

NO. 72807-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

ISRAEL FABIAN SANCHEZ,

Appellant.

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

The Honorable William L. Downing, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Israel Fabian Sanchez was denied a fair trial when the court permitted a law enforcement witness to express an improper opinion on his guilt.

2. The trial court erred in impermissibly commenting on the evidence before the jury.

3. The trial court erred in entering a lifetime no-contact order between Fabian and his two biological children.

Issues Pertaining to Assignments of Error

1. Witnesses may not offer an explicit or implicit opinion as to a criminal defendant's guilt. A law enforcement witness referred to the alleged victim, J.F.H. as "the victim" during testimony. Given that the sole issue at trial was whether or not J.F.H. was in fact a victim of child rape, was the law enforcement witness's testimony that J.F.H. was "the victim" a comment on Fabian's guilt that deprived Fabian's of his constitutional right to a fair trial by an impartial jury?

2. Prior to trial, the trial court granted a defense motion in limine to preclude the prosecution or its witnesses from referring to J.F.H. as "the victim." The trial court indicated it would sustain any objection to a witness referring to J.F.H. as "the victim" and instruct the jury to disregard such reference. However, rather than sustain defense counsel's

objection to a law enforcement witness's reference to J.F.H. as "the victim," the trial court ruled, "The answer stands." Was this endorsement that J.F.H. was the victim an impermissible comment on the evidence?

3. When it did not determine whether the order was reasonably necessary to serve a compelling state interest, was it error to prohibit all contact between Fabian and his biological children for life?

B. STATEMENT OF THE CASE

The State charged Fabian Sanchez with one count of rape of a child in the first degree for having sexual intercourse with his seven-year-old stepdaughter, J.F.H. on March 28, 2014. CP 1. The information included a domestic violence allegation. CP 1. Prior to trial, the State amended the information to include an additional first degree child rape charge that the State alleged had occurred between April 4, 2011 (J.F.H.'s fifth birthday) and March 27, 2014. CP 9; 2RP 55-58. The amended information included domestic violence allegations on both counts. CP 9-10.

On March 29, 2014, J.F.H. told her mother, Maria Josefa Hernandez Asencio, that Fabian Sanchez had poked her in the front part and in the back part the previous night while Hernandez was at work. 5RP¹ 28, 34, 66.

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP—August 28, 2014; 2RP—October 23, 2014; 3RP—October 27, 2014; 4RP—October 28, 2014; 5RP—October 29, 2014; 6RP—October 30, 2014; 7RP—November 3, 2014; 8RP—November 4, 2014; 9RP—November 5, 2014; 10RP—December 5, 2014.

Hernandez recounted that Fabian had “put his penis in the back part of” J.F.H. before, but that Hernandez had “remained quiet.” 5RP 31-32. Hernandez elaborated that in 2010 when she, Fabian, and her children lived with her sister and brother-in-law, she walked into a bedroom where she saw Fabian putting his penis into J.F.H. from the back. 5RP 12, 45-46. J.F.H. stated this had occurred when she was five or six years old. 5RP 101. Hernandez promised J.F.H. that if Fabian ever did that again, they would leave him. 5RP 32, 48-49.

After J.F.H. told Hernandez about the March 28, 2014 incident, Hernandez took J.F.H. and her two other children to a community center to obtain information about reporting the incident. 5RP 39-40. Based on the information she obtained, Hernandez decided to call child protective services, which dispatched the police to Hernandez’s apartment. 5RP 40-41.

When Hernandez returned to her apartment, Fabian was there. 5RP 41. According to Hernandez, Fabian said he would not give Hernandez a check necessary for paying the rent if she contacted police. 5RP 41. Fabian also reportedly stated J.F.H. had merely dreamt the sexual contact occurred, but J.F.H. said she had not dreamt it. 5RP 38.

Police arrived 90 minutes to two hours after Hernandez called CPS, after Fabian left. 5RP 41-42. Police interviewed Hernandez and collected J.F.H.’s pajamas and blankets from her bed. 4RP 21-22, 24, 49-50. Police

decided to take the entire family to Children's Hospital so that J.F.H. could undergo a forensic examination. 4RP 50-51; 5RP 71.

