

No. 35762-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Robert Todd Chesney,

Appellant.

Clallam County Superior Court

Cause No. 06-1-00260-1

The Honorable Judge Ken Williams

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
FAX: (360) 866-7475

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY TO RESPONDENT’S STATEMENT OF FACTS 1

ARGUMENT..... 2

I. Dr. Harrington impermissibly testified that Mr. Chesney was guilty and that A.C. was credible..... 2

II. A.C.’s uncertain and contradictory testimony was insufficient to establish beyond a reasonable doubt that the “nightmare” incident occurred within the charging period.. 9

III. The trial court’s decision allowing the jury to review inadmissible material during deliberations prejudiced Mr. Chesney..... 10

IV. Mr. Chesney was denied the effective assistance of counsel..... 11

A. Defense counsel’s failure to object to inadmissible evidence prejudiced Mr. Chesney and requires reversal. . 11

B. Mr. Chesney was denied the effective assistance of counsel by his attorney’s failure to challenge A.C.’s competency as a witness. 12

C. Mr. Chesney was denied the effective assistance of counsel by his attorney’s failure to request instructions on Attempted Rape of a Child in the First Degree or Attempted Incest in the First Degree. 12

CONCLUSION 12

TABLE OF AUTHORITIES

WASHINGTON CASES

In re A.V.D., 62 Wn.App. 562, 815 P.2d 277 (1991)..... 9

Rogers Potato v. Countrywide Potato, 152 Wn.2d 387, 97 P.3d 745 (2004)
..... 9

State v. Binh Thach, 126 Wn. App. 297, 106 P.3d 782 (2005)..... 3, 4

State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987)..... 3

State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001) 10, 11

State v. Jensen, 125 Wn. App. 319, 104 P.3d 717 (2005) 9

State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993) 4

State v. Kirkman, ___ Wn.2d ___, ___ P.3d ___, 2007, Wash. LEXIS 210,
p. 9 (2007)..... 3, 4, 5, 6, 7, 8

State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003)..... 11

State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998) 11

State v. Sutherby, ___ Wn. App. ___, 158 P.3d 91 (2007)..... 2, 6

State v. Thompson, 151 Wn.2d 793, 92 P.3d 228 (2004) 8

OTHER AUTHORITIES

ER 704 2

REPLY TO RESPONDENT'S STATEMENT OF FACTS

When asked about the timing of her initial allegation against her father, A.C. first testified that she made the accusation approximately a month after her father reunited with his ex-wife Christine: "It was – they had been – started seeing each other for, like, a little over a month or something..." RP (11/14/06) 86. During the state's second redirect of A.C., the prosecutor attempted to influence the child's testimony:

Q. If your dad said they got back together in February, would that be right?

A. Probably.

Q. So somewhere 5 to 6 months they had been together when you disclosed – I mean, I'm not telling you I'm asking you, do you think they could have been together for 5 or 6 months before you disclosed to Casey and Jessica?

A. I think so.

RP (11/14/06) 103.

A.C. could not provide dates and times for events; the following is a summary of all of A.C.'s trial testimony relating to offense dates. A.C. testified she was born on December 3, 1994, and her mother died in 2004. RP (11/14/06) 36, 41. She testified she was first molested at the age of three -- after getting home from kindergarten. RP (11/14/06) 41-42. She testified the family moved to the house where the "nightmare" incident occurred when she was 7 or 8. RP (11/14/06) 68. She testified she was 8 when the "nightmare" incident occurred (although it could have occurred

after her mother died). RP (11/14/06) 43-45. She testified the “Mexico” incident happened when she was nine. RP (11/14/06) 53-54. She testified she was 9 or so when her mother died. RP (11/14/06) 68. She testified her father stopped rubbing her when she was 10 years old. RP (11/14/06) 46.

ARGUMENT

I. DR. HARRINGTON IMPERMISSIBLY TESTIFIED THAT MR. CHESNEY WAS GUILTY AND THAT A.C. WAS CREDIBLE.

Dr. Harrington’s “diagnostic impression” -- that A.C. had suffered “sexual, physical, emotional abuse by her father” -- was opinion testimony that Mr. Chesney was guilty. RP (11/15/06) 27. Since Dr. Harrington’s diagnostic impression was based on A.C.’s statements, her testimony was also a clear indication that she found A.C. credible. *See* Appellant’s Opening Brief, pp. 6-8. Respondent claims that the testimony was admissible under ER 702 and ER 704, and dismisses Mr. Chesney’s arguments as “simple rhetoric.” *See* Brief of Respondent, pp. 4-5, 7-8. This argument is incorrect.

