70546-6

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NO. 70546-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

KARINA TORRESCANO-HERNANDEZ,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Was it an abuse of discretion for the trial court to allow a child abuse pediatrics expert to testify about evidence of prior abuse where that evidence was probative to the issue of credibility of the victim and the expert relied upon it to form his opinions?

2. The defendant challenges for the first time on appeal the opinion testimony of Dr. Feldman. Has the defendant shown the opinion testimony was an improper comment on the ultimate issue of fact amounting to manifest constitutional error?

3. Has the defendant shown she was denied her constitutional right to effective assistance of counsel because trial counsel did not object to one statement made during a nine day trail, where there were valid tactical reasons for counsel's actions?

II. STATEMENT OF THE CASE

On approximately September 14, 2012, C.T.'s hands were badly burned on a hot stove. The burn marks were in a parallel spiral pattern matching an electric coil-type burner. When the burns were discovered by his babysitter's 13 year old daughter, M.D., C.T. said he had injured his hands on the monkey bars at school. Later, when he was alone with M.D., C.T. said the defendant burned his hands on a hot stove. C.T. was crying when

he told M.D. this and asked her not to tell anyone. C.T. also told his six year old friend, A.C. that his mom burned his hands as punishment for touching someone else's IPod. C.T. was six and a half years old at the time of the incident. RP 439, 443, 445-447, 488-489, 492-493, 540-541, 548-549, 602-606.

The defendant was ultimately charged with one count of assault of a child in the second degree, domestic violence with the aggravating factor of deliberate cruelty to the victim. The jury found the defendant guilty of the lesser included offense of third degree assault domestic violence. The jury did not find the aggravating factor of deliberate cruelty. The defendant now appeals her conviction. CP 27, 28, 29, 30, 136-137.

On September 14, 2012, the defendant's acquaintance, Ms. Hernandez, was watching the defendant's two children, C.T. and 4 year old N.J-T. while the defendant was working the night shift at Jack in the Box. That night, Ms. Hernandez's 13 year old daughter, M.D. noticed C.T. was hiding his hands. When M.D. was able to see C.T.'s hands she saw they were injured and asked C.T. about them. After initially trying to claim he injured them on the monkey bars, C.T. eventually told M.D. his mother had burned his hands on the stove. Although C.T. asked her not to tell anyone, M.C. told her

mother. Ms. Hernandez looked at C.T.'s hands and saw they had been badly burned. Ms. Hernandez told a church administrator, Irma Reyes, and texted her a photo of C.T.'s injured hands. A few days later, Ms. Hernandez's six year old A.C. told a friend at school that led to the school counselor being told and CPS became involved. When CPS became involved, C.T. was taken for medical treatment for his hands which led to C.T. being seen by Dr. Feldman, an expert in child abuse pediatrics at Children's University Medical Group. RP 477, 488-489, 535, 555-557, 561-566, 581-582, 605-606; 614.

The jury heard testimony from Ms. Hernandez, her two juvenile daughters, M.D. and A.C.; Irma Reyes; C.T.'s school counselor, Meredith Alt; the school nurse, Jeanne Johnson; Laurie Davis, C.T.'s first-grade teacher; Janelle Berger, the CPS worker; a subsequent foster parent; Detective Wareing and a child interview specialist. Through these 11 witnesses, testimony came out that C.T. had told a number of different stories to explain the injuries to his hands. He initially claimed he had caused the injury to himself, either on the monkey bars at school; throwing burning wood chips, or falling onto the stove while trying to cook marshmallows. C.T. ultimately said that his mother had done it; that she placed his

hands on the stove as punishment for touching someone else's IPod. Ms. Hernandez, M.D and A.C. told the jury about other times they had witnessed the defendant physically disciplining C.T.; these incidents included the defendant hitting him with a shoe, breaking a wooden spoon on his back, and pinching his ear and thigh. C.T. also testified to the jury and told them the defendant had burned his hands. RP 482, 490-493, 496-498, 521, 538-540, 548-549, 584-587, 594.

Dr. Feldman, an expert in child abuse pediatrics at Children's University Medical Group, testified regarding his examination of C.T. Dr. Feldman told the jury his opinion was based upon his physical examination of C.T.; review of the photographs taken of the injury about a week after the injury was discovered that were sent to him by CPS; and a review of the history of what people had said took place, in particular, C.T. and the defendant. RP 651-652, 660-665.

Dr. Feldman said the injuries he saw in the photographs were sub-acute contact burns that were in the shape of arcing bands consistent with the coil element of an electric stove. Dr. Feldman described he burns as shallow second degree or partial-thickness burn injury; meaning the outer layer of skin was

destroyed and the destruction went fairly deep into the layer of the skin, but did not go all the way to where the follicles dip down into the deeper layers. Dr. Feldman explained to the jury that the parallel circular or spiral bands crossed each other indicating C.T. had to have contacted the hot stove at least twice to create the burn pattern. Dr. Feldman demonstrated this to the jury using the photographs of C.T.'s hands. Dr. Feldman was also able to demonstrate that based on the curve of the spirals, for the injury to have happened as a result of one application, such as a fall, C.T.'s hands would have had to have been crossed; the right hand had touched the left side of the burner and vice versa. Dr. Feldman indicated the injuries in the photographs appeared to be about a week old. Dr. Feldman indicated when he saw them C.T.'s hands they were almost completely healed, only having the slick pink marks from the burns remaining which would be consistent with one month old second degree burns. RP 662-681.

Dr. Feldman asked C.T. about his hands and C.T. told him his mother had burned them on the stove. Dr. Feldman testified that he was aware that in an interview conducted the same day the photographs he reviewed had been taken, the defendant told the CPS social worker that C.T. had burned his hands about a month

prior while attempting to roast marshmallows. Dr. Feldman showed the jury how C.T.'s hands would have had to have been cross-handed based on the pattern, which would have been a pretty unusual fall. RP 671-672; 679; 681-688.

Dr. Feldman testified that he relies at least partially on the verbal history he receives to form his medical opinion. In this case, Dr. Feldman received information from CPS regarding the defendant's explanation of the injuries and the multiple explanations C.T. had provided. Dr. Feldman asked C.T. himself and C.T. told him the defendant had burned his hands on the stove. RP 674-681.

Dr. Feldman testified that it was very important for him to compare the histories that allegedly came from the victim and the alleged perpetrator when forming his opinion. Dr. Feldman stated that in his experience and training, an otherwise healthy six and a half year old boy would have the muscular coordination and basic understanding of a hot stove to be able to avoid touching it. Dr. Feldman testified the injuries were about a week old in some of the photographs, not a month as the defendant had claimed in her explanation to CPS. Dr. Feldman went on to say "So my conclusion was that it would be terribly unlikely for a normal six-

and-a-half year old to have sustained those three separate burn injuries from an accidental event on his part. And far more likely that his history and the history that he had given to other people that his mother had burned him was correct." RP 683-687.

Dr. Feldman had also testified about a loop whip cord scar C.T. had on his thigh. Prior to Dr. Feldman being allowed to testify regarding this issue, the trial court held a hearing outside the presence of the jury. The defendant had moved in limine to prohibit Dr. Feldman from testifying about the loop whip cord injury or scar. The trial court held a hearing outside the presence of the jury to receive testimony from Dr. Feldman on this issue. Based on Dr. Feldman's testimony - whether on direct or cross - the court found that no one was suggesting that the defendant inflicted the injury or even that the jury should presume that. The court indicated "...what is important is the presence of the injury, which in his opinion is inflicted, and its impact on the child in willingness to disclose." The trial judge made it clear he was weighing the probative value of this evidence when he said, "Given the way that the evidence has come out in this case, that's quite a relevant issue. How the child disclosed and the child's willingness to disclose is a significant issue in this case...it's a substantial issue before the jury. Dr.

Feldman was allowed to testify about the loop whip cord scar. RP 614, 619-622, 630, 636-640, 666-669.

This was spelled out for the jury in the state's closing,

> "And make no mistake. The State is not saying that Karina inflicted that whip mark. I don't have the evidence to show you one way or the other who inflicted that whip mark on [C.T.]. Could have been his grandparent in Mexico or someone else. But the relevance, the importance of the mark, is that it's on [C.T.]. He experienced it. He's experienced that pattern of abuse that Dr. Feldman told you is important in understanding the context of a child's disclosure."

RP 1531.

The scar, according to Dr. Feldman, would have been caused by a whipping action, with a looped flexible object like an electrical cord. Dr. Feldman determined the loop whip cord scar was older and indicative of prior abuse. Dr. Feldman could not determine who caused the scar on C.T.'s thigh or when it was caused. Dr. Feldman testified on direct that he did not receive any information from C.T. or anyone else as to who had caused the injury and that he was not able to determine the age of the injury. To the jury, Dr. Feldman explained the significance of the scar to his examination of C.T. as "Well, abuse often is the result of a series of frustrated or disciplinary acts. A child who has had repetitive abuse may feel more afraid of future punishment if they

disclose. They also may be more likely to disclose in little bits and pieces rather than the big picture." RP 668-669.

The defendant testified. She told the jury she had to leave C.T. in Mexico with her mother from the time he was one year old. She was able to go back and get him when he was four years old. She told the jury she had noticed the mark on his thigh in Mexico, but she didn't know how it got there. The defendant told the jury that C.T. had burned his hands making himself marshmallows on the stove while she was sleeping. She was worried about losing her children so she didn't seek medical treatment for him. The defendant went through a detailed questioning series to bring out that the incident occurred about four days before Ms. Hernandez and her children discovered the injuries, not a month or three weeks as Dr. Feldman was led to believe. RP 1094-1097, 110-1111, 1125-1130.

The defendant's expert, Dr. Wigren, testified that he is a medical doctor and a forensic pathologist. Dr. Wigren took a number of photographs and measurements of C.T.'s hands and went to the actual stove to compared them with the burners. Dr. Wigren testified to a number of possible ways C.T. could have fallen and caused the injuries to his hands. Dr. Wigren's testimony

was allowed at least in part in response to Dr. Feldman's opinion testimony. RP 1180-1181.

III. ARGUMENT

1. EVIDENCE OF THE LOOP WHIP CORD SCAR WAS NOT CHARACTER EVIDENCE AND WAS PROPERLY ADMITTED UNDER ER 403 AND ER 703.

A decision to admit evidence of other crimes or acts "lies largely within the sound discretion of the trial court" and "will not be reversed on appeal absent a showing of abuse of discretion." State v. Norlin, 134 Wn.2d 570, 576, 951 P.2d 1131, 1133 (1998).

It is a general rule of appellate practice that the judgment of the trial court will not be reversed when it can be sustained on any theory, although different from that indicated in the decision of the trial judge. State v. Norlin, 134 Wn.2d 570, 582, 951 P.2d 1131, 1136-37 (1998).

The defendant argues the trial court abused its discretion by allowing testimony of prior abuse to C.T. under ER 404(b). The testimony was admissible as relevant evidence that was more probative than prejudicial under ER 403 and ER 703.

ER 404 applies to evidence being offered regarding a person's character. ER 404(b) only prohibits admission of evidence of a person's prior misconduct when it is offered for the purpose of

demonstrating the person's character and action in conformity with that character. State v. Gresham, 173 Wn.2d 405, 429, 269 P.3d 207, 217 (2012). The evidence of prior abuse to C.T. was not admitted as character evidence against the defendant or any unidentified abuser; it does not fall under ER 404. The evidence of the prior abuse was evidence that Dr. Feldman relied upon to form his expert opinion regarding this case and also went to the credibility of the victim, not the perpetrator of the prior offense.

Dr. Feldman testified that the existence of this mark showed that C.T. had been previously subject to abuse or discipline that would likely explain C.T.'s initial story about how his hands became injured. Just because the evidence references a prior bad act committed against the victim, does not mean the court should strain to fit it into the confines of ER 404(b); the general evidentiary principles of relevance, probative value and prejudice should be applied. A more analogous guide to evaluating the admissibility of prior incident of assault in this case would be the admissibility of evidence of prior sexual assault of a child rape victim. "Merely because the evidence pertains to a sexual experience does not mean we must strain to fit it into the special confines of the rape shield statute. Rather, we must apply general evidentiary principles

of relevance, probative value and prejudice." State v. Carver, 37 Wn. App. 122, 124, 678 P.2d 842, 843-44 (1984).

The state did not attempt to link the loop whip cord injury to the defendant. Testimony was elicited that the injury could have taken place while C.T. was in Mexico with his grandparents and that Dr. Feldman did not ascertain who had inflicted the injury on C.T., that he didn't even ask C.T. who had done it. The defendant moved in limine and argued that it was not admissible under ER 404(b) as it could not be attributed to the defendant. However, as in Norlin, the evidence was admissible under ER 403. ER 403 requires a balancing of probative value against unfair prejudice. The court should not overrule such a balancing absent an abuse of discretion. Norlin, 134 Wn.2d at 583-84.

In Norlin, the evidence of the prior bad acts was admitted to contradict the defendant's claim that the injuries were caused by his accidently allowing the child to fall from a couch. They were prior bad acts that were admissible under 404(b) to show absence of accident. In the case at bar, the evidence was properly admitted to explain the statements and actions of the victim, not to address the claims of the defendant.

2. DR. FELDMAN'S OPINION TESTIMONY WAS NOT MANIFEST CONSTITUTIONAL ERROR AND THEREFORE CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.

Testimony of an investigating officer or examining doctor, if not objected to at trial, does not necessarily give rise to a manifest constitutional error. Manifest error requires an explicit or almost explicit witness statement on an ultimate issue of fact. State v. Kirkman, 159 Wn.2d 918, 938, 155 P.3d 125, 136 (2007). However, it has long been recognized that a qualified expert is competent to express an opinion on a proper subject even though he thereby expresses an opinion on the ultimate fact to be found by the trier of fact. The mere fact that the opinion of an expert covers an issue which the jury has to pass upon, does not call for automatic exclusion. Kirkman, 159 Wn.2d 918; 929, State v. Ring, 54 Wn.2d 250, 255, 339 P.2d 461 (1959). The court is to look at a number of factors to determine if the statements were impermissible: (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.' Kirkman, 159 Wn.2d 918, at 928.

In the case at bar, Dr. Feldman had testified at length about the photographs of the injuries to C.T.'s hands. He had pointed out

to the jury that the parallel lines of the burns intersected, that this could only have happened with multiple contacts with the burner element. Dr. Feldman had explained he received multiple versions of what C.T. said occurred and one explanation from the defendant. In his opinion, one version, he distinguished from all the other versions as C.T.'s history he had given that his mother had burned him, was more likely than that he had received the injuries as one accidental incident, which he indicated was highly unlikely. This was based on his medical expertise in viewing the injuries and would be help the jury in reaching their ultimate conclusion. Dr. Feldman's testimony did not address the credibility of the defendant or the victim. He stated in his expert opinion, the injuries in the photographs, of all the explanations that had been provided, accident was highly unlikely and the version provided that it was an intentional act was far more likely. He didn't say C.T. was telling the truth or that it was the only way it could happen, just that of the information he was provided, this explanation was more likely than the others. This was a comment on medical probability not veracity.