Nurse Elaine Beardsley conducted an examination of J.F.H. 6RP 66. Dr. Rebekah Burns was present during the examination. 8RP 63, 70. J.F.H. told Beardsley that Fabian had put saliva on his penis and then had put it in her bottom. 6RP 73-74; 8RP 70. When asked to point to her bottom, J.F.H. pointed to her vagina and rectum. 6RP 74. When asked whether this had happened before, J.F.H. stated, "Much times." 6RP 74; 8RP 72. Beardsley collected swabs from J.F.H.'s mouth, fingertips, hymen, vagina, anal folds, and just inside the rectum.² 6RP 74-75. Profiles obtained from the vulvar and anal swabs matched Fabian's DNA. 6RP 38-41.

J.F.H. was also interviewed by Shana MacLeod, a child interview specialist employed in the prosecutor's office. 4RP 91. Prior to trial, the court held a child hearsay hearing at which MacLeod and Hernandez Asencio testified. 2RP 6-47, 102-03, 144-67. The State sought admission of a DVD recording of the child interview, which the trial court ruled was admissible in its entirety. 3RP 17-20.

² Beardsley also described a notch on J.F.H.'s hymen, but noted no other tearing, lacerations, or acute injuries in J.F.H.'s vagina or rectum. 6RP 80. Beardsley testified that, based on the exam, she could not tell if sexual abuse had occurred. 6RP 81, 104. Dr. Burns was not able to tell the cause of the notch and described the physical exam as normal; she was thus unable to say, based on the exam, whether the abuse had occurred. 8RP 73, 75-76.

This DVD was played for the jury. 4RP 69-130. In the interview, J.F.H. stated Fabian had put his “thing” on and in her bottom. 4RP 110-14. J.F.H. also recounted another time Fabian had put his “thing” in and out of her bottom and front when J.F.H. was five or six years old. 4RP 118. When she testified at trial, J.F.H. described the March 28, 2014 incident and the previous incident when she was age five or six. 5RP 97-102.

The jury returned guilty verdicts on both first degree child rape counts and a special verdict for each count that J.F.H. and Fabian were members of the same family or household. CP 50-51; 9RP 82-87.

The trial court sentenced Fabian to concurrent, indeterminate sentences of 160 months on both counts. CP 109; 10RP 18. The trial court also imposed a lifetime no-contact order between Fabian and Hernandez, J.F.H., and “other family members,” which included Fabian’s two biological children, J2.F.H.³ and A.F.H.

Fabian timely appeals. CP 104.

³ Because Fabian’s son has the same initials as J.F.H., this brief will refer to him as J2.F.H. to avoid confusion.

C. ARGUMENT

1. A POLICE OFFICER'S CHARACTERIZATION OF J.F.H. AS THE "VICTIM" CONSTITUTED AN IMPROPER OPINION ON FABIAN SANCHEZ'S GUILT AND THE TRIAL COURT'S RULING THAT THE OFFICER'S ANSWER WOULD "STAND" CONSTITUTED AN IMPROPER COMMENT ON THE EVIDENCE

The jury's fact-finding role is essential to the constitutional jury trial right. U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22; Sofie v. Fibreboard Corp., 112 Wn.2d 363, 356, 771 P.2d 771 (1989). Indeed, under our state constitution, the right a jury trial is "inviolable." CONST. art. I, §§ 21, 22. As a result, "[n]o witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 754 P.2d 12 (1987).

In determining whether testimony amounts to an improper opinion on guilt, courts consider the circumstances of the case, including the following factors: "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." State v. Quaale, 182 Wn.2d 191, 200, 340 P.3d 213 (2014).

Article IV, section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The strict prohibition on comments on

the evidence “prevent[s] the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the evidence submitted.” State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). Almost since statehood, all remarks or observations regarding the facts before the jury are strictly prohibited. State v. Walter, 7 Wash. 246, 250, 34 P. 938 (1893); State v. Coella, 3 Wash. 99, 121, 28 P. 28 (1891).

