

COURT OF APPEALS
DIVISION II

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NO. 37559-1-II

STATE OF WASHINGTON
BY _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN ALVIN FORD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Vicki L. Hogan

BRIEF OF APPELLANT

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P. M. 1-16-09

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A. ASSIGNMENT OF ERROR

1. The trial court erred in making several evidentiary rulings which excluded evidence that was relevant and material to appellant's defense in violation of his constitutional right to present a defense.

2. Cumulative error denied appellant his constitutional right to a fair trial.

Issues Pertaining to Assignments of Error

1. Appellant was charged with assault of a child based on allegations made by his son. Appellant's defense was that his son was being untruthful and that the assault was committed by his mother. Did the trial court abuse its discretion by excluding CPS records, a defense witness, and testimony that was relevant and material to appellant's defense in violation of his constitutional right to present a defense?

2. Did the cumulative errors at trial deny appellant his fundamental and constitutional right to a fair trial?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On September 13, 2006, the State charged appellant, John Alvin Ford, with assault of a child in the first degree with three aggravating factors, corrected the information on September 15, 2006, and amended the information on January 2, 2008. CP 1-3, 4-6, 27-29. The amended information charged Ford with assault of a child in the first degree with two aggravating factors, alleging that his conduct manifested deliberate cruelty and that he knew or should have known that the victim was particularly vulnerable or incapable of resistance. CP 27-29. Following a trial before the Honorable Vicki L. Hogan, on January 18, 2008, a jury found Ford guilty of the lesser included crime of assault of a child in the second degree and the two aggravating factors. CP 155, 156, 157. On April 4, 2008, the court imposed an exceptional sentence of 65 months in confinement and 18 to 36 months in community custody. CP 65. The court entered findings and conclusions for the exceptional sentence. CP 172-75.

¹ There are 13 verbatim report of proceedings: 1RP - 9/14/06; 2RP - 01/02/08; 3RP - 01/02/08; 4RP - 01/07/08; 5RP - 01/08/08; 6RP - 01/09/08; 7RP - 01/10/08; 8RP - 01/15/08; 9RP - 01/16/08; 10RP - 01/17/08 a.m.; 11RP - 01/17/08 p.m.; 12RP - 01/08/08; 13RP - 04/04/08.

2. Substantive Facts

Barbara Childs, the grandmother of the complaining witness, Juwan, testified that she sees Juwan everyday and that he lives with his mother in an apartment across from hers in the same apartment complex. 6RP 196-97. Childs did not see Juwan from June to September in 2006 because he spent the summer with his father. 6RP197-199. When Juwan returned home for school in September, she noticed “the way he was walking” and saw scars on the back of his legs and thighs. 6RP 201. She asked him what happened and he told her that “he had gotten a whoopin’ from his father.” 6RP 201. Juwan said that his brother held his legs while his father sat on his back and whipped him with a radio cord. 6RP 207.

Childs took pictures of the scars and after talking to Juwan’s mother she took him to St. Clare Hospital the next morning. 6RP 202-04. A doctor at St. Clare examined Juwan and Childs spoke with a social worker. 6RP 204. She contacted the police and an officer came to their home after they returned from the hospital. 6RP 204-05. Childs showed the officer Juwan’s injuries and he made a report. 6RP 205. Childs subsequently took Juwan to Mary Bridge Hospital for another examination and interview. 6RP 205-06.

According to Childs, Juwan knew the difference between telling the truth and telling a lie. She explained that if he tells a lie at home,

either she or his mother would give him “a whooping.” 6RP 197. Child admitted that she and Ford do not “always see eye-to-eye together on things. We don’t communicate, no, we don’t.” 6RP 209.

Gregory Burrows, a crisis social worker at St. Clare Hospital, testified that he evaluated Juwan on September 2, 2006 when his grandmother brought him to the hospital. 6RP 261, 263-64. Burrows “saw some bruising and some healing, I don’t know if I’d want to call them scars, necessarily, abrasions.” 6RP 270. He was informed that Juwan had told the triage nurse that his father caused the injuries. 6RP 267. Juwan’s grandmother said that the father caused the injuries approximately two weeks earlier. 6RP 267. Burrows notified CPS who told him that they would contact law enforcement. 6RP 271.

