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NO. 55679-7-I

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

STATE OF WASHINGTON

Respondent,

v.

JUSTIN B. BURKE,

Appellant.

BRIEF OF RESPONDENT

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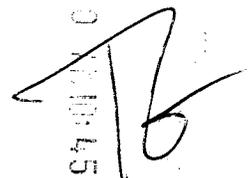


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I. ISSUES

1. Defendant's father advised him to talk to an attorney before he said anything else to the police. Defendant asked the officer "if that was possible." Did defendant have a right to counsel, and if so, did he unambiguously invoke this right?

2. After the question regarding counsel, the police asked defendant no further questions, but defendant made a spontaneous statement. Did continuing to talk waive defendant's right to remain silent?

3. Defendant gave police a partial explanation of his innocence. At trial, defendant asserted a different affirmative defense. Did counsel err by asking defendant why he did not relate his affirmative defense to the police and commenting on his failure to offer his affirmative defense before he testified?

II. STATEMENT OF THE CASE

On August 18, 2003, defendant (D.O.B. 8/25/1980) attended a party at the house of a friend. The friend's sister, J.S. (D.O.B. 4/12/88), was also at the party and was drinking alcohol. Late that night, J.S. was sitting on a couch watching television. At some point, defendant and J.S. went into the bedroom of J.S.'s sister and had sexual intercourse. CP 73. At that time, J.S. was 15.

Defendant was more than 48 months older than J.S., and they had never been married.

On September 10, 2003, two detectives went to defendant's house and interviewed him about the incident. 10/13 RP 207-08. Defendant said he had intercourse with J.S. He later found out she was "younger than he thought she was." 10/13 RP 212.

After a few more questions, defendant's father advised him not to make further statements "until he spoke to an attorney." After the detective told defendant that he could speak to an attorney, the detective asked no further questions. Defendant spontaneously said that he thought "this was a bunch of shit, that girls at Edmonds Woodway [High School] were always trying to get guys in trouble." Defendant said nothing further. 10/13 RP 214.

Defendant was charged with one count of third degree rape of a child. CP 75.

Before the trial started, defendant informed the court and the State that he intended to assert the statutory affirmative defense that he reasonably believed the victim was over 16 based on a declaration of the victim. RCW 9A.44.030(2) and (3).¹ 10/12 RP 12. There was no motion in limine to limit the police testimony

about their interview of the defendant on September 10, 2003.

10/12 RP 13-15.

When the officer started testifying about defendant's father's comment that defendant should talk to an attorney, defendant's only objection was on hearsay grounds. The objection was overruled. 10/13 RP 213.

When defendant was being cross-examined about what he said to the police, there was no objection that the State's questions were a comment on defendant's exercise of his right to remain silent. 10/14 RP 6163-64,78-79.

The State started its closing argument saying, "It is simply unlikely that [J.S.] really told the defendant that she was old enough to have sex with him." 10/14 RP 88. The State then went over the four elements of the crime from the court's instructions. 10/14 RP 92- 94. The State then reminded the jury that there was no dispute that the State had proved the four elements beyond a reasonable doubt. 10/14 RP 95.

The State discussed the affirmative defense. It told the jury that the burden was on defendant to prove the affirmative defense, and that defendant attempted to carry that burden by testifying that

¹ A copy of RCW 9A.44.030 is at Appendix A.

the victim told him she was almost 17. 10/14 RP 95. The State told the jury that when defendant testified, he was a witness, and the jury should evaluate his credibility the same way they evaluated the credibility of the other witnesses. 10/14 RP 99.

The State then discussed the credibility of the witnesses as it related to whether the victim told defendant that she was almost 17. Specifically, the State argued that when defendant failed to tell the victim's sister or the police that the victim told him she was almost 17, it cast doubt on the credibility of his testimony. 10/14 RP 109-112. In that context, the State mentioned that after the police terminated the interview, defendant provided some partial explanation of his conduct, but he did not mention that the victim lied to him about her age. 10/14 RP 111. There was no objection.

Defendant tried to explain his failure to tell the victim's sister and the police that the victim told him she was almost 17 by claiming that he didn't know that what the victim told him her age was did not matter at the time. 10/14 RP 126-27.

