edward Olson. 7RP 4. On January 22, 2009, a jury found Emery guilty as charged. 16RP 913-15; CP 174-76. The court sentenced Emery to 291 months in confinement and community custody. 18RP 19-20; CP 186-87. Emery filed this timely appeal. CP 203-04.

2. Substantive Facts

Glennys Cabrera testified that she was formerly employed as a pharmacy technician at Walgreens in Tacoma. 9RP 90. On February 26, 2006, after finishing work at about 11:00 p.m., she walked to her car parked in back of the store. 9RP 90-92. Cabrera tried to open the newly bought Lincoln Navigator SUV but could not open the door with her key. After trying the key on all the doors, she called her boyfriend on her cell phone. 9RP 91-93. Her boyfriend could not leave immediately so she told him she would call another friend. When she could not reach her friend, she decided to return to Walgreens. 9RP 94-95.

As Cabrera turned around to walk back to the store, “I saw two guys pointing a gun at me in my stomach.” 9RP 95. The “white guy” pointed the gun at her and asked her for money while the “Filipino kind of guy” stood by him. 9RP 100-02. Then the white guy took her cell phone. 9RP 102-03. When she told them that she had no money, the white guy directed her to open the car door, “I just put the key, and the car opens.” 9RP 104. They asked her to get in the car and the white guy got in the

passenger seat while the Filipino guy sat in the back. 9RP 104. Knowing that she was being abducted, Cabrera emptied personal items out of her pockets onto the parking lot hoping her boyfriend would find them when he came to look for her. 9RP 104-06.

The white guy who was giving the orders told her to drive to Market Place. The Filipino guy was “[j]ust following whatever the white guy said.” 9RP 107-09. Upon arriving at Market Place, they told her to park in the parking lot and they asked again for money. 9RP 111-12. When she repeated that she did not have any money, the white guy told her to get in the back “because we are going to rape you.” 9RP 112. Out of hysteria, Cabrera pleaded for them to let her go fabricating that she was pregnant. 9RP 113. The white guy then said, “[O]kay, you are pregnant. You have to -- you have to suck my dick and my friend’s too.” 9RP 113. He “pointed with the gun and said, you have to do it or I’m going to kill you.” 9RP 114.

Cabrera got in the back of the car and “the white guy made me do oral sex.” 9RP 114. When he ejaculated, she wiped some of the semen on her pants to leave DNA evidence. 9RP 115. Then the white guy moved up to the driver’s seat and the Filipino guy came in the back and unzipped his pants, “I had to do oral sex to him, too.” 9RP 116-119. He pushed her head down and told her “to act like I liked it” to help him get an erection.

When he ejaculated, she wiped her mouth on her smock for evidence. 10RP 130-31. After talking about what to do next, the white guy drove to Safeway and they got out in the parking lot. As they left, the white guy said, "I know where you work. If you say anything, we're going to kill you." 10RP 131-33.

Cabrera drove to a friend's house nearby, "When I get to my friend's house, I just started crying. I was like hysterical." 10RP 136. Her friend's husband called the police. The police arrived and she was taken to the hospital. 10RP 138-39. The police created composite sketches based on descriptions provided by Cabrera. 10RP 151-53. She later identified Emery as the Filipino guy from a photo montage but could not identify the white guy. 10RP 145. At trial, Cabrera identified Emery in court but said she did not recognize Olson. 10RP 154-55.

Idanya Gonzales and her husband were awakened by their door bell "ringing like crazy" at around 12:30 a.m. on February 28, 2009. 11RP 286-87. Gonzales' husband went to open the door and Cabrera rushed in, "she was hysterical and crying and screaming." 11RP 287. She said she was "violated." 11RP 288. Gonzales tried to calm Cabrera down while her husband called 911. 11RP 288. Cabrera told her that she was confronted by two men with a gun in the parking lot where she worked.

11RP 289-90, 314-15. The police arrived shortly thereafter and Cabrera was taken to the hospital. 11RP 291, 315.

