IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT LORENZA CREWS, Appellant.	No. 41517-8-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Robert L. Crews appeals his conviction of first degree rape of a child, arguing that the trial court erred in excluding evidence of the victim's precocious sexual knowledge. Finding no error, we affirm.

Facts

Crews lived with nine-year-old M.P.-W. and her mother, R.W., from April through June, 2009. Toward the end of June, M.P.-W. told her mother that Crews had pulled down her pants and put his mouth on her privates. M.P.-W. pointed to her vagina in describing what had happened. R.W. did not call law enforcement, but she did end her relationship with Crews.

When M.P.-W. went to school with a split lip in September 2009, Child Protective Services (CPS) investigated, and M.P.-W. repeated the allegation of sexual abuse against Crews to a CPS investigator. The State charged Crews with first degree rape of a child.

After a hearing in which the trial court found M.P.-W. competent to testify, the State moved to exclude a drawing she had made at school as well as an e-mail from her school principal describing a journal entry she had written. The drawing contains several images and a written declaration of love for a friend, and adds, "He is so damn fine." Ex. 1. According to the e-mail, the journal entry contains comments about kissing a boy's private parts. M.P.-W. was disciplined about the journal entry in January 2009 and about the drawing in May 2009.

The defense urged the trial court to admit this evidence, arguing that the drawing depicted "faces with penises hanging out of the mouth, oral sex" and that the "whole thing" was relevant to show sexual knowledge. Report of Proceedings (RP) (Oct. 6, 2010) at 67. Without this evidence, the defense contended that the State could argue that M.P.-W. could not know about oral sex unless Crews had done what she alleged.

The court observed that the drawing could show someone with a big tongue, and that even if it did show a penis to someone's mouth, M.P.-W. had not described that type of abuse. The State responded that it did not intend to argue that M.P.-W. could only have learned about oral sex from Crews. The State added that the principal who wrote the e-mail would not be a witness and that the drawing was ambiguous. The court then ruled as follows:

> 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.-W.] 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 (Oct. 6, 2010) at 70. The court made the exhibit part of the record in the event of an appeal.

M.P.-W. testified that Crews touched her privates with his tongue in her bedroom. She thought her mother was at work or sleeping at the time. She maintained on cross-examination that Crews had put his tongue on her private area, but she refused to identify him in court. After R.W. testified about her daughter's disclosure, the State played tapes of M.P.-W.'s interviews with the CPS investigator and a forensic child interviewer. M.P.-W. stated during both interviews that Crews had licked her privates. A nurse who examined M.P.-W. testified that she found no vaginal injuries but would not expect to given the nature of the abuse alleged.

The defense did not present any witnesses, and the jury found Crews guilty as charged. The trial court imposed a standard range sentence.

Discussion

Exclusion of Evidence

Crews argues that the trial court erred in suppressing M.P.-W.'s drawing and the e-mail concerning her journal entry about oral sex. He contends that this ruling deprived him of his due process right to present evidence rebutting the presumption that M.P.-W. must have learned about oral sex from him. The State responds that the trial court's exclusionary ruling was tentative and that Crews waived his claim of error by failing to seek a final ruling.

When a ruling on a motion in limine is tentative, any error in excluding evidence is waived unless the defendant seeks a final ruling and gives the trial court an opportunity to reconsider its ruling. *State v. Riker*, 123 Wn.2d 351, 369, 869 P.2d 43 (1994); *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991), *review denied*, 120 Wn.2d 1022 (1993). Here, the trial court made it clear that its exclusion of M.P.-W.'s drawing and the e-mail about her journal

entry was subject to reconsideration during trial. The defense never again referred to this evidence or asked the trial court to reconsider.

We find no abuse of discretion in the trial court's ruling. *See State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007) (appellate courts review decision to exclude evidence for abuse of discretion). Crews contends that the excluded evidence was admissible to show that M.P.-W. learned about oral sex from another source. *See State v. Carver*, 37 Wn. App. 122, 124-25, 678 P.2d 842 (evidence of victims' prior sexual abuse relevant to rebut inference that they would not know about such sexual acts unless they had experienced them with defendant), *review denied*, 101 Wn.2d 1019 (1984). But the drawing at issue is part of an attachment dated May 7, 2009. Thus, apart from the ambiguous images the drawing shows, M.P.-W. apparently made it while Crews was living with her and her mother. The drawing therefore does not serve as evidence that M.P.-W. learned of oral sex from someone other than Crews.

The e-mail describing M.P.-W.'s inappropriate journal entry is dated January 26, 2009, which was before Crews moved in with R.W., but it consists of hearsay statements only. Furthermore, it is unclear whether the entry refers to M.P.-W.'s thoughts or actions. Consequently, it is more akin to the potential sexual misconduct found inadmissible in *Posey* than the sexual abuse found admissible in *Carver*. *See Posey*, 161 Wn.2d at 648-49 (victim's e-mail describing her potential prior sexual misconduct properly excluded under rape shield law). Moreover, as in *Posey*, the evidence concerning M.P.-W.'s journal entry was of little probative value because it did not concern the type of sexual act that Crews allegedly committed. 161 Wn.2d at 649. We see no abuse of discretion in the trial court's decision to exclude the evidence at issue.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, J.

PENOYAR, C.J.