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DIVISION II

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STATE OF WASHINGTON
BY_____
DEPUTY

NO. 37539-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY EDWARD HAGER,

Appellant.

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

The Honorable John R. Hickman

BRIEF OF APPELLANT

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P.M. 11/14/2008

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A. ASSIGNMENT OF ERROR

The trial court erred in denying appellant's motion for a mistrial.

Issue Pertaining to Assignment of Error

Did the trial court err in failing to grant appellant's motion for a mistrial where an officer gave improper opinion testimony as to the guilt of appellant and the court's instruction for the jury to disregard the testimony did not cure the prejudice against appellant?

B. STATEMENT OF THE CASE[1]

1. Procedural Facts

On November 22, 2006, the State charged appellant, Timothy Edward Hager, with one count of rape of a child in the first degree, stating that on or about the 1st day of March, 2001, Hager unlawfully and feloniously engaged in sexual intercourse with P.B. CP 1; RCW 9A.44.073. The State amended the information on October 8, 2007, charging Hager with one count of rape of a child in the first degree, stating that on or about the period between the 1st of March, 2001 and the 1st day of June, 2001, Hager unlawfully and feloniously engaged in sexual intercourse with P.B. CP 8; RCW 9A.44.073. On January 14, 2008, the State filed a second amended information, charging Hager with one count

[1] There are eleven volumes of verbatim report of proceedings: 1RP - 1/22/07; 2RP - 1/7/08; 3RP - 1/8/08; 4RP - 1/9/08; 5RP - 1/10/08; 6RP - 1/14/08; 7RP - 1/15/08; 8RP - 1/16/08; 9RP - 1/17/08; 10RP - 1/22/08; 11RP - 3/28/08.

of rape of a child in the first degree, and in the alternative, child molestation in the first degree. CP 13-14; RCW 9A.44.083. Following a trial before the Honorable John R. Hickman, a jury found Hager guilty of rape of a child in the first degree on January 22, 2008. CP 56. On March 28, 2008, the court sentenced Hager to 108 months in confinement and 36 to 48 months in community custody. CP 62-63, 71-73. Hager filed this timely appeal. CP 74.

2. Substantive Facts

a. Trial Testimony

Andrea Lane testified that in the fall of 2006, her stepson, Sean, was living with her and she discovered a letter in his bedroom. 7RP 202-23. The letter was to Sean from "Paula," explaining that she did not want to have sex with him because she was sexually abused. 7RP 203-04. The letter stated that when she was in the third grade, "I was raped by my step dad which is still my step dad today." 7RP 204. Lane had met Paula at Sean's 15th birthday party and she seemed nice but "was dressed a little skimpy . . . [a] little promiscuous." 7RP 205.

After thinking further about the contents of the letter, Lane called Mr. Husinga, the principal at Sean's high school, and drove to his office to show him the letter. Husinga read the letter and called Sean and the school counselor to his office where they discussed the letter. 7RP 206.

They learned Paula's last name from Sean and Husinga thanked Lane for bringing the letter to his attention and said that the school would contact CPS and the sheriff's office. 7RP 207-08.

Dennis Daniels, the counselor at Onalaska High School, testified that on November 7, 2006, he called Paula to his office after learning about a letter she wrote to her boyfriend Sean. 7RP 352-54. When Daniels told Paula about the letter that Sean's mother found, she showed concern and appeared a little nervous and anxious. 7RP 355. After talking to Paula about the allegation that her step dad raped her when she was in the third grade and advising her that she needed to be truthful, Daniels contacted CPS. 7RP 356-59. Sometime in the following days, Detective Callas and a CPS worker met with Paula in Daniels' office. 7RP 359.

Detective Tom Callas, of the Lewis County Sheriff's Office, testified that he and Roni Jensen, a CPS investigator, met with Paula at Daniels' office in November 2006. 8RP 418-19. Paula appeared nervous and scared throughout the interview which took over an hour. 8RP 421, 424. Paula disclosed that the incident occurred when she was living in Sumner so Callas contacted the Sumner Police Department. 8RP 424-45. On November 15, 2006, he and Detective Dorr, of the Sumner Police Department, drove to Hager's residence and Jensen met them there in her

own vehicle. 8RP 426. Callas and Dorr were dressed in plain clothes and drove an unmarked police car. 8RP 426-27, 429. When they arrived at the home, Hager's father answered the door and said that Hager was in a van parked near the house. 8RP 427. As Callas and Dorr approached the van, Hager stuck his head out of the van. 8RP 428. Callas initially "asked if he was Tim Hager and he told me that he was not," but after Callas identified himself, Hager acknowledged who he was. 8RP 428-49. When Callas confronted Hager about allegations made by Paula, he denied any wrongdoing. 8RP 439. After conducting his interview with Hager, Callas interviewed other witnesses and had no further involvement in the case. 8RP 439-40.