Sergeant Corina Curtis was dispatched to the Gonzales residence shortly after midnight to investigate a reported rape. 10RP 229, 233. Idanya Gonzales greeted her at the door and took her to the bathroom where Cabrera “was on the floor in the fetal position sobbing hysterically.” 10RP 234-35. Cabrera said she was leaving work when two men forced her into her vehicle and tried to rob her then forced her to perform oral sex. 10RP 235. The fire department arrived and transported Cabrera to the hospital. 10RP 243-44. Curtis waited while Cabrera was examined at the hospital then escorted her to the Tacoma Police Department to collect evidence from her clothing. 10RP 244-45, 247-48.

Officer Renae Campbell, a forensic specialist, met with Cabrera at the forensics trace lab of the Tacoma Police Department. 10RP 187-88. Campbell swabbed Cabrera’s mouth for semen and removed her work smock, sweater, and pants and placed them in evidence bags. Thereafter, she submitted the evidence to the property room. 10RP 190-93. Campbell also went to the Gonzales residence to collect evidence from the bathroom. She obtained contents out of the toilet where Cabrera had vomited and sealed the contents in a sterile container. 10RP 213-15.

Officer Hannah Heilman reported to Walgreens and inspected the parking lot where she found a tube of Blistex, a tube of cold sore cream, a ballpoint pen, and some miscellaneous pieces of paper. The items were photographed and collected by forensics. 10RP 255-56. Then Heilman went into Walgreens and viewed a surveillance tape provided by the store. 10RP 258-59. The videotape revealed Cabrera walking to her vehicle and walking around it as if she was having difficulty getting into it. Cabrera kept walking around the vehicle then Heilman saw “what appeared to be a white male approach her, but the video quality wasn’t very good, so I couldn’t say for sure.” 10RP 260. Heilman could recognize that the vehicle’s brake lights came on and it pulled out of the parking lot. 10RP 260. She obtained a copy of the videotape and placed it into property as evidence. 10RP 261.

Officer Donovan Velez, a forensic specialist, photographed and collected evidence from the Lincoln Navigator. 11RP 375-76. He collected a beverage bottle, a lighter, and some breath mints from inside the vehicle. 11RP 381. While processing the vehicle, Velez collected six latent fingerprints with four of the fingerprints matching the prints of Cabrera and her boyfriend. 11RP 402. When Velez compared the other two fingerprints with the prints of Olson and Emery, the results for Olson

were negative but the results for Emery “were positive for one of the latent impressions and inconclusive for the last impression.” 11RP 403.

Detective Steven Shake prepared composite sketches of two suspects based on descriptions provided by Cabrera. 11RP 298-300. Cabrera described one suspect as “a white male in his early 20s with blonde hair, medium complexion, standing about five-foot nine, 150 pounds, hazel eyes.” 11RP 302. She described the other suspect as “an Asian male about 22 years of age with dark hair, dark complexion, standing at about 5-foot eight, 180 to 190 pounds, chubby build, and dark eyes.” 11RP 307. After completing the sketches, Shake submitted them to property as evidence. 11RP 303, 308.

On November 8, 2006, lead detective, Jeffrey Turner, received a tip from a fellow officer who gave him the name of Aaron Olson. Turner used various databases and located an address for Olson within a few blocks from Walgreens and linked Olson with Emery. 11RP 335-38, 342-43. He created two photomontages and provided them to Cabrera. She identified Emery but could not identify Olson. 11RP 344-48. After further investigation, Turner conducted a search of Olson’s home and collected evidence. On December 15, 2006, police arrested Olson and Emery. 11RP 349-50. Turner arranged to have DNA samples collected from Olson and Emery. He obtained the samples collected by a forensic

nurse and transported the evidence to the Washington State Patrol Crime Lab. 11RP 356-57.

Jeremy Sanderson, a forensic scientist for the Washington State Patrol Crime Lab, performed an analysis of seven items he received from the Tacoma Police Department, including oral swabs from Cabrera, her pants, her smock, and swabs taken from Olson and Emery. 12RP 533-34. Sanderson compared the results of DNA profiles from the smock and pants to the profiles from the swabs collected from Olson and Emery. As a result of the comparison, Sanderson concluded that the DNA profile from the semen on the pants matched that of Olson and the DNA profile from the semen on the smock matched that of Emery. 12RP 547-48.

