

NO. 46809-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICARDO TREVINO,

Appellant.

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

The Honorable Jack Nevin, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Admission of improper opinion testimony invaded the province of the jury and violated appellant's right to a jury trial.

2. Expert testimony regarding the characteristics of child sexual abuse victims did not meet the standard for admission of scientific evidence.

Issues pertaining to assignments of error

Over defense objection, the State presented expert testimony regarding behaviors common to child victims of sexual abuse. Where this testimony was expressed in terms of generalizations as to the behavior of sexually abused children as a class, and the State argued that the complaining witness fit that profile, did the expert testimony unfairly vouch for the credibility of the complaining witness, invading the province of the jury?

B. STATEMENT OF THE CASE

1. Procedural History

On October 18, 2013, the Pierce County Prosecuting Attorney charged appellant Ricardo Trevino with two counts of third degree rape of a child. CP 1-2; RCW 9A.44.079. An amended information was filed changing the charging period on one count. CP 15-19. The case

proceeded to jury trial before the Honorable Jack Nevin, and the jury returned guilty verdicts. CP 62-63. The court denied Trevino's request for a Special Sex Offender Sentence Alternative and imposed a high end standard range sentence of 34 months. CP 79. Trevino filed this timely appeal. CP 87.

2. Substantive Facts

In the fall of 2013, around the time of her 15th birthday, KL told her boyfriend DS that her stepfather¹ had been sexually abusing her. 2RP² 100-01; 3RP 51. She confided in DS because she felt she could trust him, and she asked him not to tell anyone. 2RP 101. DS told his mother, who called the school. 3RP 52, 62. The school counselor called the police. 2RP 157.

Milton Police Officer Kristofer Kidwell interviewed DS with his mother's permission. 2RP 157-58. Kidwell reported what he learned from DS to Milton Police Detective Amy Camden. 2RP 162. Camden interviewed KL at school and then directed Kidwell to arrest Ricardo Trevino. 2RP 105, 162; 3RP 15, 21. Later that day Camden went to the family home with one or two other officers. 3RP 105. She took some

¹ Although KL's mother was not married to Trevino, they lived together from the time KL was about five years old, and KL called him dad. 2RP 88.

² The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP—7/28, 29, 30/14; 2RP—7/31/14; 3RP—8/4/14; 4RP—8/5, 6, 7/14; 9/26/14.

photos of KL's bedroom, which she later deleted. 3RP 32. She also interviewed KL again. 2RP 106; 3RP 106-07.

Camden spoke briefly with KL's mother when she was at the home after Trevino's arrest. 3RP 110. When Camden tried to contact her again, she had left the area. 3RP 27, 44, 111. KL reported that she had disclosed sexual abuse to her cousin Nancy Phonthivongsa. 2RP 102-03. Camden contacted her by phone, and Phonthivongsa prepared a written statement and emailed it to Camden. 3RP 21-22, 71.

Prior to trial the State offered and the defense moved to exclude testimony from a forensic child interviewer regarding common characteristics of sexual abuse victims. CP 3-6, 8-12. Specifically, the State offered testimony regarding delayed disclosure, the correlation between the victim's relationship with the abuser and the length of the delay, the reasons for delay, and disclosure to peers rather than adults. 2RP 132-34. The trial court ruled that the evidence was admissible. 2RP 66.

At trial KL described incidents of oral sex which occurred between her 14th and 15th birthdays and a specific incident a few days before Trevino's arrest. 2RP 96-97, 99. KL testified that the touching started when she was in second grade, but she did not tell anyone about it until she was almost 15. 2RP 93, 101. She did not disclose the abuse sooner

because she was scared no one would believe her. She was also afraid of what it would do to her family, and she wanted her mother to be happy. 2RP 96.

Next, the State presented testimony from Sheri Arnold, a forensic child interviewer who works with the prosecutor's office. 2RP 139. She detailed her duties, education, and training for the jury. 2RP 140. Arnold testified that she had not interviewed anyone in connection with this case, but she had conducted over 1800 child interviews in her career, the vast majority of which involved victims of sexual abuse. 2RP 140, 142-43. Said she was testifying from her personal observations as well as training and research that she has reviewed. 2RP 151.