“A statement by the court constitutes a comment on the evidence if the court’s attitude toward the merits of the case or the court’s evaluation relative to the disputed issue is inferable from the statement.” State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). A court’s improper comment on the evidence may thus be either express or implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

During the testimony of Bellevue police officer Robin Peacey, the prosecutor asked about the people who were in J.F.H.’s home when he arrived there. 4RP 18-19. The prosecutor inquired about the three children in the apartment, specifically asking if Peacey remembered their ages. 4RP 19. Peacey responded, “There was the youngest girl, I think she was two. The boy was probably around four, and then the victim, I believe was seven.” 4RP 19-20 (emphasis added). Defense counsel “object[ed] to that characterization,” and the court ruled, “The answer stands.”

The police officer's reference to J.F.H. as the victim was an improper opinion on Fabian's guilt. Washington courts have repeatedly noted that opinions on guilt are particularly dangerous when they are backed by the prestige of law enforcement officers. State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008); State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003) (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). By calling J.F.H. the victim, Peacey gave jurors his opinion that J.F.H. had been sexually assaulted by Fabian. Given the defense of general denial, the sole issue at trial was whether Fabian had committed child rape. Peacey's improper opinion told jurors that J.F.H. was indeed a victim of that crime and that Fabian was therefore guilty.

The trial court, moreover, exacerbated Peacey's improper opinion on guilt by endorsing it in violation of article IV, section 16 of the Washington Constitution. The trial court did more than merely overrule defense counsel's objection to the characterization of J.F.H. as a victim, the trial court expressly told jurors "The answer stands." 4RP 20. This augmented the improper opinion's prejudicial effect. Telling jurors that Peacey's opinion that J.F.H. was a victim "stands" is the equivalent of stating that, in the trial court's view, Peacey was correct in opining that J.F.H. was the victim. This was an impermissible comment on the evidence. The trial court's response to defense counsel's objection thus went far beyond lending

“an aura of legitimacy” to Peacey’s improper opinion on guilt, State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984), it unconstitutionally and expressly endorsed it.

The trial court’s response to defense counsel’s objection also contradicted its pretrial ruling in limine on this precise issue. Defense counsel moved in limine to “prevent the State or its witnesses from referring to Mr. Fabian’s daughter as a “‘victim.’” CP 86. Defense counsel asserted, “One of the central issues in this case is whether she is, in fact, a ‘victim.’ Such language impermissibly expresses an opinion that the defendant is guilty.” CP 86-87. The defense also argued, “using the term ‘victim’ to describe [J.F.H.] is an improper comment on the evidence that unfairly prejudices the defense.” CP 87. The trial court agreed with defense counsel that “the prosecutor shouldn’t use that terminology in opening statement or at the outset in the case.” 2RP 138. The trial court also noted that if a witness “suddenly blurts out that terminology, and it’s an understandable thing, it doesn’t produce a mistrial.” 2RP 138-39. But the trial court indicated, “You know, objection will be lodged, the court would sustain it and instruct the jurors to disregard it.” 2RP 139 (emphasis added). The trial court’s pretrial ruling reflected its understanding that it is improper opinion on guilt for a witness to call an alleged victim “the victim” during testimony. The trial court’s agreement to sustain any objection on this basis and instruct

jurors to disregard such an opinion also revealed that it understood doing otherwise would improperly comment on the evidence, allowing the jury to infer the court's opinion that J.F.H. was indeed the victim. Yet when an objection was lodged on this very basis, the trial court did not sustain it or instruct the jury to disregard it. Instead, contrary to its pretrial ruling, the trial court gave its express approval of Peacey's opinion on guilt by allowing Peacey's reference to J.F.H. as the victim to stand.

