

FILED
COURT OF APPEALS
DIVISION II

NO. 37211-8-II

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

STATE OF WASHINGTON
[Signature]
DEPUTY

STATE OF WASHINGTON, Respondent

v.

GERALD WILLIAM JOHNSON, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN F. NICHOLS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-00400-2

BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The state accepts the Statement of the Facts as set forth by the defendant in the Brief of Appellant. Where additional information is needed, it will be supplied in the argument section of the brief.

II. RESPONSE TO ASSIGNMENTS OF ERROR 1 AND 2

The first two assignments of error raised by defendant deal with a claim that the State elicited evidence that the defendant's wife believed that the defendant was guilty and that the complaining witness was telling the truth. The first claim is that this violated his right to a fair trial and the second claim is that, because there were no objections to this, that this constitutes ineffective assistance of counsel.

The appellate court will not ordinarily consider evidentiary objections that were not presented to the trial court. RAP 2.5(a)(3); State v. Mendoza-Solorio, 108 Wn.App. 822, 834, 33 P.3d 411 (2001). The appellate court makes an exception however when the defendant is able to demonstrate a manifest error that affects a constitutional right. The right to effective counsel in criminal proceedings is a constitutional right. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). Another way of looking at this is the common statement that

an evidentiary error is not of constitutional magnitude and is prejudicial only if within reasonable probabilities, the outcome of the trial would have been materially affected, had the error not occurred. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). The error is harmless if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Nghiem v. State, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994).

It is clear from the record in our case that objections were not made to this evidence. Further, it is also obvious from the record that the defendant attempted to use this evidence to his advantage. If a defendant does not object at trial, the defendant cannot challenge the testimony for the first time on appeal. The exception under RAP 2.5(a) for manifest error affecting a constitutional right is a narrow one. State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). Requiring defendants to meet a high threshold to raise issues for the first time on appeal ensures the parties give the trial court an opportunity to obviate error and prevent prejudice to the defendant. City of Seattle v. Heatley, 70 Wn. App. 573, 584-585, 854 P.2d 658 (1993). The exception “is not intended to swallow the rule, so that all asserted constitutional error may be raised for the first time on appeal. Indeed, criminal law has become so largely

constitutionalized that any error can easily be phrased in constitutional terms.” State v. Trout, 125 Wn. App. 313, 317, 103 P.3d 1278 (2005).

Apparently during the course of the trial it came to light, to both the State and the defense, that there had been a supposed meeting between the alleged victim, some of her family members, and the defendant’s wife after the allegations had come to light. (RP 346-347). This information came to light during the case even though there had been multiple interviews of these parties and no one had ever mentioned it before. The State made a presentation to the court setting forth what it understood witnesses would be discussing and it appears that the defense was not objecting to this:

MR. SOWDER (Defense Attorney): I was wondering what I was going to say. I think mostly what we talked about this afternoon is really not a whole lot to do with the case, it’s sort of a side show.

When we originally went out there I thought the issue was whether or not Stacy’s going to say that she said there was a penis mole or not, but she’s not saying there’s not.

However, I can’t say the State cannot put on this evidence, maybe it does have some tangential relevancy. So that’s all I could say. We were out there interviewing the folks.

- (RP 351, L9-20)

The Judge, after hearing additional comments, indicated that he was going to limit the nature of what the witnesses would be discussing

and primarily it was the evidentiary questions dealing with whether or not there was some type of lesion on the defendant's penis. (RP 356).

Apparently, the child had made comment to the defendant's wife concerning a mole on or near his penis and also demonstrated for her a technique of masturbation that the defendant used. This apparently upset the defendant's wife.

When this came before the jury then the witnesses that were called were extremely limited and were not allowed to testify concerning what was actually said until the complaining witness testified about what she had told the woman and what she had demonstrated to her. (RP 385-388). It's during this recalling of the complaining witness that, for the first time, this concept of the defendant's wife trying to commit suicide came to light. The complaining witness said that she saw the defendant's wife overdosing on some pills and that she had been told about this by the wife and that she had actually seen the pills in her hand. (RP 388). The child also made it clear though to the jury that this had nothing to do with what she had talked about with the defendant's wife:

ANSWER (Complaining witness): We separated from each other. The conversation about the masturbation and his penis was completely separate from the suicidal attempt later that night.

