IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27606-6-III**
Respondent,	)	
	)	**Division Three**
v.	)	
RAYMOND MICHAEL ANDERSON,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	

Sweeney, J. — This appeal follows a successful prosecution for second degree assault. The defendant assigns error to the court's decision to admit certain hearsay statements made to the officer who investigated the assault and a nurse who treated the victim. But he did not object to the admission of that testimony at trial and we conclude that any error, even assuming error, is not "manifest" and we therefore refuse to review the assignment of error. We also conclude that the trial judge did not abuse her discretion by refusing to grant a mistrial. We therefore affirm the conviction.

FACTS

Raymond Michael Anderson assaulted his sister, Sherie Franklin. The State

charged him with second degree assault, and a jury convicted him of that crime.

Spokane Police Officers John Everly and Adam Potter were dispatched on the evening of April 26, 2008, to Ms. Franklin's house. She lived there with her brother Mr. Anderson. Ms. Franklin told the officers that her brother assaulted her, but they found no probable cause to arrest Mr. Anderson. Later that night, around 12 a.m. on April 27, Ms. Franklin pounded on the front doors of the Shiloh Inn and Hotel in downtown Spokane. The hotel's night auditor, Anna Rairdon, let Ms. Franklin in.

Ms. Rairdon testified that Ms. Franklin said her brother had just beaten her up and asked Ms. Rairdon to call 911. Ms. Rairdon did so; an ambulance came and took Ms. Franklin to the hospital. Ms. Franklin had a bruised and broken nose. Her injuries were consistent with an assault.

Officer Everly testified that he went to the hospital to talk to Ms. Franklin about the assault. Ms. Franklin told him that Mr. Anderson assaulted her. So he went to Mr. Anderson's house with three other officers. The State asked Officer Everly why he took additional officers. And Officer Everly responded, "I had dealt with this suspect before." Report of Proceedings (RP) at 166. Mr. Anderson moved for a mistrial on the ground that the State's question and Officer Everly's answer violated a pretrial order that excluded evidence of prior bad acts. The trial court denied the motion and instructed the

jury to disregard the question and answer. Officer Everly then testified that he found Mr. Anderson at the house and arrested him.

On cross-examination, Mr. Anderson asked Officer Everly about Ms. Franklin's bipolar disorder and the lack of probable cause to arrest during the officer's first encounter with Mr. Anderson. The trial court then allowed the State to ask the officer about Ms. Franklin's injuries. The officer responded that they were consistent with what she said happened during the second incident that resulted in the charges. Officer Potter testified that Ms. Franklin said Mr. Anderson punched her in the nose and that caused her injuries.

The emergency room nurse who treated Ms. Franklin, Robert Paul Stanard, testified that Ms. Franklin told him the same thing. Nurse Stanard said Ms. Franklin's statements and responses to his questions suggested that she was oriented to time, place, and her environment during his contact with her. And he did not believe she was suffering from a mental illness at the time. He thought her injuries were consistent with having been punched in the face.

DISCUSSION

Admission of Hearsay Evidence

The claim here is that the admission of the hearsay from the officers and the nurse

violated Mr. Anderson's constitutional right to confront the witnesses against him. We will then review the assignments of error in the first instance, despite the absence of any objection in the trial court, if the errors amount to manifest constitutional error. *State v. Curtis*, 110 Wn. App. 6, 11, 37 P.3d 1274 (2002). And our review will be de novo. This exception to the general rule, that the lawyers must object at trial to preserve any error for review, is however a narrow one. *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). And we should construe it narrowly to avoid retrying criminal cases here in the Court of Appeals and to discourage sophisticated and experienced trial counsel from building constitutional error into a record. *State v. Lynn*, 67 Wn. App. 339, 343, 835 P.2d 251 (1992). The problem is that most of the errors claimed in criminal cases could be characterized in a way to implicate constitutional protections and prohibitions, with the attendant potential to retry every case here in this court of review. *Id.* at 344. We refuse to do so for a number of reasons.

