SUPREME COURT NO. 97928-6

NO. 78478-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL NEIL BUSH,

Petitioner.

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

The Honorable Mary Roberts, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Daniel Neil Bush, the appellant below, seeks review of the appended Court of Appeals decision in State v. Bush, noted at ___ Wn. App. 2d ___, 2019 WL 5698779, No. 78478-1-I (Nov.4, 2019).

B. ISSUES PRESENTED FOR REVIEW

1. Bush was charged with and convicted of assault in the second degree by strangulation. A recording of a security guard's 911 call was admitted at trial, in which the caller stated on two occasions that he saw Bush "strangle" Kathstacie Dickson. The caller did not testify. Defense did not object to the call on the grounds that it contained an improper opinion but did attempt to exclude the call on other bases. The call was admitted in its entirety. The improper opinion pervaded the state's closing argument, with the prosecutor even telling the jury that the 911 call proved Bush's guilt beyond a reasonable doubt: the caller "had seen [Bush] strangle Ms. Dickson," the caller "witnessed the defendant strangle Ms. Dickson," "a witness saw [Bush] strangle [Dickson], and "the 911 call . . . proves beyond a reasonable doubt that the defendant strangled Cat Stacy Dickson." RP 499, 506, 512, 513. Because the trial court ruled that the call was "nontestimonial" under Crawford v. Washington,[1] the Court of Appeals

[1] 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

reasoned that the 911 caller's opinion could not also constitute improper opinion "testimony" under State v. Demery.[2] Is review appropriate under RAP 13.4(b)(1), (2), and (4) where the Court's decision is in conflict with State v. Demery and other Court of Appeals decisions, and the Court's logic allows out-of-court recorded improper opinions as to a defendant's guilt to be presented to the jury on the basis that such statements do not qualify as "testimony"?

2. While Bush did not object to the admission of the recorded 911 call on the basis that statements made on the call constituted improper opinion, and the trial court therefore did not exercise discretion in regards to that issue, the Court of Appeals nonetheless applied an "abuse of discretion" standard in holding that the trial court properly admitted the call. The Court never considered whether the asserted manifest error qualified as one of "constitutional magnitude" or whether the error was "manifest." Is review appropriate under RAP 13.4(b)(1) and (4) where the Court's application of the abuse of discretion standard of review when manifest error is asserted is in conflict with the appropriate analysis set out in State v. Kalebaugh[3] and State v. O'Hara?[4]

[2] 144 Wn.2d 753, 30 P.3d 1278 (2001).
[3] 183 Wn.2d 578, 355 P.3d 253 (2015).
[4] 167 Wn.2d 91, 217 P.3d 756 (2009).

3. The Court of Appeals agreed that the state's closing argument relied heavily upon the recorded 911 call but held that Bush did not show that the call's admission resulted in actual prejudice. Is review appropriate under RAP 13.4(b)(1) and (4) as an issue of substantial public interest where the Court of Appeals determined that, based on a misreading of State v. Kirkman,[5] Bush has not proven actual prejudice when a recorded and repeated express opinion as to Bush's guilt was presented at trial by an absent witness who was not subject to cross-examination, an opinion that was again repeated and "relied heavily upon" by the state in its closing argument?

4. The Court of Appeals held that Bush failed to demonstrate that his counsel's performance was deficient when counsel failed to object to the admission of a recorded opinion of Bush's guilt because counsel had previously "thoroughly" argued against admission of the call on other unsuccessful grounds. "After counsel lost the motion, it was not an unreasonable strategy to avoid further argument against the admissibility." Failing to object to objectionable evidence is not a legitimate strategic tactic simply because separate objections to the same evidence have been rejected by the court on different legal grounds. Is review under RAP 13.4(b)(3) and

[5] 159 Wn. 2d 918, 155 P.3d 125 (2007).

(4) appropriate where the Court of Appeals considers a failure to object to an absent caller's improper opinion of guilt a legitimate trial strategy simply because counsel's other arguments, which rested on entirely different legal grounds, had been rejected?

C. STATEMENT OF THE CASE

The state charged Bush with one count of assault in the second degree, domestic violence and one count of assault in the fourth degree, both alleged to have occurred on August 21, 2017. CP 70-71.

