IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. PETRONILO CIFUENTES-VICENTE, Appellant.	No. 38585-6-II UNPUBLISHED OPINION

Bridgewater, P.J. — Petronilo Cifuentes-Vicente appeals his convictions of first degree child rape and first degree child molestation. He argues that the trial court violated the confrontation clause in excluding testimony and that the trial court erred in giving the jury a non-corroboration instruction. We find no err and affirm his convictions.

FACTS

N.R. does not remember how old she was when her father, Pantaleon Rames-Gonzales, invited Petronilo Cifuentes-Vicente to live with them. Cifuentes[1] was Rames's cousin, and N.R. came to know him as "uncle." 3 RP at 367.

N.R.'s family, along with Cifuentes, lived in a few Vancouver apartments where space was

[1]Defendant indicated at trial that he preferred to be called Cifuentes.

modest. N.R. and her family slept in the same bedroom, but Cifuentes always had a separate bedroom.

N.R.'s family eventually moved to the Greenwood Acre Apartments and occupied apartment J-117. N.R. remembers Cifuente's bedroom in J-117 as the place Cifuentes would take her to sexually abuse her. She was then seven years old.

Cifuentes called it their "little game"; N.R. thought that the sexual abuse was her fault. 3 RP at 365. Eventually, within the same year that N.R.'s sexual abuse started, Cifuentes moved out of her family's house, and the abuse stopped. Cifuentes told N.R. not to talk about their "little game," but, due to her embarrassment and fear that her parents would be angry, N.R. had her own reasons not to tell anyone about Cifuentes's abuse. 3 RP at 365. She was about 13 years old when she first told someone about the abuse.

The State charged Cifuentes with four counts of first degree child rape and two counts of first degree child molestation. A jury found Cifuentes guilty of one count of child rape and guilty of both counts of child molestation.

ANALYSIS

I. Confrontation Clause

At trial, Cifuentes sought to impeach Rames on the ground that he was biased against Cifuentes for suspecting that Cifuentes was having an affair with his wife. The trial court ruled that Rames's alleged bias stemming from the affair was not relevant to his testimony; Cifuentes now argues that the court violated the confrontation clause[2] in excluding the testimony.

[2] U.S. Const. amend. VI; Wash. Const. art. I, § 22.

Cifuentes's argument is not persuasive.

The confrontation clause of the Sixth Amendment guarantees a defendant the opportunity to cross-examine a witness. *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937 (2009) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)). But the right to cross-examine a witness for bias is not absolute, and the trial court has discretion to control the scope of exploring a witness's alleged bias "'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Fisher*, 165 Wn.2d at 752 (quoting *Delaware*, 475 U.S. at 679). Thus, although the dispositive issue before this court concerns the confrontation clause, we are ultimately asked to review the trial court's ruling on the admissibility of Rames's bias testimony. *See, e.g.*, *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

We review trial court's ruling on the admissibility of evidence for abuse of discretion. *Darden*, 145 Wn.2d at 619. "Abuse exists when the trial court's exercise of discretion is 'manifestly unreasonable or based upon untenable grounds or reasons.'" *Darden*, 145 Wn.2d at 619 (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). The trial court has discretion to reject cross-examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative. *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980) (citing *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965)). The defendant has more latitude in confronting a key witness to expose bias, but, absent a finding of manifest abuse of discretion, we will uphold a trial court's ruling on the scope of cross-examination. *Fisher*, 165 Wn.2d at 752.

A "defendant has no constitutional right to have irrelevant evidence admitted in his or her defense." *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Evidence is relevant if it has any "tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. A trial court may exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

Cifuentes cites cases holding that a defendant could cross-examine a witness for bias, but he ignores the fact that the trial court in those cases admitted relevant bias testimony. For example, he cites *Roberts*, as standing for the broad proposition that cross-examining a witness is "'generally a matter of right,'" and the trial court should give a defendant "'great latitude in the cross-examination of prosecution witnesses to show motive or credibility.'" Br. of Appellant at 7 (quoting *Roberts*, 25 Wn. App. at 835).