Opinion testimony is testimony based on a belief or idea, rather than on direct knowledge of the facts. *State v. Sutherby*, ___ Wn. App. ___, 158 P.3d 91 (2007). The constitutional rule barring opinions on the guilt of the accused or the credibility of a witness trumps ER 704, because

such opinions invade the province of the jury. *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987). Whether testimony amounts to an opinion on guilt or credibility is determined by examining the “circumstances of the case, including the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” *State v. Kirkman*, ___ Wn.2d ___, ___ P.3d ___, 2007, Wash. LEXIS 210, p. 9 (2007).

Testimony about an examining physician’s “clinical impression” has been found to invade the province of the jury. *State v. Binh Thach*, 126 Wn. App. 297, 106 P.3d 782 (2005). In *Binh Thach*, an ER doctor was asked if she could “provide a clinical impression or diagnosis of what happened or--as far as what--not what happened as the facts, but-- . . . what happened to the patient and her injuries and her body?” Without objection from the defense, the doctor answered “I guess it appeared to me, after examining her, that it was likely that what she had told me had happened to her was true. And her exam was consistent with the story that I received from her about the types of injuries that were inflicted on her.” *Binh Thach*, at 311-312. Division II found the testimony was improper

opinion evidence that invaded the province of the jury.¹ *Binh Thach*, at 312.

Division I came to a similar conclusion in *State v. Jones*, 71 Wn. App. 798, 863 P.2d 85 (1993). In *Jones*, a social worker testified that, during an interview with a child, she “felt that this child had been sexually molested by [the defendant].” The court held this was impermissible opinion testimony on the credibility of the victim and the guilt of the defendant.² *Jones*, at 812-813.

Binh Thach and *Jones* are almost indistinguishable from this case. Although Dr. Harrington did not use the word “true” or testify about her feelings, she made clear that her “diagnostic impression” was that A.C. was sexually abused by her father. RP (11/15/06) 27. The clear import of her testimony was that A.C. told the truth during the interview and that Mr. Chesney was guilty.

The facts of *Kirkman*, by contrast, are distinguishable. In *Kirkman*, the Supreme Court addressed the expert testimony of a doctor in

¹ The error was determined to be harmless in light of overwhelming untainted evidence. *Binh Thach*, at 313.

² As in *Binh Thach*, the error was determined to be harmless in light of overwhelming untainted evidence. *Jones*, at 813.

two separate cases. The Court summarized the testimony from the first case as follows:

Dr. Stirling was asked for his expert opinion on the results of his physical examination of A.D. He testified:

I'm trying to think of how to phrase this. I found nothing on the physical examination that would make me doubt what she'd said, or was there anything that would necessarily confirm it. There was no damage, it was a normal examination.

Asked for his general assessment, Dr. Stirling testified that [the victim] gave "a very clear history" with "lots of detail," "a clear and consistent history of sexual touching . . . with appropriate affect" and that "[t]he physical examination doesn't really lead us one way or the other, but I thought her history was clear and consistent."

Kirkman, at ____, citations to the record omitted.

The Court evaluated this testimony and found Dr. Stirling neither corroborated nor undercut the victim's account, that he "did not come close to testifying that Kirkman was guilty or that he believed A.D.'s account," and that his statement that the victim's account was clear and consistent was not an opinion on her credibility because a witness or victim may clearly and consistently provide a false account. *Kirkman*, at ____.

The Court summarized the testimony in the second case as follows:

After establishing that there was no physical evidence of sexual contact, the State asked Dr. Stirling, "Do you have an opinion with medical certainty whether the findings you observed are consistent with the history of abuse you were given?" Dr.