These charges arose from allegations that Bush strangled his girlfriend Dickson in front of the Ganja Goddess cannabis store in Seattle, Washington. CP 1. Ganja Goddess security guard Gibson allegedly called 911 and reported a white male "strangling" a black female and that the female fell down and hit her head on the sidewalk. RP 156-57. When a bystander, David Carthon, intervened, Bush allegedly threw a beer can he had been holding in his hand and swung at Carthon. CP 1. Officers were dispatched to the scene where Bush was taken into custody for assault. CP 2. Officers observed a minor cut on Dickson's back and a bleeding bruise on Carthon's forehead. CP 2. Both Bush and Dickson appeared intoxicated. RP 299, 350. Ganja Goddess video surveillance showed an altercation between Dickson and Bush in front of Ganja Goddess, but only showed the two from their shoulders down. RP 499.

During motions in limine, the state declared its intent to offer Gibson's 911 call through the testimony of custodian of records for 911 audio for Seattle Police, Cheryl Kiefer. RP 156. Gibson, alleged to have called 911 on the incident date, did not testify. The call recorded the following excerpted exchange:

> VOICE: 911. What is your emergency?
>
> VOICE: Yes, I'm outside of Ganja Goddess, 32007 South First Avenue in Seattle, Washington, and I just watched a large white gentleman strangle a black lady – . . . .
>
> VOICE: Any weapons involved, like a gun or a knife?
>
> VOICE: No (inaudible) he was just holding her throat and then she fell down and her skull hit the sidewalk really hard.
>
> VOICE: Okay, thank you, sir. 3207 One Avenue South.
>
> VOICE: 3207 First South?
>
> VOICE: Correct, outside of (inaudible) a white male strangled a black female, suspect still there, female down on the ground. We're – we have a call in. . . .
>
> VOICE: What is your name?
>
> VOICE: My name is Zane. I'm the security guard for the store.

RP 405-08.

Bush objected to the admission of the recording, arguing that the statements on the call were testimonial in nature, that the call could not be properly authenticated, and that the implications of admitting such a call were troubling, as doing so incentivizes the state to not call the witness who placed

the call to insulate the caller from cross-examination. RP 171. The trial court concluded that the statements made by the 911 caller were excited utterances, present sense impressions, and that the statements were made to 911 in order to get help and were therefore nontestimonial. RP 168. The 911 call was admitted at trial through Kiefer's testimony. RP 400-09. Bush did not object to the admission of the 911 caller's opinion that the male "strangled" the female.

Neither Dickson nor Carthon testified at trial.

Officer Ron Komarovsky, the primary officer involved in the investigation of this incident, testified that he used a flashlight to check Dickson for injuries and did not recall observing any injuries besides a minor cut on her back. RP 369. He testified that Dickson was uncooperative, appeared calm, did not appear fatigued, did not have difficulty standing or walking, did not appear to have difficulty breathing, and that he did not note that she had bloodshot or red eyes. RP 370-72.

Surveillance of the altercation between Bush and Dickson from August 21, 2017 was admitted through Cooley's testimony. RP 409-21. Cooley testified that at the time of the incident, she was employed as general manager of Ganja Goddess and in charge of the surveillance camera system. RP 409-10. While reviewing the footage, Cooley identified a male who appeared in the video as "Zane," a security guard. RP 414. She testified that

she had worked with Zane and that he usually stations himself at the entrance of Ganja Goddess. RP 415. Cooley herself was not present at Ganja Goddess on August 21, 2017. RP 415.

Brown, a Seattle Firefighter and Emergency Medical Technician who responded to the scene, treated Carthon upon arrival. RP 428. Brown testified that an officer told him the involved female had a bump on the back of her head and asked Brown to look at her. RP 429. The female allowed Brown to put his hand on the back of her head where Brown felt slight swelling. RP 429, 437. The female refused further treatment. RP 429. Brown did not recall observing that the female had any further injuries or bloodshot or red eyes and testified that she was standing and able to speak. RP 433, 435.

Stewart, a registered nurse, testified regarding strangulation and its physiological effects, generally. RP 446-64. She testified that asphyxia or interruption of oxygen can ultimately cause loss of consciousness in as little as ten seconds. RP 452-53, 456. Stewart noted that external signs of strangulation can include a puffy face or "facial congestion," petechial, or marks on the neck, but that visible injuries are not always present. RP 457, 458. She testified that a head injury could also cause an individual to lose consciousness. RP 463.

During its closing argument, the state claimed that "Zane Gibson sat inside of the Ganja Goddess and looked through those glass doors, and he

could see exactly where the defendant's hands were as he described to the 911 operator how he had seen him strangle Ms. Dickson . . ." RP 499. The prosecutor continued: [Gibson]'s just witnessed the defendant strangle Ms. Dickson. RP 506. She repeated: ". . . the 911 call Zane made is powerful evidence that you can consider that proves beyond a reasonable doubt that the defendant strangled Cat Stacy Dickson." RP 512. She again reminded the jury: ". . . a witness saw him strangle [Dickson]." RP 513.

