NO. 69451-1-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

JEFFREY M. KINZLE,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

Where the witness is present and testifies at trial regarding her inability to remember, defendant is given a full and fair opportunity to expose the memory lapse through cross-examination, and the jury has opportunity to evaluate the witness' lack of memory, does the witness' inability to remember exclude admission of pretrial statements?

2. Was the jury properly instructed regarding the State's burden to prove the elements, and the jury's duty during deliberations?

3. Was it an abuse of discretion for the trial court to impose statutorily authorized crime-related prohibitions and conditions of community custody?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIMES.

In March of 2011, Jeffrey Michael Kinzle, defendant, visited his friend Isaiah Ristine at Ristine's three bedroom apartment in Marysville, WA. Ristine lived with Erin Shuck and their three young

children.[1] Defendant spent two nights at Ristine's apartment sleeping on the couch. 9/12/12 RP 97-101, 141-144, 149.

On the second day, while Shuck was at work, Ristine and defendant spent the day at Ristine's apartment hanging out; they started drinking after the children went to bed around 8:00 p.m. Later they went over to Ashley Doughty's neighboring apartment for drinks. Ristine and defendant were at Doughty's apartment when Shuck got home from work around 10:45 p.m. Shuck checked on the children before going over to Doughty's apartment. All three were asleep in their beds. 9/12/12 RP 102-104, 124-125, 130-131, 144-146, 186-190.

While Shuck was at Doughty's apartment, Ristine left and went to bed in his apartment. About a half hour later defendant left Doughty's apartment and went back to Ristine's apartment. Shuck returned to her apartment about 45 minutes after defendant left Doughty's. 9/12/12 RP 105-109, 149, 190-192.

When Shuck returned to her apartment she found her daughters, R and N, hiding under a little table in her bedroom, crying and scared. At the time R was 9 years old and N was 4

[1] Ristine and Shuck have two daughters and a son. At the time of trial the oldest daughter R was 11, the younger daughter N was 6, their son was 9. 9/12/12 RP 46, 72, 142.

years old. R told Shuck that defendant had rubbed stuff on her private parts. Medicated eye cream was found in the bedroom shared by R and N. Shuck woke Ristine and told him what had happened. Ristine confronted defendant and told him to leave. Shuck called the police. The responding officer directed Shuck to take R and N to the hospital. 9/12/12 RP 50-59, 65-66, 109-118, 121, 150-151, 165.

R and N were interviewed and examined by forensic nurse Paula Newman Skomski at Providence Intervention Center. R and N told Skomski that defendant put eye cream on their butts, pee-pees and crotch areas with his hand. Skomski collected R's underwear and evidentiary swabs from both R and N. 9/12/12 RP 57; 9/13/12 RP 24-25, 37-38, 40-41, 43, 46-48, 50-51.

The swabs and clothing Skomski collected from R and N were sent to the FBI for testing. Traces of the eye cream were found on R's underwear, and on swabs from both girl's perianal areas. 9/13/12 RP 108-112, 156-157, 174-176.

Detective Smith arranged for R and N to speak with child interview specialist Razi Leptich at Dawson Place. Detective Smith observed both interviews from another room. N and R told Leptich that defendant put eye cream on their butt, pee-pee and privates

with his hand. The interviews were audio and video recorded and transcribed. The audio/video recording of N's interview was played for the jury. A redacted transcript of R's interview was read to the jury. 9/13/12 RP 76-77, 81-85, 88-89, 92-107.

B. PROCEDURAL HISTORY.

On April 8, 2011, defendant was charged with one count Child Molestation in the First Degree. CP 306-307. Amended information was filed on June 10, 2011, charging defendant with two counts Child Molestation in the First Degree. CP 301-302.

On September 10, 2012, the court conducted a child hearsay hearing under RCW 9A.44.120 regarding the admissibility of the statements made by R and N to Shuck—their mother, Doughty—the neighbor, Skomski—the forensic nurse examiner, and Leptich—the child interview specialist. The court gave its ruling the next morning. The court ruled that R's statements made to Shuck, Doughty, Skomski and Leptich were admissible, but excluded any reference by R regarding alleged abuse of N. The court went through the transcript of R's interview with the child interview specialist striking the portions that were excluded. The court ruled that N's statements made to Skomski and Leptich were admissible, but excluded the portions of the interview with the

forensic nurse examiner entitled "History Obtained From N" and N's statement "he did it to R too." The court excluded N's statements to Shuck and Doughty. 9/10/12 RP 8-138; 9/11/12 RP 5-28.

