

64533-1

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No. 64533-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

RAFAEL ALANIZ LEYVA,

Appellant.

---

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

---

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE DETECTIVE'S COMMENTS AND TESTIMONY  
URGED THE JURY TO INFER GUILT FROM  
LEYVA'S PRE-ARREST SILENCE, IN VIOLATION  
OF THE FIFTH AND FOURTEENTH AMENDMENTS

The federal and state constitutions guarantee the right to remain silent. U.S. Const. amends. V, XIV; Const. art. I, §§ 9, 22. The State may not introduce evidence that a defendant exercised his constitutional right to remain silent, and a prosecutor commits misconduct if she elicits testimony or comments on the defendant's exercise of this right, whether the right is exercised before or after arrest. Doyle v. Ohio, 426 U.S. 610, 618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); Miranda v. Arizona, 384 U.S. 436, 468 n.37, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008); State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

Here, the prosecutor strategically introduced testimony that there was a gap between Jessica L's reporting of the crime against her and the filing of charges against Rafael Leyva and that the detective tried unsuccessfully to interview Leyva during that time period. Leyva argues the introduction of this testimony permitted the jury to infer guilt from his pre-arrest silence.

The police investigation of the alleged sexual assault was not relevant to the prosecution of this case. See State v. Edwards, 131 Wn.App. 611, 614, 128 P.3d 631 (2006) (hearsay from confidential informant improperly admitted to show why detective started investigation as detective's state of mind "not an issue in controversy" and thus not relevant); State v. Aaron, 57 Wn.App. 277, 280, 787 P.2d 949 (1990) (hearsay comment to investigating officer not admissible to counter anticipated defense attack on competency of police investigation). Other than pointing out that Jessica L. did not undergo a physical examination, the defense did nothing to attack the quality of the police investigation. Yet the State wanted to introduce evidence of the delay. The prosecutor used the delay to elicit sympathy for Jessica, who testified the delay upset her because she felt no one cared and the police had forgotten about her. RP 66, 79-80, 370-71, 377, 403. The prosecutor also elicited testimony from the investigating detective of her numerous attempts to contact Leyva and her need to get everyone's side of the case before referring the case to the prosecutor. RP 181-83, 195-98, 222-23.

The prosecutor implies Leyva may have elicited the improper testimony himself because, while the State elicited testimony that

the detective tired to reach Leyva, defense counsel brought out the testimony that he received some of the messages. Brief of Respondent at 12-13 (citing RP 272-73). Having objected to the evidence prior to trial and lost the motion in limine, however, Leyva was permitted to address the evidence on cross examination after it was elicited by the State. RP 20-27; see State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) (defendant who has lost motion in limine is not required to object when evidence introducing during trial).

The State acknowledges the prosecutor may not use the defendant's exercise of his constitutional right to remain silent, but claims the right was not asserted or the witness's comments were too attenuated to be viewed by the jury as a comment on Leyva's guilt. Brief of Respondent at 14-15. The Miranda warnings constitute an "implicit assurance" to the defendant that his silence will not be used against him in court. Brecht v. Abrahamson, 507 U.S. 619, 628, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); Doyle, 426 U.S. at 716. Thus, whether or not warnings are administered, a defendant's silence is "insolubly ambiguous" and the evidence is inadmissible. Doyle, 426 U.S. at 617; accord Burke, 163 Wn.2d at 220-21; Easter, 130 Wn.2d at 241.

Leyva was under no obligation to respond to the detective's attempts to locate him or to speak to the police about this case. The State's combined use of the detective's unsuccessful efforts to locate him, her need to get his side of the story, and her eventual referral of the case to the prosecutor's office, penalized Leyva for exercising his Fifth Amendment right to remain silent. RP 175, 180-81; Burke, 163 Wn.2d at 222; State v. Knapp, 148 Wn.App. 414, 199 P.3d 505 (2009); State v. Keene, 86 Wn.App. 589, 938 P.2d 839 (1977).

2. THE PROSECUTOR'S REPEATED EXHORTATIONS TO THE JURY THAT THEY MUST FIND THE STATE'S WITNESSES WERE LYING IN ORDER TO ACQUIT WERE FLAGRANT MISCONDUCT THAT DENIED LEYVA HIS RIGHT TO A FAIR TRIAL

The prosecuting attorney repeatedly cross-examined Leyva about whether various witnesses for the State "got it wrong" when his testimony diverged from theirs. The prosecutor then used these responses to denigrate the defendant in closing argument. Leyva argues the prosecutor committed misconduct.

This Court has repeatedly held that it is misconduct for the State to cross-examine the defendant in manner that asks if the State's witnesses are lying. See State v. Fleming, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997);

State v. Stith, 71 Wn.App. 14, 19-20, 856 P.2d 415 (1993); State v. Casteneda-Perez, 61 Wn.App. 354, 362, 810 P.2d 74, rev. denied, 118 Wn.2d 1007 (1991). As the State acknowledges, a prosecutor commits misconduct “when his or her cross examination seeks to compel a witness’ opinion as to whether another witness is telling the truth.” Brief of Respondent at 22 (quoting State v. Jerrels, 83 Wn.App. 503, 507, 925 P.2d 209 (1996)). The prosecutor nonetheless asserts the cross-examination in this case was proper. According to the State, the prosecutor may not directly ask the defendant if another witness is lying, but “in practice” the prosecutor may ask the defendant if another witness is “mistaken” in order to give the defendant the opportunity to correct his testimony. Id. at 22-23.

