

NO. 41517-8

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

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT CREWS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper, Judge

No. 10-1-00454-0

BRIEF OF RESPONDENT

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

1. Did defendant fail to preserve his claim of evidentiary error for appellate review when the trial court made a tentative ruling of exclusion and defendant did not re-raise the issue at trial and seek a final ruling?
2. Has defendant failed to show that the trial court abused its discretion in excluding irrelevant evidence?

B. STATEMENT OF THE CASE.

1. Procedure

The Pierce County Prosecutor's Office charged appellant, ROBERT CREWS (defendant), with one count of rape of a child in the first degree on January 29, 2010. CP 1. The State later filed an amended information, but it did not change the charges pending against defendant. CP 2.

After a pretrial hearing regarding the competency of the victim and whether child hearsay under RCW 9A.44.120 would be admissible, the court found the victim to be competent and ruled that the victim's statements to her mother, a CPS worker, and the video of a forensic interview, would be admissible. RP 30-33, 73-75.

The prosecutor also brought a motion in limine to exclude a drawing that the school had taken from M.P. and a journal entry, for which she had been disciplined by the school, as being inappropriate. RP 65-66. Defense counsel had received the drawing in response to a subpoena duces tecum he had served on the school. *Id.* Defense counsel contended the items were admissible under *State v. Carver*, 37 Wn. App. 122 , 678 P.2d 842 (1984), to show precocious sexual knowledge. RP 67-70. The court did not find that the drawings could only be interpreted as depicted oral sex, and that one “might see somebody with a big tongue.” RP 67. The court noted that none of M.P.’s disclosures involved a penis going into someone else’s mouth. The court then tentatively excluded the materials. RP 70. Defense submitted an offer of proof of four pages. RP 70, EX 1.

The case proceeded to trial before a jury; after hearing the evidence the jury returned a verdict finding defendant guilty as charged. 10/18/10 RP 55. Defendant was sentenced to an indeterminate sentence under RCW 9.94A.712; the court imposed a life term with a standard range minimum term of 280 months, giving credit for 221 days served. 10/18/10 RP 45-46; CP 20-37. The court ordered \$2799 in legal financial obligations, including restitution, and ordered a lifetime no-contact order with M.P. or her mother. 10/18/10 RP 46-48, CP 20-37.

Defendant filed a timely notice of appeal from entry of this judgment. CP 38

2. Facts

Roxanne W.¹ testified that she had three children, including an adopted daughter, M.P., who was born on December 1, 1999. RP 111-112. M.P.'s biological mother used alcohol and controlled substances during the pregnancy, and M.P. has been diagnosed with attention deficit disorder. RP 113. Roxanne testified that from 2006 until September, 2010, she and her daughter lived at the Chambers Creek Apartments in University Place. Pierce County, Washington. RP 114-115, 117. Roxanne testified that she first met the defendant, Robert Crews, in March 2009, through an online dating service. RP 116. She identified the defendant in court. RP 116, 118. Defendant's date of birth is February 22, 1970. RP 115. Roxanne allowed defendant to move into her apartment in April of 2009, and he lived there until June, 2009. RP 117-18, 133. Defendant was not married to M.P and was not her domestic partner. RP 118. During the time frame that defendant lived with Roxanne, she worked from midnight to 2:00 or 4:00 am at a Fred Meyer three or four days a week. RP 119. Roxanne testified that on the last day of school, around June 20, 2009, M.P. told her mother that Robert had pulled down her panties and put his mouth on her privates. RP 120-121. M.P. pointed to her vagina as she described what happened. RP 132.

¹ The State has used the initial of the mother's last name to protect the privacy of the victim and her family. The State will refer to the mother by her first name; no disrespect is intended.

Roxanne described her daughter's demeanor when she disclosed as being embarrassed. RP 121. M.P. told her mom that it had happened once and indicated that it happened when Roxanne was at work. RP 122. Prior to M.P.'s disclosure, Roxanne had noticed a change in her daughter's attitude toward defendant. *Id.* Initially, M.P. had liked defendant and always wanted to sit next to him. RP 121. Then, after Mother's Day, she changed and would never sit next to him or go anywhere with him. RP 121.

