NO. 42599-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JUAN JOSE RECINOS,

Appellant.

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

The Honorable Ronald E. Culpepper

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED RECINOS HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

1. The trial court erred in admitting the 911 tape as an excited utterance.

The State argues that the trial court did not abuse its discretion in admitting the 911 tape because "shock is as likely a reaction to a traumatic experience as is hysteria," mistakenly relying on State v. Bryant, 65 Wn. App. 428, 828 P.2d 1121 (1992). Brief of Respondent at 10-11. In Bryant, the defendant's 3-year-old granddaughter was found by a neighbor looking frightened and in shock in a bathroom where her grandmother lay unconscious. The neighbor testified that she volunteered "out of the blue" that "grandpa hit grandma." An officer testified that she said, "Grandpa was hitting grandma on the wall" and "Grandma had blood on her." Id. at 431. The Court held that the neighbor's testimony that the child appeared frightened and in shock together with the nature of the violence that she witnessed, supports the inference that she was still under the influence of the startling event and therefore her statements constitute an excited utterance. Id. at 433-34.

The State's claim that Theresa Moreau described the "frightening" event" and the "nature of the event was startling," is unsubstantiated by

the record. Theresa Moreau testified that Recinos arrived at her house with blood on his pants and shoes and said, "I found them together. I shot." 8RP 885. Moreau never said she was frightened or startled by Recinos's appearance or statement. She only reacted when Recinos said the children were at home alone. She immediately drove to the home and was "so stressed out" that she could not open the door because her hand was shaking. 8RP 587. Moreau's testimony merely shows that she was stressed out because the children were left at home. Unlike in Bryant, where the child was in shock by seeing her grandfather beating her grandmother, Moreau's testimony fails to establish that she was shocked and frightened by a startling event.

The State argues further that the trial court had "the unique perspective of viewing Mrs. Moreau during her trial and the 911 tape," citing State v. Williams, 136 Wn. App. 486, 150 P. 3d 111 (2007), which has no application here. The State's citation refers to Williams's argument that the trial court erred in admitting a 911 tape because it was not authenticated and its admission violated his right to confrontation which is not the argument here. Id. at 499. Brief of Respondent at 10. In any event, the record reflects that the trial court's ruling was not based on its observations of Moreau because it never compared how she appeared in

court to how she sounded on the 911 call in finding that the tape was admissible as an excited utterance. 8RP 649-50.

The State additionally argues without citing any authority that the 911 tape was admissible as admissions by a party-opponent under ER 801(d)(2). Brief of Respondent at 11. ER 801(d)(2)(i) provides that a statement is "not hearsay" if "[t]he statement is offered against a party and is . . . the party's own statement." Under this rule, Recinos's statement is admissible if it "is in some way inconsistent with [his] position at trial." 5B Karl B. Tegland, Washington Practice: Evidence section 801.35, at 389 (5th ed. 2007). The alleged statements on the 911 tape were either not sufficiently inconsistent or proven incorrect by other evidence. Ex. 137. Consequently the statements were inadmissible as admissions by a party-opponent.

2. The trial court erred in admitting Recinos's custodial statements.

The State agrees that Recinos was in custody but argues that "the defendant was read his constitutional rights which, at a minimum, obviously included the right to remain silent and that he was entitled to an attorney." Brief of Respondent at 12 citing RP 12-14. The record belies the State's argument. Deputy Thompson testified that Recinos was advised of his rights but did not describe what rights Recinos was advised

of and he could not remember who advised him. 4RP 12-14. Furthermore, in its Findings of Fact and Conclusions of Law, the trial court made no finding that Recinos was advised of his Miranda rights. CP 178-81.

The State then argues that the "unrefuted evidence is clear: there is substantial evidence to demonstrate the defendant's statements were voluntary and not the product of custodial interrogation." Brief of Respondent at 14-15. To the contrary, the record establishes that while transporting Recinos, Deputy Thompson engaged in a conversation with Recinos who was handcuffed in the back seat. 4RP 15-16. Thereafter, Thompson released Recinos to the Washington State Patrol. 4RP 17. While Recinos was handcuffed and in an enclosed cage in the back of a patrol car, Detective Gundermann opened the door and initiated a dialogue with him, despite claiming that a trooper told her Recinos had been advised of his rights and did not want to talk. 4RP 27-30.

As the Washington Supreme Court determined in State v. Sargeant, 111 Wn.2d 641, 762 P.2d 1127 (1988), Miranda refers not only to express questioning, but also to any words or actions that the police should know are reasonably likely to elicit an incriminating statement. Id. at 650. The focus is "primarily upon the perceptions of the suspect, rather than the intent of the police." Id. See also, Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)(if officers continue

interrogation after the accused invokes his right to counsel, all resulting statements must be suppressed).

The prejudicial statements were inadmissible where there was no proof that Recinos was fully advised of all of his rights under Miranda; Thompson engaged in a conversation with Recinos despite claiming he invoked his right to remain silent; Gundermann initiated a dialogue with Recinos despite claiming that he was advised of his rights and said he did not want to talk; and Thompson and Gundermann as experienced officers should have known that by engaging in and initiating a dialogue with Recinos who was under the stress of custodial restraint, it was reasonably likely that they would elicit incriminating statements.

3. The trial court erred in admitting highly prejudicial photographs of Recinos in handcuffs.

The State argues that the photographs "merely show that [Recinos] was arrested" and therefore the probative value of the photographs substantially outweighed any unfair prejudice. Brief of Respondent at 17. Under the State's argument, the photographs were cumulative and consequently unduly prejudicial because the State had already presented testimony that Recinos was arrested. 9RP 679-80.

The State attempts to minimize the prejudicial effect of the three photographs by arguing that there were 140 exhibits and "three is an

extremely small percentage." Brief of Respondent at 17. Fatal to the State's argument is the fact that the jury was instructed that it "must consider all of the evidence." CP 112 (emphasis added). Juries are presumed to follow the court's instructions. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). Regardless of how many exhibits the jury had to consider, the photographs of Recinos restrained in handcuffs leave a lasting impression of guilt.

Contrary to the State's argument, the photographs were clearly prejudicial and eroded the presumption of innocence. The trial court abused its discretion in admitting the photographs because no reasonable judge would have admitted such evidence. State v. Pete, 152 Wn.2d 546, 557, 98 P.3d 803 (2004).

4. Defense counsel was ineffective in failing to object to the State's use of the recorded jail call.

The State asserts that it "is entitled to impeach any witness, to include impeachment by prior inconsistent statement," citing ER 607(3)(c),(e). Brief of Respondent at 19. However, ER 607 only provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." In any case, the State's argument that defense counsel was not ineffective because no reasonable objection could be made is unsubstantiated by the record.

The record reflects that during cross-examination of Recinos, the prosecutor stated, "I'm going to play a clip for you of a telephone call that you made and I want you to listen to it carefully, and I'm going to have a few questions for you." Without any objection from defense counsel, the prosecutor proceeded to play the recording. 9RP 767. Defense counsel clearly should have objected because the tape had not been admitted as evidence and the prosecutor did not state the purpose for playing the recording before the jury. If defense counsel had objected, the prosecutor would have responded that the recording was for impeachment which would have necessitated a limiting instruction.[1] Consequently, defense counsel was ineffective in doing nothing and just allowing the prosecutor to play the recording.

5. Cumulative error deprived Recinos of his constitutional right to a fair trial.

"Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless." State v. Webber, 159 Wn.2d 252, 279, 140 P.3d 646 (2006). Here, the record establishes that cumulative error warrants reversal where the trial court erred in 1) admitting the 911 call as an excited utterance; 2) admitting Recinos's

[1] Certain evidence has been admitted in this case for only a limited purpose and may be considered by you only for the purpose of _____. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation. WPIC 5.30.

statements to Thompson and Gundermann in violation of Miranda; 3) admitting highly prejudicial photographs of Recinos restrained in handcuffs; and 4) defense counsel was ineffective in failing to object to the State's use of the recorded jail call.

B. CONCLUSION

For the reasons stated here and in appellant's opening brief, this Court should reverse Mr. Recinos's convictions because the cumulative errors produced a trial that was fundamentally unfair. In re Personal Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994).

DATED this 28th day of February, 2013.

Respectfully submitted,

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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 Kwayne Lund, Pierce County Prosecutor's Office, 930 Tacoma Avenue, 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 28th day of February, 2013 in Kent, Washington.

Valerie Marushige

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