SUPREME COURT NO. 92475-9
C.O.A. No. 33229-2-III
Cowlitz Co. Cause NO. 09-1-01049-5

SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONALD O. LEE,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington, represented by Eric H. Bentson, Deputy Prosecuting Attorney for Ryan P. Jurvakainen, Cowlitz County Prosecuting Attorney.

II. COURT OF APPEALS' DECISION

The Court of Appeals correctly decided this matter, holding that the trial court's ruling regarding the cross-examination of the victim was harmless error when there was additional evidence strongly corroborating her claim and the limitation on cross-examination was minor; Lee's right to a speedy trial was not violated; and that it had discretion not to review Lee's legal financial obligations ("LFOs") when he failed to object to them at sentencing. The respondent respectfully requests this Court deny review of the August 13, 2015, Court of Appeals' opinion in *State v. Donald Ormand Lee*, No. 22339-2-III, affirming Lee's convictions.

III. STATEMENT OF THE CASE

During the summer of 2008, 15-year-old J.W. was at her house when she received a phone call from 42-year-old Donald Lee. RP at 53-54, 61, 259. Lee identified himself as "Rick." RP at 57. Lee asked J.W. provocative questions that were sexual in nature. RP at 56, 59. Lee and J.W. discussed their age difference, and he was aware that she was 15-years-old. RP at 63-64. Lee was concerned that he would get in trouble

because of their age difference. RP at 64. Lee asked J.W. to meet with him and she agreed. RP at 56-57. Beginning with their first meeting, Lee and J.W. had several sexual encounters that summer, these included both oral and vaginal sex. RP at 65-69. These sexual encounters occurred at Lee's ex-girlfriend's house in Castle Rock, and at Tam O'Shanter and Riverside Parks. RP at 66-67.

During one meeting, Lee provided J.W. with a sexually-explicit handwritten note. RP at 84-86, 305, Supp. Desig. CP at Exhibit #1. The letter states:

> My Friend/Love
>
> I want to say this first. I'm glad that you walked into my life. You have a very special place in my heart. You turn me on in a way like no other woman ever has! I always hunger to be inside of you. Every time I think about you or hear your voice I always have to touch myself. You will always be my friend and I will always be there when you need me. If you ever need to be held all you have to do is ask. I will also always be there to whip your tears away. I'm also wanting you to know is, I'm starting to have some very strong feelings for you! I do not like it when we're apart from each other. You are so beautiful in my eyes. Your body turns me on. When I look into your eyes or see your smile, they make my cock so very hard for you. I just wish I could be inside your tight wet pussy 24/7! I always love making love to you. I love it when you eat my cum! I really want to have something with you. You are always and forever in my thoughts. I stroke my cock every night thinking of you. I really want to buttfuck you sometime soon ok? Thank you for wanting to be my friend. I will never let you down. I'm going to show you what it is like to have a man that cares for you more than you know. I

> also cannot ever wait to pull your panties down. Someday I would love to have that chance to be able to fuck you all day and then through the night.
>
> You friend 4 life
> R

Sup. Desig. CP at Exhibit #1.

J.W. told her mother about the relationship with Lee in March 2009. RP 89, 157-58.

In October of 2009, Lee was arrested on allegations of rape of a child in the third degree. The State did not file charges and Lee was released. Further investigation of the case was transferred between police departments, and then the investigation "fell through the cracks." RP at 197. When Detective Sergeant Brad Thurman came into the unit in May 2012 he discovered the case and began working on it. RP 199-201. He did about six months of investigation, including talking to the victim and taking her to the various locations of the sex acts to obtain pictures of the areas, tracking down the Defendant and the vehicle he drove when he was with the victim, talking to Lee's ex-girlfriend, and obtaining a handwriting sample from Lee for comparison purposes to the letter provided from the victim. RP 200-211, 213, 218. The results from the comparison came back from the lab in April 2013. RP 211. The State charged the defendant with five counts of rape of a child in the third degree alleging

sexual intercourse with J.W. between June 1, 2008 and October 1, 2008. CP 6-8. On two occasions after charges were filed, the trial date was continued at Lee's request. On both of these occasions, Lee entered a speedy trial waiver. Sup. Desig. CP at 21, 24.

