

COA NO. 64017-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

FEISAL OMAR,

Appellant.

REC'D
APR 29 2010
King County Prosecutor
Appellate Unit

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 APR 29 PM 3:36

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

The Honorable Richard McDermott, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT WRONGLY FAILED TO SUPPRESS AN INCRIMINATING STATEMENT MADE BY OMAR GIVEN IN RESPONSE TO CUSTODIAL INTERROGATION.

In asserting no interrogation occurred here, the State claims In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 965 P.2d 593 (1998) is "remarkably similar" to Omar's case. Brief of Respondent (BOR) at 10. Pirtle is distinguishable. The officer in Pirtle asked the defendant, at the time of arrest, if he knew why he was being arrested. Pirtle, 136 Wn.2d at 486. This question fell into the category of "background" questioning for which no warning is needed. Id. (citing State v. Bradley, 105 Wn.2d 898, 904, 719 P.2d 546 (1986); State v. Walton, 64 Wn. App. 410, 824 P.2d 533 (1992); State v. Franklin, 48 Wn. App. 61, 737 P.2d 1047 (1987)). Asking someone if he knows why he is being arrested is not a direct invitation to talk about the crime.

Unlike Pirtle, the detective's question in Omar's case was a direct invitation to talk about the crime. The detective informed Omar he was investigating this incident and asked Omar if he wanted to talk about this incident two days after he was arrested. CP 44 (FF 1.d.). This was no "background" question. It was a question that an officer could reasonably foresee was reasonably likely to elicit an incriminating response. The

State's assertion that it was unforeseeable an incriminating response would be given in this context because this question only called for a "yes" or "no" response splits the hair too finely.

Comparison with other "background" questioning cases illustrates why Omar's case is not among them. In Bradley, the defendant stated "You sure are making a big deal about a little bit of coke" while being questioned about personal history. Bradley, 105 Wn.2d at 904. General questions about background do not constitute "interrogation." Id.

The detective's question in Omar's case was not a background question about personal history. It was a question pertaining directly to an active investigation into the alleged crime and Omar knew this to be so.

In Walton, the booking officer and pretrial investigator did nothing more than try to determine Walton's address: "The questions asked were routine background questions necessary for identification and to assist a judge in setting reasonable bail." Walton, 64 Wn. App. 410, 414, 824 P.2d 533 (1992). Routine booking procedures do not require Miranda¹ warnings. Walton, 64 Wn. App. at 414.

The question in Omar's case had nothing to do with routine booking procedure.

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The State argues the error was harmless beyond a reasonable doubt because pre-trial proceedings supposedly showed Omar was not in fact reliant on an interpreter to understand the proceedings. BOR at 19-20. The contention is irrelevant. The jury was not privy to those proceedings. There is no authority for the proposition that evidence never received by the jury is relevant to whether the State carries its burden on appeal of showing the jury was not influenced by improperly admitted evidence.

Contrary to the State's argument, whether the error was harmless beyond a reasonable doubt has nothing to do with whether the State satisfied its burden of proof and production on the elements of its case. BOR at 19. Omar is not advancing a sufficiency of evidence argument. The dispositive issue is whether the improperly admitted statement could have influenced the jury. That statement goes to the "knowledge" element of the crime, which was otherwise subject to debate. The State cannot overcome the presumption of prejudice here.

The State cites State v. France, 129 Wn. App. 907, 120 P.3d 654 (2005). BOR at 19. France is distinguishable. France did not involve a jury who heard the defendant was not provided an interpreter when the no contact order was entered. France, 129 Wn. App. at 911.

B. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the conviction and remand for a new trial.

DATED this 24th day of April 2010.

Respectfully Submitted,

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STATE OF WASHINGTON,)	
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v.)	COA NO. 64017-8-1
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF APRIL, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FEISAL OMAR
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SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF APRIL, 2010.

x *Patrick Mayovsky*