NO. 47841-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

JORGE ALVAREZ-GUTIERREZ,

Appellant.

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

The Honorable Stanley J. Rumbaugh, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

Glinski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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A. ASSIGNMENTS OF ERROR

1. Admission of improper opinion testimony invaded the province of the jury and violated appellant's right to a jury trial.

2. Expert testimony regarding the characteristics of child sexual abuse victims did not meet the standard for admission of scientific evidence.

3. This Court should exercise its discretion to deny appellate costs should the State substantially prevail on appeal.

Issues pertaining to assignments of error

1. Over defense objection, the State presented expert testimony regarding a phenomenon common to child victims of sexual abuse. Where this testimony was expressed in terms of generalizations as to sexually abused children as a class, and the State argued that the complaining witness fit that profile, did the expert testimony unfairly vouch for the credibility of the complaining witness, invading the province of the jury?

2. Given the serious problems with the LFO system recognized by our Supreme Court in Blazina, should this Court exercise its discretion to deny cost bills filed in the cases of indigent appellants?

B. STATEMENT OF THE CASE

1. Procedural History

On June 19, 2014, the Pierce County Prosecuting Attorney charged appellant Jorge Alvarez-Gutierrez with three counts of first degree rape of a child and one count of first degree child molestation. The State alleged that the offenses were domestic violence incidents and that Alvarez-Gutierrez abused a position of trust. CP 1-3; RCW 9A.44.073; RCW 9A.44.083; RCW 10.99.020; RCW 9.94A.535(3)(n). The case proceeded to jury trial before the Honorable Stanley J. Rumbaugh, and the court dismissed two counts of rape of a child. CP 280-81. The jury returned guilty verdicts on the remaining counts. CP 201-02. The court imposed a high-end standard range sentence of 160 months to life. CP 260. Alvarez-Gutierrez filed this timely appeal. CP 283.

2. Substantive Facts

On February 13, 2014, Jorge Alvarez-Gutierrez's 11-year-old daughter EA spent the night at her friend's house. 4RP[1] 74-75. EA told her friend's mother, Janine Taylor, that her father had been touching her inappropriately for quite some time. 4RP 76. She was crying and shaking as she spoke to Taylor. 4RP 77. The next day, Taylor called the police.

[1] The verbatim Report of Proceedings is contained in nine volumes, designated as follows: 1RP—5/18/15; 2RP—5/19/15; 3RP—5/20/15; 4RP—5/21/15; 5RP—5/27/15; 6RP—5/28/15; 7RP—6/1/15; 8RP—6/2/15; 9RP—7/10/15.

4RP 76. A police officer who responded and spoke with Taylor noticed that EA was alternately crying and upset, and happy and laughing. 4RP 52-53. It was determined that EA should go to the hospital to be examined, and she was transported in an ambulance. 4RP 49. EA appeared worried, scared, upset, and tearful in the emergency room as she was waiting to be examined by the doctor. 4RP 39.

The emergency room doctor did a head to toe external physical exam. He examined the genitals looking for signs of trauma. 6RP 12, 14-15. The exam was normal, with no signs of lesions or bruising. 6RP 16-17. The doctor could not say, based on the exam, whether penetration had occurred. 6RP 28.

At trial, EA testified that her father started doing inappropriate things when she was six or seven years old. 5RP 35. She said that he would masturbate while watching "grown up" movies with "naked people" and that sometimes he asked her to watch the movies with him. 5RP 38-39. She said that the last time she watched movies with him was when she was around ten years old. 5RP 43. EA said she touched her father's penis once or twice. The first time was when he was watching a movie when she was maybe seven or eight. Another time she asked him for some money, and he said she had to do something for him. 5RP 44, 47-48. EA also testified that sometimes her father got into bed with her

during the night and touched her private area, doing things she had seen in the movies. 5RP 50-51. She said that one time his penis went inside her body and it hurt. 5RP 82-83.

EA testified that she was angry, sad, and upset when these things happened, and she wanted it to stop, but she did not tell her mother because she was afraid her mother might hurt her father. 5RP 76. She told Turner because she wanted the inappropriate touching to stop. 5RP 78.

