IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. REGINALD SPEACH, Appellant.	)	No. 65054-8-I DIVISION ONE UNPUBLISHED OPINION FILED: July 25, 2011

Appelwick, J. — A criminal defendant's constitutional right to present a defense does not extend to irrelevant or inadmissible evidence. In this case, Speach failed to demonstrate that evidence of the victim's prior bad acts had any admissible purpose. The trial court, therefore, did not abuse its discretion or violate his right to present a defense in excluding it. The court also did not abuse its discretion in precluding Speach from testifying that he had no prior convictions or arrests. Nor did it comment on the evidence when it acknowledged the trial participants' mourning over news that four local police officers had been fatally shot. For these reasons, and because Speach's claim of ineffective assistance of counsel lacks merit, we affirm his conviction for communicating with a minor for immoral purposes.

FACTS

Based on allegations that Reginald Speach raped his foster daughter S.M. and propositioned another foster daughter, T.K., the State charged him with four counts of rape of a child in the third degree and one count of communicating with a minor for immoral purposes.

Prior to trial, the State moved to exclude evidence of T.K.'s "behavioral issues." The evidence concerned a school suspension occurring during T.K.'s first foster care placement with Speach and his wife Madelynn.[1] T.K. had been under pressure during that placement to return to her biological family. Knowing that she could not live with the Speaches if she was not in school, T.K. allegedly misbehaved at school in order to facilitate a suspension and a placement change. Defense counsel argued that the evidence was relevant to T.K.'s motive and the defense theory that T.K. and S.M. had "learned to do whatever it takes in order to make something happen." The court concluded the evidence was inadmissible under ER 404(b) and excluded it.

The State also moved to exclude evidence that Speach had no prior arrests or convictions. Defense counsel argued in part that Speach should be allowed to testify to this evidence because he was being charged with a crime that put his morality in issue. The State countered that "communicating with a minor is not attacking his general morality, but his sexual morality." The court granted the motion with the caveat that the evidence would be admissible if the State presented evidence regarding his demeanor when he was first told of the accusations.

At trial, S.M. testified that she started living with the Speaches when she was 13 years old. She alleged that Speach slapped her on the butt, made inappropriate comments, and asked her questions about her sexual history. Eventually, he started having sex with her. She did not protest or tell anyone about these incidents at the time they happened.

[1] We refer to Reginald as "Speach" and his wife as "Madelynn." No disrespect is intended.

In January 2007, S.M. heard T.K. talking to Speach in his bedroom. Speach told her that Madelynn was going out of town and that he could teach her about "the birds and the bees." S.M. told T.K. what she had heard and they talked with S.M.'s sister, Rebecca, about what to do. The next day, S.M. told the assistant principal at her school that she had been propositioned by her foster father. The assistant principal contacted Child Protective Services. Police removed the girls from the Speaches' home that same day.

T.K. testified that she first lived with the Speaches in 2003 and 2004 before leaving to live with her relatives. She asked to return to the Speach home in November 2006, because she felt comfortable there.

In January 2007, T.K. told Speach that she needed to talk about "the birds and the bees." He told her to come into his bedroom and instructed her to close the door. He asked her questions about her sexual past, and then stated, "I want to ask you something." He hesitated, saying, "No, you are going to tell." When T.K. assured him she would not "tell," he asked her "[c]an I hit it?" which is slang for "can I have sex with you?" He explained they could "try it" when Madelynn, who was planning a trip to Atlanta, was out of town. T.K. was shocked and simply left the room. She did not think Speach was joking.

Federal Way police officer Oscar Villanueva testified that he went to the Speach residence to investigate S.M. and T.K.'s allegations. He told Madelynn they were looking for her husband. While they were talking, Speach called on the phone and Madelynn spoke to him briefly before handing the phone to Officer Villanueva. He

asked Speach how he was doing. Speach responded, "not so good." Officer Villanueva asked him why, and Speach said "[b]ecause I think it's about saying something inappropriate to [T.K.]" Speach returned home a short while later and was taken into custody.

Madelynn testified that she first heard of T.K. and S.M.'s accusations when the police arrived at her home. She stated that she spoke with police in the foyer of her home and never left that area. She confirmed that she had a trip to Atlanta planned in January 2007.

Speach also testified and denied having sex with S.M. or propositioning T.K. A jury acquitted him of the rape counts but convicted him of communicating with a minor for immoral purposes. He appeals.

DECISION

Speach first contends the court abused its discretion and violated his right to present a defense when it excluded evidence that T.K. had attempted to sabotage her previous placement with the Speaches. We disagree.

A defendant has a constitutional right to present a defense, but the right does not extend to irrelevant or inadmissible evidence. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (irrelevant evidence); State v. Aguirre, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010) (inadmissible evidence); State v. Mee Hui Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006) (defendant has right to present a defense "'consisting of relevant evidence that is not otherwise inadmissible'" (quoting State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992))). If the defendant's evidence is relevant and

admissible, then it is the State's burden to demonstrate that "the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). A trial court's decision to admit or to exclude evidence is reviewed for abuse of discretion, Id. at 619, but an alleged denial of the right to present a defense is reviewed de novo. Jones, 168 Wn.2d at 719.