Here, the trial court agreed to prohibit the State from introducing evidence that Ms. Franklin stated repeatedly that Mr. Anderson struck her without having Ms. Franklin testify. But the court also explained, and the defense agreed, that if the defense were to elicit hearsay testimony about Ms. Franklin's bipolar disorder, that the State would then be permitted to elicit hearsay testimony to rehabilitate her credibility. Mr. Anderson

questioned witnesses about Ms. Franklin's statements about her bipolar disorder and about her failure to take her medications. Apparently, the hope was to impugn the victim's version of events. That is a legitimate and appropriate trial tactic. But not surprisingly the State then used the reports of other statements made by Ms. Franklin to show that she could perceive and understand the events. Officer Potter explained Ms. Franklin's coherent recollection of events and relatively calm demeanor during his interview as she told the officer that her brother punched her in the nose.

That is an appropriate approach by the State "when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced." *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) (citing *State v. Stevens*, 69 Wn.2d 906, 421 P.2d 360 (1966)).

Finally, there are any number of reasons why Mr. Anderson's lawyer may not have objected to evidence of Ms. Franklin's statements to police. The lawyer obviously wanted to highlight parts of the reports and testimony that were favorable to Mr. Anderson's case. *See, e.g.*, RP at 133. She may well have concluded that evidence of the assault and its aftermath would come before the jury through other witnesses (the trauma

nurse, the hotel clerk, and a radiologist who testified about Ms. Franklin's CAT[1] scan and the injuries being consistent with an assault). And so it was better to let the evidence in, use the parts of the hearsay that helped, and otherwise deal with the statements that did not help. Again, that is an entirely appropriate trial tactic. In this context, "'manifest' means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed." *Lynn*, 67 Wn. App. at 345. Any error, even were we to assume error, is hardly unmistakable, evident or indisputable. The judge's decision to admit the statements is, then, not manifest constitutional error, if error at all. *See Lynn*, 67 Wn. App. at 345; *Gefeller*, 76 Wn.2d at 455.

Mr. Anderson also objects, for the first time on appeal, to the admission of testimony by the trauma nurse, Nurse Stanard. Again, he did not object to the testimony at trial and for good reason. It is admissible. *State v. Moses*, 129 Wn. App. 718, 729, 119 P.3d 906 (2005). Statements are not testimonial where the declarant makes the statement in the context of diagnosis and treatment. *Id.*; *State v. Sandoval*, 137 Wn. App. 532, 537, 154 P.3d 271 (2007). And that is what was done here.

This nurse examined Ms. Franklin within two hours of the assault, and simply asked what happened. That is a standard question for the history portion of any medical

[1] Computerized axial tomography.

examination. *Kain v. Logan*, 79 Wn.2d 524, 527, 487 P.2d 1292 (1971). The nurse was conducting an assessment of Ms. Franklin to triage and appropriately treat her. Ms. Franklin's statements to Nurse Stanard are then nontestimonial. *Moses*, 129 Wn. App. at 730. And they are, therefore, admissible under the medical diagnosis exception to the hearsay rule. ER 803(a)(4); *State v. Sims*, 77 Wn. App. 236, 239, 890 P.2d 521 (1995). The trial court did not abuse its discretion in admitting Nurse Stanard's testimony. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Mistrial

Mr. Anderson next assigns error to the trial judge's refusal to grant a mistrial based on comments made by Officer Everly. Officer Everly testified that he had dealt with Mr. Anderson before this case.

Our standard of review is abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). Other considerations also influence our review of these decisions. Reversal of a conviction is warranted only where "there is a 'substantial likelihood' that the error prompting the request for a mistrial affected the jury's verdict." *Id.* at 269-70 (internal quotation marks omitted) (quoting *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). And a trial court "'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.'" *Id.* at 270 (quoting *State v. Kwan Fai Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986)). Mr. Anderson must show that Officer Everly's statement—that he went to arrest Mr. Anderson with three other officers because he had "dealt with" Mr. Anderson before—likely influenced the verdict. *Id.*

There are three considerations here. We examine (1) how serious the remarks were, (2) whether they were cumulative, and (3) whether the trial court properly instructed the jury to disregard them. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). Mr. Anderson argues that the officer's prior dealings statement paints Mr. Anderson as a dangerous criminal prone to violence. But the trial court immediately instructed the jury to disregard the statement. RP at 169. And the statement is fairly benign when we compare it to other unchallenged testimony. For example, Officer Potter testified that the officers found Mr. Anderson naked in the attic when they went to arrest him and that Mr. Anderson was "extremely upset, agitated, yelling and screaming" at the officers in the patrol car. RP at 218. The trial court did not abuse its discretion in denying a mistrial. *State v. Kirkman*, 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007).

We affirm the conviction.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to

RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Kulik, C.J.

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Korsmo, J.