

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

STATE OF WASHINGTON,

Respondent,

v.

JOEL M. KAHORA,

Appellant.

No. 65866-2-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: March 12, 2012

Leach, J. — Joel Kahora appeals two convictions for third degree assault committed against his daughters. He contends that the trial court violated his right to present a defense and confront adverse witnesses by limiting the scope of cross-examination. He claims this prevented him from fully developing evidence of his daughters' credibility and motives to lie about the assaults. Because the trial court acted within its discretion, we affirm.

**Background**

In 2004, Kahora and his family moved from Kenya to the United States, settling in Massachusetts. Over the objections of Kahora's teenage daughters, M.M. and E.M., Kahora and his wife, Annsarah Mboya, moved the family to Washington state in the summer of 2009. E.M. and M.M. started high school in Kent that fall.

One Sunday evening in October, Kahora asked E.M. and M.M. to clean the kitchen. M.M. complied and began wiping the counter but did not want to perform the chore. Kahora asked M.M. why she had an attitude. M.M. told him that she was tired from staying up late the night before. Kahora grabbed M.M.'s hand and twisted it as she tried to pull it away. M.M. called for Mboya, who was in her bedroom. Kahora grabbed and held M.M.'s head, removing her scarf. As M.M. ran from Kahora, he kicked her in the hip. E.M. came out of her bedroom and saw Kahora moving toward M.M. When E.M. tried to intervene, Kahora slapped her on the side of the head and kicked her in the left thigh.

At school the next day, M.M. confided to a friend and to her teacher, Lisa Clarke, that Kahora had physically harmed her the night before. Clarke sent M.M. to the school counselor, who called E.M. to her office and alerted Child Protective Services (CPS) and the police. When Officer Carrie Nastansky arrived at the school, she noticed E.M.'s swollen ear. She also observed M.M. holding her arm in pain. E.M. and M.M. were taken to a hospital for treatment after speaking with the police and with a CPS social worker.

A doctor diagnosed E.M. with a ruptured eardrum. M.M. was diagnosed with cervical strain and wrist sprain with a possible navicular fracture.<sup>1</sup> While M.M. had no visible injuries to her hip or neck, she experienced tenderness upon palpation in both areas. According to one medical witness, the girls' descriptions of what had occurred to them were consistent with the physical

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<sup>1</sup> The navicular bone is located in the wrist.

findings.

CPS removed E.M. and M.M. from their parents' care and placed them in the same foster home. Neither E.M. nor M.M. wanted to resume living with either of their parents, and both expressed a continued desire to move back to Massachusetts. M.M. later changed her mind about leaving Seattle once she joined a track club she liked. M.M. moved out of the foster home with her sister after CPS approved M.M. to live with her track coach.

The State charged Kahora with two counts of second degree assault—domestic violence. Kahora defended with the claim that M.M. and E.M. fabricated the assaults so they could move back to Massachusetts. Kahora sought to support his claim with evidence offered to show M.M.'s and E.M.'s biases and motives to lie. This included evidence that (1) M.M. displayed behavioral problems in her first foster care placement and complained to her CPS social worker that her foster mother provides for her "needs" but not for her "wants" and (2) M.M. requested that CPS place her with her track coach, even though she knew her track coach had a previous domestic violence conviction. Kahora argued that this evidence demonstrated the lengths that M.M. would go to in order to get what she wanted.