The jury convicted Bush of assault in the second degree, domestic violence. CP 129, 132. The jury found Bush not guilty of assault in the fourth degree of Carthon. CP 131.

Bush appealed. CP 151-63. He argued that he was denied his constitutional right to an independent determination of the facts by the jury when the state admitted an absent witness's improper opinion as to his guilt (that he strangled Dickson), and that this denial constituted manifest error. Br. of Appellant at 10-14; RAP 2.5(a)(3). In failing to object to the admission of improper opinion evidence as to Bush's guilt, Bush argued that his lawyer provided ineffective assistance of counsel. Br. of Appellant at 14-17.

Though the issue of improper opinion had not been considered by the trial court, the Court of Appeals held that the trial court had not abused its discretion in admitting the 911 call. Appendix at 5, 7. The Court also reasoned that the trial court's ruling that statements made on the 911 call were

nontestimonial under Crawford "strongly suggests that they cannot then constitute improper opinion testimony under Demery." Appendix at 7. Even if the statements on the call constituted improper opinion, the Court of Appeals reasoned, Bush did not show actual prejudice under Kirkman. Appendix at 7. The Court of Appeals pointed out that jurors were instructed that they did not have to accept opinions of witnesses and that they are the sole judges of credibility. Appendix at 8.

As for ineffective assistance of counsel, the Court of Appeals held that Bush did not establish that his attorney's performance was deficient: though counsel failed to object to the admission of the 911 call on the basis that it included the caller's improper opinion as to Bush's guilt, counsel objected to the admission of the call on other grounds and "it was not an unreasonable strategy to avoid further argument against the admissibility." Appendix at 9. The Court of Appeals further surmised that "counsel may have reasoned that if Gibson's statements were non-testimonial for confrontation clause purposes, as the trial court had ruled, they could not be challenged as opinion testimony." Appendix at 9. The Court of Appeals cited no authority for this supposition. Because the Court of Appeals found that Bush had not established that his counsel's performance was deficient, it did not reach the question of prejudice.

D. ARGUMENT IN SUPPORT OF REVIEW

1. THE DECISION CONFLICTS WITH IMPROPER OPINION PRINCIPLES ESTABLISHED IN DEMERY AND SETS TROUBLING PRECEDENT ALLOWING THE ADMISSION OF IMPROPER OPINION EVIDENCE OF GUILT AS LONG AS THE HOLDER OF THAT OPINION DOES NOT TESTIFY

Without analyzing or even addressing whether the 911 caller's opinion that Bush "strangled" Dickson constituted an improper opinion of Bush's guilt of assault in the second degree by strangulation, the Court of Appeals relies upon Demery in dismissing Bush's argument because the non-testifying caller's statements were admitted without "testimony." Appendix at 6-7. The Court of Appeals relies on the lead opinion Demery to reach this conclusion, despite the fact that the Demery opinion specifically distinguishes a scenario like the one before the Court now from its facts and despite the fact that a majority of the Demery court found the specific context in which an improper opinion is offered—whether during testimony or out of court—to be irrelevant. 144 Wn.2d at 754.

In Demery, the trial court allowed the state to play a taped interview during which police officers accused the defendant of lying. 144 Wn.2d at 754. The four justices in the lead opinion held that the officer's statements did not fall within the definition of "opinion testimony" because they were not made under oath at trial and because the statements were not offered as

opinion, but were rather part of a commonly used police interview technique to see if the defendant would change his story. Id. at 760. However, the lead opinion distinguished these specific facts from a scenario where an author's opinion of a "spur-of-the-moment assessment" of a situation is recorded. Id. at 761; see Warren v. Hart, 71 Wn.2d 512, 514, 429 P.2d 873 (1967) (evidence regarding the issuance or nonissuance of a citation by a police officer would be inadmissible opinion evidence). In Bush's case, the 911 caller's recorded opinion that Bush strangled Dickson was based on his spur-of-the-moment assessment of what he allegedly saw. Demery specifically provides that its holding is not to extend to a scenario like the one before the Court now.

Further, a majority of the justices in Demery agreed that that statements by a non-testifying police officer in a taped interview accusing the defendant of lying constituted inadmissible opinion evidence, whether the officer testified or not. 144 Wn.2d at 765 (Alexander, C.J., concurring), 771-72 (Sanders, J., dissenting). As Justice Sanders pointed out in his dissent, with whom four other justices agreed,

> The majority[6] concludes a recorded expression of an officer's opinion that a suspect is lying is admissible at trial even though the same officer would not be permitted to offer such an opinion as live testimony. I see no distinction between the two. **It matters not whether the opinion was rendered in the context of an interrogation interview or in context of**

[6] The "majority" of the court found the recording admissible solely because Chief Justice Alexander in a lone concurrence believed that the opinion evidence was harmless error. 144 Wn.2d at 766.

