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MAY 25 2016

Washington State  
Supreme Court

SUPREME COURT NO. 93207.3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICARDO TREVINO,

Petitioner.

FILED

JUN 16 2016

WASHINGTON STATE  
SUPREME COURT

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,  
DIVISION TWO

Court of Appeals No. 46809-3-II  
Pierce County No. 13-1-03996-8

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, RICARDO TREVINO, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Trevino seeks review of the Ruling Affirming Judgment and Sentence filed February 12, 2016, and the Order Denying Motion to Modify filed April 21, 2016.

C. ISSUE PRESENTED FOR REVIEW

Over defense objection, the State presented expert testimony regarding behaviors common to child victims of sexual abuse. Where this testimony was expressed in terms of generalizations as to the behavior of sexually abused children as a class, and the State argued that the complaining witness fit that profile, did the expert testimony unfairly vouch for the credibility of the complaining witness, invading the province of the jury?

D. STATEMENT OF THE CASE

On October 18, 2013, the Pierce County Prosecuting Attorney charged Ricardo Trevino with two counts of third degree rape of a child. CP 1-2; RCW 9A.44.079. An amended information was filed changing the charging period on one count. CP 15-19. Trevino was convicted following a jury trial, and the Court of Appeals affirmed his conviction.

In the fall of 2013, around the time of her 15<sup>th</sup> birthday, KL told her boyfriend DS that her stepfather<sup>1</sup> had been sexually abusing her. 2RP<sup>2</sup> 100-01; 3RP 51. She confided in DS because she felt she could trust him, and she asked him not to tell anyone. 2RP 101. DS told his mother, who called the school. 3RP 52, 62. The school counselor called the police. 2RP 157.

Milton Police Officer Kristofer Kidwell interviewed DS with his mother's permission. 2RP 157-58. Kidwell reported what he learned from DS to Milton Police Detective Amy Camden. 2RP 162. Camden interviewed KL at school and then directed Kidwell to arrest Ricardo Trevino. 2RP 105, 162; 3RP 15, 21. Later that day Camden went to the family home with one or two other officers. 3RP 105. She took some photos of KL's bedroom, which she later deleted. 3RP 32. She also interviewed KL again. 2RP 106; 3RP 106-07.

Camden spoke briefly with KL's mother when she was at the home after Trevino's arrest. 3RP 110. When Camden tried to contact her again, she had left the area. 3RP 27, 44, 111. KL reported that she had disclosed sexual abuse to her cousin Nancy Phonthivongsa. 2RP 102-03. Camden

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<sup>1</sup> Although KL's mother was not married to Trevino, they lived together from the time KL was about five years old, and KL called him dad. 2RP 88.

<sup>2</sup> The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP—7/28, 29, 30/14; 2RP—7/31/14; 3RP—8/4/14; 4RP—8/5, 6, 7/14; 9/26/14.

contacted her by phone, and Phonthivongsa prepared a written statement and emailed it to Camden. 3RP 21-22, 71.

Prior to trial the State offered and the defense moved to exclude testimony from a forensic child interviewer regarding common characteristics of sexual abuse victims. CP 3-6, 8-12. Specifically, the State offered testimony regarding delayed disclosure, the correlation between the victim's relationship with the abuser and the length of the delay, the reasons for delay, and disclosure to peers rather than adults. 2RP 132-34. The trial court ruled that the evidence was admissible. 2RP 66.

At trial KL described incidents of oral sex which occurred between her 14<sup>th</sup> and 15<sup>th</sup> birthdays and a specific incident a few days before Trevino's arrest. 2RP 96-97, 99. KL testified that the touching started when she was in second grade, but she did not tell anyone about it until she was almost 15. 2RP 93, 101. She did not disclose the abuse sooner because she was scared no one would believe her. She was also afraid of what it would do to her family, and she wanted her mother to be happy. 2RP 96.

Next, the State presented testimony from Sheri Arnold, a forensic child interviewer who works with the prosecutor's office. 2RP 139. She detailed her duties, education, and training for the jury. 2RP 140. Arnold

testified that she had not interviewed anyone in connection with this case, but she had conducted over 1800 child interviews in her career, the vast majority of which involved victims of sexual abuse. 2RP 140, 142-43. Said she was testifying from her personal observations as well as training and research that she has reviewed. 2RP 151.

