

FILED

April 10, 2012

**In the Office of the Clerk of Court
WA State Court of Appeals, Division III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 29085-9-III
)	
Respondent,)	
)	Division Three
v.)	
)	
TOBIAS ALLEN PRITCHARD,)	
)	UNPUBLISHED OPINION
Appellant.)	
)	

Siddoway, J. — Washington recognizes two distinct evidentiary privileges between a husband and wife: a testimonial privilege, which, if invoked, places a party’s husband or wife off-limits as a witness against his or her spouse with only a few exceptions, and a communication privilege, which more narrowly protects spousal confidences. Both privileges can be waived. At issue in this case is whether Tobias Pritchard raised both privileges after being charged with possession of a stolen motor vehicle or only one, and whether, once privilege was raised, the trial court erred in admitting certain testimony from his wife, Sonya Pritchard. The record reveals that Mr. Pritchard invoked only the confidential communication privilege. While the trial court

admitted Ms. Pritchard's testimony to one confidence in error, it was harmless error. We affirm.

FACTS AND PROCEDURAL BACKGROUND

On an evening in February 2010, Sonya Pritchard arrived home to find her husband, Tobias Pritchard, from whom she was separated, standing on her porch with his girl friend, Linda Galvan, and a few others. Mr. Pritchard had stopped for an unplanned visit to see his children. Ms. Pritchard was upset that he showed up uninvited and with Ms. Galvan. She called 911 and let her husband know that she had called the police.

Mr. Pritchard left before the police arrived. According to the officers, Ms. Pritchard told them that her husband had been driving an unfamiliar Dodge truck. She stated or implied that it was stolen. She provided officers with the truck's license plate number, which she had written down. She also told officers that her husband was living at the All Star Motel, in room 142.

Deputy Sean Moore ran a check on the license plate, which the Department of Licensing reported back had been issued for a blue and white Ford truck. Ms. Pritchard was adamant that the truck was a newer Dodge pickup with an extended cab. Officers later testified that it is common practice for thieves to replace the license plates on a stolen vehicle with plates from a vehicle that is not stolen, in order to avoid detection.

Based on the information provided by Ms. Pritchard, the officers proceeded to the

All Star Motel, where they found a Dodge truck meeting her description, including the reported license plate, in a parking stall adjacent to room 142. Deputy Moore was able to see the vehicle identification number for the truck through the driver's side window and ran it through dispatch, receiving a report back confirming that the truck was stolen. The deputy then went to the motel office and spoke with manager Maria Meeks, who told him that room 142 was being rented by Mr. Pritchard and Linda Galvan. When asked whether she had seen Mr. Pritchard driving the Dodge truck parked next to the room, Ms. Meeks said she had, and that renters were asked to park their vehicles in the stall adjacent to their room.

Officers made several phone calls to room 142 in an effort to speak to anyone inside, but no one answered. They applied for and obtained a search warrant, obtained a key to the room from Ms. Meeks, and knocked and announced themselves. When they still received no response, they used the key and entered. They found Mr. Pritchard and Ms. Galvan in the room, sprawled across the bed, asleep. The keys to the Dodge truck were on the nightstand. Mr. Pritchard was arrested and charged with possession of a stolen motor vehicle.

Pretrial Consideration of the Marital Privilege

On the morning of trial, the prosecutor informed the court that he intended to call Ms. Pritchard as a witness to testify to information she provided to the officers, but

wanted to make sure he did not invade the “spousal privilege.” Report of Proceedings (RP) (May 10, 2010) at 10. When asked to respond, defense counsel stated that Ms. Pritchard had called him late that prior week, “frantic about that issue.” *Id.* He explained,

I told her she needs to talk to [the prosecutor]. I couldn’t advise her legally or give her legal advice. I guess we could run into other hearsay issues about that and address that as it comes up.

My understanding from her, she may either retract or say the officers were putting words in her mouth.

Id. at 10-11. The trial court said it would review the statute dealing with the evidentiary privilege of spouses in light of the potential issue. The court proceeded with jury selection and then broke for lunch.

