

NO. 41854-1-II

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

STATE OF WASHINGTON, Respondent

v.

DENNIS LAWREN TOLLES, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-01063-7

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. THE DEFENDANT'S RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED.
- II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED MR. NORTON'S TESTIMONY ABOUT DELAYED REPORTING AND LIMITED DISCLOSURES.

B. STATEMENT OF THE CASE

1. PRE-TRIAL FACTS

This case was originally filed in 2003. CP 26. The case was dismissed without prejudice on July 7, 2003 because the victim was unable to proceed at that time. CP 26. Thirty seven days had elapsed on the speedy trial clock at that time. CP 26. On July 7, 2010 the charges against Tolles were re-filed. CP 1-2, 26. A summons was issued to Mr. Tolles but he didn't appear in the Clark County Superior Court at the time designated in the summons. RP 4 (hearing on 8-18-10). A warrant for his arrest was therefore issued. Id. The defendant was arrested on the warrant in Salem, Oregon on August 13, 2010. RP 6. The defendant was on probation in Marion County, Oregon under Oregon cause number 07C44659 and subject to conditions of release in Oregon at the time the charge was re-filed. CP 26 (finding of fact number 7). He was required to

reside in Oregon as part of his probation. Id. He was extradited to Clark County and booked into the Clark County jail on August 17, 2010. CP 26. Trial was set for September 13, 2010. RP 577, CP 28. Assuming that the speedy trial clock began running again on August 17, 2010, the September 13, 2010 trial date was on day 57 of the 60 day time for trial period.¹ On September 9, 2010, Tolles' counsel requested a continuance so that he could have more time to prepare for trial. RP 16 (hearing on 9-9-10). Tolles did not want to execute a speedy trial waiver so the trial court found good cause to continue the case, stopping the speedy trial clock and beginning an excluded period under CrR 3.3(e)(3) and (f). Id. Tolles does not challenge that ruling in this appeal.

2. TRIAL FACTS

K.J. was sexually abused numerous times over approximately one year when she was six years-old by Dennis Tolles, a live-in friend of her mother's. RP 285-86, 288. The first instance of sexual abuse occurred when the defendant came into her room while she slept. RP 292. She woke to find him touching her with his hand in her pants, and his fingers in her

¹ Because the time between July 7, 2010 and August 17, 2010 was an excluded period, the speedy trial period would end no earlier than 30 days from August 17, 2010. See CrR 3.3 (b) (5). Thus, the speedy trial period would have ended in this case on September 16, 2010 had not another excluded period began on September 9, 2010. The trial court correctly noted at the hearing on September 9, 2010 that the September 13th trial date was day 57 of the 60 day trial clock. See RP at p. 17-18.

vagina. RP 292. K.J. also recalled that they had a small children's pool in their backyard and the defendant would allow her brother and sister to swim but not her. RP 296. Rather, he would make her get on his back piggyback style and place his hands on her thighs. RP 296. Then he would slide his hand under her bathing suit bottom and stick his finger in her vagina. RP 296-97. K.J. also recalled several occasions where the defendant would sit at his computer and watch pornography and would make her sit on his lap and watch it with him. RP 297-98. During these occasions he would get an erection and sometimes place his hands inside her pants and stick his fingers in her vagina. RP 297-98. K.J. never told anyone about these incidents after they occurred. RP 299. K.J. finally became fed up with the defendant terrorizing her and one night, when he came into her room wearing a mask designed to disguise his face and began to touch her thigh, she told her mother. RP 286. When she saw the mask she asked who it was and the defendant said it was "Keith," K.J.'s brother. RP 286-87. She immediately knew it was not Keith not only because Keith was a boy rather than a man, but because she recognized the defendant's voice. RP 286-88. K.J. ran into her mother's room and woke her up, telling her that the defendant had been in her room touching her. RP 286-87. K.J.'s mother called the police the following day to report the

incident. RP 333. When the police arrived at her home they found the defendant hiding under a bed. RP 333.

K.J. met twice with Detective Steve Norton of the Children's Justice Center. RP 291. On the first occasion she only told Detective Norton about the defendant touching her leg (the incident that sent her running into her mother's room). RP 291. She did not give him full disclosure of the scope of the abuse because she was afraid the defendant would harm her. RP 291. The second time she met with Mr. Norton, however, she gave him much more information about the sexual abuse. RP 292. The defendant admitted to sexually abusing K.J. RP 303, 344.

On cross examination of K.J. the defendant elicited testimony that K.J. had not given full disclosure to the officer who first responded to investigate the matter, nor had she made a full disclosure to Detective Norton when first interviewed by him. RP 307-11. Defense counsel aggressively cross examined K.J. about the fact that when she first spoke with Norton, it was in a friendly, toy-filled environment. RP 311. Likewise, K.J. was cross examined about the fact that she did not make a full disclosure either to the medical doctor or the therapist from Kaiser Permanente who interviewed her. RP 312-13.

