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No. 54096-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

AARON LAGRAVE,

Appellant.

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

The Honorable James J. Dixon, Judge
Cause No. 19-1-01615-34

BRIEF OF RESPONDENT

Joseph J.A. Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether this Court should consider whether the trial court erred in ruling on a motion in limine where the record demonstrates that the parties agreed on the status of the motion and never asked the trial court to preserve a ruling for purposes of appeal.

2. Whether the trial court infringed upon the constitutional right to present a defense by excluding evidence that the victim was a daily user of methamphetamine, where the record demonstrates that the defense did not lay a foundation for admission of the evidence, the defense never offered the evidence and the trial court never made a ruling excluding the evidence.

3. Whether a ruling excluding evidence that the victim was a daily methamphetamine user, if made and found to be erroneous, would be harmless error given that the victim admitted to using methamphetamine on the morning in question and a defense witness testified that the victim was not acting like himself on the morning in question.

4. Whether the trial court abused its discretion by making a ruling on a motion in limine based on weight not admissibility, where the record demonstrates that no ruling

occurred, and ER 403 and ER 404(b) require a trial court to balance the probative value of evidence against its prejudicial effect.

B. STATEMENT OF THE CASE.

1. Substantive Facts

On the morning of August 25, 2019, the appellant, Aaron Lagrave and his girlfriend Kimberly Hunt went to the property occupied by Zane Tetreault and her son Theodore Tetreault. RP 115, 125.¹ Mr. Tetreault resided in an RV on the property. RP 119. At that time, Shannon Austin also had an RV parked on the property. RP 123. Hunt had previously stayed on the property. RP 125. Lagrave and Hunt went to the property to attempt to retrieve property that Hunt had left there. RP 125. After speaking with Zane, they left the property and then came back later that morning. RP 126.

When they returned, Zane indicated that she saw Lagrave standing outside of his vehicle and saw him make a “fist motion”

¹ In this brief, Zane Tetreault will be referred to by her first name to avoid confusion to references to her son Theodore Tetreault. The verbatim report of proceedings appears in four volumes. The trial that occurred November 19-21, 2019, occurs in three volumes which include a check-in hearing on November 5, 2019, which are sequentially paginated and herein referred to as RP. A separate volume which includes hearings from September 25, 2019, October 2, 2019, October 25, 2019, November 7, 2019, November 12, 2019, November 14, 2019, and the sentencing hearing December 4, 2019, is referred to as 2 RP.

and noticed that it was apparent that “there was something that he had contact with.” RP 127, 136. After the motion, Tetreault “was unconscious laying on the ground.” RP 136. Zane indicated that Tetreault was unconscious for 10 to 15 minutes. RP 137-138.

Theodore Tetreault indicated that Hunt had left some of her belongings at the property after having previously stayed there, including a bow and arrow. RP 159-160. Tetreault had left the bow and arrow at a different location. RP 165. On August 25, 2019, Tetreault indicated that Lagrave came driving by at “three o’clock in the morning,” and he stayed awake after he smoked “a little narcotics.” RP 166-168. Lagrave returned at 6:20 in the morning. RP 169. Hunt was in a passenger in Lagrave’s vehicle. RP 171.

Tetreault indicated that only thing that Lagrave said was “I want my arrows,” and that Lagrave was “pretty demanding. Pretty aggressive.” RP 175. Tetreault bent down to make eye contact with Hunt to tell her the bow and arrow was not there and that was the last part of the incident that Tetreault remembered. RP 175-176. Tetreault testified that the next thing he remembered was “sitting in a wheelchair down at the hospital.” RP 177. As a result of the incident, Tetreault had memory issues and a broken collarbone. RP 177-178.

Austin indicated that Lagrave was very upset and frustrated every time that she saw him on the property. RP 194. On August 25, she woke up around 3 AM, and saw Lagrave's vehicle "peeling out and peeling back out and honking the horn down the hill." RP 195. She again woke up to Lagrave's vehicle behind her RV between "six and seven." RP 196-197. She indicated that she heard loud voices and went out and saw the situation. RP 198. She said that Lagrave was upset and Tetreault went to say something, at which time she could see rage in Lagrave's face. RP 200. She turned toward her phone and "felt the impact and heard the impact." RP 200. When she turned back she saw Tetreault on the ground and indicated he was "gasping for air." RP 200-201.

