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CASE NO. 52007-9-II

COURT OF APPEALS, DIVISION II OF THE STATE OF
WASHINGTON

Robert Frantom

Appellant,

vs.

Shane Hanson,

Respondent,

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR PIERCE COUNTY
Superior Court No. 15-2-13409-0

BRIEF OF RESPONDENT SHANE HANSON

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I. INTRODUCTION

This lawsuit arose out of a motor vehicle collision that occurred at approximately 1:07 a.m. on November 17, 2012 in Silverdale, Kitsap County, between a vehicle driven by Defendant Lorena Llamas and a vehicle driven by Plaintiff Robert Frantom.

That morning, Llamas was sitting in the front passenger seat of a red Lincoln parked on Washington Avenue in front of the Old Town Bistro when a Washington State Trooper, responding to a report of domestic violence, attempted to make contact with her. Unbeknownst to the officers, Llamas was wanted on a No Bail Felony warrant out of California for a Parole Violation on a 1st Degree Burglary charge. The Burglary had been her second felony conviction; she believed there was a firearm in her vehicle and that if the Trooper caught her with the firearm, she would face life in prison. Under the effect of the cocaine that she had used earlier in the evening, she decided to do whatever it would take to get away from the area so as not to be caught with a gun in the car. She jumped into the driver's seat of the vehicle, started the car, and sped away from the scene.

Deputy Hanson, who arrived at the Old Town Bistro after the Trooper, was walking outside his patrol vehicle when he witnessed Llamas speed past him in the Lincoln. He witnessed Llamas run stop signs and nearly collide with a group of pedestrians. Deputy Hanson got in his patrol

vehicle, turned the vehicle around, and followed after Llamas in an attempt to locate and stop her for reckless driving, a gross misdemeanor. Llamas, however, had a substantial head start on Deputy Hanson. He quickly lost sight of her vehicle as she turned north (right) onto Silverdale Way.

Llamas continued driving down Silverdale Way, reaching speeds of up to 110 miles per hour in a 30 mile per hour zone. When she approached the controlled intersection of Silverdale Way and Bucklin Hill, she had a red light. She blew through the red light and struck a vehicle driven by Plaintiff Robert Frantom, who himself tested positive for the presence of methamphetamine in his system that night. Llamas later disclosed that her phone was ringing and she had reached over to her passenger seat to pick it up and see who was calling immediately before the collision.

Deputy Hanson did not regain sight of Llamas' vehicle until right before her impact with the car driven by Frantom. He arrived at the scene of the collision scene 15 seconds later.

The jury acquitted Deputy Hanson of any liability, but found Ms. Llamas negligent, and awarded Frantom \$400,000.00 in damages.

II. STATEMENT OF THE ISSUES

1. Whether, by failing to raise the question before the trial court of his ability to cross-examine or ask leading questions of any witness other

than Deputy Hanson, Plaintiff/Appellant Frantom failed to preserve the issue for appeal.

2. Whether the trial court properly exercised its discretion in controlling the manner of interrogation of Deputy Hanson so as to make the interrogation and presentation effective for the ascertainment of the truth, avoid needless consumption of time and to protect Deputy Hanson from harassment or undue embarrassment.

3. Whether any potential error in limiting Frantom's cross-examination of Deputy Hanson during the plaintiff's case was harmless because Frantom was permitted to cross examine Deputy Hanson when the defense called Hanson as a witness.

4. Whether if there was any error in limiting Frantom's cross-examination of Deputy Hanson during the plaintiff's case, Plaintiff has failed to identify any resultant prejudice.

III. STATEMENT OF THE CASE¹

At trial, Frantom called Defendant Shane Hanson, Trooper Joren Barraclough and Deputy Robert Zoellin as a plaintiff's witness. RP 4, L 16-17; RP 44, L 13-14; RP 88, L 15. Barraclough and Zoellin were called by the plaintiff to testify on January 24, 2018, and Deputy Hanson on January 25. RP 4, L 4; RP 44, L4; RP 88, L 4. At no point during the testimony of either Trooper Barraclough or Deputy Zoellin did the plaintiff make a motion for the ability to ask leading questions or for the ability to cross examine either of the witness as a means of interrogation, nor did he