In rebuttal, the State again pointed out defendant's failure to tell the police that the victim told him she was almost 17 in the context of commenting on his credibility. 10/14 RP 137

Defendant was found guilty as charged. CP 19.

III. ARGUMENT

A. INTRODUCTION

Where a defendant gives police one explanation for his conduct, then advances another explanation at trial, it is proper to attack the defendant's credibility by asking the defendant to explain why he is now offering a different explanation. It is also proper to argue the inferences that relate to the defendant's credibility.

This is different from a defendant invoking his right to silence or counsel. Defendant here claims he invoked his right to counsel and silence and that the State improperly introduced evidence of that invocation and improperly argued the jury should use that invocation as evidence of guilt. Defendant's version of the trial testimony and argument are not supported by the record or authority.

B. DEFENDANT DID NOT INVOKE HIS RIGHT TO COUNSEL.

A suspect has no "right" to counsel unless adversarial criminal proceedings have been initiated, or he is subject to custodial interrogation. CrR 3.1(b)(1),² State v. Copeland, 89 Wn. App. 492, 499, 949 P.2d 458 (1998). Here, defendant was not in

² The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing

custody, and no criminal proceedings had been initiated against him. He had no "right" to counsel.

Defendant did have the right to remain silent or to terminate his interview with the police at any time, for any reason, or for no reason. Since the police had not limited defendant's liberty in any way, he was free to talk to an attorney. When the interview terminated, defendant spontaneously commented on the attempts of some girls to get guys in trouble. It was not until after that comment that defendant exercised his right to silence.

To the extent defendant had a right to talk to an attorney, to invoke that right, defendant must make "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). The comment "maybe I should talk to a lawyer" was made by the defendant in Davis. The United States Supreme Court determined that was not an unambiguous request for counsel. Davis, 512 U.S. at 462. Here, defendant's question if it was possible to speak to an attorney

magistrate, or is formally charged, whichever occurs earliest. CrR 3.1(b)(1).

was not an unambiguous request for counsel. Defendant did not invoke his right to counsel.

As the trial court found:

“I don’t think that this rises to the dignity of a request for counsel . . . I am not persuaded that the defendant’s question about an attorney was a request for counsel.”

1/20 RP 15. This Court should affirm the trial court.

C. DEFENDANT DID NOT INVOKE HIS RIGHT TO REMAIN SILENT.

To invoke one’s right to remain silent during police questioning, one must remain silent in a way that is “clear and unequivocal.” State v. Hodges, 118 Wn. App. 668, 671, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031 (2004). When his father advised him to talk to an attorney before answering further questions, defendant had the right to terminate the interview. Defendant elected to make one further statement to the police – “This was a bunch of shit, that the girls at Edmonds Woodway [High School] were always trying to get guys into trouble.” 10/13 RP 214. This was not a clear, unequivocal assertion of defendant’s right to remain silent.

A person who voluntarily talks to police waives his right to remain silent. State v. McWatters, 63 Wn. App. 911, 915, 822 P.2d

787, review denied, 119 Wn.2d 1012 (1992). To the extent defendant's question about the possibility of talking to an attorney was an invocation of defendant's right to remain silent, his voluntary statement immediately after being told that he could talk to an attorney waived that right.

Relying on State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996), defendant claims the State "may not elicit testimony or comment on the defendant's exercise of his right to remain silent to imply guilt from such silence." Brief of Defendant 11. The facts in Easter are too different from the facts here for Easter to be useful.

The officer in Easter was allowed to testify the defendant was a "smart drunk" and was "hiding something." Easter, 130 Wn.2d at 233. The Supreme Court found the officer "characterized Easter's silence as evasive and evidence of his guilt." Easter, 130 Wn.2d at 235. Here, the officer testified as to the statements defendant did and did not make. He did not characterize those statements in any way. Further, Mr. Easter did not testify. As the Supreme Court noted, pre-arrest silence may be used as evidence regarding a defendant's credibility. Easter, 130 Wn.2d at 237. Under the plain language of Easter, even if defendant's inquiry

about seeing a lawyer was an invocation of his right to silence, the evidence of that silence was proper impeachment.

D. THERE WAS NO PROSECUTORIAL MISCONDUCT.

Defendant elected explain his conduct to the police by saying, "girls at Edmonds Woodway [High School] girls were always trying to get guys into trouble." 10/13 RP 214. The logical inference was that the victim was not telling the truth when she reported him. At trial, defendant claimed that the victim had told him she was almost 17, and he believed that was true because of the way she looked. 10/14 RP 17.

When a defendant asserts the State improperly commented on his exercise of his right to silence, the first inquiry is whether there was a violation of the rule from Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), that prohibits comment on a defendant's unwillingness to explain his innocence at the time of arrest. State v. McFarland, 73 Wn. App. 57, 64, 867 P.2d 660, affirmed, 124 Wn.2d 322 (1994).

Here, defendant willingly attempted to explain his innocence by claiming that the victim was trying to get him into trouble. The rule from Doyle does not apply to these facts.

If there was a violation of the Doyle rule, the next inquiry is whether the evidence was presented as impeachment. McFarland, 73 Wn. App. at 64. So, even if there had been a violation of the Doyle, since the evidence was presented to impeach defendant's testimony, and since the State's argument went to defendant's credibility, there was no error.

"When a defendant does not remain silent and instead talks to police, the state may comment on what he does not say. . . . False information given to the police is considered admissible as evidence relevant to defendant's consciousness of guilt." State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) (citations omitted). That is the precise situation we have here.

Defendant did not remain silent, but gave the police one explanation of his conduct. At trial, he gave another version. It was entirely proper for the State to question him about the differences between his pre-trial statement and his testimony. State v. Belgarde, 110 Wn.2d 504, 511, 755 P.2d 174 (1988).

Defendant acknowledges that it is proper for the State to comment when a defendant gives one version of what happened to the police and a different version in his testimony. Brief of Defendant 16. He argues, however, that in this case, the

comments were on his exercise of his right to remain silent. Id.
The record of proceedings belies defendant's argument.

Defendant told the police that he did not know how old the victim was. 10/13 RP 212. He testified she had told him she was almost 17. 10/14 RP 17. He did not testify that he would have told the police that she told him she was almost 17 had the interview continued. The State's comments were all related to defendant's credibility. Since he did not remain silent, they could not have been a comment on defendant's exercise of his right to remain silent.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on August 9, 2005.

JANICE E. ELLIS
Snohomish County Prosecuting Attorney

By:



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Attorney for Respondent

West's RCWA 9A.44.030

C

West's Revised Code of Washington Annotated Currentness

Title 9A. Washington Criminal Code (Refs & Annos)

 Chapter 9A.44. SEX Offenses (Refs & Annos)

→9A.44.030. Defenses to prosecution under this chapter

(1) In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

(2) In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim.

(3) The defense afforded by subsection (2) of this section requires that for the following defendants, the reasonable belief be as indicated:

(a) For a defendant charged with rape of a child in the first degree, that the victim was at least twelve, or was less than twenty-four months younger than the defendant;

(b) For a defendant charged with rape of a child in the second degree, that the victim was at least fourteen, or was less than thirty-six months younger than the defendant;

(c) For a defendant charged with rape of a child in the third degree, that the victim was at least sixteen, or was less than forty-eight months younger than the defendant;

(d) For a defendant charged with sexual misconduct with a minor in the first degree, that the victim was at least eighteen, or was less than sixty months younger than the defendant;

(e) For a defendant charged with child molestation in the first degree, that the victim was at least twelve, or was less than thirty-six months younger than the defendant;

(f) For a defendant charged with child molestation in the second degree, that the victim was at least fourteen, or was less than thirty-six months younger than the defendant;

(g) For a defendant charged with child molestation in the third degree, that the victim was at least

West's RCWA 9A.44.030

sixteen, or was less than thirty-six months younger than the defendant;

(h) For a defendant charged with sexual misconduct with a minor in the second degree, that the victim was at least eighteen, or was less than sixty months younger than the defendant.

CREDIT(S)

[1988 c 145 § 20; 1975 1st ex.s. c 14 § 3. Formerly RCW 9.79.160.]

HISTORICAL AND STATUTORY NOTES

Effective date--Savings--Application--1988 c 145: See notes following RCW 9A.44.010.

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OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON,

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v.

JUSTIN B. BURKE,

Appellant.

No. 55679-7-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 9 day of August, 2005, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

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containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 9 day of August, 2005.



DIANE K. KREMENICH
Legal Assistant/Appeals Unit