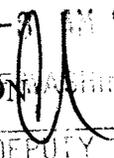


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COURT OF APPEALS
DIVISION II

NO. 38585-6-II

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

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON, Respondent

v.

PETRONILO CIFUENTES-VICENTE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE DIANE M. WOOLARD
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-00927-1

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by the appellant. Where additional information is needed, it will be set forth 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 that the trial court refused to allow cross examination of a witness as it relates to his potential bias against the defendant.

Specifically, the defense wanted to question the alleged victim's father, Ramos-Gonzales Pantaleon Rames, about possible bias he had towards the defendant because of an adulteress affair between the defendant and Mr. Rames' wife. This was not allowed by the court because of the tangential nature of it and the fact that it was not relevant or probative to any issues in the case, including bias.

The State called Ramos-Ganzales Panteleon Rames (Mr. Rames) in its case-in-chief. (RP 189). He testified that he had known the defendant for approximately 20 years. (RP 190). He also identified that he had a daughter and that she was born August 26, 1993. (RP 191). He further testified that the defendant and he are first cousins. (RP 192).

Mr. Rames testified concerning the places that he and his family had lived in and around the Clark County area and he also indicated the age of the defendant. (RP 192-194). He talked to the jury about where he worked. (RP 197). He further discussed with the jury that the defendant had lived with his family on and off and that, at times, he had paid rent when staying with them. (RP 198).

He further indicated that he had seen his daughter (the alleged victim) with the defendant on occasion and that everything looked fine to him. (RP 204). He further indicated that after the defendant left the residence, the daughter never did talk to him about this nor did he have any reason to know that anything was out of the ordinary. (RP 211-212). Finally, he was shown photographs of some of the residences where they lived and pictures of the apartment which he was able to identify. (RP 212-217).

The defendant when he testified on his own behalf (RP 597), indicated that he had never lived with Mr. Rames' family. (RP 603). Further, he said that Mr. Rames was angry at him. (RP 608-609). On cross examination, the defendant acknowledged that he had known Mr. Rames for at least 10 years. (RP 614-615). He indicated further that he had lived with them when he first came to the United States (RP 615), but denied living with the family on later occasions. (RP 616-620).

The State submits that this particular witness, Mr. Rames, did nothing more than fill in some timeframes, identified one of the residences they lived in by use of photographs, and provided ages for the alleged victim and the defendant. When he had been specifically asked his knowledge of any of the alleged sexual improprieties between his daughter and the defendant, he indicated to the jury that he did not know anything about this and that this was something that had never been discussed between him and his daughter. Nevertheless, the defense tried to argue that he had this ongoing hatred of the defendant and a bias because of an alleged illicit affair between the defendant and his wife. The State submits that there is simply no relevance to any of this and that the trial court properly ruled.

A trial court's admission of evidence is reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). This court "will not disturb a trial court's ruling on ... the admissibility of evidence absent an abuse of the court's discretion." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Abuse of discretion exists "when a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." Id.

As recently explained by our Supreme Court in State v. Fisher, 165 Wn.2d 727, 752-753, 202 P.3d 937 (2009):

The confrontation clause of the Sixth Amendment guarantees a defendant the opportunity to confront the witnesses against him through cross-examination. Delaware v. Van Arsdall, 475 U.S. 673, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The trial court retains the authority to set boundaries regarding the extent to which defense counsel may delve into the witness' alleged bias "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Id. at 679.

A defendant has a right to confront the witnesses against him with bias evidence so long as the evidence is at least minimally relevant. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983). "Bias includes that which exists *at the time of trial*, for the very purpose of impeachment is to provide information that the jury can use, during deliberations, to test the witness's accuracy *while the witness was testifying*." State v. Dolan, 118 Wn. App. 323, 327-28, 73 P.3d 1011 (2003); see also State v. Harmon, 21 Wn.2d 581, 591, 152 P.2d 314 (1944) (finding the trial court properly measured admissibility of bias evidence by proximity in time to trial testimony). A defendant enjoys more latitude to expose the bias of a key witness. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). We uphold a trial court's ruling on the scope of cross-examination absent a finding of manifest abuse of discretion. Id.

Fisher cites State v. Brooks, 25 Wn. App. 550, 552, 611 P.2d 1274 (1980), for the proposition that his confrontation right includes the right to put specific facts before the jury. Fisher misstates this rule. The Brooks court found a defendant has a right to put specific reasons motivating the witness' bias before the jury, not specific facts. Id. at 551-52. Although the trial court excluded evidence of the financial details of the divorce, it did allow counsel to elicit testimony from Ward about the prolonged nature of the divorce and whether she harbored ill will toward Fisher. Fisher's confrontation rights were not violated since the

jury was apprised of the specific reasons why Ward's testimony might be biased.

The trial court had wide latitude to limit Fisher's cross-examination of Ward given the "speculative" and "remote" nature of the evidence. CP at 19. The evidence Fisher sought to admit involved details of their divorce that transpired long before Melanie disclosed the abuse to Ward. Further, Ward was not a key witness for the defense. The trial court acted within its discretion to exclude the evidence proffered by defense counsel to demonstrate Ward's animus toward Fisher.