-(RP 389, L19-21)

Rather than raise objections to this, the defense attorney then attempted to use all this information to attack the validity of the complaining witness's story and her overall truthfulness. She testified that she has told her stories to the defense attorney and to the prosecutor at least a half dozen times. (RP 395). Yet, the defense attorney makes it clear that this was the first time that she had ever discussed with the prosecution or the defense this "so called" meeting in the garage. (RP 396).

The defense attorney then ably ties all this together in his closing statements to the jury. During the defendant's case in chief, he had called an expert who examined the defendant's private parts and found that there were no lesions as the child had described, nor was there any appearance that anything had been removed or changed. Further, when the defendant testified, he brought out the fact that no one had asked to examine him in this fashion and he was always ready, willing, and able to show them that he did not have this mark that the child had so adamantly and forcefully described. The defendant's wife also testified and indicated that the attempted suicide had absolutely nothing to do with the statements by the child and she flat out denied any type of meeting in the garage with the child and her family.

In the closing argument by the defense attorney, he refers to this as "a case of the purple penis mole". (RP 582). He describes this as a

teenager making up a story. (RP 583). He lets the jury know that there is no DNA, no physical examinations, and no physical evidence of any kind whatsoever to support the claims of the child. (RP 585). He then goes into the defense witnesses who discussed with the jury the fact that there was no mole on the defendant's penis. (RP 586-587). He touched briefly on the wife's suicide attempt as follows:

Now, you might think, it doesn't take a lot of CSI shows to figure this out, if you think there's something there, you ought to go look. You don't need to try and digest or suggest that evidence exists because his wife tries to commit suicide one night because she says – even though she says she didn't say that, but that's because she was so shocked about that.

I mean, if you think something's there, you look for it, you don't try and look for it inferentially.

-(RP 589, L 5-15)

He then discusses with the jury the other witnesses and claims that the mother of the alleged victim and others have adapted their testimony, and further, the fact that no one discussed this for over two years until just during the trial. (RP 590-592). The defense attorney then goes back to the central feature of his argument and claims, and that was, “and if the mole isn't there, then how can you believe [the complaining witness] on anything that she testifies? It's kinda like it's the central feature of the case. She says this big thing's there, and it isn't there.” (RP 593, L 16-20).

The defense attorney then goes into a discussion about the fact that because of the defendant's work schedule, he was never really alone with this child. (RP 596-597; 602).

The defense attorney also gives the jury a possible reason that the child would lie about this:

And then I think we need to consider what - - a little bit inference on the dynamic of Mary, [complaining witness], and Greg. I don't think these folks get along too well. I think [complaining witness] basically said so. At some point after that - this is November, she's off living with a boyfriend.

She's spending a considerable amount of time being sent back to her father's house in Clackamas, Oregon, which I think you actually can take that in consideration where these events occurred because there's a considerable amount of time she's over there, I think for six to nine months out of the year at one point, and simply not over here except for visitation.

The point is she's sent - being sent back there back and forth, so I don't think they get along.

So we have a situation where she discovers a \$100 bill on her mother's birthday, they don't get along, so a conceivable explanation as why she decides to implicate Mr. Johnson is he wants to get back at her - or she wants to get back at her mother. She wants to hurt her mother. A good way to hurt her mother is to implicate her best friend, her father figure, her uncle figure, to get him implicated in the crime of sexual contact, which how can you prove it?

I mean, sexual contact is one of those easy accusations to make but it's very hard to deal with. It requires a momentary touching for sexual gratification. Leaves no

fingerprints, no DNA. It's something anybody's vulnerable to, and you need to be careful about finding guilt on it.

But I'd suggest to you that's a motivation for her to come up with this story to get back at Mr. Johnson, in some ways to get back at her mother, and then her mother circles the gates, circles the wagons, to protect everyone.

I mean, [complaining witness's] testimony, and the State spent some time talking about her demeanor. She wasn't a young woman who got up here and cried. She wasn't seemingly affected by anything we were doing, she didn't look unhappy, she didn't appear to be describing a tragic event, she didn't seem to be affected by it at all, and in some sense she had a certain amount of light heart, light-heartedness about it.

