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

STATE OF WASHINGTON,

Respondent,

v.

STEPHANIE ANN DUGGER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 18-1-01352-18

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the evidentiary issue raised was preserved where the defense conceded on the record that its argument had no factual basis?
2. Whether the testimony offered by the defense was relevant?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Stephanie Ann Dugger was charged by information filed in Kitsap County Superior Court with injury hit and run. CP 1-2. A first amended information charged the hit and run and added a second count of second degree assault. CP 9-10.

A jury convicted Dugger on both counts. CP 69.

Dugger was given a mid-range sentenced of nine months. CP 71.

Dugger timely filed a notice of appeal. CP 81.

B. FACTS

James Twogood was riding his motorcycle home from work. RP 216. Mr. Twogood came up behind a black jeep, following it through a green light and up the road. RP 217-18. Traffic ahead stopped and Mr. Twogood had to abruptly stop. RP 218.

Traffic began to move again and a bit down the road the Jeep “brake-checked” Mr. Twogood. RP 219. He “backed off a little bit.” Id. Then, the Jeep “brake checked” again this time locking up its brakes. Id. In response, Mr. Twogood passed the Jeep on the left. Id.

The two vehicles continued now with the motorcycle in the lead. RP 220. The Jeep closely followed Mr. Twogood: “If I would have touched my brakes, I probably would have ended up as a hood ornament.” RP 221. The Jeep veered at Mr. Twogood as it turned right onto another road. RP 222. Mr. Twogood now turned and followed, wanting to get the license number of the Jeep. Id.

Mr. Twogood crested a hill in the road, rounded a sharp curve and saw the Jeep stopped at an angle in the road. RP 224. Mr. Twogood went around the Jeep on the right, his way to the left blocked by the Jeep. RP 224-25. He was moving at a slow speed. RP 225. As he passed, Mr. Twogood was “blasted” by the Jeep; it hit him on the left side, pushed the motorcycle out from under him, and his body hit the side of the Jeep. RP 226. Mr. Twogood identified a dent in the side of the Jeep as where his body hit. RP 227 (referring to state’s exhibit 14).

The collision knocked the wind out of Mr. Twogood. RP 229. As he slowly got up, he saw that the Jeep was gone. Id. The damage to the motorcycle was later estimated to be nearly \$5000. RP 231. Mr.

Twogood suffered “road rash,” a sprained thumb, and hurt ribs. RP 232. The ribs hurt for a week. RP 235.

Kitsap County Deputy Sheriff Andrew Aman responded to the incident. RP 104-05. A fire unit was present and the deputy observed a motorcycle on its side. RP 108. The deputy saw Mr. Twogood standing there looking sore and limping around. Id. As well as the motorcycle, the deputy saw pieces of plastic debris (RP 109) further described as pieces of a hubcap. RP 112. The deputy also collected a piece of tire stem that had been broken off. RP 120.

A witness provided Deputy Aman with the address of the fleeing Jeep. RP 121. There, the deputy saw a black Jeep in the driveway with “obvious” damage to the right side and a missing right front hubcap. Id. It was discovered that the Jeep was registered to Dugger. Id. No one answered the door of the residence after repeated efforts. RP 123. Deputy Aman left his card. RP 178. The next day, no answer was had at the door but the card was missing and the flat tire on the Jeep had been repaired. Id.

Deputy Aman failed to have contact with Dugger as his investigation continued. Three weeks later, Deputy Aman received from an attorney a letter signed by Dugger. RP 136-37 (supp. CP state’s exhibit 2A).

Dugger testified that on her way home from the store a car two cars in front of her suddenly stopped causing her to brake abruptly. RP 332-33. She saw a motorcycle in the rearview mirror that also abruptly stopped. RP 333. She thought the motorcycle rider was upset because he threw up his hands and tailgated her as they went on. Id. Dugger turned up the road to the right and the motorcycle followed. RP 337. On the narrow road, the motorcycle continued tailgating and then tried to pass on the right. Id. As she rounded the curve, Dugger thought the rider kicked her car. RP 338. She did not think an accident occurred. RP 339.

