94658-2

Case No. 75164-6-I

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

RONALD WAFFORD,

Petitioner.

PETITION FOR REVIEW

MARK D. MESTEL
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Ronald Wafford

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I. IDENTITY OF PETITIONER

Ronald Wafford, defendant in the trial court, is the petitioner herein.

II. CITATION TO COURT OF APPEALS DECISION

On May 15, 2017, Division I of the Court of Appeals issued its decision denying the defendant's appeal. A true and accurate copy of the Court of Appeal's decision will be found in Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred when it allowed the State to introduce hearsay evidence to rebut assertions made by defense counsel during her opening statement.

IV. GROUNDS FOR ACCEPTING REVIEW

RAP 13.4(b) reads in relevant part:

> (b) Considerations Governing Acceptance of Review. 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

Mr. Wafford maintains that this Court should grant review under this subsection for reasons set out more fully in section VI.

V. STATEMENT OF THE CASE

When Mariyah Wafford heard rumors in 2005 that her husband, Ron Wafford, had touched her eight-year-old daughter, TH, she took steps to protect her and her older daughter, HF. RP 1264-68, 482 Mrs. Wafford briefly discussed the rumor with her daughters, primarily HF, and the matter was reported to the police. A child forensic interview specialist, Nova Robinson, interviewed TH at Dawson Place, the Snohomish County Center for Child Advocacy. TH, during this videotaped interview with Ms. Robinson, did not make a disclosure deemed sufficient to either charge Mr. Wafford with a crime or to continue the investigation. Mr. Wafford, who had moved out of the home during the initial investigation, moved back into the home.

Seven years later, in 2012, another allegation against Mr. Wafford was reported, again allegedly involving TH. Once again TH was interviewed at Dawson Place. Again, she denied that her stepfather had ever touched her inappropriately. RP 665-6 And again, no charges were filed.

In 2014, TH, now 17 years old, made an accusation against her stepfather claiming that Mr. Wafford had been sexually abusing her from the time she was six until the present. Again, she was interviewed at Dawson Place and by the police. This time the authorities determined that TH's accusations were sufficiently credible to justify the filing of charges against Mr. Wafford. The Snohomish County Prosecutor's Office filed a two count Information on March 11, 2015. CP 250-51 The Information charged Mr. Wafford with Rape of a Child in the First Degree and Child Molestation in the First Degree. The named victim was TH. After the filing of that Information, but before the matter went to trial, TH's older sister, HF, came forward and stated that she also had been sexually abused by

her stepfather, Ron Wafford. RP 814 The State then filed an Amended Information. In the first three counts: Rape of a Child in the First Degree, Child Molestation in the First Degree, and Incest in the First Degree, TH was the named victim. In counts four through six: Rape of a Child in the First Degree, Child Molestation in the First Degree, and Child Molestation in the Third Degree, HF was the named victim. CP 17 Mr. Wafford entered pleas of not guilty and the matter proceeded to a jury trial.

Prior opening statements the Court conducted a child hearsay hearing. When Ms. Robinson interviewed TH in 2005, TH was 8 years old. The State sought to introduce the videotaped interview as child hearsay. After listening to the testimony and viewing the videotape the Court concluded that TH had not made any statements that fell within the child hearsay statute and denied the State's motion to admit the videotape. **RP 82** When asked by the prosecutor to reconsider Judge Appel stated:

Now, I won't add very much to my remarks of yesterday, perhaps just a little bit. I don't think it is at all clear that the legislature was attempting to make a vehicle by which another person's description, if that's what this was, could be attributed to a child witness. But even if that is so, even if the purpose of this statute was so as to permit the mere assent of a child to another person's description of sexual contact, I don't think that would make a difference in this case, because there simply isn't really a description of sexual contact contained within the statement.

RP 200.

The State began its opening statement by telling the jury:

> It was a close call, but he got away with it the first time. At age eight, TH was confused, anxious, uncertain, and either unable or unwilling to articulate what it was that her stepfather had been doing to her. **RP 426**

In her opening statement defense counsel took the jury through the various investigations and told them that TH did

not accuse Ron of anything until 2014. Regarding the 2005 video clip counsel stated:

> And she brought both HF and TH to Dawson Place in 2005. Nova Robinson interviewed on video TH and built rapport and made sure she was comfortable and made sure she knew she wasn't in trouble and made all of the things that in her training she's supposed to do to create an environment where, if a crime was happening to a child, that child would feel safe to disclose. But TH denied that anything was happening to her. She knew in third grade at age eight what was bad touch, good touch, and she denied that any of those things were happening to her. RP 444-5

The State did not object during defense counsel's opening.

Following the defense opening the deputy prosecutor asked the Court to reconsider and to admit the video tape from the 2005 forensic interview. It based its request on its contention that defense counsel "opened the door" when she made the remarks set out above. Defense counsel explained the context for her remarks, telling the Court that she was advising the jury that TH in 2005 denied that her step father touched her in an inappropriate manner. However, Judge Appel sided with

the State and held that the State would be allowed to introduce into evidence a portion of the taped forensic interview. A transcript of the portion admitted as Exhibit 31 is attached hereto and incorporated by reference in Appendix B.

