

34334-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

FILED
Nov 30, 2016
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

EDUARDO CHAVEZ,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUE

Did the court abuse its discretion in excluding so-called “reputation” testimony based on the conversation of 3-5 youth at a skate park discussing their opinions of the veracity of the sexual assault victim’s allegations?

IV. STATEMENT OF THE CASE

The Defendant Eduardo Chavez appeals from a jury conviction for the second degree rape of A.S.. CP 31, 120-40, 151-53.

A.S. was raised by her paternal grandparents. RP 138, 149. In April of 2015, her father had been living with A.S. and his parents for a few years in Milton-Freewater, Oregon. RP 138-39. A.S. was not getting

along with her father and decided to run away from home. RP 139-40, 155, 159-60. She was 15 years old. CP 56; RP 139, 154.

A.S. had been conversing with 25 year old Jesus Torres on Facebook. CP 56; RP 155-56, 243, 380. Previously he had picked up A.S. and her friends A.B. and M.B. (who were 12 and 13 years old) from a skate park, taken them to a hotel, and given A.S. her first taste of alcohol. RP 158-59, 161, 200, 262-66. Some weeks later, A.S. decided to run away, and Mr. Torres picked up A.S. from her house at midnight. RP 155-56, 159-60, 244. Mr. Torres took A.S., A.B., and M.B. to his house in Walla Walla. RP 161, 245, 266. There, A.S. smoked some marijuana and drank “a lot of vodka” straight from the bottle as well as in large mixed drinks. RP 162-64, 245-46, 269. A.S. was so inebriated that she does not remember exactly how she lost her eyebrows. RP 246, 270. Eventually A.B. and M.B. passed out or fell asleep. RP 245, 281.

Mr. Torres and his brother Gustavo decided that, because A.S. was a runaway, she could not sleep there. RP 165, 380, 393. They called the Defendant Eduardo Chavez to come get her. RP 165, 246. A.S. did not know the Defendant, but was able to identify him later by the tattoo over his eyebrow. RP 165-66, 168, 185, 249.

Under the street lights, she walked to his house carrying a bottle of

vodka. RP 166-67, 396. She had trouble walking due to her intoxication. RP 164. There were no lights on in the Defendant's house, and A.S. had to hold on to the Defendant's back to make her way. RP 167, 185, 401. There were two beds, one occupied by two people. RP 167. The Defendant said that he was going to sleep on the floor, and that she could have the other bed. RP 167-68, 247. She sat down on the bed, drank some more vodka, and then passed out. RP 167, 246-47.

When the Defendant woke her the next morning, A.S.'s pants were unzipped and twisted around her ankles, and her shirt was raised. RP 168-72, 247-48. Her hips hurt, and she had hickeys on her neck. RP 169-72, 247-48, 253-54, 259, 273. She "just kind of wanted to get out of there." RP 172. Mr. Torres and his brother picked her up again, and A.S. told A.B. and M.B. that she thought she had been raped. RP 171, 273-74. A.S. seemed scared, freaked out, sad, and upset. RP 273-74, 279-80. She was dropped off at her boyfriend's house, where her father located her in the late afternoon and took her home. RP 141, 173, 248.

A.S. had a headache, reeked of alcohol, and was groggy, hung over, and in a fog or a daze until the next day. RP 144-45, 149, 178. At home, A.S.'s aunt and grandmother were very angry with her. RP 141-42, 174. A.S. left to her friend Sheridan Breeding's house nearby where she

was able to process what had happened to her. RP 142, 174-76. A.S. had vaginal soreness and scratchiness, and she realized that she had probably been raped. RP 146, 176.

Ms. Breeding testified that when A.S. came to see her, she said she had nowhere to go. RP 291. A.S. looked “rough” as if she had been at a party; her hair had been cut and her eyebrows shaved. RP 294-95.

Ms. Breeding’s mother Christa Shannon was not home; she runs a foster care for disabled adults out of another residence. RP 328-29, 334. Ms. Breeding’s father took his daughter and A.S. to see Mrs. Shannon. RP 329. Mrs. Shannon testified that A.S. looked tired, sleep-deprived, and not herself; she had alcohol on her breath. RP 330, 333.

The girls went downstairs by themselves. RP 331. There A.S. told Ms. Breeding that she had been raped. RP 292. Ms. Breeding shared with her mother that A.S. had been raped and wanted to change her underclothing. RP 294, 331. A.S. shared the details of the night with Mrs. Shannon, consistent with A.S.’s trial testimony. RP 332-33.

A.S.’s family and the police were called, and a rape kit was collected. RP 143-45, 176-78, 240-41, 341. Walla Walla police officer Tracy Klem interviewed A.S. on videotape that was played for the jury. RP 241-52.

