

NO. 46809-3

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RICARDO TREVINO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin, Judge

No. 13-1-03996-8

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly admit expert testimony when the proper foundation was laid as to the expert's qualifications?
2. Was the expert testimony subject to the Frye standards when it did not include novel theories of sophisticated or technical matters?

B. STATEMENT OF THE CASE.

1. Procedural History

On October 18, 2013, the Pierce County Prosecutor's office (State) charged Ricardo Noel Trevino with two counts of Rape of a Child in the Third Degree, Pierce County Cause No. 13-1-03996-8. CP 1-2. The parties agreed to amend the information as to the charging period on Count II, and to remove the domestic violence charges in Count I and Count II. CP 15-19; 3RP 4-5.

Prior to trial, defense filed a motion in limine to exclude or limit testimony of the State's child interviewer on issues of delayed reporting and other possible behaviors that the interviewer might claim to be indicative of sexual abuse. CP 3-6. The State filed a motion in limine to allow expert testimony from the child interviewer. CP 7-14. The court

granted the State's motion in allowing the expert testimony and confirmed that testimony may include symptomology, while limiting it to exclude anything specifically relating to the victim. 2RP 66.

After a jury trial, Trevino was found guilty on both counts I and II. CP 62-63. Trevino was sentenced to a standard range sentence of 34 months. CP 73-86. He filed a timely notice of appeal on October 22, 2014. CP 87.

2. Substantive Facts

Around the time of her 15th birthday, the victim (KL) reported to her boyfriend that her mother's boyfriend had been sexually abusing her. 2RP 100-101; 3RP 51. KL's boyfriend reported this to his mother who then reported to the school. 3RP 51-52, 62. The school called the police. 2RP 7. After receiving the report and speaking with KL, Milton Police arrested Trevino at his home. 2RP 10-12.

Trevino had been living with KL and her mother from the time that KL was about five years old. 2RP 88. KL called him dad for most of her life. 2RP 89. KL asserted that the abuse began when she was in the second grade. 2RP 93. She did not tell her mom about the abuse because she was scared that her mom wouldn't believe her. 2RP 96.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED EXPERT TESTIMONY.

- a) A witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion if it will assist the trier of fact in understanding the evidence.

ER 702 expressly permits expert testimony. The expert witness must be “qualified by a showing that he or she has sufficient expertise to state a helpful and meaningful opinion.” ER 702. A witness may be qualified as an expert by her knowledge, skills, experience, training, or education. *Id.* The expert testimony may be based on the witness’s experience and professional observations. *State v. Jones*, 71 Wn. App. 798, 815, 863 P.2d 85 (1993). “The initial determination to allow expert testimony requires the trial court to find that the testimony presents information likely to help the jury to understand the evidence.” *State v. Petrich*, 101 Wn.2d 566, 575, 683 P.2d 173 (1984) *holding modified on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988). The standard of review of a trial court’s decision to admit expert testimony is abuse of discretion. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

In the case at hand, the State showed that the expert witness had sufficient expertise to state an opinion that would be helpful to the jury in understanding the evidence. The State laid the foundation for the expert

witness's qualifications at the beginning of direct examination. RP 139-143. The expert witness testified that she has been a child forensic interviewer for eleven years and had interviewed roughly 1800 children. RP 142. She provided details about her educational background in sociology, criminology, and psychology, and about her professional training. RP 140-142.

The expert witness testified that she had not personally interviewed the alleged victim. 2RP 140. She testified that she had encountered delayed disclosures during her interviews and that in the vast majority of cases there is a delay in disclosure. 2RP 144. Most of the reasons for delayed disclosures are fear based, and in most cases the alleged abuser is someone who is close such as an immediate family member or close family friend. 2RP 145-146. She also testified that in cases with delayed disclosure, it is common for the alleged victim to disclose to a peer rather than a parent. 2RP 146.

- b) Courts have permitted testimony regarding delayed reporting and general behavior of victims so long as the witness does not opine on the guilt of the defendant or credibility of the victim.

In *Petrich*, the Washington Supreme Court held that the trial court did not abuse its discretion in allowing expert testimony which provides that a delay in reporting is not unusual and the length of the delay

correlates with the relationship between the victim and the abuser. *Petrich*, 101 Wn.2d at 576. There, as in the present case, the State made an offer of proof which indicated the expert would testify about the victim's delayed reporting of sexual abuse. The trial court admitted testimony that included statistics supporting the expert's opinion regarding the delayed reporting. The Washington Supreme Court relied in part on the balance that the testimony regarding delayed reporting and its correlation with relationship would assist the jury in understanding the evidence without unfairly prejudicing the jury. *Id.* at 575. The Washington Supreme Court distinguished testimony that identified the defendant as a member of a group statistically more likely to abuse as unfairly prejudicial when it held that the expert's statement, "eighty-five to ninety percent of our cases, the child is molested by someone they already know" was not properly admitted. *Id.* at 576.

Again, in *State v. Ciskie*, 110 Wn.2d 263, 279, 751 P.2d 1165 (1988), the Washington Supreme Court held that the expert testimony regarding delayed reporting was "helpful to the jury's understanding of a matter outside the competence of an ordinary lay person." In that case, the expert witness was a social worker specializing in family violence. She testified to the state of mind of a victim who had been abused by her boyfriend. The victim was abused over a period of time and had not reported it for almost a year. The expert testimony explained why a woman might remain in an abusive relationship and delay in reporting the

abuse. The Court in that case relied in part on the difficulty a jury might have in understanding the ongoing nature of abusive relationships. *Ciskie*, 110 Wn.2d at 274.

