IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEVEN M. DILLON, Appellant.	No. 40085-5-II UNPUBLISHED OPINION

Armstrong, J. — Steven Dillon appealed his convictions for second degree child rape and first degree kidnapping with sexual motivation, arguing in part that (1) the trial court should have suppressed his confession because the police violated the "knock and announce" rule when they entered his apartment to arrest him, and (2) the State failed to prove the kidnapping charge. In our previous opinion, *State v. Dillon*, 163 Wn. App. 101, 257 P.3d 678 (2011), we held that the State failed to prove kidnapping and we remanded for the trial court to dismiss the charge together with its sentencing enhancement. We retained jurisdiction but directed the trial court on remand to enter findings of fact and conclusions of law pertaining to the claimed "knock and announce" violation.

After an evidentiary hearing, the trial court entered findings and conclusions and transmitted those to us. Now, in supplemental briefing before us, Dillon concedes that the findings and conclusions support the trial court's original ruling that the police lawfully searched his apartment; thus, Dillon's statement and any evidence resulting from the search was admissible. We accept Dillon's concession and now address his remaining issues that: (1) the trial court erred

when it failed to directly answer a jury question during deliberations; (2) he was denied his right to present exculpatory evidence on the reasonableness of his belief concerning the victim's age; and (3) there was insufficient evidence for the finding of a "sexual predator" sentencing enhancement. Finding no error, we affirm.

FACTS

Sometime before August 2008, L.M., a 13-year-old male, registered for a local Portland telephone chat service.[1] Under an alias, L.M. recorded an introductory profile message representing that he was 18 years old.[2] Dillon contacted L.M. through the chat service, and the two talked on the phone at least three times on the evening in question.[3] During one of their conversations, Dillon invited L.M. to come to his Vancouver apartment. L.M., who lives in Portland, Oregon, said that he did not have a car and asked Dillon to pick him up.

Dillon picked up L.M. around midnight in Portland and drove him back to Dillon's apartment where they watched a pornographic movie and had oral sex. Later, at L.M.'s request, Dillon drove him back to Portland. L.M. told his mother about the incident and also reported it to the police.

Dillon told the police that he met L.M. through a chat service, that they agreed to meet at a location in Portland suggested by L.M., that they returned to his apartment and engaged in consensual oral sex, and that he took L.M. back to Portland at L.M.'s request. He also told the

[1] A telephone chat service is a membership-based dating service used in particular geographic areas to connect with like-minded people.

[2] The service required that users be at least 18 years old.

[3] L.M. testified to three phone calls but phone records showed fifteen calls from L.M. to Dillon.

police he believed L.M. was at least 18 years old because L.M. repeatedly represented he was 18, a person had to be 18 to use the chat service, and L.M. had claimed that he worked full time at a nursing home.

The State charged Dillon with second degree child rape and alleged that the offense was predatory. The trial court limited the evidence of L.M.'s representations of his age to the public, including web site profiles where he stated his age as 18. The trial court ruled that only representations made directly to Dillon were relevant to show the reasonableness of his belief that L.M. was at least 14 years old, an affirmative defense to child rape.

During deliberations, the jury asked for clarification of the affirmative defense to child rape where a defendant claims to have reasonably believed the victim to be at least 14 years old based on the victim's statements. The trial court responded that the jury was the sole judge in determining what weight to give testimony. The jury found Dillon guilty of child rape as a predatory offense.

ANALYSIS

I. Jury's Inquiry During Deliberations

Dillon assigns error to the trial court's response to the jury's question about the affirmative defense instruction. Dillon argues that although the court correctly stated the law, it failed to specifically address the jury's question and clarify the burden of proof on his affirmative defense to the second degree child rape charge.

The trial court, as requested by defense counsel, instructed the jury on the affirmative defense that Dillon reasonably believed L.M. to be at least 14 years old:

It is not a defense to the charge of Rape of a Child in the Second Degree if at the

> time of the act the defendant did not know the age of [L.M.] or the defendant believed him to be older.
>
> It is, however, a defense to the charge of Rape of a Child in the Second Degree that at the time of the acts the defendant reasonably believed [L.M.] was at least 14 years of age, based upon declaration said to the age by [L.M.].
>
> The defendant has a burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means you must be persuaded, considering all the evidence of the case, that it is more probably true than not true. If you find the defendant has established this defense, it will be your duty to return a verdict of not guilty as to the charge of Rape of a Child in the Second Degree.

