IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DONALD OLIVA SALAVEA, Appellant.	No. 41368-0-II UNPUBLISHED OPINION

Penoyar, J. — Donald Oliva Salavea appeals his jury trial conviction for failure to register as a sex offender.[1] He contends that his CrR 3.3 speedy trial right was violated and that the trial court admitted improper witness opinion testimony. We affirm.

Facts

Salavea was convicted of multiple class A felony sex offenses in 1999, and as a result must register as a sex offender for life. Salavea's community custody officer, Greg Montague, testified that on September 16, 2009, Salavea was taken into custody for community custody violations. Salavea was housed in Cowlitz County where there was more room at the detention facility. On October 23, 2009, Salavea was released from custody and transported to Montague's office to be fitted with a global positioning system (GPS) monitor ankle bracelet. Montague testified that his routine was to remind released sex offenders that they needed to go register at the local county sheriff's office within 24 hours of release from incarceration. But Salavea did not register at any time after he was released from custody. His last registration occurred on August 20, 2009. At that time, he registered as living at his father's address in Tacoma.

[1] Salavea was convicted on other charges also, but he does not challenge those convictions.

On October 29, 2009, Detective Scott Yenne and Sergeant Jennifer Mueller went to the Tacoma address to verify that Salavea lived there. Each officer testified that Salavea was not present at that address when they visited. Salavea's sister, Rose Marie Salavea,[2] was at the address, permitted the officers to enter the house, and pointed out the bedroom where Salavea was supposed to be staying. The officers testified that the room contained a pair of men's jeans and a pair of men's tennis shoes, but there was no other indication that Salavea lived at the address. The officers did not look in the dresser or the closet.

Montague testified that Salavea was not present at his registered address each time he had tried to contact Salavea at that address. Salavea's father, Tomoloto Salavea, testified that the community custody officer came to the house weekly.

Tomoloto's grandchildren lived with Tomoloto although their mother did not. Tomoloto testified that Salavea stayed with him during the day while the children were at school at which time Salavea would eat or shower or rest. But the rest of the day Salavea was not in the home. Tomoloto testified that he was worried about his son because he did not know where he was living. Tomoloto and Rose testified that both Salavea and Rose received mail at the house, although Rose did not live there. Rose lived in her own home, but she visited her father's home at least every other day. Rose also testified that she told the officers conducting the verification check that her brother was not at the house "because his parole officer was looking for him." Report of Proceedings (RP) (Oct. 18 & 19, 2010) at 136.

[2] We refer to Salavea's family members by their first names to avoid confusion.

Salavea testified that he slept at his father's house at night and that he kept his clothing in the downstairs closet and in the drawers of a dresser upstairs.

On December 21, 2009, the State charged Salavea with one count of failure to register as a sex offender and one count of escape from community custody and sought a bench warrant for his arrest. The court issued a bench warrant on December 23. Salavea was arrested on the warrant and then arraigned on January 5, 2010. At the arraignment hearing, the court set a trial date of March 3, 2010, within the 60-day time for trial allowed for a detained defendant.

On February 9, the court ordered that Salavea undergo a competency examination at Western State Hospital. The court found Salavea competent to stand trial on February 24.

Defense counsel requested a continuance on March 2 because he was scheduled to be on Army Reserve duty. Salavea disagreed with defense counsel's request for more time. The court found good cause (i.e., continuance required in the administration of justice and defendant will not be prejudiced in his defense) and continued the trial until May 11.

Defense counsel requested another continuance on April 20 because he would be on Army Reserve duty and needed more time to prepare. Salavea disagreed with his counsel's request for additional time. The court continued the trial until June 1.

The State requested a continuance on May 20 because the prosecution had discovered new evidence which could lead to additional charges and had extended a new plea offer to the defense. The State would require additional time to prepare for trial if Salavea did not accept the plea offer. Defense counsel did not object to the continuance. Salavea agreed that his counsel would need time to review the evidence but did not want the case continued. The court continued the case until June 17.

On June 3 and June 16, the State filed amended informations, amending the charging period and adding two charges of tampering with a witness and two charges of violation of a protection order.

Defense counsel requested a continuance on June 16 because he would be unavailable while he served Army Reserve duty.[3] The court continued the case until August 16, over Salavea's objection.

On July 22, the State filed a third amended information charging Salavea with one count of failure to register as a sex offender, one count of escape from community custody, one count of tampering with a witness, and two counts of violation of a protection order with a domestic violence aggravator.

On August 16, the court set the case over until the following day because no courtrooms were available. Defendant voiced his objection to the continuance. Time for trial was not tolled.

On August 17, the court again set the case over until the following day because no courtrooms were available. Defendant voiced his objection to the continuance. Time for trial was not tolled.

