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C.O.A. No. 33229-2-II
Cowlitz Co. Cause NO. 09-1-01049-5

**SUPREME COURT OF STATE OF
WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

DONALD ORMAND LEE,

Petitioner.

SUPPLEMENTAL BRIEF

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SECTION III - ARGUMENT - A
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I. ISSUES PRESENTED

1. Did the trial court abuse its discretion when it limited evidence of the victim's sexual history in an attempt to strike the appropriate balance between the probative value of this evidence and the risk of unfair prejudice?
2. In light of the strong corroborative evidence of a sexual relationship between Lee and the victim, was the court's limitation of the victim's sexual history harmless error?
3. Has Lee demonstrated a manifest error affecting a constitutional right for a speedy trial violation for the time period when he had not yet been charged with the crime and was not being held in custody?
4. Did the Court of Appeals abuse its discretion in refusing to consider Lee's argument regarding legal financial obligations ("LFOs"), when Lee did not object at the time of sentencing?

II. STATEMENT OF THE CASE

During the summer of 2008, 15-year-old J.W. was at her house when she received a phone call from 42-year-old Donald Lee. RP at 53-54, 61, 259. Lee identified himself as "Rick." RP at 57. Lee asked J.W. provocative questions that were sexual in nature. RP at 56, 59. Lee and J.W. discussed their age difference, and he was aware that she was 15-years-old. RP at 63-64. Lee was concerned that he would get in trouble because of their age difference. RP at 64. Lee asked J.W. to meet with him and she agreed. RP at 56-57. Beginning with their first meeting, Lee and J.W. had several sexual encounters that summer; these included both oral and vaginal sex. RP at 65-69. These sexual encounters occurred at

Lee's ex-girlfriend Beth Bonvioganne's house in Castle Rock, and at Tam O'Shanter and Riverside Parks. RP at 66-67, 167-68.

During one meeting, Lee provided J.W. with a sexually-explicit handwritten note. RP at 84-86, 305; Supp. Desig. CP at Exhibit #1. The letter stated:

My Friend/Love

I want to say this first. I'm glad that you walked into my life. You have a very special place in my heart. You turn me on in a way like no other woman ever has! I always hunger to be inside of you. Every time I think about you or hear your voice I always have to touch myself. You will always be my friend and I will always be there when you need me. If you ever need to be held all you have to do is ask. I will also always be there to whip your tears away. I'm also wanting you to know is, I'm starting to have some very strong feelings for you! I do not like it when we're apart from each other. You are so beautiful in my eyes. Your body turns me on. When I look into your eyes or see your smile, they make my cock so very hard for you. I just wish I could be inside your tight wet pussy 24/7! I always love making love to you. I love it when you eat my cum! I really want to have something with you. You are always and forever in my thoughts. I stroke my cock every night thinking of you. I really want to buttfuck you sometime soon ok? Thank you for wanting to be my friend. I will never let you down. I'm going to show you what it is like to have a man that cares for you more than you know. I also cannot ever wait to pull your panties down. Someday I would love to have that chance to be able to fuck you all day and then through the night.

You friend 4 life

R

Supp. Desig. CP at Exhibit #1.

J.W. told her mother about the relationship with Lee in March 2009. RP 89, 157-58.

In October of 2009, Lee was arrested on allegations of rape of a child in the third degree. The State did not file charges and Lee was released from custody without conditions. Further investigation of the case was transferred between police departments, and then the investigation "fell through the cracks." RP at 197.

When Detective Sergeant Brad Thurman came into the unit in May 2012, he discovered the case and began working on it. RP 199-201. Sgt. Thurman conducted a roughly six-month investigation that included talking to J.W. and taking her to the various locations of the sex acts to obtain pictures of the areas, tracking down Lee and the vehicle he drove when he was with J.W., talking to Lee's ex-girlfriend Beth Bonvioganne, and obtaining a handwriting sample from Lee for comparison purposes to the letter provided by J.W. RP 200-211, 213, 218. The crime lab concluded the handwriting matched in April 2013. RP 211.

The State charged Lee with five counts of rape of a child in the third degree, alleging that he engaged in sexual intercourse with J.W. between June 1, 2008 and October 1, 2008. CP 6-8. On two occasions after charges were filed, the trial date was continued at Lee's request. On

both of these occasions, Lee entered a speedy trial waiver. Supp. Desig. CP at 21, 24.

At trial, Lee sought to admit evidence that J.W. told her mother that she had been raped, that her mother reported the rape to police, and that J.W. called the police the following day to withdraw the complaint because the sex actually had been consensual. CP at 15-17; RP at 20-22. The State sought to prevent the jury from hearing this evidence, arguing that because consent was not at issue in the case, the rape shield law—RCW 9A.44.020—did not permit the introduction of this evidence. RP at 23. The court ruled that pursuant to RCW 9A.44.020(2), the victim's past sexual behavior was inadmissible. RP at 26-27. However, the court also ruled that evidence of J.W. making a prior false accusation against a person to the police was admissible. RP at 33.

During the trial, J.W. testified as to the sexual relationship and identified Lee as the person who had been known to her as "Rick." RP at 57, 61, 65-69. J.W. testified to Lee having driven her in a black Camaro/Thunderbird type car. RP at 61-62, 79. J.W. was able to identify Lee's ex-girlfriend's house and remembered petting two cats there. RP at 71, 103-04, 167. She also testified that Lee handed her the sexually-explicit note while she was in his car outside of Kelso High School. RP at 85.

During cross-examination, Lee's attorney asked J.W. if she had "ever made any false accusations about another person to the police?" RP at 120. J.W. answered, "Yes." RP at 121. Lee's attorney also elicited from J.W. that this had occurred in June of 2008. RP at 121. On redirect, J.W. explained that her mother reported the allegation to the police and that later J.W. called the police and informed them the allegation was false. RP at 151.

Lee's ex-girlfriend, Beth Bonvioganne, corroborated much of J.W.'s testimony. Bonvioganne testified that she had been in a relationship with Lee. RP at 166-67. Bongiovanne confirmed that she had lived in the residence that J.W. had identified as Lee's ex-girlfriend's, and that Lee had permission to enter that residence when she was not home. RP at 167-68. Bonvioganne testified that during the summer of 2008, she had permitted Lee to use her black Camaro, and that the keys had been in his possession. RP at 167. Bongiovanne also testified to having two cats at the residence. RP at 168.

Lee admitted that he wrote the sexually-explicit letter that J.W. provided to the police. RP at 269, CP 18. However, Lee claimed that the letter was written as a fantasy, and that he had not written the letter to anyone. RP at 269. Lee claimed that he had not gone by the name "Rick" and that he had signed the letter with "R" because it was a fantasy. RP at

268-69, 274. Lee denied giving the letter to J.W. RP at 269. Lee testified that he only seen J.W. on two occasions. RP at 260-61. According to Lee, he had a less than five-minute conversation with J.W. in 2008 while he was outside of his mother's house, where J.W. asked if Lee had been married to "Tina" and implied that she knew his ex-wife's daughter. RP at 261. Lee also testified that on another occasion he and his mother drove by J.W. on Ash Street in his 1981 Firebird. RP at 26.

Lee was convicted of two counts of rape of a child in the third degree. At sentencing, the court imposed LFOs, and Lee did not object. The Court of Appeals affirmed Lee's convictions and exercised its discretion pursuant to *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680, review denied, 177 Wn.2d 1016 (2015), to decline to review Lee's contention regarding his LFOs. This Court granted Lee's petition for review.

III. ARGUMENT

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SEE CLERK'S 7/29/16 NOTATION RULING

B. THE LIMITATION PLACED ON THE VICTIM'S SEXUAL HISTORY WAS HARMLESS ERROR.

Lee contends the Court of Appeals employed the wrong standard to determine whether any error in limiting cross-examination was harmless. Lee argues that, because a limitation on cross-examination implicates the Confrontation Clause, the court should have applied the more stringent constitutional harmless error test. Lee's argument overlooks the important fact that the Court of Appeals concluded that there had been no Confrontation Clause violation. Slip Op. at 11. Lee did not seek review of that conclusion, so it is not properly before this Court. *See State v. Korum*, 157 Wn.2d 614, 623-25, 141 P.3d 13 (2006) (Supreme Court will decline to consider issues not presented in concise statement of issues presented for review). Because the court found that the error, if any, was evidentiary in nature, the court properly applied the nonconstitutional harmless error test.

"An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial." *State v. Halstein*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Here, the Court of Appeals determined that there was no constitutional error: "Given all, we conclude the court's exclusion of the evidence was harmless, does not violate the confrontation clause,

and, therefore did not warrant reversal.” Slip Op. at 10-11. Because the Confrontation Clause was not violated, the Court of Appeals relied on the correct standard of review as set forth in *Halstein*. See 122 Wn.2d at 127.

Of course, even constitutional error is harmless when the conviction is supported by overwhelming evidence. *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Under this test, constitutional error is harmless where the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. *Guloy*, 104 Wn.2d at 425. However, an error in limiting cross-examination, does not necessarily result in a violation of the Confrontation Clause: “[A] trial court that limits cross-examination through evidentiary rulings as the examination unfolds does not violate a defendant’s Sixth Amendment rights unless its restrictions on examination ‘effectively . . . emasculate the right of cross-examination itself.’” *State v. Turnipseed*, 162 Wn. App. 60, 255 P.3d 843 (2011) (quoting *Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968)).

Here, because the court’s limitation did not effectively “emasculate the right of cross-examination itself,” it was not constitutional in nature. Accordingly, the Court of Appeals applied the correct standard of review. Yet even if the constitutional standard is applied, any error was also

harmless beyond a reasonable doubt, because the convictions were supported by overwhelming evidence. First, the limitation on cross-examination was minor. The jury still heard directly from J.W. that she had made "false accusations about another person to the police." RP at 120-21. This limitation did not exclude sex as the possible subject matter of the false allegation. Considering the phrasing employed, and the subject matter involved in the case, it is likely the jury would have considered the false allegation to be sexual in nature. The jury also heard that this occurred in June of 2008, within the timeframe of her sexual relationship with Lee. Lee's attorney emphasized this date in closing to imply that J.W. should not be believed as to having sex with Lee because she had made a false allegation about another person to the police within the same timeframe. RP at 388.

The evidence of Lee's guilt was overwhelming. In addition to her testimony about repeated sexual contact with Lee, J.W. testified that he drove a black Camaro or Thunderbird, took her to his ex-girlfriend's house in Castle Rock where she remembered petting two cats, called himself "Rick" and wrote her a sexually explicit note signed "R." Lee's ex-girlfriend, Beth Bonvioganne, corroborated J.W.'s testimony, confirming that she lived in the house in Castle Rock that J.W. identified, that she had two cats in the residence, and that Lee was driving her black Camaro at

the time. Besides her relationship with Lee, there was no other explanation for J.W.'s familiarity with Bonvioganne's house, cats, or car.

Additionally, Lee admitted to writing the handwritten, sexually-explicit letter that J.W. provided to the police. Although Lee claimed he signed the letter "R" and wrote it to no one as a fantasy, the letter's content strongly indicates otherwise. The conduct described in the letter was consistent with J.W.'s claims of multiple sexual encounters. Further, the content of the letter was much more consistent with having been written to a real person with whom Lee was infatuated. In addition to expressing a strong desire for sex with J.W., Lee wrote:

- "I'm so glad you walked into my life";
- "If you ever need to be held all you have to do is ask";
- "I'm starting to have some very strong feelings for you";
- "I really want to have something with you"; and
- "Thank you for wanting to be my friend."

These do not appear to be fantastical statements, but rather those of a person seeking a relationship with another. And, by signing the letter "R," Lee corroborated J.W.'s claim that he was going by the name "Rick." Finally, Lee's letter attempted to preserve deniability—something that one would do if engaging in an unlawful sexual relationship with a minor—by not using his name, real initials, or J.W.'s name or initials.

The most incriminating fact was that the sexually-explicit letter, which Lee admitted to writing, was in J.W.'s possession. J.W.'s

testimony was that Lee handed her the letter. There was no evidence countering or explaining how she came to possess a letter written by Lee to a female that was filled with such intimate content. Combined with the fact that she also had been inside Bonvioganne's home and car, when her only connection to Bonvioganne would have been through Lee, there was overwhelming evidence that Lee and J.W. had been engaged in a sexual relationship. Given the overwhelming evidence that Lee and J.W. had a sexual relationship, any error in precluding reference to the subject matter of J.W.'s admittedly false report was harmless and did not impact the outcome of the trial.

C. LEE DID NOT SUFFER A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT WHEN HIS RIGHT TO SPEEDY TRIAL WAS NOT VIOLATED; THEREFORE THIS ISSUE WAS WAIVED.

Lee claimed the trial court violated his right to speedy trial for the first time on appeal. "The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right.'" *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)). Under RAP 2.5(a), an error may be raised for the first time on appeal only for (1) lack of trial court jurisdiction, (2) failure to establish facts upon

which relief can be granted, or (3) manifest error affecting a constitutional right. Concluding that Lee had not established manifest constitutional error, the Court of Appeals properly held that Lee “cannot raise or prevail in a speedy trial violation for the first time on appeal.” Slip Op. at 7.