When court reconvened in the afternoon, the prosecutor informed the court that Ms. Pritchard had arrived but informed him that “she’s not willing to get up there on the stand and testify,” explaining that her objection tied into the marital privilege issue. *Id.* at 12. In the ensuing colloquy between the court and counsel, almost all references were to the “spousal privilege.” The prosecutor expressed his continuing view that, “I didn’t think in the statute that it would disqualify her testimony, my understanding of what she would testify to,” but added that “she’s not willing to testify” but “did say that if she were ordered to she would testify.” *Id.*

When asked to respond, defense counsel spoke again about his earlier conversation

with Ms. Pritchard and stated:

I did listen to her. She was very adamant about potential spousal privilege, also the fact that she indicated to me that she disputed a lot of what was being alleged that she said.

I guess I don't necessarily mind her being up there. She indicated to me previously that she would indicate she was lying out of jealousy and anything that was said was based on that or stuff that was taken out of context. She may end up being a witness for the defense as well as the state.

Id. at 13. When defense counsel was asked by the court if Ms. Pritchard *wanted* to testify for the defense, he answered:

I don't think she wants to testify at all. I don't think she wants to be involved is my impression. She was bringing up the spousal privilege quite a bit.

Id. The court then asked directly whether the defendant was asking to have the spousal privilege invoked. At that point, defense counsel stated “[w]e would ask the privilege to be invoked,” but immediately added, “I’ll leave it up to your Honor. I’m not sure it applies here.” *Id.* at 14. In explaining why he thought the privilege might not apply, defense counsel contrasted, as an example, Ms. Pritchard’s observations of the truck from “any statements [Mr. Pritchard] made to her or allegedly made to her.” *Id.*

From that point on, discussion of testimony from Ms. Pritchard that might be excluded focused solely on her communications with Mr. Pritchard. As the colloquy continued, the court occasionally read into the record pertinent observations about

privilege from a treatise it had brought onto the bench; the excerpts dealt strictly with confidential communications. After several moments of discussing the privilege for confidential communications, the court observed, “I actually think that we’re all on the same page.” *Id.* at 18. It nonetheless directed the lawyers to run through an examination of Ms. Pritchard outside the presence of the jury to determine what her testimony would be in aid of making rulings.

During this preview examination, the State elicited Ms. Pritchard’s testimony that she had insisted that Mr. Pritchard tell her where he was staying if he wanted overnight visitation with her daughter. It was in that connection that she learned he was staying in room 142 at the All Star Motel. When cross-examined by defense counsel, Ms. Pritchard testified:

- Q. Ms. Pritchard, was anybody after Mr. Pritchard, collection people or anything? You said the sheriff was trying to serve a no contact order.
- A. Yeah.
- Q. *So is it your understanding he did not want anybody else to know he was there?*
- A. *No, he didn’t.*
- Q. *Okay. So is it your understanding he told you where he was in confidence so you’d know where the daughter was?*
- A. *Yes.*

Id. at 28 (emphasis added).

Having heard this preview of Ms. Pritchard’s testimony, the trial court discussed

the examination it would allow. In the process, it inferred an objection from the defense and ruled on it as follows:

As far as the information about where [Mr. Pritchard] was staying, let me focus on that next. *The defense argues that that is confidential information because he didn't want anybody to know he's there. Yet it's done for the purpose of visitation. I guess I don't view that to be confidential in the context of the statute itself. I would allow her to testify that that was the location given for purposes of visitation with the daughter.*

Id. at 30 (emphasis added).

Trial

The State called Ms. Pritchard as its first witness. She testified that she had never seen Mr. Pritchard driving the Dodge truck. She admitted having told officers something different, but stated that she did so out of anger; she wanted to get Mr. Pritchard arrested and jailed. She testified that during the February time frame she had never seen Mr. Pritchard drive anything other than a Jeep that he owned; it was the Jeep that Mr. Pritchard was driving when he picked up her daughter for overnight visitation while staying at the All Star Motel, and when she occasionally drove past the All Star Motel checking on her husband, it was his Jeep that she saw parked near room 142.

In addition to testimony from Deputy Moore and Lieutenant Nolan Wentz with the Yakima Police Department, who applied for and obtained the search warrant, the State presented testimony from Ms. Meeks. She testified that on the day of his arrest, Mr.

