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Division II
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NO. 52464-3-II

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

STATE OF WASHINGTON,
Respondent,

v.

KEVIN RAY CASE,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE RAY KAHLER, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- 1. The trial court properly sustained the State's relevance objection.**
- 2. Expert testimony on counterintuitive victim behavior has long been held admissible in Washington.**
- 3. The Defendant's trial counsel was not ineffective for failing to object to admissible testimony.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

The Appellant's statement of the case is sufficient, with the exception of the portions of the record reproduced below.

ARGUMENT

- 1. The trial court did not abuse its discretion by sustaining an objection to evidence concerning whether the victim wanted to testify.**

The Defendant first claims that the trial court violated his right to present a defense when it sustained a relevance objection, and claims constitutional error which must be reviewed *de novo*. However, 1) the testimony was irrelevant because the defense attorney was trying to elicit testimony from the victim that she did not want to testify; and 2) evidentiary ruling should be reviewed for abuse of discretion.

A defendant has no right to introduce irrelevant or otherwise inadmissible evidence at trial.

Although a defendant "does have a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence." *State v. Aguirre*, 168 Wn.2d 350, 362 - 63, 229 P. 3d 669 (2010). "A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible." *State v. Rafay*, 168 Wn. App. 734, 795, 285 P. 3d 83 (2012) (quoting *State v. Rehak*, 67 Wn. App. 157, 162, 834 P. 2d 651 (1992).) "[A] criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense." *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970, 988 (2004) (citing *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).)

A trial court's decision regarding the admissibility of testimonial evidence will only be reversed for a manifest abuse of discretion. *Aguirre*, at 361. A trial court's decision may be affirmed on any ground the record adequately supports even if the trial court did not consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P. 3d 795 (2004).

The Defendant was attempting to elicit evidence that Ms. Rothwell did not want to testify, which is irrelevant.

The exchange leading up to the sustained objection the Defendant now assigns error to is as follows:

Q. Have you been threatened in any way to testify today?

MR. WALKER: Objection. Relevance.

THE COURT: I'll sustain the objection.

MS. NOGUEIRA: Okay.

Q. (BY MS. NOGUEIRA) How hard was it for you to come here today and tell your truth?

MR. WALKER: Objection. Relevance and vouching.

THE COURT: I'll sustain the objection.

Q. (BY MS. NOGUEIRA) Ms. Rothwell, do you fear Mr. Case in any way?

A. No.

Q. Do you - did you feel pressured testifying in any way?

MR. WALKER: Objection. Relevance.

THE COURT: I'll sustain the objection.

Q. (BY MS. NOGUEIRA) Were you afraid of being charged with perjury?

MR. WALKER: Objection.

THE COURT: I'll sustain the objection.

RP I at 159.

The Defendant claims that this line of questioning was designed to show that the victim, Cindy Rothwell, had not been threatened or pressured into recanting her statement to the police. Brief of Appellant at 5-6. However, a view of the entire record indicates that trial counsel was trying to elicit testimony that Ms. Rothwell did not want to testify, implying that she did not want to prosecute the Defendant.

Ms. Rothwell was not a cooperative witness to the State. Most of her testimony was that she did not remember, and attempts to refresh her recollection were unsuccessful. *See* RP I at 98-107. Finally, the State was granted permission to treat Ms. Rothwell as a hostile witness. RP I at 107.

This was not unexpected. Ms. Rothwell's daughter told the State that she was unsure if her mother would come willingly. RP I at 14. The State had served Ms. Rothwell with a subpoena personally, and filed it with the court days ahead of trial. CP at _____. That subpoena informed Ms. Rothwell that she could be arrested if he failed to comply. *Id.* In a trial memorandum, the State indicated that Ms. Rothwell may not testify consistently with her statement, and outlined the procedure for admitting her statement as substantive evidence should she testify inconsistently. CP at 18-20. This eventually occurred, and the State admitted Ms. Rothwell's statement to the police as a prior inconsistent statement taken

under oath at a proceeding, pursuant to ER 801(d)(1)(i). RP I at 139 *and see* Ex. 26A.¹

What is clear from a view of the entire record is that the Defendant was attempting to show that Ms. Rothwell did not want to testify, implying that she did not want the Defendant prosecuted. Ms. Rothwell's wishes as to the charges do not make any fact of consequence to the determination of the action more or less probable. ER 401. This is clearly irrelevant evidence and was properly excluded under ER 402.

This is an evidentiary issue.

The Defendant claims that this is a constitutional matter, and so must be reviewed *de novo*. However, as the appellate courts in this state have recognized, “[c]riminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms.” *State v. Lynn*, 67 Wn.App. 339, 342, 835 P.2d 251 (1992). Permitting review of essentially all unpreserved errors that implicate constitutional rights “ ‘undermines the trial process, generates unnecessary appeals,’ ” and wastes resources. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (quoting *Lynn* at 344.)