The ultimate decision as to C.T.'s credibility and the credibility of all who testified, was left with the jury. As in Kirkman,

the jurors received instructions that they were not bound by witness opinions, but were to form their own opinion as to credibility. In jury instruction 1, the jury was instructed, "You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each." Jury instruction 4 advised the jury they were not required to accept the experts' opinion but "determine the credibility and weight to be given to this type of evidence..." CP 34, 38. Juror are presumed to follow the court's instructions. Kirkman, at 937. The issue of C.T.'s credibility, and the credibility of all who testified, was left to the jury.

3. THERE IS NOTHING IN THE TRIAL RECORD TO OVERCOME THE PRESUMPTION THAT COUNSEL'S CONDUCT FELL WITHIN THE WIDE RANGE OF REASONABLE PROFESSIONAL ASSISTANCE.

To prevail in a claim of ineffective assistance of counsel, the defendant must demonstrate that (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) this deficient performance resulted in actual prejudice. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Both "prongs" must be

established to prevail on the claim. Under the latter prong, the defendant must show a reasonable probability that, except for counsel's unprofessional errors, the results of the proceedings would have been different. Hendrickson, 129 Wn.2d at 78.

Proving ineffective assistance of counsel, under the two-pronged Strickland rule of objectively poor performance and resulting actual prejudice, is not the same as second-guessing the acts or omissions of prior counsel with the luxury of hindsight. Strickland cautions reviewing courts not to succumb to the temptation of second-guessing defense counsel's particular acts or omissions:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland, 466 U.S. at 689. Rather, a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland v.

Washington, 466 U.S. at 689. A court may not sustain a claim of ineffective assistance if there was a legitimate tactical reason for the allegedly incompetent act. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). An ineffective assistance claim on direct appeal must be based upon, and cannot go outside, the record before the appellate court. State v. McFarland, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

In deciding whether to object, counsel must take into account the possibility that the objection will either antagonize the jurors or underscore the objectionable material in their minds. Bussard v. Lockhart, 32 F.3d 322, 324 (8th Cir. 1994). This court will not second-guess counsel's decision not to seek a limiting instruction. State v. Frederick, 34 Wn. App. 537, 545, 663 P.2d 122 (1983). "Counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Johnston, 143 Wn. App. 1, 19, 177 P.3d 1127, 1137 (2007). Whether to object to a question is a tactical decision. "This court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus

is on the defendant to rebut this presumption." In re Davis, 152 Wn.2d 647, 714, 101 P.3d 1, 37 (2004).

The defendant argues that there can be no legitimate trial tactic for not objecting under these circumstances. This is not the case. Dr. Feldman's opinion, allowed the defendant to impeach him through attacking his basis for the opinion and showing this was a case where everyone jumped to the conclusion that the defendant did something wrong. The defendant wanted to discredit all of Dr. Feldman's conclusions, "And we know, besides Dr. Feldman's expertise, his estimation of a week is wrong....He's wrong." RP 702, 704, 706, 708, 714, 727, 1562-1563, 1571 – 1575.

Also, Dr. Feldman's opinion testimony opened the door to allow a number of photographs and opinions from Dr. Wigren the court implied it would not have allowed. RP 1182.

To prevail on an ineffective assistance of counsel claim, the defendant must show that the alleged deficient behavior resulted in actual prejudice. In this case, that Dr. Feldman's statements should not have been excluded. It was relevant and appropriate expert opinion testimony. "Each Defendant, to show he was actually prejudiced by counsel's failure to move for suppression,

must show the trial court likely would have granted the motion if made. It is not enough that the Defendant allege prejudice—actual prejudice must appear in the record." McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251, 1256 (1995).

The defendant alleges trial counsel should have objected to Dr. Feldman's comments as testimony on an ultimate issue for the jury to decide. However, they were merely a summary of the testimony previously given. They were based on his expert opinion and an analysis of the injuries to C.T. and were permissible to aid the jury in reaching their ultimate conclusion; and therefore, for the same reasons they are not manifest constitutional error, they were proper testimony at trial.

IV. CONCLUSION

For the reasons stated above, the conviction should be affirmed.

Respectfully submitted on August 18, 2014.

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