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NO. 35035-5-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ROY HOWARD MURRY,

Defendant/Appellant.

REPLY BRIEF

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ARGUMENT

The State raises a number of issues in its Amended Brief. Mr. Murry will be addressing each of those issues insofar as he has not already addressed them in his original brief or the Additional Statement of Grounds for Review.

I. RAP 2.5

RAP 2.5 (a) states, in part:

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. ...

Whenever there is a challenge to an issue that has been raised on appeal the provisions of RAP 1.2 (a) come into play:

These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

RAP 18.8 (b) has no application to any issue in Mr. Murry's case.

In general, issues not raised in the trial court may not be raised on appeal. ... However, by using the term "may" RAP 2.5 (a) is written in discretionary, rather than mandatory, terms. *See State v. Ford*, 137 Wn.2d 472, 477, 484-85, 973 P.2d 452 (1999).

Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 844 (2005).

Mr. Murry recognizes that his assignments of error, and the issues pertaining to them, encompass both constitutional and nonconstitutional issues.

The State contends that Mr. Murry does not present sufficient argument concerning the assignments of error and related issues. The State isolates Mr. Murry's arguments and ignores how they interrelate with regard to the various assignments of error.

Mr. Murry contends that when his original brief is examined in its entirety that each issue that is raised has been fully addressed. No waiver of any issue has occurred.

The general rule that an assignment of error be preserved includes an exception when the claimed error is a "manifest error affecting a constitutional right." RAP 2.5 (a). This exception encompasses developing case law while ensuring only certain constitutional questions can be raised for the first time on review. RAP 2.5 cmt. (a) at 86 Wn.2d 1152 (1976).

To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension. [Citations omitted.] Stated another way, the appellant must “identify a constitutional error and show how the alleged error actually affected the [appellant]’s rights at trial.” [Citation omitted.] If a court determines the claim raises a manifest constitutional error, it may still be subject to a harmless error analysis. *State v. McFarland*, 127 Wash.2d 322, 333, 899 P.2d 1251 (1995); *State v. Lynn*, 67 Wash. App. 339, 345, 835 P.2d 251 (1992).

State v. O’Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

Mr. Murry raised the issue of ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and Const. art, I § 22; as well as due process violations denying him a fair trial as required under the Fourteenth Amendment to the United States Constitution and Const. art. I, §§ 3 and 22.

II. EVIDENCE

Additionally, Mr. Murry raised numerous evidentiary errors which are nonconstitutional in nature. Even so, those violations, when considered in connection with the constitutional errors, amount to cumulative error that deprived him of fair trial.

It is Mr. Murry’s position that these errors were prejudicial to the outcome of his trial. The State portrayed him as a crazed, dangerous,

survivalist/ “prepper” who stockpiled weapons, ammunition, medical supplies, bulletproof clothing, knives, and related materials stored in strategic locations in eastern Washington. The prejudice is apparent as the evidence was meant to engender fear in the minds and hearts of the jury.

The State far exceeded what it needed to submit to the jury in the evidentiary realm. The State exceeded what was authorized under the trial courts pre-trial evidentiary rulings.

As the *O’Hara* Court noted at 99-100:

The determination of whether there is actual prejudice is a different question and involves a different analysis as compared to the determination of whether the error warrants a reversal. In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review. [Citations omitted.] It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

III. MOTION IN LIMINE

The pretrial rulings included a motion in limine dealing essentially with the guns and songs. The trial court placed limitations on their admissibility.

Insofar as the songs are concerned defense counsel was able to obtain a limitation whereby if the State attempted to introduce the songs the defense reserved the right to actually play them for the jury.

Mr. Murry contends that the songs themselves were used as a sword against him. This is based upon the trial court's finding that he had adopted the content message of the songs by posting them to his computer. (RP 262, l. 9 to RP 263, l. 7)

Defense counsel's actions in seeking to obtain permission to play the songs was the only remedy available at that time.