The State requested a continuance on Wednesday, August 18 because the prosecuting attorney would be out of the state on a pre-planned trip from August 26 until September 1. The parties agreed that there were not sufficient days remaining to guarantee the trial could be finished before the attorney's trip. The case could not be reassigned to another prosecuting attorney. Defense counsel did not object to the continuance. The defendant voiced his disagreement with

[3] At the June 16 hearing, Salavea filed a pro se motion to dismiss for violation of his right to speedy trial.

the court's decision. The court continued the case. The deputy prosecutor was set for trial on six other cases for the week of her return, two of which were over a year old. The court continued the case until September 16 in order to avoid further scheduling conflicts.

Defense counsel and the State jointly requested a continuance on September 16 because both were in trial on other matters. The State had two witnesses who would be out of town in the weeks following the end of those trials. Defense counsel noted that Salavea disagreed with the request for a continuance. The court continued the case until October 4.

Defense counsel and the State jointly requested a continuance on October 4. Defense counsel was in trial in the morning and the State was in trial until the end of the week. Salavea disagreed with the requested continuance. The court continued the case until October 11.

On October 11, the court set the case over until the following day because no courtrooms were available. Salavea disagreed with the continuance. Time for trial was not tolled.

On October 12, the court set the case over until the following day because no courtrooms were available. Salavea disagreed with the continuance. Time for trial was not tolled.

On October 13, the court set the case over until the following day because no courtrooms were available. Salavea disagreed with the continuance. Time for trial was not tolled.

On October 14, the court set the case over until October 18 because no courtrooms or jurors were available. Time for trial was not tolled.

Trial began on October 18. The court denied Salavea's pro se motion to dismiss under CrR 3.3 for violation of speedy trial.

On October 26, the jury found Salavea guilty on all counts.[4] Salavea appeals.

analysis

I. CrR 3.3 Speedy Trial

Salavea argues that his trial did not commence within the time established by CrR 3.3 and thus the charges against him must be dismissed. We disagree.

We review an alleged violation of the speedy trial rule de novo. *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). But the trial court's decision to grant or deny a motion for a continuance rests within the court's discretion, and we will not disturb that decision unless there is a clear showing that the trial court was manifestly unreasonable. *Kenyon*, 167 Wn.2d at 135.

CrR 3.3 requires a defendant who is detained to be brought to trial within 60 days after being arraigned or within 30 days after the end of any period excluded from the computation of the time for trial. CrR 3.3(b)(1), (5). Delays for competency determinations and continuances granted by the court pursuant to CrR 3.3(f) are excluded from the computation of the time for trial. CrR 3.3(e)(1), (3). Continuances may be granted by the parties' written agreement or by a motion of the court or a party when the "continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). A charge not brought to trial within the time required by CrR 3.3 must be dismissed with prejudice. CrR 3.3(h).

[4] By interrogatories on the charge of tampering with a witness, the jury found that Salavea had attempted to induce the witness to absent herself from proceedings and that he had induced her to testify falsely or withhold testimony at the proceedings. By special verdicts, the jury also found that the domestic violence aggravators applied. These matters are not appealed and we do not discuss them further.

As explained in the facts recitation, the trial court granted many continuances in this case, but each time explained on the record and/or noted on the continuance order the reason (e.g., agreement or good cause) for each continuance. Each such continuance is an excluded period. CrR 3.3(e). After each continuance that was agreed or found to be for good cause, a 30-day time for trial period was added to the new trial date. CrR 3.3(b)(5). The several instances of mostly single day continuances due to courtroom unavailability did not toll the time for trial period, but all such delays combined did not exceed any 30-day time for trial period added by operation of CrR 3.3(b)(5).

Notably, defense counsel and the State jointly requested a continuance on October 4, 2010 because they both were in other trials when Salavea's October 4 trial date arrived. The trial court found that the continuance motion was brought by agreement of both parties, and there was good cause for the continuance as "both counsel are presently in trials." Clerk's Papers (CP) at 39. The trial court granted the continuance from October 4 to October 11, a date agreed to by the parties. Doing so added 30 days under CrR 3.3(b)(5) to the time for trial period beginning at the new October 11 trial date.

When the October 11 trial date arrived, the parties were ready but there were no courtrooms available, forcing the trial court to continue the case a day at a time until a courtroom finally became available on October 18. The 7-day delay from October 11 to October 18 lay within the 30 days of allowable time for trial under CrR 3.3(b)(5). Accordingly, Salavea's trial did not commence beyond the CrR 3.3 speedy trial period.