Arnold testified that in most of her cases there was a delay in disclosure. She explained that the term delayed disclosure refers to the passage of time between the alleged incident and the disclosure. The length of delay is frequently months or years from when the alleged act occurred. 2RP 144. She has noticed that when there is a close relationship to the alleged abuser, that increases the likelihood of delayed disclosure, and those delays are frequently long. 2RP 145.

Most of the reasons for these delays are fear based. The victims can fear they will not be believed or fear what will happen to the abusers. 2RP 145. Arnold testified that in most cases the alleged abuser is

someone close to the child, such as an immediate family member or close family friend, and so the victims report fears about what disclosure will do to the family or even fears of retaliation if there have been threats. 2RP 145-46. Arnold testified that in the cases where there have been delays, it is common for the alleged victim to disclose to a peer rather than a parent, especially with older kids. They feel more comfortable talking to friends they are close to, without the fears associated with disclosing to adults. 2RP 146.

Arnold further testified that the understanding of time frames and the passage of time is something that develops as children grow up, and children are often not able to accurately describe when in time something happened. 2RP 147. Finally, Arnold testified that she asks open ended questions during child interviews so that she does not suggest an answer, but children become less suggestible as they get older. 2RP 150-51, 153.

C. ARGUMENT

THE EXPERT TESTIMONY DID NOT MEET THE STANDARD FOR ADMISSION OF SCIENTIFIC EVIDENCE AND INVADED THE PROVINCE OF THE JURY BY COMMENTING ON THE COMPLAINING WITNESS'S CREDIBILITY.

Under the Washington constitution, the role of the jury must be held "inviolable." Wash. Const. art. I, §§ 21, 22; State v. Montgomery, 163 Wn.2d 577, 590, 813 P.3d 267 (2008). The jury's fact-finding role is

essential to the constitutional right to trial by jury. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Therefore, “[n]o witness, lay or expert, may testify to his opinion as to the guilt of the defendant, whether by direct statement or inference.” State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (expert witness’s opinion that complaining witness in third degree rape case had “rape trauma syndrome” inadmissible because it communicated witness’s opinion that witness was telling the truth).

An expert may express an opinion concerning his or her field of expertise if the opinion will aid the jury. ER 702; Montgomery, 163 Wn.2d at 590. The opinion may encompass an ultimate fact, but the expert may not express an opinion as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. Montgomery, 163 Wn.2d at 591. A witness offering an opinion under ER 702 must be qualified as an expert, and any opinion testimony must be based on a theory generally accepted in the scientific community. State v. Jones, 71 Wn. App. 798, 814, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994).

In this case, the court permitted the State to present testimony from a forensic child interviewer regarding behaviors commonly observed in sexually abused children. Defense counsel argued that such evidence was

improper because it allowed the jury to infer that the alleged abuse occurred in this case based on the presence of those behaviors, even though that theory that was not generally accepted in the scientific community. The evidence was therefore an improper opinion on KL's credibility and Trevino's guilt, which invaded the province of the jury. CP 3-6; 1RP 18-19; 2RP 63-65.

In Jones, the defendant charged with child molestation and rape of a child challenged expert testimony presented by the State. The social worker who had worked with the victim testified that she had worked with 300 to 400 children. In addition to giving her opinion that the child had been sexually abused by the defendant, which was clearly error, the social worker testified about the victim's sexual acting out and night terrors and said that such behaviors were very common in sexually abused children. Admission of this testimony was challenged on appeal. Jones, 71 Wn. App. at 813-14.

The Court of Appeals noted that an expert's opinion must be based on a theory generally accepted by the scientific community. Id. at 814 (citing Frye v. United States, 293 F. 1013, 1014 (D.C.Cir.1923)). A description of common characteristics of sexual abuse victims is closely related to generalized profile or syndrome testimony, which requires scientific reliability as measured by the Frye standard. The court

recognized that there is a distinction “between a caseworker narrowly testifying to the behavior of abused children seen in a specific practice and more generalized assertions as to the behavior of abused children as a class.” Id. at 817. But “when personal experience is used as a basis for generalized statements regarding the behavior of sexually abused children as a class, the testimony crosses over to scientific testimony regarding a profile or syndrome, whether or not the term is used, and therefore should be subject to the standard set forth in Frye.” Id. at 818. Testimony that is limited to the expert’s observations of a specific group is not subject to Frye. Id.

