NO. 45398-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN EDWARD WILSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 13-1-00333-1

BRIEF OF RESPONDENT

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SERVICE		
	John A. Hays 1402 Broadway Longview, WA 98632 Email: jahays@3equitycourt.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED June 5, 2014, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the brief references to HLB as the victim were improper opinion evidence and whether the single reference to her as such in closing was proper argument based on the evidence?

2. Whether, under the plain language of CrR 3.3, defense counsel's request for a continuance waives the claim that the rule was violated?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Brian Edward Wilson was charged by information filed in Kitsap County Superior Court with the third-degree child molestation of HLB. CP 1.

Wilson was arraigned on April 3, 2013, and the matter was set for trial on May 28, 2013. June 3, 2013, was noted as the expiration of the 60-day time-for-trial period. The omnibus hearing was set for May 1, 2013. CP 7, 8; RP (4/3) 6.

On May 1, 2013, the omnibus hearing was continued for one week at Wilson's request. CP 12, 13; RP (5/1) 3. On May 9, 2013, the omnibus was held, and a status hearing was set for May 16, 2013. CP 14, 15; RP (5/9) 3.

On May 16, 2013, Wilson moved through counsel to continue trial

until June 10, 2013, to allow time for further investigation. CP 18; RP (5/16) 2. Counsel explained the reason she was requesting a continuance:

> My investigator and I have been working with Mr. Wilson with regard to trying to locate some witnesses that he believes can be helpful in potentially providing a defense for him. It's been a bit of a struggle to get identifying information for these witnesses. We got some yesterday. And so I'm asking to set the trial date over so I can have my investigator at least try and locate these people and speak to them to, essentially, verify whether or not they have helpful information.

RP (5/16) 2. Trial was reset over State objection, and a new time-for-trial expiration date of July, 10, 2013, was noted. CP 19; RP (5/16) 3.

On June 10, 2013, the prosecutor was in trial on another matter. RP (6/10) 2-3. The matter was therefore reset. RP (6/10) 3. The State noted that but for the other trial, it would have been ready, but that Officer Walker would thereafter be out of the country until July 8, 2013. RP (6/10) 4. Trial was reset to July 8, 2013, and a new time-for-trial expiration date of August 7, 2013, was noted. CP 21; RP (6/10) 5.

On July 8, 2013, the State announced that it had just learned that Officer Walker would not be returning until July 15. RP (7/8) 2. Trial was continued to for a week to July 15, 2013, which was within the existing time-for-trial period. CP 27; RP (7/8) 2.

Trial commenced on July 15, 2013. CP 60. At the beginning of the proceedings, counsel shared a letter on behalf of her client regarding

the time for trial. 1RP 2-3. She explained why she would not be moving to dismiss the case:

> I had a discussion with Mr. Wilson with regard to the fact that I wouldn't be bringing a motion to dismiss based on speedy trial violations because I don't believe it's appropriate or there's any basis for it. I'm not sure if that's what he wishes to do in regards to this letter. I will just hand the letter forward to the Court and let the Court read it. Perhaps if you wish to inquire of Mr. Wilson, you can.

1RP 3.

Wilson moved in limine to prevent any reference to HLB as the "victim." CP 3; 1RP 10. The State objected to the motion. 1RP 10. The court denied the motion. 1RP 12.

At the conclusion of the trial, the jury found Wilson guilty as charged. CP 109; 4RP 1654.

The trial court imposed a standard-range sentence of nine months. CP 135-36.

B. FACTS

HLB, age 15, was at the Port Orchard foot ferry dock where she had just gotten off the bus with an armload of groceries for her mom. 3RP 96, 97. After about five or ten minutes, a man she had never met before came up and started talking to her. 3RP 96. She did not really respond to him. 3RP 97.

After talking to her for a few minutes, he tried to kiss her. 3RP 96,

98. She was confused by what he was doing and backed away. 3RP 98. She told him she did not know him and did not like what he was doing. 3RP 100. He just stood there. 3RP 100.

Then he stuck his hand down her shirt. 3RP 96, 98. He touched her breast. 3RP 99. After that he tried to kiss her again. 3RP 96, 99. She kept telling him to back away. 3RP 96. She saw Laura Talkington and mouthed "help." 3RP 87, 96, 99.

