

COURT OF APPEALS
STATE OF WASHINGTON

ORDER - 8
STATE OF WASHINGTON
BY: *[Signature]*

NO. 37970-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

TAYLOR TOM CONLEY,

Appellant.

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

The Honorable James Warne

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY¹

1. THE TEXT MESSAGE SENT FROM THE VICTIM'S PHONE AFTER HIS DEATH TO "HILLBILLY" HAMRICK WAS RELEVANT AND ADMISSIBLE "OTHER SUSPECTS" EVIDENCE AND THE RULING BARRING ITS USE FOR THIS PURPOSE DENIED CONLEY HIS SIXTH AMENDMENT RIGHT TO A DEFENSE.

- a. The evidence was admissible as "other suspects"

evidence under *Holmes v. South Carolina*. At his trial for aggravated murder in the first degree, the trial court barred appellant Taylor Conley from arguing that a text message sent from Brian Swehla's cell phone after his death to Dennis Wayne "Hillbilly" Hamrick was relevant to discount the State's theory of how the crime had been committed. The trial court wrongly found that because the text message was not explicitly exculpatory, it was not relevant. Under the recent decision of the United States Supreme Court in *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), however, the text message plainly was relevant and admissible "other suspects" evidence.

In *Holmes*, mindful of the right of an accused person under the Sixth Amendment to a "complete defense," *Crane v. Kentucky*, 476 U.S.

¹ Believing the arguments regarding Assignments of Error 4 and 5 to be well-presented in the Brief of Appellant, Conley offers no further argument on these Assignments of Error here.

683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), the Court invalidated a South Carolina evidentiary rule that precluded the admission of “other suspect” evidence where the State’s evidence of guilt was strong. 547 U.S. at 330-31. Criticizing the South Carolina Supreme Court, the Supreme Court reasoned,

The rule applied in this case appears to be based on the following logic: Where (1) it is clear that only one person was involved in the commission of a particular crime and (2) there is strong evidence that the defendant was the perpetrator, it follows that evidence of third-party guilt must be weak. But this logic depends on an accurate evaluation of the prosecution’s proof, and the true strength of the prosecution’s proof cannot be assessed without considering challenges to the reliability of the prosecution’s evidence. Just because the prosecution’s evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the issues in the case.

Id. at 330 (emphasis in original).

b. Holmes requires reversal of the trial court’s ruling.

Despite the discussion of Holmes and its application to the case at bar in the Brief of Appellant, Br. App. at 14-16, the State wholly ignores that decision. The sole authority on which the State relies are cases which pre-date Holmes and consequently were decided without the benefit of its rule. Br. Resp. at 11. The State concedes that “The theory against the defendant did not preclude the possibility that Mr. Hamrick and Ms. Hardesty were involved in the murder of Brian Swehla along with Ron Childers and the

defendant.” Id. Yet the State maintains that “Defense’s cell phone argument simply had no bearing on the guilt of the defendant.” Id.

But under Holmes, the evidence should have been admitted because “the true strength of the prosecution’s proof cannot be assessed without considering challenges to the reliability of the prosecution’s evidence.” The circumstantial evidence upon which the State relied to convict Conley consisted principally of the testimony of unreliable witnesses with proven track records of dishonesty. James Zebley was a methamphetamine addict who last used three days before his testimony, was closely connected to Hardesty’s friend Darrin Wolf, and had to be forced to come to court on a material witness warrant. RP 853, 890. Zebley also had prior convictions for crimes of dishonesty under ER 609. RP 858-61 (Zebley convicted of burglary and robbery). The trial prosecutor as much as acknowledged that given Zebley’s appearance and demeanor, the jury would not be “too shocked” to learn of his criminal history. RP 860. Yet the State depended on the jury crediting his confused and rambling testimony to obtain a conviction. See Br. Resp. at 2-3, 5-6 (Respondent’s Statement of the Case).

Jennifer Perry was another witness with credibility issues. In all likelihood, Perry lied about key facts during her testimony. Perry claimed that on the morning of Swehla’s murder, Conley discharged a 12-gauge

shotgun in her home, blowing a hole in her wall and peppering her futon with buckshot.² RP 802, 817-18.

Perry vacated the apartment shortly after and Tanna Sand-Lucas, her landlady, inspected the unit and refurbished it prior to renting it out again. RP 971-73. Sand-Lucas was specifically directed to look for holes in the wall or evidence that the wall had been patched. RP 973. There was no evidence that a shotgun had ever been discharged through the wall, as Perry alleged. RP 971. Perry claimed she “sort of” did a “makeshift” repair of the wall, RP 818, so presumably a routine inspection would have revealed the damage, had it existed.

Perry further claimed, “I had pulled out all the pellets and everything out of the back of my futon and gave it to a friend of mine to turn in [to police].” RP 817. This friend was “Hillbilly” Hamrick. RP 818.

Perry and Zebley were just two of the many witnesses with connections to Hamrick or Hardesty, Swehla’s estranged ex-girlfriend. To convict Conley, the State needed the jurors to believe these witnesses were testifying truthfully. The text message sent from Swehla’s cell phone after his death to Hamrick suggested that Hamrick had a hand in orchestrating

² The State also cites this questionable testimony in its Statement of the Case. Br. Resp. at 3.

