

NO. 47480-8-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MARCOS APODACA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Stanley Rumbaugh

No. 14-1-04610-5

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to preserve his claim of the erroneous exclusion of evidence by failing to make an offer of proof as to the scope of that evidence and by failing to articulate a specific basis for its admission?
2. Has defendant failed to present a manifest constitutional error under RAP 2.5(a) when the alleged error is not apparent from the record and the trial court did not impede defendant's right to present a defense?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Marcos Apodaca (hereinafter "defendant") by amended information with theft of a motor vehicle and violation of a pre-sentence no contact order, alleging that both were domestic violence incidents. CP 25-26; RCW 9A.56.065, RCW 26.50.110, RCW 10.99.020.

After a CrR 3.5 hearing, the court found statements made by defendant to arresting officers would be admissible in the State's case-in-chief. 1RP 35.¹

¹ The verbatim report of proceedings will be referred to by volume number, RP, and page number (#RP #).

The jury found defendant guilty of both crimes alleged, but did not find they were domestic violence incidents. CP 56–58; 4RP 3–4. Defendant requested a drug offender sentencing alternative (DOSA), but the court denied his request. 5RP 13–17. Defendant was sentenced to a standard range sentence of 48 months on the felony. 5RP 17; CP 155. On the gross misdemeanor, defendant received 364 days to run concurrent to the felony. CP 164.

Defendant filed this timely notice of appeal. RP 166.

2. Facts

Sabra Kelly met defendant three or four years ago, and within a month of meeting their relationship became romantic. 3RP 37–38. The relationship, however, ended by the beginning of 2014. 3RP 39. On November 16, 2014, Kelly was taking a shower when she heard something that sounded like her car starting up. 3RP 40–42. Kelly got out of the shower and ran into the bedroom where she had left her keys. 3RP 43. The keys were not there. 3RP 43.

Kelly looked out the window, saw her car running, and saw defendant inside her car. 3RP 43. Kelly had not given defendant permission to drive her car. 3RP 43. Kelly called 911 immediately. 3RP 46. Lakewood Police Officer Austin Lee responded to the call, spoke to Kelly, and reported the 1999 blue Mercedes-Benz as stolen. 2RP 103–06.

Two days later, a friend contacted Kelly to tell her where Kelly's car was. 3RP 49. Kelly went to that location with Doug Stenge. 3RP 54. Kelly testified that Stenge was her friend and business partner. 3RP 54. Stenge owns the house that Kelly has lived in for thirteen years. 3RP 54. Kelly stated there was no romantic relationship between her and Stenge and there never had been. 3RP 54. On cross-examination, defense counsel questioned Kelly about Stenge owning the house and paying the mortgage. 3RP 83.

Kelly found her car in the parking lot of Pacific Lutheran University. 3RP 55–56. Because Kelly did not have the keys to the car, she continued on to the location her friend had told her about two blocks away. 3RP 55–56. At a nearby house, Kelly saw defendant through a window. 3RP 57. Kelly told defendant she was calling the police and wanted her car keys. 3RP 58. Defendant gave Kelly the keys. 3RP 58.

Pierce County Sheriff Deputies Inga Carpenter and Alexa Moss responded to Kelly's 911 call. 2RP 113. After speaking to Kelly, the deputies knocked on the door and asked to speak to defendant, who then came to the door. 2RP 115. Defendant initially told the deputies he had not seen Kelly for a few weeks and he had not taken her car. 2RP 116; 2RP 127. After arresting defendant and advising him of his rights, defendant told Deputy Carpenter he had actually spent the night at Kelly's house a couple days earlier. 2RP 117; 2RP 128. The next morning, the two got in

an argument and he wanted a ride home. 2RP 117; 2RP 128. When Kelly “stepped out,” defendant took her car and drove back home. 2RP 117; 2RP 129.

