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STATE OF WASHINGTON

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**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER

v.

TIMOTHY EDWARD HAGER, RESPONDENT

Court of Appeals, Division II
COA No. 37539-7

Pierce County Superior Case No. 06-1-05509-0

PETITIONER'S SUPPLEMENTAL BRIEF

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A. ISSUES PERTAINING TO SUPREME COURT REVIEW.

1. Did the trial court abuse its discretion when it denied defendant's motion for a mistrial based on one witness' single use of the word "evasive" when describing defendant's demeanor?

B. STATEMENT OF THE CASE.

A jury found defendant, Timothy Edward Hager, guilty of one count of rape of a child in the first degree for digitally penetrating his step-daughter. CP 56, 57-70.

In the fall of 2006, while she was in the ninth grade, P.B. wrote a letter to her ex-boyfriend disclosing that defendant had raped her when she was in the third grade. RP 274, 297; Exhibit 6. The boy's mother found the note and reported its contents to the school counselor. RP 202, 205-06. The school counselor informed Child Protective Services, which initiated an investigation. RP 207-08, 238, 359.

On November 9, 2006, CPS investigator Roni Jensen was contacted regarding the referral of P.B. for possible sexual abuse between P.B. and her stepfather. RP 238. Ms. Jensen and Detective Callas went to school to discuss the allegations with P.B. RP 239. As part of the normal protocol, the importance of truth telling was emphasized to P.B. during this interview. RP 240. Detective Callas, along with Ms. Jensen and Mr. Daniels, conducted a taped interview with P.B. regarding the abuse. RP

423-24. During the interview, P.B. appeared to be nervous and scared. RP 421. After she spoke briefly about the details of the incident, Detective Callas asked her if anything else like this had ever happened and she said, "no" even though that was not the truth because she was scared to tell him more. RP 279. However, later when she was asked to testify under oath she revealed more details because she knew she had to say everything. RP 280.

A decision was made not to have P.B. submit to a physical examination for signs of potential sexual abuse due to the length of time that had elapsed between report of the abuse and date that abuse occurred. RP 249-50. Ms. Jensen arranged to have P.B. move out of her family home and in with her grandmother. RP 250.

On November 15, 2006, Detectives Callas and Dorr interviewed defendant at his father's property. RP 220, 428. Defendant and P.B.'s mother lived in a van on the property. RP 219, 427. Upon the detectives' contact, defendant initially denied that he was Timothy Hager, but later admitted his identity. RP 219, 428-29. During the interview, defendant denied the victim's allegations, denied ever having lived with the victim or her mother, asserted that he had been living with his brother, and stated that, if he had been living with the victim, it was in 1999, not 2001. RP

220-225, 439. Defendant also suggested that it was P.B.'s biological father¹ who had assaulted her. RP 439.

During the contact, defendant was very jittery. RP 225. He avoided eye contact, his eyes were dilated, he spoke in a loud and fast voice, and he appeared as though his "muscles were tightened up and tense." RP 225, 438. Based on Detective Dorr's training and experience, he believed that defendant was under the influence of methamphetamine at the time of contact. RP 225-26. Despite defendant's jittery appearance, the detective found that defendant's attitude or demeanor was not problematic, and he "really didn't have any problem with him." RP 225.

Detective Dorr spoke with Mrs. Hager, who also appeared to be under the influence of methamphetamine. RP 227. Ms. Jensen, who was also present, made similar observations. RP 256, 263. He asked her questions regarding a specific apartment defendant may or may not have lived in. RP 226-27.

Detective Dorr was able to confirm through further investigation that the Hagers lived at an apartment on 5502 Washington Street, in the city of Sumner, during the 2000-2001 school year. RP 228. Victim P.B. would have gone to Daffodil Elementary and was in the third grade at the time. RP 228. Work records for defendant show that he did not work on

¹ When confronted by Mrs. Hager, defendant claimed that his own father had assaulted P.B. RP 406.

March 26, 2001, March 29, 2001, May 11, 2001, May 15, 2001, and May 23, 2001. RP 450. School records of P.B. indicated that she was in the third grade in the 2000-2001 school year, and that there was no school on March 29, 2002, March 30, 2001, and April 16-20th, 2001. RP 451.

Prior to trial, defendant motioned the court to prevent any testimony from the detectives regarding defendant's deceptive or evasive behavior. RP 155. The court granted the motion.² RP 158.

During Detective Callas's trial testimony, the prosecutor asked him: "What was Mr. Hager's demeanor like during the time you had contact with him that day?" and Callas answered, "He appeared to be angry. He was evasive." RP 432.

Defense counsel moved for a mistrial and the prosecutor explained that he had forgotten to advise³ the officer to avoid using the word "evasive." RP 432. The prosecutor conceded that the detective should not have used the word, but argued that the error did not justify a mistrial provided the jury was properly instructed to disregard the remark. RP 432-33. Defendant argued that the error affected his credibility⁴ and that the resulting prejudice could not be resolved short of a mistrial. RP 433.

² The court followed the ruling of the judge in defendant's first trial, without elaborating on what that reasoning was. RP 158. The first judge's ruling was not made part of the record below.

³ The prosecutor had instructed Detective Callas not to use the word "evasive" during defendant's first trial, but had not reminded him of the prohibition before his testimony at this second trial. RP 432.

⁴ Defendant did not testify at trial.

Defense counsel explained “I am torn in this case. I don’t really want to make a motion for mistrial. I’m happy the way the testimony went so far, but I don’t know any other way to cure this at this point.” RP 434. The court denied the motion for mistrial because (1) he did not believe the officer was acting in bad faith in violating the pretrial order, and (2) the court felt it was caught in terms of “nothing else being said after that, and I intend to advise the jury that they are to disregard that answer and they will not and should not consider it . . . as evidence.” RP 434.

The court then called the jury back into the courtroom and advised that he sustained the objection with regards to the use of the words “angry” and “evasive” and that the jury was to “disregard that answer in its entirety and you are not to consider that testimony as part of any of your deliberations in this case.” RP 437.

The jury found defendant guilty as charged. CP 56. Defendant appealed the verdict and in a published opinion, Division Two of the Court of Appeals reversed defendant’s conviction and remanded the case for a new trial. *See State v. Hager*, 152 Wn. App. 134, 136, 216 P.3d 438 (2009). In a split decision, the majority held that Detective Callas’s single use of the word “evasive” was an impermissible comment on defendant’s right to remain silent and denied defendant a constitutionally fair trial. The dissent disagreed, noting that the testimony was not a comment on defendant’s right to remain silent and suggested that the appellate court improperly substituted its discretion for that of the trial court. *Id.* at 145.

The Supreme Court granted the State's petition for discretionary review.

C. ARGUMENT.

1. A WITNESS' ISOLATED, SINGLE REMARK REGARDING DEFENDANT'S Demeanor DOES NOT WARRANT THE GRANTING OF A MISTRIAL WHERE THE COURT IMMEDIATELY GAVE AN INSTRUCTION TO THE JURY TO DISREGARD THE COMMENT.

The decision to grant or deny a mistrial is within the sound discretion of the trial court and is reversible solely for an abuse of discretion. *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Id.* When making this determination, appellate courts do not weigh conflicting evidence or decide credibility. See *State v. Rodriguez*, 103 Wn. App. 693, 696, 699-700, 14 P.3d 157 (2000)(trial judge is in the best position to determine the effects of trial irregularities on the jury), *aff'd*, 146 Wn.2d 260, 45 P.3d 541 (2002). On review, the inquiry is limited to whether the trial court had tenable reasons for concluding a defendant was or was not prejudiced by the introduction of improper evidence.

- a. Detective Calla's testimony was not a comment on defendant's right to remain silent.

The Fifth Amendment of the United States Constitution provides, in part, that no person "shall be compelled in any criminal case to be a witness against himself." In a similar provision, article I, section 9 of the Washington Constitution reads in part: "[n]o person shall be compelled in any criminal case to give evidence against himself." Washington courts give the same interpretation to both clauses. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

Generally courts distinguish between mere references to silence, and comments that use silence "to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996); *State v. Sweet*, 138 Wn.2d 466, 480, 481, 980 P.2d 1223 (1999); *See also State v. Romero*, 113 Wn. App. 779, 54 P.3d 1255 (2002)(Division Three adopts a three part framework for analyzing whether a comment is a mere reference to silence and therefore nonconstitutional error). References to silence are of less concern because "[m]ost jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence." *Lewis*, 130 Wn.2d at 706. Consequently, mere references to silence are not reversible absent a showing of prejudice. *Sweet*, 138 Wn.2d at 481

“A comment on an accused’s silence occurs when used to the State’s advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.” *Lewis*, 130 Wn.2d at 707. But introduction of nontestimonial evidence, such as physical evidence, demeanor, and conduct, is permissible. *Easter*, 130 Wn.2d at 243. And “a mere reference to silence which is not a ‘comment’ on the silence is not reversible error absent a showing of prejudice.” *Lewis*, 130 Wn.2d at 706-07.

