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SEP 28 2012

King County Prosecutor
Appellate Unit

NO. 67779-9-1

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

STATE OF WASHINGTON,

Respondent,

v.

JUAN PABLO GIRON-CLAROS,

Appellant.

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

The Honorable Mary Yu, Judge

REPLY BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED BY ALLOWING THE JURY TO REPEATEDLY VIEW THE VIDEOTAPED INTERVIEW OF O.F. DURING DELIBERATIONS.

a. Giron-Claros Did Not Waive The Error

Giron-Claros thrice objected to allowing the jury unlimited access to the videotaped interview of O.F. Brief of Appellant (BOA) at 8; 10RP 66, 83; 11RP 47-50. Nonetheless, the State suggests Giron-Claros failed to preserve the issue on appeal because his objections were articulated on the basis of “undue emphasis” rather than “undue prejudice.” Brief of Respondent (BOR) at 8-9. Even assuming the three objections were not sufficiently specific, the State’s argument fails.

An objection need only be specific enough to alert the trial court to the type of error involved. See e.g. State v. Black, 109 Wn.2d 336, 340, 745 P.2d 12 (1987) (noting ER 103(a)(1)¹ allows appellate review when

¹ ER 103(a) provides:

“Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of Proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to

grounds for objection, though not specifically lodged at trial, are readily apparent from circumstances); 5 Karl B. Tegland, *Washington Practice: Evidence Law And Practice* § 103.11, at 58-59 (5th ed.2007) (even where no specific objection made, under ER 103(a) “the propriety of the ruling will be examined on appeal if the specific basis for the objection was ‘apparent from the context.’” (quoting ER 103(a)(1))).

The State’s reliance on State v. Mason² to suggest otherwise is misplaced. BOR at 9. On appeal, Mason challenged the trial court’s admission of his prior sexual acts and possession of weapons as “prior bad acts” evidence under ER 404(b). At trial, Mason objected to the prior sexual acts as “prejudicial.” His only objection to the weapons evidence was on the basis of relevance. Mason, 160 Wn.2d at 933.

The Court concluded Mason’s relevance objection to the weapons did not preserve the issue of whether the evidence should have been excluded as “prior bad acts.” Mason, 160 Wn.2d at 933. But, even the Mason Court recognized an objection need only alert the trial court to the type of error involved. The Court concluded the “prejudice” objection

the court by offer or was apparent from the context within which questions were asked.”

² 160 Wn.2d 910, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035 (2008).

was “adequate to preserve an appeal,” on the ER 404(b) argument because it suggested the defendant was prejudiced by the admission of the evidence. Mason, 160 Wn.2d at 933-34.

Here, unlike in Mason, despite alleged conflation of the terms “undue emphasis” and “undue prejudice,” the basis for the objections were “readily apparent from the circumstances.” The State does not dispute this. The fact remains that the trial court clearly understood – and acted upon – the basis for which defense counsel objected. The error was properly preserved by defense counsel’s multiple objections.

b. Replay of the Videotape was Unduly Prejudicial

Before admitting a videotaped replay, the trial court should balance the need to provide relevant portions of testimony against the danger of allowing a witness to testify a second time. State v. Koontz, 145 Wn.2d 650, 657, 41 P.3d 475 (2002). Tape-recorded statements may be replayed only if, in the trial court’s discretion, they bear directly on the charge and are not unduly prejudicial. State v. Frazier, 99 Wn.2d 180, 189, 661 P.2d 126 (1983). BOA at 11.

Giron-Claros argues the trial court failed to consider the improper effect of allowing the jury to replay the videotape of O.F.’s interview without limitation. The repeated playing of the videotape was not only likely to invoke an emotional response from the jurors given O.F.’s age

and his detailed allegations, but it also unduly emphasized this evidence. BOA at 11-19.

Relying on State v. Gregory,³ the State maintains Giron-Claros was not unduly prejudiced. BOR at 10-13. Like the cases distinguished in the opening brief, Gregory is instructive by way of contrast.

An edited copy of a video of the crime scene was admitted as an exhibit at Gregory's trial. Defense counsel "had no objection," to the jury replaying the video during deliberations. Gregory, 158 Wn.2d at 846. During deliberations, a judicial assistant escorted the jury into the locked courtroom and then remained outside while they replayed the video. Gregory, 158 Wn.2d at 846-47.

On appeal, Gregory argued the trial court erred in allowing the jury to replay the tape during deliberations without his presence. Gregory, 158 Wn.2d at 847. Finding "no reason to distinguish" Gregory's case from State v. Castellanos,⁴ and State v. Elmore,⁵ the Court concluded replay of the videotape did not unduly emphasize the evidence. Gregory, 158 Wn.2d at 848.

³ 158 Wn.2d 759, 147 P.3d 1201 (2006).

⁴ State v. Castellanos 132 Wn.2d 94, 100, 935 P.2d 1353 (1997).

⁵ State v. Elmore 139 Wn.2d 250, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837 (2000).

Gregory is distinguishable for several reasons. First, the issue in Gregory was whether defense counsel had a right to be present when the videotape was replayed for the jury. Importantly, the case did not address the issue presented here: whether repeated replaying of a testimonial videotaped interview of a five-year-old complaining witness was unduly prejudicial. Indeed, Gregory did not even discuss whether the videotape was unduly prejudicial, concluding only that the replaying did “not place undue emphasis on the tape.” Gregory, 158 Wn.2d at 848.

