

NO. 35651-1-II

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

STATE OF WASHINGTON, Respondent

v.

WINN ROBERT GRIFFEE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT A. LEWIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-00834-1

BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The State accepts, for the most part, the statement of facts as set forth by the appellant. Because of the limited nature of the issues on appeal, additional information will be supplied in the argument section of the brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim of ineffective assistance of counsel and a claim that the defense counsel at trial failed to object to the admission of testimony of three witnesses: Miranda Sams, Adriane Campbell, and Dr. John Stirling, M.D. The claim is that their testimony was irrelevant under ER 401 and ER 402 and unfairly prejudicial.

To establish ineffective assistance of counsel, the defendant must show that the attorney's performance was both deficient and prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The appellate court will accord great deference to counsel's performance in order to "eliminate the distorting effects of hindsight" and, therefore, the appellate court will presume reasonable performance. Strickland, 466 U.S. at 689; State v. Lopez, 107 Wn. App. 270, 275, 27 P.3d 237 (2001).

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Minimal logical relevancy is all that is required. 5K. Tegland, Wash.Prac. §83, at 170 (2d Ed. 1982). In State v. Wilson, 38 Wn.2d 593, 616, 231 P.2d 288 (1951), the court stated “the connection between evidence and relevant issues need not be a necessary connection but only a reasonable and not latent or conjectural.” For example, in State v. Jones, 26 Wn. App. 551, 552, 614 P.2d 190 (1980), the court found no abuse of discretion in the court’s ruling which permitted the State to show that the defendant’s palm print had been found at the scene of the crime even though the State could not prove when the print was made. The court reasoned that the defendant’s alibi that he had left the print on an earlier occasion went only to the weight of the evidence.

A trial court’s decision regarding relevancy is discretionary and may be reviewed only for abuse of that discretion. State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990).

Concerning the testimony of Miranda Sams and Adriane Campbell, the relevance of the testimony dealt with how the allegations of child sexual abuse came to light. The victim had discussed this with her

friend, Miranda Sams, who then informed the school counselor, Adriane Campbell. Adriane Campbell then met with the victim and determined that this was a situation of mandatory reporting and thus she turned it over to law enforcement. Any attempts to go further with the testimony then that was not allowed by the trial court. This form of conditional relevance deals with how the nature of the complaint is originally made and can certainly be of relevance and importance to a jury in making a determination as to the credibility of the victim.

Miranda Sams indicated that the victim was her best friend and they lived about five houses away from each other in the eighth grade. (RP 137). She indicated that many times they would share confidences and confide in each other as best friends normally do. (RP 138).

During some of this questioning, the jury was excused from the courtroom and the court was questioning the deputy prosecutor concerning the relevance and reasons for some of the testimony. This was based on an objection made by the defense attorney. (RP 139). The deputy prosecutor withdrew the question that dealt with this and the jury was allowed back into the courtroom. (RP 140). Once the questioning resumed of Ms. Sams, there were repeated objections by the defense, some of which were sustained and the court curtailed much of what the deputy

prosecutor wanted to do with this particular witness. Ultimately what the witness was able to testify about was that her best friend had made a complaint. This complaint concerned the witness to such an extent that she disclosed it to the school counselor. (RP 147-148).

Adriane Campbell testified that she was a school counselor in the Evergreen School District and she recalled Miranda Sams coming to her about concerns about the victim (RP 154-155). Objections were made concerning this and the court admonished the jury that this did not go to the truth of the matter (the objection was hearsay – RP 156) but rather to explain “what other people said only for the purpose of determining why this witness did what she subsequently did, not for whether those statements were true or not.” (RP 156, L.20-22).

The substance of what was told to the school counselor was not disclosed to the jury, but merely the fact that she then reported this on to law enforcement and a detective talked to the child. (RP 158-159). She also indicated the demeanor of the child during the time that she was discussing these matters and gave her observations of what type of impact this had on the child. (RP 160).

Dr. John Stirling testified about his credentials in pediatrics and that he had a special interest in child development and primarily in child sex abuse and physical abuse situations. (RP 174-175). After the doctor

had given some preliminary information concerning himself, the judge excused the jury from the courtroom and then specifically asked the prosecutor what he expected to get out of this witness. The defense at that time objected as follows:

Ms. Gaffney: Yes, Your Honor. I'm going to object to any further testimony from Dr. Stirling because I do not think it;s relevant because she did not subject herself to a physical examination. Basically, we have the reporting parties through the testimony of the school counselor. So it basically is a way for the prosecutor to come in and try to talk about opinion and fabrication and whether it's real or not. So I would ask the Court to not allow Dr. Stirling to continue to testify.

(RP 180, L.9-18)

The State then gave an offer of proof concerning Dr. Stirling's testimony. The court, the deputy prosecutor and the defense attorney all entered into questioning of the doctor concerning what it was he was going to be talking about. After the offer of proof, the defense attorney requested that the court instruct the jury to disregard previous testimony of the doctor and could only consider that he did offer her a pelvic examination which she refused. (RP 188, L.13-18). The court declined to do that indicating that the testimony that the jury had heard to that point was "simply preparatory" and really had not told them anything specifically about this case. (RP 188, L.21).

After reviewing the case law, the trial court dramatically limited the testimony of Dr. Stirling. (RP 194-196).

In this situation, the court was particularly sensitive about the use of the expert when there were no physical findings. No opinions were given. This was in line with State v. Kirkman and Candia, 159 Wn.2d 918, 155 P.3d 125 (2007).

The defense on appeal claims that this was ineffective assistance of counsel. And the primary reason for that was a claim that the defense counsel had failed to object to the admission of testimony of these three witnesses. In fact, objections had been made of all three witnesses, their testimony was dramatically limited because of the objections, the trial court properly used its discretion to limit and tailor the way that the testimony would be allowed in. At one point, it admonished the jury concerning how they could consider some of the information. Further, the State submits, that there was nothing inappropriate with the testimony of the best friend who was the person of fact of complaint and what that person did with that information. The best friend went to the school counselor, who questioned the victim. None of the statements that the victim made to the school counselor went into evidence, but merely was there to demonstrate procedurally what the school counselor did with that information. She took that information from the victim and passed it on to

law enforcement. There is absolutely nothing inappropriate about this type of questioning. The State should be allowed to flesh out and give the complete picture for the jury so that they understand how the complaint came about and how it was reported to law enforcement.

The testimony concerning Dr. Stirling is even of more interest. Here, because the child had refused to have a pelvic examination, it goes to the benefit of the defendant. The doctor was not allowed to give any types of opinions, and the objections to relevancy were made by the defense. They were made to such an extent that an offer of proof was required and the trial court dramatically curtailed what information the doctor was allowed to provide to the jury. The State submits that there is absolutely nothing inappropriate with the ruling of the court nor has there been any showing of ineffective assistance of counsel or any prejudice to the defendant.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is that the trial court improperly denied a motion for mistrial based on a claim of juror misconduct. Specifically, during deliberations, one of the jurors had mentioned to the bailiff that there had been some type of contact with the defendant and this made her uncomfortable. (RP 396-397). The claim came to light when the jury had a question concerning some of the

evidence, the parties met, and a response was fashioned and given to the jury. When the bailiff returned, she indicated that she had orally received some information and passed it on to the judge. The court was mindful of the fact that the jury was in deliberations and wanted to proceed very cautiously concerning this. (RP 397-398). There was a concern raised that the defendant possibly had stuck his head into the jury room. The defense attorney indicated that the defendant had told her that he had gone to the credit union that morning and so he was not at the courthouse. (RP 399).

Nevertheless, the court wanted to be very cautious about this and so asked the juror to come in to indicate what had occurred. The juror gave the following information to the court and counsel and the court then admonished the jury. That entire proceeding went as follows:

THE COURT: Right there is fine. You're Juror Number 1, Ms. Trestrit (phonetic); is that correct?

JUROR NO. 1: Yes.

THE COURT: All right. First of all, I do not want you to tell me anything that you and the jury have been discussing with regard to deliberations in this case. I'm going to ask you some specific questions because it's my understanding from the bailiff that you relayed some information about Mr. Griffiee. And apparently you had - - Mr. Griffiee was in proximity to you last night; is that correct?

JUROR NO. 1: He followed me. He came out as I was walking to my car. Actually, it wasn't just me, it was more than me - - to the car.

THE COURT: All right. So some of you were headed to - - is this the juror parking lot over here?

JUROR NO. 1: Yes.

THE COURT: All right. And what door did you all exit out of?

JUROR NO. 1: The one between the jail and the Courthouse. Or - - well, it's the one on 13th and - -

THE BAILIFF: The west side?

JUROR NO. 1: The west side. There we go.

THE COURT: All right. And when you say that he followed you, you mean he came out the same door?

JUROR NO. 1: He just came out behind us, yes.

THE COURT: And about how closely was he to you?

JUROR NO. 1: Little bit further than he is right now. Well, he walked right past my car, so I guess he was closer.

THE COURT: All right. And did he communicate with you or any - -

JUROR NO. 1: He didn't say a word.

THE COURT: - - other juror?

JUROR NO. 1: I just saw him turn around and look.

THE COURT: All right.

JUROR NO. 1: It was just - - it was just uncomfortable.

THE COURT: All right. Other than turning around and looking, did he take any other actions, make any other communication? Now, there was some reference to the bailiff about him writing down a license number?

JUROR NO. 1: No. He didn't write anything down.

THE COURT: Okay.

JUROR NO. 1: Just turned around and looked.

THE COURT: So he walked past you, looked, and then continued walking?

JUROR NO. 1: And then he turned around, yeah.

THE COURT: All right. Thank you very much. You can resume - - oh, I guess the only other question is basically, the information that you've relayed to me, have you relayed it to the other jurors as well?

JUROR NO. 1: Just now, yeah. Yes.

THE COURT: Okay. Don't discuss it any further. I may have the entire jury back out in a moment, but you can rejoin the rest of them.

