

NO. 48127-8-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRUCE TOWNSEND, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry T. Costello

No. 14-1-01561-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion when it denied defendant's motion to remove Juror 1 for cause?
2. When defendant objected on relevancy grounds, can defendant now raise the issue on the basis of improper opinion testimony when it does not rise to a manifest error of constitutional magnitude?
3. Assuming arguendo that the error was preserved, was Detective Moss's testimony improper opinion testimony when he was merely describing the investigation?
4. Even if it was improper opinion testimony, was it harmless error when the jury was instructed that they were the sole judges of the credibility of witnesses?

B. STATEMENT OF THE CASE.

1. Procedure

Bruce Earl Townsend ("defendant") was charged with one count of rape of a child in the third degree on April 24, 2014. CP 1. An amended information was filed adding one count of unlawful delivery of a controlled substance to a person under the age of eighteen, which was alleged to be a domestic violence incident, on April 23, 2015. CP 4-5. A second amended information was filed on July 20, 2015, which removed the domestic violence incident designation from count II. CP 29-30.

The case was called for trial on July 7, 2015. 1 RP 3. The jury found defendant guilty of both crimes. 7 RP 919; CP 52 – 53. The trial court sentenced defendant to 68 months and 1 day. CP 70. Defendant filed a timely notice of appeal. CP 79.

2. Facts

S.G.'s mother and father divorced when she was in the 5th grade. 4 RP 439. S.G. would spend one week at her mother's and then one week at her father's after the divorce. 4 RP 440. S.G.'s mother started to date defendant and defendant eventually moved into S.G.'s mother's house. 4 RP 443.

In July of 2013, S.G. was at her mother's house in Graham, Washington. 4 RP 446. S.G. was born in 1998, and was 17 years old when she testified, so in 2013 she would have been roughly 15 years old. 4 RP 439.

Defendant set up a tent in the front yard of the house. 4 RP 450. He set up the tent because he and S.G. were going to smoke marijuana together. 4 RP 451.

S.G. took her laptop, a movie, a pillow, and blanket out to the tent. 4 RP 454. Defendant had already put sleeping bags in the tent. 4 RP 455. The two of them went out to the tent, smoked marijuana, watched a movie, and they both went to sleep. 4 RP 455.

S.G. woke up to defendant touching her. 4 RP 461. Defendant put his fingers inside S.G.'s vagina. 4 RP 462-463. Defendant moved his

fingers in and out of her vagina. 4 RP 465. Defendant was making a subtle grunt noise. 4 RP 467.

S.G. got up and went in the house. 4 RP 467. S.G. told her mother what happened and her mother freaked out. 4 RP 468. Defendant said he did not mean to touch her, that it was an accident and he was asleep. 4 RP 468-469.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO EXCUSE JUROR 1.

Under the Sixth Amendment and article 1, section 22 of the state constitution, a defendant is guaranteed the right to a fair and impartial jury. *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210, 219 (1987). A party may challenge a juror for cause. CrR 6.4(c)(1). RCW 4.44.150 through 4.44.190 govern challenges for cause. CrR 6.4(c)(2). Granting or denying a challenge for cause is within the discretion of the trial court, and will be reversed only for manifest abuse of discretion. *State v. Gilcrist*, 91 Wn.2d 603, 611, 590 P.2d 809 (1979). This is because the trial court is in a better position to observe the juror's demeanor and evaluate and interpret the juror's responses, which is better done by the trial court than by reading the cold record. *State v. Gosser*, 33 Wn. App. 428, 434, 565 P.2d 514 (1982).

Particular causes of challenge can be for: (1) “such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror” (implied bias); (2) “the existence of a state of mind on the part of the juror in reference to the action ... which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging” (actual bias); (3) or the existence of a physical defect that would render the juror incapable of performing his or her duties without prejudicing the substantial rights of the party challenging.

State v. Mak, 105 Wn.2d 692, 707, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986)(internal footnotes omitted).