> **direct testimony in open court. The end result is the same: The jury hears the officer's opinion.**

Id. at 767 (emphasis added); see also State v. Christopher, 114 Wn. App. 858, 861-63, 60 P.3d 677 (2003) (the relevant question is not the form of the evidence presented to the jury but rather whether the substance of that evidence invades the jury's independent determination of the facts). The Court of Appeals' conclusion that the 911 caller's statements could not constitute improper opinion testimony under Demery simply because the statements were "non-testimonial" conflicts with both the Demery lead opinion and the majority rule in Demery laid out in the concurring and dissenting opinions, and therefore merits review under RAP 13.4(b)(1).

The opinion also conflicts with Christopher, meriting RAP 13.4(b)(2) review. 114 Wn. App. at 865 (nontestimonial note which alleged "fraud" impermissibly opined as to the defendant's guilt when she was on trial for prescription fraud).

The Court of Appeals' misinterpretation also sets troubling precedent allowing the admission of improper opinion evidence of a defendant's guilt as long as the author of the opinion does *not* testify. Such precedent discourages the government from calling all of its witnesses to testify: an author of a recorded improper opinion who would not otherwise be permitted to offer that opinion in open court can do so by not appearing to testify *and*, in not

appearing, can avoid cross-examination: the crucible in which the reliability of evidence is tested. See Crawford, 541 U.S. at 61. The Court of Appeals' ironic use of the particularized and specific definition of "non-testimonial" set out in Crawford—which emphasizes the historical and logical importance of subjecting an accuser to adversarial testing—to allow the admission of improper opinion evidence as to the defendant's guilt without cross-examination presents an issue of substantial public interest that should be determined by the Supreme Court under RAP 13.4(b)(4).

2. APPLYING AN ABUSE OF DISCRETION STANDARD TO A CLAIM OF MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT CONFLICTS WITH THE REQUIRED ANALYSIS SET OUT IN STATE V. KALEBAUGH AND STATE V. O'HARA

While Bush did not object to the admission of the recorded 911 call on the basis that statements made on the call constituted improper opinion, and the trial court therefore did not consider the issue, the Court of Appeals nonetheless applied an "abuse of discretion" standard in holding that the trial court properly admitted the call. The Court never considered whether the asserted manifest error was one of "constitutional magnitude" or whether that error was "manifest."

When manifest constitutional error is asserted, the Court must first ask: Has the party claiming error shown the error is truly of constitutional magnitude? Kalebaugh, 183 Wn.2d at 583; O'Hara, 167 Wn.2d at 98. If so,

the next inquiry is: has the party demonstrated that the error is manifest? Kalebaugh, 183 Wn.2d at 583; O'Hara, 167 Wn.2d at 98. "Manifest" in RAP 2.5(a)(3) requires a showing of "actual prejudice." O'Hara, 167 Wn.2d 99. To demonstrate actual prejudice, there must be a plausible showing by the appellant that the error had practical and identifiable consequences in the trial of the case. Kalebaugh, 183 Wn.2d at 584. To determine whether an error is practical and identifiable, the reviewing court must place itself in the shoes of the trial court to ascertain whether the court could have corrected the error. Id. "Harmless error analysis occurs *after* the court determines the error is a manifest constitutional error and is a separate inquiry." Id. at 585 (citing O'Hara, 167 Wn.2d at 99).

Review is appropriate under RAP 13.4(b)(1) and (4) where the Court's application of the abuse of discretion standard of review when manifest error is asserted is in conflict with the appropriate analysis set out in detail in State v. Kalebaugh and State v. O'Hara and, where a defendant asserts manifest constitutional error, the decision fails to substantively consider at all whether the alleged error constitutes an error of constitutional magnitude, instead deferring to the trial court's discretion where that discretion was never exercised.

