

NO. 66995-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ARNOLDO ZARATE CORIA,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARIANE SPEARMAN

BRIEF OF RESPONDENT

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A. ISSUES

1. Appellate courts will not consider non-constitutional issues that have not been raised in the trial court. Zarate Coria did not object to the use of a service dog to comfort a child testifying about domestic abuse he had witnessed. Did Zarate Coria waive any objection to the use of the service dog?

2. Whether the trial court exercised proper discretion in allowing a child that witnessed his father assault his mother to have a trained service dog present when he testified to alleviate his anxiety about testifying.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Arnoldo Zarate Coria, was charged with burglary in the first degree, assault in the second degree, felony violation of a court order protecting Veronica Duarte Antunez, and misdemeanor violation of a court order protecting their children. CP 7-10. In addition, the State alleged aggravating factors that Zarate Coria had a history of domestic abuse of Antunez, and that the current offense occurred in the presence of the children. CP 27, 29, 32. The State alleged that Zarate Coria went to Antunez's

apartment to see his children in violation of the court orders and assaulted Antunez when she arrived. CP 4-5. The case proceeded to trial and the jury found Zarate Coria guilty of all counts as charged. CP 26-32. The jury also found both of the aggravating factors. CP 27, 29, 32. The court imposed an exceptional sentence of 72 months confinement. CP 84-91.

2. SUBSTANTIVE FACTS

The victim, Veronica Durate Antunez had been married to the defendant, Arnolando Zarate Coria, for twelve years. RP 310.¹ They had three children together: B.D. (female, 3 years old), J.D. (male, 9 years old) and F.D. (male, 11 years old).² RP 264, 311. Antunez and Zarate Coria were divorced in December 2009. RP 339.

Zarate Coria had a history of domestic violence against Antunez. Zarate Coria had assaulted Antunez in the past, but she did not call the police because she thought they could "fix matters." RP 331. On December 25, 2009, Zarate Coria assaulted Antunez

¹ The verbatim report of proceedings for the trial are consecutively paginated and will be referred to as "RP."

² The minor children's initials are used in an effort to protect their privacy.

by pulling her hair and trying to hit her. RP 312. Antunez's brother intervened and stopped Zarate Coria. RP 312. The police were called and Zarate Coria was arrested. RP 312. Zarate Coria pleaded guilty to assault in Seattle Municipal Court. RP 403.

Antunez obtained a protection order as a result of the incident. RP 312. The order prevented Zarate Coria from having any contact with her or her residence. RP 303. Zarate Coria had acknowledged receipt of the protection order. RP 304. Zarate Coria violated the order on several occasions. On May 10, 2010, Zarate Coria came to the apartment in violation of the order. RP 335. On May 30, 2010, Zarate Coria called Antunez in violation of the order and threatened to kill her. RP 316. Zarate Coria pleaded guilty to violating the no contact order for this incident. RP 405.

On June 27, 2010, Antunez was working when she received a call from her babysitter and learned that Zarate Coria was at her apartment. RP 315. Antunez called the police and hurried home. RP 315. When she got home she found the children crying in the living room and Zarate Coria lying in her bedroom. RP 317. Antunez told him there was a no contact order and demanded that he leave. RP 317. Antunez then went outside and Zarate Coria

assaulted her. RP 318-20. He struck her in the head, pulled out her earrings, and threatened to kill her. RP 320. He bit her on the cheek. RP 322. The children were present during the assault, and J.D. was yelling at Zarate Coria not to kill his mother. RP 321. Zarate Coria ran when the police arrived. RP 326.

Antunez's sister-in-law, Maria Elia Angeles, also witnessed the assault. She was home with Antunez's children when Zarate Coria arrived, obviously drunk. RP 347. He wanted to hug the children but they were afraid of him. RP 348. When Antunez arrived, Angeles saw Zarate Coria hit and push her. RP 348. According to Angeles, the assault began in the bedroom of the apartment. RP 348. Antunez went outside and Zarate Coria pulled her hair, punched her in the face, and bit her on the face. RP 349-50. He was threatening to kill her, and the children were with Angeles crying. RP 350.

