

NO. 65557-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARCUS ZAMUDIO-OROZCO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JAY WHITE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

A police witness may not comment on a defendant's silence in a manner that infers guilt from his refusal to talk. Detective Melton testified briefly that she "attempted to contact, attempted to interview" Zamudio. The record does not shed any light on whether Zamudio actually invoked his right to remain silent or whether Melton was simply unable to contact him. Did the trial court properly exercise its discretion by denying Zamudio's motion for a mistrial based upon this ambiguous statement by Detective Melton?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Marcus Zamudio-Orozco was tried in King County Superior Court on multiple counts of rape of a child, one count of witness tampering and two counts of violation of a no-contact order stemming from the sexual abuse of his biological daughter and his actions following the filing of charges. CP 3-5, 23-26. The jury acquitted Zamudio of all but two counts of rape of a child in the third degree and one count of violation of a no-contact order. CP 46-53. He was given concurrent 34-month sentences on the rape of a child counts and a 12-month consecutive sentence for the no-contact

order violation, a misdemeanor. CP 36, 43. He appeals his convictions, alleging that a police witness improperly commented on his right to remain silent.

2. SUBSTANTIVE FACTS

Zamudio and Lucero Epitacio had four children together, and were jointly raising a fifth child of Epitacio's. 1 RP 229-34.¹ J.E.Z., the victim in this case, was their oldest child, born April 4, 1995. 1 RP 229-30, 231. J.O.Z. and J.A.Z. were close in age to J.E.Z., but their two other sisters were much younger. 1 RP 231, 234. In September 2008, they moved to Kent, Washington. 1 RP 236-37. Prior to that time, the family lived in California. 1 RP 235-36.

In November of 2009, J.E.Z. disclosed that her father had been sexually abusing her. 2 RP 43-44. At trial, J.E.Z. initially denied that anything happened, but later testified that she had denied the abuse because she didn't want her father to go to jail for a long time. 2 RP 152-53, 167. J.E.Z. testified that Zamudio had

¹ The verbatim report of proceedings consists of 8 volumes. The transcript of the May 4, 5, 6, 10 and 11, 2010 proceedings is designated in this brief as "1 RP." The transcript of the May 12, 2010 proceeding is designated as "2 RP." The May 13 and 18 volume is designated as "3 RP." The May 18, 2010 volume is designated as "4 RP." The May 19, 2010 volume is designated as "5 RP." The other volumes are not referred to in this brief.

been raping her from the time she was ten years old, right up until November of 2009. 2 RP 161, 166-67.

J.E.Z.'s sister, J.O.Z., testified that their father had J.E.Z. go into a bedroom alone with him on a regular basis, and that J.E.Z. always came out crying or upset. 2 RP 79-81. She testified that J.E.Z. admitted the abuse to her several years before the trial, but she had not told anyone. 2 RP 83-84. In 2009, J.O.Z. walked into the bedroom and saw her father on top of J.E.Z., with his underwear down. 2 RP 85-88. Another sister, J.A.Z., corroborated J.O.Z.'s testimony. 2 RP 107-08, 113. J.A.Z. also testified that she sometimes slept in the same bed as her father and J.E.Z., and that she sometimes felt the bed moving a lot and heard J.E.Z. crying. 2 RP 110.

The underwear that Zamudio was wearing at the time of his arrest was collected by the police. 2 RP 140-41. His sperm was discovered in the front of the underwear, along with a quantity of J.E.Z.'s DNA that the forensic scientist testified was inconsistent with casual transfer. 3 RP 59-62.

Zamudio contacted his family via telephone after his arrest. 2 RP 47-48. Eпитacio allowed him to speak to J.E.Z. on the phone, despite the existence of a no-contact order. 2 RP 49, 163. During

one of the phone calls, Zamudio had a conversation with Epitacio about DNA, and asked her to wash his clothing with a lot of soap. 2 RP 53, 4 RP 48-49, 54.

During the trial, Detective Lily Melton testified about the work she had done on the case, including arranging for interviews with J.E.Z. and her sisters. 3 RP 155-56. The prosecutor asked her what else she had done, and in response, Detective Melton stated, "I then attempted to make contacts [sic] with Mr. Zamudio at the jail, attempted to interview him there." 3 RP 161. Zamudio objected; the prosecutor indicated that he would move on, but the court sustained the objection anyway. 3 RP 161. There was no other reference to Detective Melton going to see Zamudio at the jail. The prosecutor did not mention the fact in closing argument or during the testimony of any other witness. Zamudio later moved for a mistrial based on the isolated comment by Detective Melton. 3 RP 174. The court denied the motion. 3 RP 175.

C. **ARGUMENT**

1. **THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED ZAMUDIO'S MOTION FOR A MISTRIAL BASED ON DETECTIVE MELTON'S TESTIMONY.**

A trial court's denial of a motion for a mistrial is reviewed under an abuse of discretion standard, with great deference being given to the trial court. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A trial court abuses its discretion only when it bases its decision on untenable grounds or reasons. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The trial judge is in the best position to determine whether there is prejudice and its effect, if any. Lewis, 130 Wn.2d at 707. The 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." Id; State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

The State may not use a defendant's silence as substantive evidence of guilt. Lewis, 130 Wn.2d at 705; State v. Burke, 163 Wn.2d 204, 216, 181 P.3d 1 (2008). "A police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions." Lewis, 130 Wn.2d at 705. However, an officer's mere reference to a defendant's silence, without further comment inferring guilt is not reversible error. Lewis, 130 Wn.2d at 705-07. "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.” Id. at 707. An indirect reference to the defendant's silence absent further testimony from the witness, or argument from the State implying guilt from such silence, is not reversible error unless the defendant can show resulting prejudice. Id. at 706-07; State v. Sweet, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999).