Stirling stated, "I would say the findings--to have no findings after receiving a history like that is actually the norm rather than the exception." He went on to say, "I would be very surprised if her assailant were able to actually insert his penis into her vagina." *Kirkman, at ____, citations to the record omitted.*

The Court went on to summarize additional testimony and concluded as follows:

Dr. Stirling did not come close to testifying on any ultimate fact. He never opined that [the defendant] was guilty nor did he opine that [the victim] was molested or that he believed [her] account to be true. Dr. Stirling testified only that he was able to communicate with [her] because she "had good language skills for her age, she spoke clearly." His testimony was content neutral, focusing upon the clear communication, rather than the substance of matters discussed. *Kirkman, at ____, citations to the record omitted.*

Dr. Harrington's expert testimony in Mr. Chesney's case is quite different from that discussed in *Kirkman*. Rather than recount "content neutral" details describing her interaction with A.C., Dr. Harrington gave her "final outcome," or "diagnostic impression" that A.C. had suffered sexual abuse by her father. Far from content neutral, this testimony about her diagnostic impression conveyed her opinion that A.C. was credible and that Mr. Chesney was guilty. Accordingly, Mr. Chesney's conviction must be reversed and the case remanded for a new trial. *Sutherby, supra.*

Respondent implies that any error here was not preserved because Mr. Chesney's objection cited the court's order *in limine*, which did not address the specific issue raised by Dr. Harrington's testimony. Brief of

Respondent, p. 5, 6. This implied argument has no merit. First, the issue here is preserved by Mr. Chesney's objection. Where the grounds for objection are apparent from the context, the objection is sufficient to preserve an issue. *Jones, supra, at 813, citing Black, supra at 340*. Here, the context made clear Dr. Harrington was offering her "diagnostic impression," which included her opinion that A.C. was credible and that Mr. Chesney was guilty. Thus Mr. Chesney's objection was sufficient to preserve the issue.

Second, the issue raises a manifest error affecting a constitutional right, and thus may be reviewed even absent objection under RAP 2.5(a). Opinion testimony on an ultimate issue presents a manifest constitutional error if it is a "nearly explicit" or "almost explicit" statement by the witness that the witness believed the accusing victim. *Kirkman, at ____*. Dr. Harrington's diagnostic impression (that A.C. had been sexually abused by her father) undoubtedly falls within the category of "almost explicit" statements.

The instructions given by the trial court were insufficient to cure the error. *See* Brief of Respondent, p. 8. Although, as in *Kirkman, supra*, the court's instructions included language advising the jurors they were "the sole judges of the credibility of each witness [and] the sole judges of the value or weight to be given to the testimony," unlike in *Kirkman*, the

trial court in Mr. Chesney's case did not provide a special instruction on the role of expert testimony. Instruction No. 1, Supp. CP; *Kirkman, supra*, at _____. In *Kirkman*, the Supreme Court was persuaded that any error did not prejudice the accused, in part because the trial court specifically instructed the jury "that jurors 'are not bound' by expert witness opinions, but 'determin[e] the credibility and weight to be given such opinion evidence.'" *Kirkman, at _____, citations to record omitted*. Here, by contrast, the trial court failed to give the instruction. In the absence of an appropriate instruction on Dr. Harrington's expert opinion, it is highly unlikely that the jury would have felt free to disregard her "diagnostic impression" that A.C. had been a victim of sexual abuse by her father.

This case rested entirely on the credibility of A.C. The doctor's opinion on the ultimate issue invaded the province of the jury, and prejudiced Mr. Chesney. Respondent has not argued that the error was harmless beyond a reasonable doubt, as required under the constitutional harmless error test. *See State v. Thompson*, 151 Wn.2d 793 at 808, 92 P.3d 228 (2004). Accordingly, Mr. Chesney's convictions must be reversed and the case remanded for a new trial.

II. A.C.'S UNCERTAIN AND CONTRADICTIONARY TESTIMONY WAS INSUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT THAT THE "NIGHTMARE" INCIDENT OCCURRED WITHIN THE CHARGING PERIOD..

Respondent concedes that the state bore the burden of proving beyond a reasonable doubt that the "nightmare" incident fell within the charging period. Brief of Respondent, pp. 8-11. *See State v. Jensen*, 125 Wn. App. 319 at 326, 104 P.3d 717 (2005). Respondent also concedes that A.C.'s testimony on the date of the "nightmare" incident was uncertain and contradictory. Brief of Respondent, pp. 10-11. This testimony was insufficient to prove beyond a reasonable doubt the offense occurred within the charging period.

To sustain a conviction, evidence must be more than substantial evidence (sufficient to persuade a fair-minded, rational person of the truth of the matter) and more than clear, cogent and convincing evidence (substantial enough to allow the reviewing court to conclude that the allegations are highly probable). *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387 at 391, 97 P.3d 745 (2004); *In re A.V.D.*, 62 Wn.App. 562 at 568, 815 P.2d 277 (1991).