¹ The statement was Exhibit #26, but the Defendant objected to some portions, so a redacted version was admitted as Exhibit 26A. RP I at 144.

The Defendant was not denied his right to put on a defense. The trial court properly refused to admit evidence that Ms. Rothwell did not want to testify because it only would go to show her irrelevant wishes concerning the prosecution. This was not constitutional error, or error at all. This Court should uphold the trial court's decision and affirm the conviction.

2. The testimony of the State's expert did not comment on Ms. Rothwell's credibility.

The Defendant next claims that the testimony of Jason Cain, the State's expert witness on domestic violence, was an improper opinion on Ms. Rothwell's credibility. However, Ms. Cain never testified about Ms. Rothwell, her testimony, or any of the facts of this case. Testimony of domestic violence experts such as Mr. Cain have long been held to be admissible in this state.

Domestic violence expert testimony is admissible.

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.

ER 702.

“A substantial majority of the courts considering the issue have approved the admission of testimony regarding recantation and delays in reporting, so long as the testimony is not presented to prove an element of the crime.” *State v. Madison*, 53 Wn. App. 754, 766–67, 770 P.2d 662, 669 (1989) (collecting cases). “Washington cases... have made clear that expert testimony generally describing symptoms exhibited by victims may be admissible when relevant and when not offered as a direct assessment of the credibility of the victim.” *State v. Stevens*, 58 Wn. App. 478, 496, 794 P.2d 38, 48 (1990) (citing *Ciskie* at 279–80 and *State v. Madison*, 53 Wn.App. 754, 764–65, 770 P.2d 662 review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989).) This is because the common layperson may have little or no understanding of the dynamics of domestic violence, and such expert testimony has relevance because it assists juror in understanding such dynamics. See, e.g., *State v. Grant*, 83 Wn. App. 98, 102, 105-6, 920 P.2d 609 (1996); *State v. Ciskie*, 110 Wn.2d 263, 272-73, 751 P.2d 1165, 1170-71 (1988) and *State v. Baker*, 162 Wn. App.468, 474-75, 259 P.3d 270 (2011).

Notably, in upholding a trial judge’s admission of an expert in what was then called “battered woman syndrome,” the Washington Supreme Court said that, “[n]either logic nor law requires us to deny

victims an opportunity to explain to a jury, through a qualified expert, the reasons for conduct which would otherwise be beyond the average juror's understanding.” *Ciskie*, at 265. An expert may not, however, opine on the victim’s credibility or diagnose the victim as a victim of domestic violence. *See Ciske* at 279-80.

The State’s expert did not opine on Ms. Rothwell’s testimony.

As the Defendant concedes, Mr. Cain knew nothing about the facts of the instant case. RP II at 217 *and see* Brief of Appellant at 4. He explained to the jury that he was not appearing to give an opinion about any person involved in the case. RP II at 217. In the whole of his testimony, Mr. Cain never referred to Ms. Rothwell or any other party that had testified. *See* RP II at 209-235.

All parties were clear as to the limits of Mr. Cain’s testimony; before he testified, the State reminded the trial court that Mr. Cain could not opine about Ms. Rothwell’s credibility. RP II at 169. The trial court agreed this was the law and indicated that it would sustain any objection to a question that related to the credibility of a witness. RP II at 170.

As Mr. Cain explained to the jury, what he called “counterintuitive victim responses” was a “more politically correct” term for what was once called “battered women’s syndrome.” RP II at 216. The Washington

Supreme Court has held that, “[w]e join with those courts which hold expert testimony on the battered woman syndrome admissible.” *State v. Allery*, 101 Wn.2d 591, 597, 682 P.2d 312, 316 (1984) (citing *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981); *Hawthorne v. State*, 408 So.2d 801 (Fla.Dist.Ct.App.1982) and *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C.1979).)

Mr. Cain’s testimony was helpful to the jury because it explained that persons who are victims of domestic violence may minimize² or recant. However, Mr. Cain did not say that Ms. Rothwell was a victim of domestic violence or that her testimony was inconsistent. The jury was also instructed that they were not required to accept the opinion of Mr. Cain or any other expert who testified. CP at 32. It was then up to the jury, armed with the knowledge that sometimes victims of domestic abuse minimize or recant, to decide what they believed. No improper opinion was ever given.

Because Mr. Cain did not opine on the veracity of any witness, but only armed the jury with information that they could take into account, or

² It should be noted that, although the Defendant was charged with Assault in the Second Degree – Domestic Violence, the jury only convicted him of Assault in the Fourth Degree – Domestic Violence. CP at 35-36.

not, when judging the veracity of Ms. Rothwell's inconsistent testimony, there was no error.

The Defendant did not object to Mr. Cain's testimony.

“[A]ppellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756, 760 (2009) (citing *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).) The reason for this rule is to encourage the efficient use of judicial resources. *Id.*

State v. Lynn sets forth a four-part test for whether an appellate court will consider an asserted error when a defendant has failed to object.

