

64731-8

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NO. 64731-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN BINNS,

Appellant.

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

The Honorable Anita L. Farris, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE PROSECUTOR'S QUESTIONS DURING VOIR DIRE WERE IMPROPER.

The State briefly asserts the prosecutor's questions in this case were "not improper." Brief of Respondent at 19. But its authority, Lopez-Stayer v. Pitts, 122 Wn. App. 45, 93 P.3d 904 (2004), was a civil lawsuit for medical malpractice. The plaintiff there complained on appeal that the court refused to permit her to question potential jurors by using the word "insurance." The jury found for the defendant doctor. The Court of Appeals affirmed.

The State's reliance on a civil case is completely misplaced -- not just because it is not factually similar, but it also is not a criminal case. It did not involve the public duty of a prosecutor, the constitutional protections of due process, nor the presumption of innocence. U.S. Const. amends. 5, 14; Const., art. I, § 3. The prosecutor's duty is to ensure a verdict free of prejudice and based on reason. State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). A civil plaintiff has no such constitutional obligation.

The prosecutor's questions here were not "to explore the potential jurors' attitudes in order to determine whether the jury should be challenged." Pitts, 122 Wn. App. at 51. They were intended to persuade the jurors that they should believe the State's witness because she had been "sexually violated," because the sexual touching had occurred. These questions thus undercut the constitutional presumption of innocence and shifted the burden of proof to the defense. State v. Boehning, 127 Wn. App. 511, 523, 111 P.3d 899 (2005) (prosecutor's improper closing argument shifted burden of proof).

The State misses the mark in its attempt to distinguish State v. Holedger, 15 Wash. 443, 46 P. 652 (1896), and Horst v. Silverman, 20 Wash. 233, 55 P. 52 (1898). Brief of Respondent at 22-23. The thrust of those cases was not on the impropriety of asking whether a juror entertained prejudice because of a witness's religion. Horst, 20 Wash. at 234. Rather it was asking the jury about how it would consider the credibility of a witness. Id. See Brief of Appellant at 12-15.

For the same reason, the questions here were improper.

The presumption of innocence requires the jury to presume the crime did not occur. It requires the State to prove that the crime occurred and that its witnesses are credible. It is improper for the prosecutor to implant in the jury the idea that because the crime has occurred, it should believe the State's witness.

2. THE IMPROPER QUESTIONS TAINTED THE ENTIRE JURY PANEL. PEREMPTORY CHALLENGES COULD NOT HAVE RENDERED THE ERROR HARMLESS.

The State claims appellant can show no prejudice because he failed to exhaust all his peremptory challenges. Brief of Respondent at 15-16.

The improper questioning here did not merely affect individual jurors who may have responded to those questions. The improper questions were asked during the general *voir dire* questioning, using the struck method. Thus the questions were directed to the entire jury panel:

- Why a 30-year-old man might want to touch an 11-year-old girl in a sexual way
- Whether it's okay for a man of that age to touch a child in a sexual way

- Whether it's easy for a 13-year-old girl to communicate to a room full of strange adults
- Would it have been easy for you when you were 13 to talk to a room full of strange adults
- Whether a 13-year-old is less believable than an adult
- Would it be difficult for a 13-year-old talking about something that was sexually done to her by a grownup in her life
- Would it be difficult for a 13-year-old talking about a sexual subject involving a grownup

RPI 39-41, 44-45, 47-48.

The entire panel also heard all the answers given by the various jurors:

- No reason why a 30-year-old man would want to touch an 11-year-old girl sexually
- No one thought it was okay to think a man would sexually touch a girl that age
- It would be very hard, very intimidating for a 13-year-old girl to come forth and talk to strange adults, especially about this subject matter
- Jurors would have been uncomfortable at age 13 talking to strange adults, "that would be awful," especially "to share something like that"
- 13-year-olds are pretty honest. "At least I was."
- 13-year-old would "very definitely" have difficulty talking about "something very

personal and private and embarrassing to talk about"

- It's hard enough for an adult to talk "when they've been sexually violated," so it would be worse for a 13-year-old
- It would be "the most difficult" for a 13-year-old to talk about "a sexual subject involving a grownup"
- It would be "very humiliating."

RPI 39-41, 44-45, 47-48.

The taint of these questions and answers went to the entire panel. Neither party could use peremptory challenges to excuse every juror who heard these questions. Failing to exercise all his peremptory challenges did not waive this error or render it harmless.

3. DEFENSE COUNSEL'S QUESTIONS WERE NOT THE SAME AND WERE NOT IMPROPER.

The State asserts "Defense counsel pursued a similar line of questioning." Brief of Respondent at 19. The example it cites belies the assertion.

There was no dispute to defense counsel's statement "this is a case about an accusation of child molestation." RPI 53. Any such accusation is serious. It is proper for the jury to "take[] that kind of serious." His question whether their passion would override their ability to be fair

went directly to whether they could be fair and impartial. Unlike the prosecutor's questions noted above, this question was not improper.

4. THE COURT'S GENERAL JURY INSTRUCTIONS DID NOT RESOLVE THE PROSECUTOR'S IMPROPER QUESTIONING.

The court instructed the jury:

The lawyers' remarks, statements, and arguments are **intended to help you understand the evidence and apply the law.** It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

RPI 106-07; CP 47 (emphasis added). These instructions would have no effect on the prosecutor's improper questions during voir dire.