Gregory, like Castellanos, Elmore, and Frazier, is also distinguishable on the basis of what the recording at issue depicted. BOR at 12-15. The exhibit in Gregory depicted edited video of the crime scene. It did not, as here, depict testimony of the complaining witness. Thus, unlike here, the video was not testimonial evidence which supplemented the complaining witness’s trial testimony. Moreover, it was unlikely to stimulate the emotional response that five-year-old O.F.’s testimony about alleged sexual abuse could.

Because the videotaped interview of O.F. contained detailed information about the allegations and the trial court failed to consider the undue prejudice of repeatedly replaying the evidence, the trial court abused its discretion by allowing the jury unlimited access to the evidence. BOA at 12.

2. THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT.

A criminal defendant has no duty to present favorable evidence, and it is improper for the prosecution to shift the burden of proof and invite the jury to draw an adverse inference from a defendant's failure to produce evidence. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003); State v. Cleveland, 58 Wn. App. 634, 647-48, 794 P.2d 546 (1990), rev. denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). Giron-Claros argues the prosecutor improperly shifted the burden of proof during closing argument by suggesting he should have produced witnesses, including an expert, "at no cost to him" in support of his trial arguments. BOR at 20-23.

Citing State v. Contreras, 57 Wn. App. 471, 788 P.2d 1114, rev. denied, 115 Wn.2d 1014 (1990), the State suggests the prosecutor's arguments properly responded to defense counsel's closing argument. But Contreras is factually distinguishable, whereas the cases cited in Giron-Claros' opening brief apply. BOA at 20-23.

Contreras was charged with second degree assault with a deadly weapon. His defense was alibi. Contreras testified he was with a friend during the time the alleged assault occurred. The defense did not call the friend to testify. Contreras, 57 Wn. App. at 472-73. Contreras

acknowledged the friend had been present at a prior trial at his request. Contreras, 57 Wn. App. at 474-75.

The prosecutor questioned Contreras on cross examination why the friend had not testified as an alibi witness. Contreras, 57 Wn. App. at 473. The “prosecutor never directly asked why [Contreras] did not call [the friend].” Contreras, 57 Wn. App. at 475. During closing argument the prosecutor asked, “and where is [the friend]?” He continued, “You have the obvious witness that you would expect to be called not here, and it is not just like she is not around. Something fishy is going on here.” Contreras, 57 Wn. App. at 476.

The Court of Appeals concluded the prosecutor’s comments were not misconduct because “a reasonable evidentiary basis” existed on which to attack Contreras’ alibi theory which was based on corroborating testimony of an uncalled witness. Contreras, 57 Wn. App. at 475-76. The Court reasoned, “The prosecutor may comment on the defendant’s failure to call a witness so long as it is clear the defendant was able to produce the witness and the defendant’s testimony unequivocally implies the uncalled witness’s ability to corroborate his theory of the case.” Contreras, 57 Wn. App. at 476.

Importantly, the Court distinguished other cases where the defendant did not testify or call witnesses and “the only issue was the

strength of the State's case." Under those circumstances it was "clearly improper" for the prosecutor to argue evidence not at issue. Contreras, 57 Wn. App. at 473-74.

Unlike Contreras, here Giron-Claros' theory of the case was not "unequivocally" "based on corroborating testimony of an uncalled witness." Rather, the argument attempted to show the weaknesses and inconsistencies in the State's case. Defense counsel's argument asking the jury to consider whether O.F.'s allegations were the result of repeated questioning by adults was supported by the evidence: O.F. was questioned about the allegations multiple times and by multiple people, his allegations were inconsistent, he got several truth/lie cards incorrect, and interview specialist Carolyn Webster acknowledged that how questions were phrased could cause "a child who perhaps is just going to agree with you, then we're going to get inaccurate information during the interview." 8RP 53.

The prosecutor's rebuttal closing did not simply suggest defense counsel's interpretation of the evidence was unreasonable. Instead, the prosecutor suggested Giron-Claros needed to support his argument with expert testimony, which was available "at no cost" to him. This not only suggested Giron-Claros should have presented favorable evidence, but

also that there was no reason not to since it could have been acquired for free.

Moreover, even assuming the prosecutor's reference to a "no cost" expert witness was reasonable, there is no "clear" evidence Giron-Claros could have produced an expert witness to corroborate his argument. This fact likewise distinguishes this case from Contreras. The prosecutor's suggestion that defense counsel should have produced witnesses improperly shifted the burden of proof and constitutes reversible misconduct.

B. CONCLUSION

For the reasons discussed above and in the opening brief, Giron-Claros' convictions should be reversed and the case remanded for a new trial.

DATED this 20th day of September, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED
WSBA No. 40635
Office ID No. 91051

Attorneys for Appellant

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 67779-9-1
)	
JUAN PABLO GIRON-CLAROS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF SEPTEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JUAN PABLO GIRON-CLAROS
DOC NO. 351424
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF SEPTEMBER 2012.

x Patrick Mayovsky

2012 SEP 28 PM 4:34
COURT OF APPEALS
STATE OF WASHINGTON
CLERK