

64604-4

64604-4

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2011 AUG 18 PM 2:49

No. 64604-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

STEVEN MONTGOMERY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR SNOHOMISH COUNTY

The Honorable Judge Ellen J. Fair

APPELLANT'S REPLY BRIEF

MARK D. MESTEL
Attorney for Appellant
Steven Montgomery

MARK D. MESTEL, INC., P.S.
3221 Oakes Avenue
Everett, Washington 98201
(425) 339-2383

TABLE OF CONTENTS

I. ARGUMENT.....1-8

 1. The Mother’s Opinon of her Daughter’s
Veracity.....1

 2. Ineffective Assistance of Counsel.....7

II. CONCLUSION.....9

III. CERTIFICATE OF SERVICE.....10

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. King, 167 Wash.2d 324, 329-30, 219 P. 3d 642
(2009).....4, 5, 6
State v. Kirkman, 159 Wash.2d 918, 155 P.3d 125 (2007)...4, 5
State v. Scott, 110 Wash. 2d 682, 688, 757 P. 2d 492
(1988).....6

FEDERAL CASES

Chapman v. California, 386 U.S. 18 87 S. Ct. 824, 17 L.Ed 2d
705 (1967).....6

I. ARGUMENT

1. ISSUE NO. I – The Mother’s Opinion of her Daughter’s veracity.

The State acknowledges that it is error to allow a witness to give an opinion on the credibility of another witness. Yet it attempts to distinguish what occurred in Appellant’s case from the applicable case law. The prosecutor asked the complainant’s mother whether she believed her daughter and the response that she believed her daughter 100%. The State claims that the “prosecutor’s single question was not part of a strategy to establish C.H.’s credibility generically, as was the case in Sutherby and Jerrels.” Rather, the prosecutor contends that it asked the question to establish T.H.’s motives in not calling authorities immediately. This explanation is disingenuous at best.

First, there is no support in the record for the prosecutor’s supposed strategy. Indeed the record belies such an assertion. The following excerpt from the record shows that the prosecutor had already elicited the information before asking the complained

to get this all worked out. We'd been friends so long, I wanted to make sure everything was okay, you know, to hear both sides.

Q: Okay. But after that's all said and done – well, actually, let me rephrase that. So did you ever hear both sides?

A: I heard from Penny, that side, but, no.

Q: So you never talked to him?

A: No, I never talked to Steve.

Q: And, again, I ask the question, you didn't call the police?

A: No.

Q: Are you likely to call the police on things like this?

A: Yes, I would have, but I just didn't want, didn't get...

RP 62-3.

Having already provided the jury with the mother's explanation as to why she didn't immediately call the police the prosecutor then asked whether she believed her daughter. The only reason for this question was to show that her failure to call the police was not based on her belief that her daughter was lying.

It strains credulity to believe that the prosecutor asked this question not knowing the answer he was going to receive. Certainly, the prosecutor did not ask this question expecting her to answer that she did not believe her daughter. Regardless of his reason the result is the jury received improper opinion testimony that enhanced the credibility of the complainant.

In support of his contention that counsel's failure to object to the opinion testimony may be raised for the first time on appeal, appellant in his opening supplemental brief cited State v. Kirkman, 159 Wash.2d 918, 155 P.3d 125 (2007). The Court again examined the holding from Kirkman in State v. King, 167 Wash.2d 324, 329-30, 219 P. 3d 642 (2009). There our Supreme Court reinforced the right to raise an error for the first time on appeal if it constitutes manifest error affecting a constitutional right. It went on to state "opinion testimony regarding a defendant's guilt is reversible error if the testimony violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." Ibid. In King

as in other cases cited by the appellant in his opening supplemental brief, the Court again held that no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury. While opinion testimony from police officers may be given heightened scrutiny, there is no exception to this rule for the testimony of a mother concerning the veracity of her daughter.