During the defense case, Ron denied ever touching either girl inappropriately. He and Mariyah provided the jurors with reasons why TH would lie about her accusations. They recounted problems with TH's behavior and how TH wanted to move from their home to her boyfriend's home. **RP 1408-10, 1549-51** The defense brought out that HF repeatedly had denied being victimized by Ron and only came forward when she was told that a disclosure by her would enhance TH's credibility. The defense also introduced testimony that HF's disclosure only came after her parents began pressuring her to make payments on money that they lent to her. **RP 1583-84** The defense called several other witnesses to substantiate its theory of the case. Witnesses testified about problems in the relationship of the alleged victims and the defendant. It brought

out the denials by both step daughters to the investigators and discussed the agendas of the girls.

The jury convicted on Count 2, but could not reach a unanimous verdict on counts 1, 3-4. Judge Appel declared a mistrial on these counts and sentenced Mr. Wafford to 68 months in prison. Mr. Wafford filed a timely appeal. Division One affirmed his conviction on May 15, 2017.

VI. ARGUMENT AS TO WHY REVIEW SHOULD BE GRANTED.

Mr. Wafford asks this Court to accept review of his case on the following ground: (1) The decision of the Court of Appeals conflicts with a decision of the Supreme Court.

The Court of Appeal's decision can be summarized as holding that the trial court has discretion to admit otherwise inadmissible evidence offered by the prosecution, to rebut assertions made by defense counsel during opening statement.

1. The decision conflicts with a decision from the Supreme Court.

Mr. Wafford relies on two Supreme Court decisions to support his contention that the Court of Appeals Opinion in the case at bar conflicts with two prior decisions. He also contends that the Court of Appeals misinterpreted the holding in State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984), the authority on which the Court of Appeals based its decision in this case.

In Corson v. Corson, 46 Wash. 2d 611, 283 P.2d 673 (1955), one issue before the Court was whether evidence should have been allowed to rebut statements made by opposing counsel in his Opening Statement. The Court ruled that rebuttal evidence was not admissible even if counsel had "opened the door," stating:

> Respondent, however, argues that the issue of predivorce conduct was opened up by counsel for appellant because of certain allegations in his opening statement, and, therefore, respondent was entitled to rebut these allegations. We think otherwise. If appellant did in fact open up the question of the predivorce conduct of the parties by remarks made in her counsel's opening statement, this did not justify the trial court in receiving further testimony on this issue, offered in rebuttal by respondent. Erroneous admission of evidence is not cured by the reception of

> additional inadmissible evidence, even though the latter is admitted to counter the possible prejudicial effect of the former. In making inadmissible and prejudicial remarks in the opening statement for appellant, counsel should have been stopped by the court, advised to desist, and told that such matters would be disregarded by the court. The same disposition should have been made of the efforts at rebuttal by counsel for respondent.

Under Corson statements made during opening statement do not open the door for otherwise inadmissible evidence and the video clip offered by the State in this case would have been rejected.

The issue in State v. Whelchel, 115 Wash.2d 708, 801 P.2d 948 (1990) took on a somewhat different analysis as defense counsel addressed the contents of a tape recording of co-defendants which it anticipated, based on the trial court's pretrial ruling, would be admitted during the State's case. The State, although not having mentioned the tape recording during its opening, did admit it during its case in chief. On appeal the Supreme Court ruled the tape recording inadmissible. The State sought to justify its admission based on invited error, that

defense counsel had "opened the door" by mentioning the tape recording during its opening. The Supreme Court rejected this argument stating:

> It is well settled that any party may, in opening statement, refer to admissible evidence expected to be presented at trial. More specifically, defense opening statements will generally cover what the defense expects to be able to prove, an outline of the expected weaknesses in the State's anticipated proof, or may simply remind the jurors to reserve judgment until all the evidence is in. Defense counsel may also use the opening statement to emphasize the concept of reasonable doubt. This means, in part, telling the jury the ways that defense counsel claims that he or she will be able to demonstrate uncertainties in the State's case.

State v. Whelchel, 115 Wash. 2d at 727.

The Court of Appeals in its decision attempts to distinguish Corson and Whelchel which support Mr. Wafford's position, relying instead on State v. Rupe. It interprets Rupe to give the trial judge discretion to admit inadmissible evidence whenever the Judge feels it is necessary to correct a perceived unfairness created by remarks made during opening statement.