Dugger's driveway was just two or three down the street so she pulled in there. RP 339. She was panicked and scared by the incident. RP 340. Someone, not Mr. Twogood (RP 366), came to the end of her driveway and yelled. RP 341. She wanted to leave so she got a contractor who was working on the house to give her a ride. RP 342. She left without seeing the damage to her car. RP 342-43; RP 348. Dugger remained away from her home for "almost a week." RP 348. Eventually, Dugger contacted an attorney and the letter mentioned above (state's exh. 22A) was sent. RP 349.

Melody Yamanaka is Dugger's mother. RP 320. Ms. Yamanaka testified that she found Deputy Aman's card and called and left a message for Dugger about the card. RP 321. Another day, Ms. Ymanaka spoke

with Deputy Aman at the house and the deputy showed her the damage to the Jeep. RP 323.

Dugger testified that she has had panic attacks and has had medication prescribed for that disorder. RP 344-45. She took medication after the incident. RP 345. Dugger gave a general description of the symptoms of her panic attacks but did not explain the presence of those symptoms at the time of the incident. RP 345.

On cross-examination, Dugger conceded that she did not include information about the panic disorder in the letter to Deputy Aman. RP 386. When pressed, Dugger explained that she had not been asked to describe her mental state in the letter. RP 385-87. She admitted that she did not say she was overwhelmed by panic at the time of the incident finding it sufficient to have said that she was “scared.” RP 387.

The defense offered to have Ms. Yamanaka testify to her awareness of Dugger’s diagnosis and the medications for it. RP 399. Discussion of that offer is the issue in this case and is fully addressed below. That testimony was not offered to the jury.

III. ARGUMENT

A. MS. YAMANAKA DID NOT TESTIFY BECAUSE THE DEFENSE CONCEDED THAT THERE WAS NO FACTUAL NEXUS BETWEEN DUGGER'S PANICK DISORDER AND THE INCIDENT AND THEREFORE NO ISSUE WAS PRESERVED AND EVEN IF PRESERVED THERE WAS NO ABUSE OF DISCRETION BECAUSE THE EVIDENCE WAS IRRELEVANT.

Dugger argues that the trial court undermined her right to a complete defense by excluding testimony from Dugger's mother that would have corroborated that Dugger suffers from a panic disorder. This claim is without merit because the defense conceded the issue below and thus did not preserve it for review and because the trial court had tenable grounds to conclude that the offered testimony was irrelevant.

On the question of panic attacks, the prosecutor asked Dugger about her failure to include the information in her letter to Deputy Aman. RP 386. The exchange ended with:

Q. I'm asking you about, you know, panic attacks and that you were so overwhelmed by panic you couldn't focus. You had to leave. A. I didn't elaborate to that detail. I did say that I was scared. Q. But you shared it with us for the first time here today? A. Because I was asked.

The prosecutor challenged neither the existence of the Dugger's disorder nor that it may have had some effect on her conduct, accurately arguing that:

I never said she wasn't on medication; that she hadn't been diagnosed; nothing about her history. I asked about that day only, whether she put that to the letter -- to the police that she had panic attacks that day.

RP 399. Moreover, as noted, in her testimony Dugger did not describe the effect of the disorder on her actions, if any, during the incident. On that point, there was nothing offered for the state to challenge; there was no implication of recent fabrication because the state did not allege that she did not have the disorder or that she had medication for it. This becomes clear when the defense concedes the evidentiary point.

The trial court accurately enquired as to Ms. Yamanaka's knowledge "about a panic attack of your client that day?" RP 400. Argument led the trial court to accurately ask and observe that "did your client testify that she was having a panic attack? I don't recall hearing that." RP 400. Again, on the same theme: "And if your client is not going to say she had a panic attack, then why would we let the jury make an inference that she did?" Id.