EA testified that she was a little jealous because her father spent more time with her younger brother than with her, and that made her mad. 5RP 96. She never talked to her parents about her jealousy though. 5RP 97.

The State presented testimony from Keri Arnold, a child interviewer with the Pierce County Prosecutor's office. She detailed her training, duties, and experience for the jury, saying she had conducted over 2000 child interviews. 7RP 7-8. She described the procedures she uses for interviews for the purpose of obtaining statements. 7RP 8-13. Arnold testified that it is policy in Pierce County that children between the ages of three and 15 are interviewed only by a forensic interviewer trained to interview children. 7RP 14-15. She interviewed EA on February 19, 2014. 7RP 15.

Arnold testified that as a forensic interviewer she keeps track of topics relevant to her field, and she is familiar with the term "delayed disclosure." She testified that delayed disclosure refers to the time lapse between when an abusive incident occurs and when the child discloses about that incident. 7RP 16. She explained that she was familiar with the literature on that topic, and she had testified about delayed disclosure before. She stated that in her training and experience, delayed disclosure is completely common and happens in most cases. 7RP 16.

In closing, defense counsel argued that there was no witness or evidence to substantiate EA's allegations. The case was about her testimony, and there were things about her testimony that did not make sense. For example, EA had said the touching happened several times when she was in bed with her parents, and her mother was sleeping right there, but she never told her mother what was happening. 7RP 64-65.

The prosecutor argued in rebuttal that the jury should reject defense counsel's argument that EA could have told sooner. Relying on Arnold's testimony, the prosecutor argued that a lot of kids do not disclose abuse right away, and in this case, EA did not want to get her father in trouble. 7RP 75.

C. ARGUMENT

1. THE EXPERT TESTIMONY DID NOT MEET THE STANDARD FOR ADMISSION OF SCIENTIFIC EVIDENCE AND INVADED THE PROVINCE OF THE JURY BY COMMENTING ON THE COMPLAINING WITNESS'S CREDIBILITY.

Under the Washington constitution, the role of the jury must be held "inviolate." Wash. Const. art. I, §§ 21, 22; State v. Montgomery, 163 Wn.2d 577, 590, 813 P.3d 267 (2008). The jury's fact-finding role is essential to the constitutional right to trial by jury. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Therefore, "[n]o witness, lay or expert, may testify to his opinion as to the guilt of the defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (expert witness's opinion that complaining witness in third degree rape case had "rape trauma syndrome" inadmissible because it communicated witness's opinion that witness was telling the truth).

An expert may express an opinion concerning his or her field of expertise if the opinion will aid the jury. ER 702; Montgomery, 163 Wn.2d at 590. The opinion may encompass an ultimate fact, but the expert may not express an opinion as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. Montgomery, 163 Wn.2d at 591. A witness offering an opinion under ER 702 must be qualified as an expert, and any opinion testimony must be based on a

theory generally accepted in the scientific community. State v. Jones, 71 Wn. App. 798, 814, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994).

In this case, the State moved to present testimony from the forensic interviewer regarding the frequency of delayed disclosure in sexual abuse cases, so that the jury would be aware that delayed disclosure is not an uncommon phenomenon. 1RP 33. Defense counsel objected, expressing concern that the testimony would be portrayed to the jury as an accepted scientific principle, when it is really limited to her observations and experience. 1RP 33-34. The court responded that delayed disclosure is commonly accepted in the field, and it would allow testimony related to the phenomenon, limited to the interviewer's experience and observations. 1RP 35.

In Jones, the defendant charged with child molestation and rape of a child challenged expert testimony presented by the State. The social worker who had worked with the victim testified that she had worked with 300 to 400 children. In addition to giving her opinion that the child had been sexually abused by the defendant, which was clearly error, the social worker testified about the victim's sexual acting out and night terrors and said that such behaviors were very common in sexually abused children.

Admission of this testimony was challenged on appeal. Jones, 71 Wn. App. at 813-14.

