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NO. 53343-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

TOMÁS MANUEL GASPAR,

Appellant.

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

The Honorable Monty D. Cobb, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. **Nurse Wahl did more than relay A.B.'s statements; she provided testimony indicating her belief that A.B. had been abused and that Mr. Gaspar was to blame.**

Contrary to the State's claims, Brief of Respondent (BOR) at 5, Nurse Wahl did more than relay complainant A.B.'s statements. She provided testimony conveying her belief that A.B. had been abused and that Gaspar was to blame. This amounted to an impermissible opinion on guilt and it denied Gaspar a fair trial as to the charges involving A.B.

No reliable test for truthfulness exists, such that no witness is qualified to judge the truthfulness of a child's story. United States v. Azure, 801 F.2d 336, 341 (8th Cir. 1986). Expressions of belief as to guilt are "clearly inappropriate." State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). "Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

In determining whether a statement constitutes constitutionally improper opinion testimony, rather than

permissible opinion testimony, this Court considers the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. Montgomery, 163 Wn.2d at 591.

With that in mind, there are some areas of inquiry that are clearly inappropriate for opinion testimony in criminal trials, even by experts. Among these areas are opinions, particularly expressions of personal belief, as to the guilt of the defendant or the veracity of witnesses. Id. Opinions on guilt are improper whether made directly or by inference. State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014).

In light of the specific charges, and considering Nurse Wahl's elevated status and the authoritative nature of her presentation, her testimony crossed the line.

Wahl offered her opinion that A.B. had been abused and that Gaspar was the culprit. Rather than acknowledging the whole of Wahl's problematic testimony, the State now advances a divide-and conquer approach, meanwhile citing several cases out of context.

First, after summarizing Wahl's testimony, the State correctly cites authority supporting the proposition that a child's statement identifying an abuser to medical personnel is admissible. BOR at 5. But Gaspar has not challenged such statements.

The State next appears to assert that testimony regarding the typical behaviors of sex abuse victims may be admissible, provided that such testimony remains general. BOR at 5 (citing State v. Stevens, 58 Wn. App. 478, 496, 794 P.2d 38, 48 (1990)). This is not a controversial proposition. The State may wish to give the impression that that is what occurred in this case. But, as the State even acknowledges, Wahl testified that A.B. manifested signs of sexual abuse. See BOR at 5 (Wahl testified about typical reactions and "on a few occasions about A.B. specifically"). And Wahl's testimony made it clear that, in her opinion, Gaspar was the perpetrator.

Stevens, relied on by the State, is indeed instructive. Yet it ultimately supports Gaspar's—not the State's—arguments. There, Division One stated 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.*” Stevens, 58 Wn. App. at 496 (citing State v. Ciskie, 110 Wn.2d 263, 279-80, 751 P.2d 1165 (1988); State v. Madison, 53 Wn. App. 754, 762 63, 770 P.2d 662 (1989)) (emphasis added).

In Ciskie, the Supreme Court approved of expert testimony describing the symptoms of battered woman syndrome in the hypothetical. The expert did not testify directly that the complainant fit the profile. But if the expert *had* so testified, such testimony would have invaded the province of the jury. Ciskie, 110 Wn.2d at 279.

In Madison, a child sexual abuse case, Division One considered whether general testimony concerning the “recantation phenomenon” was properly admitted to rebut testimony that the complaining witness had recanted her story prior to trial. Madison, 53 Wn. App. at 764. The court approved of such testimony because even though the expert offered various explanations for why a complainant might recant, the expert never asserted that the complainant fit the pattern. Id. at 765.

In Stevens, the challenged testimony was limited to a list of common traits of children who have been sexually abused. 58 Wn. App. at 496.

Here, as even the State admits, Wahl testified at length about psychological effects A.B. suffered due to sexual abuse, and specifically, due to sexual abuse by her father. Although Gaspar's opening brief accurately recites Wahl's testimony, it is repeated here for clarity:

First, Wahl testified that sexual abuse, and efforts to keep it secret, affect children. Specifically, A.B. was so impacted:

[The abuser] use[s] enticements or . . . threats. So, for [complainant R.S.], she was given candy. For [complainant L.S.], she was told that if she tells he'll go to jail and her mother will hit her more. For [A.B.], she was told that [Gaspar will] go to jail. Now, why would that matter to [A.B.]? Well, he's her father and she loves him. And children love their parents, they're like right and left arms. You can't sever that relationship; they're the first people that a child knows and loves. And to then put that burden of her father will go to jail if she tells shifts the onus of responsibility onto the child's back and off of the perpetrator's back.

And so now we're talking about *toxic stress*, bearing that burden for six years until [A.B.] disclosed.

RP 202 (emphasis added).

Further, such toxic stress affects brain development and the ability to emotionally regulate oneself. RP 203-04. Specifically, *in A.B.'s case*, she had experienced “permanently permanent physiologic as well as psychologic change in these neuropathways.” RP 204. As stated, this was part and parcel to sexual abuse by—specifically—A.B.’s father. RP 202.

Moreover, Wahl asserted that these physiological and psychological changes manifested in A.B.’s cutting behavior. RP 204-05. As the State points out in its brief, BOR at 7, Wahl testified on cross-examination that there *might* be other reasons for cutting besides sexual abuse. RP 215.

But Wahl then clarified on redirect examination that she was aware of no other reason besides sexual abuse that A.B. would cut herself. RP 215-16. The prosecutor highlighted Wahl’s testimony about A.B.’s cutting behavior in closing argument. RP 252.

Thus, contrary to the State’s apparent claim that Stevens supports its position, the Stevens court, and indeed the Ciskie, and Madison courts, would have been taken aback at the testimony provided by Nurse Wahl.

