Filed
Washington State
Court of Appeals
Division Two

August 4, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent/Cross-Appellant, v. RONALD WITTHAUER, Appellant/Cross-Respondent.	No. 50934-2-II UNPUBLISHED OPINION ON REMAND

GLASGOW, J.—Ronald Witthauer appealed from his convictions of second degree rape and indecent liberties with forcible compulsion, where his victim was his adult niece, CZ. At trial, the State presented DNA and other physical evidence, whereas Witthauer's account of what happened changed several times up to and including at trial.

In our first decision, *State v. Witthauer*, No. 50934-2-II, slip op. (unpublished) (Wash. Ct. App. July 16, 2019), http://www.courts.wa.gov/opinions/pdf/D2%2050934-2-II20Unpublished %20Opinion.pdf, we affirmed Witthauer's convictions and held in relevant part that the trial court did not abuse its discretion in limiting Witthauer's cross-examination of CZ and there was no violation of Witthauer's right of confrontation and right to present a defense under the Sixth Amendment to the United States Constitution. The Supreme Court granted review solely on the issue of Witthauer's right to confront witnesses and to present a defense, and remanded for reconsideration in light of its recent decision in *State v. Arndt*, 194 Wn.2d 784, 453 P.3d 696 (2019). *State v. Witthauer*, 195 Wn.2d 1001, 458 P.3d 787 (2020).

Applying *Arndt*, we hold that the trial court did not abuse its discretion when it prevented Witthauer from cross-examining CZ about the prior revocation of her pharmacy technician license and excluded extrinsic evidence of the license revocation. This limitation did not violate Witthauer's right to confront adverse witnesses or present his defense. We also conclude that even if the trial court had erred, any error was harmless beyond a reasonable doubt. We accordingly affirm Witthauer's convictions.

FACTS

The underlying facts regarding CZ's allegation that Witthauer raped her are described in our previous opinion, *Witthauer*, No. 50934-2-II, slip op. The facts relevant to this remand are summarized here.

Before trial, the State moved to exclude extrinsic evidence and limit cross-examination regarding the Oregon Board of Pharmacy's prior revocation of CZ's pharmacy technician license. Witthauer sought to admit a letter from the Board to CZ, along with a certified copy of a default order against her, revoking her license based on an allegation that she had used patients' prescriptions to illegally obtain oxycodone for her own use. He also sought to cross-examine her about her license revocation. The trial court noted on the record that the order was entered by default because CZ never responded to the notice of proposed disciplinary action.

The trial court found that whether CZ dishonestly obtained prescriptions and then diverted oxycodone was probative of CZ's truthfulness. The trial court ruled that the defense could ask on cross-examination whether she did these things. But under ER 608(b), the inquiry would end with CZ's answer and Witthauer could not further inquire, even if she denied it. The trial court also

ruled that Witthauer could not ask CZ about her license revocation or present extrinsic evidence to show her license had been revoked. The trial court reasoned that the revocation order

> does not state where the allegations arose from; in other words, which people advised the investigator, or testified at the hearing, or otherwise let the Board of Pharmacy know that [CZ] was alleged to have done these things in December of 2014. There's no admission or other indication from her that, in fact, she did these things, only that she didn't contest the proceeding.

1 Verbatim Report of Proceedings (VRP) (Feb. 14, 2017) at 37.

At trial, Witthauer asked CZ on cross-examination if she had ever been accused of diverting oxycodone, but the State objected based on the trial court's pretrial ruling and the trial court sustained the objection. Defense counsel then asked if CZ had ever diverted oxycodone for her own use, and she said she had not. Counsel asked once more, and CZ again said, "No." 4 VRP (July 25, 2017) at 295. Counsel then moved on to another line of inquiry.

CZ's urine samples from the day after the rape contained alcohol and the prescription drug clonazepam. A forensic toxicologist testified that those test results were consistent with a person consuming alcohol and clonazepam about 12 hours prior to the sample being taken, though consumption could have occurred earlier or later. CZ testified that she had not consumed any drugs the day of the rape, but admitted that she had been drinking with Witthauer.

During closing argument, defense counsel argued to the jury that it should not believe CZ's allegations because her story had inconsistencies, she had previously lied about some things that happened that night, including how much she had been drinking, and she admitted at trial that she had been drinking the day of the rape.

The jury convicted Witthauer of second degree rape and indecent liberties with forcible compulsion. The trial court sentenced Witthauer to 144 months to life imprisonment.

Witthauer appealed his conviction and sentence, and we affirmed. *Witthauer*, No. 50934-2-II, slip op. We held in relevant part that the trial court did not abuse its discretion in limiting Witthauer's cross-examination of CZ, and because there is no constitutional right to present irrelevant evidence, it was unnecessary to further address whether that limitation violated Witthauer's rights of confrontation and to present a defense. Our Supreme Court accepted review solely on that issue and remanded for reconsideration in light of *Arndt. Witthauer*, 195 Wn.2d 1001.