Equivocal answers alone do not require a juror to be removed when challenged for cause, rather, the question is whether a juror with preconceived ideas can set them aside. *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190, 195-96 (1991). “On appeal, the party challenging the trial court’s decision on the objection must show more than a mere possibility that the juror was prejudiced.” *Id.* At 96 (*quoting* L. Orland & K. Tegland, §202, at 331).

In this case, Juror 1 indicated she could separate out her personal knowledge of other’s experiences and focus on the evidence presented. She had previously been on a jury and was able to look at the proof presented in that case:

PROSECUTOR: If you got seated on this jury you -- at the end you would be asked to decide it based on the facts that were presented through testimony, through exhibits. You think you would be able to separate these things that have -

- that you have some vague knowledge of with your cousins and make your decision just based on the evidence and not based on any of that?

PROSPECTIVE JUROR NO. 1: I think so. I served once before and we were able to not -- not something with this but in a different case, and we were able to -- I was able to make sure that I focused just on what evidence was actually presented and we were able to convict on certain things and not convict on other certain things because we just felt -- I realized the evidence just wasn't there to prove that and so we were able to kind of make sure we separated what there was proof of and what there wasn't.

2 RP 67-68. Defense counsel then questions Juror 1:

DEFENSE: On a case of this nature, which is an allegation of child rape, you, having known, or you knowing people in your life who said they too were molested as children, am I correct in saying you feel hesitancy in whether or not you can be a fair and an impartial juror meaning basing your decision absolutely only on the evidence that you hear in the case, not based on any residual feelings or thoughts that you may have regarding people that you know who have also been molested. Is that a fair statement? Am I correctly stating or articulating how you are feeling at this time?

PROSPECTIVE JUROR NO. 1: Yeah, I would say so.

DEFENSE: Do you think that if this was a case involving a theft or another drug charge, you would have no doubts about whether or not you could be fair and impartial; is that right?

PROSPECTIVE JUROR NO. 1: Yes.

DEFENSE: But right now as you sit here, because of the allegation in this case, you have doubts about whether you can be fair or impartial; is that a fair statement?

PROSPECTIVE JUROR NO. 1: Yes, possibly.

2 RP 69-70. Based on defense's questioning, Juror 1 indicated some hesitancy about being fair and impartial. Juror 1 goes on to say that it is *possible* that she could not be fair and impartial. Defense continues with questioning Juror 1:

DEFENSE: My next question, it's very important, what I need to know -- we need to know is if you were selected as a juror and you were sitting and deliberating, do you have concerns that somewhere in the back of your mind you may be thinking about this cousin who's had a very difficult life because of the trauma that she suffered, that somehow that might influence or color your decision? Do you have concerns that may be -- that those thoughts would be in the back of your mind as you are deliberating?

PROSPECTIVE JUROR NO. 1: There's a possibility that, yeah, it would be there.

2 RP 73. Again, Juror 1 indicates the *possibility* that she may have concerns in the back of her mind that might influence her decision. As the Court held in *Noltie*, defendant has to show more than a *mere possibility* that the juror is actually biased. *Noltie*, 116 Wn.2d at 831 (emphasis added).

The prosecutor then asked if Juror 1 could make a decision just based on the evidence in the case and Juror 1 indicated that she would try her best to do so:

PROSECUTOR: And when Ms. Ko asked you do you think it could -- you would think about it and it could color your decision, you said yeah, that's possible. You know, when we pick jurors, obviously, people have all different

kinds of life experiences and things they have done, and we want a jury with all those things. You are allowed to bring those into the jury room in deliberations. The question is, can you make a decision based on the evidence and not based on these other things? Of course if it's similar, things can come into your mind and it's not as if you need to completely shut it off. Would you make a decision just based on the evidence or do you think that those things would effect your decision?

PROSPECTIVE JUROR NO. 1: I would do my best to try to stick to just the evidence that's presented. Like I said, there's always thoughts that might trigger back to that if I think about it, but I would try and do my best just to stick with just the evidence that's presented and stick with the case from there.

2 RP 74-75.

After both the prosecutor and defense made argument, the trial court denied the defense request to remove Juror 1 for cause. 2 RP 77-78. Neither defendant nor the prosecutor exercised a preemptory challenge to excuse Juror 1 and she was impaneled on the jury.

At best, defendant can only show the slight possibility that Juror 1 was biased based on her knowledge of a friend and her cousins who had told her they had been molested, but even this is an attenuated argument because Juror 1 expressly stated that she would try to stick to the evidence presented in court.

Juror 1's answers are not similar to the juror's answers in *State v. Fire*, 100 Wn. App. 722, 998 P.2d 362 (2000), *rev'd on other grounds*¹, 145 Wn.2d 152 (2001) as defendant cites in his brief. Brief of Appellant, p. 9-10. The juror in *Fire* demonstrated clear bias calling the defendant a baby raper that should be severely punished. *Id.* At 724. In this case, Juror 1 expressed some concern about sitting on a case with this subject matter because of a friend and her cousins having previously been molested. Based on further questioning, Juror 1 indicated that she could follow the evidence in the case. Juror 1 did not demonstrate actual bias based on her answers to the parties' questioning.

The trial court did not abuse its discretion when it denied the defense's request to remove Juror 1 for cause.

2. DEFENDANT WAIVED THE ISSUE REGARDING DETECTIVE MOSS'S COMMENT BY FAILING TO OBJECT AT TRIAL ON THE BASIS NOW ARGUED AND FAILS TO DEMONSTRATE THAT THE ISSUE RISES TO MANIFEST ERROR OF CONSTITUTIONAL MAGNITUDE OR THAT THE COMMENT REALLY RISES TO IMPROPER OPINION TESTIMONY.

Pursuant to RAP 2.5(1), a defendant cannot raise an error for the first time on appeal unless the appellant demonstrates that the error is

¹ The Supreme Court never reached the issue of whether the juror in *Fire* showed actual prejudice as the Court of Appeals held because the Supreme Court did not reach the issue and reversed the Court of Appeals because the defense exercised a preemptory challenge to remove the juror at issue. *Fire*, 145 Wn.2d at 157.

manifest and is truly of constitutional dimension. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). To be manifest as required by RAP 2.5(a)(3), a showing of actual prejudice is required. *Id.* at 935. There must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences apparent on the record that should have been reasonably obvious to the trial court. *Id.* The Court will not assume the alleged error is of constitutional magnitude. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Only if the defendant can demonstrate that the error is both constitutional and manifest, does the burden shift to the State to prove that the error was harmless. *State v. Bertrand*, 165 Wn. App. 393, 401, 267 P.3d 511 (2011).

A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The court has "steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal." *Bellevue Sch. Dist. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967). A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Stevens*, 58 Wn. App. 478, 485-6, 794 P.2d 38 (1990); *State v. Thetford*,

109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). If the specific basis for the objection at trial is not the basis the defendant argues at the appellate level, then the defendant has lost their opportunity for review. *Guloy* at 422.

The testimony of an investigating officer, if not objected to at trial, does not necessarily give rise to a manifest constitutional error. *Kirkman*, 159 Wn.2d at 938. "Manifest error requires an explicit or almost explicit witness statement on an ultimate issue of fact." *Id.* Detective Moss's statement in this case is not an explicit statement on an ultimate issue of fact. Defendant's objection was relevance, not that it was an improper opinion or went to an ultimate fact. 6 RP 768.² The Court should decline to address this issue as defendant is now raising a new ground on appeal.

Even if the Court chooses to address this claim, defendant misconstrues this as improper opinion testimony based on a misreading of *Kirkman*. In his brief, defendant provides the quote from a case:

He seemed very responsive to my questions, he seemed very articulate about the events that happened and their sequence. And I felt he was – seemed pretty honest.

² Defense counsel previously objected to a question as improper opinion testimony during Detective Moss's testimony so counsel was aware of the difference between relevance and improper opinion testimony. 6 RP 762.

Brief of Appellant, p. 14. Defendant attributes this quote and the Court's analysis to "*Kirkman*, 159 Wn.2d at 36." Brief of Appellant, p. 14. This quote and its analysis actually appears to come from *State v. Schultz*, 141 Wn. App. 1017, page *9 (2007)(unpublished), which cites to *Kirkman*, but this quote does not actually appear in the *Kirkman* decision.

In *Kirkman*, the Court noted that none of the witnesses actually made an explicit statement on the credibility of the defendant or the victims. *Kirkman*, 159 Wn.2d at 938. The Court found that

The challenged portion of Kerr's *testimony is simply an account of the interview protocol he used to obtain A.D.'s statement. Kerr did not testify that he believed A.D. or that she was telling the truth. Therefore, no manifest error occurred that could relieve Kirkman of his duty to object.*

Id at 931 (emphasis added).

When reviewing the entirety of the questioning, Detective Moss was not offering his opinion on defendant's credibility, but was merely describing his investigation, similar to the witnesses in *Kirkman*:

Q Do you recall [S.G.] specifically stating Katie's name during the interview?

A Katie?

Q Katheryn Varney?

A I believe she did, yes.

Q Did you ever interview or contact the cousin or the cousin's boyfriend?

A No.

Q Why did you not do that?

A Probably because I didn't have a name.

Q What is the point of contacting disclosure witnesses in these types of cases?

A To seek additional information, to look for consistency in the story.

Q Would it have been helpful for you to have contacted the cousin and the cousin's boyfriend?

A I can only guess.

Q Is that kind of information always dispositive?

A I'm sorry?

Q Is it always dispositive?

DEFENSE: Objection to the form of the question.

Dispositive of what?

THE COURT: I am going to sustain the objection. Please rephrase it.

PROSECUTOR: Sure.

BY PROSECUTOR:

Q How -- what role do those interviews play in your investigation in these types of cases?

A In most cases it supports the story of the victim.

DEFENSE: Your Honor, I'm going to object to that response and move to strike. What happens in most cases is not relevant to this case.

THE COURT: Overruled. The answer will stand.

Next question.

PROSECUTOR: Thank you.

6 RP 767-768.

Detective Moss's testimony amounts to a statement that sometimes it is helpful to contact witnesses disclosed in an interview in order to interview other witnesses who may support the victim's disclosure and show that victim's story has been consistent. His testimony was not that the S.G seemed honest or credible or that he did not need to talk to the cousin or cousin's boyfriend because he believed S.G.'s story. The record

does not support that Detective Moss vouched for S.G's credibility or that he gave improper opinion testimony.

Even if the Court were to find that Detective Moss's statement was improper, any error is harmless. The jury in this case was instructed that they are the sole judges of the credibility of each witness. CP 33. Jurors are presumed to follow the court's instructions. *Kirkman*, 159 Wn.2d at 937. The jury judged the credibility of the witnesses in this case and found defendant guilty.

Detective Moss's statement was not objected to as improper opinion testimony and even if it were, it is not improper opinion testimony. The Court should affirm the jury's verdicts.

D. CONCLUSION.

The trial court properly exercised its discretion when it denied defendant's motion to remove Juror 1 for cause. Juror 1 agreed that she would try her best to base her decision on the facts in the case. Defendant did not object to Detective Moss's testimony as improper opinion testimony. The Court should decline to review this issue. Assuming *arguendo* that the Court does consider this issue, defendant cannot show it was improper opinion testimony as it was only a description of his

interview technique. It would also be harmless error in this case as the jury was instructed that they are the sole judges of the credibility of the witnesses. The Court should affirm the jury's verdicts in this case.

DATED: March 29, 2016.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3-30-16 Therese Kar
Date Signature

PIERCE COUNTY PROSECUTOR

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