Talkington, who knew HLB but was not friends with her, saw was walking to the Port Orchard ferry dock. 3RP 87. Wilson was standing over HLB and she looked distressed. 3RP 87, 91. He was standing behind HLB with his body pressed against her back and had his arm over her head. 3RP 88, 91. He had his face pressed up against hers. 3RP 90. As Talkington approached, he started moving his arm down over HLB's shoulder. 3RP 89. His arm was in the area of HLB's breast, but Talkington could not see if he touched it. 3RP 92.

Talkington walked up to them and told Wilson HLB was only 15 years old and that he needed to leave her alone. 3RP 87, 89, 99. He did not leave. 3RP 99. He smelled of alcohol. 3RP 87. He backed off HLB and started coming toward Talkington, mumbling. 3RP 90. He seemed really drunk. 3RP 90. Talkington told HLB to get on the bus, which she did. 3RP 100-01.

Talkington saw two police officers and went and told them they needed to deal with the situation because she had to catch a ferry. 3RP 90. The police went and talked to Wilson, and Talkington left on the ferry. 3RP 90, 92.

Helen Henry, who drove a bus Kitsap Transit, saw Wilson accosting HLB and called her dispatcher as she approached the foot ferry stop in downtown Port Orchard. 3RP 77-78. HLB looked very frightened. 3RP 78-79. Wilson had his chin over HLB's shoulder and his right arm over HLB's shoulder. 3RP 78. His body was up against HLB's back so close that "you couldn't get a piece of paper between them." 3RP 79. He had a cigarette in his right hand and was blowing smoke in HLB's face. 3RP 78. Henry got out of the bus and asked HLB if she knew Wilson. 3RP 78. HLB said no, and Henry told Wilson to get away from her. 3RP 79.

Henry had observed them immediately as she pulled into the transfer center. 3RP 79. The assault continued for at least a minute to a minute and a half before Henry got out of the bus. 3RP 79. Wilson smelled of alcohol, and looked like he might be high. 3RP 80. When Henry told Wilson to leave, he giggled and laughed it off. 3RP 80. Henry asked HLB if she was OK and if she wanted her to call someone. 3RP 80. Wilson had not left and Henry turned to him and told him that she could

"call somebody to help [him] move, if [he] would like." 3RP 80. When Henry turned back to the bus, HLB was gone. 3RP 80. Then Henry realized she was on the bus. 3RP 80. After HLB was on the bus, she asked the driver to wait because she had to talk to the police. 3RP 101. She told the officer what happened, and they gave her a ride home. 3RP 101. Before she left, they arrested the man. 3RP 101.

Wilson was wearing a dark knit cap, a dark sweater, and jeans. 3RP 80. Henry never saw Wilson again after the incident. 3RP 80. However, he sent her a letter through Kitsap Transit. 3RP 81.

In the letter, Wilson described himself as the person with a dark knit cap and dark sweater and jeans and said he was 31 years old. 3RP 81. Henry did not know either Wilson or HLB personally, but recognized them both as previous passengers. 3RP 81.

Port Orchard Police Officer Patrick Pronovost responded to the call from Kitsap Transit. 4RP 114-15. As he arrived he saw Wilson leaning over HLB. 4RP 116-17. She did not look like she wanted him there. 4RP 116.

Port Orchard Officer David Walker also responded to the call. 4RP 123. He arrived first. 4RP 123. People the scene pointed out Wilson, and Walker recognized him. 4RP 123-24. Walker arrested Wilson, and they determined that he was 31 years old. 4RP 116, 118, 124.

Wilson was incoherent, so Walker handcuffed him and took him to jail. 4RP 124.

After they placed Wilson in the patrol car, Pronovost talked to HLB. 4RP 118. She was upset. 4RP 118. She was shaky and excited, and her voice was wavering. 4RP 118. When she looked toward the car where they put Wilson, she kind of looked down, like she didn't want to look directly at him. 4RP 118. She was intimidated. 4RP 118.

III. ARGUMENT

A. THE BRIEF REFERENCES TO HLB AS THE VICTIM WERE NOT IMPROPER OPINION EVIDENCE AND THE SINGLE REFERENCE TO HER AS SUCH IN CLOSING WAS PROPER ARGUMENT BASED ON THE EVIDENCE.

Wilson argues that the trial court erred when it denied a defense motion in limine asking that the State and witnesses be required to refer to HLB by a term other than the victim. He contends that referring to HLB as the victim was an opinion that Wilson was guilty. This Court will not overturn a trial court's ruling on a motion in limine absent an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The court did not abuse its discretion by denying Wilson's motion.

