30034-0-III

FILED
AUG 20, 2012
Court of Appeals
Division III
State of Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DON LOVELL,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 5889
Pasco, Washington 99301
(509) 545-3561

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Did the superior court abuse its discretion in excluding expert discussion regarding alcoholic blackouts as unduly prejudicial where there was no evidence of memory loss?
2. Did the court abuse its discretion in excluding cumulative evidence of the victim's admitted alcoholism in the form of a diagnosis by an expert who had never treated the victim where the claim of error is not preserved, where defense agreed with the ruling, where the court permitted the defense to call another physician who had actually examined the victim, and where defense failed to take advantage of the proffered remedy?
3. Did the court abuse its discretion in denying the motion for new trial

based on the exclusion of unduly prejudicial expert discussion regarding alcoholic blackout?

IV. STATEMENT OF THE CASE

The Defendant Don Lovell has been convicted of Assault in the Second Degree for the strangulation of his girlfriend Patricia March. CP 132, 161.

When Ms. March testified at trial, she admitted that at 62 years old she was significantly older (17 years) than her boyfriend. CP 1; RP 198. Ms. March admitted that she was more than an occasional drinker. RP 245. In fact, she and the Defendant testified that the two of them were both heavy drinkers. RP 200, 543. The Defendant could put away a case of beer in a day (RP 199); and Ms. March could go through a half gallon of whiskey in a week or perhaps a full gallon in 3-4 days (RP 200, 249-52).

Ms. March first began to drink after her husband died in 1974. RP 289. She had begun to consume alcohol at a significant level in about the late 1980's or early 1990's and eventually was drinking pretty much from morning until night. RP 246. She agreed with defense counsel that she was a functioning alcoholic. RP 248, 252. She was able to maintain employment

in elder care. RP 194, 282. And her alcohol abuse was not evident[1] to her doctor even after more than one appointment. RP 389, 428, 445.

The trial court excluded evidence of Ms. March's subsequent DUI (approximately two months after the assault) as irrelevant, but noted:

> There has been plenty of testimony about her drinking and the quantity of her drinking.

RP 280.

> In fact you've done an excellent job establishing that she was drinking to that quantity for a year or more earlier than her relationship with Mr. Lovell.

RP 281.

On the day of the assault, August 23, 2009, Ms. March and the Defendant had both had a lot to drink. RP 239-40, 242, 314, 322-23. The Defendant had thrown a glass, which had broken and ricocheted, cutting open Ms. March's leg. RP 214-15, 253. It would take three staples to close, but that night Ms. March just cleaned herself up and went to bed. RP 233, 253-54. The Defendant woke her by attempting to have sex with her. RP 217. Ms. March testified that when she refused, there was a violent struggle culminating in her rape. RP 217-19. Part of the struggle involved the Defendant putting his hands on her throat and over her mouth, which

[1] A defense expert testified that it is common for a primary care physician to be unaware

prevented her from breathing. RP 220-21. Ms. March described and demonstrated that he pressed his fists against the side of her neck and inserted his thumbs at her larynx. RP 271-72. When the Defendant fell asleep or passed out afterward, Ms. March went to the neighbor's house and called 911. RP 220, 306.

Ms. March did not immediately report the rape. RP 227, 259-260, 273, 287-88. At the hospital, she was told she had a concussion. RP 230, 283. She had bruises and abrasions on her face, legs, and arms; marks on her neck (RP 411, 414), collarbone (RP 312), and thighs; a cigarette burn on her stomach; broken blood vessels in her eye; and choke marks around her neck. RP 232-37, 266, 306, 312, 400-01, 410-12, 519.

Ms. March reported the strangulation to Detective Klem and her primary care physician Dr. Lauri Larson. RP 340, 432. About a week after the assault, Ms. March reported the rape to her doctor, who observed second degree vaginal lacerations consistent with recent, forceful rape. RP 398-99. Dr. Larson testified that the hematoma she observed on Ms. March's neck was caused by a significant force, but she could not say whether it was caused by a blow, a squeeze, or a shearing. RP 600-01.

Defense witness Dr. Ronald Fleck testified that from the photographs

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of a patient's alcohol abuse. RP 497.

he was shown he did not see evidence of strangulation and that certain bruises were unlikely to have been caused by strangulation and were more likely the result of a blow to the side of the neck. RP 490-93.