Again, she testified three times. She was interviewed several times, but not an unreasonably amount (sic). I think the last time I talked to her is a year ago. So there's not a lot of conversation going on, especially if you tend to believe – which I don't think the evidence supports a belief that Mr. – her stepfather never talked to them about the event. It seems hard to believe that he went through two years of this and never got any more information than what he had here.

- (RP 598, L14 – 600, L 21)

The defense attorney also, in closing argument, touches on the jury instructions (CP 92), and in particular instruction number 13, which indicates that no corroboration is necessary. The defense attorney uses this instruction to also fit into his general argument as follows:

No. 13 is the one about corroboration, which is the one that says corroboration is not necessary. But, again, it doesn't mean just because it is no corroboration that you can't decide not guilty. I mean, I'm up here claiming he's not

guilty because the State's failed to prove its proof for the various reasons I've cited. The fact there is no corroboration doesn't mean you can't go to not guilty.

So, taken all in consideration and the clarity of her – the testimony and their age when they testified these occurred, and particularly get back to the purple mole, which I keep going back to because it's the most salient picture here. The purple mole is not there. She said it was. It has to be there for her (sic) to have done what he – they say he – Mr. Johnson did in reference to [complaining witness]. If it's not there that, you know, leads actually to the finding of not guilty.

- (RP 615, L3 – 21)

Appellate courts are and should be reluctant to conclude that questioning, to which no objection was made at trial, gives rise to “manifest constitutional error” reviewable for the first time on appeal. The failure to object deprives the trial court of an opportunity to prevent or cure the error. The decision not to object may be a sound one on tactical grounds by competent counsel, yet if raised successfully for the first time on appeal, may require a retrial with all the attendant unfortunate consequences. Even worse, and we explicitly are not referring to counsel in this case, it may permit defense counsel to deliberately let error be created in the record, reasoning that while the harm at trial may not be too serious, the error may be very useful on appeal.

- (State v. Madison, 53 Wn. App. 754, 762-763, 770 P.2d 662 (1989))

In our case, the trial court limited the approach that was to be taken, noted that there were no objections to this type of questioning, and

further that the defense attorney ably attempted to use this as a sword against the complaining witness during the case. The admissibility of evidence is within the discretion of the trial court and will not be disturbed on appeal absent a showing of abuse. This rule only makes sense when there is an objection raised and the trial court's attention is drawn to the situation or the problem. Here, no one raised such an objection and the information was utilized by the defense to attack the credibility of the child on a key physical fact that the child says exists, yet their expert and other witnesses say did not exist.

To show ineffective assistance of counsel, the defendant must show that counsel's performance was deficient, and the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). When trial counsel's actions involve matters of trial tactics or strategy, the appellate courts are hesitant to find ineffective assistance of counsel. State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262 (1983). Decisions of when or whether to object to either questioning or admission of evidence is an example of trial tactics and will not constitute incompetence of counsel justifying reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

The State submits that there were tactical reasons by the defense to allow this information to go to the jury without objection. The information

that it complained of came to light during the course of the State's case in chief after at least two years of multiple interviews with the child and other witnesses. They never mentioned it until after there was an opportunity to obtain and exchange additional information. The trial court, in making its ruling, touched on this concern: that information was being exchanged during the course of the trial between the people that were anticipated to testify and those that were sitting in the courtroom listening. The defense attorney attempted very ably to use this against the complaining witness and her credibility. Further, and of much more significance, is the claim of some type of physical abnormality about the defendant's penis and the clear testimony of the defense expert that it did not exist. The performance of the defense attorney was not deficient, but was actually tactically sound under the circumstances.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant is a claim that the trial court denied him his right to due process when it refused to allow him to present employment records to demonstrate when and where he was working during the time period in question. The defense claims that this is relevant exculpatory evidence and should have been allowed.

This matter came to light with the trial court several days into the trial when the defense presented a number of loose documents that purportedly were payroll slips and other payroll records concerning the defendant's employment. There was never any discussion on the record that this was going to be offered through anyone other than the defendant. There was never any indication that there would be any way to authenticate any of the documentation. Nevertheless, the defense maintained that these payroll records would basically show that the defendant and his wife were both working during the time that the complaining witness says that he was having access to the child. (RP 294). The State took the position that they hadn't been advised of these particular documents and thus there was a violation of the discovery rule. The court looked at it a little bit differently. The trial court was concerned, from the way the testimony had been previously going, that no one was disputing that the defendant had been working or was disputing that he was working multiple jobs for long hours. This matter was raised initially with the trial court to give the court a "heads-up" as to what was anticipated to be potentially coming. The defense attorney indicated to the court that he wasn't sure whether or not the defendant was going to testify on his own behalf, but he expected that he would and that if he were to do

that then he would have the records identified and offered into evidence to corroborate what the defendant was saying. (RP 296, L1-8).

