

66549-9

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NO. 66549-9-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY DYE,

Appellant.

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

REPLY BRIEF

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A. ARGUMENT

THE TRIAL COURT VIOLATED DUE PROCESS
BY PERMITTING THE COMPLAINANT TO
TESTIFY WITH A SERVICE DOG WITHOUT ANY
SHOWING THE DOG WAS NECESSARY AND
ALTHOUGH IT TAINTED THE PROCEEDINGS

a. The trial court erred when it permitted the
complaining witness to testify with a dog for his emotional comfort.

The trial court's discretionary authority over the manner in which a trial is conducted does not divorce the court from its responsibility to ensure the trial is fundamentally fair. See, e.g., State v. Palabay, 9 Haw. App. 414, 421 844 P.2d 1 (1992) (error to allow 12 year-old witness to testify holding teddy bear, absent finding of necessity); State v. Aponte, 249 Conn. 735, 745-47, 738 A.2d 117 (1999) (reversing where prosecutor gave child witness a doll to hold during her testimony, as due process violation).

Despite the State's efforts to distinguish the instant case from Aponte, it is undisputed that, similar to the doll in Aponte, the dog in question did not belong to the complainant, but was, in fact, the property of the prosecutor's office. 11/8/10 RP 27-28. The State argued at trial that Douglas Lare "is a complete dog fan," and "he has asked to have [Ellie] present during his testimony." Id. at 28. The fact that the dog did not belong to Mr. Lare, but to the

State, was relevant in two ways: 1) as in Aponte, it was relevant to the witness's inclination to please the prosecutor, and 2) it was relevant to the necessity for this type of accommodation.

First, Mr. Lare's attempts to please the prosecutor may have been unconscious or childlike; after all, Mr. Lare was estimated to function at the level of a child between the ages of two and ten years old. Resp. Brief at 11. The suggestibility of child witnesses is well known, and children's unconscious efforts to please the adults on whom they rely has been a subject of concern in cases involving child victims. Aponte, 249 Conn. at 745; Coy v. Iowa, 487 U.S. 1012, 1020, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) (noting upon reversal that sometimes children are coached by malevolent adult; "it is a truism that constitutional protections have costs").

Aponte explains that by giving a comfort item to a complainant, the item serves as a reminder of the bond the witness has with the prosecutor, and provides a reason for the witness to further align himself with the prosecutor. The Aponte court's reversal, was based, to a large degree, upon the fact that the comfort item with which the witness testified had been given by the prosecutor, and that the witness had been more suggestible as a result. Aponte, 249 Conn. at 745 (stating that if the witness had

brought the doll from home, there may not have been a basis for objection).

Second, no finding of necessity was made as to Douglas Lare, and no inquiry was made as to his ability to testify without the aid of a so-called comfort dog. See Palabay, 9 Haw. App. at 421. Mr. Lare did not seem to be upset, to have difficulty testifying, or to struggle with being in the same room as Mr. Dye, in the manner of the line of child sex abuse cases.

The State argues that this Court should find that Mr. Lare's situation is analogous to those cases involving child victims of violent sex crimes, due to his developmental disability. Resp. Brief at 10. The State seems to suggest that Mr. Lare's experience of having his apartment burglarized and losing his funds, while presumably demoralizing, should be equated with the shocking and harrowing testimony told by the children in several of the cases cited by the State. See, e.g., State v. Dickson, 337 S.W.3d 733 (Mo. Ct. App. 2011) (teddy bear permitted for eight year-old victim who was kidnapped, raped, sodomized, left in a burning house, and found "wandering alone in the street in the wee hours of the morning"); State v. Powell, 318 S.W.3d 297, 302-04 (Mo. Ct. App. 2010) (teddy bears allowed for 11 and 16 year-old victims who

testified that their uncle had first raped them at age seven); State v. McPhee, 58 Conn. App. 501, 506-08, 755 A.2d 893 (2000) (stuffed animal allowed for 12 year-old victim who was seven years old when first degree sexual assault by stepfather began); State v. Marquez, 124 N.M. 409, 411-13, 951 P.2d 1070 (N.M. Ct. App. 1997) (teddy bear permitted for 12 year-old victim who was nine when she was kidnapped, raped, and sodomized).

Despite the State's argument that "a similar case presents itself here," Resp. Brief at 10, the State simply did not lay the foundation at trial for the "horrific" emotional toll on a witness that might require a comfort dog, see Dickson, 337 S.W.3d at 744 (discussing the often "horrific" experiences of minors in sexual abuse cases). The experiences of Mr. Lare and a child victim who is utterly unable to discuss a terrible incident without a tool such as an unobtrusive doll, are simply not equivalent.

b. The jury's rejection of the "vulnerable victim" aggravator does not demonstrate either a lack of prejudice, or a lack of error. The State argues that the jury rejected the "vulnerable victim" aggravating factor, and therefore, they harbored no undue sympathy for Mr. Lare. Resp. Brief at 8, 12-13. This, however, misses the point. As stated above and in appellant's

Opening Brief, the State never proved that Mr. Lare required a service dog to testify. The prosecution was never entitled to accord their witness with the benefit of placing a dog at his side during his testimony without first meeting the requisite foundation, and the presence of the dog interfered with Mr. Dye's right to confrontation and his right to due process.

The fact that the jury properly decided to reject the vulnerable victim aggravator is unrelated to the court's error in relation to the comfort dog's presence at trial.

c. The error was not harmless, and reversal is required. Accordingly, even if the use of a comfort dog were ever permissible, which is not conceded, the trial court failed to make the requisite findings to support the use of the accommodation in this case. The court failed to balance the rights of Mr. Dye against the witness's need for the dog, and the jury instruction was inadequate to protect Mr. Dye's due process rights.

The use of the dog in this way was a violation of Mr. Dye's confrontation rights, as it interfered with meaningful cross-examination, garnering jury sympathy and interfering with the very truth-telling function of cross-examination. Lastly, the presence of the comfort dog was unduly prejudicial, as it presupposed the

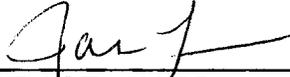
victimhood of the complainant, which is the ultimate issue of fact for the jury to decide.

B. CONCLUSION

For the foregoing reasons, Mr. Dye respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 14th day of November, 2011.

Respectfully submitted,



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