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Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent. vs. KENNETH ROBERT ARONSON, Appellant.	No. 51958-5-II UNPUBLISHED OPINION

MAXA, P. J. – Kenneth Aronson appeals his convictions of first degree child rape and first degree child molestation. The victim of the offenses was Aronson's ex-girlfriend's daughter, AS.

We hold that (1) the trial court did not err in excluding evidence of Aronson's statements denying the allegations against him made in a phone call in which AS's mother confronted him with the allegations because they were hearsay and no exception applied; (2) the trial court's exclusion of Aronson's statements did not violate his right to present a defense; (3) Aronson's claim that the prosecutor made statements during closing argument that constituted misconduct fails because the trial court's instruction cured any prejudice resulting from the statements; and (4) as the State concedes, the criminal filing fee must be stricken from the judgment and sentence and the interest accrual provision regarding nonrestitution legal financial obligations (LFOs) must be amended.

Accordingly, we affirm Aronson's convictions, but we remand for the trial court to strike the criminal filing fee and to amend the judgment and sentence to provide that no interest will accrue on nonrestitution LFOs imposed after June 7, 2018.

FACTS

Aronson was in a relationship with Barbara Avant from about 2006 to November 2011. In mid-2008, Avant moved in with Aronson. Avant had a daughter, AS, who was between the ages of six and 11 while Avant and Aronson were in a relationship. AS lived most of the time with her father, but frequently came to visit Avant at Aronson's residence.

In November 2014, AS, then 14 years old, told Avant that Aronson had sexually abused her during the time Avant and Aronson lived together. Avant contacted police, who began an investigation.

Law enforcement obtained a warrant authorizing them to record a call from Avant to Aronson, in which she confronted him with the allegations regarding AS. In the call, which lasted over 20 minutes, Aronson repeatedly and emphatically denied inappropriately touching AS and also asked Avant questions about the allegations. Aronson also discussed other issues, including the house Avant had rented from him and money that Avant owed him.

The State charged Aronson with one count of first degree child rape and one count of first degree child molestation relating to AS.

Aronson's First Trial

At Aronson's first trial, Sergeant Shane Krohn of the Hoquiam Police Department testified for the State about the confrontation call between Avant and Aronson. The State offered both the recording and a transcript of the call into evidence, and the trial court admitted them.

The recording of the call was played for the jury. Aronson's first trial in July 2017 ended in a mistrial after the jury was unable to reach a verdict.

Second Trial

At the second trial, Krohn testified that Aronson had stated the allegations were "[h]ogwash" when Krohn first contacted him. 2 Report of Proceedings (RP) (April 17, 2018) at 310. Krohn also stated that when Aronson was arrested he called the accusations an "allegation that was made [by] his crazy ex-girlfriend," because Avant was retaliating against him for a pending lawsuit he had filed against her. 2 RP (April 17, 2018) at 323. In addition, Krohn stated that Aronson denied the allegations.

However, the State did not introduce the recording or transcript of the confrontation call and made a motion in limine asking the trial court to preclude the defense's ability to "play, use, or reference the confrontation call" because it was hearsay. Clerk's Papers (CP) at 310. Aronson opposed the motion in limine, arguing that the call was admissible under the state of mind and excited utterance exceptions, and as a statement against penal interest. He did not argue that the statements were admissible under the rule of completeness.

The trial court ruled that the transcript was inadmissible hearsay. The court stated,

> I did review the hearsay exceptions that were cited. I don't believe that the excited utterance exception applies. I don't – the confrontation call is not relating to the kind of startling event in a statement made shortly after that that the excited utterance exception applies to.

2 RP (April 17, 2018) at 334. Aronson did not attempt to admit specific excerpts from the call.

During closing argument, the prosecutor framed the case as a typical child molestation and rape case involving a vulnerable family. The prosecutor highlighted that Avant was a single, recently divorced mother when her relationship with Aronson began, and that she was financially unstable and living in his house under his control. The prosecutor argued that Avant did not

wish to upset Aronson, even though she noticed his behavior toward AS was sometimes odd or inappropriate. The prosecutor further stated

> There were other things that happened that [Avant] saw. . . . But she doesn't have that kind of personality where she is really going to take charge of that. That's exactly what people like the defendant are looking for in the moms with children so they can get access to those children. . . . *[S]he is someone who's easily swayed and manipulated by others.* You could see that on the stand, right, certainly by a forceful personality. The defendant has that, *defense attorney had that.*

3 RP (Apr. 18, 2018) at 517-18 (emphasis added).

Aronson objected to the statements on the basis that they were an improper comment on counsel's performance and an improper character attack on Aronson and defense counsel. The trial court sustained the objection and instructed the jury to disregard the comments.