After hearing the discussion between the attorneys concerning these records and the failure to provide them for omnibus and discovery purposes, the court looked at it a little bit differently:

THE COURT: ...let me make short shrift of this. Discovery according to the omnibus, discovery was all supposed to be taken care of by 11/07/05. I think Mr. Harvey (Deputy Prosecutor) is correct if this is showing up for the first time today.

However, not even touching on that, I don't see the relevance of this documentation going to the jury at this juncture. I – it – there is nothing out there that - ...

- really makes all these records relevant for the jury to look at.

MR. SOWDER (Defense Attorney): He has to testify, and the question would be, you know, where were you working during 2002 –

THE COURT: If Mr. Harvey were then to raise the issue that you're not working, then they become relevant. But –

MR. SOWDER: Okay.

THE COURT: - Just on the testimony I've heard so far –

MR. SOWDER: So they could become relevant if you –

THE COURT: It's possible. But there – there's still the discovery problem. This stuff should have been out there and been out – available to everyone before today.

But as of this moment, I'm stressing the relevancy issue more than anything else, ...

- (RP 302, L1 – 303, L5)

The court went on to further explain it didn't see the relevance based on the testimony so far and the fact that no one was contesting that the defendant had been working. The defense attorney finishes off this discussion by indicating "At some point, though, I want to make an offer of proof through him." (RP 303, L21-22). The trial court indicated that that would be fine.

The items were not presented to the court as potential exhibits, they were not offered or presented in any way through the defendant or his wife when they testified, and there was no request for an offer of proof made by the defense at any time. These items were never offered to the court for purposes of admission as exhibits.

The defendant's wife, Stacy Johnson, testified that they were both working during the periods in question and that they were both working long hours. (RP 442-443). There was no objection by the State to any of this nor was there any questioning concerning it. The defendant, when he testified, indicated that he had work records and they showed that he was working long hours at various jobs. (RP 523-525). There was no objection

to this nor was there any cross-examination of the defendant to dispute or argue this fact.

The admission or exclusion of evidence is in the discretion of the trial court. It will not be reversed absent a showing of abuse of the trial court's discretion, even if the appellate court might have excluded the proffered evidence had it been in the trial court's position. State v. Stubsjoen, 48 Wn. App. 139, 147, 738 P.2d 306 (1987). To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value) and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality). State v. Baldwin, 111 Wn. App. 631, 638-639, 45 P.3d 1093 (2002); State v. We, 138 Wn. App. 716, 158 P.3d 1238 (2007).

The defense attorney candidly admitted to the trial court that he wasn't planning on using these records until testimony and then still wasn't sure whether or not he was going to be using them. (RP 295). Nevertheless, he did make the statement to the trial court that he would be making an offer of proof to show the relevance of these records at the time that the defendant testified. He never did this and this matter was never formally before the trial court as an offer and rejection of evidence. It appears to simply have been dropped by the defense because the

information got to the jury without any objection or contesting of it by the State. Simply put, no one was disputing the accuracy of the testimony of the defendant and his wife concerning their work habits and records. There has been no showing that the court was manifestly unreasonable or exercising its discretion on untenable grounds when indicating to the defense that it was inclined not to allow this to go to the jury unless the State was contesting or disputing the information. There is nothing unreasonable about the trial court's action.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 4

The Fourth Assignment of Error raised by the defendant is a claim that the trial court violated the defendant's constitutional rights when it gave a jury instruction that commented on the evidence.

The trial court's instructions to the jury (CP 92) contained, as instructions number 13, that, "In order to convict a person of a sexual offense against a child, it shall not be necessary that the testimony of the alleged victim be corroborated." The defendant in the Appellant's Brief refers to this as a comment on the evidence by the judge.