This argument ignores the reality of the prosecutor’s questions, which were intended to elicit a response about other witnesses’ credibility. Here, the prosecutor used the phrase, “got it wrong” over ten times during cross-examination of Leyva and culminated her cross-examination by asking if “everyone” else got it wrong. RP 296, 302-02, 304, 316-17, 323-23, 331. The prosecutor’s use of the words “got it wrong” did not change the meaning of her questions. The jury understood the prosecutor was

asking Leyva if other witnesses were lying, as did Leyva, who answered, "That's not true" when asked about the detective's testimony. RP 323-34.

The prosecutor relies upon this Court's opinion in Wright for its analysis. State v. Wright, 76 Wn.App. 811, 888 P.2d 1214, rev. denied, 127 Wn.2d 1010 (1995). In Wright, this Court found questions about whether other witnesses "got it wrong" were not prosecutorial misconduct but were nonetheless "misleading and unfair." Wright, 76 Wn.App. at 821-22. The Wright Court, however, acknowledged such questioning is designed to elicit testimony from one witness regarding the accuracy of another witness's testimony. This Court further acknowledged that what the defendant thinks of the credibility of another witness is simply irrelevant and puts the defendant in a bad light. Id. at 821-22.

Moreover, Wright is in conflict with another decision of this Court, State v. Walden, 69 Wn.App. 183, 847 P.2d 956 (1993). There a Snohomish County deputy prosecuting attorney asked the defendant whether a witness was "mistaken" concerning another witness's estimate of her son's height and weight. Walden, 69 Wn.App. at 184-85. This Court found no important distinction between asking the defendant if a witness was "mistaken" or lying

and the questions were designed to elicit the same response. Id. This Court added the prosecutor's question was argumentative, irrelevant, and invaded the province of the jury. Id. at 186-87.

Here, the deputy prosecutor was apparently familiar with the case law, as she developed her strategy for cross-examination based upon the repetition of the word "mistaken" instead of asking whether other witnesses were lying or telling the truth. Her reliance upon Wright, however, also shows she was aware these questions were irrelevant, unfair to the defense, and therefore improper. Wright, 76 Wn.App. at 821-22. The prosecutor nonetheless repeatedly asked if witnesses "got it wrong" in order to question the defendant about the credibility of other witnesses and put him in a bad light.

The prosecutor later reminded the jury of the improper cross-examination by again using the phrase "got it wrong" to dramatically conclude her closing argument. RP 380-82. The State is correct that the parties are entitled to address witness credibility and the differences in witnesses' testimony closing argument. Brief of Respondent at 26. The prosecutor's legitimate argument concerning witness credibility, however, does not cure her improper argument. Fleming, 83 Wn.App. at 216. The prosecutor

culminated her argument by mocking the defendant by returning to the “got it wrong theme,” reminding the jury of the questions answers she received during her improper cross-examination. RP 380-82.

In Charlton, the prosecutor referred in closing argument to the defendant’s failure to call his wife as a witness despite prior appellate decisions finding it is misconduct to direct the jury’s attention to the defendant’s exercise of the marital privilege. State v. Charlton, 90 Wn.2d 657, 660-62, 585 P.2d 142 (1978). Noting that the marital privilege is an elementary rule of evidence or which the prosecutor was no doubt aware, the Charlton Court determined the reference was “mindful, flagrant, and ill-intentioned conduct.” Id. at 663-64.

In this case, the prosecutor was aware that her questions of Leyva and the use of his answers in closing argument were misconduct. See Fleming, 83 Wn.App. at 213; Stith, 71 Wn.App. at 19-20; Casteneda-Perez, 61 Wn.App. at 362. Her cross-examination of Leyva and closing argument were thus flagrant and ill-intentioned. In a case that is essentially a swearing contest between the defendant and the complaining witness and the complaining witness’ credibility was compromised, the misconduct

was not harmless and Leyva's conviction must be reversed and remanded for a new trial. Fleming, 83 Wn.App. at 216.

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE REPEATED INSTANCES OF FLAGRANT AND ILL-INTENTIONED MISCONDUCT

Leyva's constitutional right to effective assistance of counsel was violated because his attorney did not object when (1) the prosecutor cross-examined him in a manner designed to elicit testimony commenting on the credibility of other witnesses and (2) then returned to this theme in closing argument to suggest the jury could only acquit if they found the State's witnesses were lying.

Here, there was no tactical reason for defense counsel to fail to object when the prosecutor repeatedly questioned Leyva about whether other witnesses "got it wrong" and then continued the theme in closing argument. None of the questions were designed to elicit relevant information, but rather to trap Leyva into saying other witnesses were lying. Clearly, an objection would have been sustained if made. See Fleming, supra; Walden, 69 Wn.App. at 185-85.

There is a reasonable probability that the outcome of the trial would have been different if defense counsel had posed timely

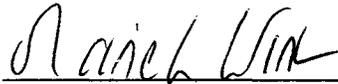
objections to the misconduct. The case hinged on whether the jury believed Leyva or the complaining witness, and defense counsel allowed the prosecutor to create a theme that denigrated Leyva and his defense. Because he did not receive the effective assistance of counsel guaranteed by the constitution, Leyva's convictions must be reversed and remanded for a new trial.

B. CONCLUSION

For the reasons stated above and in the Brief of Appellant, Rafael Leyva's conviction must be reversed.

DATED this 11<sup>th</sup> day of October 2010.

Respectfully submitted,



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NO. 64533-1-I

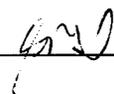
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11<sup>TH</sup> DAY OF OCTOBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON, THIS 11<sup>TH</sup> DAY OF OCTOBER, 2010.

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