

FILED
Court of Appeals
Division III
State of Washington
1/8/2020 10:04 AM

NO. 35062-2-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

WILLIAM JOSEPH KRAMER,

Defendant/Appellant.

REPLY BRIEF

Dennis W. Morgan WSBA #5286
Attorney for Appellant
PO Box 1019
Republic, Washington 99166
(509) 775-0777

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES	ii
STATUTES	ii
CONSTITUTIONAL PROVISIONS	ii
RULES AND REGULATIONS	ii
ARGUMENT	1

TABLE OF AUTHORITIES

CASES

State v. Barberio, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993) 6

State v. Ermert, 94 Wn.2d 839, 849, 621 P.2d 121 (1980)..... 7

State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) 1

State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014) 3

State v. Richard, 4 Wn. App. 415, 425, n.1, 481 P.2d 343 (1971).....8

State v. Rohrich, 132 Wn.2d 472, 476, n.7, 939 P.2d 697 (1997) 5

State v. Scott, 110 Wn.2d 682, 688-89, 757 P.2d 492 (1988)..... 2, 3

STATUTES

RCW 9A.44.120..... 1, 4, 7

CONSTITUTIONAL PROVISIONS

Const. art. I, § 3..... 4

Const. art. I, § 22..... 4, 6

Const. art. IV, § 16..... 8

United States Constitution, Fourteenth Amendment 4

RULES AND REGULATIONS

RAP 2.5 (a) 1, 2, 3, 5

RAP 2.5 (c).....5, 6

ARGUMENT

RAP 2.5 (a)

The State's initial attack on Mr. Kramer's appeal is to assert that he has no right to proceed based upon RAP 2.5 (a).

RAP 2.5 (a) provides, 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. ...

(Emphasis supplied.)

The critical issue in Mr. Kramer's case is the applicability of RCW 9A.44.120 to child hearsay testimony when a former child is now an adult.

Initially

[t]he general rule is the issues not raised in the trial court may not be raised for the first time on appeal. *See* RAP 2.5 (a); *State v. Moen*, 129 Wn.2d 535, 543, 919 P.2d 69 (1996). By its own terms, however, the rule is discretionary rather than absolute. ... Thus, the rule never operates as an absolute bar to review.

State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

The issue presented in Mr. Kramer's appeal is an issue of first impression in the State of Washington. It impacts his constitutional right to a fair trial. It also involves a critical question for prosecuting attorneys, defense attorneys and trial courts.

In order to properly analyze a RAP 2.5 (a) challenge there are two cases that need to be considered. First, in *State v. Scott*, 110 Wn.2d 682, 688-89, 757 P.2d 492 (1988) the Court held:

The proper way to approach claims of constitutional error asserted for the first time on appeal is as follows. First, the appellate court should satisfy itself that the error is truly of constitutional magnitude- that is what is meant by "manifest". If the asserted error is not a constitutional error, the court may refuse to review on that ground. If the claim is constitutional, then the court should examine the effect the error had on the defendant's trial according to the harmless error standard set forth in *Chapman v. California*, [386 U.S. 18, 17 L. Ed. 705, 87 S. Ct. 824, 24 A.L.R.3d 1065 (1967)], *supra*.

The practicality of this method of analysis is attested to by the long-standing practice of this and other appellate courts. [Citations omitted.] Also recommending this approach is its forthrightness. By making express the determinations that a literal refusal to "review" might leave unexplained, we can improve the perceived fairness of our rulings and contribute to the development of important errors of criminal and constitutional law.

The *Scott* case has continued viability even though a further explanation of the RAP 2.5 (a) analysis was recently announced in *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014):

... [A] defendant must make a showing that satisfies requirements under RAP 2.5(a)(3). For a claim of error to qualify as a claim of manifest error affecting a constitutional right, the defendant must identify the constitutional error and show that it actually affected his or her rights at trial. The defendant must make a plausible showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial. *State v. Davis*, 175 Wn.2d 287, 344, 290 P.3d 43 (2012); *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011); *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). “[T]o 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.” *O'Hara*, 167 Wn.2d at 100. “If the trial court could not have foreseen the potential error or the record on appeal does not contain sufficient facts to review the claim, the alleged error is not manifest.” *Davis*, 175 Wn.2d at 344.

The requirements under RAP 2.5(a)(3) should not be confused with the requirements for establishing an actual violation of a constitutional right or for establishing lack of prejudice under a harmless error analysis if a violation of a constitutional right has occurred. The purpose of the rule is different; RAP 2.5(a)(3) serves a gatekeeping function

that will bar review of claimed constitutional errors to which no exception was made unless the record shows that there is a fairly strong likelihood that serious constitutional error occurred.