Emery testified that on the night of February 27, 2006, he and Olson were walking to Olson's house when they saw Cabrera coming out of Walgreens. Emery thought Olson may have known Cabrera because he approached her as she walked to her SUV in the parking lot, "Aaron walks up to her, and they have some sort of conversation. I wasn't close enough to hear exactly what was being said." 13RP 631-33. Emery was wearing his headphones and listening to music on his Sony Walkman while Olson and Cabrera were talking. 13RP 634. Then Olson motioned Emery over to the car so he believed Cabrera was giving them a ride. Cabrera drove to Market Place and parked in the parking lot where Olson told him that

“there was going to be mutual sex.” 13RP 635-37. Emery got out of the car to give them privacy and stood outside listening to his CD player. Then he heard a tap on the car window and Olson moved to the front seat so Emery got in the back where Cabrera was seated, “I proceeded in the back seat and had oral sex, and then we left. Once we finished we left.” 13RP 640. Cabrera dropped them off at Safeway and they walked to Olson’s home. 13RP 640.

Emery believed the oral sex was consensual because Cabrera “appeared normal; she wasn’t crying; she wasn’t fighting, anything for me to think that there was any wrongdoing.” 13RP 641. Olson did not have a gun or demand money from Cabrera and they did not take her cell phone. 13RP 634-35, 641, 659-60. Emery explained that he chose to testify because he was being wrongly accused and he did not rape anybody. 13RP 642.

Olson testified in rebuttal, denying that he was with Emery on February 27, 2006. 14RP 725-26. Olson denied meeting Cabrera and disputed the DNA results, “Your DNA expert came in here and inaccurately described that my DNA was there. I was not there that night.” 14RP 731-33.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING EMERY'S AND OLSON'S MOTION TO SEVER THEIR TRIALS BECAUSE THEIR DEFENSES WERE IRRECONCIABLE AND THEREFORE MUTUALLY EXCLUSIVE.

Reversal is required because the trial court erred in denying Emery's and Olson's motions to sever their trials where their defenses were mutually exclusive to the extent that one defense must be believed if the other defense is disbelieved.

Washington law disfavors separate trials but the trial court should sever defendants' trials at any point in the trial whenever, "upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant." State v. Grisby, 97 Wn.2d 493, 506, 647 P.2d 6 (1982); CrR 4.4(c)(2)(ii). Trial courts properly grant severance motions only if a defendant demonstrates that a joint trial would be "so manifestly prejudicial as to outweigh the concern for judicial economy." State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d. 577 (1991). Antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive may cause specific prejudice. State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995). For defenses to be irreconcilable, they must be "mutually exclusive to the extent that one [defense] must be believed if the other [defense] is

disbelieved.” State v. Johnson, 147 Wn. App. 276, 285, 194 P.3d 1009 (2008)(quoting State v. McKinzy, 72 Wn. App. 85, 90, 863 P.2d 594 (1993). Where the jury must disbelieve one defense in order to believe the other, the defenses are mutually exclusive. State v. Lane, 56 Wn. App. 286, 298-99, 786 P.2d 277 (1989).

On the first day of trial, counsel for Olson moved to sever the trials explaining that “the defense for Mr. Emery is going to be that yes, we both were there, but that there is no gun” and the “defense for Mr. Olson is that, no, it’s the wrong person, it wasn’t me.” 7RP 40-41. Counsel argued that the defenses pose a serious conflict that would be severely prejudicial. 7RP 41. The State argued that the court should deny the motion because “antagonistic defenses or theories of the case is not a basis alone to sever.” 7RP 45. Counsel for Emery reiterated that Emery would testify that the events occurred and that Olson was there but they had no gun. 7RP 55. The court denied the motion but noted that it retains its discretion throughout the trial and “if it becomes clear to me that the defenses are so antagonistic that it is unfair to either Mr. Olson or to Mr. Emery, that I could then suggest that it should be severed.” 7RP 57-58.

