

No. 66995-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

ARNOLDO ZARATE CORIA,

Appellant.

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

The Honorable Mariane C. Spearman

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

THE PRESENCE OF A DOG PROVIDED BY THE PROSECUTOR'S OFFICE TO ACCOMPANY A STATE WITNESS ON THE SECOND DAY OF TRIAL AND WITHOUT ANY PRIOR NOTICE REQUIRES REVERSAL.

1. The presence of the dog violated Mr. Zarate Coria's right to a fair trial. The presence of the dog provided by the prosecutor's office improperly bolstered F.D.'s credibility, suggested unusual vulnerability, and implied he needed protection from Mr. Zarate Coria, in violation of Mr. Zarate Coria's right to a fair trial based solely on duly admitted evidence and before an impartial jury free of undue prejudice or sympathy. See Estelle v. Williams, 425 U.S. 510, 504, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).

The State incorrectly uses of the term "service dog" more than thirty times in its brief. The dog in question, Ellie, is not a "service dog." The Revised Code of Washington defines "service animal" in three separate statutes. RCW 9.91.170(9)(b), which criminalizes interfering with a dog guide or service animal, and RCW 70.84.021, regarding the rights and privileges of blind, hearing impaired and physically disabled persons,¹ define a "service animal" as "an animal that is trained for the purposes of

¹There was no suggestion that F.D. was blind, hearing impaired, or physically disabled.

assisting or accommodating a disabled person's sensory, mental, or physical disability." RCW 49.60.040(24), regarding the law against discrimination, defines a "service animal" as "an animal that is trained for the purposes of assisting or accommodating a sensory, mental or physical disability of a person with a disability." Also, King County Code 11.04.020(X) provides, "Service animal' means any animal that is trained or being trained to aid a person who is blind, hearing impaired or otherwise disabled and is used for that purpose...." Similarly, the dog does not meet the definition of "service animal" for purposes of the federal Americans with Disabilities Act (ADA), which specifically excludes comfort animals and therapy animals. 28 C.F.R. § 36.104, an administrative regulation enacted to promulgate the ADA, provides:

Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. ... The work or tasks performed by a service animal must be directly related to the individual's disability. ... The crime-deterrent effects of an animal's presence and the provision of emotional support, well-being, and comfort, or companionship do not constitute work or tasks for the purposes of this definition.

(Emphasis added).

This is an issue of first impression.² In a footnote, the State argues that the dog was no more obtrusive than a stuffed animal. Br. of Resp. at 12 n.4. However, the issue is not a matter of obtrusiveness, but, rather, of the emotional impact on both the witness and the jurors of the presence of living creature, bred and trained to respond to human emotion. If indeed the issue was merely whether the dog would be obtrusive, certainly it would be much easier and more cost-effective for the prosecutor's office to simply provide stuffed inanimate toys to its witnesses, rather than risk misbehavior by a living dog. And, as a matter of common sense, jurors are likely to pay more attention to a living animal than to an inanimate child's toy.

In State v. Aponte, the Connecticut Supreme Court reversed a conviction when the prosecutor gave a three year-old complainant a stuffed animal to hold during her testimony, on the grounds the gift might have influenced the complainant's testimony and the trial court limited the defendant's cross-examination

²Counsel is aware of two pending cases that challenge the presence of a dog provided by the prosecutor to accompany a witness during testimony: State v. Dye, No. 66549-9-1 (pending in Washington Court of Appeals, Div. I), and People v. Tohom, No. 149/2010 (pending in New York County Court, Dutchess County).

regarding the gift. 249 Conn. 735, 745, 738 A.2d 117 (1999). The State attempts to distinguish Aponte on the grounds it did not “give” the dog to F.D. Br. of Resp. at 13. However, the prosecutor unquestionably provided the dog to F.D. for the duration of his testimony.

The Aponte court commented, “[H]ad the victim simply brought a favorite object from home, there would have been no basis for objection.” 249 Conn. at 745. This comment underscores the difference between a dog and a toy. A witness certainly would not be allowed to bring a dog from home to hold during testimony, even if the dog was well-behaved and “a favorite object.”

