IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WILLIAM R. HARRIS, Appellant.	))))))))))	NO. 64056-9-I DIVISION ONE UNPUBLISHED OPINION FILED: November 8, 2010

Leach, A.C.J. — William Harris appeals his conviction for communication with a minor for immoral purposes, claiming that the trial court erred in admitting into evidence his 1982 murder conviction for impeachment purposes. Because Harris fails to demonstrate error materially affecting the outcome of the trial, we affirm.

FACTS

On July 31, 2008, Stephen and Barbara Huskey, who were staying at a motel on Aurora Avenue with their three sons, called police to report that their 12-year-old son received notes soliciting sexual acts from another motel occupant. Seattle Police Officer George Beasley responded to the call and met with the Huskeys in the motel manager's office. When Mr. Huskey pointed out a man in a maroon car driving out of the motel parking lot, Officer Beasley returned to his

car and gave chase.

After traveling some blocks, Officer Beasley saw the maroon car enter a vacant parking lot and activated his emergency lights. The driver, William Harris, asked if he was being stopped for a traffic violation. Officer Beasley told him that he was investigating an allegation that he had passed notes to a 12-year-old boy asking for sex. Officer Beasley asked Harris for his driver's license and car keys and then returned to the patrol car and began typing the information into the computer. Suddenly, Harris got out of his car and ran away. Officer Beasley ordered him to stop, chased him, and eventually caught him. Later, when Officer Beasley asked why he ran, Harris said he was scared. Harris also denied any knowledge of the notes or a 12-year-old boy. The next day, when interviewed at the jail by Detective Christopher Young, Harris again denied any knowledge of the notes or the boy.

On August 5, 2008, the State charged Harris with one count of communication with a minor for immoral purposes. After Harris failed to appear for his arraignment, the trial court issued a warrant for his arrest. Police arrested Harris on November 22, 2008. While Harris remained in jail, defense counsel requested a competency evaluation. On December 16, 2008, the trial court ordered Harris to be transported to Western State Hospital for a competency evaluation and then returned to the jail. An evaluator interviewed Harris in December and prepared a report dated January 14, 2009. On March 4, 2009, the trial court determined that Harris was competent to stand trial.

At a pretrial hearing on July 7, 2009, the prosecutor indicated that he did not intend to introduce into evidence Harris's prior criminal history, which includes a 1982 conviction for first degree murder.

At trial, the Huskeys testified that their family came to Seattle from Missouri and stayed in the motel while they searched for a house. Mr. and Mrs. Huskey stayed in a room on the third floor, and the three boys, ages 12, 17, and 19, shared a room next door. Robert, who was 12 years old in July of 2008, testified that he spent his time walking around the motel alone. He testified that while his brothers slept or watched television around 1:30 or 2:00 a.m., he was walking around outside and he saw a man walk across the parking lot, up to the third floor, and back down. He identified Harris as the man he saw. When Robert walked back to his room, he found a folded note on the ledge outside his room offering $100 and a "blow job." Robert gave the note to his brother. The next day, Robert saw Harris walk by his room. When Robert went outside, he found a similar note held down by a coin. Robert told his parents, who called the police.

Harris testified that he had left the notes for adult young men that he had seen standing and drinking around a black car with Missouri plates and smoking on the third floor balcony. He testified that he did not see any child in the area and had not intended the notes to be found by a child. Harris gave extremely detailed descriptions of his observations and activities on July 30 and 31. During direct examination, defense counsel questioned Harris regarding the

apparent improvement in his memory because he told the detective on the day after the incident that he did not remember writing the first note. Harris testified: "Well, I have 235 days clean and sober today. I haven't been drinking or anything like that. I've had time to reflect on matters, and we've talked about how important it is to remember accurately as much as I possibly can under the circumstances, and I've done my best to do that."

Defense counsel also asked Harris why he told the evaluator at Western State Hospital that he didn't remember the incident at all. The following exchange then occurred:

> A. I was under a legal warning that came as Miranda warning that anything I said could be used as evidence, and I was under no advisement from you, that I recall, as to how I should approach that situation. I had recently been on a horrific four-month long binge where I was doing nothing but drinking. I had walked away from my whole life, and I was almost a basket case. I couldn't even remember my own phone number or that I had a brother or where I lived. Neither, had I talked to anyone that I'd known for four months. So I was in pretty bad shape.
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> Q. When you told [the evaluator] that you didn't remember the incident at all was that the truth at the time or something that was convenient at the time?
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> A. No, I didn't remember. I remember the crime that was alleged, I could say that. But as to the details, I didn't remember. He would ask me questions like do you remember this or do you remember that, but I did not remember leaving notes for children and I said, "No, I don't."

Outside the presence of the jury, the prosecutor asserted that Harris's testimony opened the door to allow the State to cross-examine Harris about his 1982 murder conviction. The prosecutor argued:

> He made two statements in support of his contention that he couldn't remember. Number one, he said, could not remember where I'd lived before. Number two, he said, I didn't even remember if I had a brother. From my prospective [sic] those are subjects, which I'm sustained [sic]

> from going into, that I can now inquire about.
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> Number one, where he lived before shouldn't be that big of a mystery to the defendant because he spent the last almost three decades in prison. Who forgets that? Number two, the reason that he was in prison and the reason that he still maintains today is because of his prior murder conviction, but he still maintains that his brother was the killer. The fact that the defendant stated that he couldn't even remember he had a brother is not only fantastic, at least from the State's prospective [sic], it's totally unbelievable.
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> He has put those issues out in front of this jury. He has offered that as a corroboration that his memory was so bad that he couldn't even remember his brother and where he's been. And, frankly, Judge, I think that provides the opportunity to cross him on those subjects. I realize that they are explosive and that's why I wanted to talk to you outside the presence of the jury.