The trial court also limited the gun evidence. The State could use it to show Mr. Murry's familiarity with guns and the types of guns that were seized and examined by the Washington State Patrol Crime Lab (WSPCL). (Kerbs RP 245, l. 10 to RP 258, l. 20; RP 257, l. 21 to RP 258, l. 13)

The pre-trial rulings should be considered controlling. As recognized in *State v. Weber*, 159 Wn.2d 259, 252, 271, 149 P.3d 646 (2006):

In a 1937 case, this court held that a party's failure to object to evidence already excluded by a pretrial motion was "not controlling" and did not prevent the defendant from receiving a new trial. *Smith* [*State v. Smith*, 189 Wash. 422, 65 P.2d 1075 (1937)], at 429.

Mr. Murry recognizes that there is an area of uncertainty in connection with motions in limine. As pointed out by the State there are cases indicating that additional objections are necessary. However, Mr. Murry believes that the *Weber* Court presented the more viable option:

... [E]ven when the trial court has already excluded evidence through a pretrial order, the complaining party should object to the admission of the allegedly inadmissible evidence in order to preserve the issue for review, unless an unusual circumstance exists "that makes it impossible to avoid the prejudicial impact of evidence that had previously been ruled inadmissible." *Sullivan* [*State v. Sullivan*, 69 Wn. App. 167, 847 P.2d 953 (1993)] at 173. Examples of such unusual circumstances are when the other party's questions were "in deliberate disregard of the trial court's ruling," or "an objection by itself would be so damaging as to be immune from any admonition or curative instruction by the trial court."

State v. Weber, supra, at 272.

The violation of the motion in limine served to call into play Mr. Murry's character in violation of ER 404 (a).

ER 404 (a) provides, in part:

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of Accused*. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same. . . .

Mr. Murry never placed his character before the jury. The State did.

Rule 404 (a) governs the admissibility of character evidence—evidence of a person's general disposition and tendencies. The term *character evidence* is normally thought to encompass evidence offered for the purpose of showing a party's general tendencies with respect to honesty, peacefulness, carelessness, temperance, truthfulness. Other possibilities occasionally surface in the case law.

TEGLAND, COURTROOM HANDBOOK ON WASHINGTON EVIDENCE (2018-2019 Ed.) at 158.

Mr. Murry otherwise relies upon the argument contained in paragraph III of his original brief.

IV. OPENING THE DOOR

The State claims that defense counsel opened the door to testimony concerning the “shit list” which had been excluded.

The State takes the position that a question concerning any verbal threats by Mr. Murry to his wife during the marriage opened the door. The State is in error.

The “opening the door” doctrine is an evidence doctrine that pertains to whether certain subject matter is admissible at trial. The term is used in two contexts:

(1) a party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and (2) a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence.

5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 103.14, 66-67 (5th ed. 2007). **Because this “opening the door” doctrine pertains to the admissibility of evidence, it must give way to constitutional concern such as the right to a fair trial.** *See State v. Frawley*, 140 Wash. App. 713, 720, 167 P.3d 593 (2007) (ruling that constitutional concerns trump strict application of court rules); *and see* ER 402 (allowing trial court to rule that otherwise relevant evidence is inadmissible if admission would violate constitutional protections). Thus, even if [the defendant] had “opened the door” to evidence or examination of a particular subject at trial, the prosecutor is not absolved of her ethical duty to ensure a fair trial by presenting only competent evidence on this subject.

State v. Jones, 144 Wn. App. 284, 298, 183 P.3d 307 (2003); *see also Seattle v. Pearson*, 192 Wn. App. 802, 819, 369 P.3d 194 (2016) (discussing the limitations inclusive of the *Geffeler* factors [*State v. Geffeler*, 76 Wn.2d 449, 458 P.2d 17 (1969)]). (Emphasis supplied.)

The *Geffeler* case held at 455:

...[I]t is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Under the facts and circumstances of Mr. Murry's case, the testimony concerning the "shit list" came in on the State's redirect of Amanda Murry. The problem which arises is that Ms. Murry did not know if a "shit list" even existed. Mr. Murry had only talked about it during their marriage.

Even if the "shit list" existed, Ms. Murry did not know if her name was on it. All of the testimony concerning the "shit list" is mere speculation and conjecture.