Steven Norton testified that prior to retiring, he had been a police officer with the Vancouver Police Department for thirty years. RP 372. He

has a Bachelor's Degree in Psychology from Oregon State University and has completed some work toward his Master's Degree in Counseling Psychology from Lewis and Clark College. RP 378. He was a child abuse investigator assigned to the Children's Justice Center (formerly called CAIC). RP 372. He received training in that capacity during his tenure at the CAIC and also provided training to the Washington State Satellite Training Commission to police officers on child abuse investigation. RP 373, 378. He co-authored a training book on child abuse investigation that was used by the training commission. RP 373. During his tenure as a child abuse investigator he investigated thousands of cases of sexual abuse and interviewed several thousand victims. RP 378. Norton testified about the basic rules for interviewing child witnesses. RP 373. For children under the age of ten, for example, it is important to establish competency prior to questioning and it is critical that the interviewer ask open-ended questions that are not leading. RP 373.

Prior to Norton's testimony, the State advised the court that it would like to ask Mr. Norton a question about delayed reporting. RP 370. Defense counsel did not object at that time, saying only "So, there would maybe—I don't know what—his expertise, I think, is based on his experience. I don't know beyond that." RP 370. The court replied "He can

talk about his experiences. I will rule on any objections that might come up.” RP 370.

During direct examination, the prosecutor asked: “Mr. Norton, in your experience, is it unusual for kids to limit their disclosures when they talk to somebody about abuse?” RP 379. Defense counsel objected, saying “Objection. Lack of foundation. He’s not in a position to give expert opinion.” RP 379. The prosecutor responded that he felt the foundation had been laid because “[h]e is a child abuse investigator for thirty years. He has interviewed thousands of kids.” RP 379. The court said “I’m going to allow the answer.” RP 379. Norton then responded that yes, he has seen numerous occasions of children limiting their disclosures of abuse. *Id.* He said:

A lot of times you will see that—the disclosure regarding abuse is—you know, they will see how you react to that. If you show no reaction then more will be disclosed, kind of on a continuum. I don’t believe it is unusual to see children make an initial disclosure to the investigating officer and then, by the time that the prosecutor’s office and the defense interview them, there is more information that comes out.

RP 380.

Tolles was charged with four counts rape of a child in the first degree and one count of attempted child molestation in the first degree. CP 1-2. He was convicted of one count of rape of a child in the first degree

and attempted child molestation in the first degree, but acquitted of three counts of rape of a child in the first degree. CP 129-133. He was given a sentence within the standard range for the minimum term of confinement. CP 205-06. This timely appeal followed. CP 219.

C. ARGUMENT

I. THE DEFENDANT'S RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED.

The trial court entered findings of fact and conclusions of law on the motion to dismiss for violation of speedy trial. CP 28. In them, the trial court held that the former version of CrR 3.3, in effect in 2003 when this charge was first filed, could be relied on in this case. Under the former version of CrR 3.3, the court held that Tolles' right to a speedy trial was not violated. Alternatively, the trial court found that Tolles' right to a speedy trial was not violated under the current version of CrR 3.3 either because at the time this charge was re-filed the defendant was out of state and subject to conditions of release not imposed by a court of the State of Washington. CP 27-28. The defendant does not assign error to any of the trial court's findings of fact and thus, they are verities on appeal. Findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994), *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009).

Although he doesn't identify them by number, the defendant assigns error to the following two conclusions of law: That the version of CrR 3.3 in effect in 2003 should control this case (Conclusion of Law number 5, found at CP 27); and that even if the current version of CrR 3.3 applies, that the time for trial period is excluded under CrR 3.3(e)(6) for the entire period of time that the defendant was on probation in Marion County, Oregon because his probationary status renders him "subject to conditions of release not imposed by the State of Washington" for the entire period of his probation. (Conclusion of law number 6, found at CP 27-28).

As an initial matter, it is not clear why defendant claims that his right to a speedy trial was violated. Because he agrees that he was subject to conditions of release not imposed by a court of the State of Washington, he agrees that the speedy trial period did not begin running on July 7, 2010. Again, he does not assign error to the trial court's seventh finding of fact on the motion to dismiss, in which the trial court found: "Defendant was subject to conditions of release in Oregon on July 7, 2010 when the Information was filed and continues to be subject to conditions of release in Oregon. Defendant's probation in Oregon began on June 29, 2007 and terminates on June 28, 2010 in Marion County, Oregon Cause No. 07C44659." CP 26. Because this finding is a verity on appeal, Tolles

agrees that his speedy trial period did not begin running again on July 7, 2010.

