

SUPREME COURT, STATE OF COLORADO

Court Address:

2 East 14th Avenue, 4th Floor
Denver, Colorado 80203

Colorado Court of Appeals,
Case Nos. 06CA2630 & 07CA1961
Opinion by Judge Bernard; Judge Jones concurs;
Judge Dailey dissents.

District Court, Jefferson County
Case No. 05CR2164, Division 5
Hon. Peter A. Weir, District Judge
Hon. Dennis Hall, District Judge

Petitioner:

JOHN ARTHUR DEBELLA

Respondent:

PEOPLE OF THE STATE OF COLORADO

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Case No. 2009 SC 553

PETITIONER'S REPLY BRIEF

Certificate of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. I certify that the brief complies with C.A.R. 28(g). It contains 3,499 words.

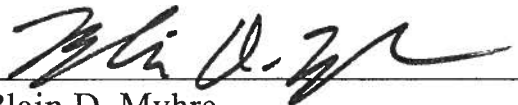

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I. Summary of the Argument

The trial court failed to exercise its discretion to consider whether allowing the victim's videotaped interview into the jury room would unfairly prejudice DeBella. That failure to exercise discretion is an abuse of discretion.

The trial court's failure to exercise discretion resulted from its application of the wrong legal standard. The court relied on the *McKinney* line of cases, which this court rejected in *Frasco*. Application of an erroneous legal standard also constitutes abuse of discretion.

The trial court's abuse of discretion unfairly prejudiced DeBella. Contrary to the People's position, DeBella need not show actual prejudice but instead must show the likelihood of unfair prejudice. The trial court's decision to allow the videotape into the jury room ensured that the record would not reflect whether the jury reviewed the tape. Under CRE 606(b), once the jury retired with the videotape, the defense had no ability to create a record to show what the jury did with it. Case law has not required defendants to prove actual prejudice, only the likelihood of unfair prejudice. On this record, DeBella demonstrated that likelihood. Therefore, the trial court's decision was reversible error.

II. Argument

A. The trial court abused its discretion by failing to exercise its discretion and applying an erroneous legal standard.

The People assert that the trial court did not abuse its discretion “especially considering the state of the case law at the time the decision was made.” Answer Brief at 20. The People also argue that where “reasonable minds could reach different conclusions on the same facts, . . . the adoption of one of those conclusions and the rejection of the other *cannot* constitute an abuse of discretion.” *Id.* at 14 (emphasis in original). But the People do not acknowledge that the trial court failed to exercise any discretion in allowing the videotape of the second interview to go with the jury for deliberations. Failure to exercise discretion is an abuse of discretion. *In re People v. Darlington*, 105 P.3d 230, 232 (Colo. 2005).

In allowing the jury unfettered access to the videotape, the trial court relied on the now-rejected reasoning of *People v. McKinney*, 80 P.3d 823 (Colo. App. 2003), *rev'd on other grounds*, 99 P.3d 1038 (Colo. 2004). *McKinney* held that because of an amendment to C.R.C.P. 47(m), all exhibits could be sent back with the jury for deliberations, without restriction. 80 P.3d at 828-29. Relying on this case law, the trial court concluded that no basis “exists for prohibiting juror access during deliberations to have videotapes, audiotapes, or written documents.” IX R.

at 144:8-24. Because the trial court relied on *McKinney*, it exercised no discretion to consider whether sending the second interview with the jury for deliberations would unfairly prejudice DeBella. The court thus gave no consideration to any safeguards or limitations on the jury's access to the videotape. But *Frasco v. People*, 165 P.3d 701, 704 (Colo. 2007), requires such consideration. *Frasco* noted that trial courts have the obligation "to assure that juries are not permitted to use exhibits in a manner that is unfairly prejudicial to a party." *Id.* Here, because of its reliance on *McKinney*, the trial court took no steps to assure that the jury was not permitted to use the videotape of the second interview in a manner unfairly prejudicial to DeBella. The trial court thereby failed to comply with its obligations under *Frasco*.

Contrary to the People's argument, the trial court's decision was not the reasonable exercise of discretion. This was not a case of a trial court making a reasoned decision after weighing the appropriate considerations the court was required to consider under *Frasco* and *Settle v. People*, 504 P.2d 680 (Colo. 1972). Instead, because of its reliance on *McKinney*, the trial court failed to exercise the discretion *Frasco* required it to exercise. That failure to exercise discretion constitutes an abuse of discretion. *In re People v. Darlington*, 105 P.3d at 232 ("failure to exercise discretion is itself an abuse of discretion").