Rupe can be harmonized with Corson and Whelchel, but not as interpreted by the Court of Appeals and not as authority for the legal principle decided by the Court. In Rupe, defense counsel stated in his opening statement that a phone call to the bank, answered by the husband of one of the victims of the shootings, would show that he likely was the shooter. The State admitted the 911 call.[1] One issue addressed on appeal was whether the trial court erred by allowing that call to be admitted into evidence. The Supreme Court held that the call was relevant, under ER 403, though it is questionable whether the defense counsel's remarks in opening statement was essential to that holding. The discovery of two women who had been shot, and the report of this to a caller, would seem to be relevant in a murder trial regardless of defense counsel's opening statement. The husband's statements to the caller, made just after finding

[1] From the Court's opinion, it is not clear whether the defense objected to the admission of the 911 call. However, since it was reviewed on appeal without any mention that the defense failed to object, it is fair to presume that it was admitted over the defense objection.

the two wounded women, fall with ER 803(a)(2)(excited utterance- "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.") The issue presented to the Supreme Court does not appear to be the relevance of the phone call, but whether its prejudicial impact caused by its emotional content, outweighed its probative effect. Such a determination is clearly within the trial court's discretion and subject to an abuse of discretion standard.

Rupe mentions neither Corson nor Whelchel. Rupe does not hold that statements made by defense counsel during opening statement justify the admission of inadmissible evidence. Rupe does not hold that the prosecution can lie in wait hoping that defense counsel will make an expansive statement during opening, fail to object to that statement, and then introduce otherwise inadmissible hearsay to rebut it. By so interpreting it in this manner the Court of Appeals erroneously rejected the language from Corson and Whelchel that rejected

the argument that defense counsel can open the door through remarks made during opening statement. As the Court routinely advises jurors during preliminary instructions and as Judge Appel did in Mr. Wafford's trial: The lawyers' remarks, statements, and arguments during this trial are intended to help you understand the evidence and apply the law. **They are not evidence, however, and you should disregard any statements or arguments by the lawyers which are not supported by the evidence or by the law as I give it to you. RP 421** (emphasis added). If statements made during opening are not evidence, they should not "open the door" to otherwise inadmissible evidence. See also, 5D Karl B. Tegland, Washington Practice: Evidence § 103 (2003). The remedies mentioned in Corson provide sufficient protection to a party arguably aggrieved by the opponent's opening. Rupe should not be read as authority that statements made during opening can "open the door" to otherwise inadmissible evidence and it was error for the Court of Appeals to do so.

Additionally, the video clip admitted by the Court did not rebut the assertions made by defense counsel. In the case at bar defense counsel did no more than that which the Court approved in Whelchel; she discussed the evidence that she believed would be admitted at trial. It is important to remember that neither TH, Nova Robinson, the forensic interviewer, Det. Pitocco, the lead investigator, nor Judge Appel, viewed TH's statement as describing an act of inappropriate sexual contact. TH, during her trial testimony denied making a disclosure. [2] Ms. Robinson[3] and Det. Pitocco[4] also testified that TH did not make a disclosure. What Ms. Goykhman told the jurors during her opening statement was that TH, in 2005, denied that anything was happening to her, that she denied that she was being touched in a bad way. As noted by the Supreme Court in Whelchel, defense counsel has an obligation to show the weaknesses in the State's case during its opening statement. In

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[2] RP 699
[3] RP 561, 628, 648, 699
[4] 489

the case at bar defense counsel wanted to establish from the outset that TH had denied being touched inappropriately by her step-father. The video clip did not rebut this. TH stated during that interview that **no one had touched her where it's not okay to be touched**. Her acquiescence to Ms. Robinson's question, **whether anyone ever asked her to do anything to any parts of their body where it is not okay to be doing things**, did not rebut defense counsel's remarks. Had the court followed Corson and Whelchel it would have excluded the video clip.

VII. CONCLUSION

The Court of Appeals reliance on State v. Rupe, supra was erroneous. Its decision in the case at bar conflicts with the Supreme Court's decisions in State v. Whelchel and Corson v. Corson, supra. State v. Rupe did not hold that statements made during opening statement open the door to otherwise inadmissible evidence. The Court of Appeals erred when it so interpreted Rupe. This Court should accept review, limit Rupe

to its facts, and reverse Mr. Wafford's conviction and order a new trial.

DATED THIS 13 DAY OF JUNE, 2017.

MARK D. MESTEL, WSBA# 8350
Attorney for Appellant

VIII. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Review was served upon the following by United States Postal Service, addressed to:

1. Court of Appeals
   Division One
   600 University Street
   One Union Square
   Seattle, WA 98101

2. Snohomish County Prosecutor
   3000 Rockefeller Ave
   M/S 504
   Everett, WA 98201

3. Ronald Wafford, DOC#389997
   Coyote Ridge Corrections Center
   PO Box 769
   Connell, WA 99326

DATED this 13 day of June, 2017.

Brandy L. Ellis

Brandy L. Ellis, Legal Assistant

APPENDIX 'A'

State v. Wafford

Court of Appeals of Washington, Division One

April 10, 2017, Oral Argument; May 15, 2017, Filed

No. 75164-6-I

Reporter
2017 Wash. App. LEXIS 1177 *

THE STATE OF WASHINGTON, *Respondent*, v. RONALD WAFFORD, *Appellant*.

