State v. Fuentes, No. 66708-4-I

Becker, J. (dissenting) — I agree with the majority that Detective Johnson's decision to listen to the telephone calls between the defendant and defense counsel was inexcusable, astonishing, egregious, and odious. I do not agree that it is possible to isolate the prejudice arising from the misconduct. A motion for a new trial was pending that had a reasonable chance of securing a new trial for the defendant, depending upon how the trial court evaluated the new evidence obtained in the videotaped interview. After listening to the phone calls of defense counsel discussing strategy with his client, Detective Johnson spent 11 days actively working to discredit the videotaped interview.

We are instructed by State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963), that the right to have the assistance of counsel is so fundamental and absolute that we should not indulge in nice calculations as to the amount of prejudice resulting from its denial. Here, it is too nice a calculation to say that the conviction itself was not tainted. In my view, this case is controlled by Cory and should have the same result, dismissal of all charges with prejudice.

I also dissent from the majority's decision on the State's cross appeal. As explained in the unpublished portion of the opinion, the trial court struck the conviction on count 1 after finding a double jeopardy violation. The majority reinstates the conviction, concluding that child molestation and child rape can never be the same offense. I disagree. Circumstances in which the two offenses are the same in fact and

in law are discussed in State v. Land, No. 67262-2-I (Wash. January 7, 2013). There should have been an instruction requiring the jury to base convictions for child rape and child molestation on a separate and distinct act. Land, slip op. at 8; State v. Mutch, 171 Wn.2d 646, 661-665, 254 P.3d 803 (2011); State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007). Because no such instruction was given, and the record does not clearly demonstrate that the State was not seeking to punish Pena Fuentes twice for the same offense, I would affirm the trial court's finding of a double jeopardy violation.

Becker, J.