

NO. 44741-0-II

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

STATE OF WASHINGTON,

Respondent.

v.

JOSE M. SEGOVIA-BARRERA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Mark McCauley, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by entering Finding of Fact 32 that “B.S. has no motive to lie about the sexual abuse.” CP 36.

2. The trial court erred by entering Finding of Fact 36 that “There is nothing in the relationship between B.S and the people to whom she disclosed that indicates any sort of untrustworthiness concerning the statements.” CP 36.

3. The trial court erred by entering Finding of Fact 38 that “The court finds no evidence that B.S.’s recollection of the events is faulty and her testimony was not exaggerated or over amplified.” CP 36.

4. The trial court erred by entering Conclusions of Law 2 – 10, finding all the statements made by B.S. to be admissible at trial. CP 37-38.

5. Prosecutorial misconduct deprived appellant of a fair trial.

6. The sentencing court erred when it ordered discretionary court costs without considering appellant’s financial resources and the burden these costs would impose. CP 47-48.

Issues Pertaining to Assignments of Error

1. Did the trial court err by admitting B.S.’s hearsay testimony when it failed to properly consider her motive to lie, the questionable timing of the statement and the relationship of the child and

the witnesses, or whether circumstances indicated B.S. had misrepresented Segovia-Barrera's actions?

2. Did the prosecutor commit egregious misconduct during closing argument by appealing to the jury's passion by making repeated comments about what the jurors would do if B.S. were their child and asking them to put themselves in her shoes?

3. By statute, before imposing discretionary court costs, sentencing courts must consider a defendant's financial resources and the burden these costs would impose. Where the court failed to comply with this statutory mandate, should these costs be stricken?

B. STATEMENT OF THE CASE

The State charged appellant Jose Segovia-Barrera with first degree child molestation after his estranged wife, Stephanie Hahn, reported to Child Protective Services that Segovia-Barrera had sexual contact with their four-year-old daughter, B.S. CP 12. The court held a hearing on January 29, 2013, to determine the admissibility of child hearsay statements B.S. made to her mother and several others. RP 1-79. The court found the child hearsay statements admissible so long as B.S. testified at trial, which she did. RP 68. The court's findings state B.S. had no motive to lie and that her character did not indicate a propensity to lie.

RP 68; CP 36. It also noted B.S.'s disclosures remained consistent as she disclosed to different parties. CP 36.

B.S. testified at trial that Segovia-Barrera "put his – where boys go potty and where girls go potty." RP 156.¹ Hahn testified that B.S. revealed this to her after Hahn found B.S. "humping" a bottle of nail polish. RP 164. B.S.'s grandmother and her aunts testified that while the criminal case was proceeding against Segovia-Barrera, B.S. told them her father was in jail for touching her "nina." RP 192, 198.

Segovia-Barrera did not testify, but presented evidence that Hahn and her new boyfriend, James Griffin, had reason to want him deported so that they could be together, and that they were willing to coach B.S. to lie for them. RP 240, 245, 256. As evidence of motive, the defense presented testimony from several police detectives who responded to the scene after Griffin assaulted Segovia-Barrera by slashing his throat. RP 240-256. The detectives testified that Griffin and Hahn first ran away to California after the assault, leaving B.S. in the care of an aunt. RP 247-49. When the couple returned to Washington, Hahn falsely confessed to the attack and admitted that she had induced B.S. to lie to support the story that she assaulted Segovia-Barrera. RP 247-49.

¹ What B.S. meant by this statement was never clarified at trial.

During closing argument, the State repeatedly instructed the jury to consider what their reaction would be if their child was victimized by a child molester and urged them to put themselves in B.S.'s shoes. RP 270-73. The defense did not object. The jury found Segovia-Barrera guilty and the court sentenced him to an exceptional indeterminate sentence of 120 months to life. CP 59-68. The court also imposed mandatory and discretionary legal financial obligations. Segovia-Barrera appeals. CP 71-72.

C. ARGUMENTS

Summary of Arguments

The State charged Segovia-Barrera with first degree child molestation under RCW 9A.44.083. The statute provides, "A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." To prove its case, the State relied exclusively on hearsay evidence regarding statements B.S. purportedly made to her family members and other adults. Because the court did not properly consider the factors that weighed heavily against B.S.'s credibility, this improper evidence became the basis for an improper conviction. Further, the

prosecutor committed egregious misconduct by appealing to the jury's passions and prejudices by encouraging it to convict Segovia-Barrera for the seriousness of the charged crime, without regard for the evidence that B.S.'s testimony was suspect.

Additionally, the court imposed discretionary legal, financial obligations despite Segovia-Barrera's inability to pay such fees.

1. THE TRIAL COURT ERRED BY ADMITTING CHILD HEARSAY EVIDENCE WITHOUT CONSIDERING ALL THE RYAN² FACTORS.

The trial court erred by finding B.S.'s child hearsay testimony admissible because it did not conduct a complete assessment of the reliability of her statements. Therefore, this Court should reverse Segovia-Barrera's conviction and remand for a new trial.

This Court reviews a trial court's decision to admit child hearsay testimony for an abuse of discretion. State v. Borboa, 157 Wn.2d 108 , 120, 135 P.3d 469 (2006); In re Duncan, 167 Wn.2d 398, 402, 219 P.3d 666 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. Duncan, 167 Wn.2d at 402. An error that "within reasonable probabilities" would materially affect the outcome of the trial is prejudicial and warrants reversal. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139

² State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984).

(1980); State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1980); accord State v. Halstein, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

Under Ryan, before a child may testify about alleged sexual abuse, the court must first consider whether the evidence has sufficient indicia of reliability. 103 Wn.2d at 175-76. Ryan sets out a nine factor test that the court must consider before making this determination: (1) whether the child had an apparent motive to lie; (2) the child's general character; (3) whether more than one person heard the statements; (4) the spontaneity of the statements; (5) whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness; (6) whether the statements contained express assertions of past fact; (7) whether the child's lack of knowledge could be established through cross-examination; (8) the remoteness of the possibility of the child's recollection being faulty; and (9) whether the surrounding circumstances suggested the child misrepresented the defendant's involvement. 103 Wn.2d at 175-76.

While not every factor must be satisfied, the court must find that the circumstances "substantially" establish the reliability of the child's out-of-court statements. State v. Woods, 154 Wn.2d 613, 625, 114 P.3d 1174 (2005). Here, the trial court based its decision largely on only four findings: (1) that B.S. understood her obligation to tell the truth, (2) that

she had the mental capacity to receive an accurate impression, (3) that she had sufficient memory, and (4) that she presented as “bright and articulate.” CP 31-38. It disregarded key evidence about B.S.’s motive to lie, the timing of statement and the relationship between the child and the witness, and whether the circumstances suggested that B.S. may have misrepresented Segovia-Barrera’s actions. For the court to not consider these factors is an abuse of discretion and requires reversal. Woods, 154 Wn.2d at 625.

Applying all the Ryan factors here, B.S.’s out-of-court statements cannot be deemed sufficiently trustworthy to allow their admission at trial. The evidence shows B.S. had a clear motive to lie. This is apparent from the extreme circumstances surrounding Segovia-Barrera’s relationship with Hahn, Hahn’s relationship with another man, and Hahn’s admission that she coached B.S. to lie for her in order to try to get Segovia-Barrera out of her life. This evidence of B.S.’s motive to lie weighed heavily against admission of B.S.’s hearsay statements and the court erred by disregarding it.

Further, the court overlooked the suspicious timing of B.S.’s disclosure to correspond with Hahn’s efforts to sever ties with Segovia-Barrera. Shortly after Hahn married Segovia-Barrera, she apparently

changed her mind and entered a romantic relationship with Griffin. RP 162, 168-69. B.S.'s disclosures only came after her parents separated.

While neither of these factors alone are determinative, each casts significant doubt on the veracity of B.S.'s statements. Combined, they severely undercut the trial court's finding that the statements were reliable. While B.S. may be, as the court noted in its ruling, a "bright and articulate" child who consistently repeated the same story, the overall facts presented at the child hearsay hearing did not "substantially" establish that her statements were reliable.

Further, while significant amounts of evidence weighed against B.S.'s credibility and justified excluding her hearsay testimony from the trial, the court's failure to conduct a full analysis of all the relevant factors also violates Ryan and merits reversal. Woods, 154 Wn.2d at 624. The court's decision to cherry-pick the factors it felt merited a finding of reliability and ignore evidence of the other factors is a clear abuse of discretion.

2. THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT BY APPEALING TO THE PASSION AND PREJUDICE OF THE JURY.

During closing argument the prosecutor made repeated attempts to justify Griffin's assault on Segovia-Barrera and Hahn's complicity. She urged each juror to "put yourself in [B.S.'s] shoes." RP 273. This

constituted egregious prosecutorial misconduct that denied Segovia-Barrera's a fair trial. This Court should therefore reverse.

To establish prosecutorial misconduct, a defendant must show the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). Misconduct is prejudicial if there is a substantial likelihood that the misconduct affected the jury's verdict. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 481-82, 965 P.2d 593 (1998). While the prosecutor has wide latitude to argue reasonable inferences from the evidence presented at trial, she "should not use arguments calculated to inflame the passions and prejudices of the jury." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

In the absence of an objection at trial, the appellant must show the misconduct is so flagrant and ill intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The focus is "less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured by an appropriate instruction. State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

Here, the State used these comments to explain away the relevant auxiliary facts that Hahn and Griffin wanted Segovia-Barrera out of the way so badly that they assaulted him and slashed his throat. By repeatedly emphasizing the emotionally charged nature of the allegations, the prosecutor inappropriately focused the jury's emotions and prejudices against Segovia-Barrera. Given the emotional nature of the charges against him, it is impossible that the prosecutor's comments did not sway the jury to react emotionally rather than based on the facts surrounding Hahn's motivation to coach B.S. to falsely accuse Segovia-Barrera.

As the court noted in Emery, "The criterion always is, has such a feeling of prejudice been engendered . . . as to prevent a [defendant] from having a fair trial." 174 Wn.2d at 761 (quoting Slattery v. City of Seattle, 169 Wash. 144, 13 P.2d 464 (1932)). These blatant emotional appeals were "extremely, flauntingly, or purposefully conspicuous." Emery, 174 Wn.2d at 761. As such, they were unlikely to be remedied by any curative instruction, and so the prosecutor's misconduct requires reversal.

3. THE SENTENCING COURT ERRED WHEN IT ORDERED SEGOVIA-BARRERA TO PAY DISCRETIONARY COSTS WITHOUT FIRST ASSESSING HIS FINANCIAL RESOURCES AND THE RESULTING BURDEN.

Although the court may order a convicted defendant to pay court costs, RCW 10.01.160(3) provides:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. these costs not be imposed on the defendant unless he is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose."

There is no requirement that the sentencing court enter formal findings in this regard. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). However, findings or not,³ the record must demonstrate that the trial court took the defendant's financial resources and ability to pay into account. State v. Calvin, ___ Wn. App. ___, 302 P.3d 509, 521-522 (2013); State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014, 287 P.3d 10 (2012). The decision to impose discretionary legal financial obligations is reviewed under the clearly erroneous standard. State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

³ No finding was entered in Segovia-Barrera's case. See CP 60 (box under section 2.5, entitled "Ability To Pay Legal Financial Obligations," left blank.

At Segovia-Barrera's sentencing, in addition to the mandatory fees,⁴ the court charged Segovia-Barrera with non-mandatory fees for his court-appointed attorney and a crime lab fee. CP 31-38. The court considered no evidence of Segovia-Barrera's inability to pay such fees and did not make an express finding that he would be able to pay them. Indeed, considering that the court granted Segovia-Barrera's motion for indigence, it is clear that the court was aware that he could not afford such fees.

Recently, in State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), the court declined to allow a defendant to challenge for the first time on appeal the trial court's finding that he had the ability to pay LFOs. However, Blazina is distinguishable, because the trial court in that case made an explicit finding that the defendant had the ability to pay. Here, the court made no such finding and there is no record on which to base such a finding. Thus, the decision was clearly erroneous.

⁴ The court imposed a mandatory crime victim assessment (RCW 7.68.035), court filing costs (RCW 36.18.020), and DNA collection fees (RCW 43.43.7541).

D. CONCLUSION

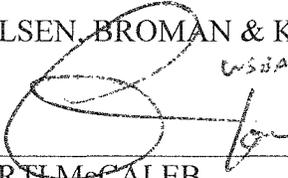
The trial court abused its discretion by failing to account for B.S.'s motive to lie and the suspicious timing of her statements in ruling the child hearsay testimony was admissible at trial. Additionally, the prosecutor committed egregious misconduct by appealing to the jury's emotions during closing argument. For these reasons, the court should reverse Segovia-Barrera's conviction. Alternatively, it should remand to strike the improperly imposed financial obligations from the judgment and sentence.

DATED this 6th day of November 2013

Respectfully submitted,

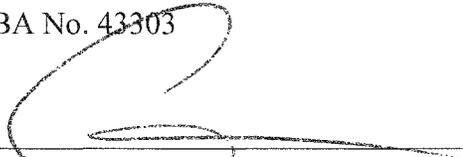
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DIVISION TWO**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 44741-0-II
)	
JOSE M. SEGOVIA-BARRERA,)	
)	
)	
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 6TH DAY OF NOVEMBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSE M. SEGOVIA-BARRERA
DOC NO. 364626
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF NOVEMBER, 2013.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

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