

FILED

JAN 06 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29317-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

RODNEY R.G. REEDY,

Appellant.

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

The Honorable John M. Antosz, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206)623-2373

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A. ASSIGNMENT OF ERROR

The trial court erred by denying Rodney R.G. Reedy's motion for a mistrial after a state's witness, who had interviewed the complainant, twice opined the complainant was "honest."

Issue Pertaining to Assignment of Error

A guardian ad litem appointed for the children in a related child custody proceeding testified at Reedy's molestation trial that she interviewed the complainant and found her to be "honest." Was this improper opinion on a witness's credibility a serious irregularity that warranted a mistrial?

B. STATEMENT OF THE CASE

1. Summary of proceedings

In summer 2005, 10-year old E.M. and her four siblings went for their customary visit to the Michigan residence of their father and stepmother. RP 79-80, 88-89, 139-40, 151, 347. The summer was the only time of year the children saw their father because they lived in Coulee City, Washington, with their mother, Susan, and stepfather, Rodney R.G. Reedy. RP 108-09, 135-36, 151, 154, 158-59, 334-35.

That all changed in 2005. The children divulged to their stepmother they did not want to return to Washington. They told her

things that caused her concern for their well-being, including descriptions of discipline they received in Washington. RP 81, 98.¹ The children were also "extremely skinny" when they first arrived. E.M.'s father filed for a change of custody, and was awarded temporary custody in late August. RP 80-81, 98-100, 348-49. The kids therefore enrolled in schools in Michigan. RP 102-03, 154.

E.M. said nothing about anything Reedy may have done until about one month later. RP 98-99, 153-54. Then one day after school, E.M. disclosed additional information about her life in Washington that caused her stepmother to contact Social Services. RP 82-83. E.M. recounted that sometime between May 2003 and May 2004, when they lived in a house in Hartline, Reedy placed her on her back on a bed, removed both his and her pants and underwear, and rubbed his erect penis between her thighs. RP 110-13, 127, 150, 156, 363-64.

A similar incident occurred between May 2004 and May 2005, when they lived in a Coulee City home. Reedy took E.M. into the

¹ E.M. testified her mother: "grounded" her for a month for eating chocolate; withheld her allowance for one year because of a suspicion she had something to do with a broken window at a church; and made her and her brothers eat the entire amount of chocolate ice cream, which she did not like, because one of the brothers ate a bit of it. RP 143, 227-28. E.M. believed some of her mother's punishments were unfair. RP 228.

bathroom, removed her pants and underwear, told her to get onto her hands and knees, and rubbed his erect penis between her thighs. RP 128-29, 132-35, 364. E.M. told her friend what happened, but no one else, until she told later her stepmother in Michigan. RP 80, 136-37.

Retired Grant County Sheriff's Deputy David Matney began to investigate the allegations in September 2005. RP 263-64, 274-77. Matney requested Michigan authorities to conduct interviews because E.M. and her siblings lived there. RP 263, 278, 284. During one October 2005 interview, E.M. said nothing about a piercing on Reedy's penis. RP 195, 278-80. In fact, she said she never saw Reedy's penis at all. RP 195-96.

The subject of Reedy's pierced penis did not come up until early in 2006. By then Noni Jackman had been appointed as the children's guardian ad litem (GAL) in the custody action. RP 242-45, 250-51. During an interview, one of E.M.'s brothers – not E.M. -- disclosed to Jackman that Reedy had a pierced penis. RP 257-58. Jackman relayed that information to Matney. RP 284-87. She submitted her final GAL report to the court in December 2006. RP 254-56. Jackman recommended the children's father be awarded custody. RP 249-50.

Matney did not interview E.M. until May 2008. RP 197, 267-68. E.M. told Matney, among other things, that Reedy had a piercing at the tip of his penis. RP 271-74. As a result of E.M.'s disclosures, the state charged Reedy in January 2009 with two counts of first degree child molestation. CP 1-2. The state added two alternative counts of first degree rape of a child in February 2010. RP 15-17. A jury trial commenced in May.