Pritchard was staying in room 142, which he and/or Ms. Galvan had been renting since February 10. She testified that she had first seen Mr. Pritchard driving the Dodge pickup several days before he was arrested. She recalled commenting to Mr. Pritchard about the truck, because he had earlier been driving a Jeep. According to her, Mr. Pritchard said the Jeep had broken down and described the Dodge pickup as belonging to him, referring to it as “my pickup.” *Id.* at 89. She testified that in the several days that Mr. Pritchard drove the Dodge pickup and parked it outside his room, she never saw anyone else drive it.

Mr. Pritchard was the only witness called by the defense. He testified that he met Ms. Galvan, a drug user, only a month before his arrest, after he relapsed into methamphetamine use and left Ms. Pritchard and his children. According to him, Ms. Galvan borrowed the truck from a friend of hers after his Jeep broke down. He did not know the name of her friend. He denied knowing that the truck had been stolen. He admitted he had driven the truck but denied ever having told Ms. Meeks it was his. He testified that Ms. Galvan had lived at the All Star Motel for over a year and had become close friends with Ms. Meeks; Ms. Meeks sometimes let Ms. Galvan help clean rooms to cover rent and referred to Ms. Galvan as “Mija,” a term of affection. RP (May 11, 2010) at 135. He claimed to have “no clue” where Ms. Galvan was by the time of trial. *Id.* On cross-examination, the State impeached Mr. Pritchard’s credibility with his 2007

conviction for theft in the second degree.

Defense counsel argued to the jury that the State had more reason to believe that Ms. Galvan was in possession of the stolen truck than Mr. Pritchard, but had been led down the wrong path from the beginning by Ms. Pritchard's allegations—allegations she now admitted had been false. He argued that Ms. Meeks was lying to protect her friend, Ms. Galvan.

The jury found Mr. Pritchard guilty of possessing the stolen truck. He appeals.

ANALYSIS

Mr. Pritchard contends that the trial court violated his rights by (1) compelling his wife to testify after the testimonial privilege was invoked and/or (2) permitting Ms. Pritchard to testify to his location, which he contends was a confidential communication exchanged during the marriage.

I

We first consider Mr. Pritchard's argument that the trial court violated his rights by "compelling his wife to testify against him at trial." Br. of Appellant at 1. We review a trial court's ruling on evidentiary rulings for abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997); *see also Dietz v. John Doe*, 131 Wn.2d 835, 845-46, 935 P.2d 611 (1997) (attorney-client privilege); *State v. Glenn*, 115 Wn. App. 540, 62 P.3d 921 (2003) (clergy-

penitent privilege). A trial court abuses its discretion when its exercise of discretion is “manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002) (quoting *Powell*, 126 Wn.2d at 258). “When the trial court bases an otherwise discretionary decision solely on application of a court rule or statute to particular facts, the issue is one of law, which is reviewed de novo on appeal.” *State v. Tatum*, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994).

Error may not be predicated upon a ruling that admits evidence unless a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context. ER 103(a)(1). Appellate courts will only consider the specific challenges that were raised at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

RCW 5.60.060(1) addresses privileged communications as a basis for disqualifying a witness. With respect to marital privileges, it provides:

A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership.

The first and broader privilege—as applied here, that Ms. Pritchard “shall not be examined for or against” Mr. Pritchard, “without the consent of the spouse or domestic

partner”—is the testimonial privilege. *Barbee v. Luong Firm, P.L.L.C.*, 126 Wn. App. 148, 155, 107 P.3d 762 (2005). It is sometimes referred to as a rule of spousal incompetency because it operates to entirely preclude a witness’s testimony. *State v. Thornton*, 119 Wn.2d 578, 580, 835 P.2d 216 (1992). The testimonial privilege reflects the “‘natural repugnance’” of having one spouse testify against the other, and it prevents one spouse from “having to ‘choose between perjury, contempt of court, or jeopardizing the marriage.’” *Barbee*, 126 Wn. App. at 155 (internal quotation marks omitted) (quoting *State v. Burden*, 120 Wn.2d 371, 375, 841 P.2d 758 (1992)). Once the testimonial privilege is asserted, the trial court does not have discretion to refuse to honor it where it directly applies. *Id.* at 159. If it directly applies, the spouse is excluded as a witness as to any matter. *State v. Tanner*, 54 Wn.2d 535, 537, 341 P.2d 869 (1959).