At trial defense sought to admit evidence that J.W. had reported a rape in June of 2008, and then the following day called the police and said the allegation was false because the sex had been consensual. RP at 20, 27. The State sought to prevent the jury from hearing this evidence, arguing that because consent was not at issue in the case, the rape shield law—RCW 9A.44.020—did not permit the introduction of this evidence. RP at 23. The court ruled that pursuant to RCW 9A.44.020(2) the victim's past sexual behavior was inadmissible. RP at 26. However the court also ruled that evidence of J.W. making a prior false accusation against a person to the police was admissible. RP at 33.

During the trial, J.W. testified as to the sexual relationship and identified Lee as the person who had been known to her as "Rick." RP at 57, 61, 65-69. J.W. testified to Lee having driven her in a black Camaro/Thunderbird type car. RP at 61-62, 79. J.W. was able to identify Lee's ex-girlfriend's house and remembered petting two cats there. RP at 71, 103-04, 167. She also testified that Lee handed her the sexually-explicit note while she was in his car outside of Kelso High School. RP at

85. On cross-examination J.W. testified that in June of 2008 she had made a false accusation against a person to the police. RP at 120-21.

Lee's ex-girlfriend, Beth Bonvioganne, corroborated much of J.W.'s testimony. Bonvioganne testified that she had been in a relationship with Lee. RP at 166-67. Bongiovanne confirmed that she had lived in the residence that J.W. had identified as Lee's ex-girlfiend's, and that Lee had permission to enter that residence when she was not home. RP at 167-68. Bongiovanne testified that during the summer of 2008 he had permitted Lee to use her black Camaro, and that the keys had been in his possession. RP at 167. Bongiovanne also testified to having two cats at the residence. RP at 168.

Lee agreed that he wrote the sexually-explicit letter that J.W. provided to the police. RP at 269, CP 18. However, Lee claimed that the letter was written as a fantasy, and that he had not written the letter to anyone. RP at 269. Lee claimed that he had not gone by the name "Rick" and that he had signed the letter with "R" because it was a fantasy. RP at 268-69, 274. Lee denied giving the letter to J.W. RP at 269. Lee testified that he only seen J.W. on two occasions. RP at 260-61. According to Lee, he had a less than five-minute conversation with J.W. in 2008 while he was outside of his mother's house working on his mother's car, where J.W. asked if Lee had been married to "Tina" and implied that she knew

his ex-wife's daughter. RP at 261. Lee also testified that on another occasion he and his mother drove by J.W. on Ash Street in his 1981 Firebird. RP at 26.

Lee was convicted of two counts of rape of a child in the third degree. At sentencing, the court imposed LFOs, and Lee did not object. The Court of Appeals affirmed Lee's convictions and exercised its discretion pursuant to *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680, *review denied*, 177 Wn.2d 1016 (2015), to decline to review Lee's contention regarding his LFOs.

IV. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' DECISION

Because Lee's petition fails to raise any of the grounds governing review under RAP 13.4(b), it should be denied. Under RAP 13.4(b) a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Lee claims the Court of Appeals' holding that the limiting instruction on a prior allegation was harmless error raises a significant

question of constitutional law. Lee also maintains that by holding his right to speedy trial was not violated and that no extraordinary circumstances were presented meriting review of his LFOs, the Court of Appeals' decision raises substantial issues of public interest. Lee's arguments fail. The Court of Appeals correctly found that (1) the limiting instruction was harmless error in light of the evidence presented; (2) Lee did not suffer a violation of his right to speedy trial when he was not even being held on the charge while the case was further investigated; and, (3) insufficient circumstances were presented to merit review of Lee's LFOs. Thus, Lee's petition does not meet the criteria required for review under RAP 13.4(b).

A. Because the Court of Appeals did not err in holding that the limiting instruction on the victim's sexual history was harmless error, Lee's petition fails to raise a significant question of constitutional law.

