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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.

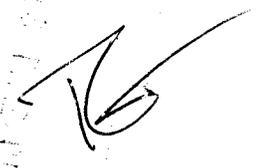
ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard J. Thorpe, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. ARGUMENT IN REPLY	1
1. RESPONDENT'S PRESENTATION OF FACTS AND INTRODUCTION IGNORE THE ACTUAL ARGUMENTS MADE BY THE PROSECUTOR AND THE ACTUAL QUESTIONS HE ASKED	1
2. THE ISSUE OF WHETHER JUSTIN INVOKED HIS RIGHT TO COUNSEL OR HIS RIGHT TO REMAIN SILENT SUFFICIENTLY TO JUSTIFY SUPPRESSION IF ADDITIONAL STATEMENTS HAD BEEN MADE IS IRRELEVANT TO THE ISSUE ON APPEAL .	6
3. THE PROSECUTOR COMMITTED MISCONDUCT IN ASKING THE JURY TO INFER GUILT FROM THE EXERCISE OF CONSTITUTIONAL RIGHTS	9
B. CONCLUSION	11

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Clark</u> , 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) . . .	9, 10
<u>State v. Copeland</u> , 89 Wn. App. 492, 949 P.2d 458 (1998)	7
<u>State v. Hodges</u> , 118 Wn. App. 668, 77 P.3d 375, <u>review denied</u> , 151 Wn.2d 1031 (2004)	8
<u>State v. McWatters</u> , 63 Wn. App. 911, 822 P.2d 787, <u>review denied</u> , 119 Wn.2d 1012 (1992)	8

FEDERAL CASES

<u>Davis v. United States</u> , 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994)	7
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A. ARGUMENT IN REPLY

1. RESPONDENT'S PRESENTATION OF FACTS AND INTRODUCTION IGNORE THE ACTUAL ARGUMENTS MADE BY THE PROSECUTOR AND THE ACTUAL QUESTIONS HE ASKED.

The issue on appeal is whether the prosecutor impermissibly commented on Justin Burke's exercise of his right to remain silent and right to counsel, denying Justin his state and federal constitutional rights to remain silent and to confer with counsel.

In its Brief of Respondent (BOR), the state argues that the prosecutor was merely pointing out to the jury that Justin's statements to the police were inconsistent with his trial testimony. BOR 5.

First, it is important to note that Justin's statements to the police were not inconsistent with his trial testimony. He candidly admitted to the police that he had sexual intercourse with J.S. and explained that he believed her to be 17 years old. 2RP 11-12. This is not inconsistent with J.S. having said she was 17 or almost 17. Justin's so called "parting shot" that "Edmonds Woodway girls are always getting people into trouble," is similarly not inconsistent with J.S.'s telling Justin she was 17. 2RP 11-12. It is inconsistent with the theory the state urges in its brief: "[t]he logical

inference was that [Justin meant that] the victim was not telling the truth when she reported him" because Justin readily admitted having had sexual intercourse with J.S. BOR at 9.

Second, and most importantly, the prosecutor's remarks -- which the state never quotes in its brief -- did not merely point out any inconsistencies between Justin's statement to the police and his trial testimony. In opening statement, the prosecutor contrasted the *motives* of the detectives who went to Justin's home with Justin's purported motives. The detectives only wanted "to find out his side of the story," while Justin decided not to tell his side of the story. 2RP 11. In other words, Justin elected, during the course of the interview, to exercise his right not to talk to the police.

The prosecutor asked the jurors to infer that Justin's father ended the interview because he sensed Justin had committed a crime, and implied that the father was wrong in doing so:

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. This clearly implies that Justin should be found guilty because he chose, during the course of the interview, not to talk to the police further. This implies that the decision not to talk further was based on Justin's father's fear that Justin had committed a crime.

Similarly, 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 when Detective Richardson told Justin's father that a charge might be filed, his father 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. Thus, the state elicited that the interview ended because Justin exercised his right to counsel:

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, "Was 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. 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.

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.

What the prosecutor's actual examination questions and arguments show is that the prosecutor was not comparing what Justin told the police with what he testified about at trial or pointing out

inconsistencies, as the state argues on appeal. The record shows that the prosecutor was asking the jurors to find Justin guilty for exercising his state and federal constitutional rights to counsel and to remain silent. Justin had a right to ask to terminate the interview or request that he be allowed to speak with his attorney at any point during the interview, and it was improper to ask the jury to find him guilty based on the exercise of these rights.

2. THE ISSUE OF WHETHER JUSTIN INVOKED HIS RIGHT TO COUNSEL OR HIS RIGHT TO REMAIN SILENT SUFFICIENTLY TO JUSTIFY SUPPRESSION IF ADDITIONAL STATEMENTS HAD BEEN MADE IS IRRELEVANT TO THE ISSUE ON APPEAL.

The state's primary argument in response and citation to authority is relevant to situations where a defendant is moving to suppress his statements to police on the grounds that he was denied his right to counsel or his right to remain silent. BOR 6-9. These arguments are simply irrelevant to the issue on appeal.

The given at trial, from the trial prosecutor's argument and evidence presented to the jury, was that Justin chose to terminate the interview by exercising his right to remain silent and to coun-

sel. e.g., 2RP 214-215. The prosecutor, in fact, insisted that the jury hear and understand that the interview was terminated because Justin asked for an attorney and because he exercised his right to remain silent during the interview -- "Was it your impression at that time that the defendant was choosing to end the interview?"

