

NO. 69742-1-I

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

REC'D
AUG 29 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

BERNARD WATKINS,

Appellant.

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

The Honorable Michael Heavey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to declare a mistrial after the prosecutor elicited improper propensity evidence the trial court had previously indicated should not be admitted.

2. Cumulative error violated appellant's due process right to a fair trial.

Issue Pertaining to Assignment of Error

1. Did the trial court err in failing to grant a mistrial where the prosecutor elicited testimony from a co-defendant who had pled guilty about prior unrelated bad acts of the defendant, namely that the defendant received oral sex from her that was recorded on video and that she saw another woman give oral sex to defendant that was also recorded on video, after the court had indicated such testimony was unduly prejudicial?

2. Did the trial court's cumulative error of twice admitting evidence that violated the evidence rules combined with the acknowledged discussion by the jury of the case during trial prior to deliberations in violation of court instructions and the allowance of testimony by the alleged victims' mothers and testimony by a noticeably pregnant witness who appeared to be in pain during cross examination violate defendant's due process rights?

B. STATEMENT OF THE CASE

Appellant Bernard D. Watkins was charged with three counts of promoting commercial sexual abuse of a minor, one count of unlawful possession of a firearm in the second degree and one count of possession of depictions of a minor engaged in sexually explicit conduct in the second degree. CP 208-11. Watkins pled not guilty and the case was set for trial. 10RP 81-82.¹

The charges stemmed from a fight between two women acquainted with Watkins; Altesa Turner and Kayla McCoy. 11RP 73-75.² Altesa filed an assault charge against Kayla. 11RP 75. When Kayla learned this, she filed an assault charge against Altesa. 10RP 81-82. Kayla then told police Watkins and Altesa were promoting prostitution of minors on a website called BackPage.com. 11RP 75-76. She also told police she saw Watkins with firearms. 10RP 75-77.

Upon this information, the police obtained a search warrant for Altesa's home. 7RP 59-60. In the interim, police learned Watkins had a prior felony in another state. CP 535-37. The warrant for Altesa's home

¹ There are 16 volumes of verbatim report of proceedings referenced as follows: 1RP - September 14, 26 & 27, 2012; 2RP - October 8, 9 & 17, 2012; 3RP - October 22, 23 & 25, 2012; 4RP - November 7, 2012; 5RP - November 8, 2012; 6RP - November 13, 2012; 7RP - November 14, 2012; 8RP - November 15, 2012; 9RP - November 19, 2012; 10RP - November 20, 2012; 11RP - November 21, 2012; 12RP - November 26, 2012; 13RP - November 27, 2012; 14RP - November 28, 2012; 15RP - November 29, 2012; 16RP - November 30, December 3 & 28, 2012.

² This brief refers to the first names of Altesa Turner and Kayla McCoy to avoid confusion. No disrespect is intended.

listed, among other things, firearms, ammunition and two cell phones Kayla said belonged to Altesa and Watkins. 7RP 61. Early the next morning, a SWAT team raided Altesa's place and found Altesa, Watkins' sister and Watkins asleep in the home. 8RP 60.

During the search, and after a shotgun was found in Altesa's home, police arrested Watkins for unlawful possession of a firearm based on his prior felony conviction in another state. 6RP 85; 7RP 17. Altesa at first claimed it did not belong to Watkins because it was her shotgun. 8RP 62. But later changed her story. Id. No fingerprints were found on the shotgun. 12RP 43-46. Police also found two cell phones matching the phone numbers provided by Kayla; they contained pictures and advertisements from Backpage.com of three teenaged minor girls. 6RP 26-27, 31.

The prosecutor charged Altesa and Watkins with one count of promoting commercial sexual abuse of a minor. CP 44. Altesa was charged in the same information with assault in the fourth degree against Kayla and violation of the uniform controlled substances act. CP 44-45. Altesa pled guilty to a lesser charge and agreed to testify against Watkins. 1RP 43-44; 8RP 80-81.

Altesa admitted she posted advertisements on BackPage.com for the three teenagers. 8RP 41. She learned of BackPage.com after she

overheard the three girls talking about it and that one of the girls had done it before. 8RP 42-43. She said Kayla took photos of the girls and gave them to Altesa to post on BackPage.com. 8RP 43, 86. Altesa said Kayla helped her create language for the advertisements but claimed Watkins told her to post the photos. 8RP 44, 93. Watkins denied this. 14RP 100, 123.

