

68436-1

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NO. 68436-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA FALEALILI,

Appellant.

REC'D
JUL 30 2012
King County Prosecutor
Appellate Unit

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

The Honorable Theresa B. Doyle, Judge

BRIEF OF APPELLANT

COURT OF APPEALS
STATE OF WASHINGTON
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JL

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A. ASSIGNMENT OF ERROR

The court erred in admitting improper opinion testimony that the nurse practitioner believed the complaining witness was telling the truth.

Issue Pertaining to Assignment of Error

Witnesses are not permitted to opine regarding the credibility of other witnesses. To do so invades the province of the jury as the sole finder of fact and credibility. Appellant's wife claimed he strangled her. Over defense objection, the nurse practitioner was permitted to testify she had no concerns the complainant was being untruthful and believed the complainant was not exaggerating her pain. Must appellant's conviction be reversed when the complainant's claim was bolstered with the nurse's impermissible opinion testimony?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Joshua Falealili with one count of second-degree assault by strangulation and one count of felony violation of a no-contact order based on assault, both with a domestic violence designation. CP 1. The information was apparently later amended to include aggravating factors, but the amended information was never filed

with the trial court. 1RP¹ 110-13. Falealili represented himself at trial. 1RP 19.

The jury found Falealili guilty on both counts. CP 168-69. In a bifurcated proceeding, the jury also found by special verdict that Falealili and the victim were members of the same family or household and that the aggravating factor of aggravated domestic violence applied to each offense. CP 171-76.

At sentencing, the prosecutor asked the court to enter judgment on the lesser-included offense of misdemeanor violation of a no-contact order.² 7RP 51. After the effect on his offender score was explained, Falealili agreed. 7RP 55-56. The court imposed a standard range sentence of 27 months on the second-degree assault and a suspended sentence of 364 days on the misdemeanor. CP 220, 226. The court imposed 18 months of community custody on the felony and 12 months of probation on the

¹ There are seven volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Aug. 29, 2011, Sept. 1, 2011, Sept. 6, 2011, Oct. 31, 2011, Nov. 1, 2011, Nov. 15, 2011, Dec. 15, 2011, Jan. 12, 2012; 2RP – Jan. 17, 2012; 3RP – Jan. 23, 2012, Jan. 25, 2012; 4RP – Jan. 26, 2012, Jan. 30, 2012; 5RP – Jan. 31, 2012; 6RP – Feb. 1, 2012, Feb. 2, 2012; 7RP – Feb. 3, 2012; Feb. 24, 2012.

² Violation of a no-contact order is elevated to a felony when the violation is an assault “that does not amount to assault in the first or second degree.” RCW 26.50.110(4). The prosecutor concluded any assault other than the charged second-degree assault would likely be the same course of conduct. 7RP 51.

misdemeanor with the condition that Falealili obtain domestic violence treatment. CP 225, 228. Notice of appeal was timely filed. CP 445.

2. Substantive Facts

Falealili's wife Nicole Brevik accused him of having choked her on May 17, 2011. At trial, she could not recall what happened aside from a fight over her mailbox key. 5RP 45-46. She explained there was a tussle, fighting back and forth over the key that got "a little bit" physical. 5RP 46-47. Afterwards, she went to work. 5RP 50.

She kept having dizzy spells so she went to the hospital. 5RP 50-51. She told a nurse and a social worker that she had been held down and choked, and was now having pain in her neck and head in addition to dizziness. 5RP 110; 6RP 29. The social worker called the police. 6RP 19.

Brevik's statement to police was read to the jury as a recorded recollection under ER 803(a)(5). 5RP 54-55. In it, she claimed Falealili punched her in the chin, and she became dizzy and fell down. 5RP 54-55. She claimed he then choked her until she could not breathe, released his hold, and then choked her again when she began to scream. 5RP 55. She told police the entire incident lasted between 5 and 15 minutes. 5RP 55.

Officer Pisconski interviewed Brevik at the hospital and testified her left eye and chin were red, her lip was cut, and her neck was scratched. 4RP 126. Officer Myers, who also met her at the hospital, testified she had

strangulation marks around the left side of her neck and two or three broken press-on fingernails. 5RP 153. Neither the nurse practitioner who treated her nor Officer Pisconski saw any strangulation marks. 4RP 126; 5RP 115.

The nurse found mild swelling and tenderness in the chin and neck scratches. 5RP 115. She did not see any eye swelling or a cut lip. 5RP 125-26. She diagnosed Brevik with neck strain resulting from assault largely based on Brevik's self report of the assault and the resulting pain. 5RP 119, 138, 150. Although the scratches and swelling were consistent with the assault Brevik described, they were not, taken alone, indicators of strangulation. 5RP 138, 149.

During his cross-examination, Falealili questioned the nurse about the basis for her diagnosis. 5RP 119, 124-38. He highlighted the lack of objectively observable signs of strangulation, and the fact that the diagnosis was based almost entirely on Brevik's report. 5RP 126-27, 138.

