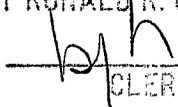


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SUPREME COURT NO. 83717-1
COURT OF APPEALS NO. 37539-7-II

THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

TIMOTHY EDWARD HAGER,

Respondent.

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

The Honorable John R. Hickman

SUPPLEMENTAL BRIEF OF RESPONDENT

VALERIE MARUSHIGE
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FILED AS
ATTACHMENT TO EMAIL

ORIGINAL

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I. STATEMENT OF THE ISSUE

Did the trial court abuse its discretion in denying Hager's motion for a mistrial where Detective Callas' improper and prejudicial testimony, which the trial court failed to cure, denied Hager his constitutional right to a fair trial?

II. STATEMENT OF THE CASE

The procedural and substantive facts are provided in respondent's answer to the petition for review and incorporated herein by reference. Respondent's Answer to Petition for Review at 4-13.

III. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HAGER'S MOTION FOR A MISTRIAL BECAUSE DETECTIVE CALLAS' IMPROPER AND PREJUDICIAL TESTIMONY, WHICH THE TRIAL COURT FAILED TO CURE, DENIED HAGER HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The Sixth Amendment to the United States Constitution and article I, section 21 of the Washington State Constitution guarantee a criminal defendant the right to a fair trial and an impartial jury. State v. Johnson, 152 Wn. App. 924, 934, 219 P.3d 958 (2009). "Only a fair trial is a constitutional trial." State v. Coles, 28 Wn. App. 563, 573, 625 P.2d 713, review denied, 95 Wn.2d 1024 (1981)(citing State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956)). A trial court's decision to deny a motion for a

mistrial is reviewed for an abuse of discretion. State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). An appellate court will reverse a trial court only if there is a substantial likelihood the trial irregularity prompting the mistrial motion affected the jury's verdict. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). In determining whether the trial irregularity affected the outcome, appellate courts examine: (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). An appellate court examines the testimony in question "against the backdrop of all the evidence." State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

During motions in limine, defense counsel moved to exclude testimony by Detective Callas that Hager was evasive or deceptive. 6RP 154-55. The trial court granted the motion explaining that it agreed with the previous court's reasoning for excluding such testimony in the first trial. 6RP 158.

At trial, the State questioned Callas about what happened when he and Detective Dorr went to Hager's home to investigate P.B.'s allegations:

Q. What was Mr. Hager's demeanor like during the time that you had contact with him that day?

A. He appeared to be angry. **He was evasive.**

8RP 432 (emphasis added).

Callas' response prompted an objection from defense counsel who stated that he wanted to make a motion so the court excused the jury. 8RP 432. The court asked the prosecutor if he discussed "the pretrial motions with this witness." 8RP 432. The prosecutor admitted that he forgot to advise Callas not to use words such as evasive but argued that Callas' error was not enough to justify a mistrial. 8RP 432-33. Defense counsel argued that Callas' comment damaged Hager's credibility and a jury instruction could not cure its prejudicial effect especially in light of Callas' position as the lead detective in the case. 8RP 433-34. The court denied the motion for a mistrial:

Well, I'm as -- probably more so than defense counsel -- frustrated over this because of the fact that we took such pains to make these rulings and insure that this was not going to occur.

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 the 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.

8RP 434.

In denying the motion for a mistrial, the court reminded Callas of its pretrial ruling prohibiting words such as evasive and deceptive:

[T]hose kind of conclusionary remarks I have struck from being part of the testimony that you would give. You can certainly -- you are allowed to make a description of his physical appearance, his movements, that kind of thing, but no conclusionary remarks regarding your judgment as to his behavior in terms of his testimony or whether he was being truthful with you or not being truthful with you.

8RP 435.

When defense counsel noted that he did not feel a limiting instruction would cure the error, the court assured him that it was “going to try to cure it the best I can.” 8RP 435-36.

The jury returned and the court proceeded to instruct the jurors:

THE COURT: Ladies and Gentlemen, I need your attention for a moment. An objection was made by Mr. Sepe as to a response that the detective gave to a question by Mr. Hammond in regards to the words angry and -- what was the word?

MR. SEPE: **Evasive.**

THE COURT: -- **evasive.** Thank you. I sustained that objection. You are 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. Do you understand that?

JURY PANEL: Yes.

8RP 437 (emphasis added).

- a. The seriousness of the irregularity is evident where Callas' testimony violated Hager's constitutional right to a jury trial, violated his constitutional right against self-incrimination, and violated two explicit pretrial orders.

The right to a jury trial under the Sixth Amendment and article I, section 21 of the Washington State Constitution includes the right to have the jury be “the sole judge of the weight of the testimony and credibility of the witnesses.” State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995)(quoting State v. Crotts, 22 Wn.2d 245, 250-51, 60 P. 403 (1900)). Impermissible opinion testimony regarding the defendant’s guilt may be reversible error because such evidence violates the defendant’s constitutional right to a jury trial, which includes the independent determination of the facts by the jury. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). “Because it is the jury’s responsibility to determine the defendant’s guilt or innocence, no witness, lay or expert, may opine as to the defendant’s guilt, whether by direct statement or by inference.” State v. Farr-Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999)(citing State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)).

