

FILED
Court of Appeals
Division II
State of Washington
12/27/2018 10:34 AM
NO. 50445-6

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NESTOR POZOS RIVERA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Gretchen Leanderson

No. 16-1-03115-5

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 ADMITTING EVIDENCE OF DEFENDANT'S PRIOR ACTS OF DOMESTIC VIOLENCE UNDER ER 404(B) TO EXPLAIN S.M.M.'S DELAYED REPORTING?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On August 2, 2016, the State charged Nestor Ricardo Pozos Rivera, hereinafter referred to as "the defendant", with two counts of child molestation in the first degree, domestic violence related. CP 1-2. The Honorable Judge Gretchen Leanderson presided over jury trial which began on May 22, 2017. RP 105.

At trial, the defense counsel moved to exclude evidence regarding unreported domestic violence between the defendant and Cassie Pozos Rivera, S.M.M.'s mother on the basis of 404(b) prior bad acts. RP 93. The State objected on the basis that it was not coming in as a prior bad act offered for proof of conformity therewith, but to explain S.M.M.'s delayed reporting of the sexual abuse. RP 94. After hearing argument from both sides as well as voir dire of Cassie Pozos Rivera, the court allowed limited testimony regarding one assault S.M.M. observed between her mother,

Cassie Pozos Rivera, and the defendant for the reason for the delay of four days for her reporting. RP 101.

On June 1, 2017, a jury found the defendant guilty beyond a reasonable doubt of two counts of child molestation in the first degree. RP 540-541. On July 28, 2017, the court sentenced the defendant to 89 months in custody, the high end of the sentencing range, on both counts to run concurrently. RP 554, CP 71-87. The court also imposed the mandatory legal financial obligations and a lifetime no-contact order with the victim. RP 554, CP 71-87.

2. FACTS

The facts of this case are incorporated from the State's original response brief.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE OF DEFENDANT'S PRIOR ACTS OF DOMESTIC VIOLENCE UNDER ER 404(B) TO EXPLAIN S.M.M.'S DELAYED REPORTING.

ER 404(b) generally prohibits admitting evidence of "other crimes, wrongs, or acts" to "prove the character of a person in order to show action in conformity therewith." Evidence of prior misconduct is presumptively inadmissible. *State v. Gresham*, 173 Wn.2d 405, 421, 269

P.3d 207 (2012). However, the rule does allow admission of such evidence for other purposes, including “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). “This list of other purposes for which such evidence of other crimes, wrongs, or acts may be introduced is not exclusive.” *State v. Baker*, 162 Wn. App. 468, 473, 259 P.3d 270 (2011).

A trial court must state its reasoning on the record when admitting ER 404(b) evidence. *State v. Jackson*, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984). Before the trial court admits evidence under ER 404(b), it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. *Gresham*, 173 Wn.2d at 421 (quoting *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). The third and fourth elements of this rule ensure that admission of the evidence does not violate ER 403. *Gresham*, 173 Wn.2d at 421. The proponent of the evidence has the burden demonstrating that the evidence has a proper purpose. *Gresham*, 173 Wn.2d at 420.

The trial court’s interpretation of ER 404(b) is reviewed de novo as a matter of law. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937

(2009). If the trial court interprets ER 404(b) correctly, then the appellate court reviews the ruling to admit or exclude evidence of misconduct for an abuse of discretion. *Id.* “A trial court abuses its discretion where it fails to abide by the rule’s requirements.” *Id.*

Here, defendant moved to exclude evidence of his unreported domestic violence against Cassie Pozos Rivera under ER 404(b). RP 93. The State objected and argued that it should come in for the purpose of explaining S.M.M.’s delayed reporting. RP 101, Supp. CP 122 “Order on Motion in Limine No. 8 and 9”.

The State argued the following,

“Under 404(b), however, someone can bring it in for considerations of credibility, motivation, et cetera, and other non-exclusive reasons listed under 404(b). In this case, [S.M.M.] who was ten years old when the defendant molested her, observed her mother being assaulted by the defendant on multiple occasions, and this is the basis – and the reasons that is relevant to this case is not to show that he’s a bad person but to show she has a reason to delay the four days that she delayed in reporting because, as the Court will recall from the State’s brief in this case, she – the defendant committed count one on Saturday, December 5th, count two on Sunday, December 6th, and then he was driving her home to be with – to return her to her mother. On the way, they stopped at a restaurant. And at that restaurant – on the way to the restaurant, she asked him, “Why did you do this to me?” And he claimed – he pretended like he didn’t know, But at the restaurant, he said that, “if you don’t – you tell your mother, I’m going to do something to you.” Now, “do something” is – without context can be a rather vague statement. But in the context of a person who she’s viewed – she’s seen attack and assault her mother, that’s a very significant context to that statement. And that jury needs to understand that so that when – when a ten-year-old, S.M.M. hears, “I’m going to do

something if you tell your mother,” the jury fully understands what that means in the context of her life and her relationship with the defendant, a person she’s seen commit domestic violence before.”

CP 94-95.

