

SUPREME COURT NO. 94890-9

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

RODNEY WILLIS,

Petitioner.

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**ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION**

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Willis, No. 73903-4-1, filed July 24, 2017 (unpublished).

C. ADDITIONAL ISSUE PRESENTED FOR REVIEW

If this Court accepts review of this case, the State seeks cross-review of the following additional issue the State raised in the Court of Appeals, which was not reached by that court:

1. The Court of Appeals held that the statements of Detective Bartlett challenged on appeal do not constitute reversible error because Willis invited any error by eliciting the testimony. As an alternative ground to affirm, the State renews its arguments that review of the claim is barred because Willis did not object to the testimony below, and that if either challenged statement was improperly admitted, the error was harmless.

D. STATEMENT OF THE CASE

The defendant, Rodney Willis, was convicted of murder in the first degree with a firearm, for the killing of Herman Tucker on September 7, 2012. CP 1-2, 84, 85; 6/11RP 3-6.<sup>1</sup> The procedural and substantive facts are set forth in the State's briefing before the Court of Appeals. Brief of Respondent at 1-10.

The Court of Appeals affirmed the conviction in a unanimous unpublished opinion. State v. Willis, 73903-4-I (Wash. Ct. App. July 24, 2017) (unpublished).

E. ARGUMENT

The State's briefing at the Court of Appeals adequately addresses the issues raised by Willis in his petition for review.

If review is accepted, the State seeks cross-review of alternative arguments it raised in the Court of Appeals but that the court's decision did not address. RAP 13.4(d). The provisions of RAP 13.4(b) are inapplicable because the State is not seeking

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<sup>1</sup> The Report of Proceedings is referred to in the State's briefs as follows: 1RP – 5/4/15; 2RP – 5/5/15; 3RP – 5/6/15; 4RP – 5/7/16; 5RP – 5/11/15; 6RP – 5/12/15; 7RP – 5/13/15; 8RP – 5/14/15; 9RP – 5/18/15; 10RP – 5/19/15; 11RP – 5/28/15; 12RP – 6/1/15; 13RP – 6/2/15; 14RP – 6/3/15; 15A RP – 6/4/15; 15B RP – 6/8/15; 16A RP – 6/9/15; 16B RP – 6/10/15; 6/11RP – 6/11/15; 17RP – 7/1/15; and 18RP – 8/21/15. As designated in the appellant's brief, RP 15 and 16 each include two dates; the dates are distinguished using letters A and B in this brief, as noted.

review, and believes that review by this Court is unnecessary. However, if this Court grants review, in the interests of justice and full consideration of the issues, this Court also should grant review of the alternative arguments raised by the State in the Court of Appeals, that review of this claim is barred because Willis did not object to the testimony, and that any error in the testimony of Detective Bartlett was harmless. RAP 1.2(a); RAP 13.7(b). Those alternative arguments are summarized below and set forth more fully in the briefing in the Court of Appeals.

1. DEFENSE COUNSEL ELICITED THE TESTIMONY TO WHICH WILLIS OBJECTS ON APPEAL, WILLIS HAS WAIVED ANY ERROR, AND ANY ERROR WAS HARMLESS.

Willis claims that testimony of the lead investigating detective, Christina Bartlett, included impermissible opinions as to guilt. The facts relevant to this claim are set out in the State's brief in the Court of Appeals. Brief of Respondent at 11-17. Willis elicited the testimony on cross-examination,<sup>2</sup> so it cannot be the basis of a claim of error. It is a rule of long standing that a party may not set up error at trial and then on appeal claim to be entitled

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<sup>2</sup> 12RP 43-52; 16A RP 975-76, 980-83.

to reversal based on that error. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (quoting State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984)). This rule applies even to claims of constitutional error that can be raised for the first time on appeal. State v. Heddrick, 166 Wn.2d 898, 909, 215 P.3d 201 (2009).

Courts have repeatedly refused to review claims that improper opinion testimony occurred in cases where the testimony was elicited or invited by the defense. State v. Notaro, 161 Wn. App. 654, 670, 255 P.3d 774 (2011) (waived challenge to interrogating detective's testimony that "I just didn't believe the story," by eliciting it during cross-examination); State v. O'Neal, 126 Wn. App. 395, 109 P.3d 429 (2005), aff'd, 159 Wn.2d 500 (2007); State v. McPherson, 111 Wn. App. 747, 764, 46 P.3d 284 (2002) (waived challenge to detective's allegedly improper opinion elicited on cross-examination); State v. Oughton, 26 Wn. App. 74, 77, 612 P.2d 812 (1980). The Court of Appeals in the case at bar agreed that the challenged testimony was elicited by defense counsel, so it cannot be the basis for reversal. State v. Willis, 73903-4-I, slip op. at 1, 3-8 (Wash. Ct. App. July 24, 2017) (unpublished).



a. RAP 2.5(a)(3) Bars Consideration Of This Claim.

