

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

|                      |   |                     |
|----------------------|---|---------------------|
| STATE OF WASHINGTON, | ) | No. 79472-8-I       |
|                      | ) |                     |
| Respondent,          | ) |                     |
|                      | ) | DIVISION ONE        |
| v.                   | ) |                     |
|                      | ) |                     |
| MUHAMMADOU JAGANA,   | ) |                     |
|                      | ) | UNPUBLISHED OPINION |
| Appellant.           | ) |                     |
| <hr/>                |   |                     |

MANN, C.J. — Muhammadou Jagana appeals his convictions for third degree rape of a child and third degree rape, contending that the trial court denied his right to present a defense. We affirm.

I.

In 2014, N.J. moved from Phoenix, Arizona to Marysville, Washington to live with her maternal aunt and grandmother. N.J.'s mother lived in Arizona. N.J. also had a boyfriend in Arizona. On April 30, 2015, fourteen-year-old N.J., ran away from her aunt's home. N.J. left without her money or cell phone and began walking south to Everett. N.J. testified that she thought she would walk all the way back to Arizona.

N.J. noticed a dark sedan following her; Jagana was driving the sedan. N.J. went into a Chevron gas station to use the restroom but was denied access. N.J. left the gas station and continued down the main road. Jagana pulled next to her and

No. 79472-8-1/2

asked her to get into the sedan and N.J. said “No, thank you. Please leave me alone” and kept walking.

Jagana persisted, promised not to hurt her, and explained “I just want to help you, and you shouldn’t be walking alone at night.” N.J. agreed and got into Jagana’s sedan. While driving, N.J. explained that she lived with her aunt, they had an argument, and she left the home. Jagana told N.J. that he was 20 years old, even though he was 39 years old and asked her age. N.J. testified that she told Jagana that she was 14 years old. Jagana testified N.J. told him she was 18 years old; she denied telling Jagana that she was 18 years old or ever misrepresenting her age.

Jagana continued driving around until parking at an apartment complex. Jagana told N.J. he needed to talk to someone there and left her in the car; N.J. fell asleep. When N.J. awoke, Jagana was leaning over her and her seat was fully reclined. N.J. could not remember if she had reclined the seat. Jagana drove them to a different place and parked.

Jagana began kissing and touching N.J.’s shoulders. Jagana asked if N.J. was “okay” with that and said, “I’m not going to make you do anything that you don’t want to do.” Jagana then climbed over to the passenger seat. Jagana removed her pants and pulled N.J.’s legs apart. Jagana penetrated N.J.’s vagina, first digitally, and then with his penis for about five minutes before N.J. screamed. Jagana told N.J. to be quiet. N.J. told Jagana that it hurt; Jagana stopped and apologized saying, “I’m sorry I forced you.”

Jagana drove to a Jack-in-the-Box restaurant and bought N.J. a meal. Then, Jagana took N.J. to a motel. They both got out of the sedan and Jagana knocked on a

door. Jagana thought N.J. could stay with a woman he knew, but no one answered their knock. Jagana took N.J. to the motel's covered garage and told her she could sleep there, hugged her, gave her his jacket, and left.

N.J. awoke the next morning around 5 a.m. A motel employee approached N.J. and asked her why she was in the garage. N.J. explained that she was 14 years old and had run away from home. The motel employee told her to go home, gave her some money, and told her where to catch the bus. While on the bus, N.J. borrowed a passenger's cell phone and called her boyfriend in Arizona. N.J. told him what happened. When N.J. got home, only her grandmother was home. N.J. did not tell her grandmother what happened the night before. N.J.'s boyfriend told N.J.'s mother in Arizona what happened to N.J. who then told N.J.'s aunt. N.J.'s aunt confronted N.J. about being raped and they went to Providence Hospital for an examination and interview with law enforcement.

The State charged Jagana with third degree child rape and second degree rape. N.J. testified for the State. On cross-examination, N.J. was asked if she had "ever misrepresented [her] age?" She replied "no." N.J. was then asked, "Have you ever had a Facebook account by the name of Serenity Van Halen?" to which she replied "yes." During redirect examination, N.J. explained that she used her Facebook accounts for sharing videos, messaging friends and family, and gaming.

Jagana sought to call N.J.'s aunt to testify about N.J.'s old Facebook account where N.J. represented that she was 18 years old. Jagana argued that he was entitled to introduce this evidence "under the Sixth Amendment and right to confrontation" and expected that N.J.'s aunt, who monitors N.J.'s electronic use, to testify "that she

observed a Facebook page where [N.J.] did misrepresent her age as 18, and she made [N.J.] take that Facebook page down.”

The defense argued that:

[N.J.] was asked on the stand if she ever misrepresents her age, and her reply was no.

....

[T]he prohibition of not impeaching on [extrinsic] evidence does not apply unless [extrinsic] evidence may be introduced to show the witness is biased or to contradict the witness on a material fact.

I think this goes to her credibility. I think it goes to bias. I think it goes to the—one of the ultimate questions, and this will be whether she misrepresented her age to Mr. Jagana.

The trial court denied the defense’s request, finding that “what the alleged victim said to others about her age is a collateral issue.” The trial court explained:

to allow the testimony at this point would appear to be inappropriate and potentially confusing to the jury by suggesting that misrepresentations regarding age at all have any significant relevance where we know that the only real relevance regarding misrepresentation to age are those statements purportedly made by the alleged victim to the accused.