These instructions were given after the jury was selected, and so after the prosecutor had completed the improper questioning.

Furthermore, they endorsed the prosecutor's questions as "intended to help you understand the evidence." A jury would perceive this instruction to mean they can "understand," if the 13-year-old has "difficulty" testifying, it is not because she is not telling the truth, but because she was, in

fact, sexually molested "by a grownup in her life." Thus the court instructed the jury to interpret reasons to doubt her credibility as proof that she had been abused. This "understanding" of the evidence violates the presumption of innocence and the burden of proof.

These pattern instructions are given in every criminal trial in this state. Nonetheless, courts have reversed convictions for flagrant and ill-intentioned prosecutorial misconduct where the error could not be cured by a remedial instruction. See, e.g., State v. Boehning, *supra*; State v. Claflin, 38 Wn. App. 847, 690 P.2d 1186 (1984); State v. Charlton, 90 Wn.2d 657, 660-61, 585 P.2d 142 (1978). Thus in Charlton, the Supreme Court reversed the conviction for a single argument the prosecutor made during rebuttal closing argument that shifted the burden of proof.

The prosecutor's improper questioning during voir dire similarly undercut the presumption of innocence and shifted the burden of proof. The court's routine instruction could not have cured the errors in this case.

5. THE STATE'S AUTHORITIES ARE NOT PERSUASIVE.

The State's authority for a curative instruction does not support its argument. In State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994), the court found there was overwhelming evidence of guilt beyond a reasonable doubt, including an eyewitness to the abuse and the defendant's own admission that he touched the child. Id. at 812.

The case at bar obviously involved no eyewitnesses or admission, but consistent denial that a crime occurred. It also involved many reasons to doubt the complaining witness's testimony: she had not told her devoted sister, although she knew she'd make it stop; she had not told her mother, although she told her immediately after the "nap" and had promised to tell if anything like that happened; she did not tell her father; she continued to ask Mr. Binns to pick her up at school rather than walk home.

As in so many cases alleging child sexual abuse, there was no physical evidence. The only issue for the jury was the credibility of the complaining witness and the defendant. In such a

case, the constitutional right to a presumption of innocence is paramount. And the State's burden to prove the credibility of its own witnesses is essential.

In State v. Bautista-Caldera, 56 Wn. App. 186, 783 P.2d 116 (1989), the Court of Appeals reversed two of three counts for violating the right to a unanimous verdict. The prosecutor in rebuttal argument briefly urged the jury to think of other children who do "not talk that well" and to let children know "you're ready to believe them and enforce the law on their behalf." In that case, unlike here, the State conceded the argument was improper. Nonetheless, the court held it was not sufficiently flagrant and ill-intentioned to warrant reversal of the third remaining count.

Here the misconduct was particularly pernicious because it occurred before any instructions on the burden of proof, before any evidence, and when the jury was only beginning to learn what the allegations were. It implanted in their minds the opposite of the presumption of innocence. It shifted to the defense the burden to prove that the State's witness's "difficulties" in

testifying were not because she was not telling the truth, but because she had been "sexually violated" by a "grownup in her life."

6. THE PREJUDICE IS CLEAR FROM THE VERDICTS.

The specific facts of this case, and the jury's verdicts, demonstrate the prejudice of these improper questions.

The jury acquitted Mr. Binns of Count I, the charge arising from the "nap incident." CP 42. This was the one incident to which there were other witnesses. E.D.'s testimony regarding this incident was contradicted by her mother's and her sister's, as well as Mr. Binns's denial. See Brief of Appellant at 4-6.

For the remaining three counts, however, there were no other witnesses. Relying solely on E.D.'s testimony against Mr. Binns's denial, the jury found him guilty. This verdict is precisely what one would expect if one began with the presumption that E.D. had been "sexually violated" by a "grownup in her life." The jury gave the defense the benefit of her mother's and sister's testimony on Count I. But there was no other evidence to contradict E.D., to support the defense, on the

remaining counts. The jury reached these verdicts with a presumption that the crime had occurred, by placing the burden on the defense to prove why it should not believe E.D.

B. CONCLUSION

The prosecutor's improper questioning in voir dire violated the due process guarantees of a presumption of innocence and shifted to the defense the state's burden of proof. The improprieties were flagrant and ill-intentioned, not cured by the court's instructions. They caused the jury to reach the verdicts it did in a case where the only question was whether to believe the complaining witness over the adult. With no physical or medical evidence, this misconduct was prejudicial. It requires reversal of Mr. Binns's convictions.

DATED this 1st day of October, 2010.

Respectfully submitted,



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DECLARATION OF SERVICE

ALEX FAST declares to the Court:

On this date, I served the following parties by depositing in the United States Mail, postage prepaid, the attached Reply Brief of Appellant addressed as follows:

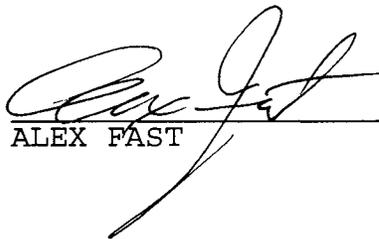
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I declare under penalty of perjury under the laws of the state of Washington that the above statement is true.

October 4, 2010,
Seattle, Washington



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