Altesa used her own cell phone number and email to post the ads of the girls. 8RP 45. She claimed Watkins wanted her to answer the phone and take the calls. 8RP 47. Watkins denied this too. 14RP 101.

Altesa said she put the ads on BackPage.com for the girls to make money prostituting. 8RP 51. She never witnessed the girls having sex for money, but testified she assumed it happened at least once because Watkins asked her to leave her house after she received a call in response to an ad. 8RP 101. Altesa said she did not witness any interaction between the caller and the girl and did not see any money exchange hands. 8RP 102. Watkins denied Altesa's version of events and denied any involvement with promoting prostitution of the teenagers. 15RP 19-20.

The prosecutor elicited statements from Altesa about Watkins' sex life:

- Q. And what are the [cell phone] videos of?
A. Two videos are of me and the defendant.

Q. And what are you and defendant doing?

A. Having sex.

Q. And what is the particular type of sex that you were --

A. Oral sex.

Q. And who is performing oral sex?

A. I am.

Q. Performing on the defendant?

A. The defendant.

8RP 149.

The prosecutor went further:

Q. And you said that there was another video, as well; what is the other video?

A. I saw the defendant getting oral sex--receiving oral sex from another person.

8RP 149.

When the jury was excused for a recess, the court addressed the prosecutor:

Okay, I was really surprised with that testimony on Exhibit 5 [oral sex iPhone videos]. I thought I said I didn't want any mention of oral sex from the iPhone, because I found no nexus to the prostitution and it was highly inflammatory...I see no relationship -- I do believe I said it would be--any probative value would be outweighed by the danger of unfair prejudice. So anyway, what is done is done. We have got three days to think about it. Mr. Minor [defense counsel] I want you to think about a possible corrective instruction, or maybe we just let it alone, but it was not my intent that any testimony on that come in.

8RP 153-54.

In response, the defense moved for a mistrial. 9RP 3. During argument on the merits, the court said its ruling may have been ambiguous as to the mention of the sexual videos but when the prosecutor elicited the testimony the court said it realized, "Obviously I wasn't clear." 7RP 35-36, 9RP 5. A few days before the testimony was elicited, however, the court had clearly warned the prosecutor, "I think maybe a description [of the sex videos] would be fine, but that is overwhelmingly a danger of unfair prejudice." 7RP 36. The court denied defendant's motion for a mistrial and instead instructed the jury:

Just before we adjourned Thursday afternoon, last Thursday afternoon, there was testimony that the iPhone contained a video of Mr. Watkins engaged in sex acts. The jury will disregard that testimony and not consider it in anyway.

9RP 20-21.

The next day, Kayla testified for the State. 10RP 14. The prosecutor elicited statements from Kayla about Watkins firing a shotgun on July 4, 2012. 10RP 75-76. The defense immediately objected based on ER 403 and ER 404(b), but the judge overruled. Id. The judge opened the proceeding the following morning by telling counsel:

Okay, I shouldn't do this, and so when I say something like that, I should stop, but I feel guilty. I shouldn't have allowed the --you were right on 403, 404B for the July 4 shotgun incident. If I could do that over again or if I had been thinking about it beforehand, I probably wouldn't have

allowed that in. It certainly shows an ownership and connection to the weapon, possession of it, but its probative value could be substantially outweighed by the danger of unfair prejudice. But that said, I don't know how to fix it.

11RP 3. The Court did not give a curative instruction.

Then the court informed counsel:

The bailiff brought to my attention that the jury was getting exacerbated at the --and I am not sure why, at the slow movement of the cross-examination, [by the defense of Kayla] and in my mind I was thinking, Well, [sic] the prosecutor took a long time, too, but I wanted to bring that to your attention, and I am going to tell them they are not to talk about this case in any way.

11RP 7.

The court addressed the jury and instructed them that the defendant is presumed innocent and "Also I will remind you do not talk about the case, and when I say 'talk about the case,' I mean everything about the case." 11RP 8.

Later, the defense moved for a mistrial on several grounds, including misconduct by the jurors for violating the court's instruction not to discuss the case before deliberations and the trial court's error in allowing testimony about the July 4th gun incident. CP 331-36; 12RP 23. Also, defense argued the circumstance of the prosecution witness Kayla McCoy created an unduly prejudicial situation for the defense, as evidenced by the jury's complaint that defense examination was taking too

long. CP 335. Even though the cross examination was substantially shorter than the prosecutor's direct examination, Kayla was noticeably pregnant and displayed discomfort while on the witness stand by constantly rubbing her stomach and appearing to be in pain during cross examination. CP 335.