When initially interviewed by law enforcement, Lagrave indicated that he was not at the Tetreault property. RP 247-248. He indicated that it had been "probably two weeks" since he had seen Tetreault and denied assaulting him. RP 249. Hunt provided two statements to law enforcement and it changed after Deputy Perez employed a ruse telling her that Tetreault had succumbed to his injuries. RP 255-256.

Hunt confirmed that she and Lagrave went to the property "about 6-6:30 in the morning." RP 298. She said that Tetreault and

Austin came out and they were “hostile, very aggressive.” RP 301-302. She said that Tetreault was making shoulder jerks to Lagrave, which she said was “like a fake punch.” RP 304. She said that she was talking to Tetreault about when she could get the property and he made a move, “like he was going to punch [her]” and Lagrave threw a punch at Tetreault. RP 308. She said that after the punch, it looked like Tetreault went towards Lagrave and she was not sure if Lagrave swung again, but he ended up grabbing Tetreault and laying him down. RP 310.

Hunt admitted that her first statement to Deputy Perez was not truthful. RP 314. During that statement she said that Lagrave had not gone with her to get her things and implied that Austin might have assaulted Tetreault. RP 315, 322. She also told Deputy Perez that Austin had turned on Tetreault with a bat. RP 329.

After Lagrave was arrested for the assault, he called Hunt from the Thurston County jail and stated, “he grabbed you or he hit you and he pushed you. Do you understand?” RP 282. He later reiterated that she needed to show up and said, “grab you and (indiscernible) and knock that down (indiscernible).” RP 284.

As a result of the events, Lagrave was charged with assault in the second degree and tampering with a witness. CP 9.

2. Motion in Limine

Prior to the start of trial, the State moved to exclude evidence that Mr. Tetreault reported to hospital staff that he used methamphetamine “seven days a week.” CP 92-93. In the motion in limine, the State indicated that the defense intended to question Mr. Tetreault on the frequency with which he uses methamphetamine or marijuana and would use the information to support an argument that a “heavy user” is someone who is “an aggressive tweaker.” CP 93. The defense responded in writing, indicating “the defense’s position is that the alleged victim possibly being under the influence of methamphetamine at the time might affect not only his memory and perception of the incident, but is very much relevant to the question of who the first aggressor was.” CP 98.

Defense counsel’s written response on the issue concluded with:

The defense therefore requests that it be allowed to solicit testimony from the State’s law enforcement witnesses about the typical effects of methamphetamine on users. They all can be expected to have received training in the effects of various drugs on human behavior, and most likely have also had experience directly dealing with people under the influence of various drugs.

CP 98.

When the trial court addressed the motion in limine prior to trial, the parties agreed that Tetreault's drug use on the morning in question was relevant and could be inquired about during trial. RP 10. The trial court began the discussion of the issue by noting, "the only issue if substance appears to be the issue with respect to the defense intention to cross examine the state's witnesses with respect to the alleged victim's admitted use of methamphetamine." RP 10-11. The prosecutor responded to the trial court's inquiry, stating:

I think we're essentially on the same page that his use that morning is relevant and is a topic that should be explored. I intend to ask Mr. Tetreault about it, and I have no objection to Mr. Hack asking about it. My - - I guess I'll have to wait and see with regard to any testimony from the deputies about whether at that point in the trial the evidence is relevant or, you know, there's a foundation or personal knowledge there so at this time I don't have any issues with the idea that that would be explored through the witnesses.

RP 11. The defense attorney responded, "I don't have anything to add to that." *Id.*

Without making any ruling, the trial court stated:

Okay. For whatever it's worth the court will mention that this court is aware of case law that stands for the proposition that it is error to admit methamphetamine use for the purpose of casting doubt on credibility of a witness or for the purpose of arguing that because a person had ingested methamphetamine she or he

was under the influence of it at a particular time or its effects on the human body. There is a well-established line of case law that stands for the proposition that expert testimony is necessary for - - prior to the jury hearing evidence with respect to how methamphetamine affects a person, the amount of methamphetamine ingested, the time when it is ingested the - - how it might affect one particular person as opposed to how it might affect another particular person and the person's tolerance to methamphetamine. So, it's error to simply argue that because a person ingested methamphetamine he or she acted in a particular way, but I'll leave that - - doesn't appear that that's really an issue at this particular point.