The defense was unable to answer the trial court's concerns and conceded the issue by saying "My client just wrote me: I was not having a panic attack." RP 404. After that, the issue evaporated. The trial court never formally excluded the proffered testimony nor did the defense except or object. By conceding the point and in fact providing the trial court with a factual basis to support the trial court's position, the defense

failed to preserve this issue for review. Ms. Yamanaka was never recalled to testify.

RAP 2.5(a) limits appellate review of alleged errors that were not properly preserved:

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.

To establish that the error is “manifest,” an appellant must show actual prejudice. *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). The purposes underlying RAP 2.5(a) were addressed in *State v. McFarland*:

[C]onstitutional errors are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. *Scott*, 110 Wn.2d at 686-87. 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.” *Lynn*, 67 Wn. App. at 344.

State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be “manifest” i.e., it must be “truly of constitutional

magnitude.” *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). Moreover, questions of the admissibility of evidence are not of constitutional magnitude, do not fall within RAP 2.5’s exceptions, and thus may not be raised for the first time on appeal. *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000); *see also State v. Clark*, 139 Wn.2d 152, 156-57, 985 P.2d 377 (1999). A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

Here, the defense not only failed to object to the trial court’s position on the point, the defense conceded that there was no factual basis for its argument. Further, the word “position” is used because the trial court never ruled that Ms. Yamanaka could not testify about the panic disorder. The trial court held the position that it would not be relevant testimony unless tied to a fact of consequence in the case—Dugger’s state of mind at the time of the incident. ER 401.

Thus the trial court invited Dugger to lay foundation for the relevance of the fact of her disorder. The trial court said nothing that would show that if Dugger were able to lay the foundation—that she was affected by the disorder during the incident—that Ms. Yamanaka’s testimony in support of that claim would have made the existence of that fact more probable. The issue was not preserved.

Even if counsel's argument with the trial court is considered to have preserved the issue, Dugger's admission that she was not having a panic attack made Ms. Yamanaka's testimony irrelevant. Verifying that one's daughter has a disorder that played no part in the incident proves no fact of consequence in the action. ER 401.

The standard of review on the trial court's rulings admitting or denying evidence is abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11,17, 74 P.3d 119 (2003). "Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for unreasonable reasons." *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Further

A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts adopts a view that no reasonable person would take, and arrives at a decision outside the range of acceptable choices.

State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (internal quotation marks and citations omitted); accord *State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 647, P.3d 45 (2017).

Dugger got into evidence how she felt after the incident; after-the-fact evidence that was likely irrelevant itself. RP 340 (after incident she was "freaked out" and "panicked"). In *State v. Stubsjoen*, 48 Wn. App.

139, 738 P.2d 306 (1987), Stubsjoen sought to introduce, through a witness, her own statements made in a phone call an hour and a half after the incident. 48 Wn. App. at 146. The trial court allowed testimony that the call occurred but not evidence of the content of the call. *Id.* The Court of Appeals affirmed, providing analysis applicable to the present case

While statements offered as circumstantial evidence of the declarant's state of mind are not hearsay, such statements must be relevant to be admissible. 5A *K. Tegland, Wash.Prac.* § 336 (2d ed. 1982). Jonsson's testimony would only have been relevant insofar as it might have corroborated Stubsjoen's contention that she did not intend to abduct the baby. However, the relevant state of mind was when she left the car with the baby in Federal Way, not her state of mind 1 ½ hours later when she was speaking on the telephone to Jonsson.

48 Wn. App. at 146. In the present case, Dugger got some circumstantial evidence of mental state under circumstances where she denied on the record that her disorder played a role. Her after-the-incident mental state was irrelevant just as was the after-the-incident mental state of Stubsjoen.

The trial court's position was tenable. Even if the defense preserved the issue, there was no error.

IV. CONCLUSION

For the foregoing reasons, Dugger's conviction and sentence should be affirmed.

DATED August 19, 2020.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "John L. Cross". The signature is written in a cursive style with a large initial "J" and "C".

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