The Appellate system reviews de novo an alleged error of law in jury instructions. Del Rosario v. Del Rosario, 152 Wn.2d 375, 382, 97 P.3d 11 (2004). Jury instructions are proper when they permit the parties

to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. Del Rosario, 97 P.3d at 382.

The Washington Constitution forbids a judge from conveying to a jury the court's opinion about the merits or facts of a case. Washington Constitution, Article 4, §16. But an instruction that states the law correctly and is pertinent to the issues raised in the case does not constitute a comment on the evidence. State v. Johnson, 29 Wn. App. 807, 811, 631 P.2d 413 (1981). An instruction that accurately states the applicable law is not a comment on the evidence. State v. Zimmerman, 130 Wn. App. 170, 181, 121 P.3d 1216 (2005); State v. Ciskie, 110 Wn.2d 263, 282-283, 751 P.2d 1165 (1988). RCW 9A.44.020(1) provides: "In order to convict a person of any crime defined in Chapter 9A.44 RCW, Sex Offenses, it shall not be necessary that the testimony of the alleged victim be corroborated." The State submits there is no error.

V. RESPONSE TO ASSIGNMENT OF ERROR NO. 5

The fifth assignment of error raised by the defendant is a claim that the trial court gave an exceptional sentence based, not on the jury's findings, but on his own findings and thus violated the defendant's rights.

As part of the case, was a special verdict that was given to the jury discussing one of the aggravators that must be presented to a jury for

finding beyond a reasonable doubt. The special verdict dealt with whether or not the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years, which was manifested by multiple incidents over a prolonged period of time. The presiding juror answered this question yes. (CP 114).

At the time of sentencing, the parties had the pre-sentence investigation report and the prosecutor made mention of the special finding by the jury. The prosecutor equated the ongoing pattern of sexual abuse with the time period needed to perform the grooming process on the victim. (RP 705-706).

After the court had heard from all the parties involved, it agreed with the jury's special verdict finding and indicated as follows:

THE COURT: For the record, I do find that there is grooming behavior involved in the abuse of this particular victim. Because of the nature of the pattern of the time that was alleged and the events that occurred and what she testified to, there is no other way to – no other – nothing else you can conclude, that she was groomed, given her tender age.

- (RP 724, L6-13)

When the court entered its felony judgment and sentence (CP 253) it included under section 2.4 the exceptional sentence above the standard range and wrote in, "the court adopts the special verdict as a factual basis for the exceptional sentence". (Felony Judgment & Sentence (CP 253,

Page 3, § 2.4)). RCW 9.94A.535 discusses the departures from the SRA guidelines. One of the aggravators is under (g) “The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time”.

The courts have previously found that a sentencing court may consider other instances of sexual abuse or approaches to sexual abuse to explain that a defendant engaged in a pattern of sexual abuse to support its decision to impose an exceptional sentence. The court has indicated that it can consider incidents of abuse to justify an exceptional sentence based on a pattern of abuse because the listed aggravating factors in the statute are merely illustrative, not exclusive. State v. Overvold, 64 Wn. App. 440, 445, 825 P.2d 729 (1992). An appellate court will reverse a sentencing court’s decision only if it finds a clear abuse of discretion or misapplication of the law. State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440 (1990).

In our situation, the trial court had the benefit of listening to the entire case, had the finding by a jury beyond a reasonable doubt of an aggravator dealing with an ongoing pattern of sexual abuse of the same victim under the age of 18 years, manifested by multiple incidents over a prolonged period of time. The prosecutor in interpreting this looked on it as a period of time for the grooming of the child by the perpetrator. The

trial court went along with that but also clearly indicated on the record that part of that finding was the fact that it occurred over a lengthy period of time. This is also the indication that the trial gave when declaring the exceptional sentence as written into the Judgment and Sentence form. The State submits that the trial court did not abuse its discretion in this matter.

VI. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 6 day of Nov., 2008.

Respectfully submitted:

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By:


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

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STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,
Respondent,

v.

GERALD WILLIAM JOHNSON,
Appellant.

No. 37211-8-II

Clark Co. No. 05-1-00400-2

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On November 7, 2008, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk Court Of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	John A. Hays Attorney at Law 1402 Broadway, Suite 103 Longview, WA 98632
Gerlad William Johnson DOC# 293995	

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Jennifer M. Casey
Date: November 7, 2008.
Place: Vancouver, Washington.