

TABLE OF CONTENTS

I. STATEMENT OF FACTS	1
II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1	1
III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2	6
IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3	12
V. CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases

<u>In Re Personal Restraint of Grasso</u> , 151 Wn.2d 1, 20, 84 P.3d 859 (2004).....	7
<u>State v. Boogaard</u> , 90 Wn.2d 733, 585 P.2d 789 (1978)	5
<u>State v. Jones</u> , 97 Wn.2d 159, 163, 641 P.2d 708 (1982).....	5
<u>State v. Kirkman and Candia</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	10, 11, 12
<u>State v. Ng</u> , 110 Wn.2d 32, 43, 750 P.2d 632 (1988).....	4
<u>State v. Williams</u> , 137 Wn. App. 736, 154 P.3d 322 (2007)	7
<u>State v. Woods</u> , 143 Wn.2d 561, 602, 23 P.3d 1046 (2001)	7
<u>United States v. Renville</u> , 779 F.2d 430 (8 th Cir. 1985)	7

Rules

ER 803(a)(4)	6, 7
--------------------	------

I. STATEMENT OF FACTS

The State, for the most part, accepts the statement of facts as set forth by the appellant. Because of the limited nature of the issues on appeal, where additional information is needed, it will be provided in the argument section of the brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error is a claim that the trial court denied the defendant a fair trial when it failed to declare a mistrial after the jury had indicated that it was deadlocked.

The State has a different interpretation of these facts than the defendant does.

On November 13, 2006, the court advised the parties that one of the jurors had taken ill. Juror Number 9 apparently had become quite ill and it was decided by the parties that they would stipulate and go with eleven jurors. (RP November 13, 2006, 5).

Later the jury sent a note to the court which indicated as follows:

We are not able to agree on a decision. What should we do if no one is willing to change their decision?

(RP November 13, 2006, 7; CP 73)

The judge and the parties gathered and the parties were asked by the court how they wanted to proceed on this. The deputy prosecutor

indicated that he wanted the jury foreman to be questioned about further deliberations. The court asked the defense attorney what he wanted to do and he indicated as follows:

MR. WALKER (Defense Attorney): I'm going to have to agree with Mr. Jackson (the Deputy Prosecutor) on this. I think it's appropriate to ask them if they feel like they could move toward a decision. It sounds like maybe they can't, but it seems like, you know, six hours of deliberation including Thursday seems awfully short. But at the same time, I'm very hesitant to squeeze a jury and make them do something.

THE COURT: What I usually do is talk to just the foreman rather than bringing in a group and asking a group question.

Do you have any objection to that procedure?

MR. WALKER: No, Your Honor.

THE COURT: Bring in the foreman, please.

(RP November 13, 2006, P.8, L.10-23)

The court then questioned the foreperson and determined that they had been able to reach a unanimous verdict on one count but had hung up on the other six. (RP November 13, 2006, 9-10). The court invited either counsel to talk to the jury foreperson and neither one of them wanted to do so. (RP November 13, 2006, P.10). After talking to the juror therefore, the court told them to keep deliberating.

It would certainly appear from the transcript that this procedure and approach was agreed to by both sides and concurred with by the trial court.

The next day, November 14, 2006, the jury arrived at a verdict dealing with all of the counts. A juror note that was crossed out was found and filed with the court documents. There is absolutely no indication from any source whatsoever that this was ever presented to the court or was even given to the bailiff. In fact, the log sheet kept by the court and filed on November 14, 2006, (CP 74) does not indicate that any note was presented to the court before the verdict on the 14th. The only notations on November 14 (on page 12) are that the court resumed session at 1:12 p.m. and that the jury was present and delivered its verdict on 1:17 p.m. It is interesting to note that the notation for November 13, 2006, indicated not only the question but also that the parties had met and agreed to the approach they wanted to take concerning the jury. Further, on the note from the 13th, there is an interlineation made by the trial judge concerning the time that it was received and responded to. His written notation is: “Please continue to deliberate. 3:05 Judge Bennett.” (CP 73).

Appellate courts will generally not inquire into the internal process by which the jury reaches its verdict. “The individual or collective

thought processes leading to a verdict inhere in the verdict and cannot be used to impeach a jury verdict.” State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988).

There is nothing in this record to indicate which way the jury was leaning at the time on the 13th that the jury foreman was questioned and indicated that they had a verdict on one but no verdict on the other counts. Counsel on appeal attempts to use the “jury note” from the following day, November 14, as an indication that the further deliberation forced them into finding the defendant guilty. In fact, as indicated, there is no indication that that note ever was received by the court and further, that the jury had already agreed on one verdict the day before. It is just as easy to argue that on the 13th they had found him guilty of one count and were hung up on the multitude of not guilty counts that they found later on. If so, than this would inure to the benefit of the defendant. Or, it could have been that he was acquitted on one but they were hung up on the others. There is absolutely no way to tell and there is no indication that this has prejudiced or damaged the defendant in any way whatsoever. Further, this was all agreed to by the parties when they agreed with the court to bring in the foreperson and question concerning what was going on and then ask for further deliberations.

