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NO. 76675-9-I

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

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In re Dependency of B.W.K., a Minor

STATE OF WASHINGTON, DSHS,

Respondent,

v.

A.K.,

Appellant.

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

The Honorable Catherine Shaffer, Judge

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REPLY BRIEF IN SUPPORT OF MOTION FOR ACCELERATED  
REVIEW

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A. ARGUMENT IN REPLY

I. APPELLANT MAY RAISE AN APPEARANCE OF FAIRNESS CLAIM FOR THE FIRST TIME ON APPEAL.

In her opening brief, appellant A.K. asserts she was denied a fair and impartial tribunal. Brief of Appellant (BOA) at 5-40. As one aspect of this claim, she asserts the trial did not provide fairness or the appearance of fairness. BOA at 5-11, 15-40. In response, the State claims the appearance of fairness issue cannot be raised for the first time on appeal because “the Washington State Supreme Court has held that the appearance of fairness doctrine does not implicated constitutional rights.” BOR at 9 (citing State v. Tolias, 135 Wn.2d 133, 140, 954 P.2d 907 (1998)). However, the State fails to recognize federal due process insists not only that trials are fair but that they also appear fair upon the appearance of fairness. U.S. Const. amends V, XIV.

The United States Supreme Court has concluded that fundamental fairness as embodied in federal constitutional due process endeavors to prevent even the “possibility” of unfairness. Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S. Ct. 1610, 1613, 64 L. Ed. 2d 182 (1980); In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955); Tumey v. State of Ohio, 273

U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927); Siefert v. Alexander, 608 F.3d 974, 985 (7th Cir. 2010); Elias v. Gonzales, 490 F.3d 444, 451 (6th Cir. 2007). As such, the appearance of fairness doctrine is a federal constitutional issue that falls under RAP 2.5(a)(3) and appellant may raise it for the first time on appeal. See, also, BOA at 9-10 (explaining in greater detail).

II. APPELLANT'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN IT FAILED TO REMAIN A NEUTRAL ARBITER.

In her opening brief, appellant explained that her right to due process was violated when the trial judge departed from the function as an impartial arbiter and assumed the role of an advocate. BOA at 11-12. In response, the State first claims that this issue cannot be raised under RAP 2.5(a)(3) because it is not a manifest error. BOR at 10-11. The State is incorrect.

RAP 2.5(a)(3) requires that a constitutional error be manifest. Error is manifest if it results in actual prejudice to the defendant. State v. WWJ Corp., 138 Wn. 2d 595, 602-03, 980 P.2d 1257, 1261 (1999). To demonstrate actual prejudice, there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." Id. at 603. In determining whether the error was identifiable,

the trial record must be sufficient to determine the merits of the claim. Id. at 602.

In this case the record is sufficiently developed to determine the issue on the merits. A.K.'s due process claim rests solely on the judge's on-the-record conduct. The transcripts convey all the facts necessary to determine whether the trial court's conduct impermissibly moved from that of an objective arbiter to an advocate.<sup>1</sup> Hence, the error is manifest and consideration for the first time on appeal is appropriate.

Next, the State claims that because the trial court did not have any "preconceived bias against Ms. K. at the outset of the case," A.K. cannot establish a due process violation. BOR at 12. The State fails to understand the contours of the due process claim raised here. In this case, due process is offended not due to some preconceived bias carried into the proceedings – it is offended by the trial judge's conduct during the proceedings when it moved from neutral arbiter to advocate. BOA at 11-12.

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<sup>1</sup> The State focuses on the fact that appellant has not assigned error to specific findings of fact. BOR at 11. However, the issue here is not whether the findings were supported by substantial evidence or whether the trial court's findings establish that all the elements for termination were met. The issue here is whether those facts were the product of an unconstitutional and unfair trial process. As such, appellant's assignment of error (BOA at 1) was sufficient to the issue raised.

The due process right to a fair and impartial tribunal is violated where the trial court takes too great a role and takes on the role of the State's advocate. State v. Moreno, 147 Wn.2d 500, 510-11, 58 P.3d 265 (2002) (citing People v. Cofield, 9 Ill.App.3d 1048, 1051, 293 N.E.2d 692 (1973)). As the United Supreme Court has recognized:

In our adversary system, in both civil and criminal cases, in the first instance [at trial] and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.

Greenlaw v. United States, 554 U.S. 237, 243, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008). The role of a neutral arbiter is abandoned where the trial court assumes an advocacy role, as happened here.

The State suggests that the trial court's conduct was merely that of a neutral fact-finder who was simply attempting to resolve questions of credibility or clarify facts when it asked hundreds of questions of the witnesses. BOR at 13-14. However, this record – when looked at – shows the trial court went far beyond asking clarifying questions or resolving credibility determinations. BOA at 15-40. While the trial court was permitted to ask clarifying questions of witnesses, it needed to do so from a neutral

perspective. Cofield, 9 Will. App. 3d at 1051. That did not happen here. See, BOA at 15-40 (going through the record in detail).

