71298-5

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NO. 71298-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

DARRELL MORGAN,

Appellant.

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

The Honorable Marybeth Dingledy, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

FEDERAL CASES

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

1. THE TRIAL COURT FAILED TO ISOLATE THE PREJUDICE OF KOWALCHYK'S MISCONDUCT, REQUIRING DISMISSAL

The State contends Kowalchyk did not actually intercept any communications, distinguishing this case from State v. Granacki, 90 Wn. App. 598, 959 P.2d 667 (1998), and State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963). Br. of Resp't at 20. The State also argues Kowalchyk's conduct was not egregious enough to prejudice Morgan. Br. of Resp't at 21-22. The State's arguments misconstrue the record and lack merit.

The State misstates the record in asserting "the facts here do not involve obtaining actual attorney-client communications." Br. of Resp't at 20. The trial court could not say whether Kowalchyk intercepted Morgan's communications but prohibited Kowalchyk's testimony because she very well could have. 2RP[1] 270-71, 275-76. Indeed, the trial court stated, "I don't know what, if anything, was read, but that is the essence of the problem. You can't have effective communication between the client and the attorney given that situation." 2RP 275. This court should reject the State's incorrect reading of the record.

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[1] As with his opening brief, Morgan cites the verbatim reports of proceedings as follows: 1RP—April 26, 2013; 2RP—October 14, 15, 16, 17, and 18, 2013; 3RP—October 18, 2013 (verdict); 4RP—December 16, 2013.

The State also contends the trial court found Kowalchyk credible, which it claims "defeats [Morgan]'s claims of purposeful intrusion and presumed prejudice." Br. of Resp't at 19-20. To the contrary, the trial court expressed extreme concern over Kowalchyk's actions and found "it hard to believe that she wouldn't know she's not supposed to look at a defendant's notebook." 2RP 270-71.

The trial court did not adequately remedy Kowalchyk's misconduct. Though Kowalchyk was not permitted to testify, she remained in the courtroom to assist the prosecution and communicated with a witness, De Folo, who later testified.[2] 2RP 271, 306, 308. This failed "to isolate the prejudice resulting from [Kowalchyk's] intrusion." Granacki, 90 Wn. App. at 603-04. Because of the trial court's failure, this court should dismiss this prosecution with prejudice.

The State responds that there was no prejudice. Br. of Resp't at 21-22. But prejudice is presumed. State v. Peña Fuentes, 179 Wn.2d 808, 818-19, 318 P.3d 257 (2014); Cory, 62 Wn.2d at 377 & n.3. The prosecutor

[2] The State asserts that the trial court "found that Detective Kowalchyk's calling Detective De Folo to inquire about his availability did not concern the substance of any testimony." Br. of Resp't at 23. This is another misstatement of the record. The trial court stated, "So in terms of calling Detective De Folo, which I understand was done for purposes of seeing if he's available tomorrow, that's not of concern to me, but not communicating any sort of information about the case to any of the witnesses." 2RP 306. The trial court failed to inquire regarding the substance of communications between Kowalchyk and De Folo and failed to remedy any communications between them regarding the case that might have already occurred.

below attempted to overcome this presumption and failed; the trial court would not have granted any remedy if it had not presumed Morgan was prejudiced. Kowalchyk's misconduct was egregious, it prejudiced Morgan, the prejudice was not adequately isolated, and this court should accordingly reverse Morgan's conviction and dismiss this case.

Short of dismissal, this court is required to remand this case so the trial court can engage in the proper analysis regarding Kowalchyk's misconduct. As the Washington Supreme Court has held,

> The State is the party that improperly intruded on attorney-client [communications] and it must prove that its wrongful actions did not result in prejudice to the defendant. Further, the defendant is hardly in a position to show prejudice when only the State knows what was done with the information gleaned .... The proper standard the trial court must apply is proof beyond a reasonable doubt with the burden on the State.

Peña Fuentes, 179 Wn.2d at 820. The trial court did not apply this standard or burden of proof. Thus, if this court does not dismiss this prosecution, this court must "remand for the trial court to consider whether the State has proved the absence of prejudice beyond a reasonable doubt." Id.

2. THERE WAS INSUFFICIENT EVIDENCE THE PHOTOS CONSTITUTED SEXUALLY EXPLICIT CONDUCT

To argue the evidence was sufficient, the State asserts, "Ocheltree was involved in an open sexual relationship with defendant and had previously sent sexual pictures of herself to defendant." Br. of Resp't at 10.

The State misunderstands what gives rise to criminal liability under RCW 9.68A.070 and RCW 9.68A.011.

Under State v. Powell, 181 Wn. App. 716, 728, 326 P.3d 859 (2014), the person who creates the depiction must have the purpose of sexual stimulation of the viewer. Ocheltree, who created the depictions by taking the photos of A.S., testified her purpose was to make a scrapbook. 2RP 511-13. This was the only evidence that pertained to the purpose for the depictions. The evidence was thus insufficient that the photos were taken for the forbidden purpose of sexually stimulating the viewer.

The fact that Morgan and Ocheltree have sex or that Ocheltree previously sent erotic pictures of herself to Morgan does not provide a rational trier of fact with evidence beyond a reasonable doubt that Ocheltree took the photos of A.S. for Morgan's sexual stimulation. As argued in Morgan's opening brief, the State's focus on the nontraditional and sexual relationship between Morgan and Ocheltree invited the jury to infer Morgan had committed a crime based on his nontraditional sexual relationship. Br. of Appellant at 22-23. Such an inference is not reasonable and this court should reject the State's current attempts to support it. See State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013) (inferences "must be reasonable and cannot be based on speculation").

