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NO. 55679-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN BRYCE BURKE,

Appellant.

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

The Honorable Richard J. Thorpe, Judge

OPENING BRIEF OF APPELLANT

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. The prosecutor impermissibly commented on Justin Burke's exercise of his right to remain silent and right to counsel.

2. The trial court erred in denying Justin Burke's Motion for New Trial or Arrest of Judgment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the prosecutor impermissibly comment on Justin Burke's exercise of his right to remain silent and right to counsel by asking the jury to infer guilt from the exercise of these rights?

2. Did the prosecutor deny Justin Burke his state and federal constitutional rights to remain silent and to access to counsel by asking the jury to infer guilt from the exercise of these rights?

3. Did the trial court err in denying Justin Burke's post-trial motion based on the prosecutor's violation of his constitutional rights?

C. STATEMENT OF THE CASE

1. Procedural history and overview

The Snohomish County Prosecutor's Office charged Justin Burke with the crime of rape of a child in the third degree, alleging that he had sexual intercourse with J.S. when she was fifteen

years old and he was more than four years older than she was. CP 73-74. Justin's defense at trial was that J.S. told him she was almost seventeen years old and that she looked mature enough to be believed.¹ RP 115

The jury convicted Justin after trial before the Honorable Richard J. Thorpe. CP 1. Judge Thorpe denied a post-trial motion for arrest of judgment or new trial and imposed judgment and sentence, sentencing Mr. Burke to a term within the standard range. CP 19-33, 46-55.

Justin Burke subsequently filed a timely Notice of Appeal. CP 3-18.

2. Trial evidence

On August 18, 2003, J.S.'s older sister Jaime Schuman lived with her friend Chelsea Pierson in a basement apartment of a house that Chelsea's father

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Defense counsel argued to the jury in closing that "[s]he is an attractive, beautiful, young woman, well developed for her age. . . . [I]f we read the whole [instruction], in fact, the height, she is probably nearly six feet tall, the fact that she is well developed, how she looks, how she carries herself, her maturity [I]t really does say in instruction 8 that it's true that if Justin reasonably believed that she was at least 16 years of age, based upon her declarations, you can find him not guilty." RP 115.

and younger sister Carleen lived in. 2RP 25-29.² The Piersons had lived across the street from the Schumans before moving to their current house, and all of the young women continued to be friends. 2RP 29-30, 160-161.

On August 18, 2003, Mr. Pierson was out of town. 2RP 162 Carleen had a party in the upstairs portion of the house in his absence; J.S. attended the party with the plan of spending the night at the house. 2RP 30-31. Chelsea and Jaime also had friends in to visit in their basement apartment, including Justin and two of his friends. 2RP 33, 94-98, 163, 180.

There was drinking and some smoking of marijuana at the party. 2RP 32-33, 37. Guests moved from the upstairs to downstairs and out to the back yard where Chelsea had started a fire in the firepit there. 2RP 179, 183-184; 3RP 7-11, 23-24. J.S. got fairly inebriated. 2RP 33-34. Late in the evening, she sat on a couch downstairs wrapped in a blanket watching television. 2RP 35 Justin sat next to

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The verbatim report of proceedings is in three volumes designated 1RP, 2RP and 3RP. The hearing on the motion for new trial and sentencing is designated RP(sent).

her. 2RP 40. Accounts from others who attended the party that evening varied as to the degree to which J.S. was actively engaged with Justin. 2RP 170, 184, 186. She testified at trial that she kept moving away from Justin and did not talk to him at all and that she did not wish to have the sexual intercourse that ensued.³ RP 40-44-54, 73. Others reported that the next day a young woman told J.S.'s older sister Jaime that J.S. and Justin had been "all over each other." 2RP 173. Justin described mutual flirtation, willing sex, and J.S. telling him she was a high school senior and almost seventeen years old. 3RP 11-12, 13-14, 17-19, 21-24.

Jaime had left the party to spend the night at her boyfriend's house. RP 41-42. When she heard the report the next day that J.S. and Justin had been "all over each other," Jaime called her sister, who had gone home, and Justin several times until she got them to agree that they had engaged in sexual intercourse. 2RP 56-57, 109-114, 141-143.

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J.S. apparently told the defense investigator that she was not sure there was intercourse, but at trial she testified that she felt pressure and knew there was. 2RP 90.

Jaime testified that Justin had been at a party a year earlier when she told him her sister was only fourteen; Justin could not recall this party or being told that. 2RP 99-103; 3RP 5-7. Moreover, Jaime had initially told the prosecutor, during an interview, that J.S. was fifteen; and, therefore, Justin could have thought that J.S. was sixteen a year later. 2RP 102-103, 120-127.