The privilege may be waived. *State v. Clark*, 26 Wn.2d 160, 168, 173 P.2d 189 (1946). “It is personal to the persons designated by the terms of the statute, and they may expressly or impliedly waive their right to exclude the banned evidence.” *Id.* (citing *State v. Frye*, 45 Wash. 645, 89 P. 170 (1907)). It is therefore held to apply only when a spouse demands it by timely objection, before the testimony. *Id.* at 168-69; *see also Tanner*, 54 Wn.2d at 537 (ruling that the spouse did not waive the privilege by failing to object during the trial because the spouse objected in a pretrial motion). Mr. Pritchard argues that both he and Ms. Pritchard timely raised the testimonial privilege. Br. of

Appellant at 3.

We consider first whether Mr. Pritchard asserted the privilege on his own behalf. By no fair reading of the trial record did Mr. Pritchard invoke the *testimonial* privilege. He never referred to a “testimonial” privilege. More importantly, nothing in his argument to the trial court suggested that he was invoking a privilege that would entitle Ms. Pritchard to refuse to testify or entitle him to exclude her as a witness. To the contrary, defense counsel stated, e.g., that “I guess I don’t necessarily mind [Ms. Pritchard] being up there” and, even after invoking spousal privilege on behalf of his client, he stated, “I’m not sure it applies here.” RP (May 10, 2010) at 14. He told the court, “[Ms. Pritchard] may end up being a witness for the defense as well as the state.” *Id.* at 13. When the trial court analyzed the privilege issue relying on a treatise’s discussion of the privilege for confidential marital communications, defense counsel never suggested that the court was analyzing the wrong privilege. Like the trial court and the State, defense counsel focused on whether particular matters to which Ms. Pritchard could testify were marital communications and whether they were confidential. Not having raised the testimonial privilege as an issue in the trial court, Mr. Pritchard cannot raise it for the first time on appeal. RAP 2.5(a).

Turning next to Ms. Pritchard’s categorical objection to testifying, it no doubt presented a stronger basis for excluding her as a witness at the trial court level. But her

objection does not avail Mr. Pritchard on appeal. Mr. Pritchard could have relied upon her objection as a basis for excluding her as a witness, but he did not. Although the parties do not address the issue, we assume without deciding that the trial court could have excluded Ms. Pritchard as a witness sua sponte based on her expressed objection to testifying. But since Mr. Pritchard never relied on Ms. Pritchard's objection to testifying as a basis for excluding her as a witness in the trial court, he may not rely on it for the first time on appeal. *Id.*; *cf. People v. McWhorter*, 47 Cal. 4th 318, 374-75, 97 Cal. Rptr. 3d 412, 212 P.3d 692 (2009) (defendant did not have standing to complain of the trial court's asserted failure to inform his wife of her statutory marital privilege). The court was not obliged to exclude Ms. Pritchard sua sponte. *Cf. People v. Resendez*, 12 Cal. App. 4th 98, 106-08, 15 Cal. Rptr. 2d 575 (1993) (trial court does not have a duty to advise a witness of the spousal privilege).

A decision by Mr. Pritchard to waive the testimonial privilege is understandable. Had Ms. Pritchard been excluded as a witness, her exclusion would not have prevented the State from presenting the testimony of law enforcement officers and Ms. Meeks establishing that the truck was stolen, that Mr. Pritchard had been driving it, and that he had characterized it to Ms. Meeks as his truck. Ms. Pritchard's privilege against testifying at trial has no bearing on the State's right to have used her earlier statements as a basis for investigation, including as probable cause for the search warrant. *State v.*

Bonaparte, 34 Wn. App. 285, 289, 660 P.2d 334 (1983). In the end, Ms. Pritchard’s testimony was not essential to the State’s case. But it did provide a basis for a defense argument that officers never considered the possibility that Mr. Pritchard was innocent, having been misled from the start by false information from his angry wife.

The trial court committed no error here.

