IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES PATRICK WHEAT, Appellant.	No. 39282-8-II (Consolidated with No. 39673-4-II) UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found James Patrick Wheat guilty of first degree rape of a child. Wheat appeals, arguing that the trial court erred in permitting the State to attribute his daughter's incriminating statement to him as an adoptive admission. Wheat makes additional claims of error in a pro se statement of additional grounds (SAG). RAP 10.10. Because the trial court erred in admitting the statement attributed to Wheat, we reverse and remand for a new trial.

Facts

In May 2006, 10-year-old M.W. moved from her mother's home in Tennessee to live with Wheat, her father, in Vancouver. M.W.'s three adult half-sisters, Kelli Orthmeyer, Leanne Wheat,[1] and Christy Childs, also lived in the Vancouver area.

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[1] We subsequently use Leanne Wheat's first name for clarity and mean no disrespect.

In March 2007, her sisters asked M.W. whether Wheat was molesting her. M.W. initially said no, but when her sisters said they knew he was molesting her, she admitted it. She talked about the molestation with her sisters a second time, with Wheat and her aunt present.

M.W. returned to her mother's home a few days later and Childs contacted the police. The State charged Wheat by amended information with first degree rape of a child committed between August 1 and December 31, 2006.

At his trial, M.W. testified to the facts cited above and explained that Wheat touched her vagina twice with his mouth, twice with his penis, and once with his fingers. The first contact occurred when Wheat was sitting in a recliner and asked her to come over. When she did, he put his mouth on her vagina. The second time oral-genital contact occurred was when she sat on the couch with her arms wrapped around her legs. She could not remember telling her sisters that she once woke with Wheat's head between her legs, and she eventually denied that any such incident occurred. She admitted telling defense counsel before trial that oral-genital contact occurred only once and without penetration and explained that she was making additional allegations at trial because she needed closure. She refused to offer further detail about the second incident of oral-genital contact, however, because she did not want to talk about it. M.W. also said Wheat penetrated her once with his penis when they were in the bedroom. Thereafter, he touched her vagina once again with his penis, once with his fingers, and once with a vibrator.

Childs testified that soon after M.W.'s allegations surfaced, Orthmeyer came to her house and was visibly upset as she spoke on the phone. Childs approached Orthmeyer as she sat in her van and could hear that she was talking to Wheat. Childs testified that Orthmeyer screamed, "You're the one that said you had your head between her legs." 3 Report of Proceedings (RP) at

258.

Defense counsel objected, arguing that there was no foundation and that the statement was hearsay. The prosecutor responded that the foundation had been laid and that the statement was not hearsay because "it's related to a conversation between two people." 3 RP at 259. The trial court overruled the objection, stating, "Means of identification." 3 RP at 259. The prosecutor then asked Childs whether she was sure Orthmeyer was talking to Wheat and, over defense counsel's objection, asked her to repeat Orthmeyer's statement. Childs did so and the defense again objected without success. Childs did not describe the conversation beyond Orthmeyer's statement.

After Childs finished testifying, Wheat moved for a mistrial. Counsel argued that Childs's description of Orthmeyer's statement was hearsay and inadmissible as an adoptive admission because there was no testimony about what Wheat said after Orthmeyer's statement. The court denied a mistrial, ruling that the statement was admissible as an adoptive admission.

Orthmeyer testified initially as a prosecution witness and said that Wheat had admitted showing M.W. pornography once to teach her about sex and that he had bought M.W. G-string underwear at her request. Orthmeyer denied discussing the allegations with Wheat on the phone when Childs was nearby and said he never admitted any such allegations. When called by the defense, she said that M.W. volunteered that she once woke to find Wheat's head between her legs. Orthmeyer testified that during an earlier discussion about sex, M.W. was very forthcoming and inquisitive, and she added that M.W.'s reputation for veracity is bad. Leanne also testified that M.W. said she once awoke to find Wheat's head between her legs.

After this testimony, the defense again moved for a mistrial, arguing that the court should

reconsider its adoptive admission ruling because all of the criteria for admissibility were not satisfied. The court denied the motion without explanation. Jessica Gray, M.W.'s mother, then testified that M.W. had mentioned the abuse allegations to everyone she saw when she returned to Tennessee and that her daughter's reputation for veracity is bad.

The trial court instructed the jury that to convict, it had to unanimously agree that one particular act of rape had been committed. During closing argument, the State described Orthmeyer's statement and said that out of the acts of sexual contact described, the State was focusing on the oral sex described in that statement and by M.W. The State asserted that it had provided the jury with "an adoptive admission to the oral sex, on the phone." 5 RP at 536. The State argued that although it did not need corroboration to prove M.W.'s allegations, Wheat's adoptive admission provided corroboration. After the defense argued that Childs's description of Orthmeyer's statement was evidence of Childs's bias against Wheat, the State again described the statement on rebuttal and reiterated that it corroborated M.W.'s allegations. Finally, the State referred to Wheat's statements to his daughters and to the "admissions" at trial as evidence of his guilt.

The jury found Wheat guilty as charged, and the trial court imposed a standard range sentence. Wheat appeals his conviction.[2]

Discussion

Adoptive Admission

Wheat contends that the trial court erred in permitting the State to attribute Orthmeyer's telephone statement to him as an adoptive admission.

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[2] The State has withdrawn its appeal of Wheat's sentence.

Determining whether evidence is admissible is within the trial court's discretion and will be reversed only upon a showing of manifest abuse of discretion. *State v. Crowder*, 103 Wn. App. 20, 25, 11 P.3d 828 (2000), *review denied*, 142 Wn.2d 1024 (2001). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds; i.e., if the decision rests on facts unsupported by the record or on the wrong legal standard. *State v. Dixon*, 159 Wn.2d 65, 76, 147 P.3d 991 (2006); *Crowder*, 103 Wn. App. at 25-26.

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay generally is not admissible except as provided by the rules of evidence, court rules, or statute. ER 802. A statement is not hearsay, however, if it is "offered against a party and is . . . (ii) a statement of which the party has manifested an adoption or belief in its truth." ER 801(d)(2). When an incriminating or accusatory statement is made in the accused's presence and hearing, and he does not deny it, contradict it, or object to it, both the statement and the accused's reaction are admissible as evidence of his acquiescence in its truth. *State v. Neslund*, 50 Wn. App. 531, 550, 749 P.2d 725, *review denied*, 110 Wn.2d 1025 (1988). An adoptive admission is attributed to the defendant and becomes his own words. *State v. Cotten*, 75 Wn. App. 669, 689, 879 P.2d 971 (1994), *review denied*, 126 Wn.2d 1004 (1995).

A party may manifest his adoption of a statement by words, gestures, or silence. *Neslund*, 50 Wn. App. at 550. Because of the inherently equivocal nature of silence, evidence of an adoption by silence must be received with caution:

> Silence constitutes an admission only if (1) the party-opponent heard the accusatory or incriminating statement and was mentally and physically able to respond; and (2) the statement and circumstances were such that it is reasonable to conclude the party-opponent would have responded had there been no intention to acquiesce.

Neslund, 50 Wn. App. at 551.

Before admitting any evidence as an adoptive admission, the trial court must find facts from which the jury could reasonably conclude that the defendant "'actually heard, understood, and acquiesced in the statement.'" *Neslund*, 50 Wn. App. at 551 (quoting *United States v. Moore*, 522 F.2d 1068, 1075 (9th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976)). The circumstances also must be such that an innocent person would normally be induced to respond. *Cotten*, 75 Wn. App. at 689; *Neslund*, 50 Wn. App. at 551. The trial court's decision is only a threshold determination; whether an accused has adopted an admission is a matter to be determined ultimately by the jury. *Neslund*, 50 Wn. App. at 551-52.

The State argues that the circumstances here are similar to those supporting the admissibility of an adoptive admission in *Neslund.* There, the witness testified that he overheard the defendant and her brother talking about their killing of the defendant's husband. This testimony showed that the defendant heard and understood her brother's incriminating statements and that she had the ability to, but did not, deny the account. *Neslund*, 50 Wn. App. at 553. His graphic account of the murder thus was properly admitted as an adoptive admission. *Neslund*, 50 Wn. App. at 553.

In this case, however, there is no evidence of Wheat's reaction to Orthmeyer's statement. Childs's testimony ended with her description of that statement; she never said whether Wheat responded with either silence or a statement. Accordingly, one of the key components of an adoptive admission is missing; there is no evidence of the defendant's acquiescence in the statement's truth. This case is more similar to *United States v. McKinney*, 707 F.2d 381 (9th Cir. 1983), in which the Ninth Circuit ruled that a witness's testimony did not provide an adequate

foundation to introduce a statement as an adoptive admission because it was impossible to determine whether the defendant heard and understood the statement or whether the circumstances were such that he could be expected to respond. 707 F.2d at 384. Consequently, we hold that the trial court committed an error of law when it permitted the State to attribute Orthmeyer's statement to Wheat as an adoptive admission on this record.

Anticipating this result, the State argues that this evidence was admissible as evidence of bias, and we turn to this theory next. *See State v. Avery*, 103 Wn. App. 527, 537, 13 P.3d 226 (2000) (we may affirm trial court's admission of evidence on any basis the record supports).

Evidence of Bias

The State argues that Orthmeyer's statement was admissible impeachment evidence to show her bias toward Wheat when she later denied making any such statement. Even if we accept the logic of this argument, the record does not establish that the statement was used to impeach Orthmeyer's credibility.

A witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with her testimony in court, even if such a statement would otherwise be inadmissible as hearsay. *State v. Clinkenbeard*, 130 Wn. App. 552, 569, 123 P.3d 872 (2005). Impeachment evidence affects the witness's credibility but is not probative of the substantive facts encompassed in such evidence. *Clinkenbeard*, 130 Wn. App. at 569. Consequently, the State may not use impeachment as a guise for submitting to the jury substantive evidence that would otherwise be inadmissible. *Clinkenbeard*, 130 Wn. App. at 569-70. In *Clinkenbeard*, the State improperly cited impeachment testimony as substantive evidence of guilt during closing argument. 130 Wn. App. at 570-71. The same is true here. Because the State clearly used Childs's testimony as

substantive evidence, we reject the argument that it could have been properly admitted to impeach Orthmeyer.

Harmless Error

The improper admission of evidence may be harmless error if that evidence is of minor significance in reference to the "overall, overwhelming evidence as a whole." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error in admitting evidence that does not result in prejudice to the defendant does not require reversal. *Bourgeois*, 133 Wn.2d at 403.

M.W. testified that Wheat engaged in oral-genital contact with her on two occasions, but she described only one episode in detail. Moreover, during trial, M.W. denied the act of oral sex that both of her sisters said she had described to them, and both her mother and Orthmeyer testified that her reputation for veracity is bad. The State contends that the evidence that Wheat showed M.W. pornographic movies and bought her G-string underwear is corroborative of his guilt. Although this evidence demonstrates poor judgment and a total lack of parenting skills, it does not prove the act of oral sex on which the State relied to the exclusion of the other sexual contact described.

Without Orthmeyer's statement, the evidence of oral-genital contact was not overwhelming. The State clearly relied on Orthmeyer's statement as substantive evidence to bolster its case; without it, the State had to rely on M.W., whose testimony was inconsistent and somewhat confusing. Defense counsel pointed out the significance of Orthmeyer's statement to the State's case during closing argument: "The State will ask you to make plenty of that, because there—there's not much else to make anything of." 5 RP at 556. Orthmeyer's erroneously admitted statement was not of minor significance when viewed in light of the remaining evidence, and its admission was erroneous and was not harmless. Accordingly, we reverse and remand for a new trial.

Statement of Additional Grounds

We need not discuss Wheat's complaints of error involving discretionary decisions that are unlikely to occur on remand. We respond briefly to the other issues he raises.

Wheat complains that he was not read his rights after his arrest, but he did not raise this issue below. The record is silent on this issue and we cannot consider it further. The State properly questioned Orthmeyer about her prior theft conviction; this conviction was admissible under ER 609. Moreover, the defense began Orthmeyer's cross-examination by questioning her about the conviction, so this claim of error is waived. There is no testimony about a poem that M.W. allegedly wrote in which she recanted because she denied the existence of any such poem in an offer of proof. If Wheat has evidence that M.W. recanted after she testified, he should bring it to the trial court's attention on remand. Any bias Childs may have against Wheat may be explored on remand if Wheat wants the reasons for that bias disclosed.

We reverse and remand for proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, J.

WORSWICK, A.C.J.