The court went on to hold that general profile or syndrome testimony regarding behavioral characteristics of sexually abused children to prove abuse does not meet the Frye standard:

Because the use of testimony on general behavioral characteristics of sexually abused children is still the subject of contention and dispute among experts in the field, we find that its use as a general profile to be used to prove the existence of abuse is inappropriate. However, we agree with the current trend of authority that such testimony may be used to rebut allegations by the defendant that the victim's behavior is inconsistent with abuse.

Id. at 819. See also State v. Maule, 35 Wn. App. 287, 295-96, 667 P.2d 96 (1983) (caseworker’s testimony, based on experience at sexual assault center, that sexually abused children exhibit typical behaviors, was not supported by accepted scientific opinion).

In this case, the State argued that the expert testimony was admissible because the expert would not refer to abused children as a class, would not refer to any syndrome, would only testify from her observations, and would not comment on this particular victim. 2RP 57-58. The court accepted these proposed limitations and admitted the evidence. 2RP 65-66.

Although the prosecutor attempted to limit his questions to Arnold's observations from interviews she conducted, her answers crossed into generalizations as to the class. For example, the prosecutor asked if, in her practice, she noted any correlation between the length of delay in disclosing abuse and the closeness of the alleged abuser. 2RP 144-45. Arnold responded that when there is a close relationship to the alleged abuser, that increases the likelihood that there will be a delayed disclosure. The prosecutor again asked about the length of the delay, and Arnold responded,

I don't know, specifically, in terms of numbers, like the length of the delay. I just know that the relationship to the alleged offender can significantly impact the likelihood that there will be a delay and that the delays are frequently long in length of time.

2RP 145. She went on to say that in most cases, the abuser is someone close, like a family member or a close family friend. *Id.* Again when the prosecutor asked why a child might disclose to a peer rather than an adult,

Arnold responded with a generalized answer, saying that it is more common for older kids to report telling a friend rather than an adult. 1RP 146. Arnold confirmed on cross examination that she was drawing conclusions not just from her own observations but also from training and research she had reviewed. 2RP 151.

It is clear from Arnold's testimony that she was using her personal observations and outside sources as a basis for generalized statements about the behavior of sexually abused children as a class. This profile testimony is not admissible to prove that abuse occurred, because it does not meet the Frye standard. See Jones, 71 Wn. App. at 819. The prosecutor argued in closing that KL fit the profile Arnold described. He reminded the jury that Arnold had testified that in a vast majority of cases children don't report abuse right away. They wait because they are scared, and because they love the abuser, who is often someone close to them. He argued that KL's behavior was consistent with that scenario. 4RP 118-19.

Admission of Arnold's profile testimony was highly prejudicial. One reason scientific evidence must be generally accepted in the scientific community before it is admissible in court is that such evidence "may over-awe or confuse the jury and may be less accessible to lay analysis than other forms of evidence." Jones, 71 Wn. App. at 817. Arnold's testimony that, after interviewing 1800 children and reviewing other

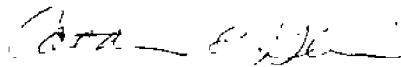
scientific research, she had identified characteristics of sexually abused children, was likely to “over-awe” the jury and impact its evaluation of KL’s testimony. As presented in this case, the expert testimony allowed the jury to infer that KL was abused because she fit the profile of sexually abused children, essentially vouching for KL’s credibility. This testimony invaded the province of the jury and denied Trevino his right to a jury trial.

D. CONCLUSION

The improper admission of profile evidence regarding child victims of sexual abuse vouched for KL’s credibility and invaded the province of the jury. Trevino’s right to a jury trial was violated, and his conviction must be reversed.

DATED May 22, 2015.

Respectfully submitted,



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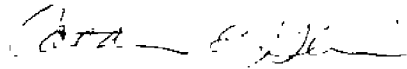
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
May 22, 2015

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