The Court of Appeals noted that an expert's opinion must be based on a theory generally accepted by the scientific community. Id. at 814 (citing Frye v. United States, 293 F. 1013, 1014 (D.C.Cir.1923)). A description of common characteristics of sexual abuse victims is closely related to generalized profile or syndrome testimony, which requires scientific reliability as measured by the Frye standard. The court recognized that there is a distinction "between a caseworker narrowly testifying to the behavior of abused children seen in a specific practice and more generalized assertions as to the behavior of abused children as a class." Id. at 817. But "when personal experience is used as a basis for generalized statements regarding the behavior of sexually abused children as a class, the testimony crosses over to scientific testimony regarding a profile or syndrome, whether or not the term is used, and therefore should be subject to the standard set forth in Frye." Id. at 818. Testimony that is limited to the expert's observations of a specific group is not subject to Frye. Id.

The court went on to hold that general profile or syndrome testimony regarding behavioral characteristics of sexually abused children to prove abuse does not meet the Frye standard:

> Because the use of testimony on general behavioral characteristics of sexually abused children is still the subject of contention and dispute among experts in the field, we find that its use as a general profile to be used to prove the existence of abuse is inappropriate. However, we agree with the current trend of authority that such testimony may be used to rebut allegations by the defendant that the victim's behavior is inconsistent with abuse.

Id. at 819. See also State v. Maule, 35 Wn. App. 287, 295-96, 667 P.2d 96 (1983) (caseworker's testimony, based on experience at sexual assault center, that sexually abused children exhibit typical behaviors, was not supported by accepted scientific opinion).

In this case, although the court ruled that Arnold could only testify as to her observations and experience, Arnold's testimony was presented as generalizations as to the class of sexual abuse victims. Delayed disclosure was presented as a topic relevant in the field of child forensic interviews, Arnold testified she is familiar with literature on the topic, and that it is a very common phenomenon is child abuse victims. 7RP 16.

It is clear from Arnold's testimony that she was using her personal observations and outside sources as a basis for generalized statements about the behavior of sexually abused children as a class. This profile testimony is not admissible to prove that abuse occurred, because it does not meet the Frye standard. See Jones, 71 Wn. App. at 819. The prosecutor argued in closing that EA fit the profile Arnold described. She reminded the jury that Arnold had testified that in a vast majority of cases

children don't report abuse right away, and EA's behavior was consistent with that scenario. 7RP 75.

Admission of Arnold's profile testimony was highly prejudicial. One reason scientific evidence must be generally accepted in the scientific community before it is admissible in court is that such evidence "may over-awe or confuse the jury and may be less accessible to lay analysis than other forms of evidence." Jones, 71 Wn. App. at 817. Arnold's testimony that, after interviewing 2000 children and reviewing other scientific research, she had identified this characteristic of sexually abused children, was likely to "over-awe" the jury and impact its evaluation of EA's testimony. As presented in this case, the expert testimony allowed the jury to infer that EA was abused because she fit the profile of sexually abused children, essentially vouching for EA's credibility. This testimony invaded the province of the jury and denied Alvarez-Gutierrez his right to a jury trial.

2. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO IMPOSE APPELLATE COSTS.

Alvarez-Gutierrez has been indigent throughout the pendency of these proceedings. He was represented by appointed counsel at trial. At sentencing the court found it extraordinarily unlikely Alvarez-Gutierrez

would be able to pay even the mandatory legal financial obligations, so it waived all non-mandatory ones. 9RP 17; CP 258.

Alvarez-Gutierrez filed an affidavit in support of his motion for an order authorizing appellate review at public expense. In it he declared that he does not own any real estate, stocks or bonds, or substantial items of personal property; he has no income or bank accounts; he was making mortgage payments of $776 per month until his arrest; and that his cancer affects his financial condition. Supp. CP (Motion and Declaration for Order Authorizing Review at Public Expense, filed 7/10/15). The court entered an order of indigency authorizing Alvarez-Gutierrez to seek appellate review at public expense, including all filing fees, attorney fees, costs of preparation of briefs, and costs of preparation of the verbatim report of proceedings. CP 284-86.

a. The serious problems *Blazina* recognized apply equally to costs awarded on appeal, and this Court should exercise its discretion to deny cost bills filed in the cases of indigent appellants.