There was a pre-trial no contact order prohibiting defendant from contacting Kelly issued on November 18, 2014 and set to expire November 18, 2019. 3RP 61–62; ex. 8. On February 19, 2015, defendant called Kelly on her personal cell phone from the Pierce County Jail. 3RP 64–65. Although the automated voice at the beginning of the call said “Danny or Benjamin,” when Kelly asked who was calling, defendant’s voice responded, “You know who this is.” 3RP 66. Kelly recognized it as defendant’s voice. 3RP 67. Corrections Deputy Don Carn explained that the call had been made using a PIN number belonging to inmate Benjamin Morrison, who was housed in the same tank as defendant. 2RP 145. According to Deputy Carn, the inmates at the jail often trade PIN numbers, steal them, or sell them; it is a “fairly extensive” problem at the Pierce County Jail. 2RP 142.

Defendant chose to testify in his defense. 3RP 86–111. According to defendant, on November 15, 2014, he spent the night with Kelly at her house. 3RP 87. Kelly and defendant “were shampooing the carpets” and “had sexual relations.” 3RP 87. The next morning, while Kelly was in the shower, he asked her to drive him to town. 3RP 89. Kelly allegedly yelled in return, “You’ve got my keys,” which defendant took to mean Kelly was giving defendant permission to take her car. 3RP 90. When Kelly came to

his friend's house on November 17, 2014, defendant gave her the car keys without any heated exchange. 3RP 92.

Defendant additionally called Beverly Wilcoxson. 3RP 25–35. Wilcoxson lived at the house defendant was at when arrested. 3RP 26. According to Wilcoxson, about six to eight months earlier, Kelly had come to the home to retrieve her keys from defendant. 3RP 30. Wilcoxson, however, had not actually seen Kelly at that time. 3RP 31. Wilcoxson allegedly recognized Kelly's voice, despite admitting that she had never heard Kelly's voice prior to that. 3RP 31.

C. ARGUMENT.

1. DEFENDANT FAILED TO PRESERVE HIS CLAIM OF THE ERRONEOUS EXCLUSION OF EVIDENCE BY FAILING TO MAKE AN OFFER OF PROOF AS TO THE SCOPE OF HIS EVIDENCE AND BY FAILING TO ARTICULATE A SPECIFIC BASIS FOR ITS ADMISSION.

The first issue to address when reviewing evidentiary issues on appeal is whether those issues have been properly preserved for appeal. *State v. Powell*, 126 Wn. 2d 244, 256, 893 P.2d 615 (1995); see RAP 2.5(a). There can be no appellate review of the exclusion of evidence without an offer of proof. *State v. Thompson*, 58 Wn. 2d 598, 608, 364 P.2d 527 (1961) (citing *State v. Griffith*, 52 Wn. 2d 721, 328 P.2d 897 (1958)); ER 103(a)(2). “An offer of proof must be sufficiently definite and

comprehensive fairly to advise the trial court whether or not the proposed evidence is admissible.” *State v. Matthews*, 41 Wn. 2d 64, 67, 247 P.2d 556 (1952). An offer of proof is also necessary to inform the appellate court whether defendant was prejudiced by the exclusion of evidence. *Id.*

In the present case, defendant did not make a sufficient offer of proof for meaningful appellate review of the evidence to which he now assigns error. Defendant assigns error to the trial court’s exclusion of evidence regarding Kelly’s relationship with Doug Stenge. *See* Br. of App. p. 7–8.² In support of admission of the evidence, defense counsel stated that Wilcoxson had initially indicated that it was “common knowledge” that a relationship existed between Kelly and Stenge, but counsel further said that information only had come from defendant himself, so it would not constitute common knowledge. 3RP 13. Other than that brief reference, counsel said he was unsure how much Kelly would substantiate, but that defendant had “personal knowledge.” 3RP 14.

Defense counsel did not make a sufficiently comprehensive offer of proof as to allow for meaningful appellate review. Although live testimony in a detailed offer of proof is not required, Evidence Rule 103(a)(2) does require the offer of proof make the *substance* of the

² Discussion of the evidence’s admissibility began as the result of a State’s motion to preclude Wilcoxson from using the term “sugar daddy” or referencing Kelly having a “reputation” for having a “male benefactor.” *See* 3RP 12–13.

evidence apparent. ER 103(a)(2); *State v. Ray*, 1169 Wn. 2d 531, 539, 806 P.2d 1220 (1991). Defendant failed to make the substance of the now-challenged evidence apparent. Defense counsel merely referenced “personal knowledge” held by defendant of the alleged relationship between Kelly and Stenge. *See* 3RP 14. Defense counsel did not make clear what this personal knowledge entailed, how defendant came to know it, or whether there was any other evidence supporting the “male benefactor” theory.³ Therefore, there was no sufficient offer of proof made.