ANALYSIS

Witthauer argues the trial court denied him his right of confrontation and right to present a defense by limiting the scope of his cross-examination of CZ. Specifically, he asserts the trial court improperly prevented him from asking her about the disciplinary proceeding that led to the revocation of her pharmacy technician license and improperly excluded the order revoking her license. We disagree.

A. <u>Standard of Review</u>

Criminal defendants have a constitutional right to confront and cross-examine adverse witnesses and to present their defense. U.S. CONST., amends. V, VI, XIV; WASH. CONST. art. I, §§ 3, 22; *e.g.*, *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1005, 39 L. Ed. 2d 347 (1974). In *Arndt,* the Supreme Court reiterated the two-part analysis for determining whether the exclusion of evidence violates a defendant's constitutional right to present a defense. 194 Wn.2d at 797-98. We consider de novo the constitutional question of whether those rulings deprived the defendant of their right to present a defense or cross-examine adverse witnesses. *Id.*; *see also State v. Darden*, 145 Wn.2d 612, 621-22, 41 P.3d 1189 (2002) (applying a similar test in the context of the right to

confrontation). We review the trial court's evidentiary rulings for abuse of discretion. *Arndt*, 194 Wn.2d at 797-98. A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or reasons. *State v. Barry*, 184 Wn. App. 790, 801-02, 339 P.3d 200 (2014).

Because *Arndt* made clear that we must address whether the defendant's constitutional rights have been violated in every case where those rights are raised, regardless of whether the trial court's ruling violated the rules of evidence, we will look first to whether the trial court's ruling violated the Sixth Amendment. If the trial court's limitation on Witthauer's cross-examination of CZ violated the Sixth Amendment requirements as described in *Arndt*, we would perform a constitutional harmless error analysis. If the trial court did not violate the constitutional protection described in *Arndt*, then we proceed to evaluating whether the trial court abused its discretion in applying the evidentiary rules and, if it did, whether any evidentiary error was harmless under the nonconstitutional harmless error analysis.

B. Whether the Trial Court Violated Witthauer's Sixth Amendment Rights

Under *Arndt* we must analyze whether the limitation on Witthauer's cross-examination of CZ and the exclusion of the order revoking her license violated his Sixth Amendment rights to confront adverse witnesses and present a defense. 194 Wn.2d at 812. In doing so, we balance the State's interest in excluding evidence of CZ's license revocation against Witthauer's need for the information pertaining to his impeachment of CZ's credibility. *See id*.

In *Arndt*, the Supreme Court held that the defendant's Sixth Amendment rights were not violated because the trial court's evidentiary rulings did not eliminate Arndt's entire defense and she was still able to advance the defense theory of the case. *Id.* at 814. The court distinguished

Arndt's situation from *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010), where "the trial court interpreted a rape shield law to preclude the defendant from presenting any evidence that the victim had voluntarily engaged in an 'all-night, drug-induced sex party.'" *Id.* at 812-13 (quoting *Jones*, 168 Wn.2d at 721). The *Arndt* court explained that the evidence at issue in *Jones* "was 'evidence of extremely high probative value; it [was] Jones's entire defense.'" *Id.* at 813 (quoting *Jones*, 168 Wn.2d at 721). In contrast, Arndt was still permitted to present evidence that pointed to an alternative cause for the fire that she was accused of starting and rebutted some of the State's evidence. *Id.* at 813-14. Similarly, in this case, the revocation of CZ's license by default was not of extremely high probative value, nor did the trial court's limitation on Witthauer's cross-examination eliminate his entire defense.

Witthauer argues that an inquiry into the disciplinary proceeding against CZ was probative because CZ's credibility was central to the State's case and her history of dishonest conduct was Witthauer's most cogent line of defense. Witthauer reasons that an inquiry into CZ's past access to prescription drugs, and the revocation of that access, was also relevant because CZ claimed she did not know how the clonazepam got into her system, implying that Witthauer had drugged her.

However, as the trial court explained on the record, CZ's license revocation occurred as the result of a default order because she never responded to the allegations. The Board's default order shows only that she was accused of dishonesty and did not contest the resulting disciplinary proceeding. Such evidence is not reliably probative of whether she actually committed the acts she was accused of because parties default for reasons other than guilt. Further, the licensing consequences are cumulative of, and collateral to, the core issue of whether she committed the

dishonest conduct in the first place. CZ's license revocation by default did not have "'extremely high probative value.'" *Id.* at 813 (quoting *Jones*, 168 Wn.2d at 721).

Nor was Witthauer deprived of an entire defense. Although Witthauer could not ask about the license revocation specifically, he was still permitted to ask CZ whether she had ever diverted oxycodone for her own use, and the jury had the opportunity to evaluate the credibility of her answer. Witthauer was able to attack CZ's credibility in other ways as he cross-examined her at length about various inconsistencies in her story. During closing argument, defense counsel was able to argue that the jury should not believe CZ based on inconsistencies in her story, the fact that she had been drinking that day, and other previous incidents where she lied. Thus, Witthauer was still permitted to present and argue his theory of the case—that CZ had a history of dishonesty and she lied again when she accused him of raping her.

For these reasons, we hold that the limitation on Witthauer's cross-examination of CZ did not violate his rights of confrontation and to present a defense.