The defense also argued as part of its motion that "the highly prejudicial testimony" of the mothers, particularly one mother who broke down in tears during her testimony where she was asked to identify her underage daughter who was posing for prostitution ads dressed in lingerie and exposing her buttocks and bare breasts. CP 333-34; 8RP 26-28. None of the three alleged victims testified at trial. The trial court denied the motion. 12RP 18.

The jury found Watkins guilty of three counts of promoting commercial sexual abuse of a minor and one count of unlawful possession of a firearm in the second degree but it could not reach a unanimous decision on one count of possession of depictions of a minor engaged in sexually explicit conduct so the trial court declared a mistrial as to that count. CP 453-56; 16RP 58-59. Watkins timely appealed. CP 529.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL AFTER THE PROSECUTOR

ELICITED INFLAMMATORY STATEMENTS ABOUT
PRIOR SEX ACTS BY WATKINS.

In assessing whether a trial irregularity improperly influenced a jury and therefore warrants declaring a mistrial, courts should consider (1) the seriousness of the irregularity, (2) whether it resulted in evidence that was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987) citing State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). The appellate court reviews the decision to grant or not to grant a mistrial under an abuse of discretion standard. Id. Here, the trial court abused its discretion in denying the defense motion for a mistrial after the prosecutor elicited testimony about videos of Watkins' receiving oral sex from Altesa and another woman.

a. The seriousness of the irregularity

Altesa's testimony that she performed oral sex on Watkins and watched while another woman performed oral sex on him is extremely serious, especially in light of the charges against Watkins for promoting prostitution of minors. In fact, the testimony caught the trial court off guard, "I was really surprised with that testimony . . . I thought I said I

didn't want any mention of oral sex from the iPhone, because I found no nexus to the prostitution and it was highly inflammatory." 8RP 153-54.

A jury may place undue weight or overestimate the probative value of other prior acts, especially where such acts are similar to the charged crime. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987), abrogated on other grounds by State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995). Evidence of other misconduct is prejudicial because jurors may convict on the basis they believe the defendant deserves to be punished for a series of immoral actions. Bowen, 48 Wn. App. at 195. Such evidence "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." Id. at 196. "This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence. State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 219 (1991). A juror's natural inclination is to reason that having previously committed bad acts, the accused is likely to have reoffended by acting in conformity with that character. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) review denied 116 Wn.2d 1020, 811 P.2d 219 (1991).

The irregularity here, therefore, is very serious. The jury heard evidence about Watkins' private sex life that tended to show deviance and a lack of morality in that he would engage in oral sex with multiple women and while others watched and documented the event on video. And the jury was to decide Watkins' fate in a trial where criminal charges involved deviancy and a lack of morality with regard to sexuality. As the trial court correctly noted, however, Watkins' private sex life bore no nexus to the charges he faced for promoting prostitution of minors.

b. Whether the statement was cumulative

Altesa's statement was not cumulative or repetitive of other evidence. In fact, the trial judge ruled the entire oral sex testimony was highly inflammatory, was very surprising and that the testimony should never have been allowed to come before the jury. 8RP 153-54. See Escalona, 49 Wn. App. at 255 (statement cuts against trial court's ruling because statement was not cumulative or repetitive of other evidence and trial court ruled in limine statement was inadmissible).

c. Whether the irregularity could be cured by an instruction to disregard the testimony.

The overwhelming danger of prejudice could not be and was not undone by a curative instruction. In a similar case, an officer testified that a Teletype from the Yakima County sheriff's office described two wanted