The prosecutor's reaction to Peacey's opinion on guilt also demonstrates the State was aware that Peacey's reference to J.F.H. as the victim was improper. The State said, "What I'll . . . have you do, Officer Peacey, is just refer to the seven-year-old . . . by her name" 4RP 20. The officer then asked "am I okay to say her name now in court?" to which the prosecutor responded, "Yes, you are." 4RP 20. The State's correction of its witness despite the trial court's endorsement of the witness's statement shows the State knew Peacey's reference to J.F.H. as the victim was improper and prejudicial and also knew the trial court's allowance of that improper reference was a comment on the evidence. This court should reach the same conclusion.

When, as here, a witness gives an opinion on a criminal defendant's guilt, it invades the province of the jury and deprives the defendant of his jury-trial right. Sofie, 112 Wn.2d at 656; Black, 109 Wn.2d at 348.

Similarly, all remarks that demonstrate the trial court's view of facts before the jury are strictly prohibited by article IV, section 16. State v. Bogner, 62 Wn.2d 247, 252, 383 P.2d 254 (1963). These constitutional errors are presumed prejudicial, and the State bears the burden of demonstrating the improper opinion on guilt and comment on the evidence were harmless beyond a reasonable doubt. Quaale, 182 Wn.2d at 201-02; Lane, 125 Wn.2d at 838; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); Lampshire, 74 Wn.2d at 892. Here, a law enforcement officer described J.F.H. as the victim and the trial court told the jury that this statement was correct by ruling that it would stand. This improper opinion on guilt and related comment on the evidence deprived Fabian Sanchez of a fair trial.

2. THE LIFETIME NO-CONTACT ORDER BETWEEN FABIAN SANCHEZ AND HIS BIOLOGICAL CHILDREN VIOLATES FABIAN'S FUNDAMENTAL RIGHT TO PARENT

A sentencing court "may impose and enforce crime-related prohibitions" under the Sentencing Reform Act of 1981. RCW 9.94A.505(9); State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Under State v. Armendariz, 160 Wn.2d 106, 118-20, 156 P.3d 201 (2007), crime-related prohibitions may extend up to the statutory maximum for the crime and are not limited to the standard sentencing range for incarceration.

Parents have a fundamental liberty interest in the “care, custody, and management” of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). While the imposition of crime-related prohibitions is generally reviewed for abuse of discretion, courts “more carefully review conditions that interfere with a fundamental constitutional right such as the fundamental right to the care, custody, and companionship of one’s children.” In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010) (citation omitted). “Such conditions must be ‘sensitively imposed’ so that they are ‘reasonably necessary to accomplish the essential needs of the State and public order.’” Id. (quoting Warren, 165 Wn.2d at 34).

Any state interference with the fundamental right to parent is subject to strict scrutiny. Warren, 165 Wn.2d at 34. Sentencing “conditions that interfere with fundamental rights must be sensitively imposed” with “no reasonable alternative way to achieve the State’s interest.” Id. at 32, 35. Thus, sentencing courts must consider whether a condition, such as a no-contact order, is reasonably necessary in scope and duration to prevent harm to children. Rainey, 168 Wn.2d at 377-82. Less restrictive alternatives, such as indirect contact or supervised visitation may not be prohibited unless there is a compelling State interest barring all contact. Warren, 165 Wn.2d at 32; State v. Ancira, 107 Wn. App. 650, 655, 27 P.3d 1246 (2001).

Washington courts hold that lifetime no-contact orders are not automatically appropriate even when the child is a victim of his or her parent's crime. In Ancira, for instance, Ancira violated a no-contact order prohibiting contact between him and his wife and child. Ancira, 107 Wn. App. at 652. Ancira drove away with one of his children and refused to return until his wife agreed to speak with him. Id. The trial court imposed a five-year no-contact order with his children as a condition of his sentence. Id. at 652-53. This court held that the no-contact order violated Ancira's fundamental right to parent. Id. at 654. Although the State had a compelling interest in preventing the children from witnessing domestic violence, it failed to show how supervised visitation without the mother's presence or indirect contact by telephone or mail could not reasonably accomplish this goal. Id. at 654-55.

Similarly, Rainey was convicted of kidnapping his daughter. Rainey, 168 Wn.2d at 371. The trial court imposed a lifetime no-contact order. Id. at 374. In addition to kidnapping, Rainey inflicted emotional distress on his daughter by using her as leverage to inflict emotional stress on her mother. Id. at 379-80. This included letters Rainey sent to his daughter from jail blaming her mother for breaking up the family. Id. The supreme court held these facts were sufficient to establish that a no-contact order, which prohibited even supervised or indirect contact, was reasonably necessary to

protect the child. Id. at 380. However, the supreme court reversed and remanded for resentencing because the trial court provided no justification for the order's lifetime duration and because the State failed to show why the lifetime prohibition was reasonably necessary. Id. at 381-82. The court explained,

The duration and scope of a no-contact order are interrelated: a no-contact order imposed for a month or a year is far less draconian than one imposed for several years or life. Also, what is reasonably necessary to protect the State's interests may change over time. Therefore, the command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the State's interests. The restrictions length must also be reasonably necessary.

Id. at 381. The court therefore remanded "so that the sentencing court may address the parameters of the no-contact order under the 'reasonably necessary' standard." Id. at 382.

Here, the trial court imposed a lifetime no-contact order between Fabian Sanchez and "other family members," which included his two biological children J2.F.H. and A.F.H. CP 109; 10RP 18. Fabian was convicted of child rape of J.F.H., not of assaulting or harming J2.F.H. and A.F.H. While the lifetime no-contact order might be reasonably necessary to protect J.F.H., the same is not true for J2.F.H. and A.F.H.

Also, as in Rainey, the trial court did not find the lifetime no-contact order as to J2.F.H. and A.F.H. was reasonably necessary to accomplish a compelling state interest. The trial court said nothing at all about the no-contact order as to Fabian's two biological children other than, "the court would specifically include a prohibition on contact with [J.F.H.], Maria Josefa Hernandez[]Asencio and other family members" 10RP 18. This failure to acknowledge or apply the appropriate legal standard was an abuse of discretion. Rainey, 168 Wn.2d at 375.

While the State has a compelling interest in protecting children from harm, the State did not demonstrate how prohibiting all contact between Fabian and J2.F.H. and A.F.H. was reasonably necessary to effectuate that interest. Indeed, while the State recommended a no-contact order protecting J.F.H. and her mother, the State made no recommendation whatsoever regarding Fabian's two biological children. 10RP 7. Because the no-contact order pertaining to J2.F.H. and A.F.H. implicates Fabian's fundamental right to parent his children, the State must show and the trial court must find that no less restrictive alternative would prevent harm to these children, and any such alternatives must be narrowly drawn. See Rainey, 168 Wn.2d at 381-82.

Finally, as a matter of policy, family and juvenile courts are "more appropriate forums than the criminal sentencing process to address the best

interests of dependent children with respect to most visitation issues.” State v. Letourneau, 100 Wn. App. 424, 443, 997 P.2d 436 (2000); Ancira, 107 Wn. App. at 655. The lifetime no-contact order effectively terminated Fabian’s parental rights without notice or due process. Even where a parent is convicted of a qualifying serious offense—which is not the case here—the State may not terminate parental rights unless it first initiates dependency proceedings and provides notice, a meaningful opportunity to be heard, and establishes termination is in the best interests of the child. RCW 13.34.180(4); RCW 13.34.190(1)(a)(iv), (1)(b). Accordingly, this court should strike the order of lifetime no contact between Fabian and J2.F.H. and A.F.H., and remand for resentencing “so that the sentencing court may address the parameters of the no-contact order under the ‘reasonably necessary’ standard.” Rainey, 168 Wn.2d at 382.

D. CONCLUSION

Because a police officer unlawfully gave his opinion on Fabian Sanchez's guilt and because this improper opinion on guilt was endorsed by the trial court in an improper comment on the evidence, Fabian Sanchez asks this court to reverse and remand for a new and fair trial. Alternatively, this court should strike the lifetime no-contact order as to Fabian's two biological children and remand for resentencing.

DATED this 28th day of September, 2015.

Respectfully submitted,

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