Nevertheless, Salavea reaches back to some of the earlier continuances, arguing that the trial court erred by granting them. His contentions are not convincing. Salavea contends that the

deputy prosecutor was dilatory in informing the trial court about her planned vacation and thus the continuance granted on August 18, 2010, which reset the trial date to September 16, could have been avoided.

But the record does not demonstrate laxity on the State's part. In fact, it shows that the deputy prosecutor informed the court about her planned vacation on June 16, two months before the August 2010 events in question, and the court included notice of the deputy prosecutor's unavailability (beginning August 26) in the June 16 continuance order. That order continued the trial date until August 16 for good cause at defense counsel's request based on counsel's Army Reserve duty requirements.[5]

On August 16, 2010, the parties were ready for trial but there were no courtrooms available and the trial court continued the case a day at a time until August 18, at which time the deputy prosecutor moved for a continuance based on her looming prearranged vacation date and the parties' agreed estimate about how long Salavea's trial was likely to take. The trial court granted a continuance for good cause until September 16. A deputy prosecutor's responsibly planned vacation is an "unavoidable circumstance within the meaning of CrR 3.3." *State v. Kelley*, 64 Wn. App. 755, 767, 828 P.2d 1106 (1992). We see no error here.

Salavea next contends that courtroom unavailability is not a valid basis for a continuance beyond the time for trial period. He relies on *Kenyon*, 167 Wn.2d 130, which applied the rule from *State v. Flinn*, 154 Wn.2d 193, 110 P.3d 748 (2005), stating, "Even though trial preparation and scheduling conflicts may be valid reasons for continuances *beyond the time for trial period*,

[5] Again, the good cause continuance added 30 days of allowable time for trial to the new August 16 trial date.

court congestion is not." *Kenyon*, 167 Wn.2d at 137 (quoting *Flinn*, 154 Wn.2d at 200) (emphasis added). But here, the continuances for courtroom unavailability never exceeded the time for trial period as adjusted under CrR 3.3(b)(5). All such continuances fell within the 30 day period added to the new trial date following issuance of a continuance for good cause or agreement. Accordingly, none of the brief continuances for unavailable courtrooms continued Salavea's trial date beyond the "allowable time for trial" period as calculated under CrR 3.3 and adjusted by Cr 3.3(b)(5) and CrR 3.3(e).

Finally, Salavea contends that when the trial court granted the August 18 continuance, setting a new trial date of September 16 for good cause, there were 28 days left in the speedy trial period thereby requiring that he be brought to trial by September 15, and he was not brought to trial within that time. This contention ignores the operation of CrR 3.3(b)(5), which, as noted, essentially extends the time allowed for trial by 30 days after an excluded period. The August 18 continuance reset Salavea's trial date to September 16, thereby excluding that period and adding 30 days of allowable time for trial beginning on September 16. CrR 3.3(b)(5), and (e)(3). Salavea's contention that his time for trial period expired on September 15 fails. We find no CrR 3.3 time for trial error.

II. Opinion Testimony

Salavea contends that the trial court improperly admitted officer opinion testimony that Salavea was guilty of failing to register as a sex offender. We disagree.

We review a trial court's decision to admit opinion testimony for abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). As a general rule, no witness, lay or expert, may "'testify to his opinion as to the guilt of a defendant, whether by direct statement or

inference.'" *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). However, "testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *Heatley*, 70 Wn. App. at 578. Moreover, an opinion is not improper merely because it involves ultimate factual issues. *Heatley*, 70 Wn. App. at 578. *See also State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (mere fact that an expert opinion covers an issue that the jury has to pass on does not call for automatic exclusion). Lay witnesses may give opinions or inferences based upon rational perceptions that help the jury understand the witness's testimony and that are not based on scientific or specialized knowledge. *Montgomery*, 163 Wn.2d at 591. In other words, a witness can express an opinion on an ultimate issue of fact so long as the witness does not tell the jury what result to reach. *Montgomery*, 163 Wn.2d at 590-91.

> Whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an "ultimate issue" will generally depend on the specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact.

Heatley, 70 Wn. App. at 579; *see also Montgomery*, 163 Wn.2d at 591 (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). We afford the trial court broad discretion to determine the admissibility of ultimate issue testimony. *Heatley*, 70 Wn. App. at 579. However, some areas are clearly inappropriate for opinion testimony in criminal trials; these are "expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses." *Montgomery*, 163 Wn.2d at 591.

Here, the State asked Sergeant Mueller what she observed in the bedroom that was

supposed to be where Salavea was living. The State then asked Mueller:

> Now, based upon your training and experience as well as your observation of the bedroom that was indicated belonged to the defendant, did you believe or did you form a belief as to whether or not the defendant was residing at that location?