Arnold testified that in most of her cases there was a delay in disclosure. She explained that the term delayed disclosure refers to the passage of time between the alleged incident and the disclosure. The length of delay is frequently months or years from when the alleged act occurred. 2RP 144. She has noticed that when there is a close relationship to the alleged abuser, that increases the likelihood of delayed disclosure, and those delays are frequently long. 2RP 145.

Most of the reasons for these delays are fear based. The victims can fear they will not be believed or fear what will happen to the abusers. 2RP 145. Arnold testified that in most cases the alleged abuser is someone close to the child, such as an immediate family member or close family friend, and so the victims report fears about what disclosure will do to the family or even fears of retaliation if there have been threats. 2RP 145-46. Arnold testified that in the cases where there have been delays, it is common for the alleged victim to disclose to a peer rather than a parent, especially with older kids. They feel more comfortable talking to friends

they are close to, without the fears associated with disclosing to adults.

2RP 146.

Arnold further testified that the understanding of time frames and the passage of time is something that develops as children grow up, and children are often not able to accurately describe when in time something happened. 2RP 147. Finally, Arnold testified that she asks open ended questions during child interviews so that she does not suggest an answer, but children become less suggestible as they get older. 2RP 150-51, 153.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THE COURT OF APPEALS DECISION CONFLICTS WITH A  
PRIOR DECISION OF THE COURT OF APPEALS. RAP  
13.4(b)(2).

The trial court's admission of expert testimony which did not meet the standard for admission of scientific evidence commented on the complaining witness's credibility, thereby invading the province of the jury. Under the Washington constitution, the role of the jury must be held "inviolable." Wash. Const. art. I, §§ 21, 22; State v. Montgomery, 163 Wn.2d 577, 590, 813 P.3d 267 (2008). The jury's fact-finding role is essential to the constitutional right to trial by jury. Sofic v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Therefore, "[n]o witness, lay or expert, may testify to his opinion as to the guilt of the defendant, whether by direct statement or inference." State v. Black, 109

Wn.2d 336, 348, 745 P.2d 12 (1987) (expert witness's opinion that complaining witness in third degree rape case had "rape trauma syndrome" inadmissible because it communicated witness's opinion that witness was telling the truth).

An expert may express an opinion concerning his or her field of expertise if the opinion will aid the jury. ER 702; Montgomery, 163 Wn.2d at 590. The opinion may encompass an ultimate fact, but the expert may not express an opinion as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. Montgomery, 163 Wn.2d at 591. A witness offering an opinion under ER 702 must be qualified as an expert, and any opinion testimony must be based on a theory generally accepted in the scientific community. State v. Jones, 71 Wn. App. 798, 814, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994).

In this case, the trial court permitted the State to present testimony from a forensic child interviewer regarding behaviors commonly observed in sexually abused children. Defense counsel argued that such evidence was improper because it allowed the jury to infer that the alleged abuse occurred in this case based on the presence of those behaviors, even though that theory that was not generally accepted in the scientific community. The evidence was therefore an improper opinion on KL's

credibility and Trevino's guilt, which invaded the province of the jury. CP 3-6; 1RP 18-19; 2RP 63-65.

In Jones, the defendant charged with child molestation and rape of a child challenged expert testimony presented by the State. The social worker who had worked with the victim testified that she had worked with 300 to 400 children. In addition to giving her opinion that the child had been sexually abused by the defendant, which was clearly error, the social worker testified about the victim's sexual acting out and night terrors and said that such behaviors were very common in sexually abused children. Admission of this testimony was challenged on appeal. Jones, 71 Wn. App. at 813-14.

The Court of Appeals noted that an expert's opinion must be based on a theory generally accepted by the scientific community. Id. at 814 (citing Frye v. United States, 293 F. 1013, 1014 (D.C.Cir.1923)). A description of common characteristics of sexual abuse victims is closely related to generalized profile or syndrome testimony, which requires scientific reliability as measured by the Frye standard. The court recognized that there is a distinction "between a caseworker narrowly testifying to the behavior of abused children seen in a specific practice and more generalized assertions as to the behavior of abused children as a class." Id. at 817. But "when personal experience is used as a basis for

generalized statements regarding the behavior of sexually abused children as a class, the testimony crosses over to scientific testimony regarding a profile or syndrome, whether or not the term is used, and therefore should be subject to the standard set forth in Frye.” Id. at 818. Testimony that is limited to the expert’s observations of a specific group is not subject to Frye. Id.