Zarate Coria's eleven-year-old son F.D. testified at the trial. He was outside with his younger brother and sister when Zarate Coria arrived at the apartment. RP 263-64. F.D. explained that Zarate Coria asked for a hug, and F.D.'s little sister was scared and ran to her babysitter. RP 265-66. Zarate Coria became angry at B.D.'s reaction and struck her. RP 267. F.D.'s aunt called his

mother and she arrived soon after. RP 267-68. By the time Antunez arrived, Zarate Coria was inside her apartment. RP 268. F.D. saw Zarate Coria punching his mother. RP 268. F.D. testified that the assault started inside of the apartment. RP 268. Zarate Coria grabbed Antunez by the hair to drag her out of the apartment and pulled her earrings out. RP 268. F.D. saw Zarate Coria punch his mother in the stomach, then he ran to his babysitter's apartment. RP 268-70.

Officers responded to the scene and found Antunez with visible injuries. RP 208, 228. Officers called the fire department to treat her injuries. RP 226, 307. Zarate Coria had fled the scene, but police found him lying in a field of tall grass nearby. RP 229, 284. Zarate Coria was very intoxicated, and he was arrested. RP 230.

Antunez went to the hospital. RP 198-99. She had visible injuries including bite marks on her face, bruising and swelling around her right eye, and bleeding from the left side of her head. RP 205. Doctors concluded she had been bitten, causing an open puncture wound that required antibiotics to prevent infection, and several weeks to heal. RP 376, 383-84. Antunez testified that her vision was also blurred. RP 322-23.

At trial, Zarate Coria's oldest son F.D. testified against his father, and described witnessing him attack his mother. F.D. was 11 years old. RP 261. F.D. had a service dog provided by the prosecutor's office with him for comfort while he testified. RP 251. The prosecutor told the court that F.D. was nervous about testifying, and that unbeknownst to her, the office staff had arranged for the presence of the dog. RP 250. Outside the presence of the jury, the prosecutor alerted the defense and the court about the request for the dog to accompany F.D.³ RP 251. The defense did not object to the presence of the dog. RP 251. When the court asked Zarate Coria's position on the use of the dog, his attorney replied:

Normally, I would object. But the problem here is that [F.D.] had the opportunity to meet Elle, to, apparently, go up on the witness stand with her now. I think that there are more problems associated with taking the dog away from the child at this point.

So I think that the lesser of two evils at this point is for me to not object to having the dog remain with the child.

RP 251. The trial court permitted the dog to sit beside F.D. during his testimony. RP 251. There was no mention of the dog during the testimony or the remainder of the trial.

³ The jury was not brought into the courtroom until later. RP 260.

The defense conceded that Zarate Coria had assaulted Antunez and that F.D. had witnessed the crime. The defense argued that the assault did not occur until they were outside of the apartment; hence, he was not guilty of burglary in the first degree. The defense further argued that Antunez's injuries were not severe enough for an assault in the second degree. RP 484-87. Zarate Coria argued he did not understand the no contact order and was intoxicated, which meant he did not intend to commit the burglary or violate the court order. RP 487. The jury found Zarate Coria guilty.

C. ARGUMENT

1. ZARATE CORIA DID NOT OBJECT TO THE PRESENCE OF THE SERVICE DOG AND THE TRIAL COURT PROPERLY ALLOWED THE DOG TO BE PRESENT.

Zarate Coria argues that he was deprived of a fair trial because the King County Prosecutor's Office's trained service dog was present when F.D. testified. This claim should be rejected. Zarate Coria was given an opportunity to object to the dog's presence before the jury was brought into the courtroom. Zarate Coria's counsel stated that she did not object to the dog's presence.

Therefore, Zarate Coria specifically waived any objection and failed to preserve any error. This Court should affirm.

a. Zarate Coria Waived Any Objection To The Dog's Presence.