In *State v. Stevens*, 58 Wn. App. 478, 794 P.2d 38 (1990), the expert witness testified generally as to behaviors consistent in sexually abused children that she had witnessed in her own field experience. The court of appeals held that the trial court properly admitted expert testimony when the expert did not testify directly that the victim fit a profile or syndrome, and the testimony was not being used directly to prove an element of the crime. *Id.* at 497-98. In that case, the expert witness did not speak directly to the symptoms of the victims in that case. The appellate court in that case relied in part on the distinction between testifying about why a victim might display certain general behaviors and testifying that the victim fit a particular profile. The appellate court found the former to be helpful to the jury. The explanation of general behaviors was held to be admissible. *Id.* at 497-98.

In *Jones*, the appellate court held that expert testimony using a general profile of sexually abused children to prove the existence of abuse or that the defendant is guilty is inappropriate. *Jones*, 71 Wn. App. at 819. The appellate court distinguished testimony derived from the expert's professional experience and observations about a group as proper because such testimony does not relate directly to an inference of guilt of a defendant. *Id.* at 815. In that case, the expert witness testified that she told

the victim she believed her. The witness also testified that she felt the victim had been molested by the defendant. The witness stated in her testimony that it is common for sexually abused children to exhibit sexualized behaviors. The appellate court noted the distinction between the witness's explicit statement of belief of the defendant's guilt was improper, but the general testimony about a specific group as observed by the expert witness was proper. *Jones*, 71 Wn. App. at 813-15.

The State in the case at hand provided an offer of proof with the testimony of the expert witness. The expert witness testified consistently with the offer of proof regarding delayed reporting in sexual abuse victims. Similar to *Petrich*, the witness in this case was allowed to offer information about delayed reporting in supporting her opinion that it is not uncommon based on her experience. As the court in *Petrich* held, this type of testimony does not unfairly prejudice the jury. Here, defense did not object to this testimony during direct examination. In contrast to the testimony distinguished by the court in *Petrich* as prejudicial, the witness in this case did not make any implicit or explicit statements regarding a class of people more likely to abuse.

In *Stevens*, the expert witness at no time testified that the victim fit a profile or syndrome. The same is true in this case. The testimony in this case was not used to prove any elements of the crime. The witness testified about delayed reporting and its correlation to the closeness between the victims and the alleged abusers based on her own experience

and observations of the roughly 1,800 children she interviewed. As in *Stevens*, the expert witness did not speak directly to the symptoms of the victim. She explained that the reasons reported to her from children about why they delayed reporting were fear based. 2RP 145.

This testimony assisted the jury in understanding the evidence presented at trial. It explained that it is not uncommon for children who have been sexually abused to delay in reporting. Without such explanation, an average juror was likely to misunderstand the evidence that the victim in this case waited years before disclosing the abuse as being inconsistent with abuse.

The expert witness in this case at no time implicitly or explicitly testified that she believed the victim or felt that Trevino was guilty. The witness in this case had never interviewed the victim, (2RP 140) unlike in *Jones* where the witness had interviewed the victim and testified that she told the victim she believed her. As the court in *Jones* stated, such explicit statements regarding the guilt of the defendant and belief in the victim “implicitly invades the province of the jury.” 71 Wn. App. at 813. In this case, the expert witness did not make any such statements, nor was there any objection from the defense during the witness’s testimony.

The courts in *Jones* and *Petrich* distinguish between improper testimony which alludes to the guilt of the defendant or credibility of the victim, and admissible testimony that simply aids the jury in understanding the evidence. These cases focused on common behaviors of

sexually abused children, including delayed reporting. In this case, the expert witness testimony included no statements which could be held to be improper or unfairly prejudicial under current case law.

- c) The expert testimony was not required to meet the standard for admission of scientific evidence under *Frye*.¹

Expert witness testimony that is limited to the witness's own observations about a specific group as opposed to generalized statements regarding sexually abused children as a class is not subject to the *Frye* standard. *Jones*, 71 Wn. App. at 818. Expert testimony that does not involve "novel theories of sophisticated or technical matters" need not meet the requirements for general scientific acceptance and is not subject to the *Frye* standard. *Jones*, 71 Wn. App. at 815.

Testimony regarding delayed reporting has been considered as "not extremely technical, (a) jury may judge its reliability and determine how much weight should be given to the testimony." *Id.*

Delayed reporting in sexual abuse cases is hardly a novel theory of sophisticated or technical matters. A number of Washington cases involve expert witnesses testifying about delayed reporting from sexually abused children. *Petrich*, 101 Wn.2d at 567; *State v. Holland*, 77 Wn. App. 420, 427, 891 P.2d 49 (1995); *State v. Graham*, 59 Wn. App. 418, 425, 798 P.2d 314 (1990). "A substantial majority of the courts considering the

issue have approved admission of testimony regarding recantation and delays in reporting, so long as the testimony is not presented to prove an element of the crime.” *State v. Madison*, 53 Wn. App. 754, 766-67, 770 P.2d 662 (1989).

In this case, the expert witness’s testimony was limited to her own observations about a specific group comprised of the children she personally interviewed. The questions posed by the State included such phrases as, “in the course of your interviews,” “in your experience,” and “in the cases that you have seen,” making it clear that the witness was speaking about the specific group of children she interviewed and not about a class of children in general. 2RP 144-47.

The expert testimony regarding delayed reporting in this case was not subject to the *Frye* standard. The testimony was not technical and was not used to prove any elements of the crime. It was properly admitted.

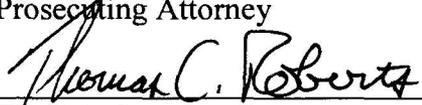
¹ *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

D. CONCLUSION.

For the foregoing reasons, the State asks this Court to affirm the judgment below.

DATED: July 21, 2015.

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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~air~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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