RCW 9A.44.120 has been fraught with difficulties as to its application. Multiple challenges to the statute have occurred since its inception. However, no challenge has been set out in a published decision involving the issue currently before the court.

The Fourteenth Amendment to the United States Constitution and Const. art I, §§ 3 and 22 provide that an individual charged with a criminal offense has the right to due process which includes a fair trial.

In Mr. Kramer's case his due process rights were violated. Testimony from K.S.'s mother, grandmother, and the forensic interviewer all served to bolster and/or vouch for the truth of her testimony. K.S.'s testimony changed from the first trial to the second trial. The mother's and grandmother's testimony changed from the first trial to the second trial.

Comparing the differences in the testimony is indicative of the fact that potential collusion may have existed between the prospective witnesses. Moreover, even though the child hearsay statute was applicable in the first trial it should not be determined applicable, under the law of the case doctrine, to the second trial.

What the State seems to ignore is that defense counsel sought to exclude and/or limit use of the Findings of Fact and Conclusions of Law from the first trial. This is where both the State and the trial court relied upon the law of the case doctrine to justify the admission of the child hearsay. (Brittingham RP 20, ll 7-13)

Finally, insofar as RAP 2.5 (a) is concerned, additional support is found in *State v. Rohrich*, 132 Wn.2d 472, 476, n.7, 939 P.2d 697 (1997);

The State also contends Rohrich should not have been permitted to argue inadmissibility of the child hearsay on appeal because he failed to object at trial. As the Court of Appeals correctly noted, the issue goes to the heart of Rohrich's right of confrontation and thus is a manifest error affecting a constitutional right which Rohrich may raise for the first time on appeal. *State v. Rohrich*, 82 Wn. App. 674, 679, 918 P.2d 512 (1996); RAP 2.5(a)(3). *Also see* 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 411, at 301-02 (3d ed. 1989) ("If the child has not testified, an appellate court would presumably review an alleged error even in the absence of a timely objection to determine whether the defendant's right to confrontation has been violated.").

RAP 2.5 (c)

The State's position concerning the law of the case doctrine is inapplicable. Both the trial court and the State on appeal are misconstruing when the law of the case doctrine applies.

RAP 2.5 (c) provides, in part:

The following provisions apply if the same case is again before the appellate court following a remand: (1) *Prior Trial Court Action*. If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case. (2) ...

Mr. Kramer's initial appeal was limited to a public trial issue. Since there was a violation of the public trial provisions of Const. art. I, § 22, the Court of Appeals reversed his conviction and remanded the case for a new trial.

Mr. Kramer did not challenge the Findings of Fact and Conclusions of Law as they pertain to RCW 9A.44.120 in his first appeal. He did contest the applicability in the current case due to the fact that K.S. was now 20 years old.

The fact of the matter is that the State recognizes that the law of the case doctrine does not apply when it cites *State v. Barberio*, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993). (State's brief at 15-16)

Mr. Kramer contends, that even if it is determined that defense counsel did not enter a proper objection to the prior child hearsay rulings, as

argued by the State, that the issue now raised is of such importance that it should not be ignored.

As set forth in *State v. Ermert*, 94 Wn.2d 839, 849, 621 P.2d 121 (1980):

The issue of the effectiveness of trial counsel denying due process was first raised in the petition for review. However, the question is appropriately raised at any point in the proceedings and a conviction will be overturned if counsel was so ineffective as to violate the defendant's right to a fair and impartial trial.

The State urges the court to rule that the invited error doctrine applies and that ineffective assistance of counsel cannot be the basis for the current challenge to RCW 9A.44.120. The State bases its argument on the lack of a sufficient objection to the prior child hearsay ruling. The State goes on to argue that it was defense counsel's trial strategy to use the prior child hearsay.

Defense counsel had no choice after the trial court ruled that the prior child hearsay was admissible under the law of the case doctrine. It should be remembered that the particular hearing(s) involving the pretrial motion on the prior child hearsay had to be reconstructed. A reconstruction of a record does not always result in a full explication of what actually occurred. It is based upon the memory of the attorneys and trial judge.

CONST. ART. IV, § 16

Mr. Kramer asserts that in addition to the argument contained in his original brief on the trial court's comment on the evidence the court should consider *State v. Richard*, 4 Wn. App. 415, 425, n.1, 481 P.2d 343 (1971).