RP 10-11.

The prosecutor noted that the trial court's comments were related to foundation and relevance and stated, "Mr. Tetreault can obviously testify about how he was feeling and whether he felt under the influence, how much he used, things of that nature." RP 11. Without making any ruling on the discussed issue, the trial court moved on to discuss jury selection. RP 11-12.

During trial, defense counsel cross examined Tetreault about his methamphetamine use on the morning in question. RP 186. When Deputy Andrew Anderson testified, the prosecutor inquired as to whether he had previous training or specialized education regarding how various amounts of "meth" might affect various types of people and responded, that he did not. RP 227. When asked if

he was a toxicologist, he stated, “no.” RP 228. He indicated that he does sometimes encounter people who are under the influence of a controlled substance, but nothing about his contact with Tetreault led him to believe that he was under the influence of something. RP 229-230. There was no attempt to further inquire about Deputy Anderson’s experience with persons under the influence of methamphetamine during cross examination. RP 233.

Deputy Per Perez testified that he had training in “DUI recognition” but when asked, “Do you have any kind of specialized training or education in the way that particular amounts of meth affect different kinds of individuals,” Deputy Perez responded, “I’m not an expert in that, no.” RP 235. He clarified that he had taken an ARIDE class for DUI investigations but was not a drug recognition expert. RP 236. On cross examination, defense counsel inquired about Deputy Perez’s ARIDE training. Deputy Perez testified that methamphetamine is a stimulant. RP 259.

During closing arguments, defense counsel addressed the use of methamphetamine by Tetreault, stating:

It was an angry argument, though. And Mr. Tetreault admitted that he had smoked methamphetamine. When I asked him, “It was methamphetamine, wasn’t it?” his response was “A little bit.” He didn’t say directly, but that’s about as close as he could have

come to saying yes, it was methamphetamine. You can use your common senses, folks. Ask yourself does a person use methamphetamine once and never again? Not likely. You heard from Deputy Perez methamphetamine is a stimulant. I submit it's possible that what Ms. Hunt remembers about what led up to this incident might just be accurate. They came out angry because Mr. Tetreault might have been high.

RP 397-398. Defense counsel continued:

I emphasize the word "might" or "may." Now the police officer - - the sheriff's deputies told you Mr. Tetreault didn't appear to be high by the time they got to him. Maybe that's because he got punched. Getting punched is a downer. It might have counteracted whatever was going on. But it's definitely a possibility here, folks. You take an angry situation and you add some stimulating drugs to it, maybe Ms. Hunt's telling the truth about that.

RP 398.

Later in his closing argument, defense counsel again implied that Tetreault might have been on a stimulant arguing:

Ms. Hunt told you Ted's usually not like this. He's usually a friendly guy. He came out and he was acting - - he was acting hyped up. It was a very quick, angry exchange. Everybody's on high alert.

RP 399.

3. Verdict and Sentence

The jury found Lagrave guilty of assault in the second degree and tampering with a witness. RP 421-422, CP 51-52. The

trial court sentenced Lagrave to a total term of confinement of 35 months. 2 RP 42. This appeal follows.

C. ARGUMENT.

1. Lagrave never requested a ruling from the trial court and therefore failed to preserve the issue raised for appeal.

In general, appellate courts will not consider issues raised for the first time on appeal. It may be so raised if it is a “manifest error affecting a constitutional right.” Constitutional errors are treated differently because they can and often do result in injustice to the accused and may affect the integrity of our system of justice. “On the other hand, ‘permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials, and is wasteful of the limited resources of prosecutors, public defenders and courts.’” State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (cite omitted, emphasis in original).

RAP 2.5(a) concerns errors raised for the first time on appeal:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which

relief can be granted, and (3) manifest error affecting a constitutional right. . . .

RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms. . . . Elementary rules of construction require that the term “manifest” in RAP 2.5(a)(3) be given meaning. . . . As the Washington Supreme Court stated in State v. Scott, [*supra*, at 687] “[t]he exception actually is a narrow one, affording review only of ‘certain constitutional questions.’”

State v. Lynn, 67 Wn. App. 339, 342-43, 835 P.2d 251 (1992).