Clerk's Papers (CP) at 262. During deliberations, the jury asked:

> If Dillon thought that [L.M.] was over 14 and [L.M.] stated (declared an older age) do we find him not guilty on that statement only? for the child rape in the 2nd degree?

CP at 275. The judge responded, "You are the sole judges of the weight to be given to the testimony." CP at 275.

Due process protections under both the federal and state constitutions require that a jury be properly instructed on all elements of the offense charged. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009). The failure to so instruct a jury constitutes constitutional error that a defendant can raise for the first time on appeal. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001).

A trial court has discretion whether to further instruct the jury after it has begun deliberations. *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). We review claimed errors of law in such instructions de novo, evaluating the instruction "'in the context of the instructions as a whole.'" *In re Pers. Restraint of Hegney*, 138 Wn. App. 511, 521, 158 P.3d 1193 (2007) (quoting *State v. Benn*, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993)). Jury instructions as a

whole must accurately state the law and must allow each party to argue its theory of the case. *Benn*, 120 Wn.2d at 654. Jury instructions are sufficient if they are readily understood and are not misleading to the ordinary mind. *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968).

Contrary to Dillon's claim here, the trial court's comment that the jury must weigh the evidence did not alter the standards for deciding the case. We presume that a jury follows a court's instructions. *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). The trial court instructed the jury to resolve the affirmative defense issue by applying the preponderance of the evidence standard. Nothing in this response invited the jury to apply a different burden of proof or altered this standard. Moreover, before deliberations, the trial court instructed the jurors that they were the "sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each." CP at 269. Thus, in reiterating an instruction already given, the trial court effectively declined to answer the jury's question, an option well within its discretion. *See State v. Allen*, 50 Wn. App. 412, 419-20, 749 P.2d 702 (1988) (no prejudice results where a court's instruction is neutral or conveys no affirmative information). Dillon's argument concerning the trial court's mid-deliberations instruction fails.

II. Exclusion of Evidence

Dillon argues that the trial court improperly limited the evidence that L.M. misrepresented his age to the public by virtue of the chat service. He contends that such evidence would have reinforced the defense claim that L.M. misrepresented his age to Dillon.

An accused's right to due process is, '"in essence, the right to a fair opportunity to defend against the State's accusations.'" *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010)

(quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). But the right to introduce evidence is not absolute, and a defendant has no right to offer evidence that is inadmissible under the rules of evidence. *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988); *Jones*, 168 Wn.2d at 720. A trial court has broad discretion in ruling on evidentiary matters; we will overturn its decision only for a manifest abuse of that discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). An aggrieved party must establish manifestly unreasonable or untenable grounds for the trial court's decision before we will find an abuse of discretion. *Magers*, 164 Wn.2d at 181.

If we find error, we will reverse only if the defendant can show within reasonable probabilities that the trial court's ruling materially affected the trial outcome and, thus, was prejudicial. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). We presume that an error in excluding evidence that infringes on a defendant's constitutional right is prejudicial. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). We must reverse unless we are satisfied beyond a reasonable doubt the jury would have convicted absent the error. *Guloy*, 104 Wn.2d at 425.

To prove his affirmative defense, Dillon had to show that he reasonably believed L.M. to be at least 14 years old, based on L.M.'s statements. RCW 9A.44.030(2), (3)(b). The State moved to preclude evidence of L.M.'s age representations to others, arguing that the evidence was improper under ER 412 and RCW 9A.44.020 because it might cause jurors to infer that L.M was promiscuous.[4] The trial court ruled the evidence was irrelevant because "[i]t's what . . .

[4] ER 412 incorporates RCW 9A.44.020 in the context of criminal cases. RCW 9A.44.020, also known as the Rape Shield Statute, generally prevents evidence of the victim's past sexual

[Dillon] knows and what was related to him is what is germane [sic]." Report of Proceedings (RP) at 459. Arguably, Dillon learned some of what he knows from L.M.'s representation to others.

But even if we assume the trial court's ruling was in error, Dillon cannot show prejudice. During the cross-examination of L.M.'s mother, defense counsel successfully elicited that L.M. represented that he was 19 years old on his MySpace page. L.M.'s mother identified him as the "Kareem" in the profile and that he gave his age as 19. RP at 440-41. Then, in closing argument, defense counsel highlighted the evidence of L.M.'s MySpace page, reminding the jury that L.M.'s mother acknowledged that he "declares himself to be 19 years of age in this website, and portraying himself out to the public that way." RP at 763. Dillon does not specify what additional evidence he wanted to offer aside from the general assertion that L.M. misrepresented his age to numerous people. Thus, despite the trial court's pretrial ruling, Dillon succeeded in showing that L.M. had represented to the public that he was 19, and his claim of prejudicial error regarding the trial court's exclusion of evidence fails.

III. Sufficiency of Evidence: Special Verdict

Dillon argues that the State failed to prove the predatory sentencing enhancement for second degree child rape. He reasons that the State offered no evidence that he and L.M. did not know each other for more than 24 hours before their meeting. He further contends that absent a specific definition of "know," the State failed to meet its burden of proof because it is possible

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behavior from being admitted as evidence. This includes, but is not limited to, a victim's marital history, divorce history, reputation for promiscuity, non-chastity, or sexual mores contrary to community standards. RCW 9A.44.020(2).

that he and L.M. communicated by telephone more than 24 hours before their physical meeting. Br. of Appellant at 46. The State counters that any contact between Dillon and L.M. before they actually met occurred under false identities.

In considering the sufficiency of the evidence, we construe the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim that the evidence was insufficient admits the truth of the State's evidence and all reasonable inferences from that evidence. *Salinas*, 119 Wn.2d at 201.

Under RCW 9.94A.836(1), in a prosecution for second degree child rape, the prosecuting attorney shall file a special allegation that the offense was predatory whenever sufficient admissible evidence exists. As charged in this case, "predatory" means that the perpetrator was a stranger to the victim. RCW 9.94A.030(38).[5] "Stranger" means that the victim did not know the offender 24 hours before the offense. RCW 9.94A.030(50).

L.M. testified that, after connecting through the chat service, he and Dillon spoke three times in one night, leading up to their eventual meeting that same night. L.M. also described the night he started talking to Dillon, stating that the sun had gone down, that they had talked over the phone, and that he had gotten Dillon to pick him up. Although Dillon claims this testimony is not credible, in challenging the evidence's sufficiency, he has admitted the truth of the State's evidence. *Salinas*, 119 Wn.2d at 201. Based on this evidence, a rational trier of fact could have

[5] Although since recodified, or in some instances marginally altered, the law in existence at the time Wagar committed his crime and applicable to his case is substantially the same today and carries the same import as it did in 2008. Thus, this opinion cites to the current versions of the Sentencing Reform Act for purposes of clarity.

found that L.M. did not know Dillon 24 hours before the evening of the rape. Moreover, the

phone records confirm that their telephone conversations occurred on the date of the offense. Finally, the testimony that Dillon thought he was meeting a young blonde female and that L.M. thought he was meeting a man named "Dalton" further supports the inference they did not know each other until they physically met. RP at 475. Accordingly, the evidence was sufficient to support the sentencing enhancement.

IV. Statement of Additional Grounds (SAG)

In his SAG, Dillon argues that two jurors should have been removed from the jury, one because her husband and son both worked in corrections facilities, and the other because she was acquainted with an attorney at the prosecuting attorney's office. He also argues that during his first contact with the police, they looked around his apartment despite not informing him why they were there.

During voir dire, one of the jurors informed the court that she was a family friend of an attorney who worked at the prosecutor's office. When asked whether this friendship might influence her as a juror, she said it would not. She also said she would listen to evidence and follow the trial court's instructions. The other juror told the court that her husband was a commander in the jail and that her son was a custody officer. But she also said she could be fair and impartial.

Dillon did not object to either juror being impaneled and thus did not preserve this issue for appeal. RAP 2.5(a). And even if we consider this a constitutional error, Dillon cannot show prejudice. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Both women were questioned as to whether they felt their respective relationships would affect their impartiality and

both maintained that they would not. Without evidence to the contrary or other evidence of bias, Dillon cannot show that he was actually prejudiced. *See Kirkman*, 159 Wn.2d at 935 (if the facts necessary to adjudicate the claim are not in the record on appeal, no actual prejudice is shown and the error is not manifest).

As to his claim