- a. The record does not reflect that Zamudio ever invoked his constitutional right to remain silent.

Zamudio claims that his constitutional rights were violated by Detective Melton commenting on his right to remain silent, yet the record does not support that he even invoked that right. Nowhere in the record did Zamudio choose to remain silent in the face of questioning by the police. The certification for determination of probable cause, Zamudio's trial brief, the testimony at the pre-trial hearing, the testimony at trial, and the findings of fact and conclusions of law regarding CrR 3.5 make no mention whatsoever of Zamudio invoking his rights upon questioning by Detective Melton. CP 3-5, CP 8-12, CP 27-30, 1 RP 5-24, 2 RP 135-37. What is clear is that Zamudio knowingly, intelligently and voluntarily

waived his right to remain silent after being properly advised by Officer Wilson. CP 27-30; 1 RP 10-22; 2 RP 135-37.

It is unknown what actually happened when Detective Melton went to the jail to speak to Zamudio. While Melton's statement that she "attempted to interview him" might imply that he chose not to speak to her, it is an equally reasonable assumption that she was unable to meet with him, for whatever reason. In fact, her brief testimony strongly implied that she didn't even contact Zamudio: "I then attempted to make contacts [sic] with Mr. Zamudio at the jail, attempted to interview him there." 3 RP 161. Given her statement that she "attempted to make contact" with him, it is certainly reasonable that the jury understood Detective Melton's testimony to be that she was unable to interview Zamudio because she was unable to contact him. This is especially true in light of the fact that Zamudio had already validly waived his rights and willingly spoken to Officer Wilson. 2 RP 135-37.

In sum, because it is not clear from the record that Zamudio invoked his right of silence, the Detective's brief reference to her "attempt" to contact him and interview him did not infringe upon his constitutional rights. Zamudio's convictions should be affirmed.

- b. Even if this Court determines that Zamudio properly invoked his rights, the Detective's testimony did not impermissibly comment on such invocation.

Zamudio objected to Detective Melton's comment at the time it was made. 3 RP 161. The court sustained the objection and no further testimony on the subject was forthcoming. Id. The State never mentioned Detective Melton's attempt to contact or interview Zamudio in closing argument or in testimony from any witness. The statement was in no way used to imply or argue guilt or used to the advantage of the State in anyway. Nonetheless, Zamudio moved the trial court to declare a mistrial based on Detective Melton's brief statement. 3 RP 174. The trial court denied the motion, indicating that the testimony did not constitute a comment on Zamudio's right to remain silent. Id. at 175. This Court should affirm the trial court's ruling because it was not an abuse of discretion.

Detective Melton's comment could imply that Zamudio refused to speak to her. However, as noted above, an equally plausible implication is that she was unable to make contact with

Zamudio. As the prosecutor stated in his response to Zamudio's motion for a mistrial:

I stopped her before she went on to say what she did when she got to the jail. . . . even in the worst light, I don't think the jurors are going to infer necessarily that she went over there and the defendant didn't want to talk, because from previous testimony it sounds like . . . the defendant spoke to the officer, the arresting officer more than once, and had a fairly lengthy conversation, so I don't think anyone is assuming that she went over there and he invoked necessarily. And she definitely . . . did not comment on his right to invoke, if in fact he did, but we didn't even get that far.

3 RP 174-75. Detective Melton's testimony was, *at worst*, a passing reference to the defendant's silence. It was not an impermissible comment on Zamudio's constitutional rights. There was no further testimony regarding the subject and the State in no way used the remark to its advantage or to imply guilt.

The trial court was in the best position to hear the remark, gauge how it was likely to have been understood by the jury, and how it may or may not have affected Zamudio's constitutional rights. The trial court did not view the statement as a comment on Zamudio's right to remain silent and the court clearly felt that it did not prevent Zamudio from receiving a fair trial. 3 RP 175. Moreover, even if the

testimony could fairly be seen as a reference to Zamudio's silence, Detective Melton's testimony did not prejudice Zamudio at all, much less to the point that nothing short of a new trial could insure fairness.² In fact, Zamudio was acquitted of five of eight counts. CP 46-48, 51, 53. It is hard to imagine how Detective Melton's brief statement, if error at all, could not possibly have been anything other than innocuous and harmless.

The trial court did not abuse its discretion when it found the testimony did not warrant a mistrial and Zamudio's convictions should be affirmed.

² It should be noted that Zamudio's counsel was unable to point to any prejudice to his client during his motion for a mistrial. In fact, after the court stated its view that the Detective merely started to say that she went to see him, Zamudio's attorney stated, "I think that is right," in essence agreeing with the State and the court that nothing harmful had occurred. 3 RP 175.

D. **CONCLUSION**

The State respectfully requests this Court to affirm Zamudio's convictions.

DATED this 5 day of July, 2011.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. MARCUS ZAMUDIO-OROZCO, Cause No. 65557-4-I, in the Court of Appeals, Division I, for the State of Washington.

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

Betty A. Huddleston
Name
Done in Seattle, Washington

7/5/11
Date