The court went on to hold that general profile or syndrome testimony regarding behavioral characteristics of sexually abused children to prove abuse does not meet the Frye standard:

Because the use of testimony on general behavioral characteristics of sexually abused children is still the subject of contention and dispute among experts in the field, we find that its use as a general profile to be used to prove the existence of abuse is inappropriate. However, we agree with the current trend of authority that such testimony may be used to rebut allegations by the defendant that the victim's behavior is inconsistent with abuse.

Id. at 819. See also State v. Maule, 35 Wn. App. 287, 295-96, 667 P.2d 96 (1983) (caseworker’s testimony, based on experience at sexual assault center, that sexually abused children exhibit typical behaviors, was not supported by accepted scientific opinion).

In this case, the State argued that the expert testimony was admissible because the expert would not refer to abused children as a class, would not refer to any syndrome, would only testify from her observations, and would not comment on this particular victim. 2RP 57-

58. The court accepted these proposed limitations and admitted the evidence. 2RP 65-66.

Although the prosecutor attempted to limit his questions to Arnold's observations from interviews she conducted, her answers crossed into generalizations as to the class. For example, the prosecutor asked if, in her practice, she noted any correlation between the length of delay in disclosing abuse and the closeness of the alleged abuser. 2RP 144-45. Arnold responded that when there is a close relationship to the alleged abuser, that increases the likelihood that there will be a delayed disclosure. The prosecutor again asked about the length of the delay, and Arnold responded,

I don't know, specifically, in terms of numbers, like the length of the delay. I just know that the relationship to the alleged offender can significantly impact the likelihood that there will be a delay and that the delays are frequently long in length of time.

2RP 145. She went on to say that in most cases, the abuser is someone close, like a family member or a close family friend. Id. Again when the prosecutor asked why a child might disclose to a peer rather than an adult, Arnold responded with a generalized answer, saying that it is more common for older kids to report telling a friend rather than an adult. 1RP 146. Arnold confirmed on cross examination that she was drawing

conclusions not just from her own observations but also from training and research she had reviewed. 2RP 151.

It is clear from Arnold's testimony that she was using her personal observations and outside sources as a basis for generalized statements about the behavior of sexually abused children as a class. This profile testimony is not admissible to prove that abuse occurred, because it does not meet the Frye standard. See Jones, 71 Wn. App. at 819. The prosecutor argued in closing that KL fit the profile Arnold described. He reminded the jury that Arnold had testified that in a vast majority of cases children don't report abuse right away. They wait because they are scared, and because they love the abuser, who is often someone close to them. He argued that KL's behavior was consistent with that scenario. 4RP 118-19.

The Court of Appeals' ruling that the trial court properly admitted Arnold's testimony conflicts with the decision in Jones, and this Court should grant review. RAP 13.4(b)(2).

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Trevino's conviction and sentence.

DATED this 20<sup>th</sup> day of May, 2016.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

*Catherine E. Glinski*

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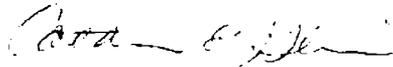
CATHERINE E. GLINSKI  
WSBA No. 20260  
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in  
*State v. Ricardo Trevino*, Court of Appeals Cause No. 46809-3-II, as  
follows:

Ricardo Trevino/DOC#376902  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

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



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Catherine E. Glinski  
Done in Manchester, WA  
May 20, 2016

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

FILED  
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DIVISION II  
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STATE OF WASHINGTON  
BY  DEPUTY

THE STATE OF WASHINGTON,

Respondent,

v.

RICARDO NOEL TREVINO,

Appellant.

No. 46809-3-II

RULING AFFIRMING  
JUDGMENT AND SENTENCE

Ricardo Trevino appeals from his conviction for third degree rape of a child, arguing that the trial court erred in allowing expert witness testimony regarding behaviors observed in child victims of sexual abuse. This court considered his appeal as a motion on the merits to affirm under RAP 18.14. Finding that his appeal is clearly without merit, this court affirms Trevino's judgment and sentence.

On about her 15th birthday, K.L. disclosed to her boyfriend that her mother's boyfriend, Trevino, had been sexually abusing her. K.L.'s boyfriend informed his mother, who contacted K.L.'s school, who contacted the police. K.L. later testified that Trevino had been living with her and her mother since she was five years old. She testified that the sexual abuse began when she was in the second grade but she did not tell her mother about it because she was scared that no one would believe her, was afraid of what the disclosure would do to her family and wanted her mother to be happy.

The State charged Trevino with two counts of third degree rape of a child based on incidents occurring in 2012 and 2013. Trevino filed a motion to exclude testimony from a State's witness, Keri Arnold, regarding delayed disclosure of child abuse and behaviors associated with child abuse. The State moved to allow Arnold to testify, based on her training and experience, regarding delayed disclosure of child abuse, without testifying that K.L. met a certain profile or displayed a syndrome. The trial court allowed Arnold's testimony. Arnold testified that based on her over 1,800 forensic child interviews, there is delayed disclosure in "[t]he vast majority" of child sexual abuse cases and that the delay may be years from the abuse. Report of Proceedings (RP) Jul. 31, 2014 at 133. She testified that a close relationship between the abuser and the child increases the likelihood of delay. She testified that the reasons for delayed disclosure are fear-based, such as fear for the abuser, fear that disclosure will break up the family, fear of retaliation and fear of not being believed. RP Jul. 31, 2014, at 145-46. She testified that in older children, the disclosure is made to a peer more often than to a parent. RP Jul. 31, 2014, at 146.

The jury found Trevino guilty as charged, and he appeals.

Trevino argues that the trial court erred in allowing Arnold's testimony because that testimony was an inferential opinion on Trevino's guilt, and therefore invaded the province of the jury. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). He contends that admission of Arnold's testimony violated *State v. Jones*, 71 Wn. App. 798, 818-19, 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018 (1994), which held:

When personal experience is used as a basis for generalized statements regarding the behavior of sexually abused children as a class, the testimony crosses over to scientific testimony regarding a profile or syndrome, whether or not the term is used, and therefore should be subject to the standard set forth in *Frye*.

Because the use of testimony on general behavioral characteristics of sexually abused children is still the subject of contention and dispute among experts in the field, we find that its use as a general profile to be used to prove the existence of abuse is inappropriate.

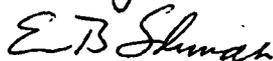
See also *State v. Maule*, 35 Wn. App. 287, 295-96, 667 P.2d 96 (1983) (footnote omitted).

But unlike in *Jones*, Arnold had not interviewed K.L. and did not opine that she believed K.L. had been abused. Arnold did not testify that K.L. met a profile or displayed a syndrome consistent with having been abused. She only testified as to frequency of delayed disclosure, to the length of the delay, to some of the reasons for the delay and to the frequency of disclosure to a peer rather than a parent. Such testimony explaining delayed disclosure of child sexual abuse has been held to be admissible. *State v. Petrich*, 101 Wn.2d 566, 575, 683 P.2d 173 (1984), *modified on other grounds in State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988); *State v. Stevens*, 58 Wn. App. 478, 497-98, 794 P.2d 38 (1990). And where, as here, the expert witness testifies based on her own observations rather than based on generalized statements about the characteristics of victims of child sexual abuse, that testimony is not subject to the standard in *Frye v. United States*, 293 F. 1013 (1923). *Jones*, 71 Wn. App. at 815. This court reviews the admission of expert testimony for an abuse of discretion. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Trevino does not demonstrate an abuse of discretion in the admission of Arnold's testimony.

An appeal is clearly without merit when the issue on review involves a decision clearly within the trial court's discretion. RAP 18.14(e)(1)(c). As the admission of Arnold's testimony is within the trial court's discretion, Trevino's appeal is clearly without merit. Accordingly, it is hereby

ORDERED that the motion on the merits to affirm is granted and Trevino's judgment and sentence is affirmed. He is hereby notified that failure to move to modify this ruling terminates appellate review. *State v. Rolax*, 104 Wn.2d 129, 135-36, 702 P.2d 1185 (1985).

DATED this 12<sup>th</sup> day of February, 2016.



---

Eric B. Schmidt  
Court Commissioner

cc: Catherine E. Glinski  
Thomas C. Roberts  
Hon. Jack Nevin  
Ricardo N. Trevino

**GLINSKI LAW FIRM PLLC**

**May 20, 2016 - 11:37 AM**

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