Detective Dennis Dorr testified that he and Callas went to Hager's residence and Roni Jensen arrived there at the same time to meet with Mrs. Hager. 7RP 215-17. As they approached a van that Hager and his wife lived in, Hager opened the door of the van and stepped out. 7RP 219. After denying that he was Timothy Hager, he acknowledged who he was when they identified themselves as police officers. 7RP 219. Callas confronted Hager and asked him "if he had digitally raped his stepdaughter" when they were living at an apartment in Sumner in 2001. 7RP 220-22. Hager replied "no." 7RP 222. Hager appeared jittery, avoided eye contact, and spoke very loudly but they "really didn't have

any problem with him." 7RP 225. After their interview with Hager that day, Dorr conducted an investigation which confirmed that the Hagers were living in Sumner in 2001 and that Paula was in the third grade, attending Daffodil Elementary School in Sumner. 7RP 228.

Roni Jensen testified that CPS was contacted by Daniels, who reported that a parent had found a note "from Paula to another boy, and in the note it said that her stepfather had raped her." 7RP 238-39. Jensen called the sheriff's office and spoke with Detective Callas and they arranged to meet with Paula at Daniels' office. 7RP 239-40. After introducing themselves and explaining who they were, Callas conducted the interview and with Paula's permission, he recorded her statements summarizing what she had told them. 7RP 240-41, 245-47.

Six days later, Jensen accompanied Callas and Dorr to Hager's residence to speak with Mrs. Hager while they contacted Hager. 7RP 250-51. Jensen watched as the detectives were directed to the van and Hager opened the door as they approached the van. 7RP 254-55. During the time that the detectives spoke with Hager, Jensen informed Mrs. Hager about the allegations made by Paula and asked her to help make plans for Paula to move. Mrs. Hager reluctantly agreed to have Paula live with her grandmother. 7RP 255-57. Jensen called the grandmother and then drove Mrs. Hager to Paula's school where they picked up Paula. 7RP 257.

Paula was placed in the care of her grandmother and Mr. Hager agreed not to have any contact with Paula. 7RP 257-58.

Paula, who was 16 years old at the time of trial, testified that she and her mother lived in a two-bedroom apartment in Sumner when she was in the third grade and she went to school at Daffodil Valley. 7RP 268. Shortly after they moved into the apartment, her mother met Hager, "My mom had got a new boyfriend." 7RP 269. When Paula's mother started working she would be at home alone with Hager after school. One day she was taking a nap in her bedroom and woke up when she felt Hager putting his fingers inside her vagina, "moving his fingers around." 7RP 271. Her top was on but her "pants were at least to her ankles." 7RP 272. She was nervous and scared but told Hager to stop and after a couple of minutes he stopped and went back into the living room. 7RP 272.

Paula did not tell anyone about the incident because she believed that CPS would put her in a foster home and she would not be able to see her mother. 7RP 273. When she was in the 7th grade, she confided in her friend Sabrina about what Hager did but told her not to tell anyone because she was scared. 7RP 291-93. Paula eventually revealed what happened in a personal letter that she wrote to Sean when they were in the 9th grade. 7RP 274. She met Sean when they were in the 7th grade and they became "boyfriend and girlfriend" during the summer before 8th

grade but "broke up with each other" just before they started 9th grade. 7RP 293-94. Once the letter was discovered, she told Mr. Daniels what happened and was interviewed by Detective Callas and Roni Jensen. 7RP 276-78. She did not disclose specific details about the incident until she testified at a hearing before the trial when she knew she "had to say everything, not just half of it" because she was put under oath. 7RP 280.

According to Paula, Hager also took pictures of her with her shirt raised up and used pornography on his computer to put her "head on other girl's bodies." 7RP 281. She recalled Hager putting his hands between her legs and rubbing his hands above her clothes when she would sit in a chair with him. 7RP 281-83. The touching stopped when she was in the fifth grade and they moved out of the apartment. 7RP 285.

