IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MARCIAL RAMOS TENORIO, Appellant.	)	DIVISION ONE No. 65977-4-I UNPUBLISHED OPINION FILED: June 11, 2012

Dwyer, J. — A jury convicted Marcial Tenorio of one count of child molestation in the first degree based upon an incident involving his daughter, J.G.T. On appeal, Tenorio contends that the trial court erroneously excluded evidence regarding a purported threat made by Gabriella Cuevas, his ex-wife and the child's mother, prior to the disclosure of abuse. He similarly asserts that the trial court erroneously precluded his other daughter, M.R.T., from testifying that Cuevas had referred to Tenorio as a "child molester." Finally, Tenorio contends that there is insufficient evidence to support his conviction. Because neither of the trial court's evidentiary rulings constitutes an abuse of its discretion, and because sufficient evidence supports the jury's verdict, we affirm.

I

On a weekend in September 2009, J.G.T. and E.A.T. visited their father, Marcial Tenorio, at his home. At the time, J.G.T. was 8 years old. Tenorio and

Gabriella Cuevas, who had been divorced for approximately four years, together have three children, J.G.T., E.A.T., and M.R.T. Although Cuevas was the children's primary caretaker, they would frequently stay with their father during weekends.

When J.G.T. and E.A.T. returned from their father's home, Cuevas noticed that J.G.T. "looked a little different" and was "quieter" than usual. J.G.T. "really didn't say much" and "just kind of looked down." Based upon how J.G.T. was acting, Cuevas believed that something was wrong. She asked her daughter if there was "anything bothering" her. Although J.G.T. repeatedly answered "no," her eyes were "really big" and "just watery." Cuevas called M.R.T., J.G.T.'s older sister, into the room during the conversation. Cuevas also asked J.G.T. whether her father had touched her inappropriately. Because J.G.T. would not explain what was wrong, Cuevas thought that J.G.T. might simply have "had a bad day" or "misbehaved." She stopped questioning her daughter, and J.G.T. went to bed.

The next day, the children's aunt, Sylvia, Cuevas's sister, visited their home. Based upon her conversation with the children, Sylvia believed that "[s]omething inappropriate was happening" when the children visited Tenorio.[1] Using a wooden spoon to demonstrate, Sylvia explained to the children that if a "man's organ" ever touched them, they would "feel uncomfortable" and "need to

[1] Sylvia's full name is Sylvia Cuevas. Because she shares a last name with her sister, Gabriella Cuevas, we refer to Sylvia herein by her first name alone. We do so for clarity and intend no disrespect.

tell somebody. " Sylvia used the spoon to show J.G.T. what it would feel like. She also told the children that it was inappropriate for someone to touch them in the "bikini area." J.G.T. disclosed to her aunt that she had "felt the spoon." Sylvia told Cuevas about the disclosure, which they reported to Ann Eilers, J.G.T.'s school counselor.

Eilers thereafter met with J.G.T. She asked J.G.T. if "something inappropriate" had happened. J.G.T. told Eilers that she often sleeps in the same bed with Tenorio and her brother, E.A.T., when they visit their father. J.G.T. said that she "did not want to sleep in the middle of the bed that night, so she moved to the outside." Tenorio would not allow J.G.T. to switch positions with her brother, so she stayed in the middle of the bed. J.G.T. told Eilers that during the night her father "touched her private parts between her legs and then he started moving against her, and it felt like a wooden spoon handle against her." J.G.T. told Eilers that "her dad was moving a lot" when she felt the "wooden spoon handle" against her. Eilers reported the incident to Child Protective Services.

J.G.T. was thereafter interviewed by Nicol Flacco, a child interview specialist with the Skagit County Sheriff's Office. J.G.T. told Flacco about an incident in which her brother, E.A.T., asked why the bed was shaking and Tenorio responded that it was because he, E.A.T., was moving the bed. J.G.T. also told Flacco that Tenorio got mad when she was hot and wanted the

blankets off of her and when E.A.T. wanted to sleep in between J.G.T. and her father. J.G.T. said that her father "touched her private" and that, although she did not see what he touched her with, "it felt like a hard stick on her private." J.G.T. told Flacco that she did not know how it stopped, but that Tenorio then "turned around in the bed."

Tenorio was charged by information with one count of child molestation in the first degree based upon J.G.T.'s disclosure.[2]

At trial, J.G.T. testified that when she and her brother, E.A.T., visited their father, they would all sleep in the same bed, and she would sleep in the middle between her father and brother. J.G.T. testified that she "wanted to switch it up once" so that her brother slept in the middle, but Tenorio "got mad and pulled down the belt." J.G.T. was not allowed to switch places with her brother in the bed. J.G.T. testified that her father would wear either pajamas or boxer shorts to bed. She further testified that, one night in bed, she felt her father's "private area" against the side of her leg and that it "move[d] up and down." J.G.T. did not know how the touching stopped because she fell asleep.

Following trial, the jury convicted Tenorio of one count of child molestation in the first degree based upon the incident involving J.G.T. Tenorio

[2] Tenorio was also charged with two counts of child molestation in the first degree based upon allegations that he had molested his 12-year-old son, E.A.T., and one count of child molestation in the second degree based upon allegations that he had molested his 16-year-old daughter, M.R.T. Following the State's case in chief, the trial court dismissed the count of child molestation in the second degree involving M.R.T. The jury thereafter found Tenorio not guilty of both counts of child molestation in the first degree involving E.A.T. Because Tenorio was not convicted on these charges, we do not further discuss the charges herein.

was sentenced to 51 months incarceration.

Tenorio appeals.

II

Tenorio first contends that the trial court erred by excluding testimony regarding an alleged threat made by Cuevas against Tenorio in the days preceding J.G.T.'s disclosure of abuse. However, because there was no evidence connecting Cuevas's purported threat with J.G.T.'s disclosure, testimony regarding the threat was irrelevant and, thus, was properly excluded.

"[W]e will not disturb a trial court's rulings on a motion in limine or the admissibility of evidence absent an abuse of the court's discretion." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). "When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists." Powell, 126 Wn.2d at 258.

"A defendant in a criminal case has a constitutional right to present a defense 'consisting of relevant evidence that is not otherwise inadmissible.'" State v. Mee Hui Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006) (quoting State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992)). However, "a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense." State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Evidence is relevant where it has "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. Evidence is relevant and, thus, admissible only where it is both probative—in other words, it has a "tendency to prove or disprove a fact"—and material, meaning that the fact to be proved "is of consequence in the context of the other facts and the applicable substantive law." State v. Sargent, 40 Wn. App. 340, 348 n.3, 698 P.2d 598 (1985) (citing 5 K. Tegland, Washington Practice: Evidence § 82, at 168 (2d ed. 1982)). A trial court properly excludes evidence that is "remote, vague, speculative, or argumentative because otherwise 'all manner of argumentative and speculative evidence will be adduced,' greatly confusing the issue and delaying the trial." State v. Kilgore, 107 Wn. App. 160, 185, 26 P.3d 308 (2001) (quoting State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965)), aff'd on other grounds, 147 Wn.2d 288, 53 P.3d 974 (2002). See also Mee Hui Kim, 134 Wn. App. at 42; State v. Donahue, 105 Wn. App. 67, 79, 18 P.3d 608 (2001).

In Kilgore, the defendant, Kilgore, was charged with multiple counts of child rape and child molestation based upon incidents involving four different children. 107 Wn. App. at 165. The State moved to exclude evidence that Kilgore's mother-in-law, Lynn B., had been arrested for shoplifting and convicted of driving under the influence (DUI). Kilgore, 107 Wn. App. at 172-73. Kilgore asserted that this evidence was relevant because Lynn B. was the "instigator of all of the allegations" and because, following Lynn B.'s arrest for DUI, Kilgore

had informed her that he did not want his children—her grandchildren—riding in the car while she was driving. Kilgore, 107 Wn. App. at 172-73. The State argued that Kilgore had failed to make the necessary connection between the incidents and Lynn B.'s purported "coaching of the children." Kilgore, 107 Wn. App. at 173. The trial court agreed. Kilgore, 107 Wn. App. at 173.

We affirmed the trial court's exclusion of the evidence of Lynn B.'s shoplifting arrest and DUI conviction. Kilgore, 107 Wn. App. at 186. We noted that the problem with Kilgore's argument was that it "provide[d] no link" between the evidence sought to be introduced and "four children's allegations that Kilgore molested and raped them." Kilgore, 107 Wn. App. at 186. We concluded that it was "too speculative to say a grandmother would prompt children to accuse her son-in-law of child molestation and rape merely because she wants to drive her grandchildren around." Kilgore, 107 Wn. App. at 186. Kilgore had failed "to provide a link or 'train of facts' that suggest that the animosity engendered by his refusal to allow Lynn B. to drive with his children caused the four children to accuse him of molesting and raping them." Kilgore, 107 Wn. App. at 186-87. Thus, we held, the trial court properly exercised its discretion in limiting the scope of Kilgore's cross-examination of Lynn B. Kilgore, 107 Wn. App. at 187.