On redirect, the nurse testified that a patient's report of pain is considered a vital sign. 5RP 144-45. She testified that sometimes people do feign pain, and so she also watches for physical responses such as flinching. 5RP 145. The prosecutor then asked her, "Did you have any concerns with [Brevik] that she was putting her pain on, if you will?" 5RP 145. Falealili objected, but the court allowed the witness to answer. 5RP 145. She

testified, “No. I didn’t feel that she was trying to exaggerate any pain, no.”
5RP 146.

The court also admitted Brevik’s recorded recollections of two previous incidents under ER 404(b). The jury was instructed it could consider the prior incidents only for the purpose of assessing Brevik’s credibility and any motive of the defendant. CP 188. In October 2010, she told police Falealili had slapped her, punched her, and broken her cell phone during a fight over whether she had looked through his papers. 5RP 68-69. She also testified that, on March 7, 2011, she had another altercation with Falealili that resulted in him going to jail. 5RP 70. She told police Falealili pulled her hair and would not let her get in the shower, so she bit him. 5RP 71. On March 17, 2011, a court order was entered preventing Falealili from contacting her. 5RP 72. But she let him live with her because he helps her financially and is the father of her child. 5RP 72.

C. ARGUMENT

THE NURSE’S OPINION TESTIMONY IMPROPERLY BOLSTERED BREVIK’S CREDIBILITY.

It is “clearly inappropriate” in criminal trials for one witness to express belief in the credibility of another witness. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). In this case, the only evidence against Falealili was Brevik’s word, which the State attempted to corroborate

with the nurse's diagnosis. When Falealili cross-examined her on the basis for that diagnosis, the State responded by eliciting an impermissible opinion that Brevik's story was credible. Despite Falealili's objection, the court permitted the nurse to tell the jury she believed Brevik's pain was real. 5RP 145.

a. The Nurse's Testimony that She Did Not Feel Brevik Was Exaggerating Was Improper Opinion Testimony that Invaded the Province of the Jury.

The jury's fact-finding role is essential to the constitutional right to a jury trial. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). That role is to be held "inviolable" under Washington's constitution. Const. art. I, §§ 21, 22. "Unquestionably, to ask a witness to express an opinion as to whether or not another witness is lying does invade the province of the jury." State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74 (1991) (citing State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985)); see also Montgomery, 163 Wn.2d at 591 (expressions of personal belief as to credibility of a witness are "clearly inappropriate"); State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995) (witness may not give an opinion on another witness' credibility).

In determining whether opinion testimony invades the province of the jury by offering opinions on credibility or guilt, courts generally look at five questions: 1) the type of witness, 2) the specific nature of the testimony,

3) the nature of the charges, 4) the type of defense, and 5) the other evidence before the trier of fact. Montgomery, 163 Wn.2d at 591 (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

For example, in State v. Sutherby, the court reversed when the complaining witness's mother gave an impermissible opinion that she was telling the truth. State v. Sutherby, 138 Wn. App. 609, 158 P.3d 91 (2007). Sutherby was charged with raping his five-year old granddaughter. Id. at 612. At trial, the child's mother was permitted to testify the child was not lying. The mother testified she could tell when her child was fibbing because she makes a sort of half smile, and that the child never made that face when talking about the allegations. Id. at 616-17. On appeal, the court agreed with Sutherby that, "this testimony was wholly improper and deprived him of his right to have the jury determine [the child's] credibility." Id. at 617. The court noted the mother's testimony was "neither cumulative nor innocuous." Id. at 617-18. The court reversed Sutherby's convictions. Id. at 618.

Under the factors listed in Montgomery above, the nurse's testimony in this case was just as improper as the mother's testimony in Sutherby and the same result should follow. First, the nurse was an expert witness, qualified by her training and experience as a medical professional. 5RP 103-04. While perhaps lacking the emotional content of testimony by a child's

mother, the fact that she was a medical professional expert witness makes the opinion more damaging.

The nature of the testimony was also especially problematic. Like the child's mother in Sutherby, the nurse here implied she had ways of telling when a patient was lying about her pain. 5RP 145. She then was permitted to testify that she had no concerns Brevik might be lying and felt she was not exaggerating her pain. 5RP 145. Courts have been particularly concerned about opinions on credibility that appear to involve objective or scientific ways of distinguishing truth from falsehood. See, e.g., State v. Barr, 123 Wn. App. 373, 98 P.3d 518 (2004) (officer's testimony he could tell defendant was being deceptive using Reid investigative technique was improper opinion testimony requiring reversal); State v. Sutherland, 94 Wn.2d 527, 529, 617 P.2d 1010 (1980) (reversing murder conviction because jury was told of two polygraph tests).