Because the court's limiting instruction still permitted cross-examination of J.W. and her claims against Lee were strongly corroborated by other evidence, the Court of Appeals correctly held that the confrontation was not violated and that any error was harmless. "An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial." *State v. Halstein*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Lee argues that the Court of Appeals incorrectly applied the

standard of review by claiming that the confrontation clause was violated therefore the standard of review should have been whether the error was harmless beyond a reasonable doubt. However, this argument completely ignores that fact that the Court of Appeals held: "Given all, we conclude the court's exclusion of the evidence was harmless, does not violate the confrontation clause, and, therefore did not warrant reversal." Slip Op. at 10-11. Because the confrontation clause was not violated, the Court of Appeals relied on the correct standard of review as set forth in *Halstein*. *See* 122 Wn.2d at 127. Further, because there was no constitutional violation, a review of the Court of Appeals' harmless error analysis does not raise a significant question of constitutional law.

"[A] court's limitation on the scope of cross-examination will not be disturbed unless it is the result of a manifest abuse of discretion." *State v. Darden*, 15 Wn.2d 612, 619, 41 P.3d 1189 (2002). Further, the right to cross-examine an adverse witness is not absolute. *Id.* at 620. Evidence of prior sexual conduct "is usually of little or no probative value in predicting the victim's consent to sexual conduct on the occasion in question." *Id.* at 9. Consent by the victim is not a defense to third degree child rape. *State v. Heming*, 121 Wn.App. 609, 90 P.3d 63, *review denied*, 153 Wn.2d 1009, 111 P.3d 1190 (2004). While some courts have found that "[A] prior accusation of rape is relevant on the issue of a rape victim's

credibility." *See, e.g., People v. Fanklin*, 30 Cal.Rptr.2d 376, 380 (Cal.App. 4th 1994); Slip Op. at 9. When such evidence is not offered to prove falsity it is irrelevant. *State v. Demos*, 94 Wn.2d 733, 736, 619 P.2d 968 (1980).

Further, even if past sexual behavior is relevant, the court still must consider the potential danger of introducing such evidence: "Although the defendant has the right to put on relevant evidence, this right may be counterbalanced by the state's interest in seeing that the evidence is not so prejudicial as to disrupt the fairness of the fact-finding process." *State v. Hudlow*, 99 Wn.2d at 1, 15 (1983). "The admissibility of past sexual behavior evidence is within the sound discretion of the trial court." *Id.* at 17-18. The trial court's discretion in balancing the danger of prejudice against the probative value of the evidence "should be overturned only if no reasonable person could take the view adopted by the trial court." *Id.* at 18. When a trial court makes an evidentiary error which is not of constitutional magnitude, reversal is required only if the error, within reasonable probability materially affected the outcome of the trial. *Halstein*, 122 Wn.2d at 127.

Here, in ruling on the admission of the evidence, the trial court determined that J.W. could be cross-examined regarding whether or not she had made a prior false allegation against a person to the police in June

2008. The trial court ruled that this was relevant to her credibility. The trial court limited the fact that the allegation involved a claim of rape based on nonconsensual sex. Relying on cases from other jurisdictions, the Court of Appeals found that the fact that the allegation involved a claim of rape was relevant to the issue of J.W.'s credibility and was therefore an abuse of discretion. However, because there was not a reasonable probability that the court's ruling affected the outcome of the trial, the Court of Appeals found any error to be harmless. Slip Op. at 10.

The appellate court was correct in finding harmless error because there was not a reasonable probability that the limitation materially affected the outcome of the trial. Because the untainted evidence against Lee was so overwhelming, any error would have been harmless regardless of whether the error was of "constitutional magnitude." First, the court's limitation on the evidence was minor. It did not preclude the jury from the possibility that the prior false allegation involved rape. Further, it allowed the portion of the evidence most relevant to J.W.'s credibility to be admitted—the fact that J.W. had made a false allegation about a person to the police. Even though the court may have erred by limiting the subject matter of the prior false allegation, the relevance of the subject matter of a claim of nonconsensual sex was less probative to the issue of J.W.'s

credibility on her claim of having consensual sex with Lee than the fact that she had made a prior false allegation itself.[1]

More importantly, the weight of the evidence against Lee would have overcome the insertion of the word "rape" into the evidence that was introduced. J.W. testified to having oral and vaginal sex with Lee, she testified that he drove a black Camaro or Thunderbird, she identified his ex-girlfriend's house in Castle Rock, and she testified to petting two cats belonging to Lee's ex-girlfriend. She testified that Lee called himself "Rick" and provided her with the sexually-explicit letter that he signed "R." Beth Bonvioganne corroborated that she was Lee's ex-girlfriend, that she lived in the house in Castle Rock that J.W. identified, that she had two cats in the residence, and that at the time Lee was driving her black Camaro. This was especially incriminating because if J.W had not been in a relationship with Lee, there would not have been any reason for her to have been inside Bonvioganne's home or Camaro. Lee admitted to writing the handwritten, sexually-explicit letter that J.W. provided to the police. Lee claimed he signed the letter "R" and wrote it to no one as a fantasy.

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[1] It would appear that the trial court's decision permitting the evidence of the false allegation while limiting the subject matter to avoid introduction of the victim's sexual history was an attempt to properly balance the probative value against the danger of unfair prejudice. Thus, even if the fact that the false allegation involved rape was relevant, exclusion may still have been appropriate under ER 403.

The content of the letter would strongly indicate otherwise. Much of the sexual content discussed in the letter corroborates J.W.'s claims of multiple sexual encounters. Further, the content of the letter is much more consistent with having been written to a real person Lee was infatuated with. In addition to expressing a strong desire for sex with J.W. it also contains statements such as:

- "I'm so glad you walked into my life";
- "If you ever need to be held all you have to do is ask";
- "I'm starting to have some very strong feelings for you";
- "I really want to have something with you"; and
- "Thank you for wanting to be my friend."

These do not appear to be fantastical statements, but rather those of a person seeking a relationship with another. And, by signing the letter "R" Lee corroborated J.W.'s claim that he was going by the name "Rick." Also, Lee's decision not to use his name or real initials or J.W.'s name in the letter was additional evidence that he was attempting to secret the relationship even when providing the letter to her.

The most incriminating fact was that the sexually-explicit letter, which Lee wrote, was in J.W.'s possession. J.W.'s testimony was that Lee handed her the letter. There was no evidence countering or explaining how she came to possess a letter written by Lee to a female that was filled

with such intimate content. Combined with the fact that she also had been inside Bonvioganne's home and car, when her only connection to Bonvioganne would have been through Lee, there was overwhelming evidence that Lee and J.W. had been engaged in a sexual relationship.

The jury heard that J.W. had made "false accusations about another person to the police" in June of 2008. RP at 120-21. Considering the phrasing employed, it is likely the jury would have taken the false accusation to be about rape. The jury weighed this information with the other evidence presented. Yet, despite having heard that J.W. had made false accusations against another person during the time of her relationship with Lee, the jury still found Lee guilty. Because of the nature of the evidence presented, had the jury heard that the false accusation expressly involved "rape," it would not have impacted the outcome of the trial. For this reason, the Court of Appeals did not err in finding the confrontation clause was not violated and that any error was harmless. Accordingly, Lee's petition does not raise an issue of constitutional significance.

B. Lee's right to a speedy trial was not violated; therefore Lee's petition fails to raise a substantial issue of public interest.

Lee did not preserve for review his claim of a speedy trial violation when he did not raise the issue with the trial court; because his appeal failed to demonstrate manifest error affecting a constitutional right he did

not preserve this issue for review. "The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right.'" *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)). Under RAP 2.5(a), an error may be raised for the first time on appeal only for (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. Lee, who after his arrest was released and was not under any restraint while the case was being investigated further, did not raise his claim of a speedy trial violation with the trial court. When analyzing his claim, the Court of Appeals applied RAP 2.5(a) and because Lee failed to show a manifest error affecting a constitutional right did not permit him to raise the issue for the first time on appeal. Lee's petition fails to show that the Court of Appeals' decision raises a substantial issue of public interest.

"[I]t is either a formal indictment or information or else the actual restraint imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." *U.S. v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). When a defendant is incarcerated this constitutes

actual restraint and mandates a Sixth Amendment analysis. *See State v. Corroado*, 94 Wn.App. 228, 232, 972 P.2d 515, *review denied*, 138 Wn.2d 1011 (1999); Slip Op. (Korsmo, J., concurring). However, when a defendant is neither under indictment nor subject to official restraint, there is no violation of the Sixth Amendment right to speedy trial. *See U.S. v. Loud Hawk*, 474 U.S. 302, 304-5, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986).

Additionally, to show a violation of speedy trial, a defendant must demonstrate that the length of the delay was prejudicial. *State v. Iniguez*, 167 Wn.2d 273, 283, 217 P.3d 768 (2009). To make this determination, a reviewing court will consider: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). When the issue is raised for the first time on appeal, the defendant must show actual prejudice to demonstrate a manifest error affecting a constitutional right. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *Id.*; Slip Op. at 6.

Here, after Lee was arrested, he was not charged and was released from jail without conditions while the case was sent for further investigation. Because Lee was not arrested and held to answer while the

case was further investigated there was no showing that his speedy trial right was violated.[2] Additionally, once the case was charged, Lee twice voluntarily waived his right to speedy trial. Lee cannot have waived a right and at the same time assert it. Moreover, Lee failed to show that a delay in the investigation caused him to suffer any prejudice. Because Lee did not raise the issue with the trial court, there was insufficient evidence in his show a manifest error. Lee's claim of prejudice was based on a self-serving anxiety and a need for his mother's testimony, which would have been cumulative and had minimal relevance. For these reasons, the Court of Appeals' refusal to allow Lee to raise a claim of a speedy trial violation for the first time on appeal was proper and does not create a substantial issue of public interest.[3]

C. Because Lee did not object to the imposition of his LFOs at sentencing the Court of Appeals' refusal to review this issue does not create a substantial issue of public interest.

Because Lee did not raise the issue of LFOs with the sentencing court, the Court of Appeals' decision not to exercise its discretion to consider the issue for the first time on appeal does not raise a substantial issue of public interest. "A defendant who makes no objection to the

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[2] This was articulated by Judge Korsmo in his concurring opinion. Slip Opinion (Korsmo, J., concurrence).

[3] A contrary holding would encourage prosecutors to charge cases based on a concern that the speedy trial "clock" has been triggered by arrest, rather than returning a case that so requires back to law enforcement to be investigated more fully.

imposition of discretionary LFOs at sentencing is not automatically entitled to review." *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). "RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them." *State v. Kuster*, 175 Wn.App. 420, 306 P.3d 1022 (2013) (citing *State v. Guzman Nunez,* 160 Wn.App. 150, 157, 248 P.3d 103 (2011) (citing *State v. Scott,* 110 Wn.2d 682, 685, 757 P.2d 492 (1988)), *aff'd,* 174 Wn.2d 707, 285 P.3d 21 (2012)). Furthermore, under RAP 2.5(a), appellate courts can refuse to address an issue *sua sponte*. *State v. Kirkpatrick,* 160 Wn.2d 873, 880 n. 10, 161 P.3d 990 (2007), *overruled in part on other grounds by State v. Jasper,* 174 Wn.2d 96, 271 P.3d 876 (2012). Because Lee did not object to the imposition of his LFOs at sentencing, this issue was waived.[4]

[4] Here, in addition to failing to object, Lee's testimony provided further support that he would be capable of working and paying his LFOs. Lee testified to owning multiple cars and working on these vehicle, indicating that he had some financial means, the physical ability to work, and the mechanical ability to replace a motor. RP at 264.

V. CONCLUSION

Because Lee's petition does not meet any of the considerations governing acceptance of review under RAP 13.4(b), it should be denied.

Respectfully submitted this 25th day of January, 2016.

By _____
Eric H. Bentson, WSBA #38471
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petition for Review was served electronically via e-mail to the following:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on January 25th, 2016.

Michelle Sasser

Michelle Sasser

OFFICE RECEPTIONIST, CLERK

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Enclosed, please find the Response to Petition for Review regarding the above-named Petitioner.

If you have any questions, please contact this office.

Thanks,

Michelle Sasser, Paralegal
Cowlitz County Prosecuting Attorney's Office

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