Tolles assigns error to two conclusions of law. He first assigns error to conclusion of law number 5, in which the trial court held that the former version of CrR 3.3, in effect in 2003, should control this case rather than the current version of CrR 3.3. The State agrees with Tolles that the trial court clearly abused its discretion in holding that the former version of CrR 3.3 could be relied on in this case.

The second conclusion he assigns error to is found in conclusion of law number 6, in which the trial court concluded that the period of exclusion under CrR 3.3(e)(6) (triggered by the defendant being subject to foreign conditions of release) would last for the entire time the defendant was subject to those conditions of release. CrR 3.3(e)(6) provides that there shall be an excluded period in the time for trial period when:

(6) Defendant subject to foreign or federal custody or conditions. The time during which a defendant is detained in jail or prison outside the state of Washington or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington.

The trial court's sixth conclusion of law states:

The Court rules that even if the present CrR 3.3 applied, because Defendant was on probation in Marion County, Oregon the time he is on probation is an excluded period

under CrR 3.3(e)(6). This section provides anytime a defendant is detained in jail or in prison outside the state of Washington or in Federal jail or prison and the time in which the defendant is subject to conditions or release not imposed by the State of Washington is an excluded period. Since the defendant is subject to conditions of release in the State of Oregon the Washington speedy trial time is excluded.

CP 27-28.

Read as a whole, Conclusion of Law 6 holds two things: (1) that at the time the charges in this case were re-filed the defendant was subject to conditions of release imposed by a foreign jurisdiction such that the speedy trial clock did not begin running again at that time; and (2) that the period of exclusion under CrR 3.3(e)(6) would only end when the conditions of release from the foreign jurisdiction were terminated.

Because the defendant agrees with the trial court's seventh finding of fact, in which the court found that the defendant was "subject to conditions of release in Oregon on July 7, 2010 when the Information was filed" under Oregon cause number 07C44659 and that the defendant was required to reside in Oregon as part of his probation, defendant only challenges the portion of Conclusion of Law number 6 which holds that the period of exclusion would last until such time as the defendant's probation in Oregon ends. On this point, the State agrees with Tolles that the period of exclusion under CrR 3.3(e)(6) would not continue in

perpetuity until such time as the Oregon conditions of release ended; rather, the period of exclusion ended when the defendant was returned to Washington's jurisdiction and booked into the Clark County jail—on August 17, 2010.² Because the defendant's right to a speedy trial was not violated based on the August 17, 2010 re-starting of the clock, the defendant's complaint that his right to a speedy trial was violated appears to be the product of confusion.

Here is the calculation:

*37 days had elapsed on the speedy trial clock at the time the charges were re-filed on July 7, 2010.

*The speedy trial clock began running again on August 17, 2010. Due to the operation of CrR 3.3(b)(5), no fewer than 30 days remained in which to bring the defendant to trial. In other words, the speedy trial period would end, assuming

² The State agrees that under the reasoning of *State v. Chhom*, 162 Wn.2d 451, 173 P.3d 234 (2007), the exclusion outlined under CrR 3.3(e)(6) would necessarily end when the defendant was booked into the Clark County jail on August 17, 2010.

The defendant devotes pages 16-21 to his argument that the trial court erred in holding that CrR 3.3(e)(6) created a continuous period of exclusion until the defendant is relieved of his Oregon probation, and pages 21-25 to his argument that the trial court erred in holding that the former version of CrR 3.3 could be applied to this case.

In pages 16-21, defendant devotes his entire argument to the premise that the trial court erred finding a *continuous* period of exclusion until such time as defendant is relieved from his Oregon probation and does not argue that the trial court erred in finding, in the first instance, that the defendant was subject to foreign conditions of release at the time the charge was re-filed on July 7, 2010. This is in accord with Tolles' decision not to assign error to Finding of Fact number 7. He agrees that CrR 3.3(e)(6) applied from July 7, 2010 until his arrival in the Clark County jail on August 17, 2010. Because the State agrees that the excluded period ended on August 17, 2010, it appears there is no disagreement between the parties (beyond those attributable to simple math) in this case.

it was not again interrupted, on September 16, 2010. The September 13, 2010 trial setting was timely.

*On September 9, 2010, six days before the expiration of the speedy trial period, an excluded period began when defense counsel moved to continue the case.

Defendant argues in his brief that trial was set for September 16, 2010 but this is an error. See Brief of Appellant at pages 25-26. Trial was set for September 13, 2010. See RP 577, CP 28. Indeed, Tolles quotes Conclusion of Law number 7, which notes the September 13, 2010 trial setting. See Brief of Appellant at p. 11. Perhaps Tolles was confusing the trial date (the 13th) with the date on which the speedy trial period would have ended (September 16th)? Even so, his complaint that a September 16, 2010 trial date would violate speedy trial makes no sense because September 16, 2010 was slated to be the 60th day of the speedy trial period (that is, until it was stopped again on September 9, 2010 when the trial court granted defense counsel's motion to continue the case). He states on page 26 of his brief that the speedy trial period would have ended (assuming the clock began running again on August 17, 2010) on September 15, 2010. Again, this is a calculation error. September 15th would have been day 59, not day 60.