The trial court's failure to exercise discretion resulted from reliance on case law that *Frasco* rejected. While the trial court's reliance on *McKinney* might be understandable, it was still legal error. As the court of appeals noted, though *Frasco* was decided after the trial in this case, *Frasco* applies here because this case was pending on direct appeal when *Frasco* was issued. *People v. DeBella*, 219 P.3d 390, 393 (Colo. App. 2009).¹ Thus, though the trial court did not have the benefit of *Frasco* at the time it made the decision, it was still required to comply with the obligations *Frasco* set forth. Moreover, though the trial court did not have the benefit of *Frasco*, it did have the benefit of *Settle*, 504 P.2d 680, as well as *People v. Montoya*, 773 P.2d 623 (Colo. App. 1989) and *People v. Talley*, 824 P.2d 65 (Colo. App. 1991). Thus, existing case law that the trial court failed to consider when it relied solely on *McKinney* provided guidance in this area. The trial court committed legal error by following *McKinney*.

The People assert that to constitute an abuse of discretion, the trial court's ruling must be manifestly arbitrary, unreasonable, or unfair. While that is true, the People fail to note that an abuse of discretion can also occur where the trial court

¹ Judge Dailey also recognized, "While the trial court's lack of concern for unfair prejudice was understandable in light of the precedent that existed at the time of trial, it nonetheless constituted an abuse of discretion, and, thus error, under *Frasco*." *DeBella*, 219 P.3d at 404 (Dailey, J., dissenting).

applies the wrong legal standard, as it did here. *See In re Freedom Colorado Information, Inc. v. El Paso County Sheriff's Dep't*, 196 P.3d 892, 899 (Colo. 2008) (“A misapplication of the law would also constitute an abuse of discretion”); *People v. Wadle*, 97 P.3d 932, 936 (Colo. 2004) (a trial court “would necessarily abuse its discretion if it based its ruling on an erroneous view of the law” (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990))); *cf. Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112, 1115-16 (Colo. 1986) (“while a court may retain discretion in determining the weight to be given certain evidence relevant to the controlling legal criteria or in assessing the relative significance to be accorded various factors encompassed within those criteria, it must exercise that discretion within the framework of, rather than in disregard of, the controlling legal norm”). Since the trial court applied the wrong legal standard by following *McKinney*, it abused its discretion. *See Wadle*, 97 P.3d at 936.

B. The trial court's abuse of discretion was reversible error.

The People raise various arguments why the jury's unfettered access to the videotape did not unfairly prejudice DeBella. Those arguments are not persuasive on this record.

The People argue that there was no indication that the jury reviewed the videotape during deliberations or that it relied on it during deliberations. *See*

Answer Brief at 9, 19. The People thus assert that DeBella cannot show prejudice. But DeBella need not demonstrate that the jury actually viewed the videotape during deliberations. Nor could he, given the trial court's decision. By giving the tape to the jury before deliberations began and without awaiting a request from the jury, the trial court ensured that the record would not indicate what the jury did with the tape. Since the jury had the tape and the means to play it in the jury room, the jury had no need to request to review the tape. And what the jury actually did with the tape is unknown under CRE 606(b).

Rule 606(b) prohibits the parties from inquiring into what the jury did with the videotape during deliberations. The rule provides: "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. . . . A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying."² Thus, once the trial court permitted the jury to have unfettered access to the videotape in the jury room, there was no way for

² The three exceptions in Rule 606(b) do not apply here.

defense counsel (or the prosecution) to create a record showing the jury's use of the tape. *See In re People v. Richardson*, 184 P.3d 755, 764 (Colo. 2008) (CRE 606(b) broadly prohibits juror testimony to contest a verdict).

As noted in the Opening Brief, one of the safeguards employed by courts is to require the jury to request to view a videotape before the tape will be provided. This safeguard offers several advantages. First, the safeguard ensures that the jury will not be provided the videotape without asking to review it and thereby avoids unnecessarily highlighting the evidence and possibly shaping the course of deliberations. Second, it ensures that the record will indicate that the jury wanted to review the videotape. Third, it provides notice in advance to the court and counsel, so that the parties and the court can discuss the procedures under which any review will take place. Thus, requiring a request first, the court can control if and how the jury will review the tape, and the court can thereby fulfill its obligation under *Frasco* "to assure that juries are not permitted to use exhibits in a manner that is unfairly prejudicial to a party." 165 P.3d at 704.

Granting the jury unfettered access to the videotape in the jury room, on the other hand, ensures that neither the parties nor the court will know what the jury did with the tape and that the record will not indicate what the jury did. Here, the jury had the opportunity to review the entire tape several times, as the jury

deliberated for about seven hours, and the tape's length was little more than an hour. While it is true that the record does not show what the jury did with the tape, that was solely the result of the trial court's decision to grant the jury unfettered access to the videotape without awaiting a jury request. The defense objected to that decision on the grounds that the jury might place undue emphasis on the tape during deliberations. *See* IX R. at 145:13-23.

Prior case law has not required defendants to show actual prejudice. In *Settle*, this court said trial courts must "observe caution that evidence is not so selected, nor used in such a manner, that there is a *likelihood* of it being given undue weight or emphasis by the jury. This would be *prejudicial abuse of discretion and constitute grounds for reversal*." 504 P.2d at 680-81 (emphasis added). In *Montoya*, the court of appeals concluded that "[t]o allow the jurors to engage in the unsupervised, *and perhaps* repetitive, viewing of [the out-of-court videotaped statements] was *inherently prejudicial* to defendant." 773 P.2d at 626 (emphasis added).

Frasco recognized that the trial court's objective "must be to assess whether the exhibit will aid the jury in the proper consideration of the case, and even if so, whether a party will nevertheless be unfairly prejudiced by the jury's use of it." 165 P.3d at 704-05. Thus, the trial court's obligation is to consider in advance the

possible prejudicial effect of the jury's use of an exhibit. Where the trial court fails to fulfill that obligation at all, as here, the defense should not be required to prove actual prejudice, but only the likelihood of unfair prejudice. *See Settle*, 504 P2d at 680-81.

In his dissent below, Judge Dailey noted that "courts have engaged in extensive analysis of the dangers attending unrestricted and unsupervised jury access to testimonial exhibits, regardless of whether the jury has requested to review the exhibit." 219 P.3d at 405 (Dailey, J., dissenting). He concluded that in cases like this, courts "are called upon only to determine the *likelihood* that an exhibit was given undue weight or emphasis by the jury." *Id.* (emphasis in original). Judge Dailey's conclusion is consistent with *Settle* and case law from other jurisdictions.

The trial court's decision took away the ability to know whether the jury reviewed the videotape and the circumstances of any review. It is no stretch to conclude that a jury would review the tape during its seven hours of deliberation, particularly since the video was the single strongest piece of evidence in the prosecution's case. On this record, this court should conclude, as Judge Dailey did, that a strong likelihood exists that the jury gave the videotape undue weight or

emphasis, and that DeBella suffered unfair prejudice as a result. *See* 219 P.3d at 406 (Dailey, J., dissenting).³

The People also argue that because defense counsel cross-examined the victim and pointed out during closing argument the inconsistencies in his testimony, the defense was able to use the videotape to its advantage. Answer Brief at 16-17. That argument misses the point. Defense counsel, understandably, did what it could with the videotape on cross-examination and in closing in an effort to undermine the victim's credibility. Defense counsel had the duty and obligation to do so on behalf of DeBella. But the strength of those defense efforts were diluted, if not completely eliminated, by allowing the jury to have the videotape during deliberations. The balance between the videotaped interview and the cross-examination of the victim at trial was lost when the videotape went with the jury. The jury had the strongest prosecution evidence to view over and over

³ The People also assert, "It stands to reason that if the jury thought the videotaped interviews were important, it would have asked to see the [first] videotape as well." Answer Brief at 19-20. But as noted in the Opening Brief, the first videotape contained little incriminating evidence and no description of any sexual acts. *See* Exhibit 1 (videotape of first interview), Opening Brief at 27 n.1. There would be little reason for the jury to request to see the first interview, since it is of little use in determining the facts. By contrast, the second interview is the most detailed evidence of the sexual acts and the most damaging evidence against DeBella. Thus, the fact that the jury did not request the first interview is not surprising, as the jury already had the second interview with it in the jury room.

while it deliberated. The jury had no access to a transcript of the cross-examination of the victim by defense counsel, nor of the defense closing argument. Instead, the jury could rely only on its collective memory of the words it heard once. Tipping the evidentiary balance in the prosecution's favor in this manner is precisely the type of undue emphasis courts must guard against.

Moreover, defense counsel should not be punished for doing its best to combat the evidence admitted over its objection. As Justice Martinez noted in his concurring opinion in *Frasco*, defense counsel "should not have to face the risk that his decision to argue evidence admitted over his objection will operate as a penalty to any later objections he might make to its admission or use." 165 P.3d at 707 (Martinez, J., specially concurring). Defense counsel must do everything possible to combat the sting of damaging evidence. But doing so should not undermine the defense ability to protest when the trial court permits the jury to unfairly emphasize prosecution evidence by having a testimonial videotape present for unrestricted use in the jury room.

In addition, the People's characterization of what defense counsel did is overstated. As Judge Dailey noted, "defendant made only a generic reference to inconsistencies between D.W.'s videotaped statements and his trial testimony. He did not otherwise mention, much less emphasize, the contents of the videotape.

