IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ERIC JAMES CHRISTENSEN, Appellant.	)	No. 65619-8-I DIVISION ONE UNPUBLISHED OPINION FILED: November 28, 2011

Becker, J. — Eric Christensen, convicted of first degree murder, does not dispute that he murdered Sherry Harlan. The sole issue at trial was whether the murder was premeditated. We conclude there was sufficient evidence of premeditation. We reject Christensen's argument that a limiting instruction given to the jury was a judicial comment on the evidence and find no basis for reversal in the other issues raised on appeal.

Christensen and Harlan began a relationship in April 2009. They lived together for a few months in Gold Bar, Washington. Christensen went to jail for about a month on an outstanding misdemeanor warrant in November 2009. Harlan renewed her involvement with another man, Dan Young. Young gave Harlan money and gifts and helped her move into her own apartment in Everett.

Christensen began seeing Harlan again in December 2009. He learned Harlan was receiving gifts from Young. He had Harlan take a "blood oath" not to have further contact with Young.

Christensen learned Harlan was still communicating with Young. He called a friend, telling her he was suicidal and threatening revenge on Harlan and other "bitches" who he claimed had betrayed his trust. One night he vandalized Harlan's car. He smashed a cell phone and computer in anger when Harlan sent him an e-mail saying that she wanted to break up. On New Year's Eve, Christensen sent Harlan a text message that said, "I fucking hate you, you fucking bitch."

The next day, Harlan invited Christensen over to spend the night. Christensen picked Harlan up from work and spent the night at her apartment. The next morning was Saturday, January 2. Christensen discovered around 8 a.m. that Young and Harlan had been exchanging text messages that morning, and he confronted Harlan about the messages. A neighbor heard them fighting. It is undisputed that Christensen killed Harlan at that time.

Remaining in the apartment, Christensen disarticulated Harlan's body into nine or more pieces. Christensen enlisted the help of a friend, Ryan Gesme, to hide the body parts. This process took several days. Christensen placed Harlan's head and several kitchen knives in her car. He burned the car down to the metal and left it in rural Snohomish County.

A coworker of Harlan's called 911 on January 5, 2010, after Harlan had not shown up for work for several days. Police went into Harlan's apartment and

determined it was a crime scene. The next day, they met with Christensen to see if he knew where Harlan was. He had scratches on his face and arms, and cuts on his hand and knee. In a recorded interview, Christensen told police about his relationship with Harlan. He admitted they had fought verbally and physically Saturday morning, but he did not know where she was and did not care.

Police found Harlan's burned-out car containing the knives and Harlan's skull on Thursday, January 7. They arrested Christensen for murder. On Monday, January 11, 2010, Gesme went to police and told them where the other body parts were.

Christensen was charged with first degree murder. Trial began on May 25, 2010, and lasted eight days. A jury convicted Christensen as charged. He appeals.

PREMEDITATION

At Christensen's request, the trial court instructed the jury on the lesser included offense of second degree murder. The defense theory was that Christensen lost his temper and killed Harlan in a fit of jealousy but did not plan the killing in advance. He now contends there was insufficient evidence of premeditation.

> Evidence is sufficient to support a finding of guilt if "viewed in the light most favorable to the state, a rational trier of fact could have found guilt beyond a reasonable doubt." State v. Clark, 143 Wn.2d 731, 769, 24 P.3d 1006, cert. denied, 534 U.S. 1000. "All reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant." Id.
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> The legislature has declared that the premeditation necessary to support conviction for murder in the first degree must "involve more than a moment in point of time." RCW 9A.32.020(1). This court has defined premeditation as
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> > deliberate formation of and reflection upon the intent to take a human life [that] involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.

> State v. Hoffman, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991). Premeditation may be proved by circumstantial evidence where inferences supporting premeditation are reasonable and the evidence is substantial. Clark, 143 Wn.2d at 769.