Other than Aponte, the toy cases either indicate the toy belonged to the witness or are silent as to the source of the toy. See, e.g., State v. Hakimi, 124 Wn. App. 15, 21, 98 P.3d 809 (2004) (two victims of child molestation in the first degree held doll owned by one of the victims); State v. McPhee, 501 Conn. App. 501, 504, 755 A.2d 893 (2000) (victim of numerous sexual offenses held large stuffed gorilla that she bought with her own money and asked to bring it to court); State v. Dickson, 337 S.W.3d 733, 743-44 (Mo. App. S.D. 2011) (victim of kidnapping, rape, and sodomy held stuffed animal of unknown origin).

Furthermore, the toy cases invariably involve a complaining witness in a prosecution for a sexual offense. In a footnote, the State dismisses this distinction, on the grounds F.D. was facing the traumatic circumstance of testifying against his father. Br. of Resp. at 12 n.4. However, unlike sexual offenses against minors in which the victim is often the only eye witness, F.D. was neither the victim nor the only eye witness.

A living animal, bred and trained to respond to human emotions, is not analogous to an inanimate child's toy. The State's argument to the contrary should be rejected.

2. The trial court abused its discretion when it failed to inquire into the lack of prior notice of the dog or the necessity of the dog's presence at the trial. A trial court's duty to "exercise reasonable control" over the mode of interrogating witnesses and the presentation of evidence will be reviewed for abuse of discretion, which includes a court's failure to exercise its discretion. ER 611(a); Hakimi, 124 Wn. App. at 19; State v. Pettitt, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980). However, that discretion may not be exercised in a manner that violates a defendant's constitutional rights. Estelle, 425 U.S. at 504.

Here, the trial court abused its discretion when it failed to inquire into the dog's surprise presence on the afternoon of the second day of trial and failed to balance the prejudice to Mr. Zarate Coria against the necessity for the witness. Rather, the court simply asked whether the defense had any objection after F.D. had appeared in the courtroom with the dog without any prior notice to the court or to Mr. Zarate Coria. 1/27/11 RP 251.

By contrast, in the toy cases, the trial courts have recognized the prejudice to the defendant and have weighed that prejudice against the interests of the witnesses. See, e.g., Hakimi, 124 Wn. App. at 21 (“[T]he trial judge weighed the interests of Hakimi’s two victims and any prejudice to Hakimi.”); Dickson, 337 S.W.3d at 744 (“The trial court balanced the benefit the comfort item would provide Victim ... against any potential prejudice it might cause Defendant.”); State v. Powell, 318 S.W.3d 297, 303 (Mo. App. W.D. 2010) (“[T]he trial court had the opportunity to observe the child witnesses and fully consider the usefulness of the teddy bear against the possibility of any prejudice.”); State v. Marquez, 124 N.M. 409, 951 P.2d 1070, 1075 (1997) (“The trial court questioned Victim, observed her demeanor, and made a finding that she would be more comfortable with the teddy bear during difficult testimony.

The trial court properly balanced the prejudicial effect of the teddy bear's against the necessity of the teddy bear's calming effect."); State v. Cliff, 116 Idaho 921, 782 P.2d 44, 47 (1989) ("In cases, such as this, where it is necessary to receive testimony from young children, the court must strike a balance between the defendant's right to a fair trial and the witness's need for an environment in which he or she will not be intimidated into silence or to tears.").

The State argues the trial court did not abuse its discretion "based on the information available." Br. of Resp. at 12. However, the only information provided to the court was that F.D. was present to testify accompanied by the dog. In State v. Palabay, 9 Haw. App. 414, 844 P.2d 1, 7 (1992), the Hawaii Court of Appeals ruled it was error to allow a child to testify holding a stuffed animal, in the absence of a finding of "compelling necessity." Here, the trial court failed to consider the prejudice to the defense, failed to make a finding of necessity, and failed to otherwise exercise its discretion regarding the surprise presence of the dog on the second day of trial. This failure to exercise discretion violated Mr. Zarate Coria's a trial free of prejudice.