Defendant's attempt to simply neutralize the impact of the tape cannot, in my view, be characterized as having put it to an advantageous use." 219 P.3d at 406 (Dailey, J., dissenting).

Attempting to minimize the negative impact of the videotape on the defense case should not be held against the defendant. To the contrary, the concern about undue emphasis increased when the videotape went with the jury because it highlighted the prosecution version of events, thereby diminishing the persuasive effect of the defense efforts to undermine that evidence at trial.

The People also assert that the trial court gave two instructions that related to the videotaped exhibits. Answer Brief at 17-18. The People suggest that these instructions adequately informed the jury that it should not place undue emphasis on the videotapes. These instructions, however, were insufficient. The first instruction said only, "In this case you heard out-of-court statements of [the victim], which were admitted into evidence. You are instructed that it is for you to determine the weight and credit to be given these statements. In making this determination you shall consider the age and maturity of the child, the nature of the statements, the circumstances under which the statements were made, and any other relevant factor." I R. at 245 (Jury Instruction 9). This is a general instruction on out-of-court statements by child witnesses. The instruction did not caution the

jury against placing undue emphasis on the out-of-court statements to the exclusion of other evidence. Therefore, it did not diminish the effect of granting the jury unfettered access and use of the videotape during deliberations.

Similarly, the second instruction did not lessen the danger of undue emphasis. That instruction read, "Where a witness in a criminal trial has made a previous statement inconsistent with his testimony at the trial, the previous inconsistent statement may be shown by any otherwise competent evidence and is admissible not only for the purpose of impeaching the testimony of the witness, but also for the purpose of establishing a fact to which his testimony and inconsistent statement relate." I R. at 246 (Jury Instruction 10). This instruction did nothing to caution the jury against placing undue emphasis on the out-of-court statement to the exclusion of the trial testimony. It did not alleviate the danger of unfair prejudice caused by the jury's unfettered access to the videotape. To the contrary, if anything, the instruction encouraged the jury to place more emphasis on the videotape than the trial testimony. Accordingly, the jury instructions did not adequately caution the jury about placing undue emphasis on the videotaped interview during deliberations.

Moreover, the trial court's decision to send the videotape with the jury for deliberations occurred after the jury had been instructed and after closing

arguments. Thus, defense counsel did not have the opportunity to offer an instruction before the instructions were read to the jury, nor to caution the jury during closing arguments not to place undue weight on the tape to the exclusion of the victim's trial testimony and the other evidence in the case.

The essence of the People's argument is that the record does not show prejudice and therefore reversal is unwarranted. Judge Dailey, however, concluded that on this record there was "a strong likelihood that the jury gave the videotape undue weight or emphasis." 219 P.3d at 406 (Dailey, J., dissenting). His conclusion that there was reversible error was correct.

As Judge Dailey noted, D.W.'s testimony at trial was "vague and equivocal." He described two sexual acts and two "grooming" incidents, but frequently could not provide details about those events, often answering "I don't know" or "I don't remember." *See* 219 P.3d at 405 (Dailey, J., dissenting). By contrast, the videotape provides explicit detail of the four instances. *See id.* The trial testimony presents an equivocal story. The videotape does not.

In addition, as noted in the Opening Brief, defense counsel impeached D.W.'s credibility on cross-examination and brought out evidence that he had lied repeatedly and fabricated events to avoid getting in trouble or being disciplined.

See Opening Brief at 27-32. That evidence called into question his trial testimony.

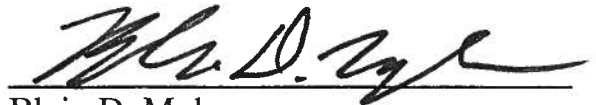
But none of that impeaching evidence was on the videotape.

The videotape was an ex parte version of the prosecution's theory of the case. It was damaging to the defense, and there was little if any mitigating evidence in it. It was the single strongest piece of evidence for the prosecution. By contrast, the trial testimony was weaker and of questionable veracity, given the impeachment of D.W. For that reason, it was essential to the defense that the videotape not be unduly emphasized during deliberations. But the trial court's decision to allow the jury unfettered access to the videotape created a substantial likelihood that the jury would emphasize the videotape and disregard the trial testimony it could not review again. That likelihood is unfairly prejudicial to DeBella, and constitutes reversible error under *Frasco*.

III. Conclusion

DeBella's convictions should be reversed and the case remanded for a new trial.

Respectfully submitted this 9th day of April, 2010.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of April, 2010, a true and correct copy of the above and foregoing **PETITIONER'S REPLY BRIEF** was served upon the following by emailing a copy and depositing a copy of same in the United States mail, postage prepaid, addressed as follows:

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