A witness may not offer an opinion regarding the defendant's guilt, either by direct statement or by inference. *State v. Black*, 109 Wn.2d 336,

348, 745 P.2d 12 (1987). Such an opinion violates the defendant's right to a jury trial, which vests in the jury "'the ultimate power to weigh the evidence and determine the facts.'" *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (*quoting Const. art. I*, § 21, and *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). Whether testimony constitutes an impermissible opinion about the defendant's guilt depends on the circumstances of the case, including (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *Montgomery*, 163 Wn.2d at 591.

Here, the brief references to HLB as "the victim" did not constitute an improper opinion on guilt under the circumstances. First, because HLB was a complainant to the Port Orchard police, it was not a comment on Wilson's guilt for them to label her the "victim" for purposes of their investigation and to describe her as the "victim" in that context. In other words, the words do not convey that the officers believed HLB had actually been molested.

First, the use of victim here was not framed as opinion testimony. Opinion testimony is "'[t]estimony based on one's belief or idea rather than on direct knowledge of facts at issue.'" *State v. Demery*, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001) (*quoting* Black's Law Dictionary 1486 (7th

ed. 1999)). In context, none of the questions or answers that used the term victim asked the witness to give an opinion on guilt or anything else. To the contrary, the record indicates that witnesses used the term "victim" generally as a term of art by those working in law enforcement.

The first cited usage contains no such request or suggestion of an opinion by the use of the term:

> Q. You briefly described the victim's demeanor while she was still sitting at the bus station. Did you have additional contact with the victim?
>
> A. Yes.
>
> Q. Can you describe that contact?
>
> A. After we put Mr. Wilson into the patrol car, I spoke with [H]. She was very upset.

4RP 118.[1]

The next two occasions, during Officer Walker's testimony, were likewise devoid of any editorial quality:

> Q. So when you got there, what was your role in it?
>
> A. We arrived, the suspect was pointed out, and I immediately recognized him. So I sort of gravitated to the suspect, since I was the lead car and I was

---

[1] Nor was the testimony that she was upset improper. Comments that are attempts to describe a witness's demeanor are proper. *State v. Rafay*, 168 Wn. App. 734, 808, 285 P.3d 83 (2012), *review denied*, 176 Wn.2d 1023, *cert. denied*, 134 S. Ct. 170 (2013). Here the prosecutor clarified the basis for the statement:

> Q. What makes you say -- Without telling us what she said, what makes you say that she was upset?
>
> A. She was shaky. She was excited. Her voice was wavering. When she looked toward the car where we put Mr. Wilson, she kind of looked down, like she didn't want to look directly at it. She was intimidated.

4RP 118.

closer to him. So I went that way while Officer Pronovost spoke to the victim.

Q. Okay. Did you ever have a chance to talk to the victim?

A. I think briefly. Basically, she pointed to the direction where the suspect was. I didn't get a blow-for-blow detail of what happened, but it was sort of pointed out, that's him. Other people in the area pointed. And I went directly to them – to him, I should say.

4RP 123-24. Furthermore, given that Walker testified that he could not recall the HLB's name, it is apparent that he was using the word as a generic term of art. *See* 4RP 126. Indeed, the next complained-of example occurred on cross-examination, when Walker was explaining that he did not recall her name. *Id.*

Moreover, the testimony "must relate to the defendant" to be an improper opinion on a defendant's guilt. *State v. Wilber*, 55 Wn. App. 294, 298, 777 P.2d 36 (1989). Using the term "victim" may imply that a crime has taken place; however, it does not imply that a defendant is the victimizer; thus, it does not constitute an opinion that he was guilty of the charged crime. The testimony at issue here did not relate to Wilson.

The type of defense here was a simple denial. The defense did not present any evidence, and as was conceded below, this was not a "he-said/she-said" case. 4RP 129. Indeed there was no evidence whatsoever that contradicted HLB's account of the offense.

Finally, the other evidence before the jury was that HLB testified that Wilson tried to kiss her and touched her breast. A bus driver and an acquaintance of HLB, and a police officer all testified that Wilson was acting very inappropriately toward 15-year-old HLB: that he was hanging on her with his arm over her shoulder and with the front of his body pressed tightly against her back. There was no evidence of any past contact between HLB and Wilson nor any evidence explaining why she would falsely accuse him of touching her breast.

Given the absence of any contradictory evidence or any motive to have fabricated the charge, Wilson's claim that the fact that no one else saw the molestation calls it into question is untenable. All the witnesses indicated that they saw HLB from behind, or as Wilson concedes, it could have occurred before the witnesses arrived. Brief of Appellant at 15.