3. Prosecutorial misconduct deprived Mr. Zarate Coria of a fair trial. The prosecutor violated his obligation to afford Mr. Zarate Coria a fair and impartial trial when, without prior notice, he allowed F.D. to appear in court in the afternoon of the second day of trial accompanied by the dog. See State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978) (“In presenting a criminal case to the jury, it is incumbent upon a public prosecutor, as a quasi-judicial officer, to seek a verdict free of prejudice and based upon reason.”).

The State argues that there is no authority prohibiting the use of a “service dog” prior to trial. Br. of Resp. at 14. However, Mr. Zarate Coria is not challenging the use of a dog at pre-trial interviews. This was not a “service dog,” nor was it pre-trial. The State’s argument is not germane.

Perhaps unintentionally, the State acknowledged the untenable position it created for Mr. Zarate Coria when the State noted it bore the “risk” of “the detrimental impact on the witness and its case” if it failed to give prior notice and the court excluded the dog. Br. of Resp. at 14-15. Yet, that is exactly the position the State placed Mr. Zarate Coria. Unlike the State, however, Mr. Zarate Coria did not create that “risk” and did not choose to “bear[] the risk.” Accordingly, requiring him to assume the unnecessary

“risk” created by the State of alienating a witness shortly before cross-examination was improper and prejudicial misconduct.

4. This issue is properly before this court. Mr. Zarate Coria did not waive his objection to the surprise presence of the dog. Rather, he noted that he did not have a meaningful choice under the circumstances created by the prosecutor’s office.

Normally, I would object. But the problem here is that [F.D.] had the opportunity to meet Elle [sic], to, apparently, go up on the witness stand with her now. I think that there would be more problems associated with taking the dog away from the child at this point.

So I think the lesser of two evils at this point is for me to not object to having the dog remain with the child.

1/27/11 RP 251. As discussed above, the State acknowledged the “risk” associated with excluding the dog at that late date. The dog’s surprise presence was a fait accompli, and Mr. Zarate Coria had no meaningful opportunity to object.

Even without his objection, the issue involves a manifest error affecting a constitutional right that may be considered for the first time on appeal. RAP 2.5(a). The presence of the dog without prior notice violated Mr. Zarate Coria’s constitutional right to a fair trial based on duly admitted evidence. Evidence of a witness’s fear or reluctance to testify may be improperly viewed as substantive

evidence of a defendant's guilt. State v. Bourgeois, 133 Wn.2d 389, 400, 945 P.2d 1120 (1996).

The presence of the dog also violated Mr. Zarate Coria's constitutional right to a fair trial free of undue prejudice or sympathy. Again, as discussed above, the toy cases recognize the prejudice to a defendant and weigh that prejudice against the witness's need for an emotional prop. Certainly, the potential prejudice to a defendant is much greater when the prop is a dog provided by the prosecutor's office and trained to respond to human emotion, rather than a toy brought from home. Where, as here, prosecutorial misconduct specifically impinges on a fundamental constitutional right, such as the right to a fair trial, it is properly before the court for the first time on appellate review, regardless of the absence of an objection. State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996).

5. The error was not harmless. The State cannot establish that the violation of Mr. Zarate Coria's constitutional right to a fair trial before an impartial jury and based on duly admitted evidence was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705

(1967). The presence of the dog undermined the impartiality of the jury and improperly bolstered the credibility of F.D.'s testimony.

The State contends the dog had "no conceivable impact" on the trial. This contention ignores the inevitable prejudicial aspects of generating animosity towards Mr. Zarate Coria, generating sympathy for F.D., and insulating him from cross-examination.

Reversal is required.

B. CONCLUSION

The surprise presence of the dog on the afternoon of the second day of trial, in the absence of a showing of necessity, violated Mr. Zarate Coria's constitutional right to a fair trial before an impartial jury, based only on duly admitted evidence. For the foregoing reasons and the reasons set forth in the Brief of Appellant, Mr. Zarate Coria respectfully requests this Court reverse his convictions and remand for a new trial.

DATED this 21st day of February 2012.

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66995-8-I
v.)	
)	
ARNOLDO ZARATE-CORIA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF FEBRUARY, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF FEBRUARY, 2012.

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