State v. Gregory, 158 Wn.2d 759, 816-17, 147 P.3d 1201 (2006).

Christensen contends the evidence was insufficient because the State did not prove exactly how the murder was committed. The autopsy examiner concluded that the cause of death was "homicidal violence of unknown mechanism."

Dr. Joanne Marzowski, a crime scene expert, testified that the blood spatter evidence was consistent with a theory that Harlan was killed and dismembered in the bedroom with a sharp weapon. It is a proper inference that the killer procured a knife or knives from the kitchen in order to kill Harlan in the bedroom. The deliberation necessary to procure a knife can be viewed as premeditation.

An inference of premeditation is also supported by evidence of prior threats or quarrels and defensive wounds on the victim. State v. Sherrill, 145 Wn. App. 473, 486, 186 P.3d 1157 (2008), review denied, 165 Wn.2d 1022 (2009). Christensen made threats to get revenge on Harlan for breaking his trust. He quarreled with Harlan out of jealousy and called her a "bitch." He stated in the police interview that death was regarded in ancient times as a suitable punishment for one who broke a blood oath. He told a friend he killed her because she broke the oath. He admitted to shaking Harlan and pushing her around on the morning she was murdered. Harlan had recent "grab mark" bruises on her arm and wrist, and Christensen had cuts on his hand and knee. All this evidence supports an inference of action taken after deliberation and reflection. That inference is bolstered by the deliberate and unfrenzied manner in

which Christensen disarticulated the corpse and disposed of it. Taking the facts and inferences in the light most favorable to the State, we conclude the State presented sufficient evidence of premeditation.

LIMITING INSTRUCTION

Dr. Katherine Taylor, a forensic anthropologist, testified for the State. During her testimony, the trial court gave a limiting instruction at Christensen's request. He now contends the instruction was a comment on the evidence.

"We review jury instructions de novo, within the context of the jury instructions as a whole." State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

> Article 4, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law". A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986). The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury. State v. Trickel, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), review denied, 88 Wn.2d 1004 (1977).

State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). "The determination of whether a comment on the evidence is improper depends on the facts and circumstances in each case." State v. Eaker, 113 Wn. App. 111, 117-18, 53 P.3d 37 (2002), review denied, 149 Wn.2d 1003 (2003).

According to Dr. Taylor, a forensic anthropologist can determine biological profiles, help identify remains, and perform trauma analysis whenever there is trauma that impacts bone. Christensen moved to prevent Dr. Taylor from stating an opinion

that the disarticulation was skillfully performed. He was concerned that the jury might speculate that he had prior experience with disarticulating a human body.

The court ruled that the State was entitled to show through Dr. Taylor's testimony that the disarticulation was done skillfully and calmly. Christensen asked the court to give a limiting instruction. The court agreed to give an instruction that would limit the purpose of the evidence to showing premeditation. The court and counsel discussed the language of the limiting instruction at length, the court trying to accommodate Christensen's concerns that the instruction not direct the jury to give undue weight to Dr. Taylor's opinion. The final language arrived at after this colloquy added another sentence to the typical pattern instruction. Christensen did not object to it. The court read the instruction to the jury:

> THE COURT: Before we start, I have an instruction that I'm going to give you that has been referred to as a limiting instruction.
>
> The State is asking Dr. Taylor to give some opinions. Before this evidence is allowed, the Court advises you that you may consider the opinions of Dr. Taylor only for the purpose of determining whether premeditation was present. You must not consider the opinions of Dr. Taylor for any other purpose. The jury shall give the opinions of Dr. Taylor no more or less weight than other evidence bearing on that issue.

Direct examination resumed. The limiting instruction was not included in the court's written instructions to the jury at the close of trial.

The only portion of the instruction to which Christensen now objects is the final phrase, "bearing on that issue." He contends the phrase improperly conveyed to the jurors the court's opinion that Dr. Taylor's testimony should be significant in their decision whether to find the murder was premeditated.