V. MARITAL PRIVILEGE

The State contends that Mr. Murry waived the marital privilege at trial by not objecting to his ex-wife's testimony. Pre-trial objections were made to the text messages between Mr. Murry and his then wife.

Mr. Murry contends that that challenge was sufficient to assert the marital privilege. He does recognize that

... [t]he privilege granted under the statute may be waived. It is personal to the persons designated by the terms of the statute, and they expressly or impliedly waive their right to exclude the banned evidence.

State v. Clark, 26 Wn. (2d) 160, 168, 173 P.2d 189 (1946).

Mr. Murry otherwise relies upon the argument contained in his original brief as to this issue.

VI. INEFFECTIVE ASSISTANCE

The State contends that experienced defense counsel could not have committed error based upon a footnote in their brief setting out the time periods they have practiced. The argument fails.

A claim for ineffective assistance of counsel presents a mixed question of law and fact, which this court reviews de novo.

State v. Jones, 183 Wn.2d 327, 338, 352 P.3d 776 (2015).

“Competency of counsel is determined based upon the entire record below.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

State v. Munoz-Rivera, 190 Wn. App. 870, 887, 361 P.3d 182 (2015).

Defense counsel was faced with a triple homicide case.

Defense counsel was faced with overwhelming physical evidence.

Defense counsel was faced with multiple evidentiary issues.

Defense counsel was faced with probably one of the most difficult tasks that an attorney can be asked to handle.

Even though the case was a well-trying case, there were still deficiencies which ended up prejudicing Mr. Murry as to his defense. Those deficiencies are more thoroughly outlined in his original brief.

VII. COMPETENCY

Mr. Murry does wish to address the State's argument concerning lack of competency. Mr. Murry agrees that defense counsel would have the best opportunity of determining whether or not a competency issue existed.

Nevertheless, the multitude of signs pointing to Mr. Murry's lack of competency preceding the events in May of 2015, and as fully expounded to the jury, were known to defense counsel.

Mr. Murry points to *Personal Restraint of Fleming*, 142 Wn.2d 853, 16 P.3d 610 (2001) which determined at 867:

Fleming's own attorneys, who had the closest contact with the defendant during the proceedings, never raised the issue that he was incompetent to stand trial, nor did they move for a competency hearing prior to plea or sentencing. ... In addition, there is no indication in the verbatim report of proceedings to show there was some irrational behavior or conduct by Fleming so as to have alerted the trial court that a competency hearing was necessary.

Considering that excerpt the court still determined that *Fleming* was entitled to have a guilty plea and sentence vacated. The case remanded for further proceedings. Ineffective assistance of counsel was the basis for the reversal.

VIII. CUMULATIVE ERROR

Mr. Murry asserts that cumulative error, such as what has occurred in this case, even though the bulk of that error may be evidentiary, constitutes a violation of his constitutional right to a fair trial.

In *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992) it was stated:

As a preliminary matter, we note that several of the errors alleged on appeal were not properly preserved for appeal. Because we believe, however, that the cumulative effect of all the errors, preserved and not preserved, denied Alexander his constitutional right to a fair trial, *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984), we exercise our discretion under RAP 2.5(a)(3) to review all of his claims. *See State v. Curry*, 62 Wn. App. 676, 679, 814 P.2d 1252 (1991); *State v. Noel*, 51 Wn. App. 436, 439, 753 P.2d 1017, review denied, 111 Wn.2d 1003 (1988).

See also: State v. Perrett, 86 Wn. App. 312, 322-23, 936 P.2d 426 (1997) (an accumulation of nonreversible-errors may deny a defendant a fair trial-outlining the nature of those factors).

Mr. Murry otherwise relies upon the argument contained in his original brief as to all of the remaining assignments of error and issues.

Dated this 28th day of March, 2019.

Respectfully submitted,

s/ Dennis W. Morgan

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35035-5-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	SPOKANE COUNTY
Plaintiff,)	NO. 15 1 02422 2
Respondent,)	
v.)	
)	CERTIFICATE OF SERVICE
ROY HOWARD MURRY,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 28th day of March, 2019, I caused a true and correct copy of the *REPLY BRIEF* to be served on:

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