The state's recurring theme throughout the trial was set out in opening statement, in which the prosecutor described Detectives Richardson and Honnen going to Justin's home "to find out his side of the story." 2RP 11. The prosecutor continued:

And for a time the defendant talked to them, freely telling them, yeah, I don't remember what her name was, but it was Jamie's [sic] sister, and Yes, we had sex. And then interestingly the defendant's father cut in, perhaps sensing that things, that the police there and perhaps sensing that it wasn't necessarily okay to have sex with J.S., the defendant's father in effect ended the interview by telling the defendant, his own son, that he shouldn't be talking to police. And that pretty much did end the interview, except the defendant had a few parting shots.

The defendant seated here in the jacket and tie next to counsel informed Detective Richardson and Detective Honnen, who was standing by, that this was a bunch of shit and that Edmonds Woodway girls are always getting people into trouble.

And with those remarks, he concluded the interview and the police simply left. They weren't there to arrest anybody, they were there to gather the defendant's side of the story. That is all he chose to give them and they left.

2RP 11-12.

In examining Detective Richardson, the state elicited that the police went to Justin's house just to get his side of the story. 2RP 209-210. The state elicited that Justin's father asked if a charge would be filed; and, when Detective Richardson said very possibly one would be, he advised Justin not to make any further statements until he had talked to an attorney. 2RP 213-214. Detective Richardson then testified that Justin asked if he could talk to an attorney, and for that reason, except for some parting words, the interview ended. 2RP 214-215.

A. Okay. Father advised Justin not to make any other statements until he spoke to an attorney. And then he [Justin] asked me if that was possible. And I told him yes, he could speak to an attorney.

Q. After you advised him of that, did he have any more words for you?

A. Then he made a statement that he thought that this was a bunch of shit, that girls at Edmonds Woodway were always trying to get guys into trouble.

Q. Did he ever explain that to you?

A. At that time he had already asked pretty much to talk to an attorney, or so what I interpreted as , so I did not ask anymore questions. That was kind of his --

Q. That was his parting shot?

2RP 215 (emphasis added). The prosecutor continued to make sure that the jury understood that Justin chose to end the interview by asking, "[w]as it your impression at that time that the defendant was choosing to end the interview." 2RP 215. This question elicited from Richardson that he probably would have continued talking to Justin if he had not asked for an attorney and that Justin never said that J.S. told him she was sixteen or seventeen. 2RP 215-216.

Detective Honnen testified and the state elicited from him that Justin's father advised him not to make any more comments. 2RP 221.

On cross examination, the prosecutor questioned Justin repeatedly and intensely about his never telling the police that J.S. said she was sixteen or seventeen. 3RP 54-55, 58-65, 78. During this questioning, the prosecutor asked Justin if this was not the "whole crux of the matter." RP 62.

In closing, the prosecutor argued that Justin should have and would have told the police that J.S. said she was sixteen or seventeen if that were true, and that Justin "never got around to what turned out to be the most significant thing here and what he told you on the stand, he never said, J.S. told me, J.S. told me that girl, Jaime's sister, she told me she was 16 . . . Well, what about she told me she was 16, or she told me she was 17, nothing, nothing. And then his father shut down the interview." 3RP 110-111.

In rebuttal closing argument, the prosecutor argued again to the jury that Justin never told the police that J.S. said she was sixteen. 3RP 130, 132.

3. Motion for new trial or arrest of judgment

At the hearing on the motion for new trial or arrest of judgment, new counsel argued that the state committed constitutional error by commenting on Justin Burke's exercise of his constitutional rights to remain silent and to access to counsel. RP(sent) 3-4. Counsel noted that, in its briefing, the state relied on cases where the defendant did not exercise his rights, gave a full and thorough

statement to the police and then was impeached with what he or she did not say at trial. RP(sent) 4.

The prosecutor argued at the hearing that Justin's father could not invoke Justin's rights and that Justin himself did not do so; he did not invoke his right to counsel and he chose to keep talking by making a parting statement after the interview was concluded. RP(sent) 6-10.

Defense counsel responded that the defense motion was based, not on the introduction of what Justin actually said to the police, but on the questioning and argument about why he ended the interview without saying more. RP(sent) 13.

The trial court denied the motion on the grounds that Justin's asking if he could speak to an attorney didn't "rise to the dignity of a request for counsel such as to make the comment on it constitutionally -- I mean a violation of the constitution." RP(sent) 15. The court further stated that "the questions on cross examination and the questions -- and the closing argument was clearly intended to explore credibility and to examine credibility of the defendant and not to

unconstitutionally imply guilt by reason of silence." RP(sent) 15.

D. ARGUMENT

THE PROSECUTOR IMPERMISSIBLY COMMENTED ON JUSTIN BURKE'S EXERCISE OF HIS RIGHTS TO REMAIN SILENT AND TO ACCESS TO COUNSEL AND VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS BY ASKING THE JURY TO INFER GUILT FROM THE EXERCISE OF THESE RIGHTS.