Although Cifuentes is correct that *Roberts* articulated the rule that a trial court should give the defendant latitude in cross-examining to show motive or credibility, he does not reconcile this general right to cross-examine with how the *Roberts* court, in holding such testimony admissible, relied on the testimony's importance. *Roberts*, 25 Wn. App. at 834-35. In particular, the *Roberts* court held that the defendant had a right to cross-examine a rape victim to show motive or credibility when the case outcome hinged on the victim's credibility and when some facts indicated that the victim had been pressured to testify. *Roberts*, 25 Wn. App. at 835-36. For *Roberts*, a sex crime case, the victim's credibility was particularly important because much of a sex crime

prosecution rides on instincts and sentiments of the jury who, due to the lack of objective corroborative evidence, put great weight on the victim's testimony. *Roberts*, 25 Wn. App. at 835-36. It was based squarely on the fact that the case stood or fell on the jury's belief or disbelief of the victim's testimony that the *Roberts* court held that the defendant had the right to cross-examine her to show motive or credibility. *Roberts*, 25 Wn. App. at 835-36.

In contrast to the testimony in *Roberts*, the present case did not hinge on Rames's testimony. Rames neither had first-hand knowledge of his daughter's sexual abuse, nor did Cifuentes allege that he had first-hand knowledge—the first Rames had heard of N.R.'s abuse was from his wife. Instead, Rames was one of three witnesses who testified to show that Cifuentes lived with his family in apartment J-117, where N.R. was sexually abused.

Further, Cifuentes cross-examined Rames, without restriction, about the dates he alleged Cifuentes lived in J-117, even using evidence of a prior inconsistent statement to impeach Rames's testimony. Specifically, when Rames said that he could not remember the exact dates when Cifuentes lived in J-117, Cifuentes reminded Rames that he had told investigators that Cifuentes moved out of that apartment six months before Rames and his family moved out. Cifuentes thus not only cross-examined Rames about the dates in which Cifuentes lived in J-117, but he also impeached the veracity of his testimony with a prior inconsistent statement.

Contrary to impeaching Rames's actual testimony, Cifuentes asked Rames whether he was biased or prejudiced toward Cifuentes, which the trial court allowed. But even though Rames responded that he did not have any bias or prejudice toward Cifuentes, Cifuentes persisted and said, "You mean to tell me you never thought my client had an affair with your wife?" 2 RP at

229. The State objected and the trial court sustained the objection. After the court heard arguments from both sides outside the jury's presence, the court ruled that Cifuentes could not cross-examine Rames about alleged bias toward Cifuentes for an affair because the testimony was not relevant to Rames's testimony.

The trial court did not abuse its discretion in excluding the bias testimony. The thrust of Rames's testimony was to show when and where Cifuentes lived with his family at apartment J-117, which other witnesses corroborated.[3] Cifuentes also cross-examined Rames about when and where he thought Cifuentes lived with his family, even impeaching him with a prior inconsistent statement on the matter. Thus, impeaching him about an alleged affair was cumulative, if it bore any relevance to the charge, which it did not.

Before finding that impeaching Rames for bias was not relevant, the trial court heard arguments from both sides and considered the nature of the testimony. The trial court was correct to consider bias testimony's relevance before giving Cifuentes latitude in cross-examining Rames for bias. We hold that the trial court did not abuse its discretion in excluding Rames's bias testimony.

II. Non-Corroboration Instruction

Cifuentes next argues that the trial court committed reversible error when it gave the following non-corroboration instruction:

> In order to convict a person of a sexual offense against a child, it shall not be necessary that the testimony of the alleged victim be corroborated.

[3] Rames's wife testified that Cifuentes lived with her family at apartment J-117 and that he did not move out before them. N.R. also testified that Cifuentes lived with them at apartment J-117. Cifuentes, however, testified that he never lived with them at apartment J-117 but instead was living at a different address during the time in which the abuse occurred.

CP at 94. Cifuentes concedes that the instruction is a correct statement of the law; but, he argues that correctly stating the law, alone, is not sufficient because the instruction implies that the victim's evidence is more credible. We disagree.

Jury instructions are sufficient when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). Article IV, section 16 of the Washington Constitution forbids a trial court from commenting on the evidence presented at trial. "'An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question.'" *Tili*, 139 Wn.2d at 126 (quoting *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996 (1996)). We review jury instructions de novo, examining a particular instruction within the context of the jury instructions as a whole. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

For years, Washington courts have wrestled with deciding whether the non-corroboration instruction for sexual offense crimes amounts to an impermissible comment on the evidence. *E.g. State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949); *State v. Zimmerman*, 130 Wn. App. 170, 121 P.3d 1216 (2005), *review denied*, 161 Wn.2d 1012 (2007); *State v. Malone*, 20 Wn. App. 712, 582 P.2d 883 (1978), *review denied*, 91 Wn.2d 1018 (1979). Of the caselaw courts have generated over the years, *Clayton* was the first, and only, court to consider the following non-corroboration instruction:

> You are instructed that it is the law of this State that a person charged with

> attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, *the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant*, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

Clayton, 32 Wn.2d at 572 (emphasis added). This instruction was unique to *Clayton* because subsequent courts only considered non-corroboration instructions that did *not* include the additional language that credibility questions remain with the jury. Yet even though those non-corroboration instructions did not include the additional language, we have upheld them under *Clayton*. *E.g.*, *Zimmerman*, 130 Wn. App. at 182.

Recently, in *State v. Johnson*, 152 Wn. App. 924, 934-36, 219 P.3d 958 (2009), we considered whether the additional language in a non-corroboration instruction is necessary. But in *Johnson*, we reversed the defendant's conviction on different grounds and did not definitively decide whether the additional language was necessary. *Johnson*, 152 Wn. App. at 934, 936-37. Instead, *Johnson* simply noted that our Supreme Court gave "no clear pronouncement" about whether the additional language is necessary and that a non-corroboration instruction without the additional language "may be an impermissible comment on the alleged victim's credibility." *Johnson*, 152 Wn. App. at 936-37.

The *Clayton* court did not address whether the additional language is necessary to validate the non-corroboration instruction because the court upheld the non-corroboration part of the instruction on the ground that it was a correct statement of the law that did not otherwise contain the trial court's opinion on the evidence. *Clayton*, 32 Wn.2d at 573-74. Indeed, *Clayton* noted

that, although the trial court's non-corroboration instruction "in a sense singled out" the victim's testimony, the trial court never advised the jury that such uncorroborated testimony *was sufficient* to find guilt. *Clayton*, 32 Wn.2d at 574. Therefore, in holding that the non-corroboration instruction reflected the law and not the trial court's personal opinion, *Clayton* did not rely on the additional language in upholding the instruction.

Notably, *Clayton* addressed the additional language with regard to the second issue that the defendant raised: whether the instruction's second sentence was a comment on the evidence. *Clayton*, 32 Wn.2d at 573, 577. Specifically, the defendant argued that the instruction's second sentence should have asked the jury to consider "all the evidence and surrounding circumstances shown at the trial." *Clayton*, 32 Wn.2d at 577. The *Clayton* court agreed that the instruction did not correctly state the defendant's right to have the jury consider all the evidence; however, it held that the jury must have understood from the second sentence in the instruction, as well as from the other instructions, that they were to determine the defendant's guilt from all the evidence in the case. *Clayton*, 32 Wn.2d at 577. Thus, *Clayton* directly addressed the instruction's additional language only in the context of whether that specific language prejudiced the defendant, not in the context of whether the instruction's non-corroboration language was a comment on the evidence.

Clayton upheld the non-corroboration portion of the instruction without relying on the additional language. Once the Washington Supreme Court has decided an issue of state law, its conclusion is binding on lower courts. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). In the present case, like in *Clayton*, the instruction correctly stated the law[4] without expressing the

[4] The instruction almost exactly mirrors the relevant statute, RCW 9A.44.020(1), which states: "In order to convict a person of any crime defined in this chapter it shall not be necessary that the

trial court's opinion on the evidence. To the extent that the instruction singled out the victim's testimony, the instruction did not say that the victim's uncorroborated testimony was sufficient to find guilt. We hold that the instruction does not imply that the victim's evidence is more credible even though it lacks the additional language that credibility questions remain with the jury. We follow *Clayton* and reaffirm our holding in *Zimmerman* that the non-corroboration instruction was not a comment on the evidence.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, P.J.

We concur:

Quinn-Brintnall, J.

Armstrong, J.

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testimony of the alleged victim be corroborated."