The defense made the following record after the trial court’s ruling:

I’d like to state that I did confront [N.J.], asking her, “Have you ever misrepresented your age?” I couldn’t follow up with her on that because she had already denied that she had ever denied misrepresentation of her age.

I laid a proper foundation by saying, do you have a Facebook of Serenity Van Halen, which is the Facebook account that her aunt who, if allowed to testify, would say she saw the Serenity Van Halen Facebook page of [N.J.], saw that she misrepresented herself as 18, and made her take it down.

....

It is the Court that is saying that she misrepresented her age as a privacy interest. She didn’t state—link that to her age.

The Sixth Amendment seeks accurate and legitimate fact-finding process, and without allowing impeachment of witnesses, the Court is essentially allowing this witness to lie to the jury and deny the jury the opportunity to learn of the lie for purposes of assessing credibility and bias.

Jagana was the sole witness to testify in his defense. Jagana testified that N.J. told him that she was 18 years old and was trying to get to Arizona.

The jury convicted Jagana of third degree rape of a child and the lesser included offense of third degree rape. At sentencing, it was uncontested that the two convictions constituted the “same criminal conduct” for the purpose of calculating the offender score. The court sentenced Jagana to 14 months for third degree rape of a child and a concurrent 12 months for third degree rape. The court imposed a 36-month community custody term and mandatory legal financial obligations. Jagana appeals.

## II.

Jagana contends that he was denied a right to present his defense when the trial court excluded evidence to impeach N.J.’s statement that she had never misrepresented her age. We disagree.

The Sixth Amendment to the United States Constitution provides a defendant “a meaningful opportunity to present a complete defense.” State v. Donald, 178 Wn. App 250, 255, 316 P.3d 1081 (2013). The right, however, does not give a defendant the right to introduce otherwise inadmissible evidence. State v. Aguirre, 168 Wn.2d 350, 363, 22 P.3d 669 (2010). “[W]e apply [a] two-step review process to review the trial court’s individual evidentiary rulings for an abuse of discretion and to consider de novo the constitutional question of whether these rulings deprived [the defendant] of [their]

Sixth Amendment right to present a defense.” State v. Arndt, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019).

“Evidence of a witness’s character, trait of character, or other wrongs or acts are not admissible for the purpose of proving action in conformity therewith on a particular occasion except as provided in ER 607, 608, and 609.” State v. O’Connor, 155 Wn.2d 335, 349, 119 P.3d 806 (2005) (internal quotations omitted). “ER 608 provides that specific instances of a witness’s conduct, introduced for the purpose of attacking his or her credibility, may not be proved by extrinsic evidence, but may ‘in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness . . . concerning the witness’ character for truthfulness or untruthfulness.” O’Connor, 155 Wn.2d at 349 (quoting ER 608(b)). “In exercising its discretion, the trial court may consider whether the instance of misconduct is relevant to the witness’s veracity on the stand and whether it is germane or relevant to the issues presented at trial.” O’Connor, 155 Wn.2d at 349. “In addition, Washington courts have been clear that not every instance of a witness’s (even a key witness’s) misconduct is probative of a witness’s truthfulness or untruthfulness under ER 608(b).” O’Connor, 155 Wn.2d at 350.

“[T]he answer of a witness on cross-examination upon a purely collateral matter cannot be contradicted but is conclusive upon the party cross-examining.” State v. Sandros, 186 Wash. 438, 443, 58 P.2d 362 (1936). “The test as to whether a matter is collateral within the meaning of the rule is this: That the cross-examining party be entitled to prove it in support of his case.” Sandros, 186 Wash. at 444.

Here, Jagana contends that the evidence of whether N.J. misrepresented her age on an old Facebook account under the pseudonym, Serenity Van Halen, was “pertinent to central issues at trial, including whether N.J. misrepresented her age to Jagana as he claimed she had, and whether N.J. consented to having sex with Jagana.” Jagana sought to admit this evidence under ER 608(b) and has not provided any other evidentiary rule under which it could be admissible. But ER 608(b) explicitly states that when attacking a witness’s credibility, specific instances of conduct “may not be proved by extrinsic evidence.” When N.J. denied ever misrepresenting her age, that answer ended the inquiry.

The Facebook evidence was not central to any issue at trial. The jury was instructed that it was a defense to the charge of rape of a child in the third degree if “the defendant reasonably believed that N.J. was at least sixteen years of age, based upon declarations as to age by N.J.” The central issue was whether N.J. told Jagana she was 16 years old or older, not whether she made such statements to third parties. There was no evidence Jagana had ever seen N.J.’s Facebook page. Thus, this impeachment evidence was collateral and a second witness may not be called to contradict N.J.’s testimony. 5A KARL B. TEGLAND, WASH. PRAC. EVIDENCE LAW § 608.11 (6th ed. 2019).

The trial court was within its discretion to conclude that, whether N.J. misrepresented her age on a Facebook account that Jagana had never seen, had little relevance to the issues in this trial and its admission risked confusing the issues for the jury. The trial court did not abuse its discretion when it prohibited Jagana from

No. 79472-8-1/8

introducing extrinsic evidence to impeach N.J. and did not deny Jagana the right to present a defense.

Affirmed.

Mann, C.J.

WE CONCUR:

Andrus, A.C.J.

Leach, J.