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No. 52464-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kevin Case,

Appellant.

Grays Harbor County Superior Court Cause No. 18-1-00134-2

The Honorable Judge Ray Kahler

Appellant's Reply Brief

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ARGUMENT

I. THE TRIAL COURT SHOULD NOT HAVE LIMITED MR. CASE'S CROSS-EXAMINATION OF MS. ROTHWELL.

Ms. Rothwell admitted to jurors that she hadn't been wholly truthful when she spoke with police. The State implied that she changed her story because she felt threatened by Mr. Case. The defense wished to show that she hadn't been threatened or pressured, but the court prevented it.

A. The restrictions on cross-examination violated Mr. Case's constitutional rights.

The trial court improperly barred the defense from asking Ms. Rothwell if Mr. Case had threatened or pressured her into changing her story. This violated Mr. Case's confrontation right and his right to present a defense. *State v. Darden*, 145 Wn.2d 612, 620-626, 26 P.3d 308 (2002); *State v. Jones*, 168 Wn.2d 713, 719-720, 230 P.3d 576 (2010).

Respondent mischaracterizes the record. According to the State, Mr. Case "was trying to elicit testimony from the victim that she did not want to testify." Brief of Respondent, p. 1. This is incorrect.

In fact, Mr. Case wanted Ms. Rothwell to affirm that she was testifying favorably of her own free will, and that he had not threatened

her into recanting her accusations. RP 159. This is clear from the context in which the questions were posed.

Before asking Ms. Rothwell if she'd been threatened, defense counsel asked if she were afraid to testify. RP 158. She said "No." RP 158-159. When counsel followed up by asking if she'd been threatened, the court refused to allow Ms. Rothwell to answer. RP 159.

Shortly after the court barred questions about threats, defense counsel asked Ms. Rothwell if she "fear[ed] Mr. Case in any way." RP 159. When Ms. Rothwell said "no," Counsel then asked if she felt "pressured testifying in any way."¹ RP 159. Again, the court refused to allow a response. RP 159.

These questions were designed to show that Mr. Case had not threatened Ms. Rothwell or pressured her into recanting. RP 158-159. The testimony was necessary to rebut the State's suggestion that Ms. Rothwell was intimidated by Mr. Case and had backed away from her accusation as a result of her fear of him. RP 107-121, 127, 209-235, 323.

¹ Defense counsel *also* asked if the State had threatened perjury charges, but counsel made clear that the focus was "her state of mind and how she feels to be here" because "[t]hat's the whole point of harassment, it's fear." RP 160. This shows that counsel's primary interest was addressing any fear caused by Mr. Case, who was charged with harassment.

Absent this cross-examination, jurors may have believed that Mr. Case threatened or pressured Ms. Rothwell into repudiating her written statement. The court should have allowed defense counsel to inquire.

The accusations outlined in Ms. Rothwell’s written statement were “essential... to the prosecution’s case.” *Darden*, 145 Wn.2d at 621. Accordingly, Defense counsel should have been granted “extra latitude in cross-examination.” *State v. Lile*, 188 Wn.2d 766, 792, 398 P.3d 1052 (2017).

The proffered testimony—that Mr. Case had neither threatened nor pressured Ms. Rothwell—was at least “minimally relevant.” *Darden*, 145 Wn.2d at 621-622. The court should have allowed the cross-examination. *Id.* This would have allowed Mr. Case to rebut the argument that Ms. Rothwell had made a false recantation stemming from domestic violence.

The court violated Mr. Case’s confrontation right and his right to present a defense. *Jones*, 168 Wn.2d at 721; *Darden*, 145 Wn.2d at 622. Mr. Case’s convictions must be reversed. *Darden*, 145 Wn.2d at 622.

B. The constitutional error must be reviewed *de novo*.

Constitutional errors are reviewed *de novo*. *State v. Armstrong*, 188 Wn.2d 333, 339, 394 P.3d 373, 377 (2017). The *de novo* standard applies to discretionary decisions that would otherwise be reviewed for abuse of

discretion. *See Jones*, 168 Wn.2d at 719; *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009).

The Supreme Court has accepted review of this issue. *State v. Arndt*, 193 Wn.2d 1001, 438 P.3d 131 (2019).² Accordingly, Mr. Case rests on the argument set forth in his Opening Brief.

