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NO. 50892-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANDRE VARGAS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Shelly Speir, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. K.V.'S IMPROPER OPINION TESTIMONY
NECESSITATES REVERSAL.

The State concedes “[t]his case involves an explicit opinion on the victim’s credibility.” Br. of Resp’t, 13. The Washington Supreme Court has recognized, emphatically, that “expressions of personal belief” as to “the veracity of witnesses” are “clearly inappropriate for opinion testimony in criminal trials.” State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

Yet the State does not believe reversal is warranted. For instance, the State claims that, “[w]hile the jury was told that [K.V.] believed her daughter, the jury was not told details of what [K.V.] believed.” Br. of Resp’t, 10. The State’s contention is belied by the record. M.V. testified that when she disclosed the allegations to her mother in December of 2015, she “told her everything.” RP 148-49. The clear import of K.V.’s testimony was that she believed the accusations M.V. was making at trial.

The State further contends the testimony was not manifest constitutional error because K.V.’s “opinion was only used to establish (albeit irrelevantly) [K.V.’s] state of mind at the time M.V. first disclosed to her.” Br. of Resp’t, 13. In other words, the State attempts to distinguish between K.V.’s state of mind at the time of the disclosure, which the State

agrees is irrelevant, and K.V.'s opinion that her daughter was telling the truth, which the State agrees would be improper. Br. of Resp't, 12.

The State's argument amounts to splitting hairs. K.V.'s state of mind at the time of M.V.'s disclosure still revealed K.V.'s opinion as to the truth of M.V.'s allegations, which is improper opinion testimony.

In Demery, the trial court admitted a videotaped interview in which the police accused Demery of lying and said they did not believe his story. State v. Demery, 144 Wn.2d 753, 756 n.2, 30 P.3d 1278 (2001) (plurality opinion). Four justices concluded the taped statements were essentially the same as live testimony by an officer and were therefore inadmissible opinion testimony. Id. at 773 (Sanders, J., dissenting). A fifth justice found the videotaped statements to be impermissible opinion evidence but believed the error was harmless. Id. at 765-66 (Alexander, J., concurring). Thus, a majority concluded the officers' taped statements that Demery was lying were inadmissible opinions on Demery's credibility. Demery demonstrates improper opinion testimony does not require a witness to take the stand and testify the victim is telling the truth or the defendant is lying.

In State v. Jones, 117 Wn. App. 89, 92, 68 P.3d 1153 (2003), the court found "no meaningful difference between allowing an officer to testify directly that he does not believe the defendant and allowing the officer to testify that he told the defendant during questioning that he did not believe

him.” Either way, “the jury learns the police officer’s opinion about the defendant’s credibility.” Id. Jones further demonstrates the flaw in the State’s argument. K.V.’s state of mind at the time of M.V.’s disclosure still revealed her opinion regarding her daughter’s truthfulness.

This Court should reverse Vargas’s conviction, because K.V.’s testimony was both improper and prejudicial.

2. ACCUSATIONS, MADE YEARS AFTER THE FACT, TO FRIENDS AND FAMILY, IDENTIFYING A KNOWN PERSON AS THE PERPETRATOR, ARE NOT WITHIN THE PROPER SCOPE OF ER 801(d)(1)(iii).

The State spends a significant amount of time in its response brief discussing waiver. However, it appears Vargas and the State agree on several points. First, the ER 801(d)(1)(iii) issue was preserved. See Br. of Resp’t, 16 (acknowledging this case is “about the applicability of ER 801(d)(1)(iii) to the facts of this case” and agreeing the evidence was admitted over objection). The trial court and the parties clearly understood the issue as whether the statements were admissible for purposes of identification, which is an exemption to the hearsay rule under ER 801(d)(1)(iii). RP 25-26. The court issued a final, written ruling admitting the statements “for identification purposes only.” CP 13.

Second, no other potential hearsay exemption or exception. Br. of Resp’t, 18 (agreeing no other “avenues of admissibility . . . apply to this

case”). Vargas included alternative arguments in his opening brief recognizing this Court may affirm a trial court’s ruling on any basis supported by the record. State v. Duarte Vela, 200 Wn. App. 306, 327, 402 P.3d 281 (2017), review denied, 190 Wn.2d 1005 (2018). The parties agree ER 801(d)(1)(iii) is the only possible, though disputed, basis for affirmance.

Third, Vargas did not move to exclude the hearsay testimony under ER 403. Br. of Resp’t, 17 (pointing out no ER 403 objection was made at trial). Nor does Vargas make an ER 403 argument on appeal. Rather, Vargas asks this Court to consider the language and purpose of ER 801(d)(1)(iii) in determining whether M.V.’s multiple, belated disclosures fall within it. This is the crux of the issue before this Court.

The cases the State relies on support Vargas’s position rather than undermine it. In United States v. Anglin, 169 F.3d 154, 159 (2d Cir. 1999), for instance, eyewitnesses identified the bank robber from a police photo array. Br. of Resp’t, 18-19 (citing Anglin). In United States v. Lopez, 271 F.3d 472, 484 (3d Cir. 2001), the eyewitness reported the three suspects’ identity to the police a day after the crime. Br. of Resp’t, 21-22 (citing Lopez). In State v. Grover, 55 Wn. App. 252, 254-55, 777 P.2d 22 (1989), too, the eyewitnesses identified the suspects to the police immediately after the crime. Br. of Resp’t, 21 (citing Grover).