Following the State’s opening statements, counsel for Olson renewed her motion to sever and the court denied the motion stating, “I’m not hearing any reason to change my view, so I will adhere to my prior

ruling. 9RP 84. Counsel for Olson renewed her motion to sever again after the State rested and counsel for Emery informed the court that if the motion is granted, Mr. Emery's case should proceed. The court denied the motion. 13RP 622-23. At the close of all the evidence, counsel for Olson renewed her motion to sever once again in light of Emery's testimony. 15RP 777-78, 80. The court acknowledged that Emery's testimony varied from what it had anticipated but refused to sever the trials, "Although my view of Mr. Emery's defense is a little different now that I have actually heard than what I thought it was when I made a ruling in the first place, I don't think that it changes the ruling. I will adhere to my prior ruling, and I will deny the motion." 15RP 780-81.

The record substantiates that the trial court erred in denying the motion to sever trials because Emery's and Olson's defenses were mutually exclusive. Emery's defense was that Olson told him "there was going to mutual sex" so he believed the oral sex was consensual. 13RP 634-38. Conversely, Olson's defense was that he was not there that night with Emery. 14RP 725-33. It is evident that the jury must disbelieve one defense in order to believe the other because obviously it could not believe that Emery was with Olson and believe that Olson was not there at all. The defenses are therefore irreconcilable and mutually exclusive. McKinzy, 72 Wn. App. at 85, Lane, 56 Wn. App. at 298-99.

The decision to proceed with joint or separate trials is entrusted to the trial court's sound discretion and appellate courts will not disturb the decision absent manifest abuse of discretion. Grisby, 97 Wn.2d at 507. At the close of all the evidence, it became clear that Emery's and Olson's defenses were mutually exclusive, particularly in light of Emery's testimony and Olson's rebuttal. Consequently, the court abused its discretion when it denied counsels' renewed motion to sever the trials and Emery is entitled to a new trial.

Furthermore, although it apparent that counsel for Emery joined counsel for Olson's motions for severance, should this Court determine that counsel for Emery waived any severance claim, Emery was denied his constitutional right to effective assistance of counsel which requires reversal. Both the Sixth Amendment of the United States Constitution and article I, section 22 (Amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In failing to move to sever trials, counsel's performance was deficient because the separate defenses were mutually exclusive and Emery was prejudiced by counsel's deficient performance because the joint trial deprived Emery of his right to a fair trial. Id. at 687.

2. THE TRIAL COURT ERRED IN DENYING EMERY'S MOTION FOR A MISTRIAL WHERE OLSON'S ACCUSATIONS DURING EMERY'S TESTIMONY PREJUDICED EMERY'S DEFENSE AND VIOLATED HIS RIGHT TO A FAIR TRIAL.

Reversal is required because the trial court erred in denying Emery's motion for a mistrial where Olson accused Emery of lying during Emery's testimony to the detriment of his defense in violation of his right to a fair trial.

The abuse of discretion standard governs review of a motion for a mistrial. State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). "The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Only errors affecting the outcome of the trial will be deemed prejudicial." Id. In determining whether a trial irregularity warrants a new trial, the reviewing court considers the seriousness of the irregularity, whether the statement was cumulative of other evidence, and whether the irregularity could have been cured by a jury instruction. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

During Emery's testimony, Olson disrupted the trial and accused Emery of lying in the presence of the jury:

- Q. It wasn't until your friend, Aaron Olson, got from the drivers's side of the vehicle, came to the bench

where you were sitting, that he told you he was going to have sex with Ms. Cabrera according to --

DEFENDANT OLSON: **You are sitting there lying, man.**

THE COURT: Mr. Olson.

DEFENDANT OLSON: **This is perjury.**

THE COURT: Mr. Olson, be quiet. You'll have your opportunity.

DEFENDANT OLSON: This man has been --

THE COURT: You have counsel, Mr. Olson.

DEFENDANT OLSON: I have been wrongly accused.

THE COURT: Ladies and gentleman, please excuse us.

DEFENDANT OLSON: I have been incarcerated for 26 months --

THE COURT: Mr. Olson, be quiet.