Speach contends T.K.'s manipulation of her prior placement was relevant evidence that went to the heart of his defense, i.e., that T.K. fabricated the allegations in order to accelerate a new foster care placement. He concedes that under ER 404(b), T.K.'s prior bad acts were inadmissible unless they were relevant for a nonpropensity purpose, such as to show motive, intent, or plan. He contends T.K.'s bad acts were admissible to show that she had "a particular scheme or plan" for getting what she wanted in the foster care system.

To establish a common scheme or plan, there must be "substantial similarity" between the prior and current acts. State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003). "Sufficient similarity is reached only when the trial court determines that the 'various acts are naturally to be explained as caused by a general plan." Id. (quoting State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995)). In this case, evidence that T.K.'s accusations were part of a plan to manipulate her placement was lacking. The State correctly points out, and Speach does not dispute, that the defense offered no evidence during argument that T.K. wanted to leave her second placement with the Speaches prior to making her accusations. In fact, the evidence that T.K. specifically requested a second placement with the Speaches only a few months before

the accusations tended to show just the opposite. In addition, the prior and current acts—i.e., intentional misbehavior at school and accusing someone of a crime—were different in kind and not "naturally to be explained as caused by a general plan." Lough, 125 Wn.2d at 860.

In short, Speach fails to demonstrate any nonpropensity purpose for T.K.'s prior bad acts. Because the evidence was inadmissible, and because the State has a strong interest in preventing inadmissible evidence of little probative worth from distracting and inflaming a jury, Darden, 145 Wn.2d at 620-23, the trial court did not abuse its discretion and did not violate Speech's right to present a defense in excluding it. See State v. Sublett, 156 Wn. App. 160, 197-99, 231 P.3d 231 (exclusion of evidence that was neither relevant nor admissible was proper and did not violate defendant's right to present a defense), review granted, 170 Wn.2d 1016, 245 P.3d 775 (2010); State v. Thomas, 123 Wn. App. 771, 778-81, 98 P.3d 1258 (2004) (exclusion of inadmissible expert testimony did not violate right to present a defense).

Speach next contends the court abused its discretion in excluding his proposed testimony that he had no arrest record or criminal history. He claims this evidence was admissible as "a mere extension of the customary practice of introducing evidence concerning the background of a witness, such as education and employment." This basis for admissibility has twice been rejected by our courts, and we decline to depart from those decisions here. See State v. O'Neill, 58 Wn. App. 367, 793 P.2d 977 (1990); State v. Mercer-Drummer, 128 Wn. App. 625, 630-32, 115 P.3d 454 (2005).

Alternatively, Speach contends the evidence was admissible "under the more

narrow constraints of ER 404 and ER 405." (Underling omitted.) Under ER 404(a), character evidence is generally inadmissible to prove conformity therewith on a particular occasion. An exception to this rule provides that "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same" is admissible. ER 404(a)(1). Evidence admissible under ER 404(a) must be proved either by reputation testimony, or "[i]n cases in which character or a trait of character . . . is an essential element of a charge," by specific instances of conduct. ER 405(b).

Speach contends his proposed testimony was admissible under ER 404(a)(1) and, given the nature of the charge against him, was provable either by reputation testimony under ER 405(a) or specific instances of conduct under ER 405(b). Even assuming the evidence was admissible under ER 404(a), we conclude that Speach did not meet the requirements of ER 405(a) or (b).

ER 405(a) allows character to be proved by reputation testimony, but Speach offered no reputation testimony below. ER 405(b) allows proof of character through specific instances of conduct if "character or a trait of character . . . is an essential element of a charge." Character is rarely an essential element of an offense and will be considered such only if character itself determines the rights and liabilities of the parties. State v. Kelly, 102 Wn.2d 188, 196-97, 685 P.2d 564 (1984). In this case, the jury instructions defined the offense as communicating with a minor "for immoral purposes of a sexual nature." To the extent "character" is an element of this charge, it is a specific trait of character relating to sexual morality, not the trait of being law-abiding. While specific conduct showing Speach's good sexual morality might have

been admissible to rebut the charge, evidence that he had never been arrested or convicted of a crime was not. Furthermore, the proffered evidence did not concern *specific instances* of conduct, but rather amounted to *the absence* of specific instances of *mis*conduct. The court did not abuse its discretion in excluding the evidence.

Speach contends the court improperly commented on the evidence when it made the following reference to the recent fatal shooting of four local police officers:

> Welcome back. I hope you all had a nice Thanksgiving. We had real bad news for the State, four officers being killed yesterday, and the Defense and the Prosecution wanted me to let you know that they all share in your mourning.[2]
>
> So, we left off with Officer Walsh last week.

Out of the jury's presence, defense counsel objected to these remarks as a comment on the evidence, noting that they were made during the testimony of a police officer. Counsel later raised the issue in a motion for a new trial, which the court denied. On appeal, Speach reiterates his claim that the court's remarks commented on the evidence. We disagree.

To constitute a comment on the evidence, the court's attitude toward the merits of the cause or the truth value of a witness' testimony must be reasonably inferable from the nature or manner of the court's statements. State v. Elmore, 139 Wn.2d 250, 276, 985 P.2d 289 (1999); State v. Francisco, 148 Wn. App. 168, 179 199 P.3d 478, review denied, 166 Wn.2d 1027, 217 P.3d 337 (2009). The remarks in this case were not a comment on the evidence. The court's attitude toward either the merits of the case or the credibility of the testifying officers is not reasonably inferable from the

[2] The State concedes neither party requested the court to make this statement.

nature or manner of its remarks.

Last, Speach contends his trial counsel was ineffective for failing to present testimony and argument regarding his initial statements to police. Officer Villanueva testified that when asked why he was not doing well, Speach said it had to do with "saying something inappropriate to [T.K.]" The State then suggested in closing that Speach's reaction showed guilty knowledge. Speach contends his counsel was ineffective for failing to introduce, or question him about, a postarrest statement in which he said he spoke with his wife before he spoke to police and she told him T.K. "said I had said something out of place but I told my wife what is going on with that." Speach contends counsel's failure to use this evidence to explain his initial reaction was ineffective assistance. We disagree.

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both deficient performance and prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). Prejudice is established when there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. Speach has not established prejudice.

The State points out that if Speach had testified along the lines of his statement, Officer Villanueva and Madelynn could have been recalled to testify as to what, if anything, Villanueva told Madelynn about T.K.'s accusations, and what Madelynn told Speach about those accusations before handing the phone to Villanueva. Either or both of them might have undermined Speach's self-serving statement.[3] Thus, to

[3] Officer Villanueva testified that when he arrived at the Speach residence, he told Madelynn the police were there "in relation to the allegations of a rape and

establish prejudice, it was incumbent on Speach to demonstrate either that these witnesses could not have been recalled, would have been precluded from testifying on this point, or would not have undermined his claim. He has not done so. In these circumstances, we conclude Speach has not shown a reasonable probability that, but for counsel's omission, the outcome of the proceedings would have been different.

We reach the same conclusion regarding counsel's failure to argue in closing that Speach's knowledge of T.K.'s accusation could have come from Madelynn, rather than his own guilty knowledge. The jury knew from Speach's testimony that he briefly spoke to Madelynn before she handed the phone to the officer. Defense counsel certainly could have reminded the jury of that testimony and could have suggested that Madelynn told Speach about T.K.'s allegations. But, the State could have easily undermined that suggestion in rebuttal argument by pointing out that Officer Villaneueva's testimony indicated that he only mentioned the rape allegations to Madelyn,[4] that there was no evidence Madelynn knew of T.K.'s allegations or told Speach anything she knew, and that Speach himself described his brief conversation with Madelynn as her simply saying "the police were [there] and they wanted to talk to me." Even assuming counsel's performance was deficient, Speech fails to demonstrate

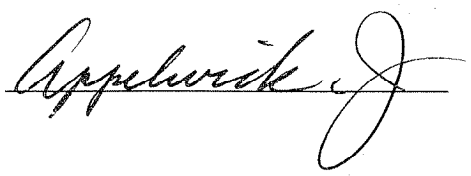
involving [S.M.] and [T.K.]" He did not mention T.K.'s accusations in his testimony. And, when asked during the CrR 3.5 hearing what Madelynn told Speach in her brief conversation with him on the phone, Officer Villanueva said, "I believe she said that we were there and that's why she ended up handing me the phone." This testimony indicates that Villanueva could hear Madelynn's conversation with Speach, and that she did not tell him about T.K.'s allegations. Madelynn's testimony that she and Officer Villanueva never left the foyer of her home also indicates that Villanueva was able to hear what she said to Speach on the phone.

[4] Note 3, supra.

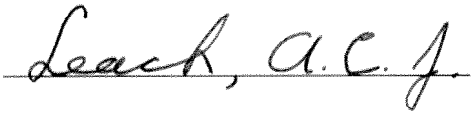
a reasonable probability that but for counsel's omission the outcome of the trial would have been different.[5]

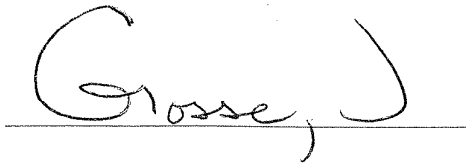
Because Speach fails to demonstrate any individual errors, his cumulative error argument fails as well.

Affirmed.



WE CONCUR:





[5] In reaching this conclusion, we do not consider postverdict statements Speach attributes to the jurors. Those statements inhere in the verdict and may not be considered by this court. Elmore, 139 Wn.2d at 294 n.17.