All these cases involved identifications made to the police. The State nevertheless contends ER 801(d)(1)(iii) does not require police-arranged identifications. Br. of Resp't, 23-24. Vargas could not find any non-police-arranged identifications in an extensive search of the case law on ER 801(d)(1)(iii). Nor has the State cited to a single such case, either state or federal. This Court "may assume that counsel, after diligent search, has found none." DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

The State further claims Vargas "points to no authority suggesting that a police administered identification has any more intrinsic value than an identification witnessed by someone other than a law enforcement officer." Br. of Resp't, 23-24. Put simply, the State is wrong. Vargas discussed McCormick on Evidence in his opening brief, which emphasizes the justification for ER 801(d)(1)(iii) "is found in the unsatisfactory nature of courtroom identification and by the constitutional safeguards that regulate out-of-court identifications arranged by police." Br. of Appellant, 30 (emphasis added) (quoting MCCORMICK ON EVIDENCE § 251, at 218 (7th ed. 2013)). Due process bars admission of impermissibly suggestive out-of-court identifications resulting from police photo arrays, showups, lineups, and the like. See, e.g., State v. Vickers, 148 Wn.2d 91, 118, 59 P.3d 58 (2002).

United States v. Owens, 484 U.S. 554, 562, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988), relied on by the State in its briefing, recognizes this very same justification for the federal counterpart of ER 801(d)(1)(iii): “The premise for Rule 801(d)(1)(C) was that, given adequate safeguards against suggestiveness, out-of-court identifications were generally preferable to courtroom identifications.” Br. of Resp’t, 19-20 (discussing Owens).

None of the justifications for ER 801(d)(1)(iii) are present in this case. There were no procedural safeguards in place to protect against an impermissibly suggestive identification. There was no concern that M.V.’s memory would fade over time and she would be unable to identify her own father in court. Nor were identifications made close in time to the alleged incidents, when M.V. would have perceived her father to be the perpetrator. Admission of M.V.’s identifications was completed untethered from the language and purpose of the hearsay exemption.

This Court cannot look at each of the above factors in isolation in determining whether the statements were properly admitted under ER 801(d)(1)(iii). Rather, this Court must consider all the circumstances regarding M.V.’s statements: she disclosed the identity of a person well known to her, in private, to friends and family, without any procedural guarantees, years after the alleged abuse. These were accusations, not statements made for the purpose of identification after perceiving her father.

Their admission was error. The State has cited to no case that stretches the rule as broadly as the trial court stretched it in this case. The rule must be tied to its plain language and its purpose. This Court should reverse.

3. VARGAS’S CHALLENGE TO ADMISSION OF M.V.’S UNANSWERED TEXT MESSAGE WAS PRESERVED FOR REVIEW.

The State contends Vargas failed to preserve the challenge to exhibit 1, M.V.’s unanswered accusatory text message. Br. of Resp’t, 27. Specifically, the State contends “[d]efense counsel did not interpose a reasonably specific objection pretrial during the motion in limine.” Br. of Resp’t, 25. The State further claims “[t]he trial court never made a definite, final ruling on the State’s text message pretrial motion.” Br. of Resp’t, 26. The State does not respond to the merits of Vargas’s argument. See Br. of Resp’t, 25-27.

“The propriety of an evidence ruling will be examined on appeal if the specific basis for the objection is ‘apparent from the context.’” State v. Braham, 67 Wn. App. 930, 935, 841 P.2d 785 (1992) (quoting State v. Pittman, 54 Wn. App. 58, 66, 772 P.2d 516 (1989)).

The State moved to admit the text messages as admissions of a party opponent under ER 801(d)(2). RP 40. Defense counsel objected based on authentication. RP 40-41. But counsel also clearly objected on the basis that “I think it would be hard for anyone to say that it’s an admission by a party

opponent.” RP 40. Counsel agreed “every statement from a defendant comes in,” but there was no statement by Vargas in response to the challenged text message. RP 41. Thus, the basis for the objection was obvious: the unanswered text message sent by M.V. was not an admission by a party opponent. The trial court then reserved on admitting the evidence only “pending the foundation being laid.” RP 45-46. The ruling was final as to the admission of a party opponent issue.

Even assuming, for the sake of argument, that defense counsel failed to make an adequate objection to the text message, that failing constituted ineffective assistance of counsel. A criminal defendant’s constitutional right to effective assistance of counsel is violated when (1) defense counsel’s performance was deficient and (2) the deficiency prejudiced the accused. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Counsel’s performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. Strickland, 466 U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009).

There can be no legitimate strategic reason for defense counsel’s failure to renew her objection. The unanswered text message served no

purpose except to prejudice Vargas. Counsel clearly wanted the text messages excluded, objecting on the basis that they could not be authenticated and were not admissions by a party opponent. Yet counsel inexplicably failed to renew that objection later when the text messages were admitted into evidence. RP 139-40. Vargas demonstrated in the opening brief that the trial court would have—or should have—sustained an objection. Br. of Appellant, 39-40; State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (noting appellant must show an objection “would likely have been sustained” to establish ineffective assistance for failing to object to admission of evidence). Counsel’s performance was deficient.

Defense counsel’s error requires reversal when there is a reasonable probability that, without the error, the outcome would have been different. State v. Ortiz, 196 Wn. App. 301, 307, 383 P.3d 586 (2016). The “reasonable probability” standard is the same as evidentiary harmless error, which Vargas discussed in his opening brief. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001); State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017) (recognizing a “reasonable probability” is one “sufficient to undermine confidence in the outcome,” which is “lower than a preponderance standard”); Br. of Appellant, 40-41 (discussing prejudice resulting from the text message).

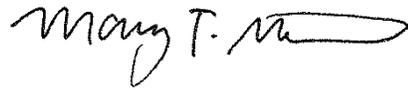
B. CONCLUSION

For the reasons stated here and in the opening brief, this Court should reverse Vargas's convictions and remand for a new trial.

DATED this 17th day of August, 2018.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Mary T. Swift", with a horizontal line extending to the right from the end of the signature.

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