3. THE DECISION MISINTERPRETS KIRKMAN IN SETTING AN IMPOSSIBLY HIGH BAR FOR DEFENDANTS TO ESTABLISH "ACTUAL PREJUDICE"

The Court of Appeals agreed that the state's closing argument relied heavily upon the recorded opinion in the 911 call, but held that even if considered improper opinion Bush did not establish "actual prejudice" as required by Kirkman, 159 Wn.2d at 927, because jurors were instructed as to the legal definition of "strangulation," jurors were instructed that they do not have to accept the opinions of witnesses and that they are the sole judges of credibility, jurors saw surveillance of Bush and Dickson from the shoulders down which did not depict a strangulation, and because the state presented testimony regarding methods and physiological effects of strangulation. Appendix at 7-8. The Court of Appeals appears to conduct a harmless error analysis to determine whether Bush has shown "actual prejudice" under Kirkman, though harmless error analysis is a completely separate inquiry. Appendix at 7-8; O'Hara, 167 Wn.2d at 99. Kirkman, Kalebaugh, and O'Hara provide that in determining whether an appellant experienced "actual prejudice," the Court looks to whether the error was practical and identifiable—whether, given what the trial court knew at that time, the court could have corrected the error. Kirkman, 159 Wn. 2d at 935; Kalebaugh, 183 Wn.2d at 584; O'Hara, 167 Wn.2d at 100.

In Kirkman, there were no explicit statements of opinion on the credibility of the defendants or the victims by the witnesses. 159 Wn.2d at 938. Counsel chose not to object to the witnesses' alleged indirect opinions for clear tactical reasons—some of the testimony was helpful to the defendant. Id. at 937. The jury was also instructed that they were the sole triers of fact and the sole deciders of credibility. Id. The jury was instructed regarding the weight to be given to expert witness testimony, which was the testimony at issue on appeal. Id. In this context, the Kirkman court held that Kirkman had not established actual prejudice. Id.

In Bush's case, the record reflects that an explicit and recorded opinion by a non-testifying author that went directly to Bush's guilt was repeatedly presented to the jury. RP 405-08. The record reflects that this improper opinion of guilt was repeated and relied upon heavily by the prosecutor. Appendix at 4; RP 499, 506, 512-13. There was no apparent tactic on the part of counsel explaining the failure to object to the testimony—in fact, counsel made a thorough record of trying to exclude the call on other grounds. RP 168-71. Bush certainly did not benefit from the absent caller's opinion that he strangled Dickson.

Finally, the Court of Appeals relies on the fact that the jury was instructed that they did not have to accept the opinions of witnesses, that they get to weigh credibility, and that they are the sole judges of credibility

in determining Bush failed to establish actual prejudice. Appendix at 8. But as the Court of Appeals also holds, the call did not qualify as "testimony"—there was therefore no "witness." Appendix at 7; Demery, 144 Wn.2d at 760 ("a 'witness' is a person who provides evidence under oath or affirmation"). Here, there was no witness credibility to be weighed in relation to the call itself because the witness did not appear. Jurors received no instruction regarding how to consider the out-of-court improper opinion of guilt that was repeatedly presented to them without a witness, and had no reason to disregard the opinion when it came time to deliberate.

The Court of Appeals misinterprets Kirkman and extends its analysis beyond its breaking point. An absent witness's explicit opinion as to Bush's guilt was repeatedly presented to the jury and relied upon as proof beyond a reasonable doubt of his guilt, and Bush was convicted without the state having to present any eyewitness to the alleged crime. The state would not have relied on this improper opinion so heavily unless the prosecutor felt that such reliance was necessary to sway a jury in a close case, as it was here. Bush has established actual prejudice.

Review is appropriate under RAP 13.4(b)(1) in order to elucidate the "actual prejudice" standard set out in Kirkland. Review is also appropriate under RAP 13.4(b)(4) where the Court of Appeals' opinion creates an issue of substantial public interest: when an improper opinion is

admitted at trial and relied upon by the state as proof beyond a reasonable doubt, the author of the opinion is not subject to cross-examination, and no eyewitness to the alleged incident appears, is it possible for a defendant to ever establish "actual prejudice"?

4. RULING THAT AN ATTORNEY'S FAILURE TO OBJECT TO THE ADMISSION OF EVIDENCE ON ALL APPLICABLE GROUNDS IN ORDER TO AVOID FURTHER ARGUMENT IS NOT DEFICIENT PERFORMANCE SETS DANGEROUS PRECEDENT WITHOUT AUTHORITY

The Court of Appeals held that Bush failed to demonstrate that his counsel's performance was deficient when counsel failed to object to the admission of a recorded opinion of Bush's guilt because counsel had previously "thoroughly" argued against its admission on other grounds. "After counsel lost the motion, it was not an unreasonable strategy to avoid further argument against the admissibility." Appendix at 9.

Though it is unclear precisely what the Court of Appeals means by "strategy" in this context, it seems that the Court of Appeals reasoned that an attorney may strategically wish to stop making a record or making viable arguments in order to stay in the trial court's good graces. This is illogical, without precedent, and sets the bar dangerously low for a finding of "deficiency." Effective assistance of counsel requires the defense attorney's performance to be reasonable under prevailing professional norms.

Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The Court of Appeals cites to no authority, nor is appellate counsel aware of any such authority, that provides that it is reasonable under prevailing professional norms to not make a viable argument simply because past, separate arguments that rested on different legal grounds have proven unsuccessful. Review is appropriate under RAP 13.4(b)(3) as the Court of Appeals' troubling view of effective assistance of counsel presents a significant question of law under both the federal and state constitutions

The Court also surmises that counsel may have reasoned that if the 911 caller's statements were non-testimonial for confrontation clause purposes, as the trial court ruled, they could not be challenged as opinion testimony. Appendix at 9. Analysis under Crawford and analysis of a statement for improper opinion are separate questions, and the Court of Appeals cites to no authority stating otherwise. In fact, as argued above, the Court of Appeals' use of the definition of "testimonial" to foreclose the question of whether the 911 call included improper opinion conflicts with the very case it relies on, Demery. 144 Wn.2d at 753-73. See Part D.1 supra. Review is appropriate under RAP 14.3(b)(3) and (4) where the Court's determination that counsel may have reasonably strategically relied upon a concept that has no basis in law appears to run contrary to both the United

States Constitution and the Constitution of the State of Washington and sets the bar dangerously low for a finding of deficient performance.

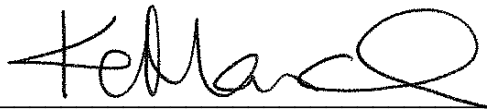
E. CONCLUSION

Admission of a recorded improper opinion at trial as to Bush's guilt constituted manifest error. Bush's lawyer provided ineffective assistance of counsel in failing to object to the admission of improper opinion as to Bush's guilt. Because all RAP 13.4(b) criteria are satisfied, Bush asks this Court to grant review and reverse the Court of Appeals.

DATED this 4th day of December, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX

FILED
11/4/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DANIEL NEIL BUSH, Appellant, v. THE STATE OF WASHINGTON, Respondent.	)	No. 78478-1-I DIVISION ONE UNPUBLISHED OPINION FILED: November 4, 2019

HAZELRIGG-HERNANDEZ, J. — Daniel Neil Bush asserts for the first time on appeal that the admission at trial of statements from a 911 call that he was "strangling" a woman constituted manifest constitutional error. He claims that this was improper opinion testimony, as he was accused of assault in the second degree by strangulation, and that trial counsel was ineffective for failing to object on those specific grounds. Because Bush failed to establish that admission of the 911 call constituted manifest constitutional error or that the decision not to object on this particular basis was deficient performance by his attorney, we affirm.

FACTS

Daniel N. Bush was accused of committing assault in the second degree, by way of strangulation, against his girlfriend, Kathstacie L. Dickson, in front of the Ganja Goddess in Seattle. Bush was also accused of committing assault in the fourth degree against David M. Carthon, an individual who tried to intervene. A

Ganja Goddess security guard, Zane P. Gibson, allegedly called 911 and reported a white male "strangling" a black female and that the female had fallen down and hit her head on the sidewalk. Carthon attempted to intervene to help Dickson when Bush allegedly threw a beer can and swung at Carthon. Officers arrived and Bush was taken into custody for assault. Officers testified that both Bush and Dickson appeared intoxicated. Dickson refused medical treatment and officers only observed a minor cut on her back and a bump on the back of her head. A recording from Ganja Goddess surveillance video acquired by police showed the incident between Bush and Dickson outside the store, but only from their shoulders down.

The state intended to introduce Gibson's 911 call, but Gibson was not expected to testify at trial. The call recorded the following exchange:

VOICE: 911, what is your emergency?
VOICE: Yes, I'm outside of Ganja Goddess, 3207 South First Avenue in Seattle, Washington, and I just watched a large white gentleman strangle a black lady—
VOICE: Okay, and you said (inaudible) verify One Avenue South, and it's outside in front?
VOICE: Yes, ma'am.
VOICE: Okay (inaudible.) Where's the man right now?
VOICE: He's still out here.
VOICE: Okay, stay on the line. We're going to get the medics on with us. Any weapons involved, like a gun or a knife?
VOICE: (Inaudible) what was that?
VOICE: Any weapons involved like a gun or a knife?
VOICE: No (inaudible) he was just holding her throat and then she fell down and her skull hit the sidewalk really hard.
VOICE: Okay. Thank you, sir. 3207 One Avenue South.
VOICE: 3207 First South?
VOICE: Correct, outside of (inaudible) a white male strangled a black female, suspect still there, female down on the ground. We're—we have a call in.
VOICE: He's got a beer with him. I don't know if that's important or not, but—
VOICE: (Inaudible).