The prosecutor commented directly on Justin Burke's exercise of his right to remain silent and right to counsel and asked the jury to infer guilt based on Justin's exercise of his constitutional rights.

The state elicited from Detective Richardson that the detective terminated the interview based on Justin's request for counsel and that he would have continued the interview if Justin had not done so. RP 2RP 215-216. The prosecutor elicited from Richardson that the interview was stopped because Justin asked if he could talk to an attorney. 2RP 213-214. The jury heard this testimony and clearly understood that the detectives were trying to get Justin's side of the story, but that Justin chose not to give it fully because he exercised his right to end the interview instead. RP 2RP 11. The state emphasized in its argument that the defendant talked

to them "freely" for a time before choosing not to continue with the interview. 2RP 11-12.

At no time did the state argue or elicit testimony that Detective Richardson was mistaken in concluding that Justin did not ask to speak to an attorney, as the prosecutor argued at the hearing on the motion for new trial or arrest of judgment. RP(sent) 6-10.

The prosecutor's questioning and argument to the jury violated Justin's state and federal constitutional rights; it was reversible error.

Under well-established authority, an accused person has a constitutional right to remain silent, even before his arrest, that derives from the Fifth Amendment. State v. Easter, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996). The state may not elicit testimony or comment on the defendant's exercise of his right to remain silent to imply guilt from such silence. Easter, 130 Wn.2d at 243; State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996); State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). It is, in fact, error to permit the state to ask the jury to draw negative inferences from the exercise of any constitutional right. See State v. Johnson,

80 Wn. App. 337, 339-340, 908 P.2d 900 (1996); State v. Jones, 71 Wn. App. 798, 810, 963 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994); Doyle v. Ohio, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1980); Dyson v. United States, 418 A.2d 127, 131 (D.C. 1980).

A direct comment on the exercise of the right to remain silent occurs when the state uses a comment as substantive evidence of guilt or to suggest that silence was an admission of guilt. For example, in State v. Romero, 113 Wn.App. 779, 787, 54 P.3d 1255 (2002), the testimony, "I read him his Miranda warnings, which he chose not to waive and would not talk to me," was held to be a direct comment on the exercise of the right to remain silent. For another example, in State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002), the comment that the defendant refused to talk saying he wanted an attorney was held to be a direct comment on the right to remain silent. The comment in Curtis was essentially the prosecutor's recurring theme -- from opening statement to closing rebuttal argument -- in this case.

Further, the issue of whether Justin unequivocally exercised his right to counsel is irrelevant here. In Washington, when the suspect makes even an equivocal request for an attorney, police questioning may continue only for the purpose of clarifying the request. State v. Robtoy, 98 Wn.2d 30, 38-39, 653 P.2d 284 (1982). Detective Richardson could only have asked Justin questions to clarify whether he was really asking for an attorney or not, even after Justin asserted his innocence as a parting statement.⁴ 2RP 11-12. Since Detective Richardson chose not to ask clarifying questions or to seek a waiver, the interview was effectively terminated by Justin's asking if he could talk to an attorney before being questioned further.

Either a direct or indirect comment on the defendant's silence may be raised for the first time on appeal, and a direct comment on the evidence is not harmless unless proven to be beyond a reasonable doubt. Romero, 113 Wn.App. at 790-791; State v.

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Justin's saying that the girls at Edmonds Woodway always were getting people in trouble and that the allegation against him was a "bunch of shit" is not inconsistent with a claim that he was misled by J.S. 2RP 11-12.

Gutierrez, 50 Wn. App. 683, 588, 749 P.2d 213 (1988). Where, as here, the defendant testifies and gives a plausible explanation for his conduct, the attack on his credibility cannot be harmless. State v. Heller, 58 Wn. App. 414, 421, 793 P.2d 461 (1990).

Here the state commented directly on the right to remain silent and to counsel so as to imply guilt. In his opening statement, the prosecutor commented to the jury directly that "perhaps sensing that it wasn't necessarily okay to have sex with J.S, the defendant's father in effect ended the interview by telling the defendant, his own son, that he shouldn't be talking to police. And that pretty much did end the interview That is all he [Justin] chose to give them and they left." 2RP 11-12. This was a direct comment on the exercise of the rights to remain silent and to access to counsel and clearly implied that it was wrong to end the interview. The prosecutor did not end by commenting on Justin's father's advice; the prosecutor made it clear that Justin himself "chose" to end the interview and to follow his father's advice. The state was clearly not merely arguing that it was too

bad that Justin's father intervened and Justin did not have the opportunity to complete his statement.

