IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ALEXANDER RODRIGUEZ-GONZALEZ, Appellant.	No. 40315-3-II UNPUBLISHED OPINION

Armstrong, J. — Alexander Rodriguez-Gonzalez appeals his conviction for first degree assault, arguing that (1) the trial court improperly admitted testimony from two witnesses that they heard his girlfriend say she had wiped his fingerprints off of a knife and disposed of the weapon as statements against interest under ER 804(b)(3) without first finding that the girlfriend was unavailable to testify; (2) the trial court improperly admitted hearsay evidence when it allowed a witness to testify that she heard his girlfriend say, "Get him, baby," referring to the victim; and (3) the prosecutor committed misconduct by stating in closing arguments that he had committed the crime and was lying. Finding no reversible errors, we affirm.

FACTS

On October 11, 2009, deputies responded to reports of a stabbing at an apartment complex in Longview. They found Amet Asencio-Marquez on his hands and knees in the parking lot, bleeding from a wound in his chest. The deputies called an ambulance and questioned bystanders, including Rodriguez-Gonzalez, Alberto Diaz, Alane Rodriguez, Charlene Daniels (who is also known as Diabla), Lakeesha Brooks, and Rosabella Harms.[1] One officer noticed a

[1] Because the parties referred to the victim and witnesses by their first names at trial and in their briefing on appeal, we also use their first names for the sake of clarity and consistency.

dark smear that appeared to be blood on the front door of Lakeesha's apartment. Another officer recovered a knife from the balcony of a vacant apartment. A detective questioned Amet at the hospital and he stated that either Rodriguez-Gonzalez or Alane had stabbed him, but he was "pretty certain" it was Rodriguez-Gonzalez. Report of Proceedings (RP) (Jan. 20, 2010) at 178.

The State charged Rodriguez-Gonzalez with first degree assault. At trial, Amet testified that he had driven Alberto, Rodriguez-Gonzalez, and Alane to Longview from Portland, Oregon, where they lived, because Rodriguez-Gonzalez and Alane wanted to visit their girlfriends. During the evening, Amet argued with Rodriguez-Gonzalez's girlfriend, Diabla. When Amet said that he needed to return to Portland, Rodriguez-Gonzalez and Alane tried to convince him to spend the night there. Amet said no and opened the door. He testified, "Alane was right behind me, and then [Rodriguez-Gonzalez] comes from behind Alane—in truth, I don't know what he used, a knife, I don't know, and then he stretched his arm out and stabbed me right in the heart." RP (Jan. 19, 2010) at 69-70. Amet tried to drive himself to a hospital, but did not have the strength to drive. He collapsed on the ground in the parking lot where the deputies found him.

Lakeesha testified that Amet and Charlene were arguing all evening. She saw Rodriguez-Gonzalez charge Amet and swing at him. Amet threw a chair, breaking a chandelier, and Alberto and Rodriguez-Gonzalez both pulled out knives. Lakeesha and the other people in the apartment pushed the men out the door and Lakeesha called 911. Later that evening, she heard Rodriguez-Gonzalez talking about Amet and saw him make a stabbing motion "as if he had stabbed the guy." RP (Jan. 20, 2010) at 12. Charlene told her that she had wiped Rodriguez-Gonzalez's fingerprints off of the knife and thrown it onto the balcony of an apartment above them. Charlene

also told Lakeesha to tell the police that an unknown Mexican guy stabbed Amet and ran away. Lakeesha initially told the police that story, but later told the police that Charlene had made it up.

Rosabella testified that Amet and Charlene were arguing and cursing at each other throughout the evening. She heard Charlene say to Rodriguez-Gonzalez, "Get him, baby." RP (Jan. 20, 2010) at 138-39. Someone threw a chair and then Rodriguez-Gonzalez punched Amet. Rosabella saw blood on Amet's chest. She also saw Rodriguez-Gonzalez grab a knife from the kitchen and run after Alberto with the knife behind his back. A few days after the incident, Charlene asked Rosabella's boyfriend to move a knife from the balcony of an apartment upstairs and said that she had already wiped Rodriguez-Gonzalez's fingerprints off of the knife.

Rodriguez-Gonzalez testified that he does not normally drink alcohol, but he had two or three drinks of whiskey that night and felt sick. He vomited and felt dizzy, so he laid down in one of the bedrooms and fell asleep. Charlene woke him up around 9:00 p.m. and told him that Amet was hurt and needed help. Rodriguez-Gonzalez suggested that someone call 911. He testified that he never argued or fought with Amet that night, and that he did not know how Amet was wounded.