At trial the Defendant testified that police picked him up and took him to the station. RP 395. He was contradicted with his own recorded statement asserting he had come to the station on his own. RP 411-13.

Initially, the Defendant told police that he had nothing to do with Jesus and Gustavo Torres. RP 343. However, at trial, the Defendant admitted that he had known Gustavo Torres for four years and was even familiar with Jesus Torres' criminal history. RP 391, 393.

In the initial police interview, he denied knowing anything about A.S.. RP 342. However, when DNA analysis determined the Defendant's semen was on the perineal swabs, cervical swabs, anal swabs, and swabs from A.S.'s underwear, then the Defendant admitted that he had sex with A.S.. RP 345-47. He claimed the sex had been consensual, although he did not know her name. RP 347.

He admitted the two other people sleeping at his parents' house were also runaway young girls, one with a warrant for her arrest – information he withheld from his parents. RP 349, 418. He admitted that he had been tearing wood from his parents' fence and burning it in an outdoor grill that night. RP 401, 423.

The Defendant testified that he had encountered A.S. just as she had reported. RP 393; *See also* RP 379-80 (defense witness Melanie

Rojas-Godinez corroborating the meeting). He said that he learned A.S.'s age from Gustavo Torres prior to the sex; he had been "gunning to hit that." RP 388, 419. Although she had been smoking and drinking all night, the Defendant denied that A.S. smelled of alcohol or marijuana or had trouble walking. RP 419. He gave multiple inconsistent statements about A.S.'s degree of inebriation, ultimately claiming she "wasn't F-upped." RP 348.

He could not respond to the question whether it would have been wiser to find out whether A.S. had the ability to consent. RP 420-21. He said he had not known A.S.'s name. RP 347. He testified that it was common and not at all suspicious for strange girls to remove their clothes and throw themselves at him. RP 417-18, 422. He claimed A.S. had enjoyed the encounter and that he knew the duration of the sex because he checked the time. RP 404-06, 422.

On appeal, the Defendant challenges the exclusion of opinion testimony the defense attempted to elicit through Ms. Breeding. Defense counsel's initial attempt to elicit the witness' opinion on the victim's veracity was very direct.

And if understood correctly on direct examination when

you were answering questions from Ms. Mulhern a bit ago, you said something about that your mom said maybe you shouldn't believe her because you weren't there or something like that? ... And that's because you were having a hard time believing her; weren't you?

RP 298. When ordered to rephrase, defense counsel then asked what A.S.'s reputation was among the students at school. RP 298-99. The court excused the jury to permit a proper voir dire. RP 299-303.

Ms. Breeding was 14 at the time of her testimony. RP 290. Under cross-examination, she was easily led. RP 297, 300-01. So led by defense counsel, she said that A.S. did not have a good reputation in the school community for truthfulness. RP 300-01. However, when pressed for details to support this conclusion, Ms. Breeding was only able to say that she personally knew A.S. to have lied about the typical things for a child that age. RP 305. Ms. Breeding did not know A.S. to have ever lied about being the victim of an assault. RP 305.

The only memory she testified to regarding other people discussing A.S.'s truthfulness was in dated hearsay opinion testimony as to the victim's veracity *on the rape only*. RP 300-02 ("They were just saying how she was raped and that they didn't believe her"). Ms. Breeding could not recall who these 3-5 kids were. RP 302, 318. She knew that the rumors could be based on no facts at all. RP 313, ll. 18-21. Ms. Breeding

was aware that A.S. struggled with the uninformed judgment of her peers.

Q. Alicia told you herself that people think she is a liar?

A. Uh-huh.

Q. Okay. What did she say about that?

A. She just thinks that people should believe her.

Q. Why should that be?

A. I honestly don't know.

Q. Okay. Do you think maybe because she is telling the truth?

A. Yeah.

RP 306-07. The prosecutor argued that what Ms. Breeding had heard was mere rumor-mongering and inadmissible opinion testimony. RP 304, ll. 5-10; RP 307, 314.

I think that rumors get started at school that may be baseless and groundless. I don't think it is the same situation, first of all, as an adult who has a reputation in the community. I also think we are talking about things that are dealing with the juvenile arena. I don't know that a juvenile's reputation for truthfulness or untruthfulness is necessarily permitted.

..... I don't think having some sort of sua sponte opinion evidence about her truthfulness is appropriate here.

RP 307.

I think it is probably everyone's experience in this courtroom that particularly in junior high and small schools, rumors get started very easily and they are often baseless. So reputation among other junior high school kids that someone may or may not be truthful is not germane to our inquiry today.

RP 314.

The court excluded the testimony, stating:

The Court finds that the relevant factors of the frequency of contact between members of the community, the amount of time known in the community and the role the person played in the community and the number of people, that that foundation has not been met and that that opinion statement with reference to truthfulness and veracity will not come in.