Zarate Coria and the trial court were informed about the dog before the jury was brought into the courtroom. Zarate Coria was given ample opportunity to object and declined to do so.

An appellate court will not review issues raised for the first time on appeal. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). RAP 2.5(a) states the general rule that appellate courts will not consider issues not raised in the trial court. State v. Coe, 109 Wn.2d 832, 842, 750 P.2d 208 (1988). The rule reflects a policy of encouraging the efficient use of judicial resources. Appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and consequently a new trial. Seattle v. Harclaon, 56 Wn.2d 596, 597, 354 P.2d 928 (1960); Scott, 110 Wn.2d at 685. 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.” State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985) (citing Bellevue Sch. Dist. 405 v. Lee, 70 Wn.2d 947, 950, 425 P.2d 902 (1967)). While there is an exception for manifest error affecting a constitutional right (see State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)), Zarate Coria cites to no authority that the presence of a service dog for a witness implicates a defendant’s constitutional rights.

At trial, Zarate Coria chose not to object to the use of the service dog. Zarate Coria’s counsel told the court “[s]o I think that the lesser of two evils at this point is for me to not object to having the dog remain with the child.” RP 251. The purpose of the dog’s presence was to comfort F.D. while testifying against his own father about a felony assault on his mother. As a practical matter, Zarate Coria was not contesting the fact that F.D. witnessed the assault; rather, he argued that the assault occurred outside the apartment and the injuries were not sufficient for assault in the second degree.

Furthermore, his contention that he had no opportunity to object is without merit. The prosecutor informed the defense and the court about the service dog before the jury was brought into the courtroom. RP 251. The court asked the defense if there was any objection. RP 251. The defense had an opportunity to object and

the trial court could have potentially not allowed the dog to remain in the court or give a cautionary instruction to the jury. The fact that F.D. had been introduced to the dog and had been in court, outside the jury's presence, did not preclude the defense from raising the issue or the trial court from intervening if the dog's presence jeopardized Zarate Coria's right to a fair trial. In sum, Zarate Coria acquiesced to the use of the service dog and cannot raise the issue for the first time on appeal.

b. The Trial Court Did Not Err By Allowing The Service Dog To Accompany The Child Witness.

A trial court has broad discretion to control the manner in which a trial is conducted. State v. Hakimj, 124 Wn. App. 15, 19, 98 P.3d 809 (2004). A trial court abuses its discretion only if its actions are manifestly unreasonable or are based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Put another way, an abuse of discretion occurs only if no reasonable person would have done what the trial judge did. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). In addition, ER 611(a) provides:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

ER 611(a).

In Hakimi, this Court ruled that the trial court did not abuse its discretion under ER 611 in a child sexual abuse case when it allowed the child victims to hold a doll while they testified. Hakimi, 124 Wn. App. at 18-22. The Court reached this conclusion after observing that the record showed "that the trial judge weighed the interests of Hakimi's two victims and any prejudice to Hakimi," and that the judge acted reasonably in recognizing that holding the doll provided security and comfort to the victims in difficult circumstances (*i.e.*, testifying in the presence of the perpetrator and a room full of strangers). Id. Moreover, courts in other jurisdictions have also held that it is within the trial court's discretion to allow child witnesses to hold a doll or a teddy bear to make them more comfortable and less anxious while testifying. *See, e.g.*, State v. Dickson, 337 S.W.3d 733, 742-44 (Mo. Ct. App. 2011); State v. Powell, 318 S.W.3d 297, 302-04 (Mo. Ct. App. 2010); State v. McPhee, 58 Conn. App. 501, 506-08, 755 A.2d 893 (2000); State v.

Marquez, 124 N.M. 409, 411-13, 951 P.2d 1070 (N.M. Ct. App. 1997); Sperling v. State, 924 S.W.2d 722, 725-26 (Tex. Ct. App. 1996). A similar case presents itself here.