Deputy Reginald Ray testified that he was dispatched to Childs’ address in Parkland to investigate a report of child abuse. 6RP 61-62. Childs was “animated” and appeared “a bit stressed.” 6RP 63. Childs told him that his grandson had spent the summer with his father and he came home with “marks on his lower back and legs” and she showed him the marks. 6RP 64. Ray introduced himself to Juwan who was nine years old. 6RP 64. Juwan and Childs told him that the father caused Juwan’s injuries sometime within the last two weeks. 6RP 67, 70-71. Childs said that Juwan was examined at St. Clare Hospital and she gave him a report

provided by the social worker at the hospital. 6RP 63, 65. Ray filled out a report and turned both reports over to detectives. 6RP 67-68.

Detective Ray Shaviri testified that on September 8, 2006, he watched an interview that Juwan had with interviewer Kim Brune at Mary Bridge Hospital. 6RP 76-77. Ray observed from a separate viewing room and took notes on his laptop. 6RP 81. Prior to the interview he obtained information from Juwan's grandparents when he met with them for about twenty minutes. 78-80. After the interview, he informed the grandparents that he believed he had probable cause for an investigation. 6RP 82.

Ray obtained a search warrant for Ford's home and went to his house with four officers on September 12, 2006. 6RP 82-85. They arrived at the house about 8 o'clock in the morning and knocked on the door. A lady answered the door and when he asked for Ford, she said he was upstairs in the bedroom. 6RP 86-87. Ray went upstairs to the bedroom and took Ford into custody and officers recovered a little boom box, a power cord, and a belt as evidence. 6RP 87. Ray spoke with two women who were in the house to find out about Ford's son Mac because he "had information that Mac was holding Juwan down "during the assault." 6RP 88-90. He was told that Mac was in Louisiana but he never located him. 6RP 90. During cross-examination, Ray reviewed a report submitted by a defense investigator which contained Mac's phone number

and address in New Orleans. Ray stated that he would have called Mac if he had that information but the prosecutor never provided him with the report. 6RP 97-98.

Detective Brian Lund testified that he assisted with collecting evidence and taking photographs of the outside and inside of Ford's home. 6RP 101. Lund found a brown leather belt with a square buckle in Ford's closet. He placed the belt and a power cord for a CD player into a bag. 6RP 105. Lund acknowledged that if the belt and cord had been used to hit someone hard enough to raise welts, there could be trace evidence on them, but there was no visible skin tissue or blood on the belt or cord and they were never sent to a crime lab for testing. 6RP 111-15. Detective Teresa Borg testified that she primarily spoke with the women who were in the home but heard Detective Shaviri questioning Ford. 15RP 13. Although she admitted that she did not hear Shaviri ask Ford for his birthdate, she claimed that Shaviri ascertained that his birthdate was September 7, 1965 and she included that in her report. 15RP 12-14.

Kim Brune, a forensic interviewer with the Pierce County Prosecutor's Office, testified that she interviewed Juwan on September 8, 2006. 7RP 294. Juwan "was very fidgety in the interview; he had a hard time sitting still; he was kind of bouncing all over the room, bouncing in his chair, just very difficult to stay still." 7RP 294-95. His verbal abilities

appeared average and he appeared to be understanding her questions. 7RP 295. During the interview Juwan blurted out, "My dad did this to me, not my mom," even though she had not asked him a question. 7RP 301. He told the whole story without taking a breath and said his father threw him down the stairs. 7RP 301-02. Juwan told her that he faced no consequences at home for lying, but she had no concerns about whether he understood truth versus lie. 7RP 302-03. A recording of Brune's 30-minute interview with Juwan was admitted as evidence and played for the jury. 7RP 297-98.

Dr. Yolanda Duralde, director of the Child Abuse Intervention Center at Mary Bridge Hospital, testified that she examined Juwan on September 6, 2006 when he came to the clinic with his grandmother. 6RP 215-16. Before the physical examination, Duralde spoke with Juwan and he said he spent the summer with his dad and his sister Kalia and big brother Mac also visited during the summer. 6RP 223-24. Juwan told him that in August, his dad hit him with an extension cord "[f]or listening to Sierra" and hit him with a belt because he lost his dad's wallet. 6RP 223-24. Juwan said that his dad "was sitting on his head and I was pinching him and he bit me," and showed Duralde where the bite marks were on his hands. 6RP 224.

Duralde described Juwan as “a pretty healthy kid.” 6RP 225. The majority of the injuries were “skin injuries, and they were loop marks, like an injury you would expect from an extension cord.” 6RP 225. Duralde identified photographs that she took during the examination and explained the injuries Juwan had on his hands, arms, legs, and thighs. 6RP 227-38. Duralde acknowledged that he could not determine precisely when the injuries occurred, “I’m just not that good. The healing process, once it’s gotten to a certain point, looks about the same, so it’s really difficult to tell.” 6RP 238-40. According to Duralde, Juwan was “probably going to have a majority of those scars for quite some time. The loop marks do fade over time, but usually we’re talking 10 to 20 years.” 6RP 242. Duralde acknowledged that some of the injuries looked like they may have bled at the time they occurred and he would expect some type of tissue or blood on a cord if it were used to inflict the injuries. 6RP 245-46, 250.

Juwan, who was eleven years old at the time of trial, testified that he lives with his mother, uncle, and sister Jakira. 6RP 145-46. His grandmother lives in the same apartment complex and he sees her a lot. 6RP 147. During the summer of 2006 he lived with his dad and one day they went to a store called Stupid Prices. 6RP 149, 153. His dad asked him to hold his wallet and he lost the wallet somewhere in the store. 6RP 153-54. His dad punished him by yelling at him and whooping him with

a belt. 6RP 154-55. Juwan got in trouble another time when he was listening to "Sierra" on his sister's radio and dancing outside on the back deck of the house. 6RP 156-57. The loud music awoke his dad who was sleeping in the living room. 6RP 157-58. His dad grabbed the cord off the radio and they went downstairs in the basement where his dad "whooped" him. 6RP 160-61. Juwan was lying down on the floor while his dad sat on his back and whooped his calves. 6RP 161. His brother Mac was upstairs and never came down to the basement. 6RP 162. A couple of days later, Juwan went home to his mother's house to start school. 6RP 162-63. While he was trying on school clothes, his mother looked at his legs and asked him what happened. 6RP 163. He told his mother and grandmother what happened and his grandmother took him to the hospital. 6RP 163-64.

Juwan could not remember telling a lady about the incident during an interview and could not recall what he said during his interview with the defense attorney. 6RP 167-70. Juwan could not recall telling the interviewer and defense attorney that Mac was holding his legs while his dad whipped him. 6RP 170. He could not remember telling the interviewer that his dad threw him down the stairs to the basement and that his dad sat on his head. 6RP 177. Juwan admitted that his mother has

hit him with a belt on his arms and legs but denied that she used an electrical cord. 10RP 454-55.

Jakira Jones Ford, who was sixteen years old at the time of trial, testified that she lives with her mother but has lived with her dad during different periods of time. 8RP 27. In 2006, her brother Juwan spent the summer with their dad but he came home sometimes and stayed a couple of days before returning to their dad's house. 8RP 28-29. On one occasion, she noticed bruises on Juwan's hands and legs and asked him what happened and he said nothing happened. 8RP 29. Their grandmother and other family members also saw the bruises and Juwan told them that "dad whupped him." 8RP 30. Their mom "didn't want to do anything about it," but their grandmother took Juwan to the hospital and the police came to the house. 8RP 31. Her dad never physically punished her except whooping her not very hard with a belt once when she was little and she never saw her dad spank or whoop Juwan. 8RP 32.

Genice Jones testified that she was married to Ford and they have two children, Jakira and Juwan. 8RP 320. Juwan lives with her but he spent the summer of 2006 with his dad. 8RP 321. When he came home after the summer she saw his bruises and was "shocked" and "stunned." 8RP 327-28. Jones did not take him to the hospital or call the police because "[m]y mother did all that." 8RP 328. Jones admitted that she

punished Juwan many times. 8RP 328-29. At first she denied hitting him with a belt but then admitted using a belt. 8RP 321. Jones denied hitting Juwan on his legs or using an electrical cord. 8RP 321, 328-29.

Jurea Rabbit testified that she knew Ford and his fiancée, Joy Taylor, because she and Taylor had plans to open up a beauty salon together in 2006. 10RP 464. During the summer, Rabbit visited them at their home and met Ford's daughter and son, Juwan. 10RP 464-66. Rabbit noticed some markings and scars on Juwan's legs and she asked Taylor what happened. 10RP 466-67. At the time, Rabbit was a high school administrator and therefore a "mandatory reporter" of child abuse. 10RP 468. The scars on Juwan's legs were not fresh and she did not believe she had to contact CPS. 10RP 469.

Ford testified that he was disabled and must use a cane. 9RP 341-42. In 2006, his son Juwan spent the summer with him but went home to his mom every other weekend to get clothes and stay overnight. 9RP 343. Ford never punished Juwan by using a belt or cord for losing his wallet or listening to "Sierra" on the radio. 9RP 344-48. He disciplined Juwan two or three weeks before he went home to start school because Juwan kept getting into fights with his cousin and tried to stab him with a pair of scissors. 9RP 350-51, 359-60. Ford spanked Juwan on his butt about four times with a belt but never hit him on his arms or legs. 9RP 354-57.

Ford had noticed marks on Juwan's legs, back, and arm and although he never asked Juwan what happened, he knew his mother and grandmother "can't control him so they beat him." 9RP 360. Juwan's mother and grandmother want to keep Juwan away from him. 9RP 360. Juwan made the allegations against him because "that's what he's told to say." 9RP 360-62.

During cross-examination, Ford acknowledged that he saw Juwan's injuries in August, a couple of weeks before he went home to his mom, but he never contacted the police or CPS. 9RP 417-18. Ford explained that he attempted to contact the police and courts in the past, "Nobody would help me. What am I supposed to do? You know, I don't know where to turn to. Nobody would help me." 9RP 417.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED FORD'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY EXCLUDING EVIDENCE THAT WAS RELEVANT AND MATERIAL TO HIS DEFENSE.

Reversal is required because the trial court abused its discretion by excluding CPS records, a defense witness, and testimony that was relevant and material to Ford's defense in violation of his constitutional right to present a defense.

“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a ‘meaningful opportunity to present a complete defense.’ ” Holmes v. South Carolina, 547 U.S. 319, 324, S. Ct. 1727, 164 L. Ed. 2d 503 (2006)(quoting Crane v. Kentucky, 475 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). Under the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution, a criminal defendant has the right to present his version of the facts to the jury so that it may decide “where the truth lies.” State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996)(quoting Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S. Ct. 1038, 35 L. Ed 2d 297 (1973). “This right is a fundamental element of due process of law.” Maupin, 128 Wn. 2d at 924 (quoting Washington, 388 U.S. at 19).

A criminal defendant has a constitutional right to present all admissible evidence in his defense. State v. Rehak, 67 Wn. App. 157, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, 844 P.2d 1018, cert. denied, 124 L. Ed. 2d 665, 113 S. Ct. 2449 (1993). Evidence is admissible when relevant and evidence is relevant if it has any tendency to make any fact that is of consequence to the case more or less likely than without the

evidence. ER 401. “[F]undamental standards of relevancy . . . require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged.” United States v. Crosby, 75 F.3d 1343, 1347 (9th Cr. 1996)(quoting United States v. Armstrong, 621 F.2d 951, 953 (9th Cir. 1980)); see also, United States v. Perkins, 937 F.2d 1397, 1400 (9th Cir. 1991)(“A defendant is entitled to introduce evidence which tends to prove someone else committed the crime.”); United States v. Brannon, 616 F.2d 413, 418 (9th Cir. 1980)(“A defendant is entitled to prove his innocence by showing that someone else committed the crime.”). When a defendant seeks to introduce evidence connecting another person with the charged crime, a proper foundation must be laid. State v. Clark, 78 Wn. App. 471, 477, 898 P.2d 854 (1995).

a. Exclusion of CPS Records

Defense counsel moved to admit evidence that Juwan’s mother, Genice Jones, was previously investigated by CPS for allegedly whipping Juwan’s sister, Jakira, with an electrical cord and choking her with the cord. 5RP 14-15. Defense counsel argued that the evidence was relevant because Juwan was allegedly whipped with an electrical cord. 5RP 14-15. The trial court excluded the evidence ruling that it was irrelevant. 5RP 19-20.

b. Exclusion of Jakira's Testimony

Defense counsel moved to allow Jakira to testify that her mother beat her with an electrical cord. 8RP 19-20. Defense counsel argued that the testimony was relevant because there "is a strong nexus" given the fact that an electrical cord "is an unusual device to discipline a child with." 8RP 22. The trial court excluded the testimony ruling that it was irrelevant when balancing the probative and prejudicial value under 404(b). 8RP 23.