DEFENDANT OLSON: I've been wrongly accused.

THE COURT: Mr. Olson.

DEFENDANT OLSON: I have been illegally arrested and wrongly accused of this. I did not rape anybody.

14RP 693-94. (Emphasis added.)

The court excused the jury and warned Olson that “if there are any additional outbursts, I will consider either gagging or having you removed from this courtroom.” 14RP 699. Counsel for Emery moved for a mistrial, arguing the he could not see “how the jury can conceivably get out of their mind what he just said.” 14RP 700. The court denied the motion and called the jury back, instructing the jurors to disregard Olson’s comments. 14RP 700-02. Shortly thereafter, Olson interrupted Emery’s testimony again:

Q. Just to be clear, the only person that you ever talked to in that vehicle that night was your friend, Aaron Olson?

DEFENDANT OLSON: **That’s a lie. I was not there.**

THE COURT: Mr. Olson, not another outburst, sir. Proceed.

Q. (By Mr. McCann) Is that your testimony, Mr. Emery?

A. Repeat the question.

Q. Are you telling the jury that you never spoke a single word to Ms. Cabrera?

A. Yes.

14RP 708-09 (Emphasis added).

It is evident from the record that Olson’s inflammatory accusations constitute a serious irregularity in light of the fact that Emery faced the

difficult task of testifying in his own behalf. With no other evidence to support Emery's testimony, his credibility and ability to convince the jury of his innocence was critical to his defense. Consequently, Olson's accusations that Emery was a liar prejudiced and undermined his defense, depriving him of a fair trial. Furthermore, although the court instructed the jury to disregard Olson's comments after the first outburst, the court failed to instruct the jury when Olson accused Emery of lying again. In any event, a jury instruction could not cure the damaging and disruptive effect of Olson's accusations in the midst of Emery's testimony. Olson's accusations undoubtedly affected the outcome of the trial because his actions distracted the jury at a time when the jury's complete attention was important and essential to Emery's defense.

The trial court abused its discretion in denying defense counsel's motion for a mistrial because Olson's repeated accusations while Emery was presenting his defense constitute a serious irregularity which a jury instruction could not cure given the fact that such accusations are inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors. See State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968).

3. THE TRIAL COURT ERRED IN DENYING EMERY'S MOTION FOR A NEW TRIAL BECAUSE EMERY WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Reversal is required because the trial court erred in refusing to grant defense counsel's motion for a new trial where Emery was denied his constitutional right to a fair trial.

A trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion. State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). CrR 7.5 provides in relevant part that the trial court may grant a new trial when it affirmatively appears that a substantial right of the defendant was materially affected due to "[i]rregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial" and when "substantial justice has not been done."

At sentencing, defense counsel moved for a new trial, arguing that the court erred in denying the defense's motions to sever the trial and motion for a mistrial. 18RP 8-11; CP 178-79, Supp CP ____ (Motion for a New Trial, 04/02/09). The trial court denied the motion, concluding that Olson's actions and the difference in Emery's and Olson's defenses had no impact on the jury's verdict. 18RP 11-12.

Contrary to the court's conclusion, as previously argued, the court erroneously refused to sever the trials because Emery's and Olson's defenses were mutually exclusive and the court erred in refusing to grant a mistrial when Olson repeatedly accused Emery of lying during his testimony, irreparably damaging his defense. Consequently, the trial court abused its discretion in denying defense counsel's motion for a new trial.

Reversal is required as Emery is entitled to new trial because his substantial rights were materially affected and he was deprived of a fair and just trial.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Emery's convictions and remand for a new trial.

DATED this 8th day of January, 2010.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Anthony Marquise Emery

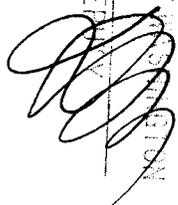
DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Anthony Marquise Emery, Jr., Booking No. 2006349052, Pierce County Jail, 910 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of January, 2010 in Kent, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851


STATE OF WASHINGTON
BY _____
DEPUTY
10 JAN 11 AM 10:45
COURT OF APPEALS
DIVISION II