When asked by the court what evidence there was, defense counsel responded,

Well, I’m going to do what I can on cross [of Kelly], but Mr. Apodaca may end up having to testify to some of this. I do have the assessor/treasurer’s report for the parcel that is listed to a Douglas Stenge at 7216 100th Avenue Court Southwest. He’s listed as the taxpayer on the parcel. So it’s not kind of a pie-in-the-sky thing. He does, in fact, have some financial interest in the domicile. I believe Ms. Kelly will testify that he was the one who was the driver of the truck that took her to the location on the 17th where they discovered the vehicle some 20 miles away from home. So, like I said, her credibility, I think, is key to this.

³ Defense counsel did speak to the assessor/treasurer reports that showed Stenge owned the house Kelly lived in, but defendant was not precluded from asking Kelly about this. Defendant did, in fact, cross examine Kelly on that subject. *See* 3RP 83. Therefore, that evidence is not relevant to the excluded evidence of an alleged romantic relationship between Stenge and Kelly.

3RP 17–18. To the extent that these statements by defense counsel could be considered an “offer of proof,” there was no error because the evidence referred to by defense counsel was admitted at trial through Kelly’s testimony. *See* 3RP 54, 83. Because that evidence was admitted, defendant cannot contend its *exclusion* was an error.

Evidence Rule 103(a)(1) additionally provides that a party may assign evidentiary error on appeal only on a *specific ground* made at trial. ER 103(a)(1); *State v. Blake*, 172 Wn. App. 515, 529, 298 P.3d 769 (2012). At trial, defendant failed to articulate which rule of evidence supported the introduction of the evidence he now challenges. The trial court ultimately excluded the evidence under Evidence Rule 403. 3RP 18. In defense counsel’s argument, however, he did not cite to any evidence rules. *See* 3RP 13–18. He makes general references to the relevance of the evidence and how it may show Kelly had a motive to lie, 3RP 14, but fails to provide any specific basis for the admission of the evidence. On appeal, defendant now asserts the evidence would be admissible under Evidence Rule 608 or 404, *see* Br. of App. p. 11, but these bases for admission were not argued below. Defendant may not assign error on specific grounds that were not articulated below – of which there were none. Therefore, defendant has failed to properly preserve the evidentiary issue he now raises, and this court should decline to review it.

2. THE TRIAL COURT DID NOT IMPEDE DEFENDANT’S RIGHT TO PRESENT A DEFENSE WHEN IT FOUND THE PREJUDICIAL EFFECT OF THE PROPOSED EVIDENCE OUTWEIGHED ANY PROBATIVE VALUE. THEREFORE, THIS COURT SHOULD NOT REVIEW THIS CLAIM UNDER RAP 2.5(A).

As a fundamental element of due process, an accused has the right to establish a defense. *State v. Maupin*, 128 Wn. 2d 918, 924, 913 P.2d 808 (1996); U.S. Const. Amend. VI; Const. art. I, § 22. This right includes offering the testimony of witnesses, compelling their attendance, and presenting the defendant’s version of the facts. *Maupin*, 128 Wn. 2d at 918. As articulated above, defendant failed to properly preserve the evidentiary exclusion he now challenges, but RAP 2.5(c)(3) allows a defendant to raise for the first time on appeal a “manifest error affecting a constitutional right.” Exceptions to RAP 2.5(a), however, are to be narrowly construed. *State v. Blake*, 172 Wn. App. 515, 530, 298 P.3d 769 (2012) (citing *State v. Montgomery*, 163 Wn. 2d 577, 595, 183 P.3d 267 (2008)). Manifest constitutional error requires a showing of actual prejudice or practical and identifiable consequences. *Id.*

For an error to be manifest, the facts necessary to adjudicate the claimed error must be apparent from the record on appeal. *State v. McFarland*, 127 Wn. 2d 322, 333, 899 P.2d 1251 (1995). As discussed previously, defendant failed to make an offer of proof regarding the evidence he sought to admit or advance a theory for admission. *See supra* p. 5–8. Defendant’s failure to adequately address this issue below means

the error cannot be manifest because the alleged error is not apparent from the record.