During cross-examination, Paula admitted that her interviews and testimonies in court were different and inconsistent. 7RP 309-12. She agreed that she told Detective Callas that the touching in her bedroom was the only incident with Hager and she told him that her underwear was off but at the hearing prior to trial she said her underwear was on. 7RP 314-17. Paula acknowledged that she told Callas that Hager said he wanted her "to give him a hand job" but at the hearing she denied that she made the accusation. 7RP 318-19. Paula admitted that it was possible that she was "making that up" when she talked to Callas because she was scared

and nervous. 7RP 331-32. Despite acknowledging that she said in an interview that she wrote the letter to get Sean to come back to her, she denied that was the reason for the letter. 7RP 323-24.

Sean Lane testified that he and Paula became friends when they attended Onalaska Middle School. 8RP 373. They were both in the choir and started dating in the 8th grade. 8RP 374. Paula gave him the letter in school after they broke up, and he learned that his stepmother found it the next day in his bedroom when he was called to the principal's office. 8RP 375-77. After he read the letter he was afraid because he did not know what he "might have caused by breaking up with her." 8RP 377. Sean thought about apologizing to Paula but he did not see her after going to the principal's office because she left the school. 8RP 378-79.

Sherry Lynn Hager testified that she and Paula were living in an apartment in Sumner when she met Timothy who was living at his brother's house that was across the street. 8RP 388-89. They started dating and he "moved in right away." 8RP 389. Paula was in the third grade at the time and would come home from school sometimes before Sherry returned from work. 8RP 390-92.

Sherry was in love with Timothy and they got married but then their marriage started falling apart and drug use became "consistent throughout [their] marriage." 8RP 393. Using drugs affected her memory

and her long-term memory was especially unreliable. 8RP 398; 410. Sherry acknowledged that Timothy owned a camera and that he viewed pornography on his computer. 8RP 396-97. When Roni Jensen informed her about Paula's allegations against Timothy, she became angry and upset because Paula was being taken away from her. 8RP 402. When she confronted Timothy, he denied the allegations but she told him to leave. 8RP 404-06. Sherry sold the van that was registered in her name and ended the relationship. 8RP 406-07.

b. Motion for a Mistrial

During direct examination of Detective Callas, the prosecutor questioned him about how Hager reacted when he and Dorr arrived at the residence and began asking him about the allegations made by Paula. The prosecutor asked, "What was Mr. Hager's demeanor like during the time that you had contact with him that day?" 8RP 432. Callas replied, "He appeared to be angry. He was evasive." 8RP 432. Defense counsel objected, stating that he wanted to make a motion and the court excused the jury. 8RP 432.

Defense counsel moved for a mistrial, arguing that Callas' statement that Hager was "evasive" damaged Hager's credibility and was therefore too prejudicial to be cured by an instruction to the jury. 8RP 433-34. The court expressed that it was "frustrated" because it "took such

pains" during motions in limine to "insure that this was not going to happen." 8RP 434. The prosecutor admitted that he forgot to advise the detective about avoiding words such as "evasive" during his testimony, but argued that the error was not enough to justify a mistrial. 8RP 432. The court denied the motion for a mistrial and instructed the jury to disregard the detective's answer and not consider it during deliberations. 8RP 434-437.

C. ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO GRANT HAGER'S MOTION FOR A NEW TRIAL WHERE AN OFFICER GAVE IMPROPER OPINION TESTIMONY AS TO HIS GUILT AND THE COURT'S DEFICIENT INSTRUCTION FOR THE JURY TO DISREGARD THE TESTIMONY DID NOT CURE THE PREJUDICIAL EFFECT OF THE TESTIMONY.

Reversal is required because the trial court erred in denying Hager's motion for a new trial where an officer gave improper opinion testimony as to his guilt and the court's instruction for the jury to disregard the testimony did not cure the prejudice against him, depriving Hager of his constitutional right to a fair trial.

There are some areas which are clearly inappropriate for opinion testimony in criminal trials. Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Lay and expert

witnesses may not testify as to the guilt of the defendant, either directly or by inference. State v. Olmedo, 112 Wn. App. 525, 530, 49 P.3d 960 (2002), review denied, 148 Wn.2d 1019, 64 P.3d 650 (2003). Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury. State v. Demerey, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). The role of the jury is to be held "inviolate" under Washington's constitution. Wash. Const. art. I, sect. 21. When a law enforcement officer gives opinion testimony, the jury is especially likely to be influenced by that testimony. Demerey, 144 Wn.2d at 763. An officer's testimony carries an "aura of special reliability and trustworthiness." Id. (citing United States v. Espinosa, 827 F.2d 604, 613 (9th Cir. 1987)).