We agree with the court of Appeals that the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can “identify a constitutional issue not litigated below.”

Scott, *supra*, at 687. The Lynn court described the correct analysis

in these steps:

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. . . . “[M]anifest” means unmistakable, evident or indisputable, as distinct from

obscure, hidden or concealed. “Affecting” means having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient.

Lynn, 67 Wn. App. at 345.

One of the most fundamental principles of appellate litigation is that a party may not assert on appeal a claim that was not presented at trial. State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1953). This rule has been a part of Washington’s legal landscape since territorial days. See Code of 1881, § 1088 (provisions of the civil practice act with regard to taking exceptions would also govern in criminal cases); Blumberg v. H. H. McNear & Co., 1 Wash. Terr. 141, 141-42 (1861) (court will not review claims to which error was not assigned). When the trial court has refused to rule or made a tentative ruling, the party must again raise the issue at the appropriate time to preserve a record for appellate purposes. State v. Noltie, 116 Wn.2d 831, 844, 809 P.2d 190 (1991).

Lagrange’s entire argument on appeal stems from a claim that the trial court excluded evidence and thereby infringed upon Lagrange’s constitutional right to present a defense. However, a close review of the record demonstrates that the parties agreed about the motion in limine and never asked the trial court to make a ruling on it. RP 10-11. The discussion on the motion in limine was

left open with the understanding that Tetreault's methamphetamine use on the morning in question would be discussed and that further testimony about the effects of methamphetamine would depend on foundation. RP 10-11.

The trial court made no ruling excluding evidence. The defense made no attempt to demonstrate the particular effect of methamphetamine use on Tetreault or what knowledge, if any, Lagrave had regarding how Tetreault acted while under the influence of methamphetamine. If the witnesses could have demonstrated that Tetreault was known by Lagrave to be aggressive when under the influence of methamphetamine, the defense could have attempted to lay that foundation. They did not.

Because the trial court never excluded offered evidence or testimony, Lagrave can demonstrate no error, and certainly not a manifest error affecting a constitutional right. This Court should decline to consider the arguments raised because they were not properly preserved for appeal pursuant to RAP 2.5(a).

2. The trial court did not infringe upon the right to present a defense.

Whether excluding or admitting evidence at trial, a reviewing court considers such decisions under the same standard of review:

abuse of discretion. State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 970 (2004); State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); Reese v. Stroh, 128 Wn.2d 300, 310, 907 P.2d 282 (1995). Thus, the trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal. State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).

A criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Evidence is relevant if it has any tendency to make any fact that is of consequence to the case more or less likely than without the evidence. ER 401. Relevant evidence is admissible unless its probative value is outweighed by its prejudice or has a tendency to confuse the issues, mislead the jury, cause undue delay, or is an unnecessary presentation of cumulative evidence. ER 403.

Generally, evidence of prior misconduct is inadmissible to prove the character of a person or show action in conformity

therewith. ER 404(b). However, the trial court may admit evidence of prior misconduct for other purposes so long as the probative value outweighs its prejudicial effect. *Id.*; State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). Even expert testimony may be excluded on the issue of whether methamphetamine usage caused a victim to act aggressively. State v. Lewis, 141 Wn. App. 367, 389, 166 P.3d 786 (2007); State v. Richmond, 3 Wn. App.2d 423, 431-432, 415 P.3d 1208 (2018) (Finding it is nothing but speculation to connect the victim's methamphetamine use with defendant's claim of victim aggression absent a basis to assess how the drug affected the victim).

Self-defense or defense of others incorporates both subjective and objective elements in determining what a reasonably prudent person would have done. State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). In Richmond, Division III of this Court considered whether the trial court restricting questions regarding the victim's drug use violated the right to present a defense. The Court said, "we find no abuse of discretion in the trial court's ruling. Evidence of [the victim's] methamphetamine use had the potential of being analyzed as bad character evidence." 3 Wn. App. at 435.

As noted above, in this case, it appears that defense counsel and the prosecutor agreed on the evidence that was going to be presented. The defense made no argument that it had evidence that Tetreault in particular acted aggressively while under the influence of methamphetamine, nor did the defense offer any argument that Lagrave knew that Tetreault acted aggressively while under the influence of methamphetamine. There was absolutely no foundation shown by the defense that would make evidence of daily methamphetamine use by Tetreault relevant.