F.D. was an 11-year-old boy who witnessed his father brutally assault his mother. RP 261, 266-71. He also had witnessed prior domestic abuse. RP 273-74. He was now required to testify against his own father. The prosecutor noted that he was nervous about having to testify. RP 249. There was no indication in the record that the dog was in any way obtrusive or that any particular attention was drawn to the dog's presence. The trial court did not abuse its discretion by allowing the use of the service dog without objection from Zarate Coria. Zarate Coria argues the trial court abused its discretion by failing to exercise discretion. However, once he waived his objection and acquiesced to the service dog's presence the trial court was not required inquire further⁴. Regardless, based on the information available the trial court did not abuse its discretion.

⁴ Zarate Coria argues that comfort items are typically used for children in sexual assault cases. However, this distinction is not persuasive. A child testifying against a parent about violence in the home would certainly be traumatic. Zarate Coria also argues that the use of a trained service dog is distinguishable from a doll or teddy bear. There was no indication in the record that the dog more obtrusive than a stuffed animal.

Nonetheless, Zarate Coria argues that the prosecutor influenced F.D.'s testimony by providing a service dog. Zarate Coria relies on State v. Aponte, 249 Conn. 735, 738 A.2d 117 (1999). That case is inapposite. In Aponte, the issue was not whether the trial court abused its discretion in allowing a child witness to hold a toy for comfort. Rather, the issue was whether the prosecutor had committed misconduct by giving the child a gift - a stuffed dinosaur -- to hold while she testified. The court concluded that giving the child such a gift was improper, as it may have unduly influenced the child in favor of the prosecution. Id. at 751-52. Moreover, the error was compounded when the trial court limited the defendant's cross-examination of the child regarding her contact with the prosecutor. Id. at 752-53. The service dog in this case was not given to F.D., nor was the dog a "gift" as in Aponte. Nothing in the record indicates that the service dog impacted the substance of F.D.'s testimony. In sum, the issues in Aponte do not resemble what occurred in this case.

Zarate Coria failed to object to the use of the service dog and failed to preserve the issue for appeal. The trial court's decision allowing F.D. to testify with the service dog was not manifestly unreasonable or based on untenable grounds,

particularly given the defense acquiescence to the presence of the dog.

c. Zarate Coria Has Failed To Demonstrate Any Prosecutorial Misconduct.

Zarate Coria argues that the prosecutor committed misconduct or violated CrR 4.7 by failing to disclose the use of the service dog earlier.⁵ There is no authority to support either contention.

There is no authority to suggest that the State is constrained in the use of a service dog prior to trial. For example, if the State chooses to employ a service dog during interviews or meetings with a witness there is no legal basis for the defense to object or preclude it. There is no requirement that the State provide notice of the use of a service dog prior to trial. The State agrees, as the prosecutor noted at trial, that the better practice is to provide some advance notice to the court and the defense. However, the State bears the risk of an adverse impact on its case by failing to do so. If the court, in its discretion under ER 611, does not permit the dog

⁵ There is nothing in the record that establishes when the prosecutor's staff arranged for the service dog.

to accompany the witness, the State would risk the detrimental impact on the witness and its case.

Zarate Coria argues the prosecutor violated CrR 4.7 by failing to disclose the use of a service dog earlier. It is not clear that CrR 4.7 requires the disclosure of the use of a service dog. Even if governed by CrR 4.7, to properly preserve an alleged discovery violation for appeal, the defendant must make a timely objection and request a remedy from the trial court. State v. Wilson, 56 Wn. App. 63, 66, 782 P.2d 224 (1989); State v. Howell, 119 Wn. App. 644, 653, 79 P.3d 451 (2003); RAP 2.5(a). Zarate Coria never objected to nor sought relief from the trial court relating to an alleged discovery violation. He has waived any claim that the State violated discovery rules. Moreover, even if the rule did require disclosure, the remedy for that failure would be to give the defense additional time to address the issue. Zarate Coria did not request additional time and acquiesced to the use of the dog.