II. MR. CASE’S CONVICTIONS WERE ENTERED IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL.

A. Cain’s testimony invaded the exclusive province of the jury.

The State presented expert testimony that amounted to an improper opinion on Ms. Rothwell’s credibility. This invaded the exclusive province of the jury. *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213, 217 (2014); *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91, 95 (2007), *aff’d on other grounds*, 165 Wn.2d 870, 204 P.3d 916 (2009).

Cain’s testimony was similar to testimony requiring reversal in *State v. Thach*, 126 Wn. App. 297, 314, 106 P.3d 782 (2005). A police officer in *Thach* spoke generally about “a study showing that many women recant their statements at trial because of fear, further abuse, or financial difficulties.” *Id.* The objectionable testimony did not specifically relate to the alleged victim in that case. *Id.*

² The Supreme Court heard argument in *Arndt* on June 27, 2019.

The *Thach* court's analysis controls. It characterized the officer's testimony as "an opinion on the credibility of the victim's courtroom testimony." *Id.*

Respondent does not address *Thach*. Instead, Respondent suggests that Cain's testimony was permissible because he "never referred to Ms. Rothwell or any other party that had testified." Brief of Respondent, p. 8. This does not distinguish *Thach*.

The constitutional violation in *Thach* did not arise from specific references to any witness. *Id.* Instead, the officer invaded the province of the jury by referring to domestic violence survivors generally. *Id.*

Cain's testimony suffers from the same flaw. Like the improper testimony in *Thach*, it amounted to "an opinion on the credibility of the victim's courtroom testimony." *Id.*

The prosecutor used Cain's testimony to argue that Ms. Rothwell's written statement to police was credible and that her in-court testimony was not. RP 323. The testimony invaded the exclusive province of the jury. *Id.* Mr. Case's conviction must be reversed.

B. Respondent's argument reflects a misunderstanding of manifest error under RAP 2.5(a)(3).

To raise a manifest constitutional error, a party need only make a "a plausible showing that the error... had practical and identifiable

consequences in the trial.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). Such a showing need not establish “an actual violation of a constitutional right.” *Id.*

The Supreme Court has explained what is meant by the phrase “practical and identifiable consequences.” *State v. O’Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). The court equates this language with the phrase “actual prejudice.” *Id.*, at 99.

An error is identifiable (and thus produces “actual prejudice”) if “the trial record [is] sufficient to determine the merits of the claim.” *Id.*, at 99. Thus, “[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *Id.*, (quoting *State v. McFarland*, 127 Wash.2d 322, 333, 899 P.2d 1251 (1995)).

Accordingly, “the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.” *Id.*, at 99-100. The proper test, as announced by the *O’Hara* court, focuses on the presence or absence of facts in the record: “to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” *Id.* at 100.

Respondent does not address the meaning of the phrase “practical and identifiable consequences.” Brief of Respondent, pp. 10-12. Instead of discussing the *O’Hara* test, Respondent relies on a Court of Appeals case from 1992. Brief of Respondent, pp. 10-11 (citing *State v. Lynn*, 67 Wn.App. 339, 342, 835 P.2d 251 (1992)).

The Supreme Court has clarified the manifest error standard since *Lynn* was decided. *O’Hara*, 167 Wn.2d at 99-100. The proper test is to “ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” *Id.* at 100. The focus is on the completeness of the record, not the impact of the error. *Id.*

Here, the improper admission of Cain’s testimony had practical and identifiable consequences; given what the trial judge knew at the time, he could have corrected the error. *Id.* The error is manifest and may be raised for the first time on appeal. RAP 2.5 (a)(3); *Id.*

III. MR. CASE’S CONVICTIONS MUST BE REVERSED BECAUSE HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Case relies on the argument set forth in his Opening Brief and in the preceding sections.

CONCLUSION

The trial court improperly restricted Mr. Case's cross-examination of Ms. Rothwell. The State sought to paint her as a domestic violence victim who had recanted under threat from Mr. Case; he should have been allowed to ask if she'd been threatened or pressured into changing her story.

In addition, the testimony of the State's domestic violence expert invaded the province of the jury. This violated Mr. Case's constitutional right to a jury trial.

Mr. Case's convictions must be reversed. The charges must be remanded for a new trial.

Respectfully submitted on September 11, 2019,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 11, 2019.



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