A.C.'s uncertain and contradictory statements, even when taken in a light most favorable to the prosecution, would not convince a fair-minded person that the offense occurred within the charging period. Nor

could a reviewing court conclude it was highly probable the offense occurred within the charging period. Given the weakness of the state's proof, it cannot be said beyond a reasonable doubt that the "nightmare" incident occurred within the charging period. Accordingly, Mr. Chesney's convictions must be reversed and the case dismissed.

III. THE TRIAL COURT'S DECISION ALLOWING THE JURY TO REVIEW INADMISSIBLE MATERIAL DURING DELIBERATIONS PREJUDICED MR. CHESNEY.

When officers asked Mr. Chesney if A.C. had lied, he was forced to choose between calling his own daughter a liar or giving some credence to her accusation. RP (11/14/06) 116-117; Exhibit 34, Supp. CP.

Assuming that this was a valid investigative technique, it was improper for the jury to hear the question and Mr. Chesney's response. Indeed, the trial judge noted that he would have sustained an appropriate objection. RP (11/15/06) 15.

The technique here was quite different from that used in *State v. Demery*, 144 Wn.2d 753 at 764-765, 30 P.3d 1278 (2001). In that case, the officers accused the defendant of lying, in order to get a response. Here, the officers presented Mr. Chesney with an insoluble dilemma. Any response he gave would be prejudicial, regardless of the truth of the allegations against him. If he called his daughter a liar, the jury would judge him for doing so. If he failed to call her a liar, the jury would

presume the accusations had some truth to them. Admission of the unredacted DVD was prejudicial error requiring reversal. *State v. Redmond*, 150 Wn.2d 489 at 496, 78 P.3d 1001 (2003).

IV. MR. CHESNEY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Defense counsel's failure to object to inadmissible evidence prejudiced Mr. Chesney and requires reversal.

Respondent apparently concedes that defense counsel's failure to object was not based on legitimate strategy, and that an objection would likely have been sustained. Brief of Respondent, pp. 17-19. Instead, relying on *Demery, supra*, Respondent argues the error did not affect the outcome. Brief of Respondent, pp. 17-18. But Mr. Chesney's refusal to call his daughter a liar would have had a substantial impact on the jury. The jurors would have presumed his failure to call her a liar meant there was some truth to her accusation. This is quite different from the introduction of the officers' statements in *Demery*. Here, it is not an officer calling the accused a liar; instead, it is Mr. Chesney's own response that prejudiced him. Accordingly, the conviction must be reversed and the case remanded for a new trial. *State v. Saunders*, 91 Wn. App. 575 at 578, 958 P.2d 364 (1998).

B. Mr. Chesney was denied the effective assistance of counsel by his attorney's failure to challenge A.C.'s competency as a witness.

Mr. Chesney stands on the authority and arguments submitted in the opening brief.

C. Mr. Chesney was denied the effective assistance of counsel by his attorney's failure to request instructions on Attempted Rape of a Child in the First Degree or Attempted Incest in the First Degree.

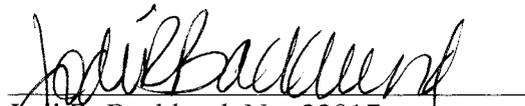
Mr. Chesney stands on the authority and arguments submitted in the opening brief.

CONCLUSION

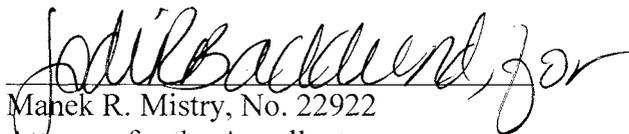
Mr. Chesney's convictions must be reversed and the case dismissed for insufficient evidence. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on July 5, 2007.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant



Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE OF MAILING

COURT OF APPEALS
DIVISION II
07 JUL -9 AM 9:43
STATE OF WASHINGTON
BY DEPUTY

I certify that I mailed a copy of Appellant's Reply Brief to:

Robert T. Chesney, DOC#300558
C/O Christine Rice
3621 55th Avenue NE
Tacoma, WA 98422

and to:

Clallam County Prosecutor's Office
223 East 4th Street
Port Angeles, WA 98362-3015

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 5, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 5, 2007.


Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant