

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
DEPUTY

NO. 37375-1-II

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

STATE OF WASHINGTON, Respondent

v.

BERT LEE WIDMER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN F. NICHOLS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-01670-0

BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The State accepts the statement of facts as set forth by the appellant.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the trial court allowed the State to exploit the complaining witness's blindness in front of the jury. The claim is that the trial court abused its discretion when it denied defense counsel's request to have the complaining witness take the witness stand before the jury entered the courtroom.

In determining whether a trial irregularity deprived a defendant of a fair trial, the appellate court examines several factors: (1) the seriousness of the irregularity; (2) whether challenged evidence was cumulative or other evidence properly admitted; and (3) whether the irregularity could be cured by an instruction to disregard the remark, or action, and would be an instruction which the jury is presumed to follow. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987); State v. Weber, 99 Wn.2d 158, 165-166, 659 P.2d 1102 (1983). Because the trial judge is in the best position to determine the prejudice of circumstances at trial, the appellate

court reviews the decision to grant or deny a request for abuse of discretion. Weber, 99 Wn.2d at 166.

As set forth in Holbrook v. Flynn, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986), whenever a courtroom arrangement is challenged as inherently prejudicial, the question is not whether jurors actually articulated a consciousness of a prejudicial effect, but whether there is an unacceptable risk of impermissible factors coming into play. Holbrook, 475 U.S. at 570. If the challenged practice is not found inherently prejudicial and the defendant fails to show actual prejudice, the inquiry is over. Holbrook, 475 U.S. at 570.

The area of concern raised by the defendant in our case took place in the morning hours of October 2, 2007 before the jury was called in. The State submits that this was not an actual motion, nor was it seriously brought by the defense attorney. Further, as the below quote will indicate, the defense attorney agrees with the court's position and does not raise this again.

MR. BARRAR (Defense Attorney): Is there any chance, your Honor, that we could call the witness and have her seated before the jury comes in so she can make it to the stand without the jury enduring any sympathy?

THE COURT: (Laughs).

MR. BARRAR: Just a request.

THE COURT: I don't see anything wrong with having her come forward. I think everyone knows the situation.

MR. BARRAR: Okay.

THE COURT: I don't think it's any real big shock to anybody. Okay.

-(RP 152, L4-14)

The State submits this is not a trial irregularity nor was this actually a formal motion. In fact, the defense never raises it again at any point in the proceedings and does not treat it as something of major significance as they pursue their line of defense. Further, this is not an "outside influence" as cited by counsel in some of the cases referred to in the appellant's brief. As the trial court indicates everyone knows the situation here: the complaining witness is blind. As indicated, the trial court is in the best position to determine what impact, if any, this will have and, obviously, the trial court did not think that it was a serious motion brought by the defense and it certainly appears that it was not a serious request made by the defense.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim of ineffective assistance of counsel for failing to object to the prosecutor's witnesses referring to the complaining witness as the "victim". The defendant maintains that he is raising this as both a reviewable constitutional infringement of his right to a jury trial as well as ineffective assistance of counsel. (Appellate Brief page 12).

To establish that the right to effective assistance of counsel has been violated, the defendant must make two showings: that counsel's representation was deficient and that counsel's deficient representation caused prejudice. State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). A defendant must affirmatively prove prejudice, not simply show that the errors had some conceivable effect on the outcome. In doing so, the defendant must show that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. State v. Crawford, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006). Finally, deciding whether and when to object to the admission of evidence is a classic example of trial tactics and

will not be the basis for ineffective assistance of counsel. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

No court in the State of Washington has ruled that the use of the term “victim” constitutes an improper opinion or will be the basis of ineffective assistance of counsel. The defendant asserts that his counsel was ineffective for failing to object when police witnesses referred to the complaining witness as “victim” in their testimony. The defendant argues that this constituted impermissible comment on his guilt and the opinion testimony invaded the province of the jury. Generally, admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a “manifest” constitutional error. “Manifest error” requires a nearly explicit statement by the witness that the witness believed the accusing victim. State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). Moreover, the use of the term “victim”, while not ideal, does not necessarily imply that the defendant is the victimizer and, thus, does not constitute an opinion that he was guilty of the charged crime. Using the term “victim” is not the same as expressing an opinion that the defendant was guilty of a crime; the term “victim applies to anyone who suffers either as a result of ruthless design or incidentally or accidentally”. Webster’s Third New International Dictionary 2550 (2002).

In State v. Alger, 31 Wn. App. 244, 640 P.2d 44 (1982) the court read a stipulation of the parties to the jury but referred to the complaining witness as “the victim”. The appellate court analyzed this as possible invited error but made the following comment nonetheless:

In any event, when placed in the context of the entire trial, the single reference by the trial judge to “victim” is harmless error beyond a reasonable doubt. The fact that defendant’s counsel said nothing when the stipulation of the co-defendant’s counsel and Deputy Prosecutor was stated, did not object when the trial court read it to the jury, and then waited through the testimony of several witnesses before mentioning it, strongly suggests that the comment was insignificant.

-State v. Alger, 31 Wn. App. at 249

Other courts around the United States have also arrived at a similar analysis: State of North Dakota v. Hartsoch, N.D., 329 N.W.2d 367 (1983); Lister v. State, 226 So. 2d 238 (Fla. Dist. Ct. App., 1969); State v. Malcom, 583 N.W.2d 45 (1998).

The State submits that there has been no manifest error demonstrated here at all. There were no objections made by the defense nor can the defense show that any of the statements or references to the “victim” were used improperly by the State of Washington to gain some unfair advantage. The fact that officers may refer to a complaining witness

as a victim does not necessarily mean that they are offering an opinion as to truthfulness, veracity, or guilt of the defendant. Whether their testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an “ultimate issue” will generally depend on the specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and other evidence before the trier of fact. City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). In Heatley, Division I considered whether a police officer’s testimony that Heatley was “obviously intoxicated” and “could not drive a motor vehicle in a safe manner” constituted an improper comment on the defendant’s guilt. Heatley, 70 Wn. App. at 577. Because the evidence supported the opinion and the testimony did not contain a direct opinion of Heatley’s guilt, the court concluded the testimony was not improper. Heatley, 70 Wn. App. at 579-580.

Applying the factors set forth in Heatley, law enforcement officers’ statements that the complaining witness was a “victim” do not amount to comments upon the defendant’s guilt. By calling the complaining witness the “victim” the officers are not expressing an opinion that an assault has occurred or that the defendant committed it; they are merely telling the jury that the complaining witness reported that she was the victim of a

crime. The truth of the assaultive allegation was left to the jury. The characterization was a reasonable inference from the evidence that the complaining witness had described to 911, that is that she was the victim of a rape and assault.

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 13 day of Dec, 2008.

Respectfully submitted:

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