Nor does the alleged "anomaly" regarding the gender of the bus driver call HLB's testimony into doubt. *See* Brief of Appellant at 15. First, if a 15-year-old girl were accosted by a drunken stranger who grabbed her breast in the middle of the afternoon in a public place, it stands to reason that incident would be the thing that was most memorable. More importantly, while HLB did not recall bus driver Helen Henry, she did recall driver Dan. It must be kept in mind that the Port Orchard ferry terminal would have multiple buses attending to it. The bus

HLB said Dan was driving had a different number than the one Helen Henry was driving. 3RP 78, 104. And Officer Walker testified that there was more than one Kitsap Transit employee present, and that at least one of them was a male who pointed Wilson out to him. 4RP 126. The record does not show any "anomaly."

Wilson's reliance on *State v. Black* and *State v. Haga*, 8 Wn. App. 481, 507 P.2d 159 (1973), is misplaced; these cases are distinguishable. In each, the witness either gave or was asked to give his opinion on the credibility of another party. A direct opinion on the credibility of the victim was given in *Black*, and an indirect opinion on the guilt of the defendant was given in *Haga*.

In *Black*, the expert whose testimony was challenged had testified that "'[t]here is a specific profile for rape victims and [the victim] fits it.'" *Black*, 109 Wn.2d at 339 (emphasis omitted). Likewise, in *Haga*, an ambulance driver who responded to the scene of a double murder testified that the defendant, the husband and father, respectively, of the victims, was unusually "'calm and cool about it,'" behavior very unlike that of the innocent relatives of murder victims whom the driver had observed. *Haga*, 8 Wn. App. at 490.

Similarly, Wilson's reliance on *State v. Carlin*, 40 Wn. App. 698, 700, 700 P.2d 323 (1985), *overruled on other grounds*, *Seattle v. Heatley*,

70 Wn. App. 573, 854 P.2d 658 (1993), is also misplaced. There, a police officer testified that a tracking dog had followed the defendant's "fresh guilt scent." But, as the Court later explained, *Carlin* did not even hold the testimony was improper:

> [T]he court in Carlin did not expressly decide that the "fresh guilt scent" testimony actually constituted an opinion on the defendant's guilt. *See Carlin*, 40 Wn. App. at 703 (testimony "arguably" was an improper opinion). Instead, the court held that even if the testimony was error, it was harmless beyond a reasonable doubt. *Carlin*, 40 Wn. App. at 705.

Heatley, 70 Wn. App. at 583-84.

More analogous to the facts at hand is *State v. Alger*, 31 Wn. App. 244, 640 P.2d 44 (1982). In *Alger*, a statutory rape case, the trial court read the following stipulation to jury: "'There has been a stipulation ... that [Alger] ... has never been married to the victim.'" *Alger*, 31 Wn. App. at 246, 248-49. The Court noted that, "[i]n the context of a criminal trial, the trial court's use of the term 'victim' has ordinarily been held not to convey to the jury the court's personal opinion of the case." *Alger*, 31 Wn. App. at 249. As such, the Court held that a "reference to 'the victim' by the trial judge, did not, under the facts and circumstances of this case, prejudice the defendant's right to a fair trial by constituting an impermissible comment on the evidence." *Alger*, 31 Wn. App. at 249. If such a reference by the trial court itself was not improper, a reference by a witness, even a police officer, cannot be improper. Wilson fails to show

that the State presented improper opinion testimony.

The final example cited by Wilson occurred not during the testimony but during closing argument. Thus the applicable standard of review, which Wilson has the burden of meeting, is whether the challenged conduct was both improper and prejudicial. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). The Court reviews the prosecutor's conduct "by examining that conduct in the full trial context, including the evidence presented, the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (internal quotation marks omitted). Comments are deemed prejudicial only where there is a substantial likelihood that they affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

Here, the prosecutor was arguing what the evidence showed. HLB testified that Wilson tried to kiss her and grabbed her breast. That evidence certainly supported an inference that HLB was a victim of child molestation. *See McKenzie*, 157 Wn.2d at 57 (rejecting that use of the word "rapist" during a trial constitutes prosecutorial misconduct when it is "a reasonable inference from the evidence and was consistent with the charged crimes"); *State v. Hunter*, 35 Wn. App. 708, 715, 669 P.2d 489

(stating the prosecution's use of the word "pimp" is a permissible reasonable inference from the trial evidence when the trial court properly instructed the jury on use of relevant prior convictions), *review denied*, 100 Wn.2d 1030 (1983).