Well, given that the contact does not appear to have been an attempt to communicate with any juror - - and there may be some misunderstanding with regard to the other contact - - it's still might be helpful that I instruct the jury that inadvertent contacts with the defendant, any witness, or any party in the courthouse or outside the courtroom proceedings is not evidence and should not be considered by them. And that they should resume their deliberations based upon the evidence presented in court.

MR. FARR (Deputy Prosecuting Attorney): The State would agree.

MS. GAFFNEY (Defense Attorney): I agree.

THE COURT: All right. Bring in the jury.

Good morning, ladies and gentlemen of the jury and welcome back. I'm sorry to interrupt your deliberations, but I needed to give you an additional instruction.

It's come to my attention that last evening and perhaps this morning one or more of you may have had inadvertent contact with the defendant, in terms of his being in proximity to areas where you were. I'm not advised that any communication or attempted communication took place, only contact. And of course, as I advised you at the beginning of the proceedings, the parties, the defendant, and any witnesses are instructed not to discuss or to communicate with you on any subject outside of the courtroom to avoid the appearance of impropriety.

I'm instructing you now that inadvertent contacts and being in physical proximity of the defendant, the witnesses, and the parties to these proceedings is a normal course of being in the same building in the same area. It is not evidence in the case. The evidence you are to consider is the testimony of the witnesses presented in court. Inadvertent contacts are not evidence, should not be discussed, and should have no part in your deliberations.

With that instruction, I'll allow you to return with the bailiff and resume your deliberations.

And Mr. Griffiee, I'm not accusing you of any wrongdoing or - - I would only ask that you and your counsel discuss where jurors are likely to be and the length of time it would normally take them to get in and out of buildings and to do things. And that you redouble your efforts to have no contact, inadvertent or otherwise with them. As you can see, it sometimes has unintended consequences.

MR. GRIFFEE (Defendant): Absolutely, sir.

THE COURT: All right. With that, we'll be in recess.

(RP 400, L.8 – 404, L.16)

The State submits that there has been no showing of misconduct in this matter. The defendant must establish prejudice for error to exist. In State v. Vasquez, 130 Ariz. 103, 107, 634 P.2d 391 (1981), the court stated: “We are only justified in disturbing the verdict of guilty on an account of an alleged misconduct of a juror when it is shown that such misconduct was prejudicial to the rights of the defendant, or when such a state of facts is shown that it may fairly be presumed there from that the defendant’s rights were prejudiced.” State v. Adams, 27 Ariz. App. 389, 392, 555 P.2d 358 (1976). Whether such prejudice exists is a matter of fact within the discretion of the trial court. State v. Young, 89 Wn.2d 613, 630, 574 P.2d 1171 (1978).

Communications by or with jurors constitute misconduct. Once established, it gives rise to a presumption of prejudice which the State has the burden of disproving beyond a reasonable doubt. Remmer v. United States, 347 U.S. 227, 229, 98 L. Ed. 654, 74 S. Ct. 450 (1954). However, this presumption is not conclusive and may be overcome if the trial court determines such misconduct was harmless to the defendant. State v. Saraceno, 23 Wn. App. 473, 475, 596 P.2d 297 (1979).

As indicated in United States v. Olano, 507 U.S. 725, 738, 113 S.

Ct. 1770, 123 L. Ed. 2d 508 (1993):

Due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. . . . It is virtually impossible to shield jurors from every contact or influence that theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

To assess whether prejudice has occurred to a defendant, the particular juror misconduct must be considered in light of all the facts and circumstances of the trial. As a neutral, trained person observing both the verbal and nonverbal features of the trial, the trial judge is best equipped to make this comparison. State v. Tigano, 63 Wn. App. 336, 342, 818 P.2d 1369 (1991). A trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant receives a fair trial. State v. Jungers, 125 Wn. App. 895, 901, 106 P.3d 827 (2005). The appellate court reviews the trial court's denial of a motion for a mistrial for abuse of discretion. Jungers, 125 Wn. App. at 902.

In our case, the trial court questioned the juror about the incident and satisfied itself that nothing had happened that would affect the juror's

ability to be fair and impartial and to continue to sit on the case. Further, from the statements of the juror, there was no communication with the defendant nor does it appear that the defendant was attempting to communicate with anyone. Further, the judge admonished the jury concerning this and that it was not to have any affect on their deliberations. This was with the concurrence and agreement of both the State and the defense. (RP 402-403).

The State submits that there has been no showing of misconduct or anything inappropriate that would cause any prejudice to the defendant's right to receive a fair trial.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant deals with community custody conditions that were imposed as part of the judgment and sentence in this case. The State does agree with the defense that there are certain areas of the judgment and sentence that need clarification by the trial court. The State concurs that it would be appropriate to return this to the trial court for further clarification.

V. CONCLUSION

The defendant received a fair trial and the trial should be affirmed in all respects. The State does agree that the matter should be returned to

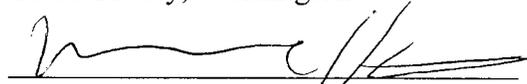
the Superior Court for purposes of clarification of various conditions dealing with the community custody.

DATED this 25 day of September, 2007.

Respectfully submitted:

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