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STATE OF WASHINGTON
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NO. 96035-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MARC MCKEE,

Respondent.

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

The Honorable Michael E. Rickert, Judge

RESPONDENT'S BRIEF IN ANSWER TO BRIEF OF
AMICUS CURIAE

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A. ARGUMENT IN RESPONSE

1. WAPA'S PRIMARY CONCERN, ALTHOUGH UNJUSTIFIED, IS EASILY ASSUAGED.

The Washington Association of Prosecuting Attorneys (WAPA) argues that a prosecutor's failure to timely make a responsive argument should be overlooked and never deemed a waiver. WAPA's primary concern is that application of waiver principles will result in precedent-setting judicial opinions based on errors of law, leading to current and future injustices. See Brief of Amicus Curiae (BAC), at 1, 8-13.

The Court of Appeals has not made an error. Moreover, the opinion in McKee's case merely indicates, "We reverse and remand to dismiss" the four convictions for possessing depictions of a minor engaged in sexually explicit conduct. State v. McKee, 3 Wn. App. 2d 11, 14-15, 30, 413 P.3d 1049 (2018). The opinion does not include detailed analysis on the subject of remedy and it does not suggest any modification of prior precedent. Even if the Court of Appeals had erred in its remedy analysis, no one reading the opinion could discern that error. The remedy discussion is not precedent-setting in any fashion.

To the extent, however, this Court shares WAPA's concern, it is cured by simply remanding the matter back to the Court of Appeals for that court to add an explanatory statement indicating reversal and dismissal is ordered based on the State's "tacit agreement," "failure to timely argue the point," "concession," or other similarly appropriate language. This would ensure there is no possible misunderstanding of events.

2. THE FAILURE TO TIMELY MAKE AN ARGUMENT MATTERS.

WAPA takes issue with the "position that an appellate court may grant relief to a petitioner based solely on the quality or quantity of the respondent's briefing," arguing it conflicts with precedent and the public's interest. BAC, at 8. While tempting to join WAPA's current stance that the content of briefs and appellate arguments should not determine the outcome on appeal (such an approach would undoubtedly benefit many a criminal defendant), precedent is not on WAPA's side.

The reporters are filled with examples of faulty, insufficient, or untimely arguments on appeal resulting in waiver. The failure to properly assign error to findings of fact waives the issue. See State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). Placing legal

argument in a footnote waives the issue. See State v. N.E., 70 Wn. App. 602, 606 n.3, 854 P.2d 672 (1993). Waiting for the reply brief to make an argument waives the issue. See Yakima County, Fire Protection Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 397, 858 P.2d 245 (1993). Failure to cross appeal waives the issue. See Robinson v. Khan, 89 Wn. App. 418, 420, 948 P.2d 1347 (1998). Arguments related, but not identical, to arguments made below are waived. See State v. Kendrick, 47 Wn. App. 620, 634, 736 P.2d 1079, review denied, 108 Wn.2d 1024 (1987). Failure to sufficiently argue an issue (even a constitutional violation) waives that issue. In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986). And, perhaps most relevant here, failure to respond to specific legal arguments can result in waiver. See In re Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983); State v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61 (2005); State v. E.A.J., 116 Wn. App. 777, 789, 67 P.3d 518 (2003), review denied, 150 Wn.2d 1028, 82 P.3d 243 (2004).

In any event, the Court of Appeals decision was not based “solely on the quality or quantity of the respondent’s briefing.” It was also based on important events at oral argument. In its supplemental brief, the Skagit County Prosecutor’s Office makes no mention of what occurred at the oral argument hearing. And while

WAPA at least acknowledges the discussion of remedy at the hearing, it has not listened to the oral argument.¹ WAPA also significantly downplays the importance of oral argument in this appeal.² See BAC, at 5-6.

The Court of Appeals' clear interest in the subject at oral argument is discussed at length in McKee's supplemental brief. See Supp'l Brief of Respondent, at 6-7. If the State disputed McKee's position that the evidence was insufficient to retry him on counts 1 through 4, the State had ten minutes in which to make this known. Given the State's complete silence on the subject, it is predictable and understandable that the Court of Appeals might conclude there was agreement on the subject. And, is it predictable and understandable that the Court of Appeals would later deny the

¹ WAPA notes the web location associated with the oral argument hearing is no longer available on the Washington State Courts website. See BAC, at 5 n.3. Even after removal from the website, however, recordings of all arguments are maintained by Division One and remain available upon request for a small fee (verified by phone call to clerk's office 2/13/19).

² While WAPA mentions oral argument in its statement of facts, its entire legal argument against waiver relies exclusively on McKee's request for relief in his *written* briefing. The impact of oral argument is ignored. See BAC, at 8-15. Moreover, even in its statement of facts, WAPA minimizes the significance of oral argument, suggesting its importance is somehow *diminished* because the Court asked about remedy before I had even mentioned it. See BAC, at 5. And although the appellate prosecutor clearly heard the discussion of remedy at oral argument, WAPA suggests that if the panel had wanted to hear the deputy prosecutor's opinion on the subject, it should have directly asked whether she held one contrary to McKee's stated opinion. See BAC, at 5-6 (noting prosecutor

State's Motion for Reconsideration on the subject.³

Ultimately, the failure to timely make an argument matters. WAPA has not justified the propriety of a more forgiving rule when it is the prosecutor rather than a defendant who fails to make an argument and then seeks to avoid the unpleasant consequences of appellate waiver.