The State contends review of the limiting instruction is precluded by the invited

error doctrine. We agree.

"A party may not request an instruction and later complain on appeal that the requested instruction was given." State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979). "Even where constitutional rights are involved, invited error precludes appellate review." State v. Alger, 31 Wn. App. 244, 249, 640 P.2d 44, review denied, 97 Wn.2d 1018 (1982); State v. Wingard, 92 Wash. 219, 226, 158 P. 725 (1916).

Defense counsel requested and helped to craft the limiting instruction concerning Dr. Taylor's opinion. It was drafted to address the specific concerns identified by the defense:

> [Defense Counsel:] . . . Really what I was looking for is some language that would say that the jury will give as much weight maybe as the direct and circumstantial evidence WPIC. . . .
> . . . .
> . . . Maybe some language to consider the evidence in light of or taking into consideration other evidence to determine how much weight to give the evidence or something to that effect.

The last sentence of the instruction, to which Christensen now objects, was the result of the court's agreeing to grant his request for extra language that would prevent the jury from giving Dr. Taylor's opinions undue weight when determining whether premeditation was present. We conclude that the invited error doctrine precludes review of this assignment of error.

Even if review were not precluded, Christensen fails to demonstrate error. The instruction used here does not resemble trial court remarks or instructions determined to be comments on the evidence in other cases. Comments have been found where the trial court remarks explicitly or implicitly on the credibility of a witness. Lane, 125

Wn.2d at 839; State v. Lampshire, 74 Wn.2d 888, 891-92, 447 P.2d 727 (1968). Instructions are comments on the evidence where they resolve disputed issues of fact, thereby relieving the State of its burden of proof. Levy, 156 Wn.2d at 721-22 (to-convict instructions in burglary case stated that apartment broken into was a building and crowbar and handgun were deadly weapons); State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997) (special verdict form told jury that a facility was a school, thereby relieving State of burden to prove the facility was a school); Eaker, 113 Wn. App. at 118 (to-convict instruction assumed as true the date alleged by State that events underlying specific criminal act took place). But a judge may refer to the evidence so long as the judge does not explain or criticize the evidence, or assert that a fact is proven thereby, and so long as the jury is made aware that the fact is for it to determine. Moore v. Mayfair Tavern, Inc., 75 Wn.2d 401, 409, 451 P.2d 669 (1969). That test was satisfied here.

Inevitably, a limiting instruction indicates that particular evidence is relevant to a particular issue. This is one reason why counsel often decide not to seek a limiting instruction. See State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 ("We can presume trial counsel decided not to ask for a limiting instruction as a trial tactic so as not to reemphasize this very damaging evidence."), review denied, 121 Wn.2d 1024 (1993). The court could not limit the jury to considering Dr. Taylor's testimony only on the issue of premeditation without leaving the impression that it was relevant to the issue of premeditation. Thus, the use of the phrase "bearing on that issue" did not contribute an improper emphasis.

Christensen argues that if review is precluded by invited error, trial counsel was ineffective for requesting the instruction. "A defendant is denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different *but for* the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993). Defense counsel's legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Counsel's request for a limiting instruction was a legitimate trial tactic to avoid misuse of Dr. Taylor's testimony by the jury. It cannot serve as a basis for a claim of ineffective assistance.

"FELON" REMARK

Before trial, the court ordered in limine that no evidence of Christensen's 1994 convictions for first degree assault with a deadly weapon could be introduced at trial. But on the first day of trial, Christensen's neighbor volunteered that she had learned Christensen was a felon:

> Q. Now, once Eric got out of jail in that early part or mid-portion of December, approximately how many times do you think you and he actually had conversations between the two of you?
> A. More than twice, I would say; about three or four times. I learned that he had a little toddler girl. I learned he was a felon.
> Ms. Kyle: Your Honor, I'm going to object and move to strike.
> The Court: I will sustain the objection, strike that comment, and the jurors will disregard it.
> A. (Continued) That's what he told me.
> Ms. Kyle: Again, Your Honor, I renew my objection.
> The Court: Just answer the questions. The jurors will disregard that statement.

The court denied Christensen's motion for mistrial. Christensen contends the trial court erred by denying the motion.

Courts generally presume jurors follow instructions to disregard improper evidence. Trial courts are accorded discretion in denying a motion for mistrial; such denials will be overturned only when there is a substantial likelihood the prejudice affected the jury's verdict. Trial courts should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. State v. Russell, 125 Wn.2d 24, 84-85, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

When evaluating whether a trial irregularity may have influenced the jury, several courts have considered "(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow." State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987); see also State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983).

In Escalona, the defendant was convicted of first degree assault with a knife. At trial, a witness for the State volunteered prejudicial testimony, "'Alberto already has a record and stabbed someone.'" Escalona, 49 Wn. App. at 253. The prejudicial nature of the remark led to reversal of the conviction. In concluding that the trial court's instruction to disregard the remark could not cure the prejudice, the Supreme Court emphasized the seriousness of the irregularity, the weakness of the State's case, and

the logical relevance of the statement. Escalona, 49 Wn. App. at 256.

Unlike in Escalona, the volunteered statement that Christensen was a "felon" was not specifically relevant to the charge of premeditated murder. And while the remark was prejudicial, its force was negligible compared to the strength of the State's evidence against Christensen and the undisputed fact that he intentionally murdered Harlan. We conclude that the trial court did not abuse its discretion by denying Christensen's motion for mistrial.

STATEMENT OF ADDITIONAL GROUNDS

Christensen alleges the trial court impermissibly practiced law by advising the State to move for a continuance before trial:

> [THE COURT:] I would just urge the State to go ahead and move for a continuance as it appears likely it be done as promptly as possible so everyone knows the timeframe in which they have to operate.

This is a comment of routine nature made out of concern for trial scheduling efficiencies, not the practice of law. It does not furnish an additional ground for review.

Christensen alleges that the trial court violated his speedy trial rights by granting the State's motion for a continuance on March 12, 2010. Trial eventually began on May 25, 2010. Christensen does not explain where in the record we would find the critical information necessary to establish a speedy trial violation. This court is not required to search the record in support of his claim. RAP 10.10(c). We decline to address it.

Christensen claims the State had one of the expert witnesses change his opinion to fit the State's theory of the case. At most, the record reveals an inconsistency in the

opinion stated by the witness. Inconsistencies in testimony are not grounds for reversal. Witness credibility is a determination for the jury. Stiley v. Block, 130 Wn.2d 486, 925 P.2d 194 (1996).

Christensen contends he was prejudiced by Dr. Taylor's testimony that the disarticulation of Harlan's body was similar to how a hunter field dresses a large mammal. This testimony, elicited on cross-examination by defense counsel, was a relatively matter-of-fact characterization of an inherently grotesque event. There was no undue prejudice to Christensen.

Christensen claims the prosecutor committed misconduct in closing argument by making the following statements:

> He removed her internal and external sexual organs. He cut off her left breast and the tissue surrounding it. Then, he dumped her body in east Snohomish County like so much garbage.
> . . . .
> . . . he field-dressed her like an animal.

These remarks were consistent with the evidence and testimony at trial. The defense did not object to them. Review has been waived. State v. Elmore, 139 Wn.2d 250, 292, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837 (2000).

Police seized Christensen's cell phone containing his New Year's Eve text to Harlan saying that he hated her. Christensen contends the seizure was illegal because the search warrant did not list the cell phone as an item to be seized. Before trial, Christensen moved to suppress other items found in the search of his home as beyond the scope of the search warrants, but his motion did not mention the cell phone. We regard this as an issue not preserved for appeal.

Affirmed.

Becker, J.

WE CONCUR:

Spearman, J.

Appelwick, J.