Roxanne did not call law enforcement to report the abuse because she did not want her daughter to "go through all the craziness that [she] knew [M.P.] would have to go through." RP 122. Once M.P. was at school, Roxanne gathered up all of defendant's things, then called him to tell him to come home immediately and that the relationship was over. RP 122. She did not see the defendant again until trial started. RP 122. Roxanne testified that she told M.P. not to tell her older brothers about the abuse. RP 123. M.P. did not seem to want to talk about what had happened, and Roxanne did not push the issue. RP 123. M.P. was nine years old during the time defendant lived at her house. RP 126. Other than telling M.P. to tell the truth, Roxanne did not tell her daughter what to say at the forensic interview or in court. RP 132.

In September, 2009, Roxanne knew that there was a Child Protective Services (CPS) investigation into her because M.P. had gone to school with a split lip. RP 123. After M.P. disclosed the sexual abuse during the CPS interview, she was placed into foster care for four days,

then she went to live at Roxanne's sister's house for two months while Roxanne went through some parenting classes. RP 125-26. CPS had been involved with Roxanne on prior occasions, but had not removed M.P. from the house. RP 126-30.

M.P., who was in fifth grade at the time of trial², testified that she used to live in the Chambers Apartments, along with her mother. RP 79-82. While she was living at the Chambers Apartments, she met a man named Robert Crews, whom she identified in a photograph. RP 84-85. Robert would sometimes sleep in her Mom's room. RP 91, 98-99 M.P. testified that her "private" is what she uses to go to the bathroom and that when she was living at the apartments, Robert did something to her privates that she did not like. RP 87-88. M.P. testified that Robert touched her private with his tongue and that this occurred in her bedroom. RP 88, 96-97, 98. She indicated that he came into her room while she was watching a movie, took off her clothes and panties then put his mouth on her private. RP 89. When he was done, he put her clothes back on and went into the other room; she then went into her bathroom. RP 89-90. She thought her mom was either sleeping or at work when this happened. RP 90. M.P. testified that she told her mother the next day and she never saw Robert at the apartment after that. RP 90-91. M.P. did not identify the defendant in court, but indicated that she did not want to look. RP 92.

² M.P. testified on October 6, 2010. RP 79.

On cross examination, M.P. testified that Robert was in the court room, but that she didn't see him. RP 101. She did not respond when asked how she could know he was in the court room if she didn't see him. RP 101.

On cross-examination, M.P. recalled going to school once with a cut lip that her mother had caused after getting angry about M.P.'s hair. RP 93-95. M.P. testified that she did not like Robert and was glad when her mom kicked him out. RP 99-100. M.P testified that she does not want to be separated from her mother. RP 103.

Deborah Ulrich testified that she is a social worker for CPS, who investigates allegations of child abuse. RP 141-42. Ms. Ulrich received a referral from the school that M.P. might be being physically abused by her mother. RP 143. Ms. Ulrich went to M.P.'s school, Chambers Elementary, on September 14, 2009, to interview M.P.; she could see a slight injury to M.P.'s lip. RP 146. Ms. Ulrich audio recorded her interview. RP 143-44. This recording was played for the jury. RP 148; EX 5.

On the recording, Ms. Ulrich goes through several questions assessing whether M.P. understands the difference between the truth and a lie, then asks about how M.P. got her lip cut. EX 5. After hearing M.P. explanation about the lip incident, Ms Ulrich goes back to try to get more details about what happened. *Id.* Ms. Ulrich then tries to establish whether M.P. had been left alone in the house, sleeping, when her mother went to work. *Id.* Ms. Ulrich asks M.P. whether there was another guy,

her mother's friend that lives with her, to which M.P. replies "Oh she got rid of him." *Id.* When Ms Ulrich asks "How come?," M.P. responds in a whisper that she "can't tell –my mom told me I can't tell anybody." *Id.* Ms. Ulrich pursued the issue telling M.P. that she gets worried when she hears that parents have told kids "not to tell" and that M.P. needs to tell her what happened so she can help her mom. *Id.* M.P. then describes how this guy would come into her room and lick her on her private – pointing at her vagina. *Id.* M.P. thought it occurred a couple of months ago and that it happened just once. *Id.* M.P. said the guy's name was Robert Crews. *Id.* M.P. reiterated that her mom told her not to tell anyone about it, but that she didn't know why. *Id.* Ms. Ulrich then returned to her questions about the recent physical abuse incident. *Id.*