Several of WAPA's more specific assertions and arguments also warrant some discussion.

Attempting to justify Skagit County's failure to address remedy in its written briefing, WAPA notes that McKee's trial counsel never argued for dismissal of the four charges (only suppression of the evidence). BAC, at 2-3. That trial counsel did not ask for dismissal of the charges is not surprising. The precise remedy would have become an issue only if the motion to suppress were granted. It was denied.

was never asked).

³ WAPA quotes a portion of the discussion in Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 623, 465 P.2d 657 (1970), to support its position the Court of Appeals was duty bound to grant the State's motion. See BAC, at 9. But the Maynard court was discussing its authority to request sua sponte that the parties address on appeal a clearly pertinent statute not raised below or otherwise discussed by the parties. See Maynard, 77 Wn.2d at 621-622. The court was not addressing the State's failure to timely respond on appeal (in briefing or at oral argument) to the arguments by opposing counsel on a subject of clear importance and interest to the appellate court.

WAPA also asserts that McKee's written briefing in the Court of Appeals contains inconsistent requests for relief. BAC, at 4-5. This is incorrect. The conclusion sections in the opening and reply briefs indicate McKee's convictions on counts 1 through 4 should be vacated. Brief of Appellant, at 24; Reply Brief of Appellant, at 9. "Vacate" means "to nullify or cancel; make void; invalidate." Black's Law Dictionary, at 1546 (7th ed. 1999). This Court has also used the word "vacate" to describe a reversal for which retrial is barred. See State v. Vasquez, 178 Wn.2d 1, 18, 309 P.3d 318 (2013) (insufficiency of the evidence); State v. Womac, 160 Wn.2d 643, 647, 664, 160 P.3d 40 (2007) (double jeopardy violations). Any possible question about the extent to which McKee sought to nullify and void his convictions on counts 1 through 4 was answered with his argument that evidence obtained with the faulty warrant "formed the basis for the charges in counts 1 through 4" and the specific request that "McKee's convictions on these counts should be reversed and dismissed." See Brief of Appellant, at 16.

WAPA also argues that, because the available untainted evidence must be viewed in the light most favorable to the State, McKee's Answer to the State's Motion for Reconsideration was improper because it "is supported almost exclusively by citations to his cross-examination" at trial. BAC, at 7 n.4. But only one of the many citations is to cross-examination. See Answer, at 4 (citing 5RP 126-127 to establish that A.S. has no independent memory of events producing videos or photos). In any event, whether facts are elicited on direct or cross-examination is irrelevant. They still comprise the evidence. And while the State benefits from a favorable gloss, WAPA cites no authority indicating evidence must or can be ignored once revealed by cross-examination.⁴

Finally, citing Adams v. Dept. of Labor and Indus., 128 Wn.2d 224, 227, 905 P.2d 1220 (1995), a case in which the respondent failed to file an appellate brief or appear at oral argument, WAPA argues appellate courts must apply the same standard of review to the legal issues whether a party files a brief or not. BAC, at 12-13. Adams does indeed stand for that proposition. It rejected the notion

⁴ McKee has not retreated from his position that the remaining admissible evidence would be insufficient to obtain convictions. See Answer, at 3-5. But McKee believes the pertinent question currently is whether the Court of Appeals exceeded its broad discretion by deeming the State's tardy argument on the subject waived by the time it moved for reconsideration.

that, where a respondent does not file a brief or participate at oral argument, the appellant is entitled to prevail on appeal with a mere “prima facie showing of reversible error.” Id. at 228-229.

But the Adams Court was not addressing the issues now before this Court. Unlike Adams, in McKee’s case, the State filed a comprehensive brief of respondent and actively participated at the oral argument hearing, a hearing where the State was made acutely aware that McKee was arguing for – and the Court of Appeals was considering – dismissal of the charges on counts 1 through 4. And yet the State, very much engaged in opposing McKee on the merits of his claims, offered no resistance to such a dismissal, signaling consensus on that issue. The portion of Adams most pertinent to McKee’s case is its statement that an appellate court “is entitled to make its decision based on the argument and record before it.” Id. at 229. This accurately describes the situation now before this Court.

B. CONCLUSION

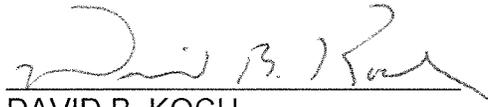
To the extent this Court shares WAPA's concern that the Court of Appeals opinion will be misread in a manner harmful to future cases, a simple remand for that court to add brief explanatory language will suffice.

The Court of Appeals did not err, following briefing and oral argument, in concluding that the State agreed on the issue of remedy for counts 1 through 4. Nor did it abuse its discretion in denying the State's Motion for Reconsideration.

DATED this 26th day of February, 2019.

Respectfully submitted,

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