The appellate court reviews a trial court's decision regarding whether to discharge a jury after it reports a deadlock for abuse of discretion. State v. Jones, 97 Wn.2d 159, 163, 641 P.2d 708 (1982). A trial court's decision to declare a mistrial when the judge considers a jury deadlocked is accorded great deference. Jones, 97 Wn.2d at 163. The rationale for this is that the trial court is in the best position to access all the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate. The factors that the court considers include, but are not limited to, the length of time the jury had been deliberating, the length of the overall trial, and the volume and complexity of the evidence. Jones, 97 Wn.2d at 164.

The State submits that the coercive factors that were noted in Jones, supra, and also in State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978) are not present in our situation. For example, in Boogaard, the trial judge basically told the jury to arrive at the verdict in 30 minutes. This coercive pressure was not acceptable to the Supreme Court. In Jones, the trial court did not seek any opinion from the parties or give them an opportunity to object or contest a mistrial. In Jones, the trial court

attempted to limit the jury to approximately 90 minutes after discussing the length of the trial and the possible difficulties of dealing with a hung jury.

These factors are not present in our case. The trial court brought the parties in, had a full and complete discussion with them, got the agreement of the parties concerning how they wanted to approach this and asked the attorneys if they wanted to question the foreperson. There is absolutely nothing that indicates that this is coercive or denied the defendant a fair and impartial jury.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the appellant is that the trial court denied the defendant a fair trial when it denied a hearsay objection. Specifically, the defense tried to prevent Dr. John Stirling, M.D., from testifying about medical history from the victim, arguing that it was hearsay. The trial court allowed the testimony to go in as a statement for purposes of medical diagnosis or treatment.

A hearsay statement is admissible when it satisfies the medical treatment exception under ER 803(a)(4). This rule allows: “statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the

inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” ER 803(a)(4).

This rule applies to statements reasonably pertinent to diagnosis or treatment. State v. Woods, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001). A party generally demonstrates a statement is reasonably pertinent when (1) the declarant’s motive in making the statement must be to promote treatment, and (2) the medical professional must have reasonably relied on the statement for purposes of treatment. In Re Personal Restraint of Grasso, 151 Wn.2d 1, 20, 84 P.3d 859 (2004); State v. Williams, 137 Wn. App. 736, 154 P.3d 322 (2007). This is further clarified in United States v. Renville, 779 F.2d 430 (8th Cir. 1985) where the court points out that the crucial question under the rule is whether the out-of-court statement of the declarant was “reasonably pertinent” to diagnosis or treatment. Renville, at 436.

In our case, the doctor makes it clear that his examination was for purposes of treatment and diagnosis of a teenage girl that he was asked to examine. What further complicates this matter is even though the defense raised a motion in limine to prevent the doctor from testifying, the defense also made it quite clear to the trial court that they wanted to use Dr. Stirling in their case.

MR. WALKER (Defense Attorney): . . . We would - - he's (Dr. Stirling) on my list, too, Your Honor. I do plan to ask him about the hymen being fully intact. I know he's going to say it's like a gym sock and you can do all kinds of things with it and it's just fine after that. But I do want him for that purpose. He also examined her and found absolutely no indications of physical abuse, no scars. Because the child indicates that she had been cutting herself all over her body and he found no scarring or indication of that. So I am - I am going to bring him in myself for his physical examination, but the other part is just hearsay, Judge.

(RP 32, L.7-17)

What is interesting about this is that for this to have any relevance or purpose, the defense would necessarily have to raise the history provided by the child. This is exactly what they were objecting to but they also want to utilize it.

When Dr. Stirling testified, he made it very clear to the jury the significance and importance of the medical history:

QUESTION (Deputy Prosecutor): And what kind of information are you gathering from the child?

ANSWER (Dr. Stirling): From the child?

QUESTION: Mm - hmm.

ANSWER: Well, we want to know - most important thing, I guess, the information that I'm seeking when I try to get the history from the child, is what does the child understand about what happened to them. How has whatever happened to them affected their physical health or their mental health, because it's a doctor's office and before the child leaves we should have some estimate as to how

they're doing in terms of being physically healthy and mentally healthy. I'd like to get some impression as to how safe the child feels in their environment before I send them back there. Just as we do with anybody who has any kind of abuse.