As the state must concede, the right to an impartial tribunal is violated where the trial judge engages in conduct that helps the State develop its case and/or undermines the defense. Moreno, 147 Wn.2d at 510-11. Conduct that suggests the trial court has moved beyond proper clarifying questions and into advocacy include: objecting to defense questions, cross-examining and impeaching defense witnesses; making efforts to enhance the testimony of State witnesses; interfering with the defendant's ability to fully present her case; suggesting theories to the State; or taking over the role of the parties in courtroom advocacy. Id.; State v. Ra, 144 Wn. App. 688, 704–05, 175 P.3d 609, 616 (2008); State v. Steele, 23 N.C. App. 524, 525-26, 209 S.E.2d 372 (1974); Cofield, 9 Ill.App.3d at 1051. The record shows many examples of this kind of judicial overreach. See, BOA at 15-40.

The State suggests that “most of questions asked by the trial court seemed to be of a clarifying nature.” BOR at 16. However, it goes on to cite examples of the trial court helping the CASA and the Department social worker clarify dates after these witnesses admitted to having foggy memories about those dates. BOR at 16-

17. However, if the State's witnesses could not recall dates or details, then it was up to the AAG to try to refresh their memories. It was not the judge's role to take over direct questioning of the witnesses to pull out facts unfavorable to the defense in order to add weight to the State's evidence. In this sense, the examples cited by the State actually support appellant's position that the trial judge's conduct had the effect of bolstering the State's evidence against Ms. K. BOA at 25-30. By doing so, the judge was no longer neutral, and instead, placed her thumb on the scale of justice, tipping it in favor of the State.

The State also attempts to point to a few times in which the trial court's questions elicited testimony favorable to A.K., citing four instances. BOR at 18. However, these few instances are dwarfed by the many, many examples of the trial judge's intrusive, aggressive, and repeated questioning of defense witnesses with an overwhelming emphasis on obtaining negative facts for the defense. See, BOA at 16- 24 (citing the record extensively). Also, the State overlooks that the trial court's questioning and comments impeded defense counsel's ability to fully present the defense case. See, BOA at 32-37. Finally, the State completely ignores the fact

the trial court was feeding it theories during closing. See, 38-39. Certainly, this runs counter to any sense of an impartial tribunal.

Only by ignoring huge portions of the record does the State put forth its argument that A.K. received a fair trial in front of a neutral tribunal. However, when the record is looked at its entirety, it is clear that this trial judge moved beyond the role of an impartial arbiter and undertook action that both bolstered the State's case and undermined the defense. Thus, due process was violated.

Finally, the State suggests there is no due process violation because the case was not tried in front of a jury. It claims that because a judge and not the jury was a fact-finder then "the judge's questioning does not provide evidence of unconstitutional bias and was not prejudicial to the outcome of the case." BOR at 15. The State is incorrect. The Washington Supreme Court has made clear that the constitutional guarantee of an impartial trial does not distinguish between jury and bench trials. State ex rel. McFerran v. Justice Court of Evangeline Starr, 32 Wn.2d 544, 548-49, 202 P.2d 927 (1949). Even in hearings where there is not a jury, the trial court may not slip into role of a party advocate in our adversarial system. Greenlaw, 554 U.S. at 243; Cofield, 9 Ill.App.3d at 1051. When it does – as it did here – due process is violated.

III. THE TRIAL COURT VIOLATED SEPERATION OF POWERS BY TAKING ON THE ROLE OF AN ADVOCATE.

In her opening brief, appellant also asserts the trial court violated separation of powers because it invaded the functions of the executive branch. BOA at 14-15. In response, the State claims that the trial court remained a neutral arbiter committed to considering only admissible evidence. BOR at 20-21. However, simply because the trial court may have understood and applied the rules of evidence as they pertained to admissibility of evidence, this does not show the trial court maintained a proper separation of powers.

The test for determining whether separation of powers is violated has been stated as follows:

The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.

Zylstra v. Piva, 85 Wn.2d 743, 750, 539 P.2d 823 (1975). The independence and integrity of the judiciary is threatened when it is either “assigned [or] allowed tasks that are more properly accomplished by [other] branches.” Moreno, 147 Wn. 2d at 506 (internal quotes omitted). As explained in appellant’s opening brief,

the AAG undertakes investigations and prosecution of the State's case to enforce RCW 13.34.180 and terminate parental rights. BOA at 14-15). It alone must present the issues and martial evidence in support of its claim. It alone must strive to assure that its evidence carries weight and tips the scales of justice in its favor. It alone must provide theories for relief.

The function of the judicial branch is to fairly and impartially settle disputes according to law by weighing evidence. Its function does not involve adding or subtracting from either side of the scale of justice in any given case. As explained in appellant's opening brief, the trial court failed to maintain a neutral position. BOA at 15-40. Hence, the separation of power doctrine was violated.

B. CONCLUSION

For the reasons stated above and those set forth in appellant's opening brief, this Court should reverse the termination order.

DATED this <sup>4<sup>th</sup></sup> day of January, 2018.

Respectfully submitted,

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