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NO. 69742-1-I

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

REC'D
DEC 18 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

BERNARD WATKINS,

Appellant.

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

The Honorable Michael Heavey, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING WATKINS' MOTION FOR A MISTRIAL.

The State argues Watkins' motion for a mistrial was properly denied because the testimony concerning videos of Watkins private sex life was "not particularly prejudicial" and "not particularly inflammatory" and therefore constitutes "no irregularity, let alone a serious one." Brief of Respondent (BOR) at 11-12. The State is wrong. Where a defendant is charged with criminal sex acts and the jury hears descriptions of a woman performing oral sex on the defendant while he recorded the act with an iPhone while another woman watched, the testimony by its nature is prejudicial and inflammatory. Here, the sex acts described to the jury were wholly unrelated to the charges brought by the State. 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 (emphasis added).

To support its argument, the State correctly cites to three factors courts consider when assessing a trial irregularity, but then relies on Black's Law Dictionary for the definition of "irregularity" to support its position. BOR at 11, 13. The State misunderstands the analysis. Courts

look to more than the definition of a single word when reasoning through the factors. The three factors are: (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. 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). In its response brief, the State addresses only the first factor.¹

Contrary to the State's assertion, and as argued in Watkins' opening brief, the irregularity here was serious. Brief of Appellant (BOA) at 8-10. The jury was to decide Watkins' fate in a trial where criminal charges involved deviancy and a lack of morality with regard to sexuality. The trial court found the oral sex videos bore no nexus to the charges and that mention of them would be "highly inflammatory." 8RP 153-54. The jury here may have convicted Watkins because they believed he deserved to be punished for his deviant private sex life and the normal "presumption of innocence" was "stripped away" after Altesa testified about the videos where she performed oral sex on Watkins and watched while another woman performed oral sex on Watkins. 8RP 149; State v. Bowen, 48 Wn.

¹ The State does not address factor (2) and fails to analyze factor (3). Although it does mention the instruction to disregard the irregularity, it does not address nor analyze whether that instruction could cure the irregularity. BOR at 18.

App. 187, 196, 738 P.2d 316 (1987), abrogated on other grounds by State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995).

The State correctly points out the trial court was concerned about the impression on the jury of the oral sex video testimony, namely “the jury would view Watkins as he did: as ‘a jerk.’” BOR at 16; 9RP 10. Then it argues the trial court’s “sensibilities about Watkins’s [sic] choice to videotape his sexual activity are not universally shared – witness the abundance of celebrity videos of just this type.” BOR at 17. The State misses the point. This may be a factual argument for mainstream media, but it is not a legal argument. No matter one’s views on sexual mores however liberal or conservative, if a behavior in one’s private life is linked to propensity to commit a crime, prejudice will result. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) review denied 116 Wn.2d 1020, 811 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). Specifically, in a court of law- as opposed to the public media – when a defendant is charged with sex crimes, then sex videos unrelated to the crimes charged are admitted or discussed in the jurors’ presence, the jury has been influenced and the defendant is prejudiced. Here, the jury’s natural inclination is to reason Watkins likely committed the offenses charged

because he is the type of person who videotapes two different women engage in oral sex with while others watch. Id. The irregularity was serious.

The State further argues the testimony of the oral sex videos was admissible evidence and probative to prove who owned the iPhone. BOR at 15-16. However, by its own admission, the State had “[t]housands of text messages and numerous photos from the iPhone” to try to prove who owned the iPhone but it selected prejudicial, inflammatory content to put before the jury resulting in unfair prejudice to the defendant. BOR at 20.

Further, the State takes issue with the lack of objection by the defense at the time of the testimony. BOR at 15. But as explained in the opening brief, it is immaterial for at least two reasons. First, the State argues “the State did what it had said it was going to do.” BOR at 15. To the contrary, the trial court said the State should not have introduced the evidence at all and said there was “clearly a misunderstanding, a disconnect” about what the State said it was going to do versus what the trial court said was admissible. 9RP 10-11. Second, the defense explained during argument on motion for a mistrial that he did not object 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.

Finally, as argued in Watkins' opening brief, the overwhelming danger of prejudice could not be and was not undone by a curative instruction to the jury. BOA at 10. "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.

2. CUMULATIVE ERROR DEPRIVED WATKINS OF A FAIR TRIAL

The State argues Watkins failed under the cumulative error doctrine "even to assign error to any of the "errors" he claims cumulatively deprived him of a fair trial." BOR at 22. The State several times refers to "assigned errors" and urges this Court to decline review of the cumulative errors. BOR at 22, 23, 25, 26. The State misunderstands the doctrine.

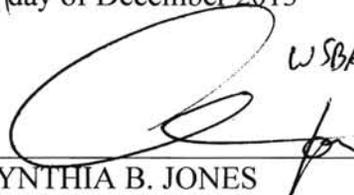
Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

Here, as detailed in Watkins' opening brief, an accumulation of errors affected the outcome of Watkins' trial and produced an unfair trial. Appellant stands by the argument in the opening brief without recitation to it here. 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.

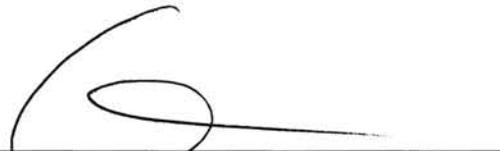
C. CONCLUSION

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

DATED this 6th day of December 2013

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Respondent,)	
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v.)	COA NO. 69742-1-1
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BERNARD WATKINS,)	
)	
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 18TH DAY OF DECEMBER 2013, 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 AND/OR VIA EMAIL.

[X] BERNARD WATKINS
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COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF DECEMBER 2013.

x *Patrick Mayovsky*

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