The State objected, arguing that the evidence was not relevant and was unduly prejudicial. The trial court excluded the proffered evidence, finding that the evidence's potential for prejudice and for misleading the jury outweighed its

relevance. However, the trial court permitted Kahora to introduce other testimony regarding E.M.'s and M.M.'s biases and motives to fabricate the story against him.<sup>2</sup>

Kahora testified in his own defense. He told the jury that before the family moved to Washington, M.M. said to him that she would "do everything I can" not to go. Kahora provide the following description of the kitchen incident. That night he was making tea for himself and Mboya when E.M. came out of her room to clean the kitchen. Kahora said M.M. entered the kitchen a few minutes later and began to argue with E.M. When Kahora asked them why they were arguing, M.M. explained that she did not want to clean because she was tired. Kahora told M.M. that she had to complete the chore anyway. M.M. got angry and punched him in the back of the neck. M.M. told Kahora he had too much pride,

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<sup>2</sup> The trial court permitted the defense to introduce the following evidence: (1) M.M. spoke to one of her teachers in Massachusetts about wanting to stay; (2) before moving to Washington, M.M. made efforts to emancipate herself; (3) the family discussed the move with their pastor in Massachusetts, who offered to allow M.M. and E.M. to stay with him; (4) the family spoke with a CPS worker in Massachusetts, and M.M. told him that she wanted to stay in Massachusetts because she did not want to leave her friends and wanted to attend Harvard; (5) even after they moved to Washington, E.M. and M.M. continued to ask their parents to move back to Massachusetts; (6) on the night of the assault, M.M. told Kahora that he would have to break down his pride if he wanted to be a "true servant of god" and that she would "bring [Kahora] down"; (7) after CPS became involved, M.M. and E.M. insisted on being returned to Massachusetts, and CPS worker Anna Tran contacted their pastor in Massachusetts in order to plan to send the girls back; (8) M.M. and E.M. did not wish to be placed with their mother, even if she was not living with Kahora; (9) after the assault, M.M. wrote her mother asking for permission to return to Massachusetts; (10) M.M. changed her mind about moving after she had an opportunity to be involved in a Seattle track club; and (11) E.M. continued to talk about returning to Massachusetts after moving to Washington.

saying he “had to break down that pride to be a true servant of god.” M.M. also allegedly told him, “I will bring you down, that pride of yours.” Kahora then moved toward M.M. but stopped when E.M. placed her hand on Kahora’s collarbone in a “sign of peace.” Kahora denied touching either M.M. or E.M.

Kahora argued in closing,

[M.M.] and [E.M.] are getting exactly what they wanted, something they couldn't have a year ago. [E.M.], regardless of what happens in this trial, she is going back to Massachusetts [sic].

And then there is [M.M.]. What does she want? She was concerned about her school. She was concerned about her track career, and she thought the best place for that was in Massachusetts, and she wants to go back for those reasons.

Now she wants to stay here. She found a track coach who is willing to support her and give her what she wants, her opportunities. She is getting exactly what she wanted. [M.M.] and [E.M.] would not be in the position they are today unless Mr. Kahora is here today.

The jury acquitted Kahora of second degree assault but convicted him on two counts of the lesser included offense of third degree assault. Kahora appeals.

#### Standard of Review

“We review alleged violations of the state and federal confrontation clauses de novo.”<sup>3</sup> We review a trial court’s ruling on the admissibility of evidence for an abuse of discretion.<sup>4</sup> An abuse of discretion occurs when the trial court’s exercise of its discretion is manifestly unreasonable or based upon

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<sup>3</sup> State v. Medina, 112 Wn. App. 40, 48, 48 P.3d 1005 (2002) (citation omitted).

<sup>4</sup> State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

untenable grounds.<sup>5</sup>

### Analysis

Kahora claims the trial court violated his right to present a defense and confront witnesses by limiting the scope of cross-examination. The confrontation clause guarantees a criminal defendant the right “to be confronted with the witnesses against him.”<sup>6</sup> This includes the right to cross-examine those witnesses.<sup>7</sup> But the right to cross-examine a witness is not absolute.<sup>8</sup> A defendant does not have a constitutional right to present irrelevant evidence.<sup>9</sup> Generally, evidence of motive and bias is relevant to a witness’s credibility.<sup>10</sup> But a trial court properly limits cross-examination where the offered evidence only remotely tends to show bias or prejudice of the witness.<sup>11</sup> While the scope of confronting a witness is within the trial court’s discretion,

“[t]he exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. . . . [A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.”<sup>[12]</sup>

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<sup>5</sup> Darden, 145 Wn.2d at 619.