QUESTION: Is it fair to say that medical history then assists you in medical diagnosis and treatment?

ANSWER: Yes. It's a major part of the diagnosis – diagnostic process.

(RP 257, L.14 – 258, L.8)

The doctor indicated that he saw the victim in this case and took a history from the child. (RP 258-259). The history was quite extensive (RP 259-270) and after the history he then conducted a physical examination of the child. (RP 270-271).

During part of the medical history that the doctor was taking, there were indications that the child had attempted suicide because of what had occurred. (RP 269-270). The doctor indicated that on his physical examination of the girl he did not find anything remarkable. (RP 271). He was then asked to explain how it was that given the nature of the history provided by the child that there would not be physical signs. Among the other things he talked about concerning that was the age of the teenager and also the fact that her body was undergoing dramatic and substantial changes. (RP 272-276).

As part of cross examination, the doctor again indicated the significance and importance of a medical history. At one point, he talked about the medical history as “taking and servicing medical diagnosis.” (RP 281, L.20-21). He further indicated that the significance of this is “my job, as I had indicated, is to assess the patient that’s in front of me and take care of her medical needs.” (RP 283, L.6-8).

The State submits that the doctor has demonstrated that the out-of-court statements from the teenager were reasonably pertinent to diagnosis or treatment. There is nothing to indicate that the doctor was treating this as a forensic examination for purposes of the courtroom. Rather, the doctor’s comments all go to the questions of treatment, diagnosis and that these are areas that he would reasonably rely on.

The doctor was not giving an opinion in this particular case. In many ways this is similar to the recent case of State v. Kirkman and Candia, 159 Wn.2d 918, 155 P.3d 125 (2007). There, the State Supreme Court allowed the testimony from the doctor concerning his medical history taken from the child and the fact that there was no physical findings to support an opinion. The testimony of the doctor in the Candia portion of the case is strikingly similar to the one in this case:

We also agree with the State on this issue. Dr. Stirling’s testimony was particularly relevant because Candia’s jury was presented with what might appear to be a discrepancy:

C.M.D. alleged that she had been raped numerous times by an adult, but there was no medical evidence so support these allegations. In cross examination, Candia's counsel focused on C.M.D.'s allegations in order to argue that the medical examination showed that C.M.D. had not been raped as she claimed. Cases involving alleged child sex abuse make the child's credibility "an inevitable central issue." (cite omitted). Where the child's credibility is thus put in issue, a court has broad discretion to admit evidence corroborating the child's testimony.

Dr. Stirling did not come close to testifying on any ultimate fact. He never opined that Candia was guilty, nor did he opine that C.M.D. was molested or that he believed C.M.D.'s account to be true. Dr. Stirling testified only that he was able to communicate with C.M.D. because she "had good language skills for her age, spoke clearly." (cite omitted). His testimony was content neutral, focusing upon the clear communication, rather than the substance of matters discussed. The doctor's testimony did not constitute manifest error.

- State v. Kirkman and Candia, 159 Wn.2d at 933.

This discussion then ties in with the earlier portion of this response where it was made clear that the defense also wished to use Dr. Stirling to show the inconsistencies of this child witness. The defendant was found guilty on Count 6 – Rape of a Child in the Third Degree. The difference in the count that he was found guilty of was that there was DNA testimony concerning a shirt that he had used to clean himself and her up with after the child had claimed a date specific incident of sexual activity. (RP 108, 214, 355-356). The DNA came back with both her DNA and his seminal DNA. (RP 325-327). The jury, thus, had additional information and

scientific evidence to warrant a finding of guilt on a particular count. Elsewhere, it appears that the defense tactic of utilizing the doctor was successful. As indicated in the Kirkman and Candia case, Dr. Stirling did not come close to telling the jury that he thought a defendant was guilty or that he believed the child's account. What he was concerned about as treating physician, was the physical and mental well being and health of a child who had made complaint of multiple acts of sexual impropriety and had further made claim of attempted suicides because of this occurring. As the doctor indicated, these statements were necessary for diagnosis and treatment and to help his patient.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the appellant deals with conditions of community placement for his conviction in Count 6 of Rape of Child in the Third Degree. The felony judgment and sentence filed in this matter (CP 108) includes as an appendix of additional conditions of the sentence that were suggested and incorporated from the pre-sentence investigation report submitted by the Department of Corrections. The State agrees that some of these provisions that DOC has requested need clarification by the trial court and the State agrees that it would be appropriate to return this to the trial court for that further clarification.

V. CONCLUSION

The trial court should be affirmed in all respects as it relates to the trial of this case. The State agrees that clarification may be needed for some of the community placement requirements in the judgment and sentence.

DATED this 27 day of September, 2007.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

