

FILED
Court of Appeals
Division III
State of Washington
3/27/2020 11:35 AM

No. 36738-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

MARK MOEN,

Appellant.

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

The Honorable Judge John O. Cooney

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Appellant Mark Moen accepts this opportunity to reply to the State's brief. Mr. Moen requests the Court refer to his opening brief for issues not addressed in this reply.

B. ARGUMENT IN REPLY

1. The doctrine of invited error does not bar review of Mr. Moen's claim of ineffective assistance of counsel where Mr. Moen's trial attorney merely agreed that M.A. was competent.

This argument pertains to Issue (A)(1) raised in Respondent's brief. In Issue (A)(1), Respondent argues that the invited error doctrine bars Appellant from raising a claim of ineffective assistance of counsel based on trial counsel's failure to contest M.A.'s competency. Appellant's Opening Brief pgs. 5-7.

The invited error doctrine is an appellate remedy that “prohibits a party from setting up error in the trial court and then complaining of it on appeal.” *State v. Rushworth*, No. 36077-6-III, slip op. at 12-13 (Wash. Ct. App. Feb. 20, 2020), https://www.courts.wa.gov/opinions/pdf/360776_pub.pdf. While it typically applies in the context of jury instructions, it can also apply to evidentiary rulings. *Rushworth*, No. 36077-6-III, slip op. at 8 (citing *State v. Henderson*, 114 Wn.2d 867, 870-871, 792 P.2d 514 (1990); *In re: Estate of Muller*, 197 Wn. App. 477, 484-85, 389 P.3d 604 (2016)). In short, “the invited error doctrine provides the State adequate redress in circumstances where the defense induces the trial court to commit evidentiary error.” *Rushworth*, No. 36077-6-III, slip op. at 14.

In determining whether the invited error doctrine applies, courts consider, “whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it...The doctrine appears to require affirmative actions by the defendant.”

In determining whether the invited error doctrine applies, courts consider, “whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it...The doctrine appears to require affirmative actions by the defendant.” *State v. Hood*, 196 Wn. App. 127, 135, 382 P.3d 710 (2016)(citations omitted). In *Hood*, the defendant challenged the reasonable doubt instruction given by the trial court for the first time on appeal. *Id.* at 131. Trial counsel for the defendant did not submit proposed jury instructions. *Id.* at 134. Rather, at several conferences prior to closing argument, defense counsel either agreed it was joining in the State’s instructions, or raised issues with the instructions the court proposed. *Id.* at 132-134.

The appellate court found that the record did not provide a basis for holding that the defendant had specifically invited error by assenting to the reasonable doubt instruction given by the court. *Hood*, 196 Wn. App. at 135. The court reasoned that since it was the State that wishes to secure a conviction, it assumes the duty of proposing an appropriate and comprehensive set of instructions. *Id.* at 134. “A defendant has no duty to propose the instructions that will enable the State to convict him.” *Id.*

In any case where a child is testifying, five factors must be met before a child can be found competent to testify. Appellant’s Opening Brief, 29; Respondent’s Brief, 13. Clearly, it is in the State’s interest that a child, in this case, M.A., be competent so as to testify in front of the jury. The child’s testimony is the State’s most direct evidence the State has to establish what happened, particularly when the physical, or forensic evidence, is left wanting. The defense has no duty to show the child is competent, and thus, help secure a conviction. Defense counsel’s mere agreement that M.A. was competent is not invited error. Moreover, the failure by trial counsel to challenge the

competence of the child witness lacks any reasonable explanation. There can be no strategic reason sufficient for trial counsel to not raise this issue. In terms of strategy, defense counsel would have an opportunity to further assess and cross examine the child witness prior to ever being in front of a jury.

Further, while invited error may foreclose review of an instructional error, it does not bar review of a claim of ineffective assistance of counsel. *State v. Studd*, 137 Wn.2d 533, 550-551, 973 P.2d 1049 (1999). In *State v. Doogan*, defense counsel proposed an instruction that included two alternate means of committing the charged offense when the Information had only charged one means. 82 Wn. App. 185, 917 P.2d 155 (1996). The court, in reversing the conviction, found that the defendant was not precluded from raising an ineffective assistance of counsel claim even though defense counsel had proposed the erroneous instruction. *Id.* at 188.

The doctrine of invited error does not preclude this court from reviewing the trial court's finding that M.A. was competent to testify. Further, defense counsel's failure to challenge M.A.'s competency was ineffective assistance of counsel as argued in Appellant's Opening Brief.

2. Mr. Moen did not waive objection to Ms. Nesbitt's improper statement about M.A.'s credibility when admission of the improper statement was manifest constitutional error.