After hearing M.P.'s disclosure of sexual abuse, Ms Ulrich made an appointment for M.P. to be seen at the Child Advocacy Center, called law enforcement to report the disclosure, then had M.P. taken into protective custody. RP 149-50. Ms. Ulrich stated that because there had been a prior referral on physical abuse that she thought the mother needed some services. RP 150-53. M.P.'s disclosure regarding sexual abuse that day was the first time she had ever made such a disclosure to a CPS worker. RP 151.

Deputy Cooney of the Pierce County Sheriff's department responded to Chambers Elementary school on September 14, 2009, to take a report regarding an allegation of child sexual abuse. The report had been

disclosed during a CPS interview. He gathered information from the CPS worker and school officials then took the child into protective custody. RP 105-108.

Cornelia Thomas, a forensic child interviewer at the Child Advocacy Center in Pierce County, interviewed M.P. on September 15, 2009. RP 156, 160. Her interview of M.P. was observed through a one way window by Ms Ulrich, and a Pierce County Sheriff's detective, Det. Catey. RP 160-61. She also audio and video recorded the interview, and this recording was played for the jury. RP 161, 165; Ex. 2.

On the recording, M.P. describes that Robert "licks" her. She indicated that he licked her "here" while pointing to her crotch. Ex. 2. M.P. states that she calls that part of her "my private." *Id.* She describes that this happened in her room and that he would come in while she was in bed. *Id.* M.P. described that he would open her legs, pull her underwear off, and then he would lick her with his tongue. *Id.* She indicated that his clothes would stay on and that his private did not do anything. *Id.* M.P. indicated that mom was at work when this happened, and that it was on the weekends when it happened. *Id.* She stated that she was nine when it happened and in third grade. *Id.* M.P. stated that when she told her mom about it, which she thought was the next day, that her mom got his stuff together and kicked him out. *Id.* M.P. stated that this hasn't happened with anyone else and she hasn't seen Robert since it happened. *Id.*

Ms. Thomas testified that, based upon her 15 years of experience, children disclosing sexual abuse usually do it over time so that it is a disclosure process rather than a single event. RP 159-160.

Joanne Mettler is an advanced registered pediatric nurse practitioner employed by the Child Advocacy Center at Mary Bridge Hospital. RP 178, 182. She has performed medical exams on children who are suspected of being abused for over twelve years; she performs between 200 and 300 exams a year. RP 178-79. Ms Mettler performed an examination on M.P. on September 22, 2009. RP 182. She did not find any injuries or abnormalities to M.P.'s genitalia. RP 187-88. Ms Mettler testified that she would not expect to see any vaginal injury based upon the nature of the abuse that M.P. had disclosed. RP 188.

The defendant did not present any witnesses. RP 190-91, 10/18/10 RP 6.

C. ARGUMENT.

1. EXCLUSION OF EVIDENCE

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Powell*, 126

Wn.2d at 258. A trial judge, not an appellate court, is in the best position to evaluate the dynamics of a jury trial, and therefore the prejudicial effect of a piece of evidence. *State v. Posey* 161 Wn.2d 638, 648, 167 P.3d 560, 564 (2007); *State v. Taylor*, 60 Wn.2d 32, 40, 371 P.2d 617 (1962).

A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).

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.

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. *In re Twining*, 77 Wn. App. 882, 893, 894 P.2d 1331, *review denied*, 127 Wn.2d 1018 (1995). The right to present evidence is not absolute, however, and must yield to a state’s legitimate interest in excluding

inherently unreliable testimony. *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Baird*, 83 Wn. App. 477, 482, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012 (1997).

Limitations on the right to introduce evidence are not unconstitutional unless they affect fundamental principles of justice. *Montana v. Engelhoff*, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L.Ed.2d 361 (1996) (stating that the “accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence” (quoting *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L.Ed.2d 798 (1988))). Similarly, the Supreme Court has stated that the defendant’s right to present relevant evidence may be limited by compelling government purposes. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983) (discussing Washington’s rape shield law).

Under ER 103(a)(2), error may not be asserted based upon a ruling that excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made known to the court by offer or was apparent from the context of the record. “An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review.” *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). The party offering the evidence has the duty to

make clear to the trial court: 1) what it is that he offers in proof; and, 2) the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. *Ray*, 116 Wn.2d at 539, citing *Mad River Orchard Co. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978).

Defendant asserts that he should have been allowed to admit evidence of a drawing that M.P drew at school that he contends depicts oral sex, and a journal entry where she wrote about kissing someone's privates. He did make an offer of proof of the evidence he sought to admit. RP 70, Ex. 1.

a. As The Court Made A Tentative Ruling Of Exclusion, Defendant Waived This Claim By Failing To Seek A Final Ruling From The Court.

When a trial court makes an expressly tentative evidentiary ruling on a motion in limine and a defendant fails to seek a final ruling later at trial, the defendant waives any error in the admission or exclusion of the evidence. *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991), *review denied*, 120 Wn.2d 1022 (1993); *State v. Riker*, 123 Wn.2d 351, 369, 869 P.2d 43 (1994).

The prosecution brought a motion in limine to exclude the drawing and journal entry from evidence. RP 65. When the court granted this motion, its ruling was clearly tentative:

Court: Well, *at this point* I'm going to exclude these. And precocious sexual knowledge, I actually haven't heard that. What I heard was [M.P.] say "he licked my private parts." That doesn't strike me as precocious sexual knowledge. It's simply a statement of something. And the way she said it didn't sound particularly precocious to me, so *at this point* I don't see this as an issue. *We can readdress this outside the jury's presence if you think this needs getting into.*

RP 70(emphasis added). At three different points of the ruling, the court indicates that it was making a preliminary ruling on the basis of what it knew about the case, but that the issue could be raised again outside the presence of the jury. Defendant does not identify where this issue was re-raised for the court to make a final ruling. By failing to seek a final ruling later at trial, defendant waived any error in the exclusion of the evidence. *State v. Carlson*, 61 Wn. App. at 875.

- b. Defendant has failed to show an abuse of discretion in the tentative ruling excluding evidence.

While this Court should not reach this unpreserved claim of evidentiary error, defendant cannot show an abuse of discretion in the court's ruling. He relies upon *State v. Carver*, 37 Wn. App. 122, 678 P.2d 842 (1984). Carver had been charged with one count of indecent liberties and one count of second degree statutory rape for having anal intercourse and sexual contact with his stepdaughters. Carver attempted to introduce evidence that the victims had suffered prior sexual abuse by

others to rebut the inference that the victims would have been unable to describe the abusive acts because of their age unless the abuse was experienced at the hand of the defendant. The Court of Appeals in that case reversed the trial court's decision to exclude the evidence based upon the rape shield statute and held it was admissible because (1) it was not evidence of a victim's prior misconduct but evidence of prior abuse; (2) consent was not at issue since the victims' ages made it impossible for them to consent; and (3) evidence of prior abuse was not so prejudicial as to "cause the jury to decide the case on an improper emotional basis." *Carver*, 37 Wn. App. at 123-24. The court held that the evidence Carver sought to admit did "not fit within the concepts and purposes of the rape shield statute [T]he evidence sought to be admitted here was prior sexual abuse, not misconduct, of a victim." *Carver*, 37 Wn. App. at 124, 678 P.2d 842.

In contrast, in *State v Posey*, 161 Wn.2d 638, 648, 167 P.3d 560, 564 (2007), the Supreme Court found that the trial court did not abuse its discretion in excluding evidence of an email taken from the victim's computer in a rape prosecution under the rape shield statute. Posey had sought introduction of the email citing *Carver*, contending that it provided evidence that the victim would have consented to violence and rape, arguing it was relevant to rebut the State's theory that Posey was violent and abusive. The appellate courts noted that *Carver* did not control because it concerned prior sexual abuse, not sexual misconduct, and that,

additionally, consent was an issue in Posey's case, whereas in *Carver* it was not. The appellate courts also agreed with the trial court's analysis that the email was of little probative value as people might talk about doing something but that is very different from actually doing it. The Supreme Court upheld the trial court stating:

The e-mail was not addressed to Posey nor was it sent to Posey, and it described only potential prior sexual misconduct or potential sexual mores, rendering the admission of the e-mail violative of the rape shield statute.

Posey, 161 Wn.2d at 649.

Defendant argues that the evidence is probative because it rebuts the inference that M.P. must have learned about oral intercourse by being abused by him. This argument is erroneous as to the drawing as the drawing was done in May of 2009 after defendant had moved in with the victim's mother. The Think Time form, which documents the school's discipline action with M.P. over the drawing, is dated "5-7-09." That this form pertains to the drawing can be seen from the handwritten notation³ at the bottom of the page. EX 1 May 5, 2009, is in the middle of the charging period of March 1, 2009, to June 30, 2009. CP 2. M.P.'s mother testified that defendant moved into the apartment in April, and was kicked out at the end of June, 2009. RP 117-18, 133. As this drawing occurred

³ The "think Time Form is labeled "A-pg 2 of 3" and the drawing is labeled "A -pg 3 of 3." Page 1 of A was not made part of the record below.

after defendant moved into the victim's home, it does not have the relevance that trial counsel contended it had. If the drawing does depict oral sex, and that is open to interpretation, it could have been the result of knowledge M.P. gained because of defendant's abuse of her. The drawing does not provide evidence of another source of M.P.'s alleged "precocious sexual knowledge" as it was drawn after defendant began to live with the victim.

The journal entry⁴ at issue was written prior to M.P.'s mother meeting defendant, as the school discipline for this entry occurred on January 26, 2009. EX 1. The offer of proof does not contain the actual journal entry, however, only a school employee's summary notes regarding the entry. Ex 1. Thus, defendant did not present evidence of what M.P. wrote, but a hearsay statement of what she wrote. The evidence was inadmissible for this reason alone. From the hearsay summary it would appear that the journal might have contained the words "kissing his private parts", but the record is ambiguous as to whether this was an entry about events that had actually happened or only thoughts of what M.J. was thinking about. From the offer of proof, it appears that the statement refers to something M. J. was thinking about rather than

⁴ The handwritten notation at the bottom of Kathy Drouhard's email indicates it was sent January 26, 2009, and was "B pg 1 of 2" and the disciplinary form was " B pg 2 of 2" EX 1.

something that had occurred. This evidence is very similar to the evidence properly excluded in *Posey*.

Defendant cannot show that any of his proffered evidence was evidence of prior abuse so as to bring it under the holding of *Carver* and out of the control of the rape shield law and the holding of *Posey*. As M.P. had been disciplined for her drawing and journal entry, it is clear that defendant was seeking to show evidence of M.P.'s. prior misconduct of a sexual nature which should be excluded under the rape shield law and *Posey*. Additionally, what M.P. might say she wanted to do to another boy and what she would actually do are not the same thing. The words "kissing his private parts" do not demonstrate precocious sexual knowledge like descriptions of anal rape might show in *Carver*. Nor do these descriptions match what M.P. testified that defendant did to her. At no point did M.P. state that she had to put defendant's penis in her mouth or that she had to kiss his private parts. She testified that defendant licked her private and neither her drawing nor what we can tell of her journal entry describe or depict such acts. The case before the Court is far more similar to *Posey* than *Carver*, and defendant cannot show that the trial court abused its discretion when it made its tentative ruling excluding the evidence.

D. CONCLUSION.

For the foregoing reasons this Court should affirm the judgment entered below.

DATED: October 6, 2011.

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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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