Our supreme court in Blazina recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue interest at a rate of 12 percent so that even persons "who pay[] $25 per month toward their LFOs will owe the state more 10

years after conviction than they did when the LFOs were initially assessed." Id. This, in turn, "means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." Id. (citing AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS, at 68-69 (2010), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf; KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE, at 9-11, 21-22, 43, 68 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." Blazina, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The Blazina court addressed LFOs imposed by trial courts, but the "problematic consequences" are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to move on with their lives in precisely the same ways the Blazina court identified.

Although Blazina applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene Blazina's reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that Blazina held was essential before including monetary obligations in the judgment and sentence.

Alvarez-Gutierrez qualified for indigent defense services in the trial court and continued to qualify for indigent defense services on appeal. To require him to pay appellate costs without determining his financial circumstances would transform the thoughtful and independent judiciary

to which the Blazina court aspired into a perfunctory rubber stamp for the executive branch.

In addition, the prior rationale in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of Blazina. The Blank court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed because ability to pay would be considered at the time the State attempted to collect the costs. Blank, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for Blazina's recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship.[2] Blazina, 182 Wn.2d at 836; see also RCW 10.82.090(1) ("[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments."). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); State v. Mahone, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, "Mahone

[2] Troubling still, under Blank's time-of-enforcement rule, the State has seemingly unfettered power to control the amount of interest that accrues simply by delaying its collection efforts months or years before attempting to exact awarded appellate costs from indigent persons.

cannot receive counsel at public expense"). Expecting indigent defendants to shield themselves from the State's collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The Blazina court also expressly rejected the State's ripeness claim that "the proper time to challenge the imposition of an LFO arises when the State seeks to collect." Blazina, 182 Wn.2d at 832, n.1. Blank's questionable foundation has been thoroughly undermined by the Blazina court's exposure of the stark and troubling reality of LFO enforcement in Washington.

Furthermore, the Blazina court instructed *all* courts to "look to the comment in GR 34 for guidance." Blazina, 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The Blazina court also suggested, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." Blazina, 182 Wn.2d at 839. This court receives orders of indigency "as a part of the record on review." RAP 15.2(e). "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that

the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. Blazina, 182 Wn.2d at 839.

This court has ample discretion to deny cost bills. RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Blank, too, acknowledged appellate courts have discretion to deny the State's requests for costs. 131 Wn.2d at 252-53. Given the serious concerns recognized in Blazina, this court should soundly exercise its discretion by denying the State's requests for appellate costs in appeals involving indigent appellants, barring reasonable efforts by the State to rebut the presumption of continued indigency. Alvarez-Gutierrez respectfully requests that this court deny a cost bill in this case should the State substantially prevail on appeal.

b. Alternatively, this court should remand for superior court fact-finding to determine Alvarez-Gutierrez's ability to pay.

In the event this court is inclined to impose appellate costs on Alvarez-Gutierrez should the State substantially prevail on appeal, he requests remand for a fair pre-imposition fact-finding hearing at which he

can present evidence of his inability to pay. Consideration of ability to pay before imposition would at least ameliorate the substantial burden of compounded interest. At any such hearing, this court should direct the superior court to appoint counsel for Alvarez-Gutierrez to assist him in developing a record and litigating his ability to pay.

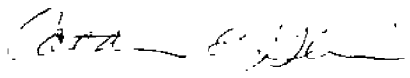
If the State is able to overcome the presumption of continued indigence and support a finding that Alvarez-Gutierrez has the ability to pay, this court could then fairly exercise its discretion to impose all or a portion of the State's requested costs, depending on his actual and documented ability to pay.

D. CONCLUSION

Improper admission of expert testimony invaded the province of the jury, and Alvarez-Gutierrez is entitled to a new trial. Moreover, this Court should exercise its discretion not to impose appellate costs should the State substantially prevail on appeal.

DATED March 8, 2016.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

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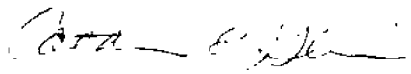

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