RP (Oct. 18 & 19, 2010) at 104. Following defense counsel's overruled objection, Mueller answered:

> Yes. Based on what I saw in the bedroom at the top of the stairs, I came to form the opinion that, no, the defendant, in fact, did not live there. I did not find the amounts of clothing that you would find normally in a bedroom or clothing of the type that somebody of that age would wear. There was mostly women's clothing and women's items in the bedroom upstairs.

RP (Oct. 18 & 19, 2010) at 104-05. Detective Yenne similarly testified about what he observed in the bedroom. He said he saw female clothing and personal items, but only two items that belonged to a male: a pair of jeans and pair of tennis shoes. The State then asked without objection:

> So based on your training and experience of conducting somewhere in the hundreds of sex offender verification checks, as well as your interactions with the defendant's registered address, did you formulate a belief as to whether or not the defendant resided at that address?

RP (Oct. 18 & 19, 2010) at 118. Yenne responded: "Yes. It was a belief that he did not reside at the residence." RP (Oct. 18 & 19, 2010) at 118.

While these statements clearly encompass an ultimate factual issue,[6] they are not direct

[6] The jury was instructed that:

> A person commits the crime of failure to register as a sex offender when he or she is required to register as a sex offender, having been convicted of a felony sex offense, and knowingly fails to reside at an address registered with the county sheriff or knowingly fails to notify the county sheriff regarding a change of address, or fails to register with the county sheriff within 24 hours of release after being in custody as a result of a sex offense.

comments on Salavea's guilt, or his intent, or the veracity of any witness. As *Heatley* instructs:

> The fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt. [I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material. More important, [the officer's] opinion was based solely on his experience and his observation of [defendant's] physical appearance and performance on the field sobriety tests. The evidentiary foundation directly and logically supported the officer's conclusion [that defendant was obviously intoxicated]. Under these circumstances, the testimony [that defendant was obviously intoxicated] did not constitute an opinion on guilt.

70 Wn. App. at 579-80 (internal quotations and citations omitted). As in *Heatley*, Mueller and Yenne's conclusions are based on their experience in light of their observations of what they found in the bedroom. The evidentiary foundation supports the officers' conclusions and, in any event, their testimony is subject to the jury's evaluation and scrutiny.[7] *See State v. Baird*, 83 Wn. App. 477, 485, 922 P.2d 157 (1996) (testimony that is not a direct comment on the defendant's guilt is based solely on inferences arising from the physical evidence, is not based on the defendant's credibility, and is helpful to the jury does not constitute improper opinion testimony).

Moreover, under Evidence Rule 701, a witness may testify to opinions or inferences when they are rationally based on the perception of the witness and helpful to the jury. "'Where the opinion relates to a core element that the State must prove, there must be a substantial factual basis supporting the opinion.'" *State v. Fallentine*, 149 Wn. App. 614, 624, 215 P.3d 945 (2009) (quoting *State v. Farr-Lenzini*, 93 Wn. App. 453, 462-63, 970 P.2d 313 (1999)).

CP at 192 (Instr. 4).

[7] The jury was instructed that they are the sole judges of witness credibility and what weight and value is to be given to witness testimony. We presume the jury followed the court's instructions. *Montgomery*, 163 Wn.2d at 596.

Even if the testimony here was "technically improper," such "evidentiary error is reversible only if '"'within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'"' *Fallentine*, 149 Wn. App. at 624 (quoting

State v. Brockob, 159 Wn.2d 311, 351, 150 P.3d 59 (2006) (quoting *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997))). Here, a rational juror would have arrived at the same conclusion Mueller and Yenne expressed. Further, the other evidence, including Montague's testimony that he checked the residence on multiple instances but never found Salavea there, and Tomoloto's expressed concern for his son because he did not know where Salavea was living, combined to present a strong case of Salavea's guilt. Any error was harmless. *See Fallentine*, 149 Wn. App. at 625.

Salavea relies on *Montgomery* and *State v. Hudson*, 150 Wn. App. 646, 208 P.3d 1236 (2009), but neither case requires a different result. *Montgomery* held that witness testimony expressing an opinion that the defendant had the intent to manufacture methamphetamine was improper opinion testimony. 163 Wn.2d at 594-95. *Hudson* held that expert opinion testimony that the victim's injuries were caused by nonconsensual sex was in essence an opinion that the defendant was guilty of rape. *Hudson*, 150 Wn. App. at 653. The present case does not involve witness testimony about the defendant's or a victim's mental state. Salavea's case is more like *Heatley* than it is like *Montgomery* or *Hudson*.

Under the circumstances of this case, we hold that Mueller's and Yenne's testimony was not improper opinion evidence. We affirm.

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.

Penoyar, J.

We concur:

Quinn-Brintnall, J.

Van Deren, J.