Of course, arguing over whether the speedy trial period ended on September 15th or September 16th is very interesting but ultimately

irrelevant because the September 13th trial setting was timely either way, and because the speedy trial clock stopped again on September 9th when the trial court granted defense counsel's motion to continue the trial.

Tolles does not assign error to the trial court granting the continuance on September 9, 2010 and stopping the speedy trial clock at that time pursuant to CrR 3.3(e)(3). Moreover, Tolles does not complain about anything that occurred after September 9, 2010 as it relates to the timeliness of his trial. Tolles was not denied a speedy trial.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED MR. NORTON'S TESTIMONY ABOUT LIMITED DISCLOSURES.

The defendant claims that the trial court abused its discretion when it "allowed a police officer to render an opinion for which he was not qualified." See Brief of Appellant at 27, see also appellant's assignment of error 4.

ER 702 allows testimony by an expert. It states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The rule does not require scientific knowledge; specialized knowledge will suffice so long as the expert is qualified to give such testimony. ER 702. Experts are "permitted to testify on subjects that are not within the

understanding of the average person.” *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008); *State v. Petrich*, 101 Wn.2d 566, 575-76, 683 P. 2d 173 (1984). The expert will be allowed to offer testimony when the testimony will assist the trier of fact. *Montgomery* at 590; ER 702. Moreover, the “mere fact that an expert opinion covers an issue that the jury has to pass upon does not call for automatic exclusion.” *Montgomery* at 590; *State v. Kirkman*, 159 Wn.2d 918, 929, 155 P.3d 125 (2007).

In discussing how the qualifications for an expert are established, Professor Karl Teglund observes:

- (a) Ordinarily this foundation for expert testimony is accomplished by questioning the witness before he or she begins to give the expert testimony.
- (b) The witness need not possess the academic credentials of an expert; practical experience may suffice. Rule 702 states very broadly that the witness may qualify as an expert by virtue of knowledge, skill, experience, training, or education.

Courtroom Handbook on Washington Evidence, Karl B. Teglund, 2011-2012 Edition, p. 367 (emphasis in original).

A trial court’s decision to admit expert testimony is discretionary and will not be disturbed on appeal absent an abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 715, 940 P.2d 1239 (1997).

Here, the defendant does not claim that Mr. Norton’s testimony would not assist the trier of fact. His assignment of error is limited to his

claim that Mr. Norton was not qualified to give the testimony he gave. Notably, K.J.'s delayed and limited disclosures were the centerpiece of Tolles' defense. Tolles' claim fails. Mr. Norton was a child abuse investigator with the Children's Justice Center and was a police officer for thirty years. He holds a Bachelor's degree in psychology and has completed some work toward a Master's Degree in counseling psychology. He has conducted training for other law enforcement officers in the area of child abuse investigation dating back several decades and even co-authored a book used to by the Washington State Training Commission on investigation of child abuse. During his tenure as a child abuse investigator he has investigated thousands of cases of sexual abuse and interviewed several thousand child witnesses. He gave expert testimony on the proper manner in which to question child witnesses. It is difficult to imagine a more qualified witness on the subject of delayed reporting or limited disclosure of abuse by child victims. Again, defense counsel did not object to the admission of this testimony on the basis that it would not assist the trier of fact, nor does Tolles make such a claim in this appeal. Tolles' claim that Mr. Norton was not qualified to testify in the manner he did is meritless.

Finally, if the trial court is deemed to have abused its discretion by admitting this evidence, the error was harmless. The improper admission

of evidence is harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *Thieu Lenh Ngiam v. State*, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994). Here, the evidence against Mr. Tolles was very strong given not only the certainty of K.J.'s testimony, but the fact that he admitted the conduct to both K.J. and her mother (see RP at pages 303, 344) and the fact that when the police came to the home to investigate the abuse he was found hiding under a bed. Moreover, the jury acquitted Tolles of three counts of rape of a child, convicting him of only two of the counts charged. While the defendant suggests this is evidence of prejudice, the opposite is true. That the jury acquitted Tolles on three of five counts demonstrates that Tolles suffered no actual prejudice by the admission of Mr. Norton's testimony. The trial court did not abuse its discretion and Tolles' convictions should be affirmed.

D. CONCLUSION

Mr. Tolles' convictions should be affirmed.

DATED this 12th day of March, 2012.

Respectfully submitted:

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