II

Mr. Pritchard argues that the marital privilege for confidential communications was invoked and that the trial court erred in allowing the State to inquire into his confidential disclosure to his wife of where he was living. He asserts that in admitting the communication because “[it was made] for the purpose of visitation,” RP (May 10, 2010) at 30, the trial court created a new and unwarranted “visitation” exception to the privilege.¹

The confidential communication privilege prevents a spouse from being examined as to any confidential communications made by one to the other during the marriage. *State v. Thorne*, 43 Wn.2d 47, 55, 260 P.2d 331 (1953). “To fall within the privilege, a communication must have been induced by the marriage relationship.” *State v. Webb*, 64

¹ The State points out that Mr. Pritchard never actually raised an objection, which is true. But the trial court inferred an objection from defense counsel’s questioning of Ms. Pritchard, treated it as an objection, and explained why it was going to deny the inferred objection. This is sufficient to preserve the issue for appeal.

No. 29085-9-III
State v. Pritchard

Wn. App. 480, 487, 824 P.2d 1257 (1992); *see Breimon v. Gen. Motors Corp.*, 8 Wn. App. 747, 750, 509 P.2d 398 (1973) (stating that the scope of the privilege “embraces all knowledge communicated to a spouse because of the relationship”). The privilege is intended to encourage the free exchange of confidences in order to encourage mutual understanding and trust between the spouses. *Webb*, 64 Wn. App. at 487.

The State defends the trial court’s ruling, arguing that it was not creating an exception but only recognizing that at issue was a geographical location, not a communication. But Ms. Pritchard testified that her knowledge of where her husband was living was obtained from him. She believed he disclosed it in confidence, and explained why. Common law treats marital communications as presumptively confidential. *Blau v. United States*, 340 U.S. 332, 333, 71 S. Ct. 301, 95 L. Ed. 306 (1951). The assumption is strengthened if confidentiality is expressly affirmed or if the subject is such that the communicating spouse would probably desire that the matter be kept secret. 1 McCormick on Evidence § 80, at 330 (John W. Strong ed., 5th ed. 1999). Washington cases have held that the term “communication” within the meaning of the confidential communication privilege should be given a “‘liberal construction’” and may include even the act of a spouse, if it is one “‘which would not have been done by one spouse in the presence of, or within the sight of, the other, but for the confidence between them by reason of the marital relation.’” *State v. Robbins*, 35 Wn.2d 389, 393, 213 P.2d

310 (1950) (quoting 70 C.J. *Witnesses* § 520, at 388 (1935)). A wife’s communication to her husband as to where she is living, conveyed in confidence, falls within the common law privilege for confidential communications. *Blau*, 340 U.S. at 334 (expressing “no doubt” that husband was entitled to claim a confidential communication privilege rather than disclose the whereabouts of his wife, learned from her, at a time when she was hiding out to avoid being served with process). A husband’s communication enjoys the same protection.

The State more persuasively argues that even if Mr. Pritchard’s disclosure of his address was a confidential communication and should not have been admitted, the error was harmless. An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Since any error in admitting the evidence is nonconstitutional error, it is not prejudicial “unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

Mr. Pritchard argues that if the trial court had not improperly admitted Ms. Pritchard’s testimony as to her husband’s location, “the jury would not have heard about [his] lodging at the All Star.” Br. of Appellant at 9-10. But Deputy Moore, Lieutenant Wentz, and other officers who were present at the motel to help execute the search

No. 29085-9-III
State v. Pritchard

warrant were available to testify to Mr. Pritchard's presence in room 142, to the Dodge truck being parked outside, and to the keys being found on the nightstand. Ms. Meeks was available to testify to having seen Mr. Pritchard (and only Mr. Pritchard) drive the truck, and to his statements characterizing it as "my" truck. Given the evidence developed from Ms. Pritchard's lead, her testimony was not necessary evidence or even the best evidence.

The admission of Ms. Pritchard's testimony as to her husband's confidential communication of his residence was error, but was harmless.

We affirm.

A majority of the panel has determined that this opinion will not be printed in the

No. 29085-9-III
State v. Pritchard

Washington Appellate Reports but it will be filed for public record pursuant to RCW
2.06.040.

Siddoway, J.

WE CONCUR:

Korsmo, C.J.

Kulik, J.