Verdict and Sentencing

The jury convicted Aronson at the second trial of first degree child rape and first degree child molestation. At sentencing in May 2018, the trial court imposed LFOs, including a $200 criminal filing fee. The judgment and sentence stated that the LFOs imposed would bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments under RCW 10.82.090. The court entered an order of indigency for purposes of Aronson's appeal.

Aronson appeals his convictions and the imposition of the criminal filing fee and the interest accrual provision in the judgment and sentence.

ANALYSIS

A. ADMISSIBILITY OF ARONSON'S STATEMENTS

Aronson argues that the trial court erred in excluding the statements he made during the confrontation call with Avant. He claims that even though the statements were hearsay, they should have been admitted under one or more hearsay exceptions. We disagree.

1. Legal Principles

Under ER 801(c), "hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A party's out-of-court statement offered *against* that party does not constitute hearsay. ER 801(d)(2)(i). But a party's out-of-court statement is hearsay if that party seeks to introduce his or her own statement. *State v. Finch*, 137 Wn.2d 792, 824, 975 P.2d 967 (1999). In that situation, the party's "self-serving" statement is admissible only if an exception to the hearsay rule applies. *See State v. Pavlik*, 165 Wn. App. 645, 654, 268 P.3d 986 (2011).

Hearsay generally is inadmissible under ER 802, but ER 803 provides several exceptions to that rule of inadmissibility. *See State v. Alvarez-Abrego*, 154 Wn. App. 351, 366, 225 P.3d 396 (2010). We review a trial court's ruling on the applicability of a hearsay exception for an abuse of discretion. *State v. Rodriquez*, 187 Wn. App. 922, 939, 352 P.3d 200 (2015). A trial court abuses its discretion if its decision is "manifestly unreasonable or based on untenable grounds or reasons." *Id.*

2. State of Mind Hearsay Exception

ER 803(a)(3) provides a hearsay exception for

> [a] statement of the declarant's *then existing state of mind*, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(Emphasis added.)

" '[T]hen' in the term 'then existing' refers to the time the statement was made, not the earlier time the statement describes." *State v. Sanchez-Guillen*, 135 Wn. App. 636, 646, 145 P.3d 406 (2006). In addition, "[t]he hearsay exception includes only statements describing the

declarant's own *emotions or feelings*." 5C KARL B. TEGLAND, WASHINGTON PRACTICE EVIDENCE LAW AND PRACTICE § 803.10 (6th ed. 2016).

Here, Aronson sought to introduce his statements from the confrontation call with Avant as state-of-mind evidence to show his shock at being accused of raping and molesting AS. He claims that his shock demonstrated his ignorance of a reason for AS to make such accusations against him.

However, none of Aronson's statements actually expressed his state of mind or mental feeling. They involved denials that he had done anything wrong and questions about the accusations against him. It could be inferred from Aronson's statements that he was shocked. But they were not statements expressing what his state of mind was. In the language of the rule, they were not statements "of" his state of mind. Instead, they were statements about what he remembered or believed. ER 803(a)(3) expressly excludes statements of memory or belief.

We conclude that ER 803(a)(3) does not apply to the types of statements Aronson made on the confrontation call. Therefore, we hold that the trial court did not abuse its discretion by not admitting this evidence under ER 803(a)(3).

3. Excited Utterance Hearsay Exception

ER 803(a)(2) provides a hearsay exception for statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The exception is based on the idea that statements made while a person is under the stress of an exciting event will be spontaneous rather than based on reflection or self-interest, and therefore are more likely to be true. *See State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). "[T]he key determination is whether the statement was made while the declarant was still under the influence of the event to the extent that the statement could not be the result of

fabrication, intervening actions, or the exercise of choice or judgment." *State v. Woods*, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001).

For the excited utterance exception to apply, the declarant's statement must meet three requirements: "(1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition." *State v. Ohlson*, 162 Wn.2d 1, 8, 168 P.3d 1273 (2007). Relevant factors include the statement's spontaneity, the passage of time, the declarant's emotional state, and the declarant's opportunity to reflect or fabricate a story. *State v. Williamson*, 100 Wn. App. 248, 258, 996 P.2d 1097 (2000). An excited utterance can be made in response to a question. *Id.*

Here, Aronson cannot satisfy the second requirement – that he was under the stress of the excitement caused by the startling event when he made the statements. He arguably may have been under the stress of the excitement in the moment immediately after Avant first made the accusations. An excited denial blurted out during that moment may have been admissible under ER 803(a)(2). However, the confrontation call involved a lengthy conversation (over 20 minutes) between Aronson and Avant that involved a number of topics. For example, Aronson wanted to talk about Avant's rental of his house and money that Avant owed him. There is no indication that Aronson was under the stress of excitement during the later portions of the call.[1]

[1] The trial court found that Aronson's statements were not admissible under the excited utterance hearsay exception because the confrontation call was not a startling event, not because Aronson could not show that he was under the stress of the excitement caused by the startling event when he made the statements. But we may affirm a trial court's ruling on the admissibility of evidence on any ground adequately supported by the record. *State v. Francisco*, 148 Wn. App. 168, 176, 199 P.3d 478 (2009).

Further, in the trial court Aronson never requested that only his initial denial should be admitted. His only argument was that the *entirety* of the confrontation call must be admitted. We generally do not consider arguments made for the first time on appeal. RAP 2.5(a); *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). Therefore, we decline to consider whether the trial court should have admitted only some of Aronson's statements under the excited utterance exception.

The standard of review is abuse of discretion. *Rodriquez*, 187 Wn. App. at 939. We hold that the trial court did not abuse its discretion by not admitting Aronson's statements under ER 803(a)(2).

4. Rule of Completeness

ER 106 states the "rule of completeness." *See State v. Roberts*, 142 Wn.2d 471, 496, 14 P.3d 713 (2000) (referring to ER 106 as the rule of completeness). ER 106 provides

> When *a writing or recorded statement or part thereof is introduced by a party*, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

(Emphasis added).

Aronson argues that he was entitled to introduce his repeated denials from the confrontation call because Krohn testified that Aronson denied the accusations only once when he was arrested. However, Aronson did not argue in the trial court that exclusion of his statements from the confrontation call violated ER 106. We generally do not consider arguments made for the first time on appeal. RAP 2.5(a); *Robinson*, 171 Wn.2d at 304. Therefore, we

decline to consider whether the trial court should have admitted only some of Aronson's statements under the rule of completeness.[2]

5. Admissibility of Inquiries

Aronson also argues that, to the extent some of his comments in the confrontation call were actually questions, they were not hearsay. Under ER 801(c), hearsay is "a statement" that is offered to prove the truth of the matter asserted. For purposes of the hearsay rule, "[a] 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." ER 801(a). Because an inquiry is not assertive, it is not a "statement" as defined by the hearsay rule and cannot be hearsay. *State v. Collins*, 76 Wn. App. 496, 498, 886 P.2d 243 (1995). And because a question does not involve an assertion, it cannot be offered to prove the truth of the matter asserted.

Several of Aronson's comments in the confrontation call were inquiries. These questions, if offered apart from the assertions Aronson made in the confrontation call, were not hearsay. However, in the trial court Aronson never requested that only the questions should be admitted. As noted above, his only argument was that the entire call be admitted. As noted above, we generally do not consider arguments made for the first time on appeal. RAP 2.5(a); *Robinson*, 171 Wn.2d at 304. Therefore, we decline to consider whether the trial court should have admitted the questions alone.

6. Summary

We hold that the trial court did not err in ruling that the transcript of the confrontation call was not admissible when offered by Aronson.

[2] In any event, the rule of completeness is inapplicable because the State at the second trial did not offer any of Aronson's statements from the confrontation call, either in transcript or recorded form.

B. CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

Aronson argues that the exclusion of his statements violated his constitutional right to present a defense. We disagree.

1. Legal Principles

A criminal defendant has a constitutional right to present a defense. *State v. Jones*, 168 Wn.2d 713, 719-20, 230 P.3d 576 (2010). This right to present a defense derives from the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *State v. Wade*, 186 Wn. App. 749, 763, 346 P.3d 838 (2015). There also is a fundamental due process right to present a defense under the Fourteenth Amendment. *State v. Lizarraga*, 191 Wn. App. 530, 551, 364 P.3d 810 (2015).

However, the right to present a defense is not absolute. *State v. Arndt*, 194 Wn.2d 784, 812, 453 P.3d 696 (2019). A defendant has no constitutional right to present evidence that is inadmissible under standard evidence rules. *Lizarraga*, 191 Wn. App. at 553. This rule generally applies to inadmissible hearsay. *Id*. But the longstanding rule against the admission of hearsay evidence "may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *see also Lizarraga*, 191 Wn. App. at 553.

In evaluating whether the exclusion of evidence violates the defendant's constitutional right to present a defense, "the State's interest in excluding evidence must be balanced against the defendant's need for the information sought to be admitted." *Arndt*, 194 Wn.2d at 812.

We review a trial court's evidentiary rulings for abuse of discretion. *Id.* at 797. We review de novo whether an evidentiary ruling violated the defendant's right to present a defense. *Id.* at 797-98.

2. Analysis

We hold above that the trial court did not abuse its discretion in excluding Aronson's statements. Aronson generally has no constitutional right to present inadmissible evidence. *Wade*, 186 Wn. App. at 764. The question is whether the State's interest in excluding inadmissible evidence is outweighed by Aronson's need for the excluded evidence. *Arndt*, 194 Wn.2d at 812.

In *Arndt*, the court found no violation of the right to present a defense when the evidence at issue was not excluded entirely and the defendant "was able to present relevant evidence supporting her central defense theory." *Id.* at 813-14. The situation here is similar.

Aronson's defense theory was that Avant and AS had fabricated the allegations to retaliate against him for a lawsuit he filed against Avant, and that he had consistently denied the charges. Sergeant Krohn testified that Aronson had stated the allegations were "[h]ogwash" when Krohn first contacted Aronson, 2 RP (April 17, 2018) at 310. And Aronson was permitted to draw testimony from Krohn that at arrest Aronson characterized the accusations as an "allegation that was made [by] his crazy ex-girlfriend" to retaliate against him for his lawsuit against Avant. 2 RP (April 17, 2018) at 323. Krohn also stated that Aronson denied the allegations. The jury heard evidence that Aronson denied abusing AS and that he thought Avant and AS had fabricated the allegations. Therefore, we hold that exclusion of Aronson's statements from the confrontation call did not violate his constitutional right to present a defense.

C. PROSECUTORIAL MISCONDUCT

Aronson argues that the prosecutor engaged in misconduct during closing argument by improperly impugning defense counsel. We hold that Aronson cannot show that the alleged misconduct caused any prejudice.

1. Legal Principles

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). In assessing whether a prosecutor's closing argument was improper, we recognize that the prosecutor has "wide latitude to argue reasonable inferences from the evidence." *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011).

It is improper for a prosecutor to impugn opposing counsel's role or integrity. *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). Prosecutorial statements that malign defense counsel are impermissible because they can damage a defendant's opportunity to present his or her case. *Id*. at 432. But comments that "can fairly be said to focus on the evidence" do not constitute misconduct. *Thorgerson*, 172 Wn.2d at 451.

To establish prejudice, the defendant must show a substantial likelihood that the misconduct affected the jury verdict. *Lindsay* 180 Wn.2d at 441-43. When analyzing prejudice, we do not look at the alleged improper remarks "in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury." *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

2. Impugning Defense Counsel

Here, the prosecutor stated during closing argument that Avant was "easily swayed and manipulated by others . . . . certainly by a forceful personality." 3 RP (Apr. 18, 2018) at 517. And the prosecutor suggested that defense counsel had a forceful personality.

Even assuming that the prosecutor's comment regarding defense counsel's forceful personality was improper and irrelevant to the issues before the jury, Aronson objected to this argument and the trial court instructed the jury to disregard it. We presume that jurors follow the

trial court's instructions. *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). And Aronson does not argue that the statement was so inflammatory that the instruction could not cure any prejudice. Therefore, Aronson cannot show that the comment prejudiced him. We reject Aronson's prosecutorial misconduct claim.

D. IMPOSITION OF LFOS

Aronson argues, and the State concedes, that under the 2018 amendments to the LFO statutes, we should order the trial court to strike the criminal filing fee and the requirement that nonrestitution LFOs bear interest from his judgment and sentence.

In 2018, the legislature amended (1) RCW 36.18.020(2)(h), which now prohibits imposition of the criminal filing fee on an defendant who is indigent as defined in RCW 10.101.010(3)(a)-(c); and (2) RCW 10.82.090, which now provides that no interest shall accrue on nonrestitution LFOs after June 7, 2018 and that all accrued interest before that date shall be waived on motion from the offender after release from total confinement. These amendments apply prospectively to cases pending on direct appeal. *State v. Ramirez*, 191 Wn.2d 732, 749-50, 426 P.3d 714 (2018).

Regarding the criminal filing fee, under RCW 10.101.010(3)(a)-(c), a person is "indigent" if he or she receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual after tax income of 125 percent or less of the current federally established poverty level. At Aronson's sentencing, the trial court made no finding regarding his ability to pay LFOs. But the trial court found that he was indigent for purposes of appeal and entered an order of indigency. The record is unclear if the trial court found Coleman indigent based on the definitions in RCW 10.101.010(3)(a)-(c), but the State

does not oppose striking the criminal filing fee. Therefore, we order the trial court to strike the criminal filing fee.

Regarding the interest provision on nonrestitution LFOs, RCW 10.82.090(1) expressly provides that interest cannot accrue on nonrestitution LFOs after June 7, 2018. Therefore, we order the trial court to amend the judgment and sentence to provide that no interest will accrue on nonrestitution LFOs imposed after June 7, 2018. Interest accruing before June 7, 2018 can be waived on the motion of the defendant after release from total confinement. RCW 10.82.090(2)(a).

CONCLUSION

We affirm Aronson's convictions, but we remand for the trial court to strike the criminal filing fee and to amend the judgment and sentence to provide that no interest will accrue on the nonrestitution LFOs imposed after June 7, 2018.

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 in accordance with RCW 2.06.040, it is so ordered.

MAXA, P.J.

We concur:

GLASGOW, J.

CRUSER, J.