

NO. 65866-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOEL M. KAHORA,

Appellant.

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COURT OF APPEALS
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY WHITE

BRIEF OF RESPONDENT

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A. ISSUES

Evidence Rule 403 prohibits the admission of evidence that is unfairly prejudicial and not relevant. The trial court allowed Kahora to cross examine the victims about their bias and motive, but did not permit cross examination regarding the victim's relationship with her foster mother, or her track coach's prior domestic violence conviction. Did the court properly exclude Kahora's irrelevant cross examination?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Joel M. Kahora, was charged with two counts of assault in the second degree (domestic violence). CP 1-2. The State alleged that Kahora assaulted his two teenage daughters, M.M. and E.M., on October 12th, 2009. CP 4-5. Kahora was tried by a jury and found guilty of two counts of assault in the third degree. CP 47, 49. The court imposed a standard range sentence. CP 107-14.

2. SUBSTANTIVE FACTS

M.M. was a 17 year old student at Kent Meridian High School. 3 RP 53¹. She lived with her mother, her sister (E.M.) and her father, the defendant Kahora. 3 RP 57. E.M. was sixteen years old. 4 RP 49. M.M. was born in Kenya and her family moved to the United States in 2004. 3 RP 55-57. They initially moved to Dallas and then Massachusetts. 3 RP 57. They lived in Massachusetts for five years and M.M. and E.M. were happy there. 3 RP 58, 131.

In July of 2009, Kahora told the family they would be moving to Washington. 3 RP 57, 60. Kahora was to be ordained as a minister. 3 RP 59-60. Neither M.M. nor E.M. wanted to move away from their friends in Massachusetts. 3 RP 139.

As would be expected, M.M. had some difficulty adjusting to the move. 2 RP 12. Nevertheless, she thrived at Kent Meridian High School. She earned a 3.7 GPA, was a member of the honor society and student counsel, and was president of the Spanish

¹ The verbatim report of proceedings consists of ten volumes, which will be referred to in this brief as follows: 1 RP (6/23/10), 2 RP (6/24/10), 3 RP (6/29/10), 4 RP (6/30/10), 5 RP (7/1/10), 6 RP (7/6/10), 7 RP (7/7/10), 8 RP (7/8/10), 9 RP (7/30/10), and 10 RP (8/13/10).

Club. 3 RP 54-55. M.M. also excelled at track and field and volunteered at the Boys and Girls Club. 3 RP 54-55.

Kahora assaulted M.M. and E.M. on October 11-12, 2009, after an argument about M.M.'s chores. 2 RP 25; 3 RP 70-72. The day before the assault, M.M. and E.M. had several friends over to their apartment. 4 RP 54. The teenagers stayed up late. 3 RP 66. They kept Kahora up too, and M.M.'s mother told them to quiet down because they were going to church in the morning. 3 RP 67-68; 4 RP 55. The following day, the family attended lengthy church services and did not return home until 9 p.m. 3 RP 68-71; 4 RP 56. Kahora told M.M. to wipe the kitchen counters because she had failed to do so after breakfast. 3 RP 71. While M.M. wiped the counters, Kahora asked her why she had an "attitude." 3 RP 71. M.M. explained that she was tired because she had stayed up late the night before. 3 RP 71. E.M. was in her room but could hear the argument. 4 RP 56.

Kahora was angry and grabbed M.M.'s wrist and twisted it. 3 RP 72-73. M.M. felt pain in her wrist. 3 RP 74. Kahora grabbed her by the head and kicked her in the thigh. 3 RP 75-76. E.M. heard her sister yelling for help and came out of her room to see what was happening. 3 RP 78; 4 RP 56. Kahora slapped E.M.'s

left ear and kicked her as well. 3 RP 78; 4 RP 56. Kahora denied assaulting either M.M. or E.M. 6 RP 56-57. Doctors later discovered that M.M. had a sprained wrist, and E.M.'s eardrum was perforated. 3 RP 184; 4 RP 92.