VOICE: Sir, you just want us to just call you back when the scene is secure?
VOICE: Yeah (inaudible).
VOICE: Okay, thank you. Well, what the—the white male—how old does he appear?
VOICE: I'd say 50 to 60, if not (inaudible).
VOICE: What color shirt or jacket is he wearing?
VOICE: He's wearing a white tank top, red shorts, kind of cargo, no underwear on. He's now—he's picking her up now.
VOICE: Okay. Is she pretty limp?
VOICE: He's got a Target bag.
VOICE: Is—
VOICE: No, she's trying to—she's rubbing her head. She's able to stand.
VOICE: Okay. All right. The female—how old does she appear?
VOICE: The same. Probably 50's.
VOICE: What color shirt or jacket—
VOICE: She's a lot shorter than him. She's—she's in a dress. It's kind of like black, white, and blue paint splattered all over, just kind of, you know like some sort of design (inaudible) they're in front of a yellow van.
VOICE: Okay.
VOICE: Oh, he's trying to take off and she doesn't want to.
VOICE: He's trying to get in a yellow van?
VOICE: No, he's—they don't have a vehicle. (Inaudible) yellow van. But he's like grabbing her arm and trying to pull her away.
VOICE: Okay.
VOICE: They're taking off now.
VOICE: Which way are they going?
VOICE: They're walking towards Spokane Street. What's that intersection right there? They're walking towards First and Horton.
VOICE: First and Horton? Okay. Is she willingly walking with him now? Or is he—are they yelling at each other?
VOICE: No, she—well, he's like forcing her to. He was just grabbing her arm, then he let go, and they're still walking together.
VOICE: Okay.
VOICE: But he's like yelling at her face.
VOICE: Okay. Is he still pulling her?
VOICE: No, right now they're just walking—
VOICE: Okay.
VOICE: — (Inaudible).
VOICE: What is your name?
VOICE: My name is Zane. I'm the security guard for the store.

VOICE: Spell your first name, please.
VOICE: Z-a-n-e
VOICE: And your last name?
VOICE: Gibson, G-i-b, as in boy, s-o-n.
VOICE: And this is a good number for you . . . ?
VOICE: Yes, ma'am.
VOICE: Okay. Police are going to be out there as soon as they're available. If anything changes or escalates any further before they get there, call us back immediately.
VOICE: Yes, ma'am.
VOICE: Thank you. Bye-bye.

In a pretrial motion, Bush objected to the admission of the recording arguing that it was testimonial in nature thereby violating his right to confrontation, that it could not be properly authenticated, and that the implications of admitting such evidence incentivizes the state to not call witnesses to insulate the caller from cross-examination. The judge ruled the statements were non-testimonial and that they would be allowed into evidence as hearsay exceptions based on both present-sense impression and excited utterance. Bush did not object based on improper opinion testimony as to the caller's statement that the male "strangled" the female in either his written motion or in oral argument at the motion hearing.

At trial the prosecution called police officers, a firefighter, and the former general manager of Ganja Goddess to testify; none of whom had witnessed the incident. The court admitted the 911 call and surveillance video into evidence. A registered nurse testified as an expert for the state regarding strangulation and its physiological effects generally. Neither Dickson nor Carthon testified. The state's closing argument relied heavily upon Gibson's statements in the 911 call as he witnessed the incident. The jury convicted Bush of assault in the second degree, domestic violence as to Dickson and acquitted him of the misdemeanor charge of

assault in the fourth degree as to Carthon. Bush timely appeals his case, arguing that the admission of the 911 call denied him of his right to an independent determination of the facts by the jury and that his lawyer was ineffective by failing to object to the admission of improper opinion testimony as to his guilt.

DISCUSSION

I. Opinion testimony

Generally this court may not consider issues raised for the first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). Impermissible opinion testimony regarding the defendant's guilt may be reversible error as admission of such testimony violates the defendant's constitutional right to a jury trial, which includes independent determination of the facts by the jury. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

Impermissible opinion testimony as to the guilt of a defendant is unfairly prejudicial as the testimony "invad[es] the exclusive province of the finder of fact." State v. Black 109 Wn.2d 336, 348, 745 P.2d 12 (1987). We review the trial court's decision whether to admit or exclude evidence for abuse of discretion; the burden is on the appellant to establish such abuse. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). Where reasonable minds could differ regarding the propriety of the trial court's actions no abuse of discretion has occurred. State v. Sutherland, 3 Wn. App. 20, 21—2, 472 P.2d 584 (1970).

"The trial court must be accorded broad discretion to determine the admissibility of ultimate issue testimony." City of Seattle v. Heatley, 70 Wn. App.