Swehla's murder, and at a minimum established he knew the crime would be committed. Hamrick was mysteriously connected to many of the State's key witnesses, provided an alibi for Hardesty, and apparently tried to bolster the State's circumstantial case against Conley by propping up Perry's story about the shotgun. The text message thus undermined the "strength of the prosecution's proof" by challenging the reliability of the prosecution's evidence. Holmes, 547 U.S. at 330.

c. Even under the decisions cited by the State, the text message was admissible "other suspects" evidence and the ruling limiting the defense argument denied Conley his Sixth Amendment right to a defense. The State chiefly relies on State v. Clark, 78 Wn. App. 471, 898 P.2d 854 (1995), to defend the trial court's ruling. Br. Resp. at 11. As noted, the standard articulated in Clark – which authorized the admission of other suspect evidence only where the prosecution's case against the defendant is largely circumstantial, and the evidence "may neutralize or overcome" the prosecution's evidence – conflicts with the holding in Holmes. Compare Clark, 78 Wn. App. at 478-79 with Holmes, 547 U.S. at 330-31 (holding that other suspect evidence should be admitted regardless of the strength of the prosecution's case). But even under this decision, the trial court's ruling was incorrect.

First, the prosecution's case against Conley was entirely

circumstantial. Clark, 78 Wn. App. at 479. In addition to the lack of forensic evidence connecting Conley to the crime, Ronald Childers, Conley's co-defendant, testified that someone other than Conley was his accomplice. RP 911. Second, as the prosecution concedes, the other suspect evidence tended to link Hamrick with the actual commission of the crime charged. Clark, 78 Wn. App. at 478; Br. Resp. at 11. Third, the prosecution depended on witnesses closely tied to Hamrick and his associate, Amy Hardesty, to convict Conley, thus the evidence tended to neutralize or overcome their inculpatory testimony. Clark, 78 Wn. App. at 479.

In State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996), a prosecution for the murder of a six-year-old child, the defendant sought to introduce evidence that the child had been seen with a person other than the defendant after the defendant allegedly had abducted her. Id. at 922. In the Supreme Court, the appellate prosecutor made the same argument that the State makes here: "The State argues Brittain's testimony would not have exculpated Maupin, because the addition of other suspects did not preclude Maupin's having committed the crime." Id. at 926. The Court agreed with the State, but held this fact was not dispositive:

Although the State correctly notes this testimony would not necessarily have exculpated Maupin, as he may have been acting in concert with the persons Brittain claimed to have

seen, it at least would have brought into question the State's version of the events of the kidnapping.

Id. at 928.³

The Court concluded the exclusion of the evidence denied Maupin his federal and state constitutional rights to compulsory process and to present a defense, and reversed the conviction. Id. at 930.

As noted in the Brief of Appellant, "Even minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). And where an accused person's constitutional rights are at stake, the State must show a compelling interest in excluding the evidence. Id. at 622. The State has not made this showing. This Court should conclude the limitations on Conley's defense violated his Sixth Amendment right. Because the State cannot show the error was harmless, the conviction must be reversed.

2. ACKLER IMPROPERLY COMMENTED ON CONLEY'S FIFTH AMENDMENT PRIVILEGE.

The State contends that Sid Ackler did not improperly comment on Conley's Fifth Amendment privilege when he first testified that he told Conley he was "aware of [Conley's] deceptions" and then described confronting Conley with the evidence against him: "I told Mr. Conley that

³ In so holding, the Court in large part abrogated the holdings of State v. Mak 105 Wn.2d 692, 705 P.2d 407 (1986), and State v. Rehak, 67 Wn. App. 157, 834 P.2d 651 (1992), on which the State also relies. See Br. Resp. at 10-11.

we had the ability even partial latents [sic] off of ammunition and shotgun shells.” RP 311, 315; Br. Resp. at 12-17. The State’s claims are without merit.

The State relies on State v. Lewis, 130 Wn.2d 700, 927 P.2d 235 (1996). Lewis is inapposite, as in Lewis, the officer did not couple his reference to the defendant’s silence with a characterization like the one that occurred here. Lewis, 130 Wn.2d at 703 (Officer testified, “I told him- my only other conversation was that if he was innocent he should just come in and talk to me about it.”); but see id., 130 Wn.2d at 710 (Madsen, J., concurring in result) (“I fail to see how an officer’s testimony that he told a defendant that ‘if he was innocent he should just come in and talk to [the police] about [the charges]’ could be viewed as anything but an attempt to suggest that Lewis’s failure to ‘come in and talk’ was an admission of guilt.”).

State v. Hager, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 2832088 (No. 37539-7-II, Div. 2 2009),⁴ recently decided by this Court, is directly on point. In Hager, as here, a detective violated a motion in limine by testifying that during an interrogation, Hager “was evasive.” App. at 3.⁵ In Hager, as here, the court sustained a defense objection to the testimony

⁴ A copy of Hager is attached as an Appendix. Because Hager is not paginated on Westlaw, citations herein are to the Appendix.

⁵ In a hallway conference outside of the presence of the jury, defense counsel moved to prohibit any comment on Conley’s silence. RP 309-10.

but denied a motion for mistrial, choosing instead to issue a curative instruction. Id. Analyzing the facts, this Court held,

Detective Callas' comment violated Mr. Hager's privilege against self-incrimination. His comment that Mr. Hager was evasive was given in the context of Mr. Hager's denial of the allegations against him. As such, it was injected for no other purpose than to suggest Mr. Hager's guilt. And because Mr. Hager did not testify, he was unable to rebut this inference of guilt.

App. at 5.

This Court distinguished Lewis because the Detective's use of the word "evasive" elevated his testimony to a comment on the right to silence. Id. In so holding, this Court found that the curative instruction issued by the trial court did not obviate the prejudice from the remark:

[E]liciting such testimony [about silence] puts the defense in a difficult position. Counsel must gamble on whether to object and ask for a curative instruction—a course of action which frequently does more harm than good—or to leave the comment alone. Other courts, including the Ninth Circuit, have expressed doubt about the effectiveness of curative instructions.

App. at 6 (quoting State v. Curtis, 110 Wn. App. 6, 15, 37 P.3d 1274 (2002)).

Here, the State glosses over Ackler's insinuation that Conley was being deceptive and focuses instead on Ackler's testimony regarding confronting Conley with the evidence against him. Br. Resp. at 16. As Hager makes clear, the State mistakes the issue. The error occurred when

Ackler said he told Conley he was “aware of his deceptions” and this error was amplified by Ackler’s subsequent remarks.⁶ This Court should conclude the combination of Ackler’s improper remarks urged the jury to draw the inference that Conley was silent because he was guilty. As argued in the Brief of Appellant, the constitutional error requires reversal of the conviction.

3. A CAUTIONARY INSTRUCTION ON INFORMANT TESTIMONY SHOULD HAVE BEEN ISSUED GIVEN THE STATE’S HEAVY RELIANCE ON THE TESTIMONY OF INFORMANTS.

Although the State integrally depended on the testimony of jailhouse informants to obtain a conviction, the State contends that Conley was not entitled to an instruction telling the jury that this testimony should be viewed with caution. Br. Resp. at 18-19. The State claims that such an instruction was not necessary based on two premises: (1) the jury received the standard introductory instruction in WPIC 1.02 regarding the credibility of witnesses, and (2) the witnesses did not receive any benefit for their testimony. *Id.* Both claims are unavailing.

The State asserts WPIC 1.02 “fully informed” the jury of its ability to weigh the credibility of the witnesses. But in federal court, jurors are

⁶ Given the context of these latter remarks, Conley believes they independently constitute a comment. The jury might have concluded from this testimony that if Conley were innocent, he would have told Ackler his fingerprints were not on the shells.

given an introductory instruction regarding witness credibility markedly similar to WPIC 1.02. 9th Cir. Model Crim. Jury Instr. 1.08.⁷ Even though juries are given this standard instruction, because of the “characteristic” of jailhouse informants to manufacture false evidence motivated by the desire for leniency, federal courts also issue instructions telling juries to view the testimony of informants with great caution as a matter of course. Plascencia v. Alameida, 467 F.3d 1190, 1199-2000 (9th Cir. 2006) (citing 9th Cir. Crim. Jury Instr. 4.9).

The State also points out that Conley did not cite a Washington case to support his argument. Conley did, however, cite decisions from the United States Supreme Court. Br. App. at 31 (citing Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) and On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed.2d 1270 (1952)). In Banks, writing for a seven-justice majority, Justice Sandra Day O’Connor observed, “[t]his Court has long recognized the ‘serious problems of credibility’ informers pose. We have therefore allowed defendants ‘broad latitude to probe [informants’] credibility by cross-examination’ and have counseled submission of the credibility issue to the jury with ‘careful instructions.’ [Citations omitted.]” 540 U.S. at 701.

⁷ Available at:
<http://207.41.19.15/web/sdocuments.nsf/dcf4f914455891d4882564b40001f6dc/e48de3cb42964d4e882564b4000378f5?OpenDocument>

With respect to the State's claim that the instruction should not have been given because the witnesses did not receive a benefit, the State again mistakes Conley's argument and the relevant authority. The State asserts that "This instruction offered by the defense contemplates a situation where in-custody confessions are presented by fellow inmates (co-defendants excluded) in exchange for leniency." Br. Resp. at 18-19.⁸ The State reasons that because the prosecution witnesses, other than Ronald Childers, were not conclusively shown to have received a benefit in exchange for their testimony, the instruction was not warranted. *Id.*

But it is the prospect of leniency that motivates many jailhouse informants to offer false information. *See* Senior Judge Arthur L. Burnett, Sr., The Potential for Injustice in the Use of Informants in the Criminal Justice System, 37 Sw. L. Rev. 1079, 1088-89 (2008). And in fact, the defense proposed instruction made it clear that it is not merely the receipt of benefits from the State that may influence informants to testify falsely, but the expectation of such benefits. CP 57.⁹ Three informants—not

⁸ The State asserts, "[Conley] claims that State's witnesses obtained leniency for their cooperation and testimony in this case." Br. Resp. at 19. Conley made no such assertion. Conley pointed out that witness Nick Hicks had previously acted as a government informant and was urged to do so in this case by his girlfriend to get a deal. Br. App. at 29. Conley also pointed out that Hicks did get a good deal. *Id.*

⁹ The defense proposed instruction was identical to the instruction that is given in California courts when informants are witnesses. *See* Cal. Jury Instr. – Crim. 3.20.

including Conley's co-defendant—testified for the prosecution in this case. Given the absence of any forensic evidence connecting Conley to the crime, these individuals' testimony was key to the prosecution obtaining a conviction. Particularly in light of the grave "potential for injustice" arising from the use of informant testimony in a circumstantial case, *Burnett, supra*, the trial court erred in refusing to instruct the jury to view such testimony with caution.

4. CONLEY WAS PREJUDICED BY JURORS SEEING HIM IN HANDCUFFS.

In his pro se Statement of Additional Grounds for review, Conley has argued that his right to due process was violated when jurors saw him in handcuffs. Conley is correct.

In response, the State asserts first, that the error was harmless because the jury was aware Conley was in custody, and second, that because of the strength of the State's evidence, the jury having seen Conley in handcuffs was so "insignificant" that it could not have tipped the scales in favor of guilt. Br. Resp. at 22. Neither claim has merit.

An accused person's right to a fair trial by an impartial jury is a fundamental liberty secured by the Fourteenth Amendment guarantee of due process. U.S. Const. amends. 5, 6, 14; Wash. Const. art. I, §§ 3, 22; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126

(1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996).

The Supreme Court has said that the use of shackling and appearance in prison garb are “inherently prejudicial” because they are “unmistakable indications of the need to separate the defendant from the public at large.” Holbrook v. Flynn, 475 U.S. 560, 567-68, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986). The prejudice is “particularly apparent” when the defendant is charged with a violent crime, because shackling “is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged.” State v. Finch, 137 Wn.2d 792, 845, 975 P.2d 967 (1999) (quoting People v. Duran, 16 Cal. 3d 282, 290, 545 P.2d 1322 (1976)).

It is true that the jurors knew Conley was in custody because of the informants’ testimony. But they did not necessarily know that he was still held in custody awaiting his trial. And more importantly, lacking familiarity with the mechanisms for transporting in-custody defendants for their trials, they may not have realized that it is standard protocol to transport inmates in handcuffs. Consequently, they may have concluded that Conley was so dangerous he could not be escorted from the courtroom except in shackles. As argued in Conley’s statement of additional grounds for review, the constitutional violation requires reversal of his conviction.

B. CONCLUSION

For the foregoing reasons, and for the reasons argued in the Brief of Appellant, Taylor Conley's conviction must be reversed and remanded for a new trial. On retrial, Conley should be permitted to argue the relevance of the text message to "Hillbilly" Hamrick as "other suspects" evidence, law enforcement should be strictly prohibited from commenting on Conley's constitutional rights, and the court should issue Conley's proposed jury instructions.

DATED this 8th day of October, 2009.

Respectfully submitted:



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2009 WL 2832088

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Court of Appeals of Washington,
Division 2.
STATE of Washington, Respondent,
v.
Timothy Edward HAGER, Appellant.
No. 37539-7-II.

Sept. 3, 2009.

Background: Defendant was convicted in the Superior Court, Pierce County, John Russell Hickman, J., of first degree rape of a child. Defendant appealed.

Holding: The Court of Appeals, Schultheis, J., held that detective's comment that defendant was evasive during questioning violated his constitutional privilege against self-incrimination and warranted a new trial.

Reversed and remanded.

Hunt, J., filed dissenting opinion.

West Headnotes

[1] **Criminal Law** ⚡407(1)
110k407(1) Most Cited Cases

[1] **Witnesses** ⚡300
410k300 Most Cited Cases

The privilege against self-incrimination prohibits the State from forcing the defendant to testify or eliciting testimony from witnesses relating to a defendant's silence or evasiveness. West's RCWA Const. Art. 1, § 9; U.S.C.A. Const.Amend. 5.

[2] **Criminal Law** ⚡407(1)
110k407(1) Most Cited Cases

[2] **Criminal Law** ⚡1169.12
110k1169.12 Most Cited Cases

Detective's comment that rape defendant was evasive during questioning, in violation of two pretrial orders, violated defendant's constitutional privilege against self-incrimination, and warranted a new tri-

al; comment was given in the context of defendant's denial of the allegations against him, was injected for no other purpose than to suggest defendant's guilt, defendant was unable to rebut the inference of guilt because he did not testify, the comment was not cumulative of other evidence, and a jury instruction could not have cured the prejudice. U.S.C.A. Const.Amend. 5.

[3] **Criminal Law** ⚡867.5

110k867.5 Most Cited Cases

The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly; only errors affecting the outcome of the trial will be deemed prejudicial.

[4] **Criminal Law** ⚡1169.1(1)

110k1169.1(1) Most Cited Cases

[4] **Criminal Law** ⚡1169.2(1)

110k1169.2(1) Most Cited Cases

[4] **Criminal Law** ⚡1169.5(1)

110k1169.5(1) Most Cited Cases

In determining whether a trial irregularity warrants a new trial, the reviewing court considers the seriousness of the irregularity, whether the statement was cumulative of other evidence, and whether the irregularity could have been cured by a jury instruction.

[5] **Criminal Law** ⚡393(1)

110k393(1) Most Cited Cases

The State must obtain incriminating evidence on its own; the Fifth Amendment right against self-incrimination spares the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government. U.S.C.A. Const.Amend. 5.

[6] **Criminal Law** ⚡407(1)

110k407(1) Most Cited Cases

[6] **Witnesses** ⚡347

(Publication page references are not available for this document.)

410k347 Most Cited Cases

Generally, testimony about a defendant's refusal to speak with police is admissible for impeachment purposes after a defendant has taken the stand; however, the State may not use a defendant's refusal to talk to police as evidence of his or her guilt when the defendant has not testified, as such use violates defendant's privilege against self-incrimination. U.S.C.A. Const.Amend. 5.

[7] Criminal Law 407(1)

110k407(1) Most Cited Cases

The problem with the inference of guilt associated with testimony that a defendant was evasive during questioning is that a defendant may be forced to testify to rebut such an inference, in violation of the defendant's fifth amendment rights against self-incrimination. U.S.C.A. Const.Amend. 5.

Valerie Marushige, Attorney at Law, Kent, WA, for Appellant.

Michelle Luna-Green, Pierce County Prosecuting Attorney, Tacoma, WA, for Respondent.

SCHULTHEIS, J.