RP 316.

V. ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING INADMISSIBLE TESTIMONY.

As the Defendant acknowledges, the standard of review is abuse of discretion. BOA at 3; *Boyd v. Kulczyk*, 115 Wn. App. 411, 416, 63 P.3d 156, 160 (2003) (“The standard of review for challenges to the foundation of reputation testimony is abuse of discretion.”) A court abuses its discretion when its decision is manifestly unreasonable because it adopts a view no reasonable person would take or when the decision is based on untenable grounds because it applies the wrong legal standard or relies on unsupported facts. *Salas v. Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010). The reviewing court need not rely on the rationale provided by the lower court, but may affirm on any grounds supported by the record. *State v. Huynh*, 107 Wn. App. 68, 74, 26 P.3d

290, 294 (2001).

A. The court did not abuse its discretion in finding the defense had not established a foundation supporting admission under ER 608.

Although the lower court can be affirmed on any theory, the appeal focuses on whether Weston Middle School is a community under the meaning of the evidence rule. BOA at 5. The Defendant acknowledges that, as the lower court ruled (RP 316), relevant factors include “the frequency of contact between members of the community, the amount of time a person is known in the community, the role a person plays in the community, and the number of people in the community.” BOA at 4, quoting *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993).

In this case, we do not know who the 3-5 speakers were or what familiarity they may have had with A.S. at what period in her life. That is, we have no information as to the frequency of contact factor. Nor do we know the role A.S. played in the community such that her business would be known to others generally or these 3-5 others specifically. Because A.S. transferred schools due to bullying (RP 195-97) and because she spent time with friends who were several years younger than her (RP 200), it is not likely she was well known by her classmates or played any significant role in her class such that she had any reputation at all in the

community. All we know is that there are approximately two hundred students at Weston (RP 306), and that *A.S. was at Weston for less than a year*. RP 195-97.

Whether Ms. Breeding's friends would know A.S. is likewise doubtful. A.S. was in a different year than Ms. Breeding. RP 313. They only had "some" friends in common. RP 197. They had different school experiences. A.S. was bullied; Ms. Breeding was popular. RP 196, 198.

A valid community must be " 'neutral enough [and] generalized enough to be classed as a community.' " *State v. Lord*, 117 Wn.2d 829, 874, 822 P.2d 177 (1991) (quoting *Parker v. State*, 458 So.2d 750, 753-54 (Fla.1984)). In *State v. Callahan*, 87 Wn. App. 925, 935, 943 P.2d 676, 681 (1997), the court was found to have properly excluded reputation testimony from two police officers. These officers based their opinions on knowledge acquired from the defendant's past encounters with the criminal justice system. "For purposes of reputation testimony, the criminal justice system is neither neutral nor sufficiently generalized to be classified as a community." *Id.*

These few kids at the skate park who somehow knew about A.S.'s rape although she did not tell them and who chose to judge her without personal knowledge of the events are likewise neither neutral nor

sufficiently generalized to be classified as a community.

B. The proffered testimony was not reputation testimony.

The Defendant argues that excluding the purported “reputation” testimony was an abuse of discretion, because the evidence was admissible under ER 608(a).

The idle chatter of a random handful of skate park youth does not become admissible because the defense attempts to frame it as reputation in the community. The court would have been justified in excluding the testimony under any number of evidence rules. It was unreliable evidence where Ms. Breeding could not remember when or who had made the statements and her memory as to the number of speakers kept going down and down in number. ER 402 (others’ uninformed opinions on matters for which they have no personal knowledge is irrelevant); ER 403 (unfair prejudice substantially outweighs probative value). It would have been inadmissible as hearsay. ER 801(c); ER 802. It would have been inadmissible, because the speakers lacked any personal knowledge. ER 602. It was inadmissible as opinion testimony by a lay witness that was not based on any witness’ perception, not based on any specialized knowledge, and not helpful to the trier of fact. ER 701.

And the proffered testimony was inadmissible because it did not,

in fact, offer reputation evidence as to A.S.'s character of untruthfulness.

Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence *may refer only to character for truthfulness or untruthfulness, ...*

ER 608(a)(1) (emphasis added). Under the rule, only evidence of a reputation for having a “character for truthfulness or untruthfulness” is admissible, and only if the witness offering this reputation testimony must establish that “the reputation is drawn from the community’s perceptions, not personal opinion, and that the reputation is not remote from the time of the trial.” *Boyd v. Kulczyk*, 115 Wn. App. at 416. The offer of proof demonstrated that Ms. Breeding did not have any information to share regarding A.S.’s general reputation for a character of truthfulness.