<sup>6</sup> U.S. Const. amend. VI; Const. art. 1, § 22.

<sup>7</sup> Washington v. Texas, 388 U.S. 14, 19, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

<sup>8</sup> Darden, 145 Wn.2d at 620-21.

<sup>9</sup> State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

<sup>10</sup> State v. Lubers, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996).

<sup>11</sup> State v. Knapp, 14 Wn. App. 101, 108, 540 P.2d 898 (1975).

<sup>12</sup> State v. Gregory, 158 Wn.2d 759, 883, 147 P.3d 1201 (2006) (some

The more essential a witness is to the prosecution's case, the more latitude a trial court should afford a defendant to explore motive, bias, credibility, or foundational matters.<sup>13</sup>

Kahora relies on State v. Peterson.<sup>14</sup> In Peterson, the defendant sought to establish that allegations of indecent liberties with a minor were a fabrication initiated by the victim's older sister.<sup>15</sup> The trial court limited cross-examination of the mother regarding the older sister's motives and involvement in initiating the complaint. Reasoning that a defendant should be given great latitude in cross-examining a prosecution witness to show motive or credibility, Division Two of this court reversed, stating, "Failure to permit the defendant reasonably to pursue a valid theory constituted error which seriously jeopardized his defense to a heinous crime."<sup>16</sup> We find Peterson factually distinguishable.

In Peterson, the defendant sought to introduce evidence having a sufficient nexus with his prosecution to show motive to fabricate. And there, the trial court entirely denied the defendant the right to present evidence to attack the witnesses' credibility. That did not occur here. The trial court determined

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alterations in original) (internal quotation marks omitted) (quoting Olden v. Kentucky, 488 U.S. 227, 231, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988)).

<sup>13</sup> Darden, 145 Wn.2d at 619.

<sup>14</sup> 2 Wn. App. 464, 469 P.2d 980 (1970).

<sup>15</sup> Peterson, 2 Wn. App. at 465.

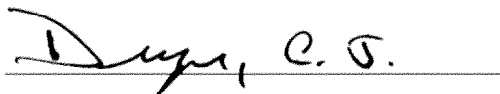
<sup>16</sup> Peterson, 2 Wn. App. at 467; see also State v. York, 28 Wn. App. 33, 34-37, 621 P.2d 784 (1980) (finding reversible error where trial court excluded evidence probative of chief prosecution's witness's motivation to fabricate allegations, noting that the witness's questionable credibility was "the very essence of the defense").

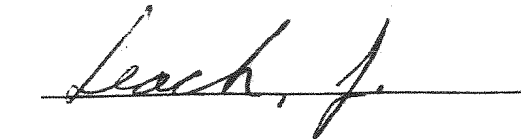
the offered evidence was prejudicial, confusing, and had little bearing on credibility. However, the trial court permitted Kahora other avenues to explore thoroughly his daughters' motives to lie and to challenge their credibility. Kahora was allowed to present 11 of his 14 proposed categories of bias and motive evidence, including testimony that E.M. and M.M. did not want to move from Massachusetts, were angry with their parents for making the decision without them, tried to emancipate themselves, and wanted to go back to Massachusetts after they were removed from their parents' care. In short, the trial court gave Kahora great latitude to explore his daughters' motives, biases, and credibility.<sup>17</sup> Under these circumstances, we cannot conclude that the trial court abused its discretion or violated Kahora's right to present a defense and confront adverse witnesses.

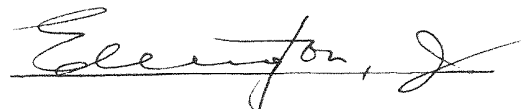
Conclusion

Because the trial court did not abuse its discretion by excluding certain evidence of motive and bias, we affirm.

WE CONCUR:







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<sup>17</sup> Darden, 145 Wn.2d at 619.