At least four distinct views have been heretofore expressed by the State Supreme Court concerning whether objection and request for curative instruction are necessary to preserve for review an alleged unlawful comment on evidence. First, that objection is unnecessary because the violation of a constitutional right is involved, especially if manifest prejudice would be aggravated by such objection. *State v. Crotts*, 22 Wn. 245, 60 P. 403 (1900); *State v. Jackson*, 83 Wn. 514, 145 P. 470 (1915); *Eckhart v Peterson*, 94 Wn. 379, 162 P. 551 (1917); and *State v. Warwick*, 105 Wn. 634, 178 P. 977 (1919). Second, a related approach is taken in the recent case of *State v. Lampshire*, 74 Wn.2d 888, 447 P.2d 727 (1968), where it was held that neither objection nor request for curative instruction was necessary because an unlawful comment on the evidence violates the defendant's constitutional rights. Third, that an objection is unnecessary because it might cause further prejudice, but to be reviewable, objection must be brought to the attention of the trial court either in a motion for new trial or by objection at the time of comment. *State v. Davis*, 41 Wn.2d 535, 250 P.2d 548 (1952). See also: *Lee Eastes, Inc. v. Continental Carriers, Ltd.*, 44 Wn.2d 28, 265 P.2d 257 (1953); *Olson v. Seattle*, 54 Wn.2d 387, 341 P.2d 153 (1959). Fourth, objection or request for cautionary instruction is necessary to preserve for appellate review the matter of unlawful

comment. See e.g., *State v. Bengson*, 165 Wn. 612, 5 P.2d 1040 (1931); *State v. Kelsey*, 46 Wn.2d 617, 283 P.2d 982 (1955). We need not decide to what extent *Lampshire* overruled prior inconsistent cases sub silentio. It is arguable that *Lampshire* did not involve and does not apply to the post prejudicial effect of a comment made out of the presence of the jury, or to the prejudicial effect of the manner and tone of the trial court's ruling made in the presence of the jury. These errors are peculiarly susceptible to being obviated by objection and request for curative instruction; not to impose such a requirement would tend to promote expensive and avoidable retrials. In *Lampshire*, unlike the instant case, prejudice appeared from the record and according to the court was not capable of correction by curative instruction.

Mr. Kramer otherwise relies upon the argument contained in his original brief.

DATED this 8th day of January, 2020.

Respectfully submitted,

s/Dennis W. Morgan
DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant
P.O. Box 1019
Republic, Washington 99166
Phone: (509) 775-0777/Fax: (509) 775-0776
nodblspk@rcabletv.com

NO. 35062-2-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	LINCOLN COUNTY
Plaintiff,)	NO. 05 1 00015 2
Respondent,)	
)	CERTIFICATE OF SER-
)	VICE
v.)	
)	
WILLIAM JOSEPH KRAMER,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 8th day of January, 2020, I caused a true and correct copy of the *REPLY BRIEF* to be served on:

RENEE S. TOWNSLEY, CLERK
Court of Appeals, Division III
500 North Cedar Street
Spokane, Washington 99201

E-FILE

CERTIFICATE OF SERVICE

GRETCHEN EILEEN VERHOEF
Spokane County Prosecutor's Office
1100 W Mallon Ave
Spokane, Washington 99260-0270
gverhoef@spokanecounty.org

E-FILE

WILLIAM JOSEPH KRAMER #719978
Airway Heights Corrections Center
PO Box 2049
Airway Heights, Washington 99001-2049

U.S. MAIL

s/Dennis W. Morgan
Dennis W. Morgan, Attorney at Law
DENNIS W. MORGAN LAW OFFICE
PO Box 1019
Republic, WA 99166
(509) 775-0777
(509) 775-0776
nodbbspk@rcabletv.com

CERTIFICATE OF SERVICE

January 08, 2020 - 10:04 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35062-2
Appellate Court Case Title: State of Washington v. William Joseph Kramer
Superior Court Case Number: 05-1-00015-2

The following documents have been uploaded:

- 350622_Briefs_20200108100346D3131681_0388.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Reply Brief Kramer.pdf

A copy of the uploaded files will be sent to:

- gverhoef@spokanecounty.org
- scpaappeals@spokanecounty.org

Comments:

Sender Name: Dennis Morgan - Email: nodblspk@rcabletv.com
Address:
PO BOX 1019
REPUBLIC, WA, 99166-1019
Phone: 509-775-0777

Note: The Filing Id is 20200108100346D3131681