Callas’ testimony that Hager was evasive during questioning constituted improper opinion testimony because the comment clearly implied guilt. As the trial court concluded, words such as evasive are impermissible because they are conclusory remarks regarding Callas’

“judgment” as to whether Hager “was being truthful.” 8RP 435. Furthermore, in light of the fact that Callas was the lead detective in the case, the jury was especially likely to be influenced by his testimony because an officer’s testimony carries an “aura of special reliability and trustworthiness.” State v. Demerey, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001)(citing United States v. Espinosa, 827 F.2d 604, 613 (9th Cir. 1987)). The prejudicial effect of Callas’ comment implying guilt is evident because it clearly damaged Hager’s credibility which was critical to his defense.

Callas’ comment also violated Hager’s constitutional right against self-incrimination. The Fifth Amendment provides that “[n]o person shall . . . be compelled in any criminal case to be a witness against himself” and article I, section 9 of the Washington Constitution provides that “[n]o person shall be compelled in any criminal case to give evidence against himself.” Washington courts interpret the two provisions equivalently. State v. Earls, 116 Wn.2d 364, 375-76, 805 P.2d 211 (1991). The right against self-incrimination is liberally construed. Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify. Moreover, the State may not elicit comments from witnesses or make closing arguments relating to a

defendant's silence to infer guilt from such silence. State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996)(citations omitted). An accused's Fifth Amendment right to silence can be circumvented by the State "just as effectively by questioning the arresting officer or commenting in closing argument as by questioning the defendant himself." Id. (citing State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979)).

The record substantiates that Callas' comment violated Hager's right against self-incrimination because a comment on an accused's silence occurs when used "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). Callas testified that Hager was evasive during questioning, suggesting that Hager was avoiding his questions because Hager was guilty of the allegations. Consequently, Callas' comment implying that Hager was hiding his guilt circumvented Hager's constitutional right to silence.

Importantly, Callas' comment was particularly egregious because his testimony violated two pretrial orders explicitly prohibiting words such as evasive. As this Court emphasized in Easter, violations of pretrial orders protecting a defendant's right to silence are not taken lightly, "We do not condone cavalier violation of trial court pretrial rulings as in this

case. Such violations may be so flagrantly prejudicial as to be incurable by instruction.” 130 Wn.2d at 242 n.11.

Under the totality of the circumstances, where Callas’ comment violated Hager’s right to a jury trial, violated his right against self-incrimination, and violated two pretrial orders, his improper and prejudicial testimony constitutes a serious trial irregularity.

- b. Callas’ testimony did not involve cumulative evidence.

Callas’ testimony that Hager was evasive did not amount to cumulative evidence because the record reflects that there was no other testimony lending corroboration to his opinion. Although Detective Dorr testified that he was with Callas when he questioned Hager about the allegations made by P.B., nothing in Dorr’s testimony suggested that Hager avoided questions, casting doubt on his credibility. 7RP 220-25.

- c. The trial court’s deficient instruction failed to cure the prejudicial effect of Callas’ testimony.

The trial court explained that it was denying defense counsel’s motion for a mistrial because it did not think Callas acted in bad faith and “I intend to advise the jury that they are to disregard that answer.” 8RP 434. To Hager’s detriment, the court did not proceed in a straightforward manner and instruct the jury to disregard Callas’ last response. Instead, the court attempted to remember the word that it prohibited and asked

“what was the word?” 8RP 437. Consequently, the jury repeatedly heard that Hager was evasive. 8RP 437. The record substantiates that rather than curing the error as the court intended, the court exacerbated the prejudicial effect of Callas’ testimony by drawing further attention to his comment and therefore leaving a lasting impression upon the minds of the jurors that Hager was evasive during questioning.

- d. There is a substantial likelihood that the trial irregularity affected the outcome of the trial because Callas’ improper comment constitutes a serious irregularity, it did not involve cumulative evidence, and the trial court failed to properly instruct the jury to disregard it.

When considering Callas’ testimony against the backdrop of all the evidence, there is a substantial likelihood that Callas’ improper and prejudicial comment affected the outcome of the trial because the State’s case against Hager was not overwhelming. With the case turning on the relative credibility of the complaining witness and the accused, it is evident from the record that P.B.’s testimony was impeached with inconsistent and contradictory statements. 7RP 309-19, 323-24, 331-32, 293-94; 8RP 377.

Despite the reasonable doubt raised by P.B.’s testimony, the fact remains that Hager was accused of raping a child, a crime which naturally invokes the passion and prejudice of a jury. In light of the nature of the crime and the special aura of reliability of Callas’ testimony, the trial court

abused its discretion in denying Hager's motion for a mistrial because Callas' prejudicial comment, which the court failed to cure, undoubtedly influenced the jury and materially affected the outcome of the trial. State v. Bourgeois, 133 Wn.2d 389, 409, 945 P.2d 1120 (1997)(citing State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

IV. CONCLUSION

"From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which each defendant stands equal before the law." Gideon v. Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). Mr. Hager did not stand equal before the trial court. For the reasons stated, this Court should affirm the Court of Appeals' reversal and remand for a new trial because Mr. Hager was denied his constitutional right to a fair trial.

DATED this 5th day of May, 2010.

Respectfully submitted,

VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Respondent, Timothy Edward Hager

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 Kimberley DeMarco, Pierce County Prosecutor's Office, 930 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 5th day of May, 2010 in Kent, Washington.

Valerie Marushige
Attorney at Law
WSBA No. 25851

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