[1] ¶ 1 Under the fifth amendment to the United States Constitution and article I, section 9 of the Washington Constitution, a defendant has the right to say nothing at all about the allegations against him. This privilege against self-incrimination prohibits the State from forcing the defendant to testify or eliciting testimony from witnesses relating to a defendant's silence or evasiveness. *State v. Easter*, 130 Wash.2d 228, 236, 241, 922 P.2d 1285 (1996).

¶ 2 Here, a State's witness violated a pretrial order prohibiting testimony that Timothy Hager was evasive during police questioning. The trial court denied Mr. Hager's subsequent motion for a new trial. We conclude that testimony pertaining to Mr. Hager's evasiveness violated Mr. Hager's privilege against self-incrimination and denied him a constitutionally fair trial. Accordingly, we reverse and remand for a new trial.

FACTS

¶ 3 During November 2006, Andrea Lane found a letter to her 15-year-old stepson, Sean Lane, from his girl friend, P.B. (date of birth: October 7, 1991). The letter stated that P.B. did not want to have sex with Sean because when she was in the third grade, "I was raped by my step dad which is still my step dad today." Report of Proceedings (RP) at 204. Ms. Lane went to Sean's school and showed the letter to the high school principal, who notified Dennis Daniels, the school counselor.

¶ 4 Shortly thereafter, Mr. Daniels, Detective Tom Callas, and Roni Jensen, a Child Protective Services investigator, met with P.B. to discuss the letter. Detective Callas and Detective Dennis Dorr later contacted Mr. Hager, P.B.'s stepfather, at his residence. Mr. Hager, who appeared to be on methamphetamine at the time, denied any wrongdoing.

¶ 5 On November 22, 2006, Mr. Hager was charged with one count of first degree rape of a child. Before trial, the trial court conducted an ER 404(b) hearing to determine whether Mr. Hager's alleged prior acts of sexual misconduct against minors should be admitted. The court excluded the evidence. It also excluded any reference to Mr. Hager's evasiveness during police questioning. The matter proceeded to trial and resulted in a hung jury.

¶ 6 The State elected to retry the case and filed an amended information in January 2008, charging Mr. Hager with first degree rape of a child, and in the alternative, child molestation in the first degree.

¶ 7 Before trial, Mr. Hager moved the court for an order prohibiting Detective Callas from testifying about Mr. Hager's deceptive or evasive behavior during police questioning. Defense counsel argued that it was permissible for Detective Callas to state that Mr. Hager appeared to be on methamphetamine and avoided eye contact during questioning, but that it was improper for him to opine that Mr. Hager was evasive. He argued, "You can state the demeanor. You can't say because of that I think he

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was deceptive or evasive. The jury is to make that conclusion." RP at 155.

¶ 8 The court granted the defense motion, stating that it was relying on the reasoning of the judge in the first trial. However, the first judge's ruling is not part of the record before us.

¶ 9 Mr. Hager did not testify at trial. P.B. testified that during the third grade she lived with her mother in an apartment. At some point during that school year, Mr. Hager moved in with them. She testified that one afternoon after school while she was napping, Mr. Hager put his fingers inside her vagina. She stated that she did not tell anyone about it because she was worried that she would be removed from her home and mother. She also testified that once while sitting in a chair with Mr. Hager, he put his hand between her legs above her clothing.

¶ 10 P.B. was questioned about the letter she wrote to Sean. She explained that she and Sean started dating in the 7th grade and broke up just before they entered the 9th grade. About two to three weeks after their breakup, P.B. sent the letter to Sean explaining why she would not have sex with him. During cross-examination, defense counsel elicited numerous inconsistencies in P.B.'s statements to a detective and at the first trial.

¶ 11 Detectives Dorr and Callas described their questioning of Mr. Hager. Detective Dorr testified that Mr. Hager denied digitally raping P.B. in 2001 or living in the apartment with P.B. and her mother. Detective Dorr testified that during the interview, Mr. Hager appeared to be on methamphetamine--he was jittery, his eyes were dilated, he avoided eye contact, and he spoke loudly and rapidly.

¶ 12 The prosecutor then asked Detective Callas, "What was Mr. Hager's demeanor like during the time that you had contact with him that day?" Detective Callas answered, "He appeared to be angry. He was evasive." RP at 432.

¶ 13 Defense counsel moved for a mistrial. The prosecutor explained that "same as last time" he advised the detective to refrain from mentioning Mr. Hager's criminal history but this time he forgot to advise him to avoid using the word "evasive." RP at 432. The prosecutor conceded that the detective should not have used the word but argued that the error did not justify a mistrial as long as the jury was instructed to disregard the remark.

¶ 14 Defense counsel argued that Mr. Hager's credibility was central to the case "at least insofar as what he told the police officers" and therefore the detective's characterization of Mr. Hager as "evasive" was prejudicial and required a mistrial. RP at 433.

¶ 15 The trial court denied the motion, stating, "Well, I'm as--probably more so than defense counsel--frustrated over this because of the fact that we took such pains to make these rulings and insure that this was not going to occur. I'm going to deny the motion for mistrial and I'm going to do it on the basis that No. 1, I don't think the officer was acting in bad faith in terms of violating a rule. I think he just was not aware of that from a prior discussion with counsel." RP at 434.

¶ 16 The court then advised the detective that it was permissible to testify about Mr. Hager's physical appearance but prohibited "conclusory remarks regarding your judgment as to his behavior in terms of his testimony or whether he was being truthful with you or not being truthful with you." RP at 435. The court instructed the jury to disregard the detective's comment.

