

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 26996-5-III

Respondent,

)

)

) **Division Three**

v.

)

)

ALBERTO PEREZ-VALDEZ,

) **UNPUBLISHED OPINION**

)

Appellant.

)

)

Kulik, A.C.J. — A jury convicted Alberto Perez-Valdez of second and third degree rape of a child. He appeals, arguing the trial court made several evidentiary errors and improperly denied Mr. Perez-Valdez’s motion for a mistrial when an investigator testified that alleged child victims were telling the truth.

Mr. Perez-Valdez’s assertions of error are without merit. Therefore, we affirm his convictions.

FACTS

Alberto Perez-Valdez and his wife, Ramona Valdez, adopted a number of children, including Samantha, Ana, Ashley, and five boys. The three girls felt Mr. and Ms. Perez-Valdez treated them unfairly because the girls believed they had to do more chores than the boys. Samantha and Ana, while ages 10 to 13 and 11 to 14 respectively, were also unhappy because they were not allowed to have boyfriends. Before Samantha and Ana alleged sexual abuse, the State removed Ashley, the youngest of the girls, from the Perez-Valdez household after she reported that Mr. Perez-Valdez was sexually abusing her. Ashley later recanted her statements of abuse.

In December 2004, Samantha, age 13, and Ana, age 14, accused Mr. Perez-Valdez of raping them repeatedly over a number of years. Samantha testified that Mr. Perez-Valdez had intercourse with her about 3 times a week from ages 10 through 13. Ana testified that Mr. Perez-Valdez had intercourse with her about 6 times a month from ages 8 through 14. Both girls testified that Mr. Perez-Valdez did not use a condom except once and would pull out before ejaculation. Samantha and Ana testified that their stepbrother, Jose, also had sex with them.

At trial, Mr. Perez-Valdez asserted that Samantha and Ana made up allegations of sexual abuse to get out of the Perez-Valdez home. Mr. Perez-Valdez argued that Samantha and Ana knew they would be taken out of the home if they said they were being sexually abused because their sister was removed after making similar allegations.

The court denied admission of evidence that Samantha and Ana had burned down a foster home after they were removed from the Perez-Valdez home. Ana was later convicted of first degree arson. The defense argued that this evidence showed that the girls would do anything to get out of a living situation they did not like. The court found that the evidence of the arson would be too prejudicial.

Several witnesses testified about Mr. Perez-Valdez's good moral character. Later in the trial, the court granted the State's motion to strike the character evidence. During the jury instruction conference, the parties agreed on the record not to give a curative instruction and that defense counsel would not mention moral character in closing argument.

Karen Patton, the CPS¹ investigator, testified that the girls' knowledge of their parents' bedroom was consistent with continual sexual abuse. The following exchange took place at trial:

[Defense Counsel:] Are you telling me only children sexually

¹ Child Protective Services.

abused would know what their mother and father's room looked like if they had been in there five, six, seven or eight years?

[Ms. Patton:] No, not at all, but each family has rules, and some families don't allow the children in the parents' bedroom. That's a private space. So I'm saying these children knew what the parents' bedroom looked like, and in addition, they were in there several times being sexually abused by their father.

[Defense Counsel:] Assuming they are telling you the truth?

[Ms. Patton:] They are telling me the truth.

Report of Proceedings (RP) at 301-02.

Defense counsel objected immediately and moved for a mistrial based on Ms. Patton's assertion that the girls were telling the truth. The court denied the motion for mistrial, but sustained the objection and immediately instructed the jury to disregard Ms. Patton's remark. Later, defense counsel moved again for a new trial based on Ms. Patton's comment. The court again denied that motion.

The jury convicted Mr. Perez-Valdez of second and third degree rape of a child. Mr. Perez-Valdez appeals.

ANALYSIS

Mr. Perez-Valdez asserts that the trial court erred by: (1) preventing him from introducing evidence of the girls committing arson to show motive under ER 404(b), (2) prohibiting defense counsel from mentioning Mr. Perez-Valdez's moral character in closing argument even though the State failed to timely object to character evidence, and

(3) denying the motion for a mistrial when Ms. Patton testified the girls were telling the truth.

Motive Evidence. The trial court's decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. *State v. Stein*, 140 Wn. App. 43, 65, 165 P.3d 16 (2007). The trial court abuses its discretion if its decision is based on manifestly unreasonable or untenable grounds. *Id.*

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Relevant evidence is admissible; irrelevant evidence is not. ER 402. The trial court may exclude relevant evidence if its probative value is substantially outweighed by its prejudicial effect. ER 403. Character evidence is not admissible to show that the person acted in conformity on a particular occasion, but is admissible for other purposes such as motive. ER 404.