The State's argument that Morgan's storage of nude images of A.S. alongside other "sexual" images provides sufficient evidence also misses the mark. Whether Morgan used the photos of A.S. or any other photos for his own sexual stimulation has nothing to do with Ocheltree's purpose in taking photos of A.S. To conclude otherwise would be to ignore the rule that inference must "logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption." Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911).

The State would prefer Washington jurors and this court to infer criminal liability for sex offenses based on a person's legal yet nontraditional sexual preferences. This court should reject the State's baseless arguments.

3. EVIDENCE THAT MORGAN POSSESSED PORNOGRAPHIC IMAGES OF ADULTS AND NONPORNOGRAPHIC IMAGES OF CHILDREN WAS IRRELEVANT AND UNDULY PREJUDICIAL

The State claims various photos of nude adults and clothed children on Morgan's phone were relevant because they supported the State's theory of the case.[3] Br. of Resp't at 17. But, as discussed in Morgan's opening brief, the State's theory was based entirely on a misunderstanding of the definition of "sexually explicit conduct" in RCW 9.68A.011. See Br. of Appellant at 17-19, 21, 26-28.

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[3] Morgan concedes that Exhibits 19 and 44 were admitted without objection. 2RP 105, 113. He therefore does not challenge the admission of those exhibits.

The State continues to argue that Morgan's possession of nude photos of adult women and clothed photos of children were relevant because they tend to show Morgan possessed the images of A.S. for his own sexual stimulation. Br. of Resp't at 14, 16-17. But these images have no tendency to show Ocheltree took the photos for the purpose of sexual stimulation. Because these images were not probative of any element the State had to prove, they were irrelevant.

Even if, under some stretch of the imagination, the images were relevant, their unfair prejudice greatly outweighed their minimal probative value. By admitting these photos, the trial court invited jurors not to consider whether Ocheltree took the photos for the purpose of sexual stimulation—the proper inquiry—but to convict Morgan because he had unrelated sexually explicit materials.

The State does not respond to this argument. Instead, the State asserts that the trial court did not abuse its discretion because it weighed probative value against prejudice per ER 403. Br. of Resp't at 17-18. But the trial court misunderstood the law, believing it was criminal conduct for the viewer of images to derive sexual stimulation regardless of the purpose of the images' creator or photographer. See, e.g., 2RP 534-35, 539 (trial court refusing to give jury instruction that depiction's creator must have the purpose of sexually stimulating the viewer); 2RP 546 (trial court stating, "it's

all from the viewer's perspective, not the initiator or the contributor . . . . or the photographer"). In light of its erroneous view of the law, any ER 403 balancing performed by the trial court was meaningless: the court simply did not correctly ascertain what was probative for the purposes of ER 403 balancing. Because it applied an incorrect legal standard, the trial court abused its discretion. E.g., State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (trial court abuses discretion when its decision is based on incorrect legal standard).

This court should hold that the various sexually explicit images the trial court admitted were irrelevant, unduly prejudicial, and inadmissible.

4. THE TRIAL COURT DEPRIVED MORGAN OF HIS RIGHT TO ASSISTANCE OF COUNSEL IN HIS DEFENSE

The State is confused by Morgan's argument that the trial court deprived Morgan of his right to counsel by prohibiting defense counsel from arguing the evidence in a favorable manner in closing. Morgan does not argue his trial counsel was ineffective. Cf. Br. of Resp't at 24-26 (State analyzing Morgan's argument under Strickland[4] standard). Far from it; as discussed, defense counsel was the only person at trial who correctly understood RCW 9.68A.011(4)(f)'s definition of sexually explicit conduct. By restricting what counsel could argue in closing, the trial court deprived

[4] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Morgan of his "right to be heard in summation of the evidence from the point of view most favorable to him." Herring v. New York, 422 U.S. 853, 864, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975); accord State v. Woolfolk, 95 Wn. App. 541, 550-51, 977 P.2d 1 (1999). This amounts to a deprivation of counsel and requires reversal. Id.

Ocheltree testified she took photos of A.S. to use for a scrapbook, not for the purpose of sexual stimulation. 2RP 512-13. In closing, defense counsel argued, "This is about whether or not the nude picture was for the purpose of sexual stimulation of the viewer, and that wasn't the purpose at all. The purpose was for a scrapbook." 2RP 562. By sustaining the State's objection that this misstated the law, the trial court prevented Morgan's counsel from arguing the facts and the law to the jury. The essence of the right to assistance of counsel is the ability of counsel to argue evidence in the light most favorable to her client. See Woolfolk, 95 Wn. App. at 547 ("Closing argument is perhaps the most important aspect of advocacy in our adversarial criminal justice system."). Because this right was not honored in Morgan's trial, this court must reverse.

B. CONCLUSION

Because the State's lead detective committed egregious misconduct and because the State failed to put forth sufficient evidence that the depictions of A.S. were created for the purpose of sexual stimulation, this court should reverse Morgan's conviction and remand for dismissal. Alternatively, because the court admitted irrelevant and unduly prejudicial evidence and prevented counsel from arguing Morgan's theory of the case, this court should remand for a new trial.

DATED this 8th day of December, 2014.

Respectfully submitted,

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	)	
DARRELL MORGAN,	)	
	)	
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 8TH DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF DECEMBER 2014.

X Patrick Mayovsky