The case proceeded to trial and a jury found defendant guilty on both counts Child Molestation in the First Degree. CP 274, 275; 9/14/12, 9/17/12, 9/25/12 RP 74-78. Defendant was sentenced pursuant to RCW 9.94A.507 to an indeterminate sentence of 198 months to life, with community custody for the maximum term of life. CP 9-10; 9/14/12, 9/17/12, 9/25/12 RP 111-115. At sentencing the prosecutor went through the list of conditions recommended in the Pre-Sentence Investigation Report (PSI)[2] striking some and amending others. 9/14/12, 9/17/12, 9/25/12 RP 93-96. With one exception,[3] defendant was in full agreement with State's recommendations on the conditions of community custody. 9/14/12, 9/17/12, 9/25/12 RP 97-98. The court imposed twenty-two conditions of community custody. CP 11, 19-21; 9/14/12, 9/17/12, 9/25/12 RP 93-98, 112. Defendant timely appealed. CP 83.

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[2] The parties agreed that the court could use the PSI from defendant's prior case. 9/14/12, 9/17/12, 9/25/12 RP 81-83, 88-89; CP ___ (Sub# 74, Pre-Sentence Investigation Report).

[3] Defendant's only expressed concern was regarding polygraph and plethysmograph in condition 28. 9/14/12, 9/17/12, 9/25/12 RP 97-98.

III. ARGUMENT

A. THE PRETRIAL CHILD HEARSAY STATEMENTS WERE PROPERLY ADMITTED AT TRIAL.

Defendant argues that, given the character of N's testimony at trial, the admission of N's pretrial statements to a forensic nurse examiner and a child interview specialist violated the confrontation clause. Appellant's Brief 6-13. Whether the admission of N's out-of-court statements violated defendant's confrontation rights is a constitutional question subject to de novo review. State v. Price, 158 Wn.2d 630, 638-639, 146 P.3d 1183 (2006).

In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that where a witness is absent, but the State wishes to present his or her prior testimonial statements at trial, it can do so only if the witness is truly unavailable and the defendant has had a prior opportunity for cross-examination. Crawford, 541 U.S. at 59, 68; Price, 158 Wn.2d at 639. However, "the admission of hearsay statements will not violate the confrontation clause if the hearsay declarant is a witness at trial, is asked about the event and the hearsay statement, and the defendant is provided an opportunity for full cross-examination." Price, 158 Wn.2d at 644, citing State v. Clark, 139 Wn.2d 152, 159, 985 P.2d 377 (1999).

In California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), the Court concluded that "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." Green, 399 U.S. at 158; Price, 158 Wn.2d at 640. The purposes of the confrontation clause are to ensure that the witness' statements are given under oath, to force the witness to submit to cross-examination, and to permit the jury to observe the witness's demeanor. Id.

"When analyzing the three purposes of the confrontation clause set forth in Green, it becomes clear that a witness testifying to a lapse in memory can satisfy those purposes." Price, 158 Wn.2d at 649. The first purpose, ensuring that the witness must testify under oath, is satisfied if a declarant is present and testifying at trial on the stand. Id. "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." Price, 158 Wn.2d at 647, citing Green, 399 U.S. at 162. Here, N was physically present in the courtroom and confronted defendant face to face when she testified under oath at trial.

The second purpose is satisfied when the defense is given a full and fair opportunity to expose the memory lapse through cross-examination, thereby calling attention to the reasons for giving scant weight to the witness's testimony. Price, 158 Wn.2d at 649, citing Delaware v. Fensterer, 474 U.S. 15, 22, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985). The Court has clarified that "the Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Price, 158 Wn.2d at 642, citing United States v. Owens, 484 U.S. 554, 559, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988) (citations and internal quotations omitted). "[A] witness's inability to remember does not implicate Crawford nor foreclose admission of pretrial statements." Price, 158 Wn.2d at 650. In the present case, the defense had full opportunity to cross-examine N, including the fact of her lack of memory.

With regard to the third purpose, when the witness takes the stand and is asked about the events and hearsay statements, the fact finder can determine whether the witness is telling the truth about her lapse of memory or evading. Price, 158 Wn.2d at 649, citing Fowler v. State, 829 N.E.2d 459, 466 (Ind. 2005) ("The

feigned or real absence of memory is itself a factor for the trier of fact to establish, but does not render the witness unavailable."); United States v. Keeter, 130 F.3d 297, 302 (7th Cir.1997) (witness who feigns amnesia during trial is subject to cross-examination for purposes of confrontation clause). Here, the judge, jury, and defendant were able to view N's demeanor and body language while she was on the stand and evaluate for themselves whether N was being truthful about her lack of memory. Thus, the jury was provided opportunity to evaluate whether it believed N or whether she was evading for some other reason.

The purposes of the confrontation clause were satisfied when N's testimony showed that she was unable to recall. Admission of N's out-of-court statements to the forensic nurse examiner and the child interview specialist did not violate the confrontation clause in this case. Price, 158 Wn.2d at 650-651.

Defendant argues that N was unavailable for confrontation purposes because she was not asked about the incident or her out-of-court statements. Defendant's claim that the prosecutor did not ask N about the incident or her out-of-court statements is a mischaracterization of the record. After preliminary questions the prosecutor asked N if she knew the names of her dad's friends; N

replied that she did not. 9/12/12 RP 75-76. The prosecutor asked N if any of her dad's friends were in the courtroom; defendant was present in the courtroom and N did not identify him. 9/12/12 RP 77-78. When the prosecutor asked if she ever spoke to the police, N answered no. 9/12/12 RP 78-79. N said that she did not know what a nurse was and that the only time she spoke to a doctor was at school when she was given a shot. 9/12/12 RP 79-80. On cross examination N said she did not remember talking to "Dr. Dan" and that she did not remember hiding under the table. 9/12/12 RP 92. The record shows N's inability to recall the incident or remember making her prior statements. "[A]n inability to remember does not render a witness unavailable for confrontation clause purposes. Price, 158 Wn.2d at 651.

Defendant's reliance on State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997) is misplaced. In Rohrich, the prosecutor thwarted the confrontation clause by expressly acting to shield the witness from testifying about the incident or the hearsay statements. See Price, 158 Wn.2d at 644-645; In re Grasso, 151 Wn.2d 1, 16, 84 P.3d 859 (2004); Clark, 139 Wn.2d at 161. In the present case, the prosecutor did not seek to shield N. Rather, it was the prosecutor's efforts to question N about the incident and

her out-of-court statements that was thwarted by N's inability to recall. The prosecutor asked questions, but N did not know the answers or could not recall the incident. Rohrich does not apply in this case.

B. THE JURY WAS PROPERLY INSTRUCTED REGARDING THE STATE'S BURDEN TO PROVE THE ELEMENTS AND THE JURY'S DUTY DURING DELIBERATIONS.

1. The Trial Court Did Not Error In Giving WPIC 4.01.

Defendant argues that it was error for the trial court to include "an abiding belief in the truth of the charge" in the reasonable doubt instruction. Appellant's Brief at 14-18; see CP 280 (Instruction 2, WPIC 4.01). This phrase has been upheld in several appellate cases. State v. Pirtle, 127 Wn.2d 628, 658, 904 P.2d 245 (1995) (does not diminish the definition of reasonable doubt given in the first two sentences); State v. Lane, 56 Wn. App. 286, 299–300, 786 P.2d 277 (1989) (rejecting the argument that WPIC 4.01 dilutes the State's burden of proof); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988); State v. Price, 33 Wn. App. 472, 476, 655 P.2d 1191 (1982) review denied, 99 Wn.2d 1010 (1983). The U.S. Supreme Court has also upheld the use of traditional abiding-belief instructions. Victor v. Nebraska, 511 U.S. 1, 14, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). See also 11 Wash.

Prac., Pattern Jury Instr. Crim. WPIC 4.01 (3d Ed) Comment. It was not error in the present case to include WPIC 4.01 in the court's instructions to the jury.

2. The Trial Court Did Not Err By Giving WPIC 44.21.

Defendant argues that it was error for the trial court to include in the "to convict" instruction the sentence, "If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty." Appellant's Brief at 18-33; see CP 286, 287 (Instructions 8 and 9, WPIC 44.21). The rationale that underlies defendant's challenge has been rejected in cases arising from all three Divisions of this court. State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, review denied, 136 Wn.2d 1028 (1998) (abrogated on other grounds in State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005)); and State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998); State v. Brown, 130 Wn. App. 767, 770, 124 P.3d 663 (2005); State v. Wilson, ___ Wn. App. ___, ___ P.3d ___, 2013 WL 4176077 (August 15, 2013).

In Meggyesy the court found that the instruction clearly directed the jury to consider the evidence and to determine whether the State had proven, beyond a reasonable doubt, each element of

the charged crime. Meggyesy, 90 Wn. App. at 699. Additionally, the court found that the appellants were in effect asking the court to require an instruction notifying the jury of its power to acquit against the evidence, and that an accused is not entitled to a jury nullification instruction. Id. at 699-700. Further, the court found that the instruction did not direct a verdict and that there was no connection between the court's lack of power to direct a verdict and informing the jury that it may acquit against the evidence. Id. at 700. Finally, the court found that the instruction did not implicate either the State or Federal constitutional right to trial. Id. at 701, 704.

The court in Bonisisio, agreed with the reasoning in Meggyesy. The court found that an instruction telling the jury it "may" convict is equivalent to notifying the jury of its power to acquit against the evidence, and that a defendant is not entitled to a jury nullification instruction. Bonisisio, 92 Wn. App. at 794.

In Brown the court found no meaningful difference between Brown's argument, that the language of the "to convict" instruction affirmatively misleads the jury about its power to acquit, and the issues raised in Bonisisio and Meggyesy. The court rejected

Brown's argument that the court erred in giving the "duty" instruction. Brown, 130 Wn. App. at 771.

In Wilson the court found that same issues had been raised in Brown and Meggyesy. The court agreed with the reasoning and holdings in those cases that "such an instruction is equivalent to notifying the jury of its power to acquit against the evidence and that a defendant is not entitled to a jury nullification instruction." The court held that Wilson's constitutional right to a jury trial was not violated by the "to convict" jury instruction. Wilson, at 2-3. Giving Instructions 8 and 9 in the present case was not error.

C. CONDITIONS OF COMMUNITY CUSTODY.

The court imposed twenty-two conditions of community custody. CP 11, 19-21. Defendant argues that the court lacked authority to impose four of the conditions; 7, 10, 13 and that he participate in a chemical dependency evaluation. Appellant's Brief 34-41.

A defendant always has standing to challenge his sentence on grounds of illegality. State v. Valencia, 169 Wn.2d 782, 787, 239 P.3d 1059 (2010). An illegal or erroneous sentence may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 751, 193 P.3d 678 (2008); State v. Jones, 118 Wn. App.

199, 204 n. 9, 76 P.3d 258 (2003). The court reviews whether the trial court had statutory authority to impose community custody conditions *de novo*. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). The court reviews the imposition of crime-related prohibitions and conditions of community custody for abuse of discretion. Armendariz, 160 Wn.2d at 110; State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993); State v. Brooks, 142 Wn. App. 842, 850, 176 P.3d 549 (2008). A trial court abuses its discretion when its decision is based on untenable grounds, including those that are contrary to law. Riley, 121 Wn.2d at 37; Brooks, 142 Wn. App. at 850 .

Defendant was sentenced pursuant to RCW 9.94A.507. Since defendant's community custody was ordered pursuant to RCW 9.94A.507, the court had authority to impose conditions of community custody set out in RCW 9.94A.703. Conditions of community custody may include participation in "crime-related treatment or counseling services" and "rehabilitative programs," or performance of "affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(c),(d),(f). Additionally, the sentencing court had authority to impose and

enforce crime-related prohibitions and affirmative conditions as a part of the sentence. RCW 9.94A.505(8). A "crime-related prohibition" is a court order "directly relating to the circumstances of the crime for which the offender was convicted." RCW 9.94A.030(10). A trial court may impose a sentence that is required or allowed by law. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999); State v. O'Cain, 144 Wn. App. 772, 774, 184 P.3d 1262 (2008).

The prevention of coerced rehabilitation is the main concern when reviewing crime-related prohibitions. Riley, 121 Wn.2d at 37. Otherwise, the assignment of crime-related prohibitions has "traditionally been left to the discretion of the sentencing judge." Id., quoting State v. Parramore, 53 Wn. App. 527, 530, 768 P.2d 530 (1989). A sentence will be reversed only if it is "manifestly unreasonable" such that "no reasonable man would take the view adopted by the trial court." Riley, 121 Wn.2d at 37, citing State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977).

1. Condition 7.

The State concedes that the court's imposition of condition 7 was error. There is no evidence in the record that defendant accessed sexually explicit material before the crimes or that his

possession of sexually explicit material contributed to the crimes. O'Cain, 144 Wn. App. at 775.

2. Condition 10.

Defendant committed his crimes against the minor children of his friend while he was spending the night in their apartment. 9/12/12 RP 98-101, 142-144, 149, 151, 167, 177, 181. The trial court had authority to impose crime-related conditions relating to defendant's contact with minor children. RCW 9.94A.505(8). Five conditions of community custody pertain to defendant's contact with minor children; conditions 4, 5, 6, 10 and 11; conditions 4, 6 and 10 are subject to the direction of the Supervising Community Custody Officer. CP 19.

Condition 10 prohibits defendant from dating women or forming relationships with families who have minor children. CP 19. "Although the conduct prohibited during community custody must be directly related to the crime, it need not be causally related to the crime." State v. Autrey, 136 Wn. App. 460, 467, 150 P.3d 580 (2006), quoting State v. Letourneau, 100 Wn. App. 424, 432, 997 P.2d 436 (2000). Prohibiting defendant from dating women who have minor children or from forming relationships with families who have minor children is directly related to the circumstances of the

crimes for which defendant was convicted. The trial court's imposition of condition 10 was not an abuse of discretion.

3. Condition 13.

The court imposed three conditions of community custody relating to defendant's employment; conditions 12, 13 and 19. CP 19-20. Taken as a whole, these conditions require affirmative conduct. RCW 9.94A.703(3)(d). Condition 19 requires defendant to "find and maintain fulltime employment and/or fulltime educational program" as directed by the supervising Community Corrections Officer during the period of supervision. CP 20. Under condition 12 defendant is required to notify the employer of his conviction before accepting employment. CP 19. Condition 13 requires that defendant only accept employment in a position where he receives direct supervision. CP 20. The affirmative conduct required by condition 13 is reasonably related to defendant's "risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(d). Imposition of condition 13 was not an abuse of the trial court's discretion.

4. Chemical Dependency Evaluation.

Defendant challenges the condition that he participate in a chemical dependency evaluation. Appellant's Brief 40-41; see CP

11. Defendant does not challenge condition 27 that requires defendant to participate in substance abuse treatment as directed by the supervising Community Corrections Officer. CP 20.

The record shows that defendant had been drinking just prior to the committing the crimes. 9/12/12 RP 104-105, 107, 128-129, 144-145, 148, 168-169, 187-189. This evidence is sufficient to show that defendant's alcohol use related to the circumstances of the crime. Autrey, 136 Wn. App. at 467. The PSI discussed defendant's alcohol and drug use. CP ___ (Sub# 74, Pre-Sentence Investigation Report). At sentencing defense argued for concurrent sentencing and treatment on the basis that defendant only gets in trouble with the law when he is drinking or using drugs. 9/14/12, 9/17/12, 9/25/12 RP 104-108. The trial court expressed hope that defendant would get help and treatment. 9/14/12, 9/17/12, 9/25/12 RP 111-112.

The court has authority to order an offender to participate in crime-related treatment or counseling services as a condition of community custody. RCW 9.94A.703(3)(c). It would make no sense to require defendant to participate in substance abuse treatment without a chemical dependency evaluation The court did not abuse its discretion by imposing the condition of community

custody that defendant participate in a chemical dependency evaluation.

IV. CONCLUSION

For the reasons stated above, defendant's appeal should be denied and his convictions should be affirmed.

Respectfully submitted on August 20, 2013.

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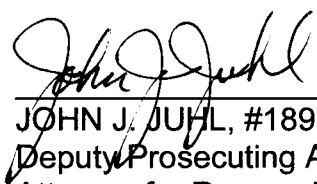
By: 
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