

No. 35007-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Charles Wayne Sifers,

Appellant.

Lewis County Superior Court

Cause No. 05-1-00274-8

The Honorable Judge Richard L. Brosey

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Appellant's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

I. The Trial Court did Not Err in Making Evidentiary Rulings in this Case.

The defendant argues that the trial court erred in ruling on various issues of admissibility of testimony of witnesses after appropriate objections by counsel. This is not correct. There was no abuse of discretion here.

The standard of review for evidentiary rulings made by the trial court is abuse of discretion. City of Spokane v. Neff, 152 Wn.2d 85, 91, 93 P.3d 158 (2004), citing State v. Ellis, 136 Wn.2d 498, 504, 963 P.2d 843 (1998). The abuse of discretion standard of review applies to review of decisions by the trial court to either admit or exclude evidence. State v. Thomas, 150 Wn.2d 832, 856, 83 P.3d 970 (2004), citing State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (2990). A court abuses its discretion when its evidentiary ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State v. Williams, 137 Wn.App. 736, 743, 154 P.3d 322 (2007), citing State v. Downing,

151 Wn.2d 265, 272, 87 P.3d 1169 (2004)(quoting State ex. rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). Great deference is given to the trial court's determination regarding such evidentiary matters. State v. Young, 62 Wn.App. 895, 902-03, 817 P.2d 412 (1991); State v. Montgomery, 95 Wn.App. 192, 198, 974 P.2d 904 (1999). Thus, the trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). The 'burden is on the appellant to prove an abuse of discretion.' Williams, 137 Wn.App. at 743. The reviewing Court may "uphold a trial court's evidentiary ruling on the grounds the trial court used or on other proper grounds the record supports." Id., citing State v. Powerll, 126 Wn. 2d 244, 259, 893 P.2d 615 (1995).

In the present case the trial court made many rulings after proper objections by defense counsel. RP1 53, 94, 95, 111, 114; RP2 66; RP3 40, 52. Among the issues the court addressed in these rulings were issues of hearsay and the appropriateness of application of the medical diagnoses and treatment exception to the hearsay rule. RP1 114; RP3 40. From these various rulings, it is obvious that the trial court is well-versed in the application of the rules of evidence. Several times the trial court admonished the jury

to disregard the question and the answer. RP1 94, 95, 111, 114;
RP3 37.

Much of what the Defendant is complaining about in this case is the admissibility by the trial court of testimony regarding observations of the child victim's demeanor when talking about the sexual assault. See e.g., RP1 112. "A witness may properly describe the manner and demeanor of a child at the time [she] is making . . . statements, and that description may include inferences." State v. Madison, 53 Wn.App. 754, 760, 770 P.2d 662, rev. den. 113 Wn.2d 1002 (1989). Admitting such testimony was not error. Furthermore, as discussed elsewhere in this brief, evidence of this non-verbal, non-assertive conduct such as observations that a victim was crying or trembling when relating events about an incident is not hearsay and is admissible. In re the Dependency of Penelope B., 104 Wn.2d 643, 652, 709 P.2d 1185 (1985).

The trial court did not abuse its discretion in its ruling on the admission or exclusion of testimony in this case and the Defendant's arguments to the contrary should be disregarded and his conviction should be affirmed.

II. Appellant has Not Shown that his Trial Counsel was Ineffective.

The Defendant in this case also argues that his trial counsel was ineffective because he failed to object to the testimony of various State's witnesses. This argument is without merit.

In order to prove ineffective assistance of counsel an appellant must show deficient performance resulting in prejudice. Strickland v. Washington, 466 U.S. 668, 687-289, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Mere differences of opinion regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim. Hendrickson, 129 Wn.2d at 77-78. When reviewing claims of ineffective assistance of counsel, a reviewing court gives great deference to trial counsel's performance and begins the analysis with a strong presumption that counsel was effective. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1241 (1995). Prejudice occurs when, but for the deficient performance by counsel, there is a reasonable probability that the outcome would have been different. In the Matter of the Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). It is the defendant's burden to prove ineffective assistance of

counsel. McFarland, 127 Wn.2d at 335. The defendant must show that there were no legitimate strategic or tactical rationales for his trial counsel's conduct. State v. Hakimi, 124 Wn. App. 15, 22, 98 P.2d 809 (2004) citing McFarland, 127 Wn.2d at 336. Exceptional deference must be given when evaluating counsel's strategic decisions. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Decisions by trial counsel concerning methods of examining witnesses are trial tactics. Hendrickson, 129 Wn.2d at 77, 78. Likewise, decisions by trial counsel as to when or whether to object are trial tactics. State v. Madison, 53 Wn.App. at 763.; State v. Neidigh, 78 Wn.App. 71, 77, 895 P.2d 423 (1995) (failure to object is not ineffective assistance of counsel if it could have been a legitimate trial strategy).

In the present case, trial counsel objected early and often--nearly each time the jury was taken out of the courtroom at which time defense counsel made extensive, knowledgeable, lengthy, detailed, legal argument about why testimony of various State's witnesses should be excluded. RP1 24, 25-27;¹ RP1 44, 49, 50, 51,52, 91, 92, 110, 114; RP2 4, 33-37, 45,46, 52-57; RP3 37-39,

¹ There are four volumes of transcripts for the jury trial proceedings. For ease-of-typing purposes, these volumes will be referred to as follows in this brief: RP1, RP 2, RP3, RP4 (RP 1= 1/30/06; RP2=1/31/06; RP3=2/1/06; RP4=2/2/06).

42-45; RP4 84,85. Defense counsel's decisions about when and whether to object are clearly trial strategy and cannot be the basis for an ineffective assistance of counsel claim. Hendrickson, 129 Wn.2d at 77, 78. Moreover, despite the Defendant's protestations to the contrary, Defense counsel below clearly understood the hearsay rule. See e.g., RP1 91-94; RP2 34-37.

But more importantly here, although defense counsel below objected many times on the basis of "hearsay," the vast majority of what the Defendant now complains about on appeal with regard to his trial counsel is misplaced because the complained-of testimony should not be designated hearsay at all. In the trial below, it seems that everyone involved tried its best to limit the testimony of Rita Trask and Deputy Spahn to only their observations of non-assertive conduct exhibited by the victim S.T. RP3 46-47. "Nonverbal conduct that is not intentionally being used as a substitute for words to express a fact or opinion is not hearsay. An involuntary act such as trembling would be admissible as nonassertive, nonverbal conduct." In re the Dependency of Penelope B., 104 Wn.2d 643, 652, 709 P.2d 1185 (1985)(emphasis in original). The Penelope B. Court went on to give another example of nonverbal conduct in the following passage:

[I]f in a child abuse case someone walked into a place where the child is, or that person's name is mentioned, and the child involuntarily reacts by trembling, running and hiding, screaming, crying. . . . then such would be nonassertive utterances of nonverbal conduct and not hearsay.

Id. at 654. The existence of such holdings by our appellate courts is probably one reason that trial counsel did not object to such demeanor testimony--he knew there was nothing "objectionable" about it. This shows knowledge of the law by trial counsel. It does not show ineffectiveness. Moreover, trial counsel below had ample opportunity to cross examine both the victim and all other witnesses regarding such demeanor testimony. RP1 63. Additionally, defense counsel below did object to testimony by the State's witnesses on the basis of "how many times you say it doesn't make it true." RP1 49, 50,51,52. But, "repeated" Testimony is not necessarily prejudicial: "The statements . . . may repeat and overlap. But the admission of merely cumulative evidence is not necessarily prejudicial error." State v. Dunn 125 Wn.App. 582, 589, 105 P.2d 1022 (2005), citing State v. Todd, 78 Wn.2d 362, 372, 474 P.2d 542 (1970); State v. Acheson, 48 Wn.App. 630, 635, 740 P.2d 346 (1987).

The Defendant simply has not demonstrated that his trial counsel was ineffective, nor has he shown that he has been prejudiced by any alleged ineffectiveness by trial counsel. This argument is without merit and his conviction should be affirmed.