Further, Willis did not object to any of the testimony in the trial court and RAP 2.5(a)(3) bars consideration of the claim. A claim of error may be raised for the first time on appeal only if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The defendant must show that a constitutional error occurred and caused actual prejudice to his rights. Id.

The limitations of RAP 2.5(a)(3) apply to opinion evidence challenged first on appeal. State v. Montgomery, 163 Wn.2d 577, 591, 595, 183 P.3d 267 (2008); State v. Curtiss, 161 Wn. App. 673, 696-97, 250 P.3d 496 (2012). In Montgomery, the court held that direct testimony of three state’s witnesses (two detectives and a forensic chemist) as to the defendant’s intent, which was the sole disputed issue at trial, was improper, but the defendant failed to preserve the issue for appeal – it was not manifest constitutional error. Id. at 595-96.

In context, the statements challenged by Willis appear to be statements of Bartlett’s state of mind at the time of the interview, and not opinions of Willis’s guilt at trial. That was the conclusion

reached by the Court of Appeals. Willis, slip op. at 5-7. Statements made during a pretrial interview as part of an interrogation strategy do not carry any special aura of reliability that would usurp the jury's role at trial. State v. Notaro, 161 Wn. App. at 669.

Bartlett's opinion at the time of the interview was of limited significance at trial, because at trial Willis conceded that he shot Tucker and killed him. 13RP 311-13. Willis's failure to object to the statements challenged on appeal indicates that when they occurred, Willis did not believe they were unduly prejudicial. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1980); State v. Miller, 66 Wn.2d 535, 537-38, 403 P.2d 884 (1965). Defense counsel purposely elicited this testimony by cross-examining the detective about her interview tactics, alleging they were game playing and deceitful, and emphasizing the number of times Bartlett repeated that she believed Willis intended to rob Tucker.<sup>3</sup> This strategy demonstrates that counsel thought the benefits of this challenge to Bartlett's interview tactics outweighed any prejudice of Bartlett confirming her belief. Because the jury heard the interview, which included those statements of Bartlett's belief, repetition of them during her testimony did not cause prejudice.

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<sup>3</sup> 12RP 43-52; 16A RP 975-76, 980-83.

The jury was properly instructed that they were the sole judges of the credibility of the witnesses and were not bound by the testimony of expert witnesses. CP 44-45, 50. There is no indication that the jurors did not follow these instructions.

Willis's own arguments on appeal (in arguing that Bartlett's facial expressions during trial are reversible error) concede that these statements on cross-examination were not prejudicial. He characterizes the statements as "opinion that Willis lied during his interview in Ellensburg." App. Br. at 38-39. He asserts that her statements "did little to damage the defense case." App. Br. at 38. Because the statements were invited by defense counsel, they do not constitute constitutional error. Willis has not established actual prejudice; he concedes the statements did little damage to the defense case. This court should decline review of this claim.

- b. If Either Challenged Statement Was Improperly Admitted, The Error Was Harmless.

If this Court concludes that either of the challenged statements made by Bartlett was an unconstitutional opinion as to Willis's guilt, any error was harmless beyond a reasonable doubt. Constitutional error is harmless if the State establishes beyond a

reasonable doubt that any reasonable jury would have reached the same result absent the error. State v. Quaale, 182 Wn.2d 191, 202, 340 P.3d 213 (2014). The statements were of virtually no relevance to the disputed issues at trial and would not have affected the verdict.

Unlike in Quaale, there was no suggestion here that Bartlett's opinion was based on any special expertise or was based on scientific principles. The jury twice heard recordings of the interview of Willis and those recordings included many statements by Bartlett that she believed that Willis went to the motel to rob Herman Tucker.<sup>4</sup> As previously noted, that was one point of the cross-examination, so Bartlett's confirmation of those statements would help the defense case, if anything.

Bartlett stated she was relying on the text messages, which were admitted at trial. 16A RP 983. She did not suggest she had evidence the jury did not have.

Willis did not dispute that he killed Tucker. Willis did not dispute the significance of the text messages – instead, he claimed that he had allowed the others in the BMW to use his phone and

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<sup>4</sup> Exhibits 52 and 76 are both recordings of the interview, played at trial, the latter with fewer redactions. Exhibits 55 and 77 are the respective transcripts used to assist jurors as they listened. 12RP 12-15; 16A RP 962-64.

that they had been planning a robbery, which he talked them into abandoning. 14RP 588-90. Thus, Bartlett's opinion that the person who was exchanging those text messages intended to commit a robbery was not inconsistent with Willis's own testimony and was harmless beyond a reasonable doubt.


F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the State seeks cross-review of the alternative issues identified in Sections C and E, supra.

DATED this 21st day of September, 2017.

Respectfully submitted,

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