A defendant's right to confrontation includes the right to engage in otherwise appropriate cross-examination to show that a witness is biased. Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S. Ct. 1431 (1986); Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Bias refers to "the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." United States v. Abel, 469 U.S. 45, 52, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984). Bias may be established through cross-examination or by introducing extrinsic evidence, including third party testimony. Abel, 469 U.S. at 49. But the right to cross-examine adverse witnesses is not absolute. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). The trial court "has discretion to control the scope of cross-examination and may reject lines

of questions that only remotely tend to show bias or prejudice, or where the evidence is vague or merely speculative or argumentative.” State v. Kilgore, 107 Wn. App. 160, 185, 26 P.3d 308 (2001). See also State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965).

The defendant relies primarily on examples like Davis, State v. Dolan, 118 Wn. App. 323, 327-28, 73 P.3d 1011 (2003), and State v. Roberts, 25 Wn. App. 830, 611 P.2d 1297 (1980), to support his argument that the trial court erred in denying him the opportunity to establish bias by questioning Mr. Rames about an alleged affair between the defendant and Mr. Rames’ wife. Davis, Dolan, and Roberts, are distinguishable.

In Davis, the Court held that the defense could cross-examine the sole eyewitness to a burglary to show bias or motive because the witness was a possible suspect and the prosecution’s case depended almost entirely on the truthfulness and accuracy of his testimony. Davis, 415 U.S. at 317-18. In Dolan, a child’s mother testified against the father on child abuse charges, while in a separate action the mother was party to a bitter custody dispute with the father and allegedly told him she would drop the abuse charges if he relinquished custody of the child. The court concluded the defendant father had the right to cross-examine the mother about her possible bias against him stemming from the custody battle. Dolan, 118 Wn. App. at 326. In Roberts, the court ruled that evidence of

bias to impeach a rape victim was admissible to show that the victim was pressured by her father to testify against the defendant, because the outcome of the case hinged on whether the jury believed the victim. Roberts, 25 Wn. App. at 834-35.

Here, unlike in Davis, Dolan, and Roberts, the State's case did not hinge solely on Mr. Rames' testimony, and evidence of any animosity between the witness and the defendant was ambiguous and speculative at best.

The State submits that there simply is no evidence to support a claim of bias to such an extent that it would prevent the defendant from receiving a fair trial. Certainly there is nothing in the testimony given by this witness that would indicate that he was a "critical" witness for the State or that the entire prosecution rose or fell on his testimony concerning the defendant and his daughter. The court made proper rulings on limiting the examination of this witness.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim that the trial court violated the defendant's constitutional rights when it gave a jury instruction that commented on the evidence.

The trial court's instructions to the jury (CP 87) contained, as instruction number 5, that, "In order to convict a person of a sexual offense against a child, it shall not be necessary that the testimony of the alleged victim be corroborated". Even though this matter was discussed with the attorneys, there was no exception taken to the instructions that were given. (RP 766-767). If neither party objects to an instruction, it becomes the "law of the case." State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Before raising an alleged instructional error on appeal, the party challenging the instruction must show that he objected to the instruction at trial. State v. Reid, 74 Wn. App. 281, 292, 872 P.2d 1135 (1994). This issue has not been preserved for appeal. In order to preserve this issue, the defendant needed to have complied with CrR 6.15(c) and excepted to the instruction. State v. Salas, 127 Wn.2d 173, 897 P.2d 1246 (1995). Nevertheless, the defendant in the appellant's brief refers to this as a comment on the evidence by the judge.

When properly raised, the appellate system reviews De Novo alleged errors of law in jury instructions. Del Rosario v. Del Rosario, 152 Wn.2d 375, 382, 97 P.3d 11 (2004). Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. Del Rosario, 97 P.3d at 382.

The Washington Constitution forbids a judge from conveying to a jury the court's opinion about the merits or facts of a case. Washington Constitution, Article 4, §16. But an instruction that states the law correctly and is pertinent to the issues raised in the case does not constitute a comment on the evidence. State v. Johnson, 29 Wn. App. 807, 811, 631 P.2d 413 (1981); State v. Zimmerman, 130 Wn. App. 170, 181, 121 P.3d 1216 (2005); State v. Ciskie, 110 Wn.2d 263, 282-283, 751 P.2d 1165 (1988). RCW 9A.44.020(1) provides: "In order to convict a person of any crime defined in Chapter 9A.44 RCW, Sex Offenses, it shall not be necessary that the testimony of the alleged victim be corroborated."

An impermissible comment conveys a judge's personal attitude toward the merits of a case or permits the jury to infer from what the judge said or did not say, that the judge believed or disbelieved questioned testimony. State v. Ciskie, 110 Wn.2d at 283; Hamilton v. Department of Labor & Industries, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). However, as pointed out in the Zimmerman, case and the Ciskie, case (in particular), the providing of the proper jury instruction is not a comment by the judge nor does it convey his personal attitude toward the evidence or lack of evidence. It does not suggest that the court believes more weight should be given to the alleged victim's testimony. It merely mirrors the accurate statement of the law. The giving of the instruction of the type given in our

case, has been found by the Washington Supreme Court to be a correct statement of the law and that it does not constitute reversible error. State v. Malone, 20 Wn. App. 712, 582 P.2d 883 (1978); State v. Clayton, 32 Wn.2d 571, 202 P.2d 922 (1949).

The State submits that this has not been preserved for appeal and further no evidence has been shown that the jury inferred from this instruction that the alleged victim's testimony required corroboration or that the alleged victim's testimony was entitled to greater weight and it was not improperly argued by the State or the defense.

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 2 day of Sept, 2009.

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