¶ 17 Detective Callas testified without further incident, stating that Mr. Hager denied the rape allegation and pointed to P.B.'s biological father as a suspect.

¶ 18 The jury found Mr. Hager guilty of first degree rape of a child. The court imposed a standard range sentence of 108 months. Mr. Hager appeals.

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ANALYSIS

[2] ¶ 19 Mr. Hager argues that the trial court erred in denying his motion for a mistrial after Detective Callas violated the in limine order prohibiting the detective from testifying that Mr. Hager was "evasive" during questioning. He contends the detective's testimony constituted an improper opinion of Mr. Hager's guilt and damaged his credibility.

[3] ¶ 20 The abuse of discretion standard governs review of a motion for mistrial. *State v. Mak*, 105 Wash.2d 692, 701, 718 P.2d 407 (1986). "The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Only errors affecting the outcome of the trial will be deemed prejudicial." *Id.*

[4] ¶ 21 In determining whether a trial irregularity warrants a new trial, the reviewing court considers the seriousness of the irregularity, whether the statement was cumulative of other evidence, and whether the irregularity could have been cured by a jury instruction. *State v. Escalona*, 49 Wash.App. 251, 254, 742 P.2d 190 (1987).

¶ 22 We first address the seriousness of the irregularity. The trial court denied Mr. Hager's motion for a mistrial based in part on its finding that Detective Callas "was not aware" of the order prohibiting testimony that Mr. Hager was evasive. RP at 434. However, the record does not support this finding. The question of the admissibility of testimony regarding Mr. Hager's evasiveness was addressed at two trials. After extensive discussion of the issue, two judges ruled that the State could not present such testimony. In this context, the detective's comment is a particularly egregious violation of the trial court's order.

¶ 23 In any event, inadvertent or not, we conclude that Detective Callas' comment violated Mr. Hager's constitutional privilege against self-incrimination. An accused has "a constitutional right to say nothing at all about the allegations" against him. *State v. Rowland*, 234 Neb. 846, 852,

452 N.W.2d 758 (1990). The fifth amendment to the United States Constitution provides that "[n]o person shall ... be compelled in any criminal case to be a witness against himself." Article I, section 9 of the Washington Constitution states that "[n]o person shall be compelled in any criminal case to give evidence against himself." We interpret the two provisions equivalently. *State v. Earls*, 116 Wash.2d 364, 375, 805 P.2d 211 (1991).

¶ 24 The Washington Supreme Court has explained the purpose of these amendments:

The right against self-incrimination ... is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt....

At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify. Moreover, the State may not elicit comments from witnesses ... relating to a defendant's silence to infer guilt from such silence.... The purpose of this rule is plain. An accused's Fifth Amendment right to silence can be circumvented by the State "just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself."

Easter, 130 Wash.2d at 236, 922 P.2d 1285 (citations omitted).

[5] ¶ 25 Furthermore, the State must obtain incriminating evidence on its own. The Fifth Amendment right against self-incrimination " 'spare[s] the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government.' " *Id.* at 241, 922 P.2d 1285 (quoting *Doe v. United States*, 487 U.S. 201, 213, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988)).

[6] ¶ 26 Generally, testimony about a defendant's refusal to speak with police is admissible for impeachment purposes after a defendant has taken the stand. *See id.* at 237, 922 P.2d 1285 (citing cases in accord). However, it is well settled that the State may not use a defendant's refusal to talk to police as evidence of his or her guilt when the defendant

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has not testified. *Id.* at 241, 922 P.2d 1285.

¶ 27 *Easter* is instructive here. In that case, a police officer testified that the defendant was a "smart drunk" because he was evasive during police questioning, ignored the officer's questions, and appeared to be hiding something. *Id.* at 233-34, 922 P.2d 1285. The *Easter* court held that the police officer's testimony regarding the defendant's evasiveness violated the defendant's privilege against self-incrimination. *Id.* at 241, 922 P.2d 1285. In reversing the defendant's conviction, the court noted:

An accused's right to remain silent and to decline to assist the State in the preparation of its criminal case may not be eroded by permitting the State in its case in chief to call to the attention of the trier of fact the accused's pre-arrest silence to imply guilt.

Id. at 243, 922 P.2d 1285.

¶ 28 Similarly here, Detective Callas' comment violated Mr. Hager's privilege against self-incrimination. His comment that Mr. Hager was evasive was given in the context of Mr. Hager's denial of the allegations against him. As such, it was injected for no other purpose than to suggest Mr. Hager's guilt. And because Mr. Hager did not testify, he was unable to rebut this inference of guilt.

¶ 29 Relying on *State v. Lewis*, 130 Wash.2d 700, 927 P.2d 235 (1996), the State distinguishes between a mere reference to silence, which is not reversible error, and a comment on silence. It argues that Detective Callas' "single, isolated reference to defendant's demeanor cannot constitute a 'comment' on defendant's right to remain silent. Instead, his testimony is more akin to the instruction of evidence regarding a defendant's demeanor or conduct." Br. of Resp't at 14. Pointing to the evidence that Mr. Hager was jittery, his eyes were dilated, and he spoke rapidly, the State argues, "the reference to 'evasive' could have just as much to do with a methamphetamine user's demeanor, and less to do with involving the right to remain silent." *Id.*

¶ 30 The State's argument is not persuasive. First, *Lewis* is readily distinguishable from this case. In *Lewis*, a detective testified that in the course of asking the defendant about two assaults under investigation, he told the defendant, " 'that if he was innocent he should just come in and talk to me about it.' " *Lewis*, 130 Wash.2d at 703, 927 P.2d 235. Significantly, the detective did not say that Mr. Lewis refused to talk or that he failed to keep an appointment to talk with him. On appeal, the court held that the detective's comment did not violate the Fifth Amendment because there had been no statement that the defendant refused to talk with police and no statement that silence implied guilt. *Id.* at 706, 927 P.2d 235.

¶ 31 In reaching its conclusion, the *Lewis* court distinguished between a comment and a reference to silence, explaining that a statement constitutes a "comment" when the State uses a defendant's silence as evidence of guilt or an admission of guilt. *Id.* at 706-07, 927 P.2d 235. The *Lewis* court found the detective's remark a mere "reference" to silence because it indirectly referenced the defendant's exercise of his right to silence.

[7] ¶ 32 Unlike *Lewis*, the detective here unequivocally testified that Mr. Hager was evasive during questioning. The inference was that because Mr. Hager was evasive with the detective, he was guilty of the allegation against him. See *Rowland*, 234 Neb. at 852-53, 452 N.W.2d 758 (finding a Fifth Amendment violation where the trial court permitted a police officer to testify that the defendant was "evasive" during questioning). The problem with this inference of guilt is that "a defendant may be forced to testify to rebut such an inference." *Lewis*, 130 Wash.2d at 706 n. 2, 927 P.2d 235. Here, Mr. Hager did not testify and was therefore unable to rebut the inference of guilt.

¶ 33 Mr. Hager was under no obligation to assist the State in producing evidence against him. Nor was he required to testify at trial to rebut any inference of guilt from his evasiveness. Two trial judges explicitly prohibited any testimony regarding Mr.

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Hager's evasiveness. Nevertheless, in violation of two pretrial orders, Detective Callas testified that Mr. Hager was evasive during questioning. This violated Mr. Hager's constitutional privilege against self-incrimination and constitutes a serious trial irregularity.

¶ 34 As indicated, a new trial is warranted if the error affected the outcome of the trial. *Mak*, 105 Wash.2d at 701, 718 P.2d 407. We have concluded the irregularity is serious. Furthermore, the detective's comment was not cumulative of other evidence. Finally, an instruction could not have cured the prejudice. While it is presumed that juries follow the court's instructions, no instruction can "remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." *State v. Miles*, 73 Wash.2d 67, 71, 436 P.2d 198 (1968).

¶ 35 Division Three of this court has noted:

[E]liciting such testimony [about silence] puts the defense in a difficult position. Counsel must gamble on whether to object and ask for a curative instruction--a course of action which frequently does more harm than good--or to leave the comment alone. Other courts, including the Ninth Circuit, have expressed doubt about the effectiveness of curative instructions. And, of course, injecting evidence of ... silence may also impermissibly pressure the defendant to testify and explain that silence.

State v. Curtis, 110 Wash.App. 6, 15, 37 P.3d 1274 (2002); see also *Easter*, 130 Wash.2d at 242 n. 11, 922 P.2d 1285 ("We do not condone cavalier violation[s] of trial court pretrial rulings as in this case. Such violations may be so flagrantly prejudicial as to be incurable by instruction.").

¶ 36 These concerns are present here. In instructing the jury to disregard the detective's comment, the court emphasized Mr. Hager's evasiveness. Furthermore, the jury may well have wondered why Mr. Hager did not testify to rebut the inference of guilt--further strengthening the suggestion of guilt. We

fail to see how an instruction could have cured the prejudice.

CONCLUSION

¶ 37 The trial court abused its discretion in denying Mr. Hager's request for a mistrial. Mr. Hager is entitled to a constitutionally fair trial in which there is no testimony that he was evasive during questioning. Accordingly, we reverse and remand for a new trial. [FN1]

I CONCUR: BRIDGEWATER, J.

HUNT, J. (dissenting).

¶ 38 I respectfully dissent. The trial court has broad discretion to grant or to deny motions for a mistrial. We should reverse only when there is a clear abuse of this discretion. Such abuse exists only when no reasonable judge could have reached the same conclusion. *State v. Johnson*, 124 Wash.2d 57, 76, 873 P.2d 514 (1994). The facts of this case do not meet this standard. The officer's one-time mention of the term "evasive," taken in context, was not a comment on Hager's exercise of his right to remain silent, was not a comment on Hager's guilt, and did not incurably prejudice the jury.

¶ 39 As the majority acknowledges, the trial court granted Hager's motion in limine and ordered the State not to adduce from its witnesses that Hager acted "evasively" when the officers interviewed him during their investigation. The trial court later expressed understandable frustration when, during retrial, one State's witness unwittingly used this word in spite of the court's and the parties' advance efforts to prevent this very thing.

¶ 40 Nevertheless, the trial court opined that this one-time mention of the word was not ill-intentioned, denied Hager's motion for mistrial, and instructed the jury to disregard the officer's characterization of Hager's actions as "evasive" as follows: "You are to disregard that answer in its entirety and you are not to consider that testimony as part of any of your deliberations in this case." RP at

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437. The trial court determined that this instruction would cure any possible prejudice to Hager and, therefore, it need not declare a mistrial. This decision was well within the trial court's discretion. The circumstances do not justify our overturning this reasonable, discretionary trial court decision.

I. NOT A COMMENT ON DEFENDANT'S SILENCE

¶ 41 I strongly disagree with the majority's characterization of the witness's single mention of the word "evasive" as an unconstitutional violation of Hager's privilege against self-incrimination warranting reversal of Hager's conviction and a third trial. Majority at ---- - ----. The single use of the word "evasive" did not constitute a comment on Hager's exercise of his right to remain silent during his pre-arrest interview with the officers. [FN2] Majority at ----. Furthermore, Hager did not, in fact, elect to exercise his right to remain silent at that time.

¶ 42 Instead, Hager agreed to an interview with the police, during which they engaged him in a dialogue for 10 to 15 minutes. RP at 430. When the officer used the word "evasive" during his testimony at Hager's later retrial, the officer was not commenting on Hager's refusal to answer questions or his denial of culpability during that investigatory interview. [FN3] Rather, the officer used the word in the broad context of describing Hager's demeanor during that pre-arrest interview. For example, the officer also testified that Hager's "[m]uscles were tightened up and tense" and that he "appeared to be angry." RP at 438; RP at 432. Similarly, another officer had earlier testified, "[Hager's] actions, his loud voice, the rapid speech, dilated pupils, and his jerkiness ... led me to believe that he was probably under the influence of methamphetamine." RP at 225-26. Thus, it was not unreasonable for the trial court to conclude that the second officer's single mention of the word "evasive" was not ill-intentioned. [FN4]

¶ 43 Moreover, unlike the facts in the cases the majority cites, here, there were no further repetitions

of the word "evasive" by this officer, by another witness, or by the prosecutor in closing argument. On the contrary, once admonished, the officer strictly adhered to the trial court's instruction about the permissible scope of his testimony [FN5] and neither he nor any other witness uttered the word again.

II. NOT A COMMENT ON DEFENDANT'S GUILT

¶ 44 The majority asserts that the officer "injected" the word "evasive" "for no other purpose than to suggest Mr. Hager's guilt." Majority at ----. This assertion not only lacks support in the record, but also it directly contradicts and ignores the conclusion of the very trial court whose pretrial order use of the word violated. In spite of its frustration that its precautions had not prevented the utterance, the trial court clearly opined:

I'm going to deny the motion for mistrial and I'm going to do it on the basis that No. 1, I don't think the officer was acting in bad faith in terms of violating a rule. I think he just was not aware of that from a prior discussion with counsel.

RP at 434.

¶ 45 Just as we appellate judges do not review the trier of fact's assessment of witness credibility, we similarly should not second-guess the trial court's assessment of a witness's motive in uttering this single word. It was the trial court that had the opportunity to observe the witness's demeanor, the context in which he mentioned the word "evasive," and the witness's reaction to the trial court's admonition to avoid repeating the word. The record is devoid of support for the majority's conclusion that the officer "injected" the word solely to "suggest Hager's guilt." Furthermore, the majority's conclusion that the officer's utterance was purposefully designed to suggest Hager's guilt indefensibly disregards the trial court's finding that the utterance was merely inadvertent, though unfortunate. With all due respect to my learned colleagues, in my view, such unsupported discarding of the trial court's finding, which demonstrates the reasonable-

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ness of the trial court's discretionary action, is unjustified.

III. JURY PRESUMED TO FOLLOW COURT'S INSTRUCTIONS; NO PREJUDICE

¶ 46 The majority's holding also contradicts the long-standing principle that the jury is presumed to follow the trial court's instructions. *State v. Warren*, 165 Wash.2d 17, 28, 195 P.3d 940 (2008). Here, in addition to the specific curative instruction to the jury to ignore the officer's mention of the word "evasive," the trial court gave the following general jury instruction:

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

.... Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. *If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict....*

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. *If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict....*

Instruction No. 1, CP 38. (emphasis added).

¶ 47 Not only do we presume that the jury followed the trial court's specific instruction to ignore the officer's single use of the term "evasive," but also that the jury followed the trial court's general instruc-

tions to disregard any stricken or inadmissible evidence. The majority's speculation about the effect the stricken word "evasive" *may* have had on the jury does not defeat this well-settled presumption; nor does such speculation justify reversal of Hager's conviction.

¶ 48 It was not unreasonable for the trial court to conclude that a jury instruction could cure any potential prejudice resulting from the witness's single utterance of the word "evasive." In my view, contrary to the majority's holding, Hager was not "so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." Majority at ---, citing *State v. Mak*, 105 Wash.2d 692, 701, 718 P.2d 407 (1986). I similarly disagree with the majority's characterization of this single "irregularity" as such "a particularly egregious violation of the trial court's order" that it could not be corrected by a jury instruction. Majority at ---.

¶ 49 Under the circumstances here, we cannot reasonably say that the trial court abused its discretion in choosing to cure this single utterance with an instruction to the jury to disregard it, an instruction that we presume the jury followed. Nor can we reasonably say that the trial court abused its discretion in denying Hager's motion for a mistrial. I would affirm.

FN1. Given this disposition, we do not address Mr. Hager's claim of sentencing error or his statement of additional grounds.

FN2. Nor did the officer in any way comment on Hager's not taking the stand in his own defense at trial; and Hager does not argue on appeal that this was the case.

FN3. During the interview, Hager denied having raped the victim, claimed that he had been living with his brother at the time, and suggested that the victim's biological father had raped her. RP at 225; RP at 439.

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FN4. In denying Hager's motion for a mistrial, the trial court noted the officer's lack of awareness about the trial court's pre trial order to avoid using the word "evasive." Although the prosecutor had told the officer not to use this word during the first trial, the prosecutor had apparently neglected to inform the officer again before the retrial. RP at 434.

FN5. Thus, the only "repetition" was defense counsel's objection and the trial court's instruction to the jury to disregard this word.

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 TAYLOR CONLEY,)
)
 Appellant.)

NO. 37970-8-II

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