Ms. Breeding had two types of possible testimony to offer. First, she had personal knowledge of instances when A.S. had told the kind of lies that one does at that age. This would be inadmissible under ER 404(b) (evidence of bad acts offered to prove the character of a person in order to show action in conformity with character).

And, second, Ms. Breeding had overheard the opinions of 3-5 juveniles at the skate park, whose identities she could not remember, specific to the subject of the rape allegation. It is not alleged that these

opinions were the product of personal perception of fact or informed investigation. Personal opinions not based on community perceptions are not reputation testimony.

The Defendant claims that Ms. Breeding could testify that A.S. had a reputation at school as being a liar and was known to lie to teachers. BOA at 2. This was under the initial leading cross-examination. But in further examination, when Ms. Breeding was allowed to explain the real substance of her information, it became apparent that she had no knowledge of A.S.'s reputation for a *general character of truthfulness*. She only knew that 3-5 others in the skate park were suspicious *of the rape allegation*.

Even if Ms. Breeding had been able to testify that A.S. had a general character for untruthfulness in her school community premised on lying to her teachers about assignments, the court would be justified in excluding this as *collateral* to her credibility as to a rape. *See* ER 403 (probative value substantially outweighed by unfair prejudice); *State v. Griswold*, 98 Wn. App. 817, 991 P.2d 657 (2000) (court did not abuse its discretion in excluding impeachment of child victim with prior false statement where the matter was collateral to allegations of sexual abuse).

C. The court properly excluded inadmissible opinion testimony.

In Washington State, the courts hold that no witness may opine on ultimate issues because it is said to invade the exclusive fact-finding province of the jury. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125, 131 (2007).

A witness's expression of personal belief about the veracity of another witness is inappropriate opinion testimony in criminal trials. *State v. Montgomery*, 163 Wash.2d 577, 591, 183 P.3d 267 (2008). Admission of such testimony may be reversible error. *State v. Demery*, 144 Wash.2d 753, 759, 30 P.3d 1278 (2001).

State v. Perez-Valdez, 172 Wn.2d 808, 817, 265 P.3d 853, 857 (2011).

In determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: “(1) ‘the type of witness involved’, (2) ‘the specific nature of the testimony,’ (3) ‘the nature of the charges,’ (4) ‘the type of defense,’ and (5) ‘the other evidence before the trier of fact.’ ”

State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125, 131 (2007).

In this case, the “type of witness” whose credibility was being questioned was the rape victim herself. The “specific nature of the testimony” the defense wanted to admit was that 3-5 kids at a skate park had opined that A.S. was not telling the truth about her rape. The “defense” was that A.S. was lying: that she had not been intoxicated and

that she had actually consented to the sex. In a he said-she said rape case, the credibility of him or her is dispositive of the case.

Accordingly, this is the precisely the type of evidence that is said to “invade the province of the jury.” On the matter of the defendant’s and victim’s credibility, the only opinions that matter are those of the jurors. It would have been an abuse of discretion for the trial court to admit the idle gossip of anonymous, uninformed, and bullying skate park youth.

D. The exclusion of children’s “reputation” evidence is good policy.

The Defendant argues there is a policy concern implicated. BOA at 8. This is true. The courts are careful and should continue to be careful about characterizing children’s characters and reputations as relevant or admissible evidence.

While a child’s character for truthfulness may be discussed in preliminary hearings, it is not admissible evidence before a jury. *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984) (in child hearsay hearings conducted under RCW 9A.44.120, the court considers many factors relevant to the reliability of the hearsay, including the general character of the declarant). Children have not lived so long and are not so well formed as to have established characters or reputations of any kind.

State v. Witherspoon, 180 Wn.2d. 875, 890, 329 P.3d 888 (2014) (one of the primary differences between children and adults is that “children’s characters are not well formed, meaning that their actions are less likely than adults to be evidence of depravity”); *In re Lundy*, 82 Wash. 148, 152, 143 P. 885, 887 (1914) (“there is ordinarily a lack of mature discretion, discriminating judgment, and stability of character in children under the age of 18 years”). Therefore, even a matter that has been adjudicated beyond a reasonable doubt is inadmissible when it involves a juvenile. ER 609(d) (“Evidence of juvenile adjudications is generally not admissible under this rule.”).

It is not helpful to the trier of fact and indeed harmful to the child rape victim to brand her as having a character or reputation for deceit.

VI. CONCLUSION

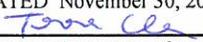
Based upon the forgoing, the State respectfully requests this Court affirm the Appellant’s conviction.

DATED: November 30, 2016.

Respectfully submitted:



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Deputy Prosecuting Attorney

<p>David P. Gardner dpg@winstoncashatt.com</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 30, 2016, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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