Here, Tenorio sought to introduce testimony regarding an alleged threat made by Cuevas against him in the days preceding J.G.T.'s disclosure of abuse. Tenorio alleged that, just days before J.G.T.'s disclosure, he had called the

police upon learning that his son's hand had been "slapped" by Cuevas and had "start[ed] to bleed." Cuevas allegedly told Tenorio, "I'm gonna make you pay for this." Tenorio asserted in the trial court that such evidence was relevant as part of the "chain of events" that led to J.G.T.'s disclosure.

The State moved to exclude testimony regarding the alleged threat, contending that the defense would use it "to paint [Cuevas] in a bad light and try to argue that she put the kids up to making these allegations." The State asserted that there was no connection between the purported threat and the disclosures of abuse and, furthermore, that there was no evidence that the children had been coerced into making the disclosures. Tenorio acknowledged that there was no evidence that Cuevas, or anyone else, had prompted J.G.T. to make the allegation.

The trial court ruled that the defense could

> certainly inquire of the kids on cross-examination whether or not they were prompted or told what to say or instructed to do something or not do something by a mother, an aunt, or another relative.
>
> And if it becomes, I guess for lack of a better word, suspicious that that occurred, then maybe this little scenario about Friday night and the alleged threat would become relevant. Without that, they're [*sic*] probably isn't a nexuses [*sic*]. So we'll reserve on that and see what happens when the kids are questioned.

The trial court stated that the testimony would not be admitted "[u]nless the kids connect the dots" and informed counsel that the necessary connection could be

provided by "[j]ust some evidence, some indecision, [that] some adult prompted these kids to say something as far as the story." Thus, the court ruled that testimony regarding the alleged threat was irrelevant—and, thus, inadmissible—absent some evidence that J.G.T. had been coerced into making the allegation against Tenorio.[3]

The trial court did not abuse its discretion by so ruling. Absent evidence that J.G.T. had been coerced or prompted to disclose the abuse, the alleged threat by Cuevas does not tend to make more or less probable "any fact that is of consequence to the determination of [this] action." ER 401. Indeed, absent such evidence, there is no connection at all between the alleged threat and J.G.T.'s disclosure. Rather, the assertion that Cuevas had the motivation to—and then did—prompt J.G.T. to make an allegation against her father is wholly speculative. As in Kilgore, 107 Wn. App. at 187, the exclusion of this speculative evidence was proper. See also State v. Fisher, 165 Wn.2d 727, 752-53, 202 P.3d 937 (2009) (holding that, in a prosecution for child molestation, the trial court properly excluded evidence of the defendant's ex-wife's alleged bias, as such evidence was too speculative and remote in time to be relevant). The

[3] We note that the trial court's ruling was not a final one, as the court indicated that it would consider admitting testimony regarding the alleged threat if the evidence presented at trial demonstrated that the children had been prompted to make allegations against their father. Tenorio did not question the children at trial regarding whether they had been so prompted. Accordingly, we need not review this claim of error, as Tenorio's challenge to the trial court's tentative ruling has not been preserved for appellate review. State v. Carlson, 61 Wn. App. 865, 875, 812 P.2d 536 (1991) ("[W]hen ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling."). However, we do so to point out that, even had the ruling been a final one, such testimony would properly be excluded.

trial court did not err by excluding such testimony.

III

Tenorio next contends that the trial court erred by excluding testimony by M.R.T. that she had heard Cuevas tell J.G.T. that Tenorio was a "child molester." However, because there was no evidence that J.G.T. had heard any such statement by her mother, the trial court did not abuse its discretion by excluding the proffered testimony.

Prior to the testimony of M.R.T., J.G.T.'s older sister, the State moved in limine regarding the scope of her testimony. According to defense counsel, M.R.T. had indicated during interviews that, on the evening before J.G.T. disclosed the abuse, Cuevas told J.G.T. "that her dad is a child molester." The State contended that the defense sought to introduce M.R.T.'s testimony about Cuevas's purported statement in order to show its effect on J.G.T.—in other words, to show that Cuevas's alleged statement influenced J.G.T.'s disclosure of abuse.[4] However, the State asserted, there was no evidence "that even though [J.G.T.] was in the room, that she even heard the statements or that they had any effect on her." The defense asserted that such testimony constituted "background," as Cuevas's alleged statement was made "in the context of" the conversation between Cuevas and J.G.T.

[4] Presumably, Tenorio sought to introduce M.R.T.'s testimony on this issue because he expected that J.G.T. would not testify that Cuevas had made such a statement. Indeed, when the trial court asked defense counsel whether J.G.T. would testify that she had heard Cuevas make the alleged statement, defense counsel did not assert that she would do so. During her testimony at trial, J.G.T. did not testify that she had heard her mother make any such statement.

The trial court granted the State's motion, noting that "because [Cuevas] made the statements doesn't mean that [J.G.T.] heard the statements." The court ruled that "[t]here has got to be connective tissue there, and the connective tissue is [J.G.T.] heard the statements." Thus, the trial court ruled, because M.R.T.'s testimony was being offered to demonstrate that Cuevas's purported statement influenced J.G.T., such testimony was inadmissible absent evidence that J.G.T. actually heard the alleged statement. The court permitted defense counsel to question J.G.T. with regard to whether she heard Cuevas's purported statement but precluded counsel from eliciting testimony from M.R.T. regarding that statement.

As explained above, evidence is relevant—and, thus, admissible—only where it is both probative and material. Evidence that J.G.T.'s mother stated that Tenorio was a "child molester" could very well be probative of whether J.G.T. was influenced in making the allegation of abuse. However, given the facts here, whether Cuevas made such a statement is not material—in other words, it is not "of consequence in the context of the other facts and the applicable substantive law" in this case. Sargent, 40 Wn. App. at 348 n.3. Absent evidence that J.G.T. heard her mother refer to Tenorio as a "child molester," the assertion that such a statement was made is immaterial to whether J.G.T. was thereby influenced in disclosing the abuse. Accordingly, the trial court did not err by excluding M.R.T.'s testimony regarding Cuevas's alleged

statement.

IV

Finally, Tenorio contends that insufficient evidence was presented to support the jury's verdict convicting him of child molestation in the first degree.[5] We disagree.

"Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." Thomas, 150 Wn.2d at 874-75.

"A person is guilty of child molestation in the first degree when the person has . . . sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.083(1). "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying

[5] Tenorio asserts on appeal that he moved in the trial court to dismiss all of the charges against him. The record does not support this assertion. Rather, Tenorio moved to dismiss the counts based upon incidents involving E.A.T. and M.R.T.—not the one count based upon the incident involving J.G.T., which resulted in the conviction from which Tenorio appeals. Thus, we do not review here a decision by the trial court; rather, we review whether substantial evidence supports the jury's verdict convicting Tenorio of child molestation in the first degree.

sexual desire of either party or a third party." RCW 9A.44.010(2). Touching of a child's intimate parts itself supports the inference that the touching was for the purpose of sexual gratification where the defendant is an unrelated adult with no caretaking function. State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991). "However, in those cases in which the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification." Powell, 62 Wn. App. at 917 (footnote omitted).

The evidence presented supports the jury's verdict. J.G.T. testified at trial that Tenorio touched her with his "private area," which he "move[d] up and down" against the side of her leg. J.G.T.'s school counselor, Eilers, testified that J.G.T. had conveyed to her the same version of the incident. According to Eilers' testimony, J.G.T. told her that Tenorio had "touched her private parts between her legs and then he started moving against her, and it felt like a wooden spoon handle against her." J.G.T. also told Eilers that, during this incident, Tenorio "was moving a lot." This testimony supports the jury's conclusion that the touching was performed for the purpose of sexual gratification.

Nevertheless, Tenorio contends that insufficient evidence supports the jury's verdict because, he asserts, J.G.T. initially denied to Cuevas that Tenorio had touched her inappropriately and disclosed the abuse only after Cuevas engaged in "highly suggestive questioning." Moreover, he contends that the

contact between Tenorio and J.G.T. "was a fleeting contact and nothing else was said or done." The record belies these assertions. Moreover, such assertions concern determinations of credibility and the persuasiveness of the evidence, which are within the jury's province and will not be disturbed on appeal. Thomas, 150 Wn.2d at 874-75.

Sufficient evidence supports the jury's verdict convicting Tenorio of child molestation in the first degree.[6]

Affirmed.

We concur:

[6] Tenorio has submitted a statement of additional grounds in which he, in effect, asserts that insufficient evidence supports his conviction and that Cuevas coerced the children into making the allegations against him. Because we have addressed these contentions herein, we will not do so further in response to Tenorio's statement of additional grounds.