The prosecutor then, improperly and unconstitutionally, went even further and invited the jury to find Justin guilty because he terminated the interview and took his father's advice in seeking to consult with an attorney.

State v. Copeland, 89 Wn. App. 492, 949 P.2d 458 (1998), is irrelevant because Justin is not arguing that he was denied access to an appointed attorney. Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994) is irrelevant because Justin is not claiming that the police continued to interview him after he asked to speak to an attorney. The police interpreted his question as a request for an attorney and terminated the interview for that reason. The state, in fact, concedes that Justin had the right to terminate the

interview and to terminate the interview to talk to an attorney. BOR 7.

State v. McWatters, 63 Wn. App. 911, 822 P.2d 787, review denied, 119 Wn.2d 1012 (1992), and State v. Hodges, 118 Wn. App. 668, 77 P.3d 375, review denied, 151 Wn.2d 1031 (2004), are irrelevant in so far as the state implies that they hold that Justin could not exercise his right to remain silent either before his arrest or at any time during the interview. McWatters and Hodges are also irrelevant to the issue of whether the prosecutor can comment on the exercise of the right to remain silent as evidence of guilt. Neither, for that matter, hold that police officers can continue general interrogation after even an equivocal invocation of the right to counsel.

The authority and argument which would be relevant to issues of suppression and the admissibility of the statements Justin made to the police are irrelevant to the issue of whether the state improperly commented on Justin's exercise of his constitutional rights.

3. THE PROSECUTOR COMMITTED MISCONDUCT IN ASKING THE JURY TO INFER GUILT FROM THE EXERCISE OF CONSTITUTIONAL RIGHTS.

The state concedes that it is impermissible to comment on a defendant's "unwillingness to explain his innocence at the time of his arrest." BOR 9.

The state then cites State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001), for the propositions (a) that the state may cross examine a defendant about differences between his pre-trial statement and his trial testimony and (b) that the state may comment on false information given to the police as relevant to the defendant's consciousness of guilt. BOR 10.

These propositions are not relevant to the issue on appeal. Justin does not contend that the prosecutor could not cross examine him about any differences between his pre-trial statement and his trial testimony; the state never contended at trial that Justin provided false information to the police.

In Clark, the defendant volunteered to go to the victim's house and speak with the police there, but did not do so. Then the defendant gave two different explanations to the police for not going

to the house: that he did not have a driver's license and that he did not have enough gasoline. Clark, 143 Wn.2d at 765.

Had Justin promised to talk to the police and then failed to do so or if he had given different explanations for failing to talk with the police, then his failure to follow up on what he volunteered to do or his false information would be evidence against him. This evidence might give rise to some inference that by failing to talk to the police and giving false information about why he didn't he was conscious of his guilt.

But the facts of this case are different from the facts in Clark. The prosecutor did not argue from what Justin said; he argued that the exercise of the right to counsel and the right to terminate the interview themselves gave rise to the inference of guilt. The state argued that the exercise of constitutional rights gave rise to the inference of guilt. A perfect example is the reference to Justin's father advising Justin to speak with an attorney. The prosecutor says "his own son," as if this were shocking; and says explicitly "then interestingly the defendant's father cut in, perhaps

sensing that it wasn't necessarily okay to have sex with J.S." 2RP 11-12.

Credibility was very much at issue at trial, the credibility of the state's witnesses and the credibility of Justin who testified in his own behalf at trial. The prosecutor's use of Justin's decision to seek the advice of an attorney and to terminate his interview with the police to ask the jury to infer his guilt was unfairly and overwhelmingly prejudicial and likely resulted in his conviction. The error was constitutional and not harmless beyond a reasonable doubt.

Although the state contends that the "record of proceedings belies the defendant's argument," it is the state that completely avoided in its brief any discussion of the actual argument and actual examination conducted by the prosecutor which give rise to the claim of error on appeal.

The prosecutor's misconduct denied Justin a fair trial and should result in reversal of his conviction.

B. CONCLUSION

For all of the above reasons and for the reasons set out in the Opening Brief filed in this

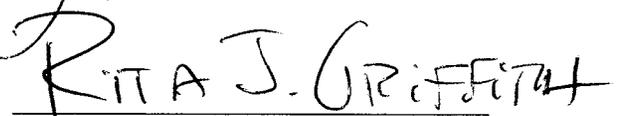
cause, appellant respectfully requests that his judgment and sentence be reversed and his case remanded for retrial.

DATED this 18 day of August, 2005

Respectfully submitted,



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By JHB

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DIVISION ONE

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v.

JUSTIN BRYCE BURKE,

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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 "Reply Brief of Appellant" upon the following counsel of record:

George Appel
Snohomish County Prosecuting Attorney
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DECLARATION OF SERVICE - 1

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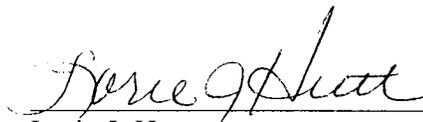
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DATED at Seattle, Washington, this 17th day of August, 2005.

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JOHN HENRY BROWNE, P.S.



Lorie J. Hutt