The State also argues that in a sex abuse case it is permissible for an expert witness to provide corroborative testimony. BOR at 5-6 (citing State v. Petrich, 101 Wn.2d 566, 575, 683 P.2d 173, 178 (1984), abrogated by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988)). Again, the general assertion is not controversial. But, once again, closer analysis is required, because not all corroborative testimony is the same.

In Petrich, an expert was permitted to testify regarding statistics that supported her opinion that delay in reporting abuse is not unusual and that the length of delay correlates with the relationship between the abuser and child. Petrich, 101 Wn.2d at 575. “We do not find that the trial court abused its discretion by allowing this limited testimony.” Id.

But here, Gaspar has not objected to Nurse Wahl’s similarly generalized testimony about the prevalence of abuse and disclosure rates. RP 188-90. The State’s reliance on Petrich is unavailing.

The State also cites Florczak for the proposition that “an observation that a victim exhibits behavior typical of a group does not relate directly to an inference of guilt of the defendant.” BOR

at 7 (citing State v. Florczak, 76 Wn. App. 55, 73, 882 P.2d 199 (1994)). Yet again, the proposition is not controversial, but the assertion does not advance the State's ultimate position. The approved-of observation in Florczak was that "[s]ome of those symptoms [poor impulse control, aggression with toys, sleep problems, distraction, fear, anxiety, stomach aches, and headaches] could be correlated with a child who has been sexually abused." Id.

But, as shown, Nurse Wahl went much further.¹ Considered as a whole, as it must be, her testimony indicates that

¹ As argued in Gaspar's opening brief, Brief of Appellant at 16-17, Florczak supports reversal in this case. As that court explained:

[C]onstitutional error did occur when, after being asked whether a diagnosis of post-traumatic stress syndrome is "consistent with a child who has suffered sexual abuse", [expert social worker Wilson] stated, "[w]hen we give the child post-traumatic stress, it can be to any traumatic event. It is secondary, in this case, in [complainant KT's] case, to sexual abuse." By stating that her diagnosis of post-traumatic stress syndrome was secondary to sexual abuse, Wilson rendered an opinion of ultimate fact—i.e., whether KT had been sexually abused—which was for the jury alone to decide. Because only [Florczak and his co-defendant] were implicated as the possible abusers, this segment of Wilson's testimony also amounted to an opinion that they were guilty, either individually or jointly, of sexually abusing KT. Admitting that evidence invaded the province of the jury[.]

A.B. manifested the behaviors of a child who had been abused by her father. While she did not say “I think Mr. Gaspar is guilty of this crime,” she did not need to utter those words for her testimony to constitute an impermissible opinion on guilt. Quaale, 182 Wn.2d at 199.

For the reasons stated above and in Gaspar’s opening brief, Wahl’s impermissible opinion testimony alone requires reversal of the charges related to A.B.

2. The State’s response referencing “the hearsay rule” mischaracterizes Gaspar’s prosecutorial misconduct argument while failing to address it.

In his opening brief, Gaspar argued that the prosecutor improperly bolstered the complainants’ statements to Nurse Wahl by suggesting that, based on the rules of evidence, statements made to medical providers are more reliable as a matter of law. Brief of Appellant at 30-38. The State’s response, referencing “the hearsay rule,” mischaracterizes Gaspar’s argument while failing to address it. BOR at 12-14. The State has not provided any substantive response to Gaspar’s argument.

Florczak, 76 Wn. App. at 74.

As explained in Gaspar’s opening brief, the prosecutor argued in closing that even though hearsay is generally prohibited

one of the exceptions is . . . the physician-patient conversation. [Because] the statements are made for the purpose of medical diagnosis and treatment people tend to be much more honest when they talk about what happened to them.

RP 250-51. The prosecutor then argued the girls “disclosed fully” to “nice lady” Wahl. RP 251.

With this argument, the prosecutor suggested that the court’s own rules—in essence, the court system—treated statements to medical providers as more reliable than other kinds of evidence. Therefore, presumably, the girls’ statements to Wahl were credible. As argued, this also offered to jurors, backhandedly, the court’s imprimatur.

The State’s response to Gaspar’s claim is puzzling. The State points to the prosecutor’s “fleeting reference to the hearsay rule,” BOR at 14, and cites only State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011).

Thorgerson rejected a claim that a prosecutor committed misconduct by referencing the rules prohibiting hearsay, and

thereby bolstering the complainant's testimony by suggesting that inadmissible out-of-court statements supported the State's case. Id. at 445.²

Thorgerson is of no use to the State. Gaspar argued the State improperly injected the rationale behind medical hearsay into the jury's consideration of the evidence. The State has not responded to Gaspar's argument, instead choosing to erect and demolish a straw man.

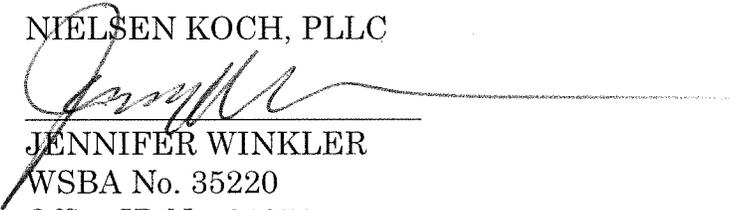
B. CONCLUSION

For the reasons stated above and in Gaspar's opening brief, his convictions should be reversed.

DATED this 28th day of February, 2020.

Respectfully submitted,

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² The Supreme Court rejected that claim, noting that any prejudice was minimal considering the jury already knew the complainant had provided consistent out-of-court accounts to several individuals. Thorgerson, 172 Wn.2d at 447-48.

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