“[I]t is either a formal indictment or information or else the actual restraint imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.” *U.S. v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). When a defendant is incarcerated, this constitutes “actual restraint, which mandates a Sixth Amendment analysis.” *State v. Corroado*, 94 Wn.App. 228, 232, 972 P.2d 515, *review denied*, 138 Wn.2d 1011 (1999); Slip Op. (Korsmo, J., concurring). However, when a defendant is neither under indictment nor subject to official restraint, there is no violation of the Sixth Amendment right to speedy trial. *See U.S. v. Loud Hawk*, 474 U.S. 302, 304-5, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986) (periods during which respondents were neither incarcerated nor subject to other substantial restrictions on liberty do not count towards claim under Speedy Trial Clause).

Additionally, to show a violation of speedy trial, a defendant must demonstrate that the length of the delay was prejudicial. *State v. Iniguez*, 167 Wn.2d 273, 283, 217 P.3d 768 (2009). To make this determination, a

reviewing court will consider: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). When the issue is raised for the first time on appeal, the defendant must show actual prejudice to demonstrate a manifest error affecting a constitutional right. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *Id.*; Slip Op. at 6.

Here, after Lee was arrested, he was not charged and was released from jail without conditions while the case was sent for further investigation. Because Lee was not arrested and held to answer while the case was further investigated, there was no showing that his speedy trial right was violated.³ Additionally, once the case was charged, Lee twice voluntarily waived his right to speedy trial. Lee cannot have waived a right and at the same time assert it. Moreover, Lee failed to show that a delay in the investigation caused him to suffer any prejudice. On appeal, he argued that the delay was prejudicial because he became anxious and a key witness passed away. But as the Court of Appeals correctly noted, "a self-serving statement of anxiety does not show prejudice." Slip Op. at 7

³ This was articulated by Judge Korsmo in his concurring opinion. Slip Op. (Korsmo, J., concurrence).

(citing *State v. Cox*, 109 Wn. App. 936, 941, 38 P.3d 371 (2002)). Also, the “key witness” who passed away was Lee’s mother, who would have testified to her home décor and furniture colors, testimony the Court of Appeals correctly observed was cumulative to other witnesses’ testimony and had minimal relevance since no sexual misconduct was alleged at that location. For this reason, the Court of Appeals properly refused to allow Lee to raise a claim of a speedy trial violation for the first time on appeal.⁴

D. BECAUSE LEE DID NOT OBJECT TO THE IMPOSITION OF HIS LFOS, THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN REFUSING TO HEAR THIS ISSUE.

Because Lee did not raise the issue of LFOs with the sentencing court, the Court of Appeals had the discretion not to consider this issue for the first time on appeal. “A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review.” *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). “RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.” *State v. Kuster*, 175 Wn.App. 420, 306 P.3d 1022 (2013) (citing *State v. Guzman Nunez*, 160 Wn.App. 150, 157, 248 P.3d 103 (2011) (citing *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)), *aff’d*,

⁴ A contrary holding would encourage prosecutors to charge cases based on a concern that the speedy trial “clock” has been triggered by arrest, rather than returning a case to law enforcement to be investigated more fully.

174 Wn.2d 707, 285 P.3d 21 (2012)). Also, under RAP 2.5(a), appellate courts can refuse to address an issue *sua sponte*. *State v. Kirkpatrick*, 160 Wn.2d 873, 880 n. 10, 161 P.3d 990 (2007), *overruled in part on other grounds by State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012).

In *Blazina*, this Court held that the Court of Appeals properly declined discretionary review of unpreserved LFO claims, but elected to review the issue anyway amid “[n]ational and local cries for reform of broken LFO systems” in order to provide guidance to lower courts. 182 Wn.2d at 834. With this guidance provided, there is no compelling reason to entertain the same claims in every case in which the defendant made no objection to the LFOs imposed. Because Lee did not object to his LFOs at sentencing, the issue is not properly before this Court.⁵

IV. CONCLUSION

For the above stated reasons, Lee’s convictions should be affirmed.

Respectfully submitted this 15th day of June, 2016.



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⁵ Here, in addition to failing to object, Lee’s testimony indicates that he would be capable of working and paying his LFOs. Lee testified to owning multiple cars and working on these vehicles, indicating that he had some financial means, the physical ability to work, and the mechanical ability to replace a motor. RP at 264.

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Supplemental Brief was served electronically via e-mail to the following:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on June 5th, 2016.

Michelle Sasser
Michelle Sasser

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Attached, please find the Supplemental Brief regarding the above-named Petitioner.
If you have any questions, please contact this office.

Thanks, Sasser

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