The subject of Reedy's pierced penis was a central feature at trial. Reedy argued before trial all such evidence was unfairly prejudicial and inadmissible under ER 403. CP 18 (Motion in Limine No. 1); RP 26-42. The trial court prohibited admission of a photograph of Reedy's adorned penis, but found testimony about the topic admissible. RP 120-24.

E.M. testified that during the bedroom incident in Hartline, she observed a piercing hole near the tip of Reedy's penis. RP 126-27. She also observed Reedy remove something resembling a hoop-shaped earring at the tip of his penis. RP 212-18; Ex. 15.

Reedy never denied having the piercing; he got it at the insistence of E.M.'s mother, to whom he was married at the time. RP 352-53, 373-74. The "jewelry" consisted of a thick hoop shaped like the letter "C" and a dimpled ball that fit into the opening of the "C." The ball stayed in place

because the opening was crimped down into the dimples. RP 355-57, 371. To remove the hardware, Reedy had to use two pairs of pliers, one to widen the opening and one to pull the ball out. RP 357-59. The piercing hole was on the bottom and behind the head of his penis. RP 333, 359.

Although Reedy would have preferred that his piercing remain private, E.M.'s mother "told everyone we knew, all of her family and friends, that she had talked me into getting a piercing." RP 370. It did not matter to her, Reedy said, if the children were within hearing distance or not. RP 370-71.

Reedy learned of E.M.'s accusations in September 2005. RP 346-47. The custody proceedings ended in October 2007, when the court awarded custody of the children to their father. RP 350-51. Reedy testified he never had sexual contact with E.M. and never disrobed in front of her. RP 352.

The rape counts were dismissed for insufficient evidence at the close of the state's case. RP 332-33. The jury found Reedy guilty of each molestation count. CP 38-39. The trial court imposed a standard range minimum prison term and a maximum of life. CP 75-94.

2. Opinion on credibility

During direct examination, the prosecutor asked GAL Jackman how E.M. came across during their interview. Jackman answered, "All of the kids came across as very honest –." RP 246. Reedy objected and moved to strike the answer. The court sustained the objection, struck the answer, and instructed the jury to "disregard" it. RP 246.

The prosecutor rephrased the question, asking "[w]hat kind of demeanor" E.M. displayed during the interview. RP 246. Apparently undaunted, Jackman responded, "She willingly spoke to me. She knew what my job was. I felt she was honest." RP 246. Reedy objected. The trial court again sustained the objection, struck the answer, and instructed jurors to disregard. RP 247. The court also gave the following admonition:

Any witness's opinion about someone's honesty is to be always disregarded. That's your job. That's imposing upon your duty. So that's why I've done that.

And the witness will be admonished not to give an opinion about whether someone is honest or not. . . . That's inadmissible under our rules of evidence.

RP 248-49.

Counsel moved for a mistrial based on Jackman's improper opinions on E.M.'s credibility. RP 248, 299. The prosecutor explained he

anticipated Jackman would answer that she found E.M. "vivacious, bright and charming" as she wrote in her GAL report. RP 300. The trial court denied the motion, finding (1) Jackman's answers were general and not specific to the charges; and (2) its admonition to jurors was sufficient to cure any error. RP 301.

C. ARGUMENT

REPEATED OPINIONS ON E.M.'S CREDIBILITY
WARRANTED A MISTRIAL.

Ms. Jackman, an experienced GAL, violated a well established rule when she twice gave her opinion that E.M. was "honest" during their interview. The state conceded the error, and because the trial court's instructions to disregard the testimony were ineffective, the trial court erred by denying Reedy's motion for a mistrial. His convictions should be reversed.