The charges in this case, as in Sutherby, are serious. Assault in the second degree is classified as a violent offense and a class B felony. RCW 9.94A.030; RCW 9A.36.021. The type of defense was simply a general denial. While that denial necessarily includes an attack on the credibility of Brevik's account, Falealili did so using permissible means such as questioning the nurse regarding the basis for her expert opinion. 5RP 124-38. He did not attempt to present or elicit improper opinion testimony.

Thus, while the nature of the defense made Brevik's credibility an issue in the case, it did not open the door to impermissible opinion testimony. See Sutherland, 94 Wn.2d at 529 (door not opened to questions about inadmissible polygraph when defense merely questioned detective about adequacy of investigation).

Finally, the lack of other evidence in the case makes the nurse's opinion particularly damaging. As in Sutherby, credibility of the complaining witness was one of, if not the, essential issue in the case. 138 Wn. App. at 617. Although Officer Myers claimed to have seen strangulation marks, serious doubt was cast on this testimony by the fact that neither the nurse nor Officer Pisconski saw them. 4RP 126; 5RP 115. They saw only scratches on the neck that did not necessarily indicate any particular mechanism of injury. Id.

Over Falealili's objection, the nurse was allowed to give a wholly improper opinion that Brevik was telling the truth about her pain. This opinion impermissibly bolstered a case that was based almost entirely on Brevik's statements. Falealili's conviction should be reversed.

b. This Issue Was Preserved for Review and, Alternatively, Is Manifest Constitutional Error.

Falealili's objection was sufficiently specific, given the context, to preserve this error for review. Error is preserved for review if the basis for

the objection is “apparent from the context.” State v. Walker, 75 Wn. App. 101, 109, 879 P.2d 957 (1994) (quoting State v. Braham, 67 Wn. App. 930, 934-35, 841 P.2d 785 (1992)). That is the case here.

When the prosecutor began questioning the nurse about her opinion on the truth-telling of her patients, Falealili objected to relevance and then speculation. 5RP 145. The court overruled both of these objections and permitted the witness to answer. 5RP 145. When the prosecutor specifically asked the nurse whether she was concerned Brevik might be lying, Falealili objected again, this time without stating a specific basis. 5RP 145. However, the basis was apparent in the context of his previous objection to this same line of questioning based on speculation.

Objections based on speculation and improper opinion are closely related. See State v. Contreras, 57 Wn. App. 471, 788 P.2d 1114 (1990). A speculation objection is generally seen as relying on ER 602, which requires that a witness have personal knowledge of the events testified to. 57 Wn. App. at 477. Opinions on the state of mind of another witness may be admissible so long as they are based on some observed facts or circumstances. Id. Since the prosecutor’s line of questioning called for an opinion, Falealili’s speculation objection obviously challenged the propriety of that opinion.

Falealili's objection should have alerted the court there is no possible foundation in personal knowledge that would enable one witness to properly testify another is telling the truth about events of which the first witness has no personal knowledge. Opinion testimony is objectionable in essentially the same way as speculation. It involves a witness going beyond reporting facts he or she observed. Given the context, the basis for Falealili's objection was apparent, and this Court should review the issue.

However, even if this Court finds the error was not preserved by objection, the nurse's explicit opinion on credibility is manifest constitutional error that may be raised for the first time on appeal. Montgomery, 163 Wn.2d at 595. The nurse's testimony was an explicit opinion on Brevik's credibility when she testified that she had no concerns Brevik was faking or exaggerating her pain. 5RP 146.

The requisite prejudice is shown by the jury's inquiry. The jury asked for copies of both Brevik's statement and her medical records from Harborview Medical Center. CP 177-78. These were not admitted and could not be given to the jury. Id. But the inquiry demonstrates the jury was carefully inquiring into Brevik's testimony and looking for corroborating medical evidence. The nurse's opinion provided that evidence.

In Montgomery, the court affirmed, despite improper opinion testimony, because it presumed the jury followed the instruction that it was

the sole arbiter of witness credibility and guilt. 163 Wn.2d at 595-96. But the court specifically noted that if there were evidence, such as a jury inquiry, that the opinion influenced the verdict, it would not hesitate to find prejudice and reverse. Id. at 596 n.9. The Court should do just that in this case.

Falealili's trial was tainted by opinion testimony that unfairly bolstered the credibility of the complaining witness. The physical corroborating evidence was equivocal and scant. Therefore, admitting this testimony over Falealili's objection requires that his convictions be reversed.

D. CONCLUSION

For the foregoing reasons, Falealili requests this Court reverse his convictions and remand for a new trial.

DATED this 30th day of July, 2012.

Respectfully submitted,

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DIVISION ONE**

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)	
Appellant,)	
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vs.)	COA NO. 68436-1-I
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JOSHUA FALEALILI,)	
)	
Respondent.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF JULY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSHUA FALEALILI
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2012 JUL 30 PM 4:42
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JULY, 2012.

x *Patrick Mayovsky*