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

Lynn at 345.

In the instant case, even assuming, *arguendo*, that Mr. Cain's testimony was improper opinion testimony concerning Ms. Rothwell's veracity, the Defendant has failed to show *manifest* error – practical and identifiable consequences in the trial.

The Defendant claims that the jury's note, in which the jury asks for the Defendant's criminal history and other inadmissible evidence, as a sign that Mr. Cain's testimony improperly influenced the jury.³

This is unsupported speculation. There is nothing in the record to indicate that the jury's interest in the history of the Defendant and Ms. Rothwell had anything to do with Mr. Cain's testimony. The question was not about his testimony, or Ms. Rothwell's testimony, or even her written statement. As the Defendant concedes, there was no evidence about repeated or continuing domestic violence between the Defendant and Ms. Rothwell. Brief of Appellant at 20-21.

It appears that the jury simply wanted to know if there had been prior incidents between Ms. Rothwell and the Defendant, or if he was a serial abuser. Propensity evidence is appealing to the layman, and jurors may not understand why it is generally inadmissible. This jury question

³ The jury was properly instructed that they were the sole judges of the credibility of the witnesses. CP at 27.

has no connection to Mr. Cain's testimony and the Defendant's assertion to the contrary is speculative.

Because Mr. Cain did not testify about Ms. Rothwell's veracity, but only generally, his testimony was admissible and this Court should uphold the trial court's holding and affirm the conviction.

3. The Defendant's trial counsel was not ineffective.

Finally, the Defendant claims that his trial counsel was ineffective for not objecting to Mr. Cain's testimony. However, the testimony of domestic violence experts such as Mr. Cain have long been held to be admissible, the Defendant's trial counsel was not ineffective.

Standard of review for Ineffective Assistance of Counsel.

The Washington State Supreme Court has adopted the two prong *Strickland* test for analysis of the effectiveness of a defense counsel performance. See *State v. Jeffries*, 105 Wn.2d 398, 417, 717 P.2d 722, 733 (1986). "Ineffective assistance of counsel is a fact-based determination..." *State v. Carson*, 184 Wn.2d 207, 210, 357 P.3d 1064, 1066 (2015) (citing *State v. Rhoads*, 35 Wn.App. 339, 342, 666 P.2d 400 (1983).) Appellate courts "review the entire record in determining whether a defendant received effective representation at trial." *Id.*

Strickland explains that the defendant must first show that his counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel's errors must have been so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel's performance is guided by a presumption of effectiveness. *Id.* at 689. "Reviewing courts must be highly deferential to counsel's performance and 'should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Carson* at 216 (quoting *Strickland* at 690.)

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Strickland* at 687. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* For prejudice to be claimed there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The defendant bears the “heavy burden” of proof as to both prongs. *Carson* at 210. If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Strickland* at 687.

The Defendant has not shown deficient performance.

As stated above, Washington Courts have long held that expert testimony concerning what was once called “battered women’s syndrome” to be admissible to explain apparent counterintuitive behavior such as minimization and recantation. Therefore, it was not ineffective to fail to object.

The Defendant has not demonstrated prejudice.

As discussed above, the Defendant has not shown that Mr. Cain’s testimony was so prejudicial that it changed the outcome.

The Defendant claims that Mr. Cain’s testimony was irrelevant because there was no evidence of a history of domestic violence. There is no case that holds such a showing is necessary,⁴ and there is no evidence in this record that the counterintuitive behaviors Mr. Cain testified about only occur in cases of repetitive domestic violence.

⁴ The Defendant points to *State v. Ciskie* for this proposition. Although the facts of *Ciskie* certainly involved a repeating pattern of domestic violence and sexual assault, the holding did not impose such a fact pattern as a condition precedent to introducing such expert testimony.

Conclusion.

Because the Defendant has failed to the “heavy burden” of proving both deficient performance and prejudice, his claim must fail. This Court should uphold his conviction.

CONCLUSION

Although the Defendant now attempts to frame the issue in constitutional terms, the trial court properly held that evidence of the victim’s unwillingness to testify was irrelevant.

The testimony of the State’s expert was of a sort long held admissible as “battered women syndrome,” but now referred to as “counterintuitive victim responses.” In this case, Mr. Cain testified that victims of domestic violence sometimes minimize the behavior of the perpetrator, or recant their earlier accusations. The jury could use this testimony, consistent with the jury instructions, to decide what weight to give the testimony of the victim, Cindy Rothwell.

Given the long history of such testimony being admissible, it was not ineffective assistance to not object to this testimony, and the Defendant fails to show prejudice in his assertions to the contrary.

Because the Defendant received a fair trial, this Court should uphold the judgment entered in the trial court and affirm the Defendant's convictions.

DATED this 20th day of August, 2019.

Respectfully Submitted,

BY



JASON F. WALKER
Chief Criminal Deputy
WSBA # 44358

JFW /

GRAYS HARBOR PROSECUTING ATTORNEY

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