¹ Defendant Hanson would note that to the limited extent Plaintiff's Opening Brief includes factual references and citations to the record, the facts actually declared are frequently inaccurate, and the record cited not supportive of the facts declared. For instance; at p. 5 of Appellant's brief, it is indicated that "Llamas had not committed any crime, felony or misdemeanor other than a driving violation, when Hanson decided to give chase." Yet the Report of Proceedings cited for this proposition indicates instead that, Deputy Hanson was attempting to stop the car because of its reckless driving. Independent of that RP reference, we know reckless driving to be a gross misdemeanor under the laws of the state of Washington. RCW 46.61.500. Similarly, at p. 6, appellant's brief reads, "Llamas asserted at trial that the pursuit by Deputy Hanson caused Llamas to increase the speed she was driving." However, the report of proceedings provided to support this allegation states nothing about Llamas increasing her speed, why she may have increased her speed, or, for that matter, about her testifying at trial. Instead the RP citation is to cross examination of Deputy Hanson by plaintiff's counsel regarding Hanson's recollection of Llamas' deposition transcript having been read at trial. These recitations to the record by Frantom do not comport with RAP 10.3(a)(5).

Also, in his Statement of the Case, Frantom sets forth argument and citation to legal authority as "substantive" and "procedural facts". RAP 10.3(5) directs that the statement of the case contain "a fair statement of the facts and procedure relevant to the issues presented for review" and specifically directs that such statement be "*without argument.*"

make or note an objection for an inability to do so. RP 4, L 16 – RP 43, L 9; RP 45, L 6-RP 83, L 20.

With regard to Deputy Hanson, who was called by plaintiff to testify after both Barraclough and Zoellin, there was an objection made when a leading question was asked, and the court sustained the objection, finding, at that time, that there was no record to support a finding that the witness was hostile. RP 93, L 15 – RP 96, L 9. Frantom did not seek to address the issue again for the duration of Hanson's testimony, nor did he attempt thereafter to have the deputy identified as a hostile witness. RP 93 – 169. He did, however, ultimately shift his interrogation style to that of cross examination; to wit:

Q: Let's stop right there. Was - - you were attempting to stop Ms. Llamas; is that correct? (RP 121, L 12-13)

...

Q: Well, when you finally stopped, there were other officers right behind you? (RP 121, L 18-19)

...

Q: Initially, she was spinning her tires getting out of a parking lot? (RP 121, L 23-24)

...

Q: So you were in a vehicle pursuit, weren't you? (RP 122, L 12)

...

Q: And by denying that you were in pursuit, you're claiming that you have no liability for this accident? (RP 122, L 18-19)

...

Q: When you got to the scene, you saw Mr. Frantom's vehicle though: is that correct? (RP 125, L 6-7)

...

Q: How is it that you can't recall anything about your vehicle at the scene of the crash and yet you could say it was five seconds or any distance or anything else like that regarding the route on Silverdale way? (RP 164, L 10-13)

...

Further, when Deputy Hanson was recalled as a defense witness, plaintiff was given free leave to cross examine him as a witness. (Supp. RP 21-28)

IV. ARGUMENT

A. Standard of Review

Frantom challenges the trial court's ruling under ER 611 regarding the utilization of leading questions on direct examination of a witness. The trial court has broad discretion in this regard and such decisions will not be reversed absent abuse of that discretion. *Stevens v. Gordon*, Wn. App. 43, 55-56, 74 P.3d 653 (2003). "A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds

or for untenable reasons.” *State v. McDaniel*, 83 Wn.App. 179, 185, 920 P.2d 1218, 1221 (1996).

B. Plaintiff Failed to Preserve Issue regarding inability to use leading questions regarding any Witness but Hanson

Frantom’s opening brief asserts that he examined “several other officers” associated with the incident and that “Appellee objected to the Appellant use of leading questions.” (Opening Brief at p. 6.) Frantom’s Opening Brief does not identify any of those “several other officers.” However, his limited references to the record does identify two witnesses: Deputy Zoellin and Trooper Barraclough, and a total of 3 objections that were made in response to leading questions asked by plaintiff’s counsel during the direct testimony of these two witnesses.

Other than establishing that these two officers testified and that “leading” objections were made and sustained, Frantom fails to identify in any manner how the issue he currently wishes to present was raised before the trial court. That is, he offers no record whatsoever tending to support the fact that he ever sought authority of the court to proceed with leading questions on direct examination of these two witnesses, to have either of these witnesses declared hostile, or in any other manner to seek the trial court’s leeway with regard to the interrogation of these witness.