This argument pertains to Issue (B) raised in Respondent's brief. In Issue (B), Respondent argues that Ms. Nesbitt's statement that she "told M.A. she believed her" was not an explicit statement of belief, thereby barring review as manifest constitutional error since defense counsel did not object. Respondent's Brief pgs. 17-19.

A defendant may challenge admission of lay testimony on appeal for the first time if he can show a manifest error that causes actual prejudice and identifiable consequences. *State v. Johnson*, 152 Wn. App. 924, 934, 219 P.3d 958 (2009)(citing *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008)). Article 1, section 21 of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee a defendant the right to a fair trial and an impartial jury. *Id.* at 934 (citing *State v. Carlin*, 40 Wn. App. 698, 701, 700 P.2d 323 (1985)). Lay witness opinion testimony about the defendant's guilt invades that right. *Carlin*, 70 Wn. App. at 701. An error is manifest when it actually affects the defendant's right to a fair trial. *Johnson*, 152 Wn. App. at 934.

Improper opinion testimony is only reviewable as manifest constitutional error when the witness makes an "explicit or almost explicit statement on an ultimate issue of fact." *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007).

Similar to Mr. Moen, the defendant in *Johnson* faced child sexual abuse allegations. 152 Wn. App. at 928. During trial, the victim testified that the defendant's wife had told her, "she believed me, she was sorry she didn't believe me," and that she had apologized for not believing the victim. *Id.* at 932. Two other witnesses testified that the defendant's wife said, "it was true." *Id.*

The court found that collateral testimony that the defendant's wife believed the victim served no purpose except to prejudice the defendant. *Id.* at 934. Even though the jury had been instructed the statements were only admitted to assess credibility, such admission deprived the defendant of a fair trial. 152 Wn. App. at 933.

Conversely, in *State v. Vargas*, the victim's mother testified on one occasion that

she believed her daughter. *State v. Vargas*, No. 50892-3-II, 2019 WL 2515619 at *1, (Wa. Ct. App. June 18, 2019).ⁱ The court distinguished the facts from those in *Johnson*, finding that the prejudicial effect was not the same as when there were several witness statements describing the defendant's wife's belief of the victim.

The State argues that Ms. Nesbitt only made one statement, and that it was a statement of *what she told the child*, not that she personally believed her daughter. Respondent's Brief, page 18. There is no "meaningful difference between allowing an officer to testify directly that he does not believe the defendant and allowing the officer to testify that he told the defendant during questioning that he did not believe him." *Vargas*, 2019 WL 2515619 at *3 (citing *State v. Jones*, 117 Wn. App. 89, 92, 68 P.3 1153 (2003)).ⁱⁱ The same is true for Ms. Nesbitt's statement. There is no meaningful difference in testimony that she believed her daughter versus testimony that she told her daughter she believed her.

Ms. Nesbitt's statement is also not an isolated instance of one witness testifying in Mr. Moen's trial to M.A.'s veracity. Statements made during Ms. Williams' testimony were similarly improper, and referenced during the prosecutor's closing argument. Brief of Appellant, 25, 32-38. Consequently, the admission of Ms. Nesbitt's testimony prejudiced Mr. Moen's right to a fair trial, and constituted manifest error.

C. CONCLUSION

The doctrine of invited error does not apply to Mr. Moen's trial counsel's mere acquiescence that M.A. was competent to testify. Mr. Moen's claim of ineffective assistance of counsel may be reviewed by this court.

Mr. Moen's objection to Ms. Nesbitt's improper opinion testimony was not waived. Combined with the improper testimony of Ms. Williams and the prosecutor's statement in closing argument, admission constituted manifest constitutional error. Failure to object to the statement also constituted ineffective assistance of counsel where no legitimate tactical reason could exist for the jury to hear that another witness believed M.A. The case should be reversed and remanded for a new trial.

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ⁱ Unpublished opinions have no precedential value and are not binding on any court but may be cited if identified and accorded persuasive value as the Court deems appropriate. GR 14.1(a).

ⁱⁱ See footnote i.

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DIVISION III
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STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 36738-0-III
vs.)
MARK MOEN ,) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Brooke D. Hagara, counsel for the Appellant herein, do hereby certify under penalty of perjury that on March 27, 2020, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's reply brief to:

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Having obtained prior permission, I also served a copy on the Spokane County Prosecutor's Office at SCPAappeals@SpokaneCounty.org using the Washington State Appellate Courts' Portal.

Dated this 27th day of March, 2020.

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March 27, 2020 - 11:35 AM

Transmittal Information

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Appellate Court Case Number: 36738-0
Appellate Court Case Title: State of Washington v. Mark Aaron Moen
Superior Court Case Number: 17-1-00185-7

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