Prior History: [*1] Appeal from Snohomish Superior Court. Docket No: 15-1-00624-4. Judge signing: Honorable George F Appel. Judgment or order under review. Date filed: 04/29/2016.

Core Terms

door, opening statement, recording, trial court, interview, video, opened, rebut, inadmissible evidence, molestation, first degree, inadmissible, admissible, admitting, hearsay, argues, sexual abuse, contends, admitting evidence, defense counsel, sexual

Case Summary

Overview

HOLDINGS: [1]-Court did not abuse its discretion in admitting into evidence a portion of the video recording it had previously excluded because the recording was not hearsay under *Wash. R. Evid. 801(d)(1)(ii)* and the door had been opened by a comment made by counsel during her opening statement; it is within a court's discretion whether the door is opened to otherwise inadmissible evidence by statements of counsel and, if so, what, if any, remedy is appropriate; [2]-Counel was not ineffective because her failure to request a limiting instruction could be considered a legitimate trial tactic.

Outcome
Conviction affirmed.

LexisNexis® Headnotes

Evidence > Admissibility > Procedural Matters > Curative Admissibility

Criminal Law & Procedure > Trials > Opening Statements

HN1[] It is well settled in Washington that a party that introduces evidence of questionable admissibility runs the risk of opening the door to the admission of otherwise inadmissible evidence by an opposing party. It is within a trial court's discretion whether the door is opened to otherwise inadmissible evidence by statements of counsel and, if so, what, if any, remedy is appropriate.

Criminal Law & Procedure > Trials > Judicial Discretion

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

HN2[] A decision to admit evidence lies within the sound discretion of a trial court and should not be overturned absent a manifest abuse of discretion. An abuse of discretion exists when the trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. The range of discretionary choices is a question of law and a judge abuses his or her discretion if the discretionary decision is contrary to law.

Evidence > Admissibility > Procedural Matters > Curative Admissibility

HN3[] A party may open the door to otherwise inadmissible evidence by introducing evidence that must be rebutted in order to preserve fairness and determine the truth. The party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and the party who is the

first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence.

Criminal Law & Procedure > Trials > Bench Trials

Criminal Law & Procedure > Trials > Opening Statements

Evidence > Admissibility > Procedural Matters > Curative Admissibility

Criminal Law & Procedure > Trials > Judicial Discretion

HN4[] In the context of a bench proceeding, a trial court abuses its discretion by admitting irrelevant and prejudicial evidence in response to an improper opening statement when other more effective means of ensuring a fair proceeding are available. Corson v. Corson does not hold that opening statements can never open the door to otherwise inadmissible evidence.

Criminal Law & Procedure > Trials > Judicial Discretion

Evidence > Admissibility > Procedural Matters > Curative Admissibility

Criminal Law & Procedure > Trials > Opening Statements

Evidence > Relevance > Relevant Evidence

HN5[] A trial court does not abuse its discretion by admitting otherwise irrelevant evidence in response to remarks made during opening statement.

Criminal Law & Procedure > Trials > Opening Statements

Criminal Law & Procedure > Trials > Witnesses

Criminal Law & Procedure > Trials > Jury Instructions > Curative Instructions

Evidence > Admissibility > Procedural Matters > Curative Admissibility

Evidence > Types of Evidence > Documentary Evidence

HN6[] Whether an issue arises from a statement of counsel or the testimony of a witness is immaterial to the question faced by a trial judge: to what extent, if any, has the statement compromised the fairness of a trial and what, if any, response is appropriate. In answering this question, the trial judge should have a range of options at his or her disposal. The judge may admonish a jury to disregard certain statements or reiterate its instruction that opening statements are not evidence. The judge may allow testimony about otherwise inadmissible evidence, while continuing to exclude an exhibit or document which contains the evidence. Or the judge may find that a party has opened the door to otherwise inadmissible evidence. The appropriate response is that, which in the discretion of the trial judge, best restores fairness to a proceeding.

Evidence > ... > Exemptions > Prior Statements > Consistent Statements

HN7[] A statement is not hearsay if a declarant testifies at a trial or hearing and is subject to cross examination concerning the statement, and the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. *Wash. R. Evid. 801(d)(1)(ii)*.

Evidence > Admissibility > Procedural Matters > Curative Admissibility

Criminal Law & Procedure > Trials > Judicial Discretion

HN8[] A party may open the door to evidence that is otherwise inadmissible, subject to a trial court's discretion.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Ineffective Assistance of Counsel

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN9[] An appellate court reviews an ineffective assistance of counsel claim de novo. A defendant has the burden of establishing ineffective assistance of counsel. The performance of an attorney is not deficient if it can be considered a legitimate trial tactic.

Headnotes/Syllabus

Summary

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: Prosecution for two counts of first degree rape of a child, two counts of first degree child molestation,

and one count each of first degree incest and third degree child molestation.

Superior Court: After entering a directed verdict in favor of the defendant on the charge of third degree child molestation and one of the charges of first degree child molestation, the Superior Court for Snohomish County, No. 15-1-00624-4, George F.B. Appel, J., on April 29, 2016, entered a judgment on a verdict finding the defendant guilty of first degree child molestation.

Court of Appeals: Holding that the trial court did not abuse its discretion by ruling that the door was opened to the admission of otherwise inadmissible evidence by remarks made by defense counsel in opening statement and that the defendant did not prove his claim of ineffective assistance of trial counsel, the court *affirms* the judgment.

Headnotes

WASHINGTON OFFICIAL REPORTS HEADNOTES

WA[1][↓] [1]

Criminal Law > Evidence > Discretion of Trial Court > Admissibility of Evidence.

The decision to admit evidence in a criminal trial lies within the sound discretion of the trial court.

WA[2][↓] [2]

Criminal Law > Evidence > Review > Standard of Review.

A trial court's decision to admit evidence in a criminal trial will not be disturbed by a reviewing court absent a manifest abuse of discretion. A trial court manifestly abuses its discretion if its exercise of discretion is manifestly unreasonable or is based on untenable grounds or reasons. The range of discretionary choices available to a trial court is a question of law, and the court commits an abuse of discretion if the discretionary decision is contrary to law.

WA[3][↓] [3]

Evidence > Opening the Door > Introduction of Inadmissible Evidence > Effect.

By introducing evidence that must be rebutted with other evidence in order to preserve fairness and to determine the truth, a party may open the door to otherwise inadmissible evidence.

WA[4][↓] [4]

Criminal Law > Evidence > Opening the Door > Opening Statement Remarks by Defense Counsel > Effect > Discretion of Court.

Remarks made by defense counsel in opening statement in a criminal trial can be sufficient to open the door to otherwise inadmissible evidence. It is within the trial court's discretion to determine whether counsel's remarks have opened the door to otherwise inadmissible evidence and to determine what remedy, if any, may be appropriate, including allowing admission of the otherwise inadmissible evidence. The appropriate response is the one that, in the discretion of the trial court, best restores fairness to the proceeding.

WA[5][↓] [5]

Criminal Law > Right to Counsel > Effective Assistance of Counsel > Review > De Novo.

A criminal defendant's challenge to the effectiveness of trial counsel is reviewed de novo.

WA[6][↓] [6]

Criminal Law > Right to Counsel > Effective Assistance of Counsel > Burden of Proof.

A convicted defendant claiming ineffective assistance of counsel has the burden of proof.

WA[7][↓] [7]

Criminal Law > Right to Counsel > Effective Assistance of Counsel > Trial Strategy > Tactics > In General.

A legitimate trial tactic by defense counsel is not deficient performance and will not support a claim of ineffective assistance of counsel.

WA[8][↓] [8]

Criminal Law > Right to Counsel > Effective Assistance of Counsel > Failure To Request Instruction > Limiting Instruction > Tactical Decision.

Defense counsel's failure to request a limiting instruction on damaging evidence will not support a claim of ineffective assistance of counsel if the failure may be viewed as a legitimate trial tactic.

SPEARMAN, J., delivered the opinion for a unanimous court.

Counsel: Mark D. Mestel (of *Mark D. Mestel, Inc., PS*), for appellant.

appeals.

DISCUSSION

Opening the Door to Recorded Interview

¶10 Wafford argues that the trial court erred when it found that his attorney's opening statements opened the door to the admission of T.H.'s 2005 recorded interview. He primarily contends that as a matter of law, comments made by counsel during opening statements cannot open the door to otherwise inadmissible evidence.

WA[1,2][↑] [1, 2] ¶11 *HN2*[↑] The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned absent a manifest abuse of discretion. *State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997)*. An abuse of discretion exists "[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons ... ." *State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)*. The range of discretionary choices is a question [*6] of law, and the judge abuses his or her discretion if the discretionary decision is contrary to law. *State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001)*.

WA[3][↑] [3] ¶12 *HN3*[↑] A party may open the door to otherwise inadmissible evidence by introducing evidence that must be rebutted in order to preserve fairness and determine the truth. *State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)*.

> "(1) [A] party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and (2) a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence."

State v. Jones, 144 Wn. App. 284, 298, 183 P.3d 307 (2008) (quoting 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 103.14, at 66-67 (5th ed. 2007)).

¶13 Wafford argues that only the introduction of evidence can open the door to otherwise inadmissible evidence. He contends that because a comment made during an opening statement is not evidence, it cannot open the door. Wafford relies on *State v. Whelchel, 115 Wn.2d 708, 801 P.2d 948 (1990)* to support his argument, but the case is not helpful. In *Whelchel*, the trial court found a recording admissible prior to trial. The State did not discuss the recording in opening statements, but defense counsel did. When the recording was ruled inadmissible on appeal, the Supreme Court [*7] rejected the State's argument that defense counsel opened the door by discussing the recording in opening statements. *Id. at 728*. Given that the evidence in question was admissible when the parties made opening statements, *Whelchel* does not stand for the broad proposition that opening statements cannot open the door.

¶14 Wafford also relies on *Corson v. Corson, 46 Wn.2d 611, 283 P.2d 673 (1955)*, but to the extent the case is relevant, it does not support his argument. In *Corson*, the trial court held a show cause hearing to determine whether a father should be held in contempt for failure to pay child support as previously ordered. In the course of the hearing, the trial court admitted evidence of the mother's predivorce conduct. On appeal, the Supreme Court concluded that the trial court erred in admitting the evidence. It rejected the father's argument that the evidence was necessary to rebut remarks made by the mother in opening statements. The court found that even if the mother had introduced the subject of predivorce conduct in her opening statement, it did not justify receiving further testimony on the issue because the trial court had other, more appropriate means of addressing the matter. The court stated:

> In making inadmissible and prejudicial [*8] remarks in the opening statement for [the mother], counsel should have been stopped by the court, advised to desist, and told that such matters would be disregarded by the court. The same disposition should have been made of the efforts at rebuttal by counsel for [the father].

Id., at 616-17.

¶15 Our reading of *Corson* is that *HN4*[↑] in the context of a bench proceeding, a trial court abuses its discretion by admitting irrelevant and prejudicial evidence in response to an improper opening statement when other, more effective means of ensuring a fair proceeding are available. The case does not hold, as Wafford suggests, that opening statements can never open the door to otherwise inadmissible evidence.

¶16 To resolve whether opening statements can open the door, we find *State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984)* (plurality opinion) to be more on point and thus more persuasive. In *Rupe*, defense counsel suggested in opening statement that the victim's husband, rather than the defendant, was responsible for her murder and that of one other person. As a result of those remarks, the State moved to admit an emotional recording of the victim's husband calling 911. The trial court admitted the recording to rebut the inference that the victim's husband was culpable. *Id. at 687*.

¶17 On appeal, Rupe contended [*9] that the trial court erred in admitting the evidence because the probative value of the recording was far outweighed by its prejudicial effect. The

Mark K. Roe, Prosecuting Attorney, and Mary K. Webber, *Deputy*, for respondent.

Judges: Authored by Michael Spearman. Concurring: Ronald Cox, Stephen Dwyer.

Opinion by: Michael Spearman

Opinion

¶1 SPEARMAN, J. — *HN1*[↑] It is well settled in Washington that a party who introduces evidence of questionable admissibility runs the risk of opening the door to the admission of otherwise inadmissible evidence by an opposing party. It is less clear whether the rule is triggered only by the introduction of questionable evidence or whether a statement by counsel regarding such evidence is sufficient. In this case, appellant Ronald Wafford contends the trial court erred when it found the door was opened by a comment made by his counsel during her opening statement and admitted evidence it had previously ruled inadmissible. We conclude that it is within the trial court's discretion whether the door has been opened to otherwise inadmissible evidence by statements of counsel and, if so, what, if any, [*2] remedy is appropriate. Here, the trial court did not abuse its discretion when it found the door had been opened and admitted into evidence a portion of the video recording it had previously excluded. We affirm Wafford's conviction.

FACTS

¶2 Several times over the course of her childhood, T.H. accused Wafford, her stepfather, of inappropriate sexual contact. In 2005, T.H.'s mother, Mariyah Wafford, heard that eight-year-old T.H. had told a friend that something inappropriate had happened with Wafford. After reporting to police, Mariyah took T.H. to be interviewed at Dawson Place Child Advocacy Center in Snohomish County. There, a child forensic interview specialist talked with T.H., and their conversation was video recorded. T.H. did not make a specific disclosure of sexual abuse by Wafford, though she did appear to nod affirmatively in response to one question about inappropriate sexual contact. The State did not investigate further or charge Wafford.

¶3 Seven years later, in 2012, T.H. again told a friend that Wafford sexually abused her. The friend then passed along the allegations to police, who interviewed her at school. Upset about the investigation, T.H. told investigators that there [*3] was nothing going on. No charges were filed.

¶4 Two years later, in 2014, T.H. was 17 years old. She was having problems at home and at school, where she failed to regularly attend classes. T.H. started seeing a counselor at school to talk about her anger. Eventually, T.H. disclosed to her counselor that Wafford sexually abused her. The matter was reported to police. T.H. was removed from her home and began living with her biological father in Mount Vernon. During the investigation, T.H.'s older sister, H.F., also made allegations that she had been sexually abused by Wafford.

¶5 The State charged Wafford with crimes against both T.H. and H.F. As to T.H., Wafford was charged with first degree rape of a child, first degree child molestation, and first degree incest. As to H.F., Wafford was charged with first degree rape of a child, first degree child molestation, and third degree child molestation.

¶6 Before trial, the court conducted a child hearsay hearing at which it concluded that the 2005 recorded interview of T.H. was inadmissible. The court reasoned that because T.H. never actually described an act of sexual contact, her statements were not admissible under the child hearsay statute. [*4]

¶7 In opening statements, the State began by telling the jury, "It was a close call, but he got away with it the first time. At age eight, [T.H.] was confused, anxious, uncertain, and either unable or unwilling to articulate what it was that her stepfather had been doing to her." Verbatim Report of Proceedings (VRP) at 426. The prosecutor went on to say that "[e]ventually [T.H.] ended up talking to a police officer, talking to an interviewer, [who] ask[ed] her questions about what was happening." VRP at 428. He told the jury that it would hear testimony from two people involved in that initial investigation. During defense counsel's opening statement, she referred explicitly to the video of T.H.'s interview: "[Mariyah] brought both [H.F.] and [T.H.] to Dawson Place in 2005. Nova Robinson interviewed [T.H.] on video [b]ut [T.H.] denied that anything was happening to her." VRP at 444. The State did not object.

¶8 After opening remarks, the State requested that the court admit the interview video that had been previously excluded. The State argued that when defense counsel mentioned the video, she opened the door to its admission. The State contended that the jury must see the video to rebut the characterization that T.H. denied abuse in [*5] her interview. Finding that defense counsel opened the door, the court admitted a portion of the video.

¶9 At trial, Wafford successfully moved for a directed verdict on counts V (first degree molestation of H.F.) and VI (third degree molestation of H.F.) for insufficient evidence. The jury found Wafford guilty of first degree child molestation of T.H., but was unable to reach a verdict on the remaining counts. The court sentenced Wafford to 68 months in prison. Wafford

Supreme Court acknowledged the recording's prejudicial effect, noting that it was, "without a doubt, an extremely emotional experience to listen to th[e] tape." *Id. at 686*. But it held that the trial court did not abuse its discretion in admitting the tape. *Id. at 688*. The court agreed with the State that because the defense theory, as asserted in opening statement, was that the husband was responsible for the murders, the recording was relevant and admissible to rebut that assertion. While the Supreme Court did not expressly rely on the open door doctrine in reaching this result, *Rupe* supports the conclusion that *HN5*[↑] a trial court does not abuse its discretion by admitting otherwise irrelevant evidence in response to remarks made during opening statement.

WA[4][↑] [4] ¶18 We decline to adopt Wafford's suggested rule that as a matter of law, comments made during opening statements cannot open the door. First, such a rule would be contrary to the general rule permitting trial courts the discretion to determine the admissibility of evidence. Second, *HN6*[↑] whether the issue arises from the statement [*10] of counsel or the testimony of a witness is immaterial to the question faced by the trial judge: to what extent, if any, has the statement compromised the fairness of the trial and what, if any, response, is appropriate. In answering this question, the trial judge should have a range of options at his or her disposal. A judge may admonish the jury to disregard certain statements or reiterate its instruction that opening statements are not evidence. The judge may allow testimony about otherwise inadmissible evidence while continuing to exclude the exhibit or document that contains the evidence. Or the judge may find that a party has opened the door to otherwise inadmissible evidence. The appropriate response is that which, in the discretion of the trial judge, best restores fairness to the proceeding.

¶19 Wafford next argues that even if comments made during opening statement can open the door, the trial court abused its discretion in finding that counsel did so in this case. He contends that counsel merely previewed the testimony of two witnesses, which he argues did not make the video recording of T.H.'s interview relevant. But the trial court reasoned that counsel opened the door because [*11] she

> referred to the video that was made from the interview, and [she] said that [T.H.] denied anything was happening to her, and [she] said that twice.
>
> It would be fundamentally unfair to leave it like that. I said the State could not use this item of evidence, and then [she] told the jury what was inside the evidence. So things have changed, and the door is now open.

VRP at 452. We agree. Prior to trial, Wafford successfully excluded the recording. In its opening statement, the State discussed the interview, but did not reference a video. Then, in her opening remarks, Wafford's counsel told the jury that there was a video, and that in it T.H. denied the abuse. Thus, Wafford was the first to identify the existence of the recording, which he went on to characterize as containing a denial of the abuse. Because these statements made continued exclusion of the recording unfair to the State, the trial court did not abuse its discretion in finding that counsel's opening statements opened the door to its admission.

¶20 Next, Wafford argues that the trial court erred by admitting the recording because it was inadmissible hearsay and therefore incompetent evidence. The State contends that the recording was not hearsay because it rebutted [*12] a claim of recent fabrication. The State is correct. *HN7*[↑] A statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is ... consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive ... ." *ER 801(d)(1)(ii)*. In opening statements, Wafford theorized that T.H. recently fabricated the sexual abuse in order to live with her boyfriend. The interview recorded almost 10 years earlier tends to rebut this theory. In it, T.H. indicated that Wafford acted sexually toward her by slightly nodding her head in response to the question, "Has anybody ever shown you any parts of their body that it's not okay for kids to see?" Ex. 3 at 17. An affirmation of sexual conduct is consistent with her testimony and is thus not hearsay under *ER 801(d)(1)*.