A jury found Rodriguez-Gonzalez guilty of first degree assault while armed with a deadly weapon. The trial court sentenced him to 147 months of confinement.

ANALYSIS

I. Statements Against Interest: ER 804(b)(3)

Rodriguez-Gonzalez argues that the cumulative effect of several errors denied him his constitutional right to a fair trial. He first challenges the trial court's admission of testimony from

Lakeesha and Rosabella that Charlene said she had wiped his fingerprints off of a knife and disposed of the weapon, arguing that the trial court improperly admitted the testimony as statements against interest under ER 804(b)(3)[2] without first finding that Charlene was unavailable as a witness or that the State had made a good faith effort to locate her. The State counters that Rodriguez-Gonzalez did not object on this basis at trial and is therefore precluded from raising the issue on appeal.

At trial, the State argued that Charlene's statements were admissible as statements of a co-conspirator or as statements against interest. Regarding her availability, the State said, "[W]e do not expect to hear from Ms. Daniels in this trial, as she cannot be located." RP (Jan. 20, 2010) at 108. Defense counsel objected, arguing there was no evidence that Rodriguez-Gonzalez was involved in a conspiracy with Charlene. The trial court ruled that Charlene's statements were not admissible as statements of a co-conspirator, but were admissible as statements against interest under ER 804(b)(3).

"A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Because Rodriguez-Gonzalez did not dispute Charlene's availability at trial or object to the admission of her statements on this basis, he is precluded from raising the issue on appeal.

Rodriguez-Gonzalez also argues for the first time in his reply brief that this alleged error

[2] ER 804(b) provides several exceptions to the general rule that hearsay is inadmissible, but requires that the declarant be unavailable as a witness. ER 804(b)(3) allows the admission of statements that "so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true."

affected his constitutional right to confrontation under article 1, section 22 of our state constitution, and is therefore reviewable under RAP 2.5(a)(3). While we may consider constitutional issues for the first time on appeal, the defendant must raise the issue in accordance with the rules of appellate procedure. *State v. Johnson*, 119 Wn.2d 167, 170, 829 P.2d 1082 (1992). We generally will not address arguments, even constitutional arguments, raised for the first time in a reply brief. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Oostra v. Holstine*, 86 Wn. App. 536, 543, 937 P.2d 195 (1997). Additionally, Rodriguez-Gonzalez's assertion that this alleged error affected a constitutional right without argument or citation to authority is insufficient to merit review. *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

II. Hearsay

Rodriguez-Gonzalez next contends that the trial court erred by admitting Rosabella's testimony that Charlene said, "Get him, baby," arguing that this statement was inadmissible hearsay evidence. Br. of Appellant at 1, 14. At trial, defense counsel objected to this testimony as hearsay and the State responded that it was offered "simply to indicate that it was said." RP (Jan. 20, 2010) at 138. The trial court initially sustained the objection, but then overruled it following an unreported side bar with counsel. Here, the State maintains that the statement is not hearsay because it was offered simply to show that Charlene said it and that it had an effect on Rodriguez-Gonzalez. Rodriguez-Gonzalez counters that the statement was not admissible to show its effect on him because there is no evidence that he heard the statement or reacted to it.

We review a trial court's decision to admit evidence for abuse of discretion and will not overturn the trial court's decision unless it was manifestly unreasonable or based on untenable grounds. *State v. Athan*, 160 Wn.2d 354, 382, 158 P.3d 27 (2007). Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). "Where a statement is not offered for the truth of the contents of the conversation, but only to show that it was made, the statement is not hearsay." *State v. Gonzalez-Hernandez*, 122 Wn. App. 53, 57, 92 P.3d 789 (2004) (citing ER 801(c); *State v. Garcia-Trujillo*, 89 Wn. App. 203, 209, 948 P.2d 390 (1997)).

The statement "[g]et him, baby" is a directive; it does not assert a fact that could be true or false, but merely shows that Charlene encouraged Rodriguez-Gonzalez to "get" Amet. Because the statement was not offered to prove the truth of a fact asserted in the statement, it is not hearsay. *See Gonzalez-Hernandez*, 122 Wn. App. at 57. While Rodriguez-Gonzalez argues that there is no evidence he actually heard Charlene's statement or reacted to it, this argument concerns the statement's relevancy and defense counsel did not object on that basis at trial.[3] Accordingly, we hold that the trial court did not abuse its discretion by admitting this statement over defense counsel's hearsay objection.

III. Prosecutorial Misconduct

Finally, Rodriguez-Gonzalez contends that the prosecutor committed misconduct during closing arguments by stating that Rodriguez-Gonzalez had committed the crime and was lying. Because he did not object to the challenged remarks at trial or request a curative instruction,

[3] Even if defense counsel had objected on the basis of relevancy, Rosabella testified that she was standing behind Rodriguez-Gonzalez when she heard Charlene make the statement. The jury could reasonably infer from her testimony that if Rosabella heard the statement, then Rodriguez-Gonzalez did too.

Rodriguez-Gonzalez has waived his objection to the error unless the comment was "so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). The absence of an objection by defense counsel "'*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.'" *State v. McKenzie*, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (quoting *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)) (emphasis in original).

Rodriguez-Gonzalez first argues that the prosecutor clearly expressed his personal opinion that he had stabbed Amet when he stated:

> Now what happens to the knife? Because what happens to the knife also tells us the guilty party. Rosabella and Lakeesha both hear the Defendant's girlfriend/fiancé, Diabla, say, you know what? After the stabbing, I took the knife, wiped [Rodriguez-Gonzalez's] fingerprints off it, and I threw it up on the balcony. And you might think that's just a story, but for one important fact. The police find a knife right where his girlfriend said it would be. Detective Lincoln gets up through the vacant apartment, finds one thing in that apartment: A knife sitting on the balcony, where it had been thrown in an attempt by his girlfriend to conceal the crime. *The crime that he committed*.

RP (Jan. 21, 2010) at 25 (emphasis added); Br. of Appellant at 17-18

It is improper for a prosecuting attorney to express an independent, personal opinion that the accused is guilty, but "'he may nevertheless argue from the testimony that the accused is guilty, and that the testimony convinces him of that fact.'" *McKenzie*, 157 Wn.2d at 53 (quoting *State v. Armstrong*, 37 Wash. 51, 54-55, 79 P. 490 (1905)). "'In other words, there is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.'" *McKenzie*, 157 Wn.2d at 53

(quoting *Armstrong*, 37 Wash. at 54-55) (emphasis omitted). Here, it is clear from the context of the prosecutor's argument that he was expressing an opinion based on the evidence regarding the knife when he stated that Rodriguez-Gonzalez had committed the crime. Accordingly, we hold that this comment does not amount to misconduct.

Rodriguez-Gonzalez also challenges the prosecutor's statement that he was lying. The prosecutor stated:

> His defense is: I'm asleep, and the prostitutes and the guys are conspiring against me. How does that story make any sense? It's not a sensible story, his testimony is not credible, and what does it tell us? It tells us again, he's trying to get out of it. *He's lying*. He has a stake because he doesn't want to be found guilty.

RP (Jan. 21, 2010) at 48 (emphasis added). Rodriguez-Gonzalez argues that this remark was unsupported by the evidence, because his testimony was no less credible than the conflicting testimonies of Amet, Lakeesha, and Rosabella.

"Where a prosecutor shows that other evidence contradicts a defendant's testimony, the prosecutor may argue that the defendant is lying." *McKenzie*, 157 Wn.2d at 59 (citing *State v. Copeland*, 130 Wn.2d 244, 291-92, 922 P.2d 1304 (1996)). Here, the prosecutor first emphasized that three witnesses had seen Rodriguez-Gonzalez strike Amet. He then went on to argue that Rodriguez-Gonzalez's testimony was inconsistent with the other witnesses' testimony:

> [Y]ou have to look at [Rodriguez-Gonzalez's] testimony the same as everybody else's. Inconsistencies about minor details? How is his testimony consistent with anyone? With any? He can't even admit to being in the living room. . . .
>
> His defense is: I'm asleep, and the prostitutes and the guys are conspiring against me. How does that story make any sense? It's not a sensible story, his testimony is not credible, and what does it tell us? It tells us again, he's trying to get out of it. He's lying. He has a stake, because he doesn't want to be found guilty.
>
> His story, in his mind, probably is the best story of all. . . . I'm not even gonna put

> myself in the room where the crime occurred. I'm gonna leave myself totally out of there, because I'm gonna say I was in the bedroom. But he wasn't in the bedroom. Nobody else says he was in the bedroom. Obviously, he's not in the bedroom. He's upright. He's up and about. You see a photo of him that the police took when they got there, he's outside, he's walking around, he's talking. He's not sick, he's not passed out, he's not staggering. None of that.

RP (Jan. 21, 2010) at 47-48. Because the prosecutor argued that Rodriguez-Gonzalez was lying in the context of arguing that other evidence contradicted Rodriguez-Gonzalez's testimony, this statement did not amount to misconduct either. *See McKenzie*, 157 Wn.2d at 59.

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.

Armstrong, P.J.

We concur:

Van Deren, J.

Johanson, J.