Further, the trial court did not abuse its discretion. Although a defendant has a right to present evidence, “the scope of that right does not extend to the introduction of otherwise inadmissible evidence,” *State v. Aguirre*, 168 Wn. 2d 350, 362–363, 299 P.3d 689 (2010), and it is within the discretion of the trial court to determine whether evidence is admissible, reversible only upon a showing of a manifest abuse of discretion. *State v. Bourgeois*, 133 Wn. 2d 389, 299, 945 P.2d 1120 (1997). A manifest abuse of discretion requires the decision be manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn. 2d 12, 26, 482 P.2d 775 (1971).

Evidence Rules 401 and 402 provide that admissible evidence must be relevant, although the threshold is very low and even minimally relevant evidence may be admitted. ER 401, ER 402; *State v. Darden*, 145 Wn. 2d 612, 621, 41 P.3d 1189 (2002). Relevant evidence may be excluded under Evidence Rule 403 if the probative value is substantially outweighed by the danger of unfair prejudice. ER 403. Credibility determinations are for the trier of fact and are not reviewable on appeal. *State v. Camarillo*, 115 Wn. 2d 60, 71, 794 P.2d 850 (1990).

In the present case, defendant assigns error to the trial court’s exclusion of evidence regarding Kelly’s relationship with Doug Stenge.

See Br. of App. p. 7–8. At trial, defense counsel argued for the admission of this evidence:

Well, the Defense theory of the case is based on the investigation, what it turned out was we felt what was going on was that Ms. Kelly was, in fact, dating – it was a Mr. Stenge, who’s the owner of the house that she was living in. And this common knowledge, so to speak, was that every time Stenge came around, she would kick Mr. Apodaca out of the house. And that was part of the situation, that Mr. Stenge noticed that the vehicle was missing, and so Ms. Kelly cooked up this story in order to essentially cover her involvement or her double dealing, if you will, with Mr. Apodaca. . . . I think that would be relevant and would go to Ms. Kelly’s credibility and give her motive to lie.

3RP 14. The State responded that this evidence was both unsubstantiated impermissible character evidence and more prejudicial than probative.

3RP 14–15.

The trial court ruled:

I think that whether or not Ms. Kelly had a male benefactor and what her personal relationship with him was, you know, it does imply character, I guess, although not particularly these days.

I understand your point, Mr. Reich, that it would provide some motivation for Ms. Kelly to falsify her testimony. I just think that on balance I don’t like it. It takes us too far afield from the actual event of February [sic] the 17th.

3RP 15–16. After hearing further argument regarding credibility from defense counsel, the trial court said:

Well, credibility is always an integral part of the jury’s contemplation. I think that just inquiring into the nature of other relationships and who owns the house and does she pay rent there and what are the circumstances, it may have

some marginal relevance. *But under the 403 balancing test, I don't think you're there.*

3RP 18 (emphasis added). Therefore, the trial court excluded the evidence under Evidence Rule 403.

The trial court did not abuse its discretion by excluding the evidence under Evidence Rule 403, thus depriving defendant of a right to present a defense. Trial courts have *considerable discretion* in weighing the probative value of evidence against its possible prejudicial impact. *State v. Barry*, 184 Wn. App. 790, 801, 339 P.3d 200 (2014). In the present case, the court articulated several reasons supporting the decision to exclude the evidence under Evidence Rule 403. First, the court said the evidence may have character implications. 3RP 15. Second, the court expressed concern that the evidence would take the jury “too far afield” from the actual events of November 17, 2014. 3RP 16. Third, the court reminded defense counsel that the State’s case did not rely solely on Kelly’s statements, it also relied upon the statements defendant himself made to police. 3RP 16. Fourth, the court recognized that, although credibility is always an integral part of the jury’s decision, it did not suffice to make the offered evidence more probative than prejudicial. 3RP 18.