¶21 The trial court did not err by admitting the video of T.H.'s 2005 interview.[1]

Ineffective Assistance of Counsel

¶22 Wafford argues that his attorney provided ineffective assistance of counsel because she failed to request a limiting instruction for the video of T.H.'s 2005 interview. He contends that [*13] his counsel should have sought a jury instruction that would limit consideration of the recording as evidence rebutting her characterization of the video as a denial of sexual abuse. The State argues that this was a legitimate trial tactic because in closing statements, counsel used the videos to argue for the truth of the matter asserted: whether Wafford abused T.H.

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[1] We also disagree with Wafford's contention that hearsay cannot be admitted even when a party opens the door to it. *HN8*[↑] A party may open the door to evidence that is otherwise inadmissible, subject to the trial court's discretion. *Haysom v. Coleman Lantern Co., 89 Wn.2d 474, 485-86, 573 P.2d 785 (1978)*; *State v. Tarman, 27 Wn. App. 645, 651, 621 P.2d 737 (1980)*.

WA[5-7][↑] [5-7] ¶23 HN9[↑] We review an ineffective assistance of counsel claim de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). The defendant has the burden of establishing ineffective assistance of counsel. State v. Humphries, 181 Wn.2d 708, 719-20, 336 P.3d 1121 (2014). The performance of an attorney "is not deficient if it can be considered a legitimate trial tactic." Id. at 720 (citing State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

WA[8][↑] [8] ¶24 Here, defense counsel's failure to request a limiting instruction can be considered a legitimate trial tactic. During closing arguments, counsel used the 2005 recording in defense of her client. She argued that T.H.'s responses to the interviewer's questions about molestation "were emphatically no." VRP at 1636. A limiting instruction would have prevented counsel from arguing that the recording proved that there was no molestation. Thus, the failure to request a limiting instruction was not deficient performance by Wafford's attorney.

¶25 Affirmed.

DWYER and [*14] COX, JJ., concur.

References

Robert H. Aronson & Maureen A. Howard, The Law of Evidence in Washington (5th ed.)

Washington Rules of Court Annotated (LexisNexis ed.)

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APPENDIX 'B'

NR: Okay. Tyran, is there any place on your body where it is not okay to touch?

TH: There.

NR: Okay. Any place there?

TH: There.

NR: Uh huh.

TH: There.

NR: Okay. Any place else? It's not a test. Are those all the places?

TH: (just giggling) no audible response

NR: Okay. There are no right or wrong answers, it's up to you what you want to tell me about okay?

TH: Uh huh.

NR: And so you said right here where you said you don't want to say on the girl drawing and then right here where you're not really sure what it's called that's below the mouth and above the belly button. And then you said right here on the part you called the butt.

TH: Uh huh.

NR: If you think of any place else I want you to let me know okay?

TH: Uh huh.

NR: Has anyone touched you someplace on your body where it's not okay?

TH: Not that I know of.

NR: Okay. Have you told somebody that you were touched on your body where it's not okay to be touched?

TH: No.

NR: Okay. Has anybody ever asked you to touch them on their body where it's not okay for you to touch them?

TH: Huh uh.

NR: Has anybody ever shown you any parts of their body that it's not okay for kids to see?

TH: Not that I know of.

NR: Okay. Has anybody ever asked you to do anything to any parts of their body where it's not okay to be doing things?

TH: Uh...

NR: What?

TH: I'm not really what it, sure what it's called actually.

NR: Just do your best. Tell me about what was going on, where you were at, who was there, what was happening, that helps me understand.

TH: Uh my daddy and I'm not sure what was happening actually cause I don't know what it's called.

NR: Okay. Alright. It was your daddy? And is that the daddy you told me about on here on this picture named Ron?

TH: Uh huh.

NR: Or a different daddy?

TH: That daddy.

NR: That daddy? Okay. And where were you at when that was happening?

TH: My house.

NR: Okay, where at at your house?

TH: In the garage.

NR: In the garage. Is that the only place something like that ever happened or any place else?

TH: Huh uh.

NR: Huh uh what?

TH: There is no other place that that happened.

NR: Okay. Just in the garage? And is that the only time something like that happened or were there more than one time?

TH: More than one time.

NR: Okay. And I know that you're eight years old, you're almost nine...

TH: Yeah.

NR: ...so I know you can probably count.

TH: Uh huh.

NR: Can you count to ten for me?

TH: one, two, three, four, five, six, seven, eight, nine, ten.

NR: Okay. And did the thing that happened with your daddy happen more than ten times or less than ten times or about ten times or…

TH: About ten times, I'm not really sure.

NR: You're not really sure?

TH: I'm not really sure.

NR: Okay. And have you ever seen that happen with any other kids or any other people?

TH: No.

NR: Okay. And was anybody else ever with you when that happened?

TH: …no audible response.

MARK D. MESTEL, INC., P.S.

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