A mistrial should be granted only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). Only errors affecting the outcome of the trial will be deemed prejudicial. Id. To determine the prejudicial effect of an irregular occurrence during trial, appellate courts examine the occurrence's seriousness, whether it involved cumulative evidence, and whether the trial court properly instructed the jury to disregard it. State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977 (1998).

Here, the record substantiates that Detective Callas' opinion testimony that Hager was evasive during questioning constitutes a serious error because it violated a motion in limine prohibiting such testimony. 8RP 432, 434-35. See Thompson, 90 Wn. App. at 46 (improper testimony was sufficiently serious because it violated a motion in limine ruling). Furthermore, the statement was highly prejudicial because Callas' testimony as the lead detective in the case carried an enormous degree of reliability and trustworthiness. Importantly, his statement implied guilt, casting Hager in a bad light before the jury. Consequently, Callas' testimony damaged Hager's credibility which was critical to his defense.

Callas' statement that Hager was evasive did not amount to cumulative evidence because the record reflects that there was no other testimony lending corroboration to his opinion. Although Detective Dorr testified that he was with Callas when he questioned Hager about the allegations made by Paula, nothing in Dorr's testimony shed doubt on Hager's credibility. 7RP 220-25. Significantly, Callas was the last witness to testify and therefore the jurors had his testimony fresh in their minds as they began deliberations.

Most importantly, the record substantiates that the instruction given by the court failed to cure the prejudicial effect of Callas' opinion because of the improper manner in which the court instructed the jury:

> THE COURT: Ladies and Gentleman, I need your attention for a moment. An objection was made by Mr. Sepe as to a response that the detective gave to a question by Mr. Hammond in regards to the words angry and – what was the word?
>
> MR. SEPE: **Evasive.**
>
> THE COURT: **-- evasive.** Thank you.
>
> I sustained that objection. 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. Do you understand that?
>
> JURY PANEL: Yes.

8RP 437 (Emphasis added.)

Instead of properly providing a straightforward instruction for the jury to disregard Callas' last response, to minimize the jury's recollection of his statement, the court called further attention to his opinion testimony by having the word "evasive" repeated twice. To Hager's detriment, the court compounded the prejudicial effect of Callas' statement rather than curing the error. Consequently, the court's deficient instruction failed to remedy the damage to Hager's credibility.

It is evident that when viewing Callas' improper opinion testimony against the background of all the evidence, his prejudicial statement denied Hager a fair trial because the case critically turned on the credibility of the complaining witness and the accused. It is clear from the

record that Paula undermined her own credibility by her admissions that she gave contradictory and inconsistent versions of Hager's misconduct. 7RP 309-17. Paula admitted that she could have fabricated the accusation that Hager wanted her "to give him a hand job." 7RP 318-19, 331-32. Despite her denial at trial, she admitted that she previously said she wrote the letter intending to get Sean to come back to her. 7RP 323-24. Paula's claim that it was a mutual breakup was contradicted by Sean's testimony that he broke up with her. 7RP 293-94, 8RP 377.

In light of the "aura of special reliability" of Detective Callas' opinion and the reasonable doubt raised by Paula's testimony, the trial court erred in failing to grant Hager's motion for a mistrial because Callas' prejudicial testimony, in violation of the court's pretrial ruling, undoubtedly influenced the jury and affected the outcome of the trial. Demerey, 144 Wn.2d at 763, Johnson, 124 Wn.2d at 76.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Hager's conviction. Should this Court conclude that reversal is not required, this case must be remanded for resentencing because the judgment and sentence ordering community custody imposes a condition not to "possess or peruse pornographic materials," which has been held unconstitutionally vague by the Washington Supreme Court. [2] State v. Bahl, ___Wn.2d___(October 9, 2008)

Dated this 14th day of November, 2008.

Respectfully submitted,

VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant

[2] "17. Do not possess or peruse pornographic materials. Your Community Corrections Officer will define pornographic material." CP 72.

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Timothy Hager, DOC # 983787, Washington State Penitentiary, 1313 N 13th Avenue, Walla Walla, Washington 99362.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of November, 2008 in Kent, Washington.

Valerie Marushige

Valerie Marushige
Attorney at Law
WSBA No. 25851

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