The record additionally shows that the trial court carefully considered defense counsel’s arguments, inquired as to what evidence might support the defense theory for admission, and even allowed defense

counsel to cross-examine Kelly as to who owned the house she lived in. *See* 3RP 15–18, 83. Thus, the record does not support that the trial court’s decision was manifestly unreasonable because the court articulated several reasons for its decision, and the decision was made after fully and fairly considering the arguments before the court.

Defendant further cannot establish that he was *actually prejudiced* by the exclusion of this evidence, as required for review under RAP 2.5(a)(c).⁴ Defendant was fully able to present his defense. Defendant took the stand and testified, placing his version of events fully in front of the jury. *See* 3RP 86–111. According to defendant, he believed he had permission to drive Kelly’s car, and defendant was fully able to express that belief to the jury. 3RP 96. Therefore, defendant was fully able to present his defense. The argument on appeal, rather, is that the trial court improperly precluded defendant from impeaching Kelly.

Defendant, however, cannot show he was prejudiced by the court allegedly precluding him from impeaching Kelly. First, defense counsel was permitted to cross-examine Kelly as to who owned the house, whether Stenge paid the taxes, and whether Stenge paid the mortgage. 3RP 83.

⁴ It should be noted that Defendant erroneously asserts that, “the State did not make any argument below that this evidence was prejudicial,” Br. of App. p 11, but the State argued, in relevant part, “I think this sort of evidence, number one, can’t be substantiated. But, moreover, it’s *more prejudicial than probative*.” 3RP 15 (emphasis added).

Although Kelly testified on direct that she and Stenge had never had a romantic relationship, defense counsel chose not to cross-examine Kelly on that statement. *See* 3RP 54. Second, defense counsel focused his closing argument on Kelly's credibility – arguing the evidence actually admitted at trial. *See* 3RP 141–147. For example, defense counsel argued, “So I would like to talk about Ms. Kelly’s version of what happened and *why I don’t think that’s plausible.*” 3RP 142. Defense counsel ended his closing statement by arguing that the State’s case assumed one thing: “That Ms. Kelly is telling the truth. And I submit to you that *she is not telling the truth.*” 3RP 147 (emphasis added). Therefore, even without the excluded evidence of Kelly’s alleged relationship with Stenge, defendant was able to fully attack Kelly’s credibility and argue his theory of the case.

Defendant asserts that he was prejudiced because the State rested its case “entirely on whether the jury believed Kelly’s version of events,” Br. of App. p. 12, an argument that defense counsel at trial also made. 3RP 16. This argument, however, overlooks the statements that defendant made to police that the State offered in its case-in-chief. *See* 3RP 16. Defendant told Deputies Carpenter and Moss that he was at Kelly’s house, she refused to take him home, so he waited for her to step out of the house, and then he took her car and drove himself home. 2RP 117, 129.

Defendant admitted to police that he took Kelly's car when she stepped out of the house. Therefore, the State's case did not hang on Kelly's credibility alone, and defendant has failed to show the exclusion of the evidence actually prejudiced him.

Defendant has not shown a manifest error affecting his constitutional right to present a defense. Thus, this Court should decline to exercise discretionary review of the unpreserved evidentiary ruling under RAP 2.5(a).

D. CONCLUSION.

By not conducting an offer or proof or articulating a specific basis for the admission of the evidence, defendant has failed to adequately preserve the evidentiary issue for meaningful appellate review. Therefore, this Court should decline to review the ruling. Further, defendant was not denied his constitutional right to present a defense when the trial court excluded the evidence, after careful consideration, under Evidence Rule 403. Therefore, this Court should not review this claim under RAP 2.5(a).

The State respectfully requests this Court affirm defendant's convictions for motor vehicle theft and violating a pre-sentence no contact order.

DATED: January 13, 2016.

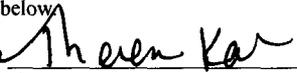
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The undersigned certifies that on this day she delivered by ~~US~~ ^{air} mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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PIERCE COUNTY PROSECUTOR

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