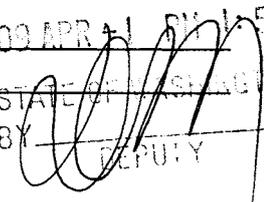


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHN ALVIN FORD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Susan K. Serko

No. 06-1-04323-7

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion in excluding irrelevant evidence that was remote in time from the instant case and could not be connected to the instant crime?

B. STATEMENT OF THE CASE.

1. Procedure

On September 13, 2006, the State charged defendant, John Ford, with one count of assault of a child in the first degree with two alternatives. CP 1-3, 4-6, 1RP 3-4, 9RP 339¹. The charges related to his son, J.J.² CP 1-3, 4-6. On January 2, 2008, the State filed an amended information that changed the incident date from a specific date to the period of August 1, 2006, to August 31, 2006. CP 27-29, 3RP 3-6.

On January 2, 2008, the case was assigned to the Honorable Vicki Hogan for jury trial. 3RP 3. The court held a child competency hearing on the child victim, J.J. 4RP 27. After testimony, the court found the victim competent to testify. 4RP 37-38. The court also held a hearing as to child hearsay. 4RP 38-39. After hearing testimony, the court allowed

¹ The State adopts appellant's method of referring to the 13 volumes of verbatim report of proceedings: 1RP - 9/14/06; 2RP - 01/02/08 (Tollefson); 3RP - 01/02/08 (Hogan); 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.

the admission of the child hearsay statements. 5RP 28-30, 6RP 141. In addition, the court ruled that the CPS investigation involving the victim's sister and the victim's mother that had occurred over four years earlier was not admissible as it was not relevant, was remote in time and involved different people than the instant case. 5RP 9-19.

On January 18, 2008, the jury found defendant not guilty of assault of a child in the first degree but did find defendant guilty of assault of a child in the second degree. 12RP 4-5, CP 154, 155. The jury also found that defendant had committed the crimes with deliberate cruelty and against a vulnerable victim. 12RP 5, CP 156.

The court held sentencing on April 4, 2008. 13RP 138, CP 159-171. Defendant's offender score was calculated as a 2 and his standard range was 41-54 months. 13RP 139, CP 159-171. The court sentenced defendant to an exceptional sentence of 65 months, which accounted for the low end of the standard range 12 months for each of the two aggravating factors. 13RP 153, CP 159-171. Defendant filed this timely appeal. CP 158.

2. Facts

During the summer of 2006, 9 year-old victim, J.J., spent the summer with his father, defendant John Ford. 6RP 148-9, 197, 9RP 321. Two incidents happened in August during his time with his father. 6RP

² As the victim is a minor, the State will refer to him using initials.

155, 156. In the first incident, J.J. and defendant were at a store. 6RP 153. While in the store, defendant told J.J. to hold his wallet for him. 6RP 153. Defendant's pants were too loose and his wallet would make them fall down. 6RP 153. J.J. lost the wallet and it was not able to be recovered from the store until the following day. 6RP 154. As punishment for this, defendant yelled at J.J. and whipped J.J. with a belt. 6RP 154-155, 223. Defendant claimed that J.J. did not get in trouble. 9RP 343-5.

The second incident occurred a short time later. 6RP 166. J.J. was outside listening to Sierra, a female singer, on the radio. 6RP 156-7. Defendant had told J.J. that he didn't want him listening to music like that and wanted him to listen to more men. 9RP 347-8. Defendant was concerned that J.J.'s mom and grandmother were trying to turn him into a girl. 9RP 347-8, 360. Defendant saw J.J. listening to Sierra and dancing outside. 6RP 157-8, 9RP 346-7. Defendant got mad and J.J. ran around the house. 6RP 158, 9RP 348. Defendant brought the stereo inside and then called J.J. again to come in. 6RP 159, 161, 9RP 348, 349. Defendant got his belt, but J.J. did not want to go to him because he didn't want to get hit. 6RP 159. Defendant then took the cord off the radio, and took J.J. down to the basement where he proceeded to whip him. 6RP 160-1. J.J. said that he was whipped on the legs with a cord. 6RP 161, 207, 223. J.J. indicated that his dad sat on his back and his brother Mac sat on his legs. 6RP 161, 174, 207. J.J. also told Dr. Duralde that

defendant bit him, though defendant denied this. 6RP 224. Defendant testified that he whipped J.J. with his belt four times. 9RP 353, 354. Defendant denied that Mac held J.J. down though he did ask J.J. if he wanted Mac to hold him down. 9RP 356. Defendant testified that he wasn't mad at J.J. and in fact was punishing him for an incident that had occurred days earlier between J.J. and his cousin. 9RP 350-3, 394. Defendant testified that he saw marks on J.J. about two weeks prior to him returning to his mother, and while they concerned him, he didn't call CPS or the police. 9RP 417, 360.

J.J. returned home to his mother's house at the end of the summer. 6RP 162, 199-200. While he was trying on school clothes, his family noticed injuries on his legs, and lower back. 6RP 163, 201. J.J. was also walking funny. 6RP 201. His grandmother, Barbara Childs, took pictures and took J.J. to St. Clare Hospital. 5RP 63, 6RP 163, 6RP 202, 204, 6RP 264. J.J. said his dad had inflicted the injuries and provided information to his mother, grandmother, Dr. Yolanda Duralde and the forensic child interviewer, Kim Brune. 5RP 67, 82, 6RP 163, 6RP 216, 249, 267.

Dr. Duralde examined J.J. 6RP 216. Dr. Duralde is the medical director at the Child Abuse Intervention Department at Mary Bridge Hospital. 6RP 213. She had 18 years of experience in working with abused children. 6RP 214. Dr. Duralde testified that J.J.'s injuries were loop marks and most likely made by an extension cord. 6RP 225. She also observed the bite mark. 6RP 228. Further, Dr. Duralde found an

injury on J.J.'s shoulder that was consistent with a belt buckle. 6TP 230. The injuries were 1-3 weeks old and the majority of the injuries were on the back of J.J.'s thighs. 6RP 231, 235. Dr. Duralde also testified that it is easier to hit someone on the legs if you are sitting on them. 6RP 233. The injuries that Dr. Duralde observed were consistent with J.J.'s account of what happened. 6RP 238, 251.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING IRRELEVANT EVIDENCE THAT WAS REMOTE IN TIME FROM THE INSTANT CASE AND COULD NOT BE CONNECTED TO THE INSTANT CRIME.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, *review denied*, 120 Wn.2d 1022 (1992). The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *Rehak*, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable that it would be without the evidence.” ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence. ER 403.

A defendant does not have an absolute right or a constitutional right “to have irrelevant evidence admitted in his or her defense.” *State v. Maupin*, 128 Wn.2d 918, 924-5, 913 P.2d 808 (1996)(citing *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1938)). The exclusion of evidence that does not connect another to a crime is proper because there is a lack of foundation. *Maupin*, 128 Wn.2d at 922, (citing *State v. Downs*, 168 Wash. 664, 13 P.2d 1 (1932)).

“While evidence tending to show that another party might have committed the crime would be admissible, before such testimony can be received there must be such proof of connection with it, such a train of facts or circumstances as tend clearly to point out someone besides the prisoner as the guilty party. Remote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose.”

Downs, 168 Wash. at 667, (quoting *Greenfield v. People*, 85 N.Y. 75, 39 Am. Rep. 636). “..where there is no other evidence tending to connect such outsider with the crime....his bad character,...his means or opportunity to commit, or even his conviction of, the crime, is irrelevant to exculpate accused;...” *Downs*, 168 Wash. at 667. Opportunity to commit

the crime is not sufficient and would be “the most remote kind of speculation.” *Maupin*, 128 Wn.2d at 925, *Downs* 168 Wash. at 668.

Defendant alleges that the court abused its discretion in excluding 1) CPS records related to a different child, 2) the testimony of the sister of the victim as to the underlying allegations of the CPS records, 3) the testimony of the victim as to whether his grandmother ever punished him, and 4) the testimony of a friend of the defendant who called CPS on an incident involving the sister of the victim years earlier. All of these items were irrelevant as they were remote in time from the incident at hand, did not have a sufficient connection to the crime and would not create a reasonable inference as to exculpate defendant. The court did not abuse its discretion in excluding the evidence or testimony.

- a. The CPS records, and testimony by J.J.F. related to the subject of the CPS records, were not relevant to defendant’s case as they did not involve the victim or defendant and were remote in time.

Defendant sought to introduce a CPS investigation related to Genice Jones and J.J.F.³ 5RP 9-19. J.J.F. is the victim’s sister, and Genice is the victim’s mother. 5RP 12, 14. Ms. Jones whipped and choked J.J.F with an electrical cord. 5RP 14. However, the incident that

³ As J.J.F. is also a minor, the State will refer to her using initials.

was the subject of the investigation happened in 2002, over four years prior to the incident charged in this case. 5RP 18. Further, it did not involve the victim or defendant. 5RP 17-20. The court excluded the CPS records as irrelevant. 5RP 19-20. Specifically, the court found they were too remote in time and dealt with different people than the victim and defendant in the instant case. 5RP 20.

The court again ruled on this issue in relation to testimony from J.J.F. 8RP 22-3. Defense counsel wanted J.J.F. to testify that her mother beat her with an extension cord in 2002. 8RP 20. J.J.F. had sustained one mark, which she called the “candy cane” mark and the mark had since faded. 8RP 22. The court again ruled that this testimony was not relevant and there was not a sufficient nexus to the instant case. 8RP 22-3.

These records, and the testimony from J.J.F. about the incident with her mother, did nothing to exculpate defendant. Further, they did not show a history of abuse of the victim or even a history or pattern of abuse by the victim’s mother. All the incident shows is that Genice Jones hit her daughter years ago. It is one incident, remote in time that does not have any connection to this case. In fact, this testimony would have confused and mislead the jury. A court does not abuse its discretion when it focuses the testimony on the instant case and does not stray into other incidents. *See United States v. Perkins*, 937 F.2d 1397, 1401 (9th Cir. 1991). The court did not abuse its discretion in excluding this irrelevant evidence and testimony.

b. The victim's testimony as to whether or not his grandmother punished him was not relevant.

Defense counsel asked J.J. whether his grandmother had ever punished him. 10RP 459. The State objected and argument was heard outside the presence of the jury. 10RP 459-460. Whether or not the grandmother ever punished J.J. is not relevant to the instant case. There was no connection to the crime. There was no abuse of discretion in finding the question irrelevant.

The question was also not relevant to test the voracity of J.J. Credibility determinations are up to the jury. In the case of conflicting evidence, or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The jury heard from Barbara Childs, Kim Brune, Dr. Duralde and J.J. himself. The jury heard both the consistencies in what J.J. told people as well as the inconsistencies. The jury also heard about the physical evidence that corroborated the victim's story. In addition, the jury heard from the defendant and his version of events. It was up to the jury to judge the credibility of the witnesses and reach a conclusion. There is no evidence that this one question would have tested the voracity of J.J. 10RP 459-460. The jury's determination as to the credibility of J.J.

is not subject to review, and the court did not abuse its discretion in finding the question irrelevant.

- c. The testimony of Jeanette Williams was not relevant to defendant's case as it did not concern the victim in this case, was remote in time, and did not show that defendant called CPS.

Toward the end of the trial, defendant sought to introduce the testimony of Jeanette Williams. Ms. Williams apparently came into the courtroom and asked to speak to defense counsel. 9RP 423-4. Defense counsel then asked to be allowed to introduce her testimony. 9RP 423-4.

In an offer of proof outside the jury, defense counsel indicated that Ms. Williams would testify that she had met the victim and had helped defendant contact CPS at some point in time. 9RP 424-5. However, Ms. Williams had not seen the victim during the time period relevant to this offense. 9RP 425. Ms. Williams had only seen the victim years earlier and had not seen the victim from 2003-2007. 9RP 425. Further, Ms. Williams had helped defendant contact CPS for J.J.F., the victim's sister and had not helped report any incidents related to the victim. 9RP 425.

The court properly found that the testimony of Ms. Williams was not relevant and was too remote in time. 9RP 426. The court did not allow Ms. Williams to testify. 9RP 426. There was no abuse of direction. Nothing about Ms. Williams' testimony was connected to the instant

incident nor was it even related to the same time period or the same child. The fact that Ms. Williams had helped defendant call CPS about J.J.F. years earlier did not show that defendant had even attempted to call CPS about the instant victim. The court properly excluded the irrelevant testimony.

2. DEFENDANT FAILS TO ESTABLISH THAT HE IS ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

The cumulative error doctrine applies when several errors occurred at the trial court level, none of which alone warrants reversal, but the combined errors effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). Even so, “[a]bsent prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial.” *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 232 (2004). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994).

Defendant cannot meet his burden under the cumulative error doctrine. There is no evidence that the court abused its discretion in excluding evidence that had no relevance to the case. The evidence and testimony that defendant sought to introduce were remote in time,

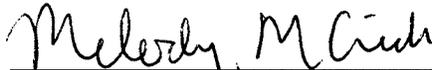
concerned other people, and did not tend to exculpate defendant. Further, it would have confused and mislead the jury. The court properly excluded the testimony. Defendant was still able to present a defense. Defendant has not shown that exclusion of this evidence was an error and has not shown it to be so prejudicial that it denied him a fair trial. Defendant has failed to prove that he is entitled to a new trial under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the conviction and sentence below.

DATED: March 31, 2009

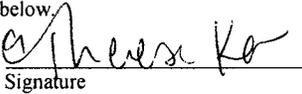
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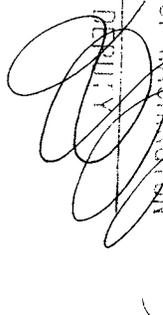


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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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