In *Lewis*, the defendant moved for a mistrial after an officer testified that he told Lewis, “that if he was innocent, he should just come in and talk to me about it.” 130 Wn.2d at 703. The officer did not testify as to any appointments Lewis made and subsequently failed to appear to. *Id.* at 704. In support of its holding that the testimony was not a comment on Lewis’s right to remain silent, the court noted that “the detective did not say that Lewis refused to talk to him, nor did he reveal the fact that Lewis failed to keep appointments. The officer did not make any statement to the jury that Lewis’s silence was any proof of guilt.” *Id.* at 706.

In *State v. Easter*, the Court reached the opposite conclusion. In *Easter*, an officer testified that when he asked the defendant what had happened at the scene of a car accident, Easter “totally ignored” him. 130 Wn.2d at 232. He also testified that when he continued to ask questions, Easter looked down and continued to ignore his questions. *Id.* The officer

then stated that when he took Easter back to the scene of the accident, Easter's attitude changed and he was no longer evasive. *Id.* at 233. On redirect, when explaining the difference in Easter's behavior, the officer characterized Easter as a "smart drunk." *Id.* According to the officer, "smart drunk" meant that Easter "was evasive, wouldn't talk to me, wouldn't look at me, wouldn't get close enough for me to get good observations of his breath and eyes, I felt that he was trying to hide or cloak." *Id.* Later, during closing argument, the prosecutor argued two weeks of testimony were best summed up with the words, "smart drunk." *Id.* at 234. The prosecutor referred to Easter as a "smart drunk" several times during closing and referenced the testimony that Easter had ignored the officer. *Id.*

The Court held that Easter's right to silence was violated by testimony he did not answer and looked away without speaking to the officer. *Easter*, 130 Wn.2d at 241. The Court also found that his right was violated by testimony and argument that he was evasive, or was communicative only when asked about papers or another person. *Id.* Finally, the court determined that since "smart drunk" was defined for the jury as evasive behavior and silence when interrogated, the testimony that Easter was a smart drunk violated his right to silence. *Id.*

This issue was again addressed in *State v. Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008). There, the Court held that the defendant's right to silence was violated when the State invited the jury to infer guilt from the

exercise of a constitutionally protected right. In *Burke*, the twenty two year old defendant had consensual sex with a fifteen year old. He claimed that the girl had affirmatively told him that she was sixteen. The State sought to undermine the defendant's claim on the theory that if the victim had really told him she was sixteen, he would have shared this information with the officers. The State made these arguments in its opening and closing arguments to the jury and stressed the defendant's silence in both direct examination of the investigating officers and in cross examination of the defendant.

The facts of the present case are more analogous to the facts in *Lewis* than they are to *Easter* or *Burke*. Detective Callas described defendant's demeanor during the course of a 10-15 minute interview as angry and evasive. RP 432. The detective then testified that defendant denied the allegations against him, and that he suggested the victim's biological father as a suspect. RP 438-39. At no time did Detective Callas suggest that defendant refused to speak to them, or refused to respond to all of his questions. Nothing in either Detective Callas's or Detective Dorr's testimony suggested that defendant refused to answer any question, terminated the interview, invoked his right to remain silent, or that he failed to share an exculpatory explanation with the officers. Given that defendant not only voluntarily spoke to the detectives but also that he answered all of their questions, Detective Callas's testimony that

defendant's demeanor was evasive was not a comment on defendant's right to remain silent.

Another way this case is factually dissimilar to *Easter* and *Burke* is that there was no repetition of the testimony and the State did not argue that defendant's demeanor was substantive evidence of his guilt. Once Detective Callas was instructed to avoid the word "evasive," he never repeated it or any similar statement. *See* RP 438-48. Nor did the prosecutor make any argument about defendant's interview behavior or demeanor in closing argument, noting only that defendant's story changed from accusing the victim's biological father when speaking to the officers, to accusing his own father when speaking to Mrs. Hager in an attempt to maintain his relationship, to claiming the allegations were complete fabrications at trial. RP 492-519, 547-56. The isolated statement did not invite the jury to infer that defendant was guilty of child rape⁵ based on his evasiveness and was not a comment on his right to remain silent under the Fifth Amendment.