Zarate Coria also argues that the lack of notice was prosecutorial misconduct requiring reversal. A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Unless a

defendant objected to the alleged misconduct at trial, requested a curative instruction, or moved for a mistrial, reversal is not required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice. State v. Smith, 67 Wn. App. 838, 847, 841 P.2d 76, 81 (1992). As noted earlier, there is no requirement governing notice of the use of a service dog. When the prosecutor learned that her staff had arranged for the dog she informed the court and defense outside of the presence of the jury to provide the defense with an opportunity to be heard. This is not misconduct. Zarate Coria waived any claim of misconduct by failing to object or request a limiting instruction. Zarate Coria could have requested an instruction telling the jury to disregard the presence of the dog, but did not do so.

Zarate Coria cites only to State v. Fisher, 165 Wn.2d 727, 202 P.3d 932 (2009), arguing otherwise. In Fisher, the prosecutor blatantly defied the trial court's evidentiary rulings, admitted prior bad acts of the defendant, then misused the evidence to argue the defendant's propensity. Fisher, 165 Wn.2d 735-40, 743. The flagrant and prejudicial misconduct in Fisher bears no resemblance to the present case. In the present case, the prosecutor sought

permission outside the presence of the jury to use the service dog. Zarate Coria has failed to demonstrate any misconduct requiring reversal.

d. Any Error Was Harmless.

Lastly, even if the trial court erred by allowing the service dog to remain in the courtroom while F.D. testified, it was harmless. Zarate Coria argues that any error was of constitutional magnitude requiring that it be harmless beyond a reasonable doubt. However, he provides no authority that a trial court's ruling under ER 611 is of constitutional magnitude. In fact, analogous cases do not find a constitutional violation.

In Hakimi, this Court never indicated that allowing a witness to testify with a teddy bear for comfort implicated a constitutional right. The Court merely reviewed for an abuse of discretion. State v. Hakimi, 124 Wn. App. at 19. Zarate Coria also argues that the use of a service animal bolstered the credibility of F.D. However, even when the prosecution comments directly on the credibility of a witness it does not trigger a constitutional harmless error analysis. State v. Sargent, 40 Wn. App. 340, 343, 698 P.2d 598 (1985) (prosecutor's remark during closing that "I believe Jerry Lee Brown.

I believe him....” did not trigger a constitutional harmless error analysis).

Under any standard, the presence of the service dog was harmless. Zarate Coria's counsel conceded that he assaulted Antunez, and conceded that F.D. witnessed part of the assault. Zarate Coria challenged whether the injuries were severe enough to constitute assault in the second degree, and whether the assault happened inside or outside of the house for the burglary charge.⁶ In other words, the only implication that could possibly be drawn from the presence of the service dog was that F.D. needed some comfort because he had watched his father assault his mother and had to testify against his father. The defense conceded that was the case. In fact, it is likely the defense did not object to the dog's presence because the defense was conceding that F.D. was in the difficult position of witnessing his own father beating his mother, then having to testify against his father.

Finally, the evidence was overwhelming. Antunez testified about his assault on her. RP 318-22. Both F.D. and Angeles witnessed Zarate Coria assault Antunez inside her apartment and

⁶ On appeal, Zarate Coria does not argue the evidence of burglary in the first degree was insufficient.

testified. RP 268, 348. The assault caused serious injuries, including open wounds that took weeks to heal. There were photos and testimony from medical witnesses about the severity of her injuries. RP 376, 383-84. Zarate Coria was arrested hiding in a field near the scene. RP 229, 284. The evidence of Zarate Coria's guilt was overwhelming, and given the defense theory of the case, the service dog's presence had no conceivable impact on the outcome of the trial.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Zarate Coria's convictions.

DATED this 21st day of January, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Sara M. Hrobsky, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ARNOLDO ZARATE CORIA, Cause No. 66995-8-I, in the Court of Appeals, Division I, for the State of Washington.

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

W Brame
Name
Done in Seattle, Washington

1/24/12
Date 1/24/12