Weighing a witness's credibility is the jury's province. State v. Jerrels, 83 Wn. App. 503, 507-08, 925 P.2d 209 (1996). A witness may not express an opinion on whether another witness is telling the truth. State v. Casteneda-Perez, 61 Wn. App. 354, 360, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). This rule applies to testimony as well as statements made out of court. See In re Guardianship of Stamm v. Crowley, 121 Wn. App. 830, 839, 91 P.3d 126 (2004) (although GAL is

"expert" for guardianship and child custody purposes, "a GAL's subjective assessments of credibility are irrelevant."); State v. Alexander, 64 Wn. App. 147, 152, 822 P.2d 1250 (1992) (counselor's testimony that child sexual abuse complainant gave a "very clear" and consistent description of abuse throughout their counseling sessions was improper comment on child's credibility).

The prosecutor in Reedy's case conceded GAL Jackman violated this rule when she described E.M. as "very honest" and "honest" during their 2006 meeting. RP 247-48. The question on appeal is whether the trial court erred by denying Reedy's motion for mistrial after Jackman voiced her opinion on E.M.'s credibility.

A trial court should grant a mistrial when an irregularity in the trial is so prejudicial that it renders the trial unfair. State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). In determining whether an irregularity deprived the accused of a fair trial, reviewing courts consider

(1) the seriousness of the irregularity, (2) whether challenged evidence was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.

Babcock, 145 Wn. App. at 163. The standard of review is abuse of discretion. State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987).

The irregularity during Reedy's trial – Jackman's improper opinion testimony – is serious. First, that opinions on witness veracity are strictly forbidden is a longstanding rule that an experienced GAL like Jackman should be aware of.² "Courts have found a serious irregularity when a witness's statement would generally be excluded under an established evidence rule aimed at preventing inherently prejudicial evidence." State v. George, 150 Wn. App. 110, 120, 206 P.3d 697 (citing cases), review denied, 166 Wn.2d 1037 (2009).

Second, Jackman told jurors a GAL is "a court-appointed investigator" for the children. RP 242-43. "The judge appoints a guardian ad litem to basically be the eyes and ears of the court." RP 243. The GAL report, Jackman testified, is "an additional tool for the court." RP 243.

In other words, the GAL in such a proceeding is an extension of the court or quasi-judicial official. See West v. Osborne, 108 Wn. App. 764, 773-74, 34 P.3d 816 (because GAL in child custody matter was "acting as an arm of the court at all times," she was entitled to quasi-judicial immunity), review denied, 145 Wn.2d 1012 (2001); Reddy v. Karr, 102 Wn. App. 742, 744, 9 P.3d 927 (2000) (family court

² Jackman testified she "literally do[es] hundreds of cases." RP 255.

investigators, who perform court-ordered parenting evaluations to assist the court, "act as an arm of the court and accordingly are entitled to quasi-judicial immunity from civil liability for acts undertaken in performing such parenting evaluations.").

This status adds persuasive weight to Jackman's opinion that E.M. told her the truth. Instructive in this regard is Guardianship of Stamm v. Crowley, where the GAL testified part of her job was to "assess the credibility" of people she interviews. The GAL told jurors that GALs are considered

the eyes and ears of the court, and we have to go out and hear what there is to be heard from the people who do make the observations. . . . The judge can't speak to everyone. He can't make those phone calls. There just isn't the time and it's just not appropriate. So, it's up to the guardian ad litem to report back.

Crowley, 121 Wn. App. at 840.

The court found the GAL "aligned herself with the court and bolstered her assessments" with the testimony. Id. This was a problem, the court found, because "when a jury is told that the GAL is essentially an investigator for the court whose role includes determining credibility, the jury cannot be expected to sort out its proper role from that claimed by the GAL." Crowley, 121 Wn. App. at 841. The court found the GAL's inaccurate description of her role inadmissible and that there was a

substantial likelihood her testimony affected the jury's verdicts. Crowley, 121 Wn. App. at 843-44.

More generally, our Supreme Court recently observed that "[t]he fact the witness is a 'professional' witness also indicates a serious irregularity." State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010); see United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973) (recognizing expert testimony may unduly bias jury "because of its aura of special reliability and trustworthiness"). For these reasons, Jackman's testimony constituted a serious irregularity.