⁵ Based on defendant's mannerisms and behavior during the interview, a more logical inference was that defendant was evasive because he did not want the officers to suspect he was under the influence of a narcotic.

- b. The trial court did not abuse its discretion when it denied defendant's motion for mistrial based on Detective Callas's violation of its pretrial ruling.

A trial court should grant a mistrial only when a trial irregularity is so prejudicial that it deprives the defendant of a fair trial. *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). A court conducts a three part test in evaluating whether a trial irregularity requires a new trial. A court looks to: (1) The seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark. *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). The trial judge, having heard the testimony first hand, has additional information as to the witnesses' inflection and manner when testifying, which a reviewing court cannot discern from reading a cold transcript. *State v. Walker*, 136 Wn.2d 767, 777-778, 966 P.2d 883 (1998). Because of its opportunity to hear the evidence directly, the trial court is in the best position to examine the effect of the statement and its decision will only be overturned if there was an abuse of discretion. *Escalona*, 49 Wn. App. at 254.

This court "must presume that the jury followed the judge's instructions to disregard the remark." *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). A mistrial should be granted only if the statement is so prejudicial that the defendant cannot possibly receive a fair trial. *Id.*

Here, the trial court did not abuse its discretion when it denied defendant's motion for a mistrial based on Detective Callas's violation of its pretrial ruling. The trial court noted its frustration with the violation but stated:

I'm going to deny the motion for mistrial and I'm going to do it on the basis that No. 1, I don't think the officer was acting in bad faith in terms of violating a rule. I think he just was not aware of that from a prior discussion with counsel.

The other thing is that I think it was caught in time in terms of nothing else being said after that, and I intend to advise the jury that they are to disregard that answer and they will not and should not consider it as part of their -- any testimony or evidence in this case, and will be happy to emphasize it in a limiting instruction, if so desired.

RP 434. The court then instructed the jury to disregard the testimony. RP 437. The jury indicated on the record that it understood the court's instruction. RP 437.

In addition to the curative instruction, the court presented the jury with the following general instruction:

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. *If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict....*

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. *If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss*

that evidence during your deliberations or consider it in reaching your verdict....

CP 38 (Jury Instruction 1).

The trial court, having observed Detective Callas's demeanor and inflection deemed the error inadvertent, and found it did not warrant a mistrial. The court's ruling suggests that it did not find the violation of its pretrial ruling to be a serious irregularity.

In addition, the statement that defendant's demeanor was evasive was cumulative of other testimony, properly admitted. Detectives Dorr and Callas both testified that defendant initially refused to identify himself. RP 219, 429. While Detective Dorr did not characterize defendant as angry, he noted that defendant "was kind of upset that we were there." RP 225. Detective Dorr noted that defendant avoided eye contact and appeared to be "very jittery." RP 225. Detective Dorr concluded that defendant was under the influence of methamphetamine based on his appearance and speech pattern. RP 225-26. That Detective Callas considered defendant's demeanor to be "evasive," was consistent with his jittery behavior, avoidance of eye contact, and refusal to identify himself to the officers; therefore, Detective Callas's testimony was cumulative of properly admitted testimony.

Finally, the error was cured by instruction. The court immediately offered a curative instruction, which the jury acknowledged they understood. RP 437. The court reinforced the curative instruction by

giving the general instruction regarding objections. CP 38 (Jury Instruction 1). The jury is presumed to follow the court's instructions.

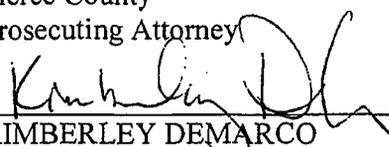
The trial court did not abuse its discretion when it declined defendant's motion for mistrial based on Detective Callas's single, isolated statement. This violation of the court's pretrial ruling was inadvertent, brief, and dealt with swiftly and appropriately. The trial court did not error.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court reverse the Court of Appeals decision and reinstate the jury's verdict of guilt.

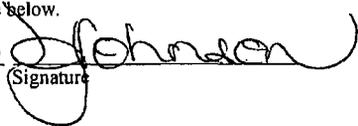
DATED: APRIL 2, 2010

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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