An argument raised for the first time on appeal will normally not be

reviewed absent unusual circumstances. *Savage v. State*, 72 Wn. App. 483, 495 n.9, 864 P.2d 1009 (1994), *reversed in part on other grounds*, 127 Wn.2d 434, 899 P.2d 1270 (1995). *See also*, RAP 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial court.) No such unusual circumstances have been identified here.

Accordingly, Frantom has failed to give any reason for this court to consider his claims regarding Deputy Zoellin and Trooper Barraclough that were not raised below and that he failed to preserved for appeal.

C. Court Properly Exercised Discretion in Controlling Interrogation to make Presentation of Testimony Effective for Ascertainment of Truth and to Protect Witness from Harassment or Undue Embarrassment

Frantom called defendant Deputy Shane Hanson to testify in his case in chief. As his testimony began and after a series of questions were asked where the Deputy was asked to simply confirm information provided to him by plaintiff’s counsel, an objection was made that the questions were leading. RP 89-93. The objection was sustained, and the trial court advised plaintiff’s counsel that the questions were in fact leading; counsel was advised that it was direct examination, that he had not previously made a motion to the court to treat the witness as hostile, that there was in fact nothing in the responses given by the witness that would allow the court to make such a finding, and that the court would sustain the objection. RP 95-

96. Counsel for Frantom then made an oral motion asking to be allowed to treat the witness as hostile, to which the court responded that there was no record indicating that he was a hostile witness, and therefore denied the motion. RP 96, L 1-7.

Thereafter, Frantom never readdressed the issue. At no point did he identify to the court how his examination of the witness was or had been hindered, nor did he bring to the court's attention in what manner he perceived that his inability to utilize leading questions was impeding his effectiveness in gleaning truthful information via the interrogation process. He did, however, despite the sustained objection, continue to utilize leading questions. For example:

Q: But you said five seconds here: is that correct? RP 102, L 16

...

Q: And as you followed her, her speed increased; is that correct? She didn't go the same speed that she was on Byron? RP 102, L 22-24

...

Q: You were trying to catch up with her; is that correct? RP 103, L 4

...

Q: And you followed you up until the time of the collision; is that correct? RP 103, L 18-19.

...

Q: And your intent in going after Ms. Llamas was to stop and catch her; is that correct? RP 106, L 10-11

“It is well settled in Washington that the trial court has broad discretion ‘to conduct [a] trial with dignity, decorum and dispatch and [to enable it to] maintain impartiality.’ *State v. Hakimi*, 124 Wn.App. 15, 19, 98 P.3d 809, 811 (2004), quoting, *State v. Johnson*, 77 Wn.2d 423, 426 P.2d 933 (1969). Specifically, with regard to the questioning of witnesses, ER 611 further provides that the court shall:

exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

As it relates to the use of leading questions, ER 611(c) provides that they “should not” be used on the direct examination of a witness, “except as may be necessary to develop the witness’ testimony, and that such questions “may” be utilized when a party calls an adverse party or hostile witness.

Alleged violations of ER 611 are reviewed for manifest abuse of discretion. *Hakimi*, 124 Wn. App. At 19.² “Discretion is abused by the trial

² In his opening brief, Frantom first cites to the abuse of discretion standard, but then argues his case under a “de nova” [sic] standard, urging this to be a more appropriate standard as suggested by federal case authority (relying on *U.S. v. Blue Bird*, 372 F.3d 989 (2004), a case that’s implied overruling has been recognized in many subsequent cases; see, *Doe v. Smith*, 470 F.3d 331 (7th Cir. 2006); *Harris v. Chand*, 506 F.3d 1135 (8th Cir. 2007). However, even the federal authority included by Frantom refutes this standard. (see pages 10-11 of Frantom’s opening brief: “The use of leading questions during direct examination remains within the trial court’s sound discretion, and we review that decision only to

court when its decisions are manifestly unreasonable, based on untenable grounds or made for untenable reasons.” *Id. citing State ex. rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

No such error has been identified by the plaintiff. The court evaluated the question asked and the objection made in the context of the appropriate evidentiary rule and exercised its discretion. The court concluded, based upon the its observations thus far, that there was no basis to find the witness hostile, and no reason, at that juncture, to allow leading questions.