Defense counsel objected, arguing that evidence of the conviction was highly prejudicial and completely irrelevant to the credibility of Harris's trial testimony regarding the events at the motel. The trial court ruled:

> Well, I think it is certainly highly prejudicial, but his testimony has now made it relevant. I wish this hadn't happened, but I think that he so testified on direct about his interview with [the evaluator]. And he did make reference to his brother and whether he knew that he had a brother, and he made a reference that he didn't know where he lived. So now we are stuck with this situation. It certainly is highly prejudicial, but it's legitimate in this case because of credibility, and I will entertain a proposal for a limine [sic] instruction, but I don't know what good it's going to do, frankly.

After the prosecutor cross-examined Harris about the murder conviction, the trial court instructed the jury,

> Ladies and gentlemen, you've heard testimony about the defendant having been convicted of murder and having been incarcerated because of that conviction. You may not consider that conviction or the defendant's incarceration as a result of that conviction for the purpose of whether or not the defendant committed the crime that he's accused of in this case. This evidence has only been admitted for the limited purpose of allowing you to consider it in order to assess the credibility of the defendant's testimony in this trial and for no other purpose. So to repeat

you may not consider this evidence for the purpose of determining directly whether the defendant committed the crime for which he is accused in this trial.

The jury found Harris guilty. Harris appeals.

ANALYSIS

Harris argues that the trial court abused its discretion by admitting evidence of the murder conviction under ER 609[1] or ER 404(b)[2] without

[1] ER 609 provides in pertinent part,

(a) **General Rule**. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) **Time Limit**. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

[2] ER 404(b) provides,

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

conducting a proper analysis on the record for the admission of evidence under those rules. But a review of the record reveals that the trial court did not admit the evidence under either rule. Rather, the State argued, and the trial court agreed, that Harris's reference to his living arrangements and his brother opened the door to the admission of otherwise inadmissible evidence about his prior conviction.

Under the well-established doctrine of "opening the door," the trial court has the discretion to admit otherwise inadmissible evidence when the opposing party raises a material issue.[3] The doctrine is intended to preserve fairness and prevent one party from bringing up a subject to gain an advantage and then barring the other party from further inquiry.[4] "But a passing reference to a prohibited topic during direct does not open the door for cross-examination about prior misconduct."[5] We review a trial court's decision to allow cross-examination under the open-door rule for abuse of discretion.[6]

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[3] State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008); see also State v. Brush, 32 Wn. App. 445, 451, 648 P.2d 897 (1982) (Rules of Evidence do not supersede open-door doctrine).

[4] State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995) (citing State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)).

[5] State v. Stockton, 91 Wn. App. 35, 40, 955 P.2d 805 (1998) (defendant's testimony that he thought men were trying to sell him drugs did not open door to evidence of his prior drug convictions); Avendano-Lopez, 79 Wn. App. at 714-15 (Defendant's "passing reference to his release from jail did not open the floodgates to questions about prior heroin sales.").

[6] State v. Wilson, 20 Wn. App. 592, 594, 581 P.2d 592 (1978); State v. Ortega, 134 Wn. App. 617, 626, 142 P.3d 175 (2006).

We reject the State's assertion that Harris's mere reference to a lack of memory of his brother or the place he lived opened the door to evidence regarding the murder conviction. Harris was attempting to demonstrate that his drinking binge had been so severe that he had no memory of things that he obviously should have remembered, not things that would be easy to forget. Nothing in Harris's testimony conveyed a false image to the jury about his character, his relationship with his brother, his previous residences, or his prior criminal history that would have given him an unfair advantage had the State not been allowed to inquire specifically into the murder conviction.

But even if the trial court abused its discretion by allowing the State to cross-examine Harris about the conviction, reversal is not required ""unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.""[7]

Here, in all likelihood, the result of the trial would have been the same regardless of the admission of the murder conviction. First, the evidence did not contradict Harris's testimony. Harris consistently testified that his four-month alcoholic bender had been so severe that at the time of the Western State interview he didn't remember anything whatsoever, but that he recovered a very detailed and accurate memory by the time of trial. It is extremely unlikely that the jury would have found Harris's claim regarding his memory to be incredible

[7] State v. Korum, 157 Wn.2d 614, 647, 141 P.3d 13 (2006) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981))).

based on the evidence of the murder conviction. Second, the trial court gave a pointed limiting instruction immediately following the State's introduction of the

conviction. We presume that juries follow the trial court's instructions.[8] Third, Harris admitted at trial that he wrote the notes but claimed that he intended them to be found by the adult men he observed drinking and smoking outside the motel rooms. But four members of the Huskey family consistently testified that Robert spent a lot of time walking around outside the motel room while the older boys stayed in their room watching television or sleeping. Although they admitted that the oldest boy occasionally sat in his car listening to the radio, the witnesses denied drinking or smoking around the car or on the balcony. And finally, there was no suggestion that Harris's prior conviction involved any facts similar to those alleged in the charge of communication with a minor for immoral purposes. Given this evidence, Harris fails to demonstrate that the admission of the murder conviction likely affected the jury's verdict and requires reversal.

Affirmed.

Leach, A.C.J.

WE CONCUR:

Ellington, J.

Grosse, J.

[8] State v. Hanna, 123 Wn.2d 704, 711, 871 P.2d 135 (1994).