Mr. Perez-Valdez argues that Samantha and Ana would go to any lengths to get out of a living situation they considered to be unhappy. Mr. Perez-Valdez testified that the girls made false accusations of sexual abuse and burned down a foster parent's house so they could leave those homes. In considering admitting evidence of the arson, the trial

court stated: “[I]t’s going to depend on what the testimony is. If there is some testimony that [Samantha and Ana] just couldn’t wait to get out of the home of the defendant, and boy they would do just about anything to get out of there, then maybe the fact that they did do something like this to get out of another foster home, I’ll take a long, hard, look at it. But we have to lay that foundation first.” RP at 22. Neither Samantha nor Ana testified they would do anything to get out of a living situation they did not like.

Therefore, Mr. Perez-Valdez’s argument that the arson evidence shows motive in regard to allegations of sexual abuse is tenuous at best.

Generally, bad acts are not admissible evidence because they are more prejudicial than probative. *State v. Sexsmith*, 138 Wn. App. 497, 506, 157 P.3d 901 (2007).

Evidence of arson is highly prejudicial and the prejudicial effect greatly outweighs the probative value. Importantly, Mr. Perez-Valdez did not establish a connection between the fire and a false allegation of sexual abuse. The trial court did not abuse its discretion by excluding the arson evidence.

Character Evidence. A defendant has the right to present a defense as long as the evidence is relevant and not otherwise inadmissible. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). Character evidence is generally inadmissible under ER 404(a). Evidence of a pertinent character trait of the accused is an exception. ER

404(a)(1). In *State v. Griswold*, 98 Wn. App. 817, 991 P.2d 657 (2000), *overruled on other grounds by State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003), the defendant was found guilty of child molestation. On appeal, the court found that general moral character evidence was too broad to be a pertinent character trait under ER 404(a)(1), but that sexual moral character was admissible. *Griswold*, 98 Wn. App. at 829. Here, the court denied evidence of Mr. Perez-Valdez's general moral character.

The State did not object to Mr. Perez-Valdez's character witnesses until the day after the testimony. The State's objection was not timely. *See State v. Jones*, 70 Wn.2d 591, 597, 424 P.2d 665 (1967). However, the trial court granted the State's motion to strike the character evidence and agreed to give a jury instruction stating that the jury should disregard any character evidence that was presented.

Later, when the jury instructions were discussed, defense counsel again raised the State's untimely objection. The State then proposed an agreement stating, "Why don't we do this? Don't give the instruction, and obviously, [defense counsel] would be precluded from giving anything about moral character [in closing arguments]. I can live with that. We can get on with it." RP at 367. The court agreed, and defense counsel did not object; therefore, the parties made an agreement on the record. An agreement on the record is not reviewable on appeal, absent fraud or an attorney overreaching his authority.

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Nguyen v. Sacred Heart Med. Ctr., 97 Wn. App. 728, 735, 987 P.2d 634 (1999).

Denial of Mistrial. A trial court's decision to grant or deny a mistrial is reviewed under the abuse of discretion standard. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

“A trial court should grant a mistrial when an irregularity in the trial proceedings is so prejudicial that it deprives the defendant of a fair trial.” *State v. Babcock*, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008). The court examines the following factors to determine whether the defendant was denied a fair trial:

(1) the seriousness of the irregularity; (2) whether challenged evidence was cumulative of other evidence properly admitted; and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.

Id.

Mr. Perez-Valdez argues that he should have been granted a mistrial based on the exchange between defense counsel and Ms. Patton, the CPS investigator. Defense counsel immediately objected, moved to strike, and made a motion for mistrial. The court sustained the objection and instructed the jury to disregard the comment, but denied the motion for mistrial.

An expert may not testify to the guilt of a defendant or to the veracity of a witness. Such testimony invades the province of the jury to weigh the evidence and determine

witness credibility. *State v. Jones*, 71 Wn. App. 798, 812, 863 P.2d 85 (1993).

The entire case rested on whether the jury believed the testimony of Samantha and Ana. Both the State and Mr. Perez-Valdez presented many witnesses to bolster or impeach Samantha's and Ana's testimony. The State presented expert witnesses who testified that Samantha's and Ana's statements and demeanors were consistent with victims of sexual abuse. Ms. Patton's testimony vouching for Samantha's and Ana's credibility was cumulative in that regard.

Lastly, the court must determine if a jury instruction can cure the irregularity. Here, the defense objected to Ms. Patton's testimony immediately, and the court instructed the jury to disregard Ms. Patton's comment. Furthermore, instruction 1 directed the jury to determine the facts of the case and informed the jury that it was the sole judge of witness credibility. Considering this was a multi-day trial with numerous witnesses, all of whom either supported or refuted Samantha's and Ana's testimony, the impact of Ms. Patton's statement likely did not have an effect on the outcome of the case. Ms. Patton's statement was not so prejudicial that it deprived Mr. Perez-Valdez of a fair trial. The curative instruction was sufficient to cure the irregularity.

The trial court did not abuse its discretion by denying Mr. Perez-Valdez a mistrial.

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We affirm Mr. Perez-Valdez's convictions for second and third degree rape of a child.

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

Kulik, A.C.J.

WE CONCUR:

Sweeney, J.

Korsmo, J.