During trial, the prosecutor elicited from Detective Richardson that Justin asked if he could talk to an attorney, and for that reason the interview ended. 2RP 214-215. This, again, was a direct comment on the exercise of the right to counsel and inferentially to remain silent. The state elicited from Richardson that he probably would have continued talking to Justin if he had not asked for an attorney. 2RP 215-216. This further response made it abundantly clear to the jury that the interview was not over when Justin terminated it by exercising his constitutional rights.

In closing, the prosecutor continued that Justin "never got around to what turned out to be the most significant thing here and what he told you on the stand, he never said, J.S. told me, J.S. told me that girl, Jaime's sister, she told me she was 16 . . . Well, what about she told me she was 16, or she told me she was 17, nothing, nothing. And then his father shut down the interview." 3RP 110-111. "Never got around to" implies that Justin curtailed the interview.

These direct comments on Justin's exercise of his right to counsel denied Justin his right to due process of law. The error was not harmless beyond a reasonable doubt. Credibility was the key issue at trial and the state's comment on Justin's failure to tell the police that J.S. said she was almost seventeen undermined his credibility with the jury. The error could not have been more harmful and unfairly prejudicial.

And, while the state *may* comment on a defendant's failure to give an explanation to the police if the defendant waives his rights and gives a statement, or if the defendant testifies inconsistently at trial, State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006, cert. denied, 534 U.S. 1000 (2001), and State v. Belgarde, 110 Wn.2d 504, 511, 755 P.2d 174 (1988), this does not permit the state to comment on the right to remain silent.

Here, because Justin exercised his right to remain silent before completing the interview with the police, the state's further and insistent questioning about the failure to tell the police that J.S. said she was almost seventeen also constituted a comment on the evidence -- particularly as

the state repeatedly tied Justin's exercise of his right to counsel with evidence of his guilty knowledge and the failure to tell the police about what J.S. said to him. For example, the state asked Justin, "So it was clear to you that this is your chance to let law enforcement know whatever you wanted them to know, right?" When Justin said in response, "Yeah," the prosecutor continued, "So at what point did you tell them, hey, she said she was 16. At what point did you tell them that?" When Justin responded, "I didn't," the prosecutor continued, "Never told them that at all, did you?" 3RP 61-64. The prosecutor continued and once again asked, "That wasn't even a piece of information you shared with the police either, was it?" 3RP 64.

The prosecutor continued by asking Justin, "Did you attempt to be as open with them [the police] as you could?" knowing that the jury knew that Justin had invoked his right to counsel and terminated the interview. 3RP 73.

In closing, the state referred to Justin's statement after he asked for an attorney and terminated the interview, that this was a "bunch of shit," and asked the jury "Well, gosh, Justin,

wouldn't that be about the time to tell somebody . . . the police . . . but she told me she was old enough." RP 110. He argued, "He never got around to what turned out to be the most significant thing here and what he told you on the stand. . . ." RP 110-111. This was a direct reference to Justin's decision to end the interview.

Thus, the prosecutor in no way limited his argument or examination to an argument that Justin gave a statement and did not mention that J.S. said she was seventeen. The prosecutor focused on the fact that the interview was ended, impliedly to avoid incrimination. The prosecutor focused on the fact that the interview was ended by the exercise of the right to counsel and to avoid incrimination.

The state made Justin's decision to exercise his right to remain silent and to consult with counsel a central theme of the trial and asked the jury to find him guilty because he stopped the interview and did not go on to explain that J.S. had told him she was almost seventeen. This denied Justin his constitutional rights to due process and a fair trial. The trial court erred in not granting Justin Burke a new trial at the time of sentencing.

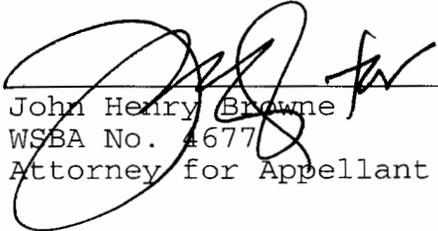
The court's failure to grant relief and the violation of Justin's rights require that his conviction be reversed.

E. CONCLUSION

Appellant respectfully submits that his judgment and sentence should be reversed and his case remanded for retrial.

DATED this 7 day of April, 2005

Respectfully submitted,



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Court of Appeals No. 55679-7-I

Snohomish County Superior Court
No. 04-1-00181-6

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of
Washington that on this day, I caused to be served by ABC Legal
Messengers a copy of the attached "Opening Brief of Appellant" upon the
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DECLARATION OF SERVICE - 1

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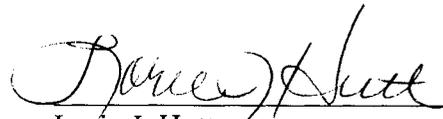
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and mailed a copy U.S. Regular Mail, postage prepaid to:

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DATED at Seattle, Washington, this 4th day of April, 2005.

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