subjects out of Yakima County and a wanted car, and stated that they were headed for Spokane and were going to duplicate the robbery committed in Grandview (the charged robbery). State v. Miles, 73 Wn.2d 67, 68, 436 P.2d 198 (1968). At this point the defense moved for a mistrial. Id. The trial judge denied the motion and gave the jury a curative instruction "to disregard that last portion of the testimony of this officer, other than that relating to two subjects in an automobile." Id. at 69. The defense argued the testimony relating to the Teletyped message - that they were going to duplicate the crime in the Spokane area - was "the most prejudicial type of hearsay evidence" and that no instruction could cure its effect from the minds of the jury. Id. The Supreme Court agreed, stating "This testimony was calculated to and undoubtedly did implant in the minds of the jury the idea that defendants had committed other robberies of this type and were therefore likely to have committed the one charged." Id. at 70. Importantly, neither the trial court nor the Supreme Court found the prosecutor's actions improper. Id. at 69. However, the Supreme Court, in reversing the trial court and remanding for a new trial, held the prejudicial effect of the testimony could not be removed by an instruction and "a more elaborate instruction than that which was given would only emphasize the testimony in the minds of the jury". Id.

Here, as in Miles, the curative instruction and a more elaborate instruction to disregard Watkins' sex life would only emphasize the oral sex testimony in the minds of the jury. This testimony was calculated to and undoubtedly did implant in the minds of the jury the idea that Watkins had promoted prostitution of minors because he proved himself to be immoral and a sexual deviant. Although the trial court cautioned the jury with respect to sex acts evidence, that instruction had little efficacy where the evidence was erroneously introduced in the first place. 9RP 20-21; Miles, 73 Wn.2d at 67.

Further, as in Miles, the trial court did not find the prosecutor's actions improper. 9RP 7-8. And, as in Miles, the curative instruction could not undo the damage done by the testimony. As the trial court admitted, "I found no nexus to the prostitution and it was highly inflammatory." 8RP 153-54.

That no objection was made at the time of the testimony is immaterial. The defense promptly made a motion for a mistrial. 9RP 3. In argument, defense counsel explained he had not objected at the time the testimony was elicited because he was concerned about making the circumstance more harmful by bringing it to the attention of the jury. 9RP 6. Indeed, as in Miles, bringing the circumstance of Watkins' sex life to

the attention of the jury by way of an instruction to disregard would only emphasize it in the jury's minds.

The trial court denied the motion for a mistrial but its decision was based on flawed reasoning. The trial court focused on whether the prosecutor had engaged in misconduct reasoning that it was "clearly a misunderstanding, a disconnect from what I was trying to say and what I did say[.]" 9RP 10-11. As the Supreme Court recognized in Miles, whether the prosecutor engaged in misconduct is not determinative. Rather, the trial court should have focused on the three Weber factors, which adopted the rule "that a judge should not consider whether the statement was deliberate or inadvertent. That inquiry diverts the attention from the correct question: Did the remark prejudice the jury, thereby denying defendant his right to a fair trial?" Weber, 99 Wn.2d at 164-65.

Ultimately, the court read a curative instruction to the jury:

Just before we adjourned Thursday afternoon, last Thursday afternoon, there was testimony that the iPhone contained a video of Mr. Watkins engaged in sex acts. The jury will disregard that testimony and not consider it in anyway.

9RP 20-21.

Just as in Miles, a mistrial was necessary to preserve Watkins' right to a fair trial. This is so because once the jury heard that Watkins recorded a video of an unidentified female performing oral sex on him, the jury was

likely left with the impression that the female was underage and perhaps one of the alleged victims in the charging document.

"The final measure of error in a criminal case is not whether the defendant was afforded a perfect trial, but whether the defendant was afforded a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968) citing State v. Green, 71 Wn.2d 372, 428 P.2d 540 (1967). "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial. Id.

The inflammatory evidence here is prejudicial because the jury may have convicted Watkins because the sex video testimony was calculated to and undoubtedly did implant in the minds of the jury the idea that Watkins was amoral and a sexual deviant, and therefore had promoted prostitution of minors. Indeed, even the trial court said, "What affects me is not that the defendant is sexually active, what offends me is that he would take a video of it." 9RP 10. No curative instruction could prevent such evidence from "inevitably shift[ing] the jury's attention to the defendant's general propensity for criminality" of the allegations of promoting prostitution. Bowen, 48 Wn. App. at 196.

In sum, the seriousness of the irregularity here, combined with the complete lack of logical relevance of the statement to the crimes charged,

leads to only one conclusion: the trial court's instruction could not cure the prejudicial effect of Altesa's testimony. Accordingly, under the factors outlined in Weber, this Court should hold the inflammatory evidence of sex acts was serious enough to warrant a mistrial and the trial court abused its discretion in deciding otherwise.

2. CUMULATIVE ERROR DEPRIVED WATKINS OF A FAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. V and XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Here, an accumulation of errors affected the outcome of Watkins' trial and produced an unfair trial. These errors include: 1) improper evidence of Watkins sexual activity (see § C.1. supra); 2) the trial court's error in allowing testimony about the July 4th gun incident; 3) misconduct by the jurors for violating the court's instruction not to discuss the case before deliberations; 4) the highly prejudicial testimony of the mothers, particularly one mother who broke

down in tears during her testimony where she was asked to identify her underage daughter who was posing for prostitution ads dressed in lingerie and exposing her bare buttocks and bare breasts; and 5) the circumstance of the prosecution witness Kayla McCoy who was noticeably pregnant and displayed discomfort while on the witness stand by constantly rubbing her stomach and appearing to be in pain during cross examination created an unduly prejudicial situation for defense, as evidenced by the jury's complaint that the defense examination was taking too long even though the cross exam was substantially shorter than the prosecutor's direct exam.

Evidence about Watkins having oral sex was not the only evidence the trial court acknowledged in retrospect should not have been admitted. The prosecutor also elicited testimony from Kayla that she witnessed Watkins fire a gun on July 4th, over defense ER 403 and 404(b) objections. 10RP 75-76. The trial court overruled the objection and allowed the testimony. 10RP 76. The next day, however, the trial court told the parties he felt "guilty" about allowing in the testimony and told defense, "I shouldn't have allowed the--you were right on the 403, 404B for the July 4 shotgun incident." 11RP 3. The court recognized that its probative value was substantially outweighed by the danger of unfair prejudice, "But that said, I don't know how to fix it." Id. The prosecutor

responded the State had to prove the firearm was operable so the evidence established an element of the crime. Id.

The State, however, was allowed to introduce the firearm at trial (Exhibit 11) through two officers, one who testified the shotgun was fully functional, and another who found the shotgun during the search of Altesa's home. 6RP 66, 71, 85-86. And the State was allowed to take photos of Watkins' arm to compare to a photo found on an iPhone in evidence showing the arm of a man holding a firearm. 12RP 19-21, 31. Further, the State elicited testimony from Watkins that it was him in photos holding the gun. 15RP 21-22.

The State did not need to elicit this highly prejudicial 'July 4th' testimony to try to prove its case of unlawful possession of a firearm. The defense properly objected, the trial court erroneously overruled that objection and regretted it later exclaiming the court felt "guilty" for allowing it to come before the jury. 11RP 3. By its own admission, the trial court abused its discretion by allowing in this prejudicial evidence.

In addition to these prejudicial errors admitted to by the trial court, the trial court also allowed additional prejudicial testimony into evidence, namely the highly prejudicial testimony of the alleged victims' mothers. Their testimony was emotionally charged; indeed, one mother broke down

in tears when shown pictures of her daughter baring her breasts and buttocks.

What's more, the prosecution presented a witness who was noticeably pregnant. She appeared in constant pain during cross examination. And that witness's testimony caused the jury to violate the court's instructions not to discuss the case prior to deliberation.

Taken together, the cumulative effect of these errors violated Watkins' due process right to a fair trial and requires reversal of the convictions and remand for a new trial.

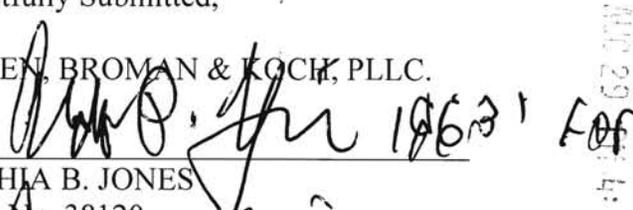
D. CONCLUSION

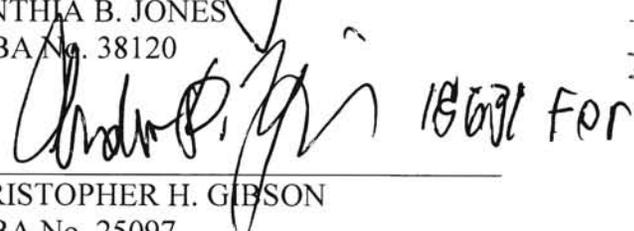
For the reasons stated, this Court should reverse Watkins' convictions and remand for a new trial.

DATED this 29 day of August, 2013.

Respectfully Submitted,

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