III. The Prosecutor did Not Commit Misconduct in Closing Argument.

To prove prosecutorial misconduct, the defendant must show that the prosecutor's conduct was improper and prejudicial. State v. Gregory, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), citing State v. Kwan Fai Mak, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). Prosecutorial misconduct is reversible error only when there is "a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 757 (1994). However, if there was no proper objection, a request for a curative instruction, or a motion for a mistrial, the issue of a prosecutor's misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill-intentioned that no curative instruction could have prevented the resulting prejudice. State v. Padilla, 69 Wn.App. 295, 846 P.2d 564 (1993). A prosecutor's remarks "must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and

the instructions given to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied 523 U.S. 1007 (1998). Moreover, if the prejudice could have been cured by a jury instruction but the defense did not request one, reversal is not required. State v. Dhaliwal 150 Wn.2d 559, 578, 79 P.3d 432 (2003); State v. Fiallo-Lopez, 78 Wn.App. 717, 726, 899 P.2d 1294 (2003). Additionally, "the absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d at 661; State v. Negrete, 72 Wn.App. 62, 863 P.2d 137 (2003), rev. denied, 123 Wn.2d 1030, 877 P.2d 695 (1994).

None of the remarks by the Prosecutor in closing argument, as listed now by the Defendant on appeal, rises to the level of reversible error. For one thing, as to the "I saw it" remark by the Prosecutor in her closing argument, there was no objection to that statement. RP4 151. However, defense counsel below did address this remark by the Prosecutor in his own closing argument, thereby at least attempting to "deflect" the remark, to the degree that it may have been improper. RP4 154 (Defense counsel bringing up the "I saw it" remark by the Prosecutor and stating to

the jury, "what I saw is irrelevant and not for you to consider.") The State also does not think the remarks about defense counsel by the Prosecutor below were an attempt to draw a "cloak of righteousness" around the State's position--as the Defendant now claims. The Prosecutor's statements may have been inartful but they should not rise to the level of reversible error. After all, as evidenced by defense counsel's own vigorous closing argument here, defense counsel was capable of taking his own "pot shots" at the Prosecutor. RP4 168 (commenting inter alia that the State "wouldn't want to be fair about things").

The Defendant also claims that the Prosecutor improperly argued that the victim's testimony alone was sufficient if the jury found her credible. This was not improper and is an accurate statement of the law. The rule that it is not necessary for the testimony of an alleged rape victim to be corroborated has been the law in Washington since 1913. RCW 9A.44.020(1); State v. Thomas, 65 Wn.2d at 255. RCW 9A.44.020(1) provides: "In order to convict a person of any crime defined in [chapter 9A.44 TCW, sex offenses] it shall not be necessary that the testimony of the alleged victim be corroborated." Even in the context of an actual jury instruction on this issue, our Courts have held that giving this

"no corroboration needed" instruction is not an improper comment on the evidence. State v. Zimmerman, 130 Wn.App. 170, 182, 121 P.3d 1216 (2005), citing State v. Clayton, 32 Wn.2d 571, 574-74, 202 P.2d 922 (1949). Indeed, "[w]hether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel." 11 WPIC, Sec. 45.02, cmt. at 510 (2005 Supp.). And that is what the Prosecutor did here: she argued that the jury could accept the uncorroborated testimony of the victim if they found her credible. RP4 190. This was not improper argument but instead was an accurate description of the current law. Such statements by the Prosecutor below certainly do not rise to the level of "flagrant or ill-intentioned" misconduct as contemplated by our Courts. Henderson, supra. Accordingly, this argument by the Defendant also fails and his conviction should be affirmed.

CONCLUSION

The Defendant has not shown that the trial court abused its discretion in admitting evidence in this case. Nor has the Defendant met the heavy burden of showing that his trial counsel was ineffective or how such alleged ineffectiveness has prejudiced

him. Finally, the Defendant has not shown how the alleged misconduct by the Prosecutor substantially affected the verdict in this case. Accordingly, his conviction should be affirmed.

Respectfully submitted this 19th day of June, 2007.

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