Even in the context of an adverse witness, ER 611 provides that only that “interrogation may be by leading questions.” As our court has noted, “use of the term ‘may’ generally indicates the existence of an option that is a matter of discretion.” *Whatcom County v. Hirst*, 186 Wn.2d 648, 694, 381 P.3d 1 (2016). And, even were we to rely on the federal authority supplied by Frantom, “[t]he use of leading questions during direct examination remains within the trial court’s sound discretion...” *Woods v. Lecureux*, 110 F.3d 1215, 1222 (6th Cir. 1997).

The only fact argued by Frantom to this court (or the trial court) in support of his request for leeway in interrogation is that Hanson was a party

determine whether there has been a clear abuse of discretion.” *SEC v. Goldstone*, 317 F.R.D. 174 (NM 2016), *citing Woods v. Lecureux*, 110 F.3d 1215, 1222 (6th Cir. 1997) (*citing Chonich v. Wayne County Community College*, 874 F.2d 359, 386 (6th Cir. 1989))

opponent. On that alone he claims he was denied the right to ask leading questions of Hanson on direct examination. But the rule doesn't declare that leading questions "shall" be allowed under such circumstances; the rule grants only the discretion of the court to allow (or disallow) such questioning. The simple fact that Deputy Hanson was an opposing party does not lead to the conclusion that the court's decision was manifestly unreasonable when it sustained a single leading question objection.

The court found that Deputy Hanson was not hostile, that the plaintiff had not previously sought to examine him as a party-opponent or as a hostile witness and that there were insufficient reasons, at the time of the objection, to warrant allowing leading questions. Frantom has offered no fact, no evidence, no argument to bolster his assertion that the court's decision in this regard was manifestly unreasonable; particularly given the leeway that was granted in the questioning that followed.

D. Any Error in Granting Objection was Harmless because Hanson was Cross-Examined Anyway

Even if this court were to disagree, and were to find that sustaining the objection for "leading" was manifestly unreasonable, because plaintiff's counsel continued with leading questions, and because Deputy Hanson took the stand and testified during the defense case, giving Frantom an opportunity to ask leading questions at that time, any error in the court's

ruling was harmless.

In *Trotzer v. Vig*, 149 Wn.App. 594, 203 P.3d 1056 (2009), the court was faced with a nearly identical factual scenario. Trotzer claimed error was committed when the trial court prevented him from using leading questions when examining Vig when Vig was called to testify in Trotzer's case in chief. The appellate court noted that Trotzer failed to articulate how the restriction on leading questions had prejudiced his case. Regardless, because Vig again took the stand and testified during the defense case, and Trotzer then had an opportunity to cross examine him, the court held that "any error in the trial court's leading question restriction was harmless ..." *Id.*, at 604.

Here, not only did Frantom's counsel continue to ask leading questions throughout his direct examination of Hanson (*see*, references above), Hanson was called to testify in the defense case, and Frantom was able to fully cross examine him at that time. As was the case in *Trotzer, supra*, if there was any error in the trial court's earlier ruling on the leading question objection, it was thereby rendered harmless.

E. Frantom has Identified No Prejudice

Even were this court to find that the trial court's decision was in error, and that such error was manifestly unreasonable, and that the error was not cured by the leading questions asked during direct examination or

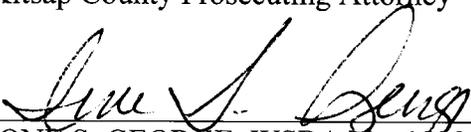
later during cross-examination; Frantom has still not identified what harm he has suffered. Other than claiming that he was denied the right to fully capitalize on his skillful trial tactics (*see*, Opening Brief, Conclusion, p. 22), he has articulated no specific harm resulting from the court's ruling. He has not identified how the alleged error impacted the evidence received by the jury or the outcome of the case. Indeed, other than alleging that the ruling hindered counsel's style, Frantom has identified no resultant prejudice. Error without prejudice is not grounds for reversal. *Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wn.2d 188, 197, 668 P.2d 571 (1083).

V. CONCLUSION

Based upon the foregoing, Respondent Hanson respectfully requests that all matters raised on appeal by appellant Frantom be denied.

Respectfully submitted this 5th day of February, 2019.

CHAD M. ENRIGHT
Kitsap County Prosecuting Attorney



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CERTIFICATE OF SERVICE

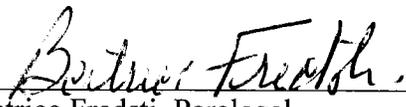
I, Batrice Fredsti, declare, under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the above document in the manner noted upon the following:

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SIGNED in Port Orchard, Washington this 5th day of February, 2019.



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