Lagrave was able to present his defense as he planned. The jury heard that Tetreault had used methamphetamine on the morning in question, the defense elicited testimony from Ms. Hunt regarding Tetreault's behavior on the morning in question, and the defense argued that the use of a stimulant on the morning in question by the victim supported the self-defense claim. RP 186, 297, 397-398.

There was no ruling of the trial court that infringed upon the right to present a defense. Even if the defense had attempted to demonstrate that daily methamphetamine use of Tetreault was relevant, on the record that was before the trial court, it would not have been error to exclude it under ER 404(b). There was no offer

of proof made regarding how methamphetamine affected Tetreault. Moreover, Hunt's testimony would tend to refute an argument that Tetreault was a known "aggressive tweaker." When discussing the morning in question, she indicated "Ted was not Ted. He was irrational and kind of hostile. I'd never seen that side of him before." RP 297. The evidence did not support any conclusion that daily methamphetamine use was in any way relevant to whether Tetreault was the first aggressor. Had the defense been able to lay such a foundation, perhaps the defense would have requested a ruling from the trial court or sought to admit the evidence at issue. They did not do so.

3. Any error was harmless beyond a reasonable doubt.

As argued repeatedly throughout this brief, the trial court never made a ruling specifically excluding any evidence. At most, the trial court correctly noted that evidence of methamphetamine use of a witness on its own is inappropriate to attack credibility of a witness. The defense never offered the evidence at issue, and it would have been properly excluded because no foundation was shown which would make it relevant. However, even if the defense had offered the statement made at issue regarding drug use,

“seven days a week,” and the trial court had actually excluded it, the exclusion would have had no effect on the verdict.

The argument made on appeal is that the evidence would have demonstrated that Tetreault was the first aggressor. However, Hunt’s testimony contradicted any inference that Tetreault’s “daily” use of methamphetamine made him aggressive. She indicated that he was not himself and she had never seen him act like he did on the morning in question. RP 297. Evidence of frequent use of methamphetamine would have done no more than the evidence that was presented indicating use on the morning in question.

Even constitutional violations are harmless if, beyond a reasonable doubt, they had no effect on the verdict. State v. Guloy, 104 Wn.2d at 425. Given that the jury heard that Tetreault used methamphetamine on the morning in question, and considering all of the evidence at trial, it is clear beyond a reasonable doubt that evidence of daily drug use would have had no effect on the verdict.

4. The trial court did not abuse its discretion by excluding evidence based on weight rather than admissibility.

Lagrange’s final argument is that the trial court “did not make a ruling based on relevancy or admissibility. Instead, the trial court evaluated the weight of the evidence rather than its admissibility

and excluded it.” Brief of Appellant at 17. This argument is again based on the flawed assumption that the trial court made an evidentiary ruling. The trial court did not make such a ruling. RP 10-11. Additionally, ER 403 and ER 404(b) require a trial court to weigh the probative value of evidence against its prejudicial affect. The defense made absolutely no showing that the evidence at issue was relevant to the issue of whether Tetreault was the first aggressor and the trial court’s observations on the law were correct.

The defense never attempted to provide a foundation that would make evidence of daily drug use relevant. Moreover, the defense never asked the trial court to admit the evidence or actually engage in an ER 403 or ER 404(b) analysis. The trial court did not abuse its discretion in any way.

D. CONCLUSION.

The issues raised on appeal were not adequately preserved at the trial court and rely on the flawed assertion that the trial court made a ruling on the State’s motion in limine that prevented the defense from acting. The trial court was never asked to make a ruling on the admissibility of “daily” drug use of the victim. The defense asked to and did admit evidence of drug use on the day in

question. Further, the defense was allowed to provide a foundation for testimony regarding the effects of drug use with later witnesses but did not do so. The trial court in no way infringed upon the right to present a defense or otherwise abused its discretion to make evidentiary rulings. The State respectfully requests that this Court affirm Lagrave's convictions and sentence.

Respectfully submitted this 4th day of September, 2020.



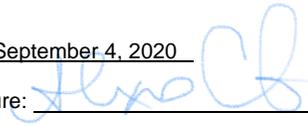
Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

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THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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