The following day, M.M. and E.M. went to school. Lisa Clarke was teaching class when she noticed that something was wrong with M.M. 2 RP 7-9. While M.M. was usually outspoken in class, on this day she had her head down. She was holding her left arm as though she was in pain. 2 RP 8. M.M. asked to go to the nurse's office for ice. 2 RP 8. Clarke asked several times whether M.M. was alright, and M.M. answered yes, declining to disclose any abuse. 2 RP 8.

M.M.'s friend Letecia Romos also noticed something was wrong. M.M. was sitting in the back of the class and she was crying. 3 RP 31, 34-35. Romos asked what was wrong and M.M. initially told her she had hurt her wrist at track practice. 3 RP 36. M.M. had an ice pack on her wrist. 3 RP 42. Romos asked her teacher (Clarke) for permission to talk to M.M. in the hallway. 3 RP 36. Romos pressed and M.M. disclosed that she had argued with her "step dad." 3 RP 39. M.M. said things got a little "crazy"

and she ended up getting hurt. 3 RP 39. Romos told M.M. that she should talk to their teacher Ms. Clarke. 3 RP 41.

M.M. returned to the class and her teacher. M.M. disclosed to Ms. Clarke that she had been physically harmed. 2 RP 10-11. As required by law, Clarke took M.M. to a school counselor to report the abuse to the authorities. 2 RP 11.

Christine Vinson was a guidance counselor at Kent Meridian High School. 2 RP 13-14. M.M. was referred to her office and disclosed that her father had injured her. 2 RP 15. M.M. told Vinson her father got angry with her and injured her wrist and neck. 2 RP 15. Vinson took a statement from M.M. and her sister E.M. 2 RP 16. Vinson then called Child Protective Services (CPS). 2 RP 16. Police and medics responded, then took M.M. and E.M. for a medical exam. 2 RP 18; 4 RP 70.

Officer Carrie Nastansky responded to Kent Meridian High School on October 12, 2009. 2 RP 25. She interviewed M.M. and E.M. separately and observed the medics treating the girls. 2 RP 27. Nastansky noted that M.M. was holding her arm in pain and observed swelling on E.M.'s ear. 2 RP 27-28.

CPS removed M.M. and E.M. from Kahora's home. They were both placed in foster care with Delores Drill. In May 2010,

M.M. was placed in foster care with her track coach. 3 RP 103-04. M.M. testified she preferred the placement with her coach because he assisted her athletic endeavors, while her former foster placement "provided what I needed, but sometimes I wanted stuff and they were not able to provide." 3 RP 104.

During the trial, the court permitted Kahora to offer lengthy testimony about M.M. and E.M.'s bias towards Kahora and their motive to fabricate their story. Kahora provided a list of fourteen points he intended to offer under ER 404(b)² to demonstrate bias and motive to fabricate that can be summarized as follows:

- 1) M.M. told her mother that she would get a group of young people to get rid of her dad.
- 2) M.M. talked to her teacher about wanting to stay in Massachusetts.
- 3) M.M. made efforts to emancipate herself.
- 4) The family spoke to their pastor in Massachusetts about allowing the girls to stay with him.
- 5) The family spoke to Joe Liberti, a probation officer in Massachusetts, and M.M. indicated she wished to stay in Massachusetts.
- 6) M.M. and E.M. continued to ask to move back to Massachusetts after arriving in Washington.

² Kahora relied on ER 404(b) at the trial court as a basis to admit the evidence, but does not cite to ER 404(b) on appeal.

7) On the night of the assault M.M. told Kahora he has "pride he has to break that pride down if he wants to be a true servant of god and she talked a lot and she said I'll bring you down I'll make sure I bring you down with that pride of yours."

8) After CPS became involved, M.M. and E.M. insisted on being returned to Massachusetts and CPS worker Anna Tran contacted their pastor in Massachusetts to attempt to send them back.

9) M.M. and E.M. did not wish to be placed with their mother even if she was not living with Kahora.

10) After the incident M.M. wrote a letter to her mother asking for permission to return to Massachusetts.

11) M.M. changed her mind about returning to Massachusetts after she had an opportunity to be involved in the Seattle Track Club.

12) M.M. was disobedient while she was living with her foster mother, M.M. would not do chores and complained that her foster mother talked about providing for her needs but not her wants.

13) E.M. continued to talk about returning to Massachusetts.

14) M.M. requested that she be placed with her track coach and CPS complied with her request. M.M. did not want to live with her father because of safety concerns however she was aware that her track coach had a prior domestic violence conviction.

CP 19-20 (Defense Trial Memorandum).

The trial court excluded only three of the fourteen categories of defense evidence (items #1³, #12 and #14). Kahora wished to admit evidence that after M.M. was placed in foster care by the state that there was friction between M.M. and her foster mother Drill. Kahora argued that when M.M. does not get what she wants she "makes a plan to get out of the situation." 1 RP 28-29. Kahora also wished to admit evidence that M.M.'s track coach (and current foster father) had been convicted of a domestic violence offense to show M.M. was not truly concerned about her safety. 1 RP 29. However, Kahora provided no further information or verification about the alleged conviction. The trial court excluded both areas of cross examination under ER 403. 1 RP 38-39.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXCLUDED KAHORA'S IRRELEVANT CROSS EXAMINATION.

Kahora contends the trial court violated his confrontation rights by preventing him from cross-examining M.M. about her rocky relationship with her foster mother and her track coach's alleged domestic violence conviction. Kahora's claim fails for two

³ Kahora did not raise the exclusion of these alleged threats on appeal.

reasons. First, his proffered evidence failed to demonstrate M.M.'s bias against her father, therefore it was not relevant. Second, the trial court gave Kahora wide latitude to explore M.M.'s bias and motives, hence, the trial court did not deny Kahora's right to present a defense.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); State v. Luvene, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995). Abuse exists when the trial court's exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons." Powell, 126 Wn.2d at 258. Similarly, a court's limitation of the scope of cross-examination will not be disturbed unless it is the result of manifest abuse of discretion. State v. Campbell, 103 Wn.2d 1, 20, 691 P.2d 929 (1984). Reversal is only required if there is a reasonable possibility that the testimony would have changed the outcome of the trial. Id.

A criminal defendant has the constitutional right to cross examine and confront witnesses against him. Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). However, this right is subject to the limitation that the evidence must be relevant for a proper purpose. State v. Reed,

101 Wn. App. 704, 706, 6 P.3d 43 (2000). Under ER 401 and 402, evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is generally admissible. ER 403 gives the court discretion to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." A trial court's decision on relevant and prejudicial effect is reviewed for manifest abuse of discretion. State v. Rupe, 101 Wn.2d 664, 686, 683 P.2d 571 (1984).

a. M.M.'s Relationship With Her Foster Mother Was Not Relevant.

Kahora argues that evidence that M.M. had a difficult relationship with her foster mother and asked CPS for a new placement showed "the lengths M.M. was willing to go to get what she wanted." Brief of Appellant at 3. Kahora's proffered cross examination was not relevant; the evidence had little use other than

to allow Kahora to argue that M.M. was a difficult teenager and had a propensity for manipulating her placement.

It is well-settled that the use of specific instances of prior misconduct offered simply for propensity purposes is disfavored. See ER 404(b) (prior bad acts evidence inadmissible "to prove the character of a person in order to show action in conformity therewith"); see also State v. Pogue, 104 Wn. App. 981, 984-85, 17 P.3d 1272 (2001) (prior bad acts evidence merely to show a propensity for committing misconduct inadmissible). Aside from showing such propensity, the evidence had no probative value. Proving that a teenage girl such as M.M. had a rocky relationship with her foster mother does not prove bias toward M.M.'s father, Kahora.

Evidence about a teenager's reluctance to do chores and friction over that reluctance has no tendency to prove Kahora's claim that M.M. fabricated the allegation against Kahora. Moreover, when M.M. had friction with her foster mother over chores and other wants, M.M. took appropriate steps to seek a new placement; she did not fabricate allegations against her foster mother. Thus, the difficulties with her foster parent do not prove the point Kahora sought to make.

Furthermore, the trial court gave Kahora considerable leeway to elicit relevant evidence of M.M.'s bias against her father and desire to stay in Massachusetts. The court permitted Kahora to present twelve of the fourteen proposed categories of bias and motive evidence. Such testimony permitted Kahora to argue M.M. was biased and had a motive to fabricate the claim of abuse.

For instance, M.M. testified that she was not very close to her mother and did not believe that Kahora was her biological father. 3 RP 118-21. She sometimes referred to Kahora as her "step dad."⁴ 3 RP 120. She testified she did not believe that Kahora was concerned about her future. 3 RP 215. M.M. testified that she liked living in Massachusetts and she did not like that her father made her move to Washington. 3 RP 127-28. The family spoke to their pastor Steve Williams about allowing M.M. and E.M. to stay with him. 4 RP 40-41. The family spoke to a probation officer in Massachusetts named Joe Liberti about the girls' desire to stay in Massachusetts. 6 RP 8. The defense presented evidence that M.M. made efforts to emancipate herself. 3 RP 138, 169.

⁴ M.M.'s skepticism about her father was based on the fact he was not a part of her life until she was six years old, and he did not marry M.M.'s mother until six years after she was born. She had also heard from other family members that her real father's name was Isaac. 3 RP 170-72.

The move was very emotional for M.M. 3 RP 132. She did not like that Kahora made the decision for her. 3 RP 127-28. After the move, M.M. and E.M. continued to ask their parents to return to Massachusetts. 5 RP 78. Kahora was permitted to elicit testimony that on the night of the assault M.M. told her father "I'll make sure I bring you down and with that pride of yours." 5 RP 32.

The defense elicited testimony that M.M. did not wish to live with her mother even if she was not living with Kahora. 3 RP 152. M.M. had written a letter to her mother after the assault asking to be allowed to return to Massachusetts. 3 RP 155-57. After the assault, a CPS worker named Anna Tran contacted the family pastor in Massachusetts to try to arrange for their return. 6 RP 41; 3 RP 151. Later, M.M. testified that she had changed her mind about returning to Massachusetts when she became involved in the Seattle Track Club. 3 RP 157. The defense established that E.M. still wished to return to Massachusetts. 4 RP 71, 82-82. The trial court allowed Kahora to demonstrate M.M.'s bias against him and her motive to fabricate.

For these reasons, Kahora's reliance on cases such as State v. Peterson, 2 Wn. App. 464, 469 P.2d 980 (1970), and State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010) is misplaced. In those

cases, the defendants sought to attack witnesses with evidence having a sufficient nexus with the defendants' prosecutions to show bias or motive to fabricate, and in which the defendants were entirely denied the right to present evidence to attack the witnesses' credibility. Here, the offered evidence had little bearing on bias or credibility and the trial court gave Kahora plenty of other avenues to explore M.M.'s motive to fabricate. Under these circumstances, the trial court did not abuse its discretion in excluding the very discrete and irrelevant portions of Kahora's cross examination.

b. Evidence That M.M.'s Track Coach Had A Domestic Violence Conviction Was Not Relevant.

Kahora also wished to cross examine M.M. about whether she was aware that her track coach (and current foster father) had a prior conviction for domestic violence. Kahora argued that this demonstrated that M.M. was more concerned about her ambitions than her safety. The trial court correctly ruled that the criminal history of M.M.'s current foster parent was inadmissible.

The fact that M.M. was not afraid of her coach is not relevant. ER 402. First, the evidence does not undermine her claim that she was afraid of Kahora. Kahora had assaulted her,

whereas her coach had always treated her with respect. 1 RP 36. It is hardly surprising that a trusted coach who has treated a teenager with respect would earn that teen's trust, and that teen would choose to live with that coach instead of the father that beat her. Thus, her subjective belief was reasonable. There was no evidence presented that the coach posed an actual danger to M.M. Kahora's theory, that M.M. chose to live in "danger" rather than with her father, assumes that she felt she was in danger and that she was, in fact, in danger. Neither was true.

The trial court was given no information to show that M.M. had any objective basis to fear her coach stemming from the alleged domestic violence conviction. If the conviction were old, did not allege physical force, or did not involve children, there may have been no objective reason for M.M. to be afraid of her coach.⁵

The evidence was also excludable under ER 403. Exploring these issues would have been a distraction to the jury. M.M.'s coach had not done anything to M.M. to cause her to be afraid. The only evidence offered was that the coach treated M.M. with respect and M.M. did not feel threatened by him. Offering evidence

⁵ M.M. was placed with her track coach by CPS, and there was no evidence offered by the defense to suggest CPS had any safety concerns about the coach acting as a foster parent.

of a prior conviction of an unknown age would have served only to inflame passions rather than illuminate the issues.

c. Any Error Was Harmless.

Even if the trial court should have permitted Kahora to cross examine M.M. about her relationship with her foster mother and her track coach's domestic violence conviction, any error was harmless. Reversal is only required if there is a reasonable possibility that the testimony would have changed the outcome of the trial. State v. Campbell, 103 Wn.2d 1, 20, 691 P.2d 929 (1984).

As argued above, Kahora was properly permitted to cross examine M.M. about possible motives to fabricate her allegation and her potential bias. He presented evidence that showed M.M. was not happy with her father, and that she was unhappy about the family's move from Massachusetts. However, demonstrating a bias and motive alone did not convince the jury that M.M. and E.M. both were making up the allegations. There is no reasonable likelihood that additional irrelevant cross examination about potential bias would have changed the outcome of the trial.

Kahora frames this as a violation of his constitutional right to present a defense. Brief of Appellant, at 8, 14. Kahora is incorrect. Not every evidentiary ruling against a defendant amounts to a denial of his constitutional right to a defense. For example, in State v. Hudlow, the defendant in a rape trial was precluded from offering evidence of a rape victim's promiscuity. State v. Hudlow, 99 Wn.2d 1, 5, 659 P.2d 514 (1983). The Supreme Court noted that the Sixth Amendment to the United States Constitution and Const. art. I, § 22 grant criminal defendants the right to present testimony in one's defense, and confront and cross-examine adverse witnesses. Id. at 14-15. However, the Court went on to say a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense. Id. The Court went on to hold there was no violation of Hudlow's constitutional right by excluding evidence or cross examination about the victim's past sexual experiences because they were minimally relevant and more prejudicial than probative. Id. at 21-23. See also State v. Ayala, 108 Wn. App. 480, 31 P.3d 58 (2001).

Kahora's constitutional right to present a defense was satisfied by the trial court's decision to permit him to cross examine M.M. about her potential bias and motive. Kahora's constitutional

right to present a defense does not extend to the introduction of otherwise inadmissible evidence. See Reed, 101 Wn. App. at 706.

Kahora argues that he had a right to "meaningful cross examination" of M.M. Brief of Appellant at 9. However, the United States Supreme Court has held "[T]he 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." U.S. v. Owens, 484 U.S. 554, 559, 108 S.Ct. 838, 842 (1988). In the present case Kahora was provided the opportunity to cross examine M.M. about possible bias and motive to fabricate. He was not deprived of his constitutional rights by the exclusion of additional irrelevant cross examination.

Even if the Court were to apply the constitutional harmless error standard, reversal would not be required. A constitutional error can be harmless when the court is convinced "beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010); State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). Kahora was permitted to cross examine M.M. extensively about her bias and motive because she was unhappy with him. The defense succeeded in establishing that M.M. did not like Kahora, and that she initially wanted to return to Massachusetts. That evidence failed to create a reasonable doubt as to Kahora's guilt. Kahora's irrelevant cross examination would not have changed the result in this case.

The trial court permitted Kahora to put on his defense, but excluded testimony that was irrelevant and unduly prejudicial. The trial court properly exercised its discretion to exclude Kahora's proffered evidence.

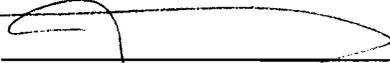
D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Kahora's convictions for assault in the third degree.

DATED this 27th day of June, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JOEL MBOYA KAOHORA, Cause No. 65866-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

6/27/11
Date 6/27/11