Moreover, the trial court instructed the jury to "reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference," CP 97, and that the lawyer's remarks "are intended to help you understand the evidence and apply the law.... You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 96. The jury is presumed to follow the court's instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Wilson fails to show either impropriety or prejudice flowing from this remark.

Even if the five[2] brief references during the testimony to the "victim" were improper, they would be harmless. Improper opinions on guilt are subject to the constitutional harmless error standard set forth in *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). *State v. Thach*, 126 Wn. App. 297, 312-13, 106 P.3d 782 (2005). The State must show beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *State v. Watt*, 160 Wn.2d 626,

[2] As previously discussed, Wilson bears the burden of establishing harmful error with regard to the comment during closing argument.

635, 160 P.3d 640 (2007); *Thach*, 126 Wn. App. at 313 (*quoting Guloy*, 104 Wn.2d at 425). This test is met if the untainted evidence presented at trial is so overwhelming that it leads necessarily to a finding of guilt. *Watt*, 160 Wn.2d at 636.

As discussed above, four witnesses corroborated HLB's testimony that Wilson was accosting her in an unwelcome manner. No evidence contradicted her assertion that he also tried to kiss her and touched her breast under her shirt. No evidence suggested any motive for her to have made up the story. No evidence seriously called into doubt her recollection of the event. Wilson was apprehended at the scene of the assault. In short, the evidence was all consistent with Wilson's guilt. None of it in any way suggested he was not guilty.

Additionally, the trial court instructed the jury:

> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

CP 99. As previously noted, this Court presumes that the jury followed the trial court's instructions. Stein, 144 Wn.2d at 247.

The brief use of the term victim, which was not even mentioned until near the end of a two-day trial, could not reasonably have led the jury to convict Wilson. Most assuredly, he would not have been acquitted had the term been excluded from his trial. This claim should be rejected.

B. UNDER THE PLAIN LANGUAGE OF CRR 3.3, DEFENSE COUNSEL'S REQUEST FOR A CONTINUANCE WAIVES THE CLAIM THAT THE RULE WAS VIOLATED.

Wilson next claims that his rights under CrR 3.3 were violated when the trial court granted defense counsel's motion for a continuance. This claim is frivolous.

Notably, the case upon which Wilson relies involves a State motion for continuance. *See State v. Nguyen*, 131 Wn. App. 815, 817, 129 P.3d 821 (2006). However, as the Supreme Court recently explained, where defense counsel brings a continuance motion, "as the rule expressly provides, any objection is ... waived." *State v. Ollivier*, 178 Wn.2d 813, 823-24, 312 P.3d 1 (2013) (*citing* CrR 3.3(f)(2)). Moreover, "under CrR 3.3, counsel has authority to make binding decisions to seek continuances." *Ollivier*, 178 Wn.2d at 825.

Even were the claim not waived under the current rule, counsel's representation to the court would have been adequate to grant the continuance:

> Under case law preceding the 2003 adoption of the last sentence in CrR 3.3(f)(2) that waives objections when defense counsel moves for a continuance, granting continuances over the defendant's objection to ensure that counsel was adequately prepared and provided effective representation was not an abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984); *see State v. Finch*, 137 Wn.2d 792, 806, 975 P.2d 967 (1999).

Ollivier, 178 Wn.2d at 824 n.2.

Here, contrary to Wilson's assertion, Brief of Appellant at 20, counsel did explain why a continuance was needed:

> My investigator and I have been working with Mr. Wilson with regard to trying to locate some witnesses that he believes can be helpful in potentially providing a defense for him. It's been a bit of a struggle to get identifying information for these witnesses. We got some yesterday. And so I'm asking to set the trial date over so I can have my investigator at least try and locate these people and speak to them to, essentially, verify whether or not they have helpful information.

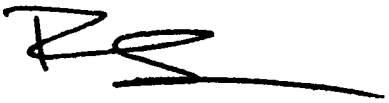
RP (5/16) 2. A continuance of a little over three weeks was not unreasonable under these circumstances. Even if the claim were not waived, the trial court could not be found to have abused its discretion. This claim should be rejected.

IV. CONCLUSION

For the foregoing reasons, Wilson's conviction and sentence should be affirmed.

DATED June 5, 2014.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney



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