Defense counsel attempted to admit expert testimony from Dr. Fleck explaining alcoholic blackouts. RP 498-99. The prosecutor objected and pointed out that the defense recitation of events was inconsistent with the victim's testimony. RP 503. The court found that the evidence of a blackout had marginal relevance and that the probative value was outweighed by the prejudicial effect. RP 504-05. "Whether or not she had a blackout based on the testimony is speculative." RP 505. Instead, the court permitted the witness to testify that a person, who had consumed as much alcohol as Ms. March may have, would probably have suffered both short term and long term memory loss. RP 507-09.

Out of the presence of the jury, defense counsel asked the court for a preliminary ruling. Counsel wanted to obtain a diagnosis from Dr. Fleck based on information that counsel proposed to share with the witness. RP 505. Because Dr. Fleck had never examined Ms. March, the court did not allow the doctor to testify to a diagnosis. RP 506. However, the court permitted defense counsel to call Ms. March's actual physician Dr. Larson or

the emergency room physician who treated her, Dr. Fredenburg, in order to give a diagnosis. RP 506. Defense counsel did not object to this ruling. RP 506 ("All right.").

The prosecutor called Dr. Larson to testify in rebuttal. RP 595. The defense had an opportunity to ask Dr. Larson questions regarding Ms. March's alcohol abuse in cross-examination a second time, but counsel chose not inquire as to a diagnosis. RP 604-08.

The Defendant testified at trial that he suffered a significant diminishment in his mental capacity after a neck injury in 1999. RP 541-42. He also complained of difficulty in concentrating. RP 542. At trial, he claimed that he was drinking out of a six ounce glass, which he described as being sixteen inches tall. RP 593.

He testified that he stopped having sex with Ms. March after August 21, because they were concerned that she might have contracted herpes and he did not want to catch it. RP 551, 584. Yet he also acknowledged that Ms. March had not been in any relationship in the ten years before she began a relationship with the Defendant. RP 585. The Defendant testified that an earlier incident had not resulted in any police report or photographs. RP 586, 588. But in fact, the incident had resulted in a report, photos, and a

restraining order. RP 586-88, 625-26. The Defendant's history of domestic violence against Ms. March included an incidence of him strangling her. RP 201-13, 306, 349-50, 387, 449-53, 623.

The Defendant was charged with (1) assault in violation of a protection order, (2) assault in the second degree, (3) felony harassment–DV, (4) felony harassment, and (5) rape in the second degree, with Ms. March being the victim in every count but the fourth which involved Jason Spencer. CP 82-85. After Mr. Spencer testified at trial that he did not fear the Defendant would carry out his threat (RP 300), the court dismissed count four. RP 456-57. The jury acquitted the Defendant on charges of rape and harassment–DV (counts three and five) and convicted on the assault charges (counts one and two). CP 132-33.

Following the trial, the Defendant made a Motion for Arrest of Judgment, arguing that the Information failed to include all the necessary elements for count one. CP 147-50. The court agreed and vacated the conviction for assault in violation of a protection order. CP 82-85, 132-33, 161. The Defendant also challenged the conviction in count two, arguing that the court abused its discretion in excluding expert testimony regarding alcoholism. CP 149. This conviction remains. CP 158-72.

V. STANDARDS OF REVIEW

On appeal, the Defendant questions the exclusion of expert testimony diagnosing Ms. March as an alcoholic and describing alcoholic blackouts.

As the Defendant noted in his Motion for Arrest of Judgment (CP 149), the correct standard of review for this issue is abuse of discretion. *See also* Brief of Appellant at 7-8 ("his principal argument was that the court had abused its discretion" in excluding discussion of blackout). A trial court's ruling on relevance and prejudicial effect under ER 402 and ER 403 are reviewed only for abuse of discretion. *State v. Anderson*, 44 Wn. App. 644, 652, 723 P.2d 464 (1986). *See also State v. Foxhoven,* 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or rests on untenable grounds or reasons. *State v. Powell,* 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The standard of review for an order denying a motion for a new trial is the same: abuse of discretion. *State v. Copeland*, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996); *State v. Williams,* 96 Wn.2d 215, 221, 634 P.2d 868 (1981).

VI. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING TESTIMONY REGARDING ALCOHOLIC BLACKOUT.