C. Whether CZ's License Revocation Was Properly Excluded Under the Rules of Evidence

Having determined that there was no Sixth Amendment violation, we next examine whether the trial court abused its discretion in limiting Witthauer's cross-examination of CZ. Witthauer argues that he should have been permitted to cross-examine CZ about her license revocation based on ER 608(b).

Under ER 608(b), a party may inquire into specific instances of a witness's prior conduct, for purposes of impeachment, "if [the conduct is] probative of [the witness's] truthfulness or untruthfulness." Conduct involving fraud or deception can be indicative of the witness's general disposition with regard to truthfulness. *State v. Johnson*, 90 Wn. App. 54, 71, 950 P.2d 981 (1998).

ER 608(b) expressly does not permit introduction of extrinsic evidence to prove specific instances of conduct. Instead, the party attacking the witness's credibility may only inquire into those instances on cross-examination. ER 608(b) ("Specific instances on the conduct of a witness . . . may not be proved by extrinsic evidence."). As a result, if a witness denies the alleged conduct, the examining attorney cannot impeach using extrinsic evidence.

Testimony or evidence that actually demonstrated that CZ committed dishonest acts would be relevant to her truthfulness, and the trial court engaged in the appropriate ER 608(b) analysis allowing cross-examination of the alleged dishonest conduct—whether she diverted oxycodone for her own use. As discussed above, the Board's default order was neither relevant nor reliably probative of whether CZ actually committed the dishonest acts she was accused of. It was within the trial court's discretion to allow cross-examination regarding whether CZ had ever committed the specific instances of dishonest conduct allowing the jury to evaluate her credibility on this issue, but to prohibit any inquiry into whether she had been accused of or disciplined for such conduct when evidence of this particular disciplinary proceeding would not reveal the truth of the underlying accusation. Thus, the trial court did not abuse its discretion when it allowed cross-examination on whether CZ had dishonestly obtained prescriptions and then diverted oxycodone for her own use, but excluded evidence of the license revocation.

We hold that the trial court properly limited Witthauer's cross-examination under ER 608(b).

D. Any Error Was Harmless in Any Event

Even if it were error to exclude extrinsic evidence and testimony about the default order revoking CZ's pharmacy technician license, any error was harmless under either the constitutional

or nonconstitutional standard. "'A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.'" *State v. Rhoden*, 189 Wn. App. 193, 202-03, 356 P.3d 242 (2015) (quoting *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). The improper admission or exclusion of evidence constitutes harmless error if the evidence is of minor significance compared with the overall, overwhelming evidence as a whole. *State v. Clark*, 187 Wn.2d 641, 665, 389 P.3d 462 (2017); *see also State v. Lord*, 161 Wn.2d 276, 295-96, 165 P.3d 1251 (2007) (any error in excluding evidence is harmless "if the untainted admitted evidence is so overwhelming as to necessarily lead to a finding of guilt"). The less exacting nonconstitutional harmless error test requires the defendant to show a reasonable probability that the error materially affected the outcome of the trial. *State v. Barry*, 183 Wn.2d 297, 317-18, 352 P.3d 161 (2015).

A reasonable jury would not have reached a different result had CZ testified about whether she had previously been accused of diverting oxycodone for her own use and lost her pharmacy technician license by default. That evidence would have been insignificant compared with the overall body of evidence demonstrating Witthauer's guilt. CZ made multiple, consistent, emotional disclosures immediately after getting away from Witthauer and then gave a consistent, detailed account at trial. Her testimony was corroborated by visible physical injuries the day after the rape, including swelling and redness in and around her vagina, scratches in places where she said he held her down, and DNA evidence.

Witthauer, on the other hand, constantly changed his account of what happened. He initially denied sexual contact with CZ. Then, after DNA results showed the presence of his semen in CZ's vagina, he invented an outlandish story that there was a conspiracy to steal his DNA and

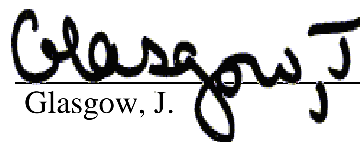
plant it on CZ. It was only at trial that Witthauer finally admitted to having sex with his niece, but then he claimed it was consensual.

Evidence of CZ's license revocation would have done little, if anything, to convince the jury that Witthauer was telling the truth, rather than CZ, especially in the face of the corroborating physical evidence and CZ's unwavering testimony. Given the strength of the State's case and Witthauer's changing stories, any error in limiting Witthauer's cross-examination of CZ was harmless beyond a reasonable doubt. It was also, necessarily, harmless under the less exacting nonconstitutional standard.

CONCLUSION

We affirm Witthauer's convictions.

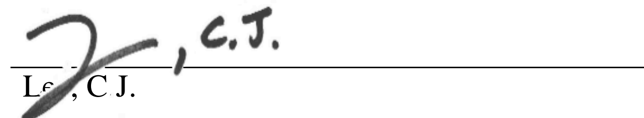
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Glasgow, J.

We concur:

Worswick, J.



Lee, C.J.