

No. 80169-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

v.

RANDY J. SUTHERBY
Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

THE HONORABLE DAVID E. FOSCUE, JUDGE

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STATEMENT OF FACTS

The State of Washington adopts the facts as set forth in the Brief of Respondent filed with the Court of Appeals in this matter and as further set forth in the Petition for Review on file herein.

ASSIGNMENT OF ERROR

The opinion of the Court of Appeals regarding the testimony of the mother is in conflict with the decision of this Court in State v. Kirkman, 159 Wn.2d 918 (2007).

ARGUMENT REGARDING ASSIGNMENT OF ERROR

Following the decision of the Court of Appeals in this matter, this Court decided State. v. Kirkman, 159 Wn.2d 918 (2007). In Kirkman, and in the companion case, State v. Candia, this Court was called upon to examine two issues: (1) whether expert witness testimony concerning the manner and demeanor of the child victim, and testimony from the interviewing law enforcement officer concerning questions asked of the victim during the interview bearing upon the child's ability to understand the need to tell the truth were proper; and (2) whether the admission of such testimony may be challenged on appeal when not raised at trial. In each case the court found that the comments were not an opinion regarding the child's veracity and that in any event the decision of trial counsel not to challenge the testimony was a matter of trial strategy.

No challenge was made at trial to the testimony of the mother. Accordingly, this asserted constitutional claim may be raised for the first time of appeal only if there is an issue of “manifest” constitutional magnitude. Kirkman, 159 Wn.2d at 934-35. Finding that a constitutional error is “manifest” requires a showing a actual prejudice, “... a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.” Kirkman, 159 Wn.2d at 935, quoting State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). As noted in Kirkman, there is no presumption that a manifest error infringing on a constitutional right necessarily exists where an opinion is expressed by a witness on an ultimate issue of fact not objected to a trial. Kirkman, 159 Wn.2d at 935. As it has been shown below, the testimony offered herein does not rise to the level of a manifest injustice constituting a constitutional error. In fact, the testimony was entirely proper.

In Kirkman the physician, Dr. Stirling, testified that the victim gave “a very clear history” with “lots of detail” and a “clear and consistent history of sexual touching... with appropriate effect.” Kirkman, 159 Wn.2d at 929. The physician also testified that he “...found nothing on the physical examination that would make me doubt what she said, or was there anything that would necessarily confirm it.” Kirkman, 159 Wn.2d at 929.

This Court held that Dr. Stirling did not “clearly” comment on the victim’s credibility nor did Dr. Sterling testify that the defendant was guilty or that he believed the victim’s account. Kirkman, 159 Wn.2d at 930. In short, the testimony was proper and not objectionable.

In Kirkman, as well as in Candia, the investigating officers described the interview protocol. The questioning was directed toward determining if the victim could “distinguish between truth and lies.” Kirkman, 159 Wn.2d at 918. The Court of Appeals in Kirkman held that the officers expressed an indirect opinion concerning the victim’s credibility that “in essence” told the jury that the victim had told the truth when providing statements to law enforcement. Kirkman, 159 Wn.2d at 930-931. This Court, upon review, expressly rejected the Court of Appeals reasoning. This Court held that the interview protocol “... including that the child promised to tell the truth...” did not impermissibly infringe upon the province of the jury, especially since the child testified at trial. Kirkman, at 159 Wn.2d 934.

In the case at hand, the mother did not testify that she believed that her child was telling the truth. The mother testified to mannerisms of the child that she had observed under circumstances when she knew the child was not telling the truth. It was not objectionable for the mother to describe the manner and demeanor of the child when the child made the disclosure. This information was properly before the jury to assist them in making an assessment of the truth of the child’s out-of-court statements to

the mother. In light of the ruling Kirkman, it is quite apparent that this is not an improper expression of an opinion concerning whether the child is telling the truth.

Finally, as the Court in Kirkman acknowledged, there may be times when the defendant chooses, as a matter of trial strategy, not to object to such testimony. Kirkman, 159 Wn.2d 937.

In the case at hand, there was the direct and detailed testimony of the child concerning what had happened. There was injury to the child's vaginal area found shortly after the touching. The defendant did not deny the presence of the injury. The defendant did not deny that, in all likelihood, he caused the injury. He admitted that he must have touched the child when he went to pick up the child. He essentially admitted the touching but denied that it was done for a sexual purpose.

In short, the defendant was alleging that the child was telling the truth as she understood it. The defendant had an explanation of how the injury occurred. He picked up the child because she was about to fall off the mattress. As he picked her up, she arched her back and her legs got stiff and she rolled out of his hands and back onto the mattress. (RP 330-331). The defendant explained to the jury that he had an injury to his little finger on his right hand and that this finger must have been in the immediate area of the child's vagina as the child was thrashing around, thus causing the injury. (RP 332-33).

To raise an attack on the credibility of the child would have been completely inconsistent with his claim that the touching was an accident. From the defendant's point of view, given his defense, it made sense to admit that the child was telling the truth about being touched but to assert that the child's perception concerning how the touching occurred was mistaken because she had just woken up. Given these circumstances, the child's credibility was not an issue. It only distracted from the defendant's case to object to the mother's testimony and challenge the admissibility of the mother's testimony.

CONCLUSION

For the reasons set forth, this Court should reverse the decision of the Court of Appeals and reinstate the defendant's convictions for Rape of a Child in the First Degree and Child Molestation in the First Degree.

DATED this 8 day of February, 2008.

Respectfully Submitted,

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