573, 579, 854 P.2d 658 (1993). However, prior to determining whether the statements were improper opinion testimony we must examine whether the statements were testimony at all. Demery, 144 Wn.2d. at 760. In Demery, the Supreme Court examined whether an officer's statements during a taped interview were improper opinion testimony. Id. at 758. The court's analysis indicated that opinion testimony requires that the opinion be provided as testimony from a witness, which would occur by an individual providing evidence under oath or affirmation. Id. at 759-60. The court rejected the claim that the officer's statements in a video interview challenging the defendant's veracity were testimony. Id. at 760. The Demery court relied on the facts that the officer's statements were not live, but made during a recorded interview, and that the statements by the officer were not comments on the credibility of the defendant, but rather a commonly used technique during interrogation. Id.

In the present case, Bush brought a pretrial motion to exclude the 911 call on a number of grounds, but oral argument focused mainly on the assertion that admission of the call violated Bush's confrontation right. The trial court ruled that the statements by Gibson were non-testimonial in nature and were made "in order to get help." The court admitted the statements as excited utterances and present sense impressions of Gibson. Bush does not assign error to the trial court's ruling on his motion to exclude the 911 call as a violation of the confrontation clause. As such, we decline to explore that issue.

Furthermore, it is logically and practically unreasonable to treat the challenged statements as non-testimonial for the analysis of a constitutionally

protected right, but to then consider the same statements testimony for purposes of reviewing a later evidentiary ruling. The trial court's finding that Gibson's statements were non-testimonial strongly suggests that they cannot then constitute improper opinion testimony under Demery. A trial court abuses its discretion if it improperly applies an evidence rule. State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007). In the pretrial motion hearing, the parties argued several defense challenges to the admissibility of the 911 call and the court carefully considered each of them in turn, reviewing both the call and the surveillance footage. The trial court did not abuse its discretion in admitting Gibson's statements in the 911 call.

Even if we determined that the statements were testimony and that they were improperly admitted, Bush has not proven that the admission resulted in prejudice to his right to a jury trial by taking the independent determinations of facts away from the jury. "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." Kirkman, 159 Wn.2d at 935. At trial, the jury was instructed as to the legal requirements of "strangulation" in Instruction No. 12. The State presented testimony from registered nurse Teresa Stewart as to methods of strangulation as well as an explanation of what occurs physiologically during and after strangulation.

Additionally, the surveillance video from Ganja Goddess was played for the jurors. The video did not show Bush or Dickson above their shoulders. However, officers testified that the clothing on the persons in the video matched that observed on Bush and Dickson when law enforcement arrived on the scene.

Jurors were instructed that they do not have to accept opinions of witnesses, that they get to weigh credibility, and that they are the sole judges of credibility. "Jurors are presumed to follow the court's instructions." Id. at 937. In a similar inquiry regarding opinion testimony, the Supreme Court warned, "[o]nly with the greatest reluctance and with clearest cause should judges—particularly those on appellate courts—consider second-guessing jury determinations or jury competence." Id. at 938. Even if we had determined that Gibson's 911 statements did constitute improper opinion testimony, Bush still failed to meet his burden of demonstrating manifest constitutional error under RAP 2.5(a)(3).

II. Ineffective assistance of counsel

Bush also asserts that defense counsel was ineffective for failing to object to Gibson's statements in the 911 call on the specific grounds that they constituted improper opinion testimony. In a claim of ineffective assistance of counsel, the performance must have been deficient and the deficient performance must have resulted in prejudice. Strickland v. Wash., 466 U.S. 668, 669, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Performance is considered deficient if "it [falls] below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). A showing of prejudice requires a reasonable probability that but for the deficient performance, the outcome of the proceeding would have been different. State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). "Courts engage in a strong presumption counsel's representation was effective." McFarland, 127 Wn.2d at 335.

Though counsel did not object to the admission of Gibson's statement in the 911 call on opinion grounds at trial, failing to object when a previous and thorough argument against the admissibility of the statements had been made, and rejected, does not demonstrate deficient performance. Defense argued against the admissibility based on confrontation and other grounds and the trial court was not persuaded. After counsel lost the motion, it was not an unreasonable strategy to avoid further argument against the admissibility. Further, counsel may have reasoned that if Gibson's statements were non-testimonial for confrontation clause purposes, as the trial court had ruled, they could not be challenged as opinion testimony. Bush fails to demonstrate that the failure to object on these particular grounds was deficient under these circumstances.

Affirmed.

WE CONCUR:

NIELSEN, BROMAN & KOCH P.L.L.C.

December 04, 2019 - 11:24 AM

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