With respect to the second factor in the three-part irregularity test, Jackman's opinions of E.M.'s credibility – being blatantly inadmissible – were not cumulative. Nor was E.M.'s credibility otherwise without doubt. Reedy seriously impeached her claims, for example, by noting she said she did not see his penis at all in an interview conducted nearer to the time of the alleged second incident than her other disclosures. Moreover, E.M. did not accurately describe the penis "jewelry" or the location of the piercing.

Furthermore, E.M. made her disclosures during the time her father was battling for custody of his children against her mother, whose methods of discipline E.M. sometimes found unfair. This custody matter was

relevant to show E.M. was biased when she made her accusations. See State v. Dolan, 118 Wn. App. 323, 328, 73 P.3d 1011 (2003) (assault of a child conviction reversed where trial court prohibited accused from presenting evidence of bias by questioning mother of child about ongoing custody dispute between accused and mother).

Finally, Jackman's improper testimony occurred within the context of a child sexual abuse prosecution. Courts have recognized child abuse is a sensitive and "highly inflammatory" subject. Garcia v. Providence Medical Center, 60 Wn. App. 635, 644-45, n.2, 806 P.2d 766, review denied, 117 Wn.2d 1015 (1991); see Dewalt v. State, 307 S.W.3d 437, 453 (Tex. App. 2010) ("Evidence of sexual abuse, especially allegations of such abuse perpetrated by a parent on a child, is extremely prejudicial."); State v. Fassero, 256 S.W.3d 109, 119 (Mo. 2008) ("inflammatory nature" of charges set forth in Illinois indictment, which alleged accused fondled vaginal area of child and breast of either same child or another child, so prejudicial as to warrant reversal of penalty); Valmonte v. Bane, 18 F.3d 992, 1004 (2d Cir. 1994) (determining whether an individual has abused a child is "inherently inflammatory"); Barnett v. State, 178 Ga. App. 685, 686, 344 S.E.2d 665, 667 (Ga. App. 1986) ("caseworker's testimony of

unrelated sexual and physical child abuse and neglect was so inflammatory as to guarantee [appellant's] conviction" for assault on peace officer).

Given this highly charged atmosphere, it is unlikely the trial court's instructions to disregard cured Jackman's improper opinion testimony. The jury's assessment of E.M.'s credibility was critical; there were neither witnesses nor physical evidence to corroborate E.M.'s version of events.

An instruction to disregard is futile "where the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." State v. Mack, 80 Wn.2d 19, 24, 490 P.2d 1303 (1971). It is nearly a cliché to say that some bells, once rung, cannot be unrung. See State v. Easter, 130 Wn.2d 228, 238-39, 922 P.2d 1285 (1996) ("A bell once rung cannot be unrung.") (quoting State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976)).

In cases involving an opinion on witness credibility, the risk of prejudice is acute where, as in Reedy's case, a successful defense hinges on whom the jury believes. State v. Dunn, 125 Wn. App. 582, 593-94, 105 P.3d 1022 (2005); Jerrels, 83 Wn. App. at 508. In Jerrels, the Court reversed convictions for two counts of first degree rape of a child and two counts of first degree child molestation, finding "a mother's opinion as to her children's veracity could not easily be disregarded even if the jury had

been instructed to do so." Jerrels, 83 Wn. App. at 508. If a mother's opinion can be highly prejudicial, the opinion of a professional GAL like Jackman – with its "aura" of trustworthiness – must be even more so.

The serious irregularity in Reedy's case warranted a mistrial. The trial court abused its discretion by denying Reedy's motion for that relief. His right to a fair trial was violated, and this Court should reverse his convictions.

D. CONCLUSION

The trial court erred by denying Reedy's motion for a mistrial because GAL Jackman's improper opinion on E.M.'s credibility could not be cured by an instruction to disregard. This Court should reverse his convictions for first degree child molestation and remand for a new trial.

DATED this 4 day of January, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant