

NO. 39282-8-II

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

STATE OF WASHINGTON, Respondent

v.

JAMES PATRICK WHEAT, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT L. HARRIS
CLARK COUNTY SUPERIOR COURT CAUSE NO.07-1-01204-4

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the Statement of Facts as set forth by the defendant. Where additional information is needed or facts are disputed, it will be set forth in the argument section of the brief.

II. ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED ORTHMEYER'S STATEMENT TO THE DEFENDANT AS AN ADOPTIVE ADMISSION. THE DEFENDANT HEARD THE INCRIMINATING STATEMENT, WAS ABLE TO RESPOND, AND THE CIRCUMSTANCES INDICATE HE WOULD HAVE REASONABLY RESPONDED HAD HE NOT INTENDED TO ACQUIESCE IN THE STATEMENT. NO ABUSE OF DISCRETION BY THE TRIAL COURT HAS BEEN SHOWN.

The trial court's decision to admit evidence lies within its wide discretion, and is reviewed for abuse of discretion. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). The trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Neal, 144 Wn.2d at 609. An out of court statement offered to prove the truth of the matter stated is hearsay. ER 801(c). But "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement of which the party has manifested an adoption or belief

in its truth." ER 801(d)(2)(ii). A party can manifest an adoption of a statement by words, gestures, or complete silence. State v. Cotten, 75 Wn. App. 669, 689, 879 P.2d 971 (1994), review denied, 126 Wn.2d 1004 (1995). Adoption of a statement by complete silence has been repeatedly upheld in Washington. See, e.g., State v. Pisauro, 14 Wn. App. 217, 540 P.2d 447 (1975) (admission by silence when witness asked whether guns offered for sale were stolen and defendant failed to reply); State v. Goodwin, 119 Wash. 135, 204 P. 769 (1922) (statement by victim of explosion that defendant "did it" was type of accusation to which innocent person would reply). A party's silence manifests an adoption of the statement if he heard the incriminatory statement, was able to physically and mentally respond, and the circumstances indicate that he reasonably would have responded had he not intended to acquiesce in the statement. State v. Neslund, 50 Wn. App. 531, 551, 749 P.2d 725, review denied, 110 Wn.2d 1025 (1988).

A defendant's conduct is a circumstance for the jury to consider when it is not "likely to be the conduct of one who was conscious of his innocence" or "tend[s] to show an indirect admission of guilt." State v. McGhee, 57 Wn. App. 457, 461, 788 P.2d 603 (quoting State v. Kosanke, 23 Wn.2d 211, 215, 160 P.2d 541 (1945)), review denied, 115 Wn.2d 1013, 797 P.2d 513 (1990); State v. Cotten, 75 Wn. App. 669, 689-90, 879

P.2d 971 (1994) (defendant's silence when accomplice described drive-by shooting to friend constituted an adoptive admission; "reasonable to conclude" that the defendant would have responded if the description was false), *review denied*, 126 Wn.2d 1004 (1995).

State v. Neslund provides guidance on how to construe the foundational requirements of this rule:

The trial court's decision is only a threshold determination; the jury is primarily responsible for determining "whether in the light of all the surrounding facts, the defendant actually heard, understood, and acquiesced in the statement." United States v. Moore, *supra* at 1075. Whether an accused has made an adoptive admission is thus a matter of conditional relevance to be determined ultimately by the jury. United States v. Barletta, 652 F.2d 218 (1st Cir. 1981; *see also* ER 104(b).

- Neslund, at 551-52.

The court in Neslund elaborated further on the trial court's role in such situations, drawing from United States v. Barletta, 652 F.2d 218 (1st Cir. 1981):

The court's role in ruling on the admissibility of evidence generally suggests that it should rule on the basis of its own factual assessment. But the "adoption" question comes within a special subclass of preliminary questions, those which present precisely the same question as an ultimate issue of fact in the case, which we think demands a different standard: to preserve the proper allocation of responsibilities between judges and juries, such questions ought to be decided by the latter. Thus the court's role in these instances is not to make a factual determination, but rather to rule as a matter of law whether a reasonable jury

could properly find the ultimate fact in favor of the proponent of the evidence. Indeed, to hold otherwise -- to deny the jury the possibility of making a particular factfinding simply because the court would determine the fact otherwise -- might in criminal cases deprive a defendant of his Sixth Amendment right to have his case tried to a jury. Read in this light, then, we think the "preliminary" question to be decided by the court under [Federal] Rule 104(a) is properly understood in such instances to be the question of law whether a reasonable jury could find a particular fact. In this case [adoptive admission], the precise question to be asked is whether a jury could find the fact in the government's favor by a preponderance of the evidence.

- Neslund, at 552, citing Barletta, at 219-20.

The facts of the instant case are remarkably similar to those in Neslund. In Neslund, one brother overheard a conversation from the next room that took place between his brother, and his sister, the defendant. When the speaking brother reiterated the details of the crime, the defendant did not respond. In Neslund, the defendant argued that there was an insufficient foundation to admit the statements as an adoptive admission because the testifying brother could not specify the date the conversations occurred, the number of conversations, whether another person had been present, and because the testifying brother was "pretty damn drunk" at the time of the conversations. Nonetheless, the court in Neslund found that the testimony was admissible as an adoptive admission

because there was a detailed discussion of the killing and therefore Neslund heard and understood the conversation, and had the ability to, but did not deny the account. The Neslund court held that the defendant's arguments about the weaknesses of the adoptive admission went to weight rather than admissibility. Neslund, at 549-53. In the instant case, the testifying sister was able to recall the date, was not intoxicated, indicated she overheard a phone conversation going on next to her between her father (whose voice she plainly recognized) and her sister, and did not indicate that her father responded to the statement, "You're the one that said you had your head between her legs!" (RP 258-60). This is precisely the type of statement that we should expect the defendant to deny. The facts of the instant case demonstrate an even better foundation than the facts in Neslund. The trial court in this case properly executed its gatekeeping duty in making a preliminary finding of admissibility. Like Neslund, any weaknesses claimed by the defendant were properly a matter of weight rather than admissibility. No abuse of discretion has been shown.

B. EVEN IF THE COURT ERRED IN ADMITTING THE STATEMENT UNDER AN ADOPTIVE ADMISSION ANALYSIS, HARMLESS ERROR APPLIES. THE STATEMENT WAS ADMISSIBLE TO SHOW ORTHMEYER'S BIAS, A MATERIAL ISSUE IN THIS CASE.

A trial court's determination to admit or exclude evidence may be sustained on any proper basis within the record and will not be reversed simply because the trial court gave a wrong or insufficient reason for its determination. State v. Markle, 118 Wn.2d 424; 823 P.2d 1101 (1992); Pannell v. Thompson, 91 Wn.2d 591, 603, 589 P.2d 1235 (1979). "It is a general rule of appellate practice that the judgment of the trial court will not be reversed when it can be sustained on any theory, although different from that indicated in the decision of the trial judge." State v. Norlin, 134 Wn.2d 570; 951 P.2d 1131, 1136-37 (1998), citing Cheney v. City of Mountlake Terrace, 87 Wn.2d 338, 552 P.2d 184 (1976).

A witness's out-of-court statements may be admitted for purposes of revealing the witness' bias without violating the hearsay rule. State v. Spencer, 11 Wn. App. 401, 45 P.3d 209 (2002). Here, Orthmeyer's out-of-court statements appear to have been offered for reasons beyond proving the truth of the matter asserted. They were also admissible as circumstantial evidence to reveal bias.

In this case, the State asked to treat Orthmeyer as a hostile witness. (RP 265-66). Orthmeyer was the daughter of the defendant and according to the prosecutor was not cooperative with the pre-trial interview process. (RP 265). The prosecutor, in an offer of proof, before Orthmeyer testified, stated that Orthmeyer had been combative, had used profanity with the prosecutor in the pre-trial interview process, and was in fact the person paying for the defendant's legal defense. (RP 270). Orthmeyer testified that her father, the defendant, never made any admissions to her over the telephone. (RP 296-97). This was contradicted by the testimony of her sister, Christy Childs, who was also the daughter of the defendant. The State, at trial, impeached Orthmeyer with a prior conviction for Theft. (RP 294).

Under these circumstances, Child's testimony, relating Orthmeyer's recitation of the defendant's admission, would have been admissible to show her bias—that her relationship with her father had tainted her testimony; and also to impeach her ability to accurately recall events and testify truthfully. Neither of these purposes would be using the statement to prove the truth of the matter asserted—that Orthmeyer repeated a statement made by the defendant—but rather for purposes of bias and impeachment.

- C. EVEN IF THE ALLEGED HEARSAY STATEMENT WAS IMPROPERLY ADMITTED, HARMLESS ERROR APPLIES. IF THE ADOPTIVE ADMISSION WAS EXCLUDED, IT WOULD STILL NOT HAVE BEEN REASONABLY PROBABLE THAT THE OUTCOME OF THE TRIAL WOULD HAVE BEEN DIFFERENT. THE JURY WAS PRESENTED WITH THE VICTIM'S DETAILED TESTIMONY OF REPEATED ABUSE, UNDISPUTED EVIDENCE THAT THE DEFENDANT WAS GROOMING THE VICTIM WITH LINGERIE AND PORNOGRAPHY, THE TESTIMONY OF BOTH ORTHMEYER AND LEANNE WHEAT WERE PLAINLY CONTRADICTED, AND THE ONLY DEFENSE EVIDENCE CONSISTED OF ATTEMPTS TO IMPUGN THE CHARACTER OF THE 10-YEAR OLD CHILD VICTIM.

The improper admission of evidence is harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Thieu Lenh Ngiem v. State, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994). Where the error arises from a violation of an evidentiary rule, that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

The victim, MW, testified that during her fifth-grade school year she lived with her father in Vancouver, Washington. (RP 96-97). MW said her father "molested" her in the house they lived in, during that year. (RP 97-98). Kelli Orthmeyer and Leanne Wheat, her two half-sisters, who

testified against her, lived in the home at least part of the time this abuse was occurring. (RP 98-99). The victim testified that on one occasion the defendant had viewed a pornographic movie with her that he ordered off Comcast Cable, that he grabbed her hand and placed it on his penis, and that further contact ceased on that occasion because other people arrived at the home. (RP 101-103). MW testified that the defendant showed her pornography on multiple occasions. (RP 127-28).

The victim also said the defendant touched her below the waist on other occasions with “his hands, his mouth and his penis.” (RP 103). The victim described the sexual abuse by her father occurred over a period of weeks to months. (RP 104). The victim described the first incident that occurred was her father placing his mouth on her vagina. (RP 105). The victim stated Kelli Orthmeyer was upstairs in the home when this incident of oral-vaginal rape took place. (RP 106). The victim testified that on a different occasion, at night, while she was in bed, the defendant placed his hand on the outside of her vagina for a period of 1-2 minutes. (RP 107-111). The victim testified that on another occasion in an upstairs bedroom, the defendant had pulled her panties aside, inserted his penis in her vagina, moved it in and out at least twice, and then withdrew. (RP 114-117). The victim testified that she ultimately reported this sexual abuse to her aunt, and her sisters, Leanne Wheat and Kelli Orthmeyer.

(RP 117-19). The victim said she was reluctant at first, but disclosed in more detail at the urging of her aunt and sisters who asked her, “Is he molesting you?” (RP 117-120). As the conversation continued, they pressed her, saying, “We know he is.” (RP 120). The victim said she then admitted, “Yeah, he is.” (RP 120).

Detective Osorio, the primary investigating officer, responded to a telephone call made by Christy Childs, reporting the sexual abuse in this case. (RP 228). On April 1, 2007, Detective Osorio interviewed Christy Childs, Kelli Orthmeyer, and Leanne Wheat. (RP 229). Detective Osorio said that Kelli Orthmeyer told him she had discussed the allegations in this case with the defendant. (RP 493). Orthmeyer denied this when she testified. (RP 296-97). The Appellant characterizes the victim in this case as having “enormous credibility problems.” Appellant’s Brief at 11. Appellant’s argument seems to be premised largely on the fact that Kelli Orthmeyer gave testimony contradicting the victim and that Orthmeyer testified the victim had a bad reputation for truth and veracity. Appellant’s Brief at 11-12. Of course, this ignores the fact that Orthmeyer herself was impeached with her own conviction for theft, and her testimony that she never had a conversation with her father about the allegations was plainly contradicted by the testimony of both the investigating officer and her own sister, Christy Childs. The State submits

that the individual clearly suffering from “enormous credibility problems” in this case was in fact, Kelli Orthmeyer. The jury of twelve fact-finders in this case clearly agreed. A jury, reviewing the evidence in this case, would have to find that the victim, the investigating officer, and Orthmeyer’s own sister had all fabricated or were grossly inaccurate in their testimony and that Orthmeyer should be believed.

The Appellant suggests that there was no corroborating evidence in this case, beyond the victim’s testimony. Appellant’s Brief at 12. However, this ignores the testimony of Orthmeyer’s sister, Christy Childs, and the testimony of the investigating officer, that Orthmeyer stated she had discussed the allegations with her father, and the undisputed admissions by Orthmeyer that the defendant was viewing pornography with the victim and buying her G-string underwear. (RP 286). Viewing pornography with your fifth-grade daughter and buying her revealing lingerie are not the actions of a concerned, loving parent. Instead, they are highly probative on the issue of guilt in this case. The undisputed fact that the defendant was exposing his 11-year old daughter to pornography and buying her G-string panties, goes a long way to corroborating the testimony of the victim. This sort of blatant “grooming” behavior by the defendant cannot be overlooked in reviewing the totality of the evidence.

Absent the statement of the defendant to Orthmeyer, the evidence of guilt still consisted of the following: the victim's description of at least four separate acts of sexual abuse, one of which was relied upon for conviction; the uncontested evidence that the defendant was viewing pornographic videos with his 11-year old daughter and buying her G-string panties. The evidence the defense presented in an attempt to contradict the victim came primarily from her two sisters Kelli Orthmeyer and Leanne Wheat. As noted above, Orthmeyer was contradicted by two other witnesses, her own sister Christy Childs, and the investigating detective, as well as impeached by a prior theft conviction. Wheat, it should be noted was also impeached, admitting on cross-examination that she had "pretty close to ten" prior convictions for crimes of dishonesty. (RP 389). When that evidence was viewed by the jury, it is not reasonably probable that the inclusion of the adoptive admission changed the outcome of the case. Instead, the jury already had the evidence stemming from the victim's testimony, the uncontroverted evidence of the defendant's grooming behavior, and the attempts at impeaching the victim's credibility by two witnesses with a record of crimes of dishonesty. Given those facts, the jury had every reason to convict the defendant, even absent the adoptive admission to Orthmeyer.

III. CONCLUSION

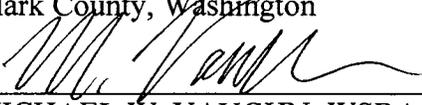
The trial court properly admitted the defendant's adoptive admission into evidence because his own daughter testified that she recognized his voice, overheard his telephone conversation and the allegation of sexual abuse made by Orthmeyer is one a reasonable person would have responded to. The statement made by Orthmeyer was also admissible to show her bias. In denying her father made any admissions about the case, a fact contradicted by both Christy Childs and Detective Osorio, her statement was admissible to show her bias towards the victim and favoring her father, the defendant. Finally, the victim's testimony, contradicted only by her step-sisters, whose own testimony was contradicted by others and impeached by crimes of dishonesty, coupled with the uncontroverted evidence of the defendant grooming the 11-year old victim with pornography and lingerie could point the jury only towards conviction, even if the adoptive admission had not been admitted.

DATED this 20 day of November, 2009.

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