The fundamental issue for an error raised for the first time on appeal is whether the error was prejudicial. In King the Court acknowledged and approved the holding in Kirkman which stated “admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a “manifest” constitutional error.” Id. (emphasis added). But, (an explicit or nearly explicit) opinion on the defendant’s guilty or a victim’s credibility can constitute manifest error. Id. at 936, 155 P. 3d 125 (noting, ([r]equiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent without

precedent holding the manifest error exception is narrow). This case concerns an explicit statement by the witness that she believed her daughter 100%.

In footnote two the Court in King went on to expand on the manifest constitutional error analysis by stating that the appellate court must first satisfy that the error is truly of constitutional magnitude-that is what is meant by “manifest”. State v. Scott, 110 Wash. 2d 682, 688, 757 P. 2d 492 (1988). As explained supra., this error is of constitutional magnitude. Then, if the claim is constitutional, then the Court should examine the effect the error had on the defendant’s trial according to the harmless error test set forth in Chapman v. California, 386 U.S. 18 87 S. Ct. 824, 17 L.Ed 2d 705 (1967). In a review of the record of this case appellant contends that this Court should not be satisfied beyond a reasonable doubt that the error did not contribute to the defendant’s conviction. This was a “he said, she said” case as argued by the parties in their closing. Testimony that enhanced the credibility of the complainant for the jury most certainly

contributed to the defendant's conviction.

2. ISSUE NO. II – Ineffective Assistance of Counsel

With regard to defense counsel raising the issue of the complainant being mad at the defendant and opening the door to testimony that Mr. Montgomery had done this to the complainant's mom, her mom's friend, and her aunt, the State contends that the mother testified that what was involved was "an individual, making a pass at another adult" or adults, and not other instances involving sexual offenses on minors. (RP 189-90) Pages 189-90, cited by the State, contain defense counsel's explanation as to why he was not requesting a limiting instruction. It does not contain the testimony of the complainant's mother.

T.H.'s testimony is found on pages 60 through 67 of the trial transcript. It contains no reference to any inappropriate behavior between her and the defendant. While defense counsel may have explained to the judge that the reference by C.H. had to do with what she considered inappropriate sexual advances by the defendant to adults, there is nothing in the record to suggest that

this information was conveyed to the jury. For all the jury knew Mr. Montgomery had inappropriate contact with some or all of these individuals while they were minors.

One does not need the benefit of hindsight to question why the defense attorney would allow the specter of other inappropriate sexual contact by the defendant to be introduced into evidence. Counsel did nothing to use her answer to his advantage. One does not even know whether the complainant was aware of these other allegations prior to her disclosure to her mother. The prosecutor asked her: "So what were you upset about in the past?" She responded: "That I found out that he's done this to my mom, my mom's friend, and my aunt." RP 48. All the jury knew is that this happened in the past; there is no time frame as to when it happened or when she learned of it. If she learned of it after her disclosure it could not have been the reason for her disclosure. If she knew about it before her disclosure and was looking at a way to make trouble for Montgomery that should have been brought out during the trial. A review of the record

simply leaves one with the impression that she was mad at the defendant because she had heard that he sexually assaulted these other persons. The Court should not find that this is within the generally accepted performance of competent defense counsel. It had no valid strategic purpose and prejudiced the defendant.

II. CONCLUSION

For the reasons set out in the Appellant's pleadings his convictions should be vacated and the matter remanded to the trial court for a new trial.

DATED THIS 15th DAY OF AUGUST, 2011.



MARK D. MESTEL
WSBA# 8350

III. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was served upon the following by North Sound Legal Messengers, addressed to:

- | | |
|---|--|
| 1) Court of Appeals
Division One
600 University Street
One Union Square
Seattle, WA 98101 | 2) Snohomish County Prosecutor
3000 Rockefeller Ave
M/S 504
Everett, WA 98201 |
|---|--|

I hereby certify that a copy of the foregoing Reply Brief was served upon the following by United States Postal Service, addressed to:

1. Steven Montgomery, DOC#288933
c/o MCC-TRU, D-413-1
PO Box 888
Monroe, WA 98272-0888

DATED this 15th day of August, 2011.



Brandy L. Ellis, Secretary