The Defendant claims error in the exclusion of expert testimony regarding the mechanism of an alcoholic blackout. There was no abuse of discretion.

The trial court found that there was "marginal relevance" to any discussion of alcoholic blackout where there was no evidence that Ms. March had voids of memory. If Ms. March had testified to no knowledge of events and could not explain how she came to be injured, there would be evidence of blackout. This was not the evidence.

> ... she testified that her mind is a little warped. All our minds get a little warped from time to time ...

RP 504. And that comment could be explained by her diagnosis of concussion, the obvious beating that she had taken, and the resulting shock. As Officer Barberich testified, it would not be fair to attribute alcohol to be the cause of the victim's behavior when it could just as likely be explained by the apparent beating she had just sustained. RP 314. Based on that evidence alone, the court found that any argument on blackout was purely speculative.

RP 505.

The court further noted that the testimony should be excluded under ER 403[2], because it was unduly prejudicial. Because the relevance or probative value was so little, it would not take much prejudice to exclude the testimony. The excluded testimony would have suggested unfairly that the victim had no memory of events and had entirely confabulated her story when in fact she had reported the events to several witnesses and testified in great detail to the events which were corroborated by her injuries and consistent with past domestic violence.

The court's ruling rests on tenable grounds.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN PROHIBITING A WITNESS FROM MAKING A DIAGNOSIS OF A PERSON THE WITNESS HAD NEVER TREATED.

The Defendant argues that the court erred in refusing to allow Dr. Fleck to diagnose Ms. March was an alcoholic. This Court should reject the claim of error as it is not preserved for review. RAP 2.5(a). The defense proposed the admission of testimony to the court. The court explained that the information would be admitted through a physician who actually had

[2] The Defendant argues that the testimony was admissible under ER 401, 402, or 702. Brief of Appellant at 11, 13. Assuming arguendo that this is so, the argument does not touch on the court's actual reason for exclusion, i.e. ER 403.

treated Ms. March. And defense counsel agreed and made no objection. RP 506.

Note, too, that Ms. March had already testified twice in the record that she was an alcoholic. RP 245, 252. In which case, the court could have excluded the testimony on an alternative ground, as cumulative under ER 403. Certainly, the Defendant can show no harm.

In any case, the court tenably ruled that it would be inappropriate for a physician who had admittedly never treated Ms. March (RP 506, ll. 17-18; RP 524, ll. 23-24) to make a diagnosis based on whatever particular information defense counsel selected to share (RP 505) with the doctor. This was a particularly tenable ruling where there were actual treating physicians available to defense counsel for this purpose. Defense counsel McCool agreed with the court (RP 506) and opted not to question Dr. Larson when she was recalled by the prosecutor.

C. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR ARREST OF JUDGMENT.

In the Motion for New Trial, the Defendant argued that the court abused its discretion by:

> not permitting the defense to get into the specific area of alcoholism as it related to a number of significant issues in the case; namely, an alcoholic's issue with severe memory loss,

> both long and short-term; the ease with which an alcoholic bruises; and what happens to an alcoholic during an alcoholic blackout.

CP 149. In fact, the court did permit the defense to discuss memory loss and bruising as relates to alcoholism. *See* RP 509 (ruling defense may allow expert to assume victim is an alcoholic); RP 507-08 (bruising in alcoholics); RP 509 (memory loss in alcoholics). *See also* RP 495-96 (hypertension and alcoholism); RP 605-08 (tremors in alcoholics); RP 522-23, 528-29 (prosecutor discussing bruising in alcoholics with defense expert).

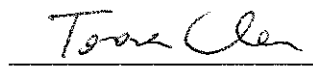
The only allegation that is consistent with the record is that the court did not permit the defense expert to testify about alcoholic blackouts. This issue is discussed above (section A) and the standard of review is the same. The trial court had tenable reasons to exclude a discussion of blackouts where there was no evidence of memory loss and such discussion would suggest the opposite so as to be unduly prejudicial.

VII. CONCLUSION

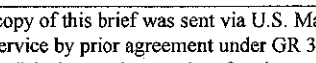
Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: August 18, 2012.

Respectfully submitted:



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

Mark Prothero <mprothero@webband.com> Don Lovell 703 Washington Street Walla Walla, WA 99362	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED August 18, 2012, Pasco, WA  **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**