c. Exclusion of Juwan's Testimony

During direct examination of Juwan, defense counsel asked, "Has your Grandma ever punished you?" 10RP 459. The State objected on relevancy grounds. 10RP 459. The trial court sustained the State's objection. 10RP 460. Defense counsel requested to make a record out of the presence of the jury and argued that Juwan's grandmother testified that she has whipped Juwan for lying and therefore the question was relevant to test Juwan's truthfulness. 10RP 460-61. The State reiterated that the question was irrelevant and the trial court stood by its ruling. 10RP 461.

d. Exclusion of Jeanette Williams' Testimony

Defense counsel made an offer of proof to allow the testimony of Jeanette Williams who knew Ford for 15 or 16 years and knew Juwan because he played with her son. Williams noticed marks and scars on

Juwan and helped Ford contact CPS to report the injuries. 9RP 423-24. Defense counsel argued that her testimony was especially relevant because on cross-examination, the State attacked Ford for failing to have CPS investigate Juwan's injuries. 9RP 424. The State objected, arguing that her testimony not "relevant to any issue in our case." 9RP 425-26. The trial court excluded the testimony, ruling that it was irrelevant and too remote in time. 9RP 426.

Contrary to the trial court's rulings, the excluded evidence was relevant and material to Ford's defense that Juwan was being untruthful and his injuries were caused by his mother. Evidence of the CPS investigation and Jakira's beatings would have shown that Juwan's mother had a history and pattern of using an electrical cord to discipline and punish her children. Juwan's testimony would have cast doubt upon his truthfulness, which was crucial because the case turned on the credibility of the witnesses. Williams' testimony would have supported Ford's defense that he made several attempts to report Juwan's injuries to no avail.

Furthermore, the court's error in excluding the evidence was not harmless error because the State's case against Ford was not overwhelming. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have

reached the same result in the absence of the error.” State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). It is evident from the record that but for the excluded evidence, the State’s case raised reasonable doubt particularly in light of the unconvincing testimony of Genice Jones:

Q. Have you ever punished Juwan?

A. Yes.

Q. Have you ever physically punished him?

A. Yes.

Q. Have you ever hit him with a belt?

A. No. Backscratcher.

Q. Have you ever hit him with an electric cord?

A. No.

Q. Would you be surprised to hear Juwan say that you have whipped him with a belt?

A. Yeah -- a belt. Well, probably.

Q. Probably you’d be surprised or probably you have hit him with a belt?

A. Probably I have.

Q. Oh, okay. So you have. How about an electric cord?

A. No.

9RP 321.

The ultimate purpose of the trial court's discretion in admitting or excluding evidence is to assure "that the truth may be ascertained and proceedings justly determined." ER 102. In light of this purpose, this Court should reverse and remand for a new trial, in which the jury should be allowed to determine the weight and credibility of the defense's evidence.

2. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED FORD HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The cumulative error doctrine applies when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial and warrants reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992).

Here, an accumulation of errors affected the outcome of Ford's trial: 1) the trial court erroneously excluded evidence of the CPS investigation; 2) the trial court erroneously excluded Jakira's testimony that her mother previously beat her; 3) the trial court erroneously excluded Juwan's testimony on whether his grandmother punishes him; 4) the trial court erroneously excluded the testimony of Jeanette Williams.

Reversal is required because cumulative error denied Ford his fundamental and constitutional right to a fair trial.

D. CONCLUSION

“From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which each defendant stands equal before the law.”² Mr. Ford did not stand equal before the trial court. For the reasons stated, this Court should reverse his convictions.

DATED this 16th day of January, 2009.

Respectfully submitted,


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Attorney at Law

² Gideon v. Wainright, 327 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and John Alvin Ford, DOC # 963583, Washington State Penitentiary, 1313 N 13th Avenue, Walla Walla, Washington 99362.

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

DATED this 16th day of January, 2009 in Kent, Washington.

Valerie Marushige

Valerie Marushige
Attorney at Law
WSBA No. 25851

09 JAN 20 PM 9:27
STATE OF WASHINGTON
BY _____
DEPUTY
COURT OF APPEALS
DEPARTMENT II