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NO. 68436-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

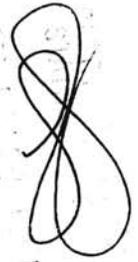
STATE OF WASHINGTON,

Respondent,

v.

JOSHUA FALEALILI,

Appellant.



APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA B. DOYLE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JASON L. SIMMONS
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

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A. ISSUE PRESENTED

May a nurse testify to observations made during the course of a medical exam?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On February 2, 2011, a jury found appellant, Joshua Falealili, guilty of one count of assault in the second degree and one count of felony violation of a court order. CP 168-69. In a bifurcated proceeding, the jury also found that Falealili and Nicole Brevik, the victim, were members of the same family or household and that both offenses were aggravated crimes of domestic violence due to an ongoing pattern of abuse. CP 171-76.

Falealili's conviction for felony violation of a court order was predicated on an assault. CP 1. Absent the assault, the violation of a court order would have been a misdemeanor. RCW 26.50.110. At Falealili's sentencing hearing, the prosecutor concluded that predicate assault for the felony violation of a court order and the assault in the second degree were likely the same criminal conduct and therefore asked the court to enter a judgment on the lesser included offense of misdemeanor violation of a court

order. 7RP 51.¹ The court imposed a standard range sentence of 27 months for the assault in the second degree conviction along with 18 months of community custody. CP 220, 221. For the misdemeanor violation of a court order, the court imposed a suspended sentence of 364 days. CP 220, 226.

2. SUBSTANTIVE FACTS

On May 17, 2011, Falealili punched Nicole Brevik, his wife, in the chin knocking the back of her head against a brick wall. 5RP 55. Brevik then fell to the ground and became dizzy. 5RP 55. Falealili got on top of Brevik and began strangling her to the point she “couldn’t breathe.” 5RP 55. When Falealili released his grip, Brevik started to scream. 5RP 55. Falealili then started “choking” Brevik “again and again,” and told her to “Stop screaming. Stop screaming.” 5RP 55. Eventually Falealili let go of Brevik. 5RP 55.

After the assault Brevik first lay on her bed then went to work. 5RP 55. While at work Brevik kept having dizzy spells so

¹ The State adopts the citation method of Falealili by citing to the verbatim report of the proceedings as follows:

1RP – 8/29/11, 9/1/11, 9/6/11, 10/31/11, 11/1/11, 11/15/11, 12/15/11, 1/12/12;

2RP – 1/17/12;

3RP – 1/23/12, 1/25/12;

4RP – 1/26/12, 1/30/12;

5RP – 1/31/12;

6RP – 2/1/12, 2/2/12;

7RP – 2/3/12, 2/24/12.

she went to the hospital where she was treated by nurse practitioner Amy Kanigher. 5RP 50-51. Brevik told Kanigher that she had been held down and was “choked out.” 5RP 110. Brevik also reported pain in her neck and the back of her head as well as dizziness. 5RP 110. Kanigher observed mild swelling and tenderness to Brevik’s chin and scratches on her neck. 5RP 115. Kanigher conducted a physical exam of Brevik, including palpating areas of alleged pain. 5RP 115-19. As a result of her assessment, Kanigher diagnosed Brevik with neck strain. 5RP 119.

Officers Pisconski and Myers then both met Brevik at the hospital. 4RP 126; 5RP 153. Brevik provided a statement to the police. 5RP 54.

At trial Brevik’s statement was read to the jury under 803(a)(5). 5RP 54-55.

On direct examination, Kanigher testified that Brevik reported dizziness and pain to her head and neck. 5RP 112. She also testified about her observations, specifically mild swelling and tenderness to Brevik’s chin, and swelling, tenderness, and scratches on her neck. 5RP 115, 116. Kanigher also explained that there was tenderness upon palpation. 5RP 115. Kanigher

testified that she ultimately diagnosed Brevik with neck strain.

5RP 115.

On cross examination Falealili, who represented himself, repeatedly asked various versions of the question of whether the neck strain diagnosis was based solely on the statements of Brevik. 5RP 129, 137, 138, 139, 140, 141, and 142. Kanigher consistently noted that the diagnosis was based on her physical exam including palpation of the allegedly painful areas, the reported history, and the verbal report of Brevik. Id. at 129, 137-42. At one point Falealili, regarding how the diagnosis of neck strain was made, specifically asked, "So basically off of your professional opinion and what she [Brevik] stated?" Id. at 140.

During cross examination Falealili made the following inquiry:

Falealili: You've diagnosed Ms. Brevik with neck strain. Am I correct?

Kanigher: Correct.

Falealili: What actual tests did you do to determine this injury?

Kanigher: Well, I did a physical exam, which I don't have my chart in front of me, but generally under MSK, which is musculoskeletal. I also did an X-ray, a C-spine, meaning the cervical spine, which is the neck, to ensure that there wasn't any fractures or, you

know, other abnormalities that way. The cervical strain is considered an abnormality in that it's, you know, a strained muscle. I basically -- the emergency department was ruling out the emergent matters, which would, you know, cause a patient to get (inaudible) or go to surgery. So based on her physical exam and --

5RP 137-38.

Kanigher later continued:

Well, I based it on the patient's report of the injury as well as my -- my taking of the history of her, you know, the mechanism of injury, I guess, I'd go back to. And then there was evidence of the abrasions and having -- I know that her chin isn't part of the neck, but she indicated that, you know, the scratches below the chin and then having a chin that was swollen,

5RP 138-39.

Falealili's inquiry continued:

Falealili: What actual report other than her stating her history and her injury did you come up with neck strain?

Kanigher: Well, from my education and experience, a patient who reports the mechanism of injury that she was, in fact, reporting and given that she, you know, did have the scratches that would coincide with her story.

5RP 139-40.

Falealili, while still speaking about Kanigher's diagnosis of neck sprain, then elicited Kanigher's professional opinion:

C. ARGUMENT

**NURSE KANIGHER'S TESTIMONY DID NOT DEPRIVE
FALEALILI OF HIS RIGHT TO A FAIR TRIAL.**

Falealili asserts that his conviction for assault in the second degree must be reversed because Kanigher improperly bolstered Brevik's credibility. Falealili's argument must be rejected for three reasons: (1) Kanigher did not improperly bolster Brevik's credibility; (2) even if Kanigher's testimony would have been generally improper, it was allowable in this case because Falealili opened the door to its admission; and (3) even if Kanigher's testimony would have been generally improper, any error was harmless.

1. Nurse Kanigher's Testimony Was Not Improper.

Nurse Kanigher testified that, as medical professional, pain is "considered a vital sign along with blood pressure, pulse, [and] respirations." 5RP 144-45. Importantly, according to Kanigher, pain is something that can be tested for during a medical exam and its detection is not based solely on the report of the patient. 5RP 115, 145-46. For example, Kanigher explained that she will look for the patient's reaction to palpation to help determine if the pain is indeed present. 5RP 115, 145-46. Kanigher noted that in

response to being touched in a painful area a patient “may pull away, or they may say, ow, that hurts, or they may wince.”

5RP 145-46. Kanigher then went on to testify that “if I’m not entirely convinced that a patient is forthcoming with their level of pain, I may try to distract them a little bit and palpate the same area to determine whether or not their pain is -- is, you know, whether they’re still wincing and showing signs of discomfort.” 5RP 146.

It was immediately after this comment regarding objective clinical means to differentiate between the actual presence of pain and feigned pain that the prosecutor asked, “And did you have any concerns with Ms. Brevik that she was putting her pain on, if you will[?]” 5RP 146. Kanigher responded, “No. I didn’t feel that she was trying to exaggerate any pain, no.” 5RP 146. Importantly, the context of the prosecutor’s comments makes it clear he was asking whether Brevik ever physically responded in a manner that was inconsistent with the actual existence of pain. The prosecutor, when the comments are viewed in context, was not asking for Kanigher’s opinion regarding Brevik’s truthfulness, but rather was asking if Brevik’s exam and behavior was consistent with her reporting of pain. Kanigher’s response was not a comment on Brevik’s credibility, but rather Kanigher was simply noting that her

(3) 'the nature of the charges,' (4) 'the type of defense,' and (5) 'the other evidence before the trier of fact.'" State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (quoting City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)).

Opinion testimony is not improper merely because it addresses an ultimate factual issue that is to be resolved by the jury. ER 704; City of Seattle Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993). Such testimony is not improper so long as it is not a "direct comment" on the defendant's guilt, is helpful to the jury, and is based on inferences from the evidence. Heatley, 70 Wn. App. at 578. Nor is such testimony improper merely because it supports the conclusion that the defendant is actually guilty. The fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt." Heatley, 70 Wn. App. at 579. Additionally, lay witnesses are generally allowed to provide opinion testimony regarding a person's appearance or demeanor. For example, it is permissible for a lay person to testify about another's level of intoxication. City of Seattle v. Heatley, 70 Wn. App. 573, 580, 854 P.2d 658 (1993).

In the instant case, Kanigher had made a permissible observation regarding Brevik's demeanor; specifically that Brevik acted consistently with the presence of neck pain. Falealili's reliance on State v. Sutherby, 138 Wn. App. 609, 158 P.3d 91 (2007) is misplaced. In Sutherby, a five-year-old alleged rape victim's mother testified that her daughter was not lying when she testified about the rape. Id. at 616-17. On appeal, the court found the testimony "wholly improper" as the mother blatantly testified about the daughter's credibility with regards to the charged offense, and therefore the defendant's guilt. Id. at 617-18.

In the instant case, unlike the circumstance in Sutherby, Kanigher did not testify whether she believed Brevik was being honest about the assault. She did not testify whether she believed Brevik was strangled. She was not asked to opine on Brevik's truthfulness. Rather, Kanigher was asked immediately after noting ways to physically determine feigned pain if Brevik appeared to be feigning her reported pain or more specifically if she was "putting her pain on." 5RP 146. Kanigher indicated that as a result of the exam and time spent with Brevik, Brevik did not appear to be trying to exaggerate her pain. 5RP 146. As such, this testimony was not improper.

2. Even If Kanigher's Testimony Would Otherwise Have Been Improper, It Was Allowable Here Because Falealili Opened The Door To Its Admission.

Under the "open door" doctrine, if a defendant raises an issue before the jury, the State may generally respond by asking additional questions about the same matter. State v. Gefeller, 76 Wn.2d 449, 454-56, 458 P.2d 17 (1969). This rule applies to impeachment in cross-examination. See, e.g., State v. Mak, 105 Wn.2d 692, 709-10, 718 P.2d 407 (1986), overruled on other grounds, State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994).

Here Falealili focused his cross examination extensively on the basis for Kanigher's neck sprain diagnosis. 5RP 124-42. He specifically asked if the diagnosis was made "basically off of your professional opinion and what she stated?" 5RP 140. This question specifically opened the door to the basis of Kanigher's "professional opinion" regarding the neck sprain or pain. As made clear in re-direct, Kanigher's professional opinion regarding the diagnosis was heavily influenced by the fact that Brevik's exam and behavior was consistent with her actually having neck pain. Accordingly, Kanigher's testimony that there was no indication Brevik "was trying to exaggerate any pain," 5RP 146, was directly

responsive to a door opened by Falealili on cross examination. As a result, the testimony was not improper.

3. Falealili Was Not Prejudiced.

The testimony that Falealili asserts bolstered Brevik's credibility did not prejudice his case. Important to any determination of whether opinion testimony has prejudiced the defendant is whether the jury was properly instructed. Montgomery, 163 Wn.2d at 595. In Kirkman, this court concluded there was no prejudice in large part because, despite the allegedly improper opinion testimony on witness credibility, the jury was properly instructed that jurors "are the sole judges of the credibility of witnesses," and that jurors "are not bound" by expert witness opinions. Kirkman, 159 Wn.2d at 937, 155 P.3d 125. Here, the jurors were instructed in an identical manner. CP 182, 187. There was no written jury inquiry or other evidence that the jury was unfairly influenced, and we should presume the jury followed the court's instructions absent evidence to the contrary. See Kirkman, 159 Wn.2d at 928, 155 P.3d 125.

4. Falealili Failed To Preserve The Issue For Appeal.

Falealili failed to make a specific objection to the prosecutor's question that elicited the alleged improper opinion testimony. 5RP 146. Error is preserved for review when the basis for the objection is "apparent from the context." State v. Walker, 75 Wn. App. 101, 109, 879 P.2d 957 (1994). Here, the basis for the objection is not apparent from the context.

The relevant trial testimony went as follows:

Prosecutor: Have you ever had experiences where you felt like somebody was not being completely honest, if you will, about the level of pain that they say they have?

Falealili: I object, your Honor. Speculation.

The Court: I'm going to allow it. I'll see where you go.

Kanigher: Yes, I have.

Prosecutor: And so when you're kind of testing someone, when you say you palpate. Are you looking for actual responses from the individual as well as what they say?

Kanigher: Correct. Yes, I am. Responses but based on my exam, yes.

Prosecutor: And what kind of response -- maybe it seems very obvious, but if you're touching somebody where it hurts, what kind of response could they have?

Kanigher: Well, they may pull away, or they may say, ow, that hurts, or they may wince. You know, everyone responds to pain differently. Sometimes if I'm not entirely convinced that a patient is forthcoming with their level of pain, I may try to distract them a little bit and palpate the same area to determine whether or not their pain is -- is, you know, whether they're still wincing and showing signs of discomfort.

Prosecutor. And did you have any concerns with Ms. Brevik that she was putting her pain on, if you will --

Falealili: I object, your Honor.

The Court: I'm going to allow her to answer.

Kanigher: No. I didn't feel that she was trying to exaggerate any pain, no.

5RP 145-46.

From the context of the conversation, it appears that Falealili's objection was based on speculation, not improper opinion. After Falealili's speculation objection regarding patients feigning pain, the prosecutor made a specific inquiry and established that Kanigher has the ability to personally observe, at times, indicators that pain is in fact present. This inquiry demonstrated that Kanigher's ability to detect pain is not speculative, but rather the result of her own personal observations during a medical exam. After establishing a basis for Kanigher's knowledge, the prosecutor then asked the question that elicited the

purported improper opinion testimony. While Falealili did object, he did not state a basis for the objection. We can only assume the basis for the objection, once again, was speculation. However, the testimony was not speculative as it was based on Kanigher's personal observations of Brevik.

An appellate court may refuse to entertain a claim of error not raised before the trial court. RAP 2.5(a). An exception exists for a claim of manifest error affecting a constitutional right. Id. To benefit from this exception, "the appellant must 'identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial.'" State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (alternation in original) (quoting State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)).

"A constitutional error is manifest if the appellant can show actual prejudice, i.e., there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" Id. at 99, 217 P.3d 756 (quoting Kirkman, 159 Wn.2d at 935, 155 P.3d 125). Here, Falealili cannot demonstrate actual prejudice.

5. Any Error Was Harmless.

Even if the trial court abused its discretion in admitting Kanigher's allegedly improper opinion testimony, reversal is not warranted because any error was harmless. Reversal is required only if there is a reasonable probability that the error materially affected the outcome of the trial. Id. (citing State v. Tharp, 96 Wn.2d 591, 599, 637 P.3d 961 (1981)). Here, Brevik's original statement to police was read to the jury. Officers observed injuries constant with the reported assault. Kanigher observed injuries consistent with the reported assault. Importantly as well, the allegedly improper inquiry only pertained to neck pain. The existence of pain does not mean Falealili strangled Brevik. As previously noted, unless there is evidence to the contrary jurors are presumed to have followed the trial court's instructions. See, e.g., Kirkman, 159 Wn.2d at 928. Nothing in the record gives any reason to conclude that the jury so disregarded this instruction as to make an improper inference.

Given that the jurors were actually able to observe both Brevik, the officers, and Kanigher testify and were informed that they needed to make their own decisions regarding credibility, there is not a reasonable probability that the outcome of the case was

materially affected by the passing testimony that Brevik's report of pain was consistent with Kanigher's observations.

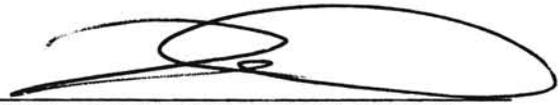
D. CONCLUSION

For the reasons cited above, this Court should affirm
Falealili's convictions.

DATED this 29 day of November, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
JASON L. SIMMONS, WSBA #39278
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JOSHUA FALEALILI, Cause No. 68436-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

Holly Gilmore
Name Holly Gilmore
Done in Kent, Washington

11/29/2012
Date 11/29/2012

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