After hearing argument from both sides, the trial court allowed testimony limited to one prior incident witnessed by S.M.M. and explained:

As to the 404(b), to allow [S.M.M.] to testify as to the domestic violence that she observed between her mother, Cassie Pozos Rivera, and the defendant, I am going to allow that in as a reason for the delay of four days for her reporting.

And as Mr. Cummings had indicated, there are some reasons, such as her motivation for the delay, and also for her credibility.

RP 100.

S.M.M. thereafter testified before the jury regarding the incident of abuse where the defendant hit her mother and yelled at her to come watch while it happened. RP 389-390. Cassie Pozos Rivera also testified to that incident where the defendant kicked her in her ribs and face while S.M.M. was present. RP 170-171.

Defendant argues that the trial court abused its discretion in admitting the evidence in a statement of additional grounds. *See* Statement of Additional Grounds. Defendant’s argument fails for the reasons set forth below.

In sexual abuse cases, Washington courts allow admission of evidence of misconduct “to prove the alleged victim’s state of mind,” and to explain the victim’s delay in reporting the sexual abuse. *Fisher*, 165 Wn.2d at 744-45. Additionally, evidence of prior abuse that bears on a victim’s credibility may include abuse of others that causes fear for the current victim. *State v. Nelson*, 131 Wn. App. 108, 114-16, 125 P.3d 1008 (2006). Here, the trial court properly admitted the prior misconduct evidence to explain S.M.M.’s state of mind and help the jury evaluate her delay in reporting the sexual abuse.

Additionally, courts have recognized that cases involving sex crimes against children generally put the child victim’s credibility in issue, especially where the defendant denies that the crimes occurred and the child asserts their commission. *State v. Kirkman*, 159 Wn.2d 918, 933, 155 P.3d 125 (2007) (citing *State v. Petrich*, 101 Wn.2d 566, 575, 683 P.2d 173 (1984)). “Where the child’s credibility is thus put in issue, a court has broad discretion to admit evidence corroborating the child’s testimony.” *Id.* This is true regardless of whether the defense makes delayed reporting an issue.

The record demonstrates that the trial court properly admitted evidence of defendant’s acts of domestic violence as it explained why S.M.M. did not immediately report the sexual abuse. See *Fisher*, 165

Wn.3d at 745-46; *State v. Wilson*, 60 Wn. App. 887, 890, 808 P.2d 754 (1991) (in sexual abuse of a minor case, evidence of physical assaults was properly admitted under ER 404(b) to explain delay in reporting the abuse and to rebut inference that the sexual abuse did not occur); *State v. Baker*, 162 Wn. App. 468, 474-75, 259 P.3d 270 (2011) (prior acts of domestic violence between defendant and victim are admissible to assist jury in assessing credibility of victim who delays reporting, changes her story, or minimizes the degree of violence due to fear of defendant).

The trial court initially granted defense counsel's motion to exclude testimony from Cassie Pozos Rivera regarding the domestic violence, but allowed for the parties to revisit the issue. Prior to ruling, the Court heard testimony from Cassie Pozos Rivera regarding the unreported domestic violence. Cassie Pozos Rivera testified to two different incidences. That S.M.M. witnessed the defendant throw a phonebook at her stomach while she was pregnant and on another occasion hit her in the face until she was on the ground and then kicked her in the face and ribs. RP 149, 152. The court excluded testimony regarding the phone book, but found the other assault relevant and identified a proper purpose for admission: "that it does go towards motivation for the reason for the delay". RP 161.

However, even if the trial court improperly admitted the prior misconduct evidence, any error was harmless. An erroneous evidentiary ruling that is not of constitutional magnitude is not prejudicial unless, within reasonable probabilities, the trial's outcome would have been different had the error not occurred. *State v. Brockob*, 159 Wn.2d 311, 351, 150 P.3d 59 (2006); *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). "Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole." *Neal*, 144 Wn.2d at 611.

Here, S.M.M. testified that she woke up with the defendant's hand inside her underwear. RP 401. She felt the defendant's fingers moving around on her vagina. RP 402. S.M.M. pretended to go to the bathroom to stop being molested by the defendant and sat on the toilet crying. RP 403-404. The defendant molested S.M.M. again the next morning. RP 404-405. S.M.M. testified that the defendant asked if she wanted to play a biting game while she was still in bed from the night before. RP 404. She testified that although she said no, the defendant rolled onto her, pinned her down, pushed up her shirt and bra and sucked and licked her nipple. RP 407-410. Cassie Pozos Rivera testified that S.M.M. was acting differently after the incident, told her the defendant touched her and cried because she did not want to go back to the defendant. RP 198-199. There

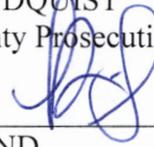
is no reasonable probability that the outcome of the trial would have been different had the trial court not admitted evidence of the unreported domestic violence. Accordingly, any error was harmless, and defendant's convictions should be affirmed.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's convictions.

DATED: December 27, 2018.

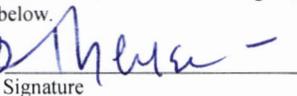
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Certificate of Service:

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.

12-27-18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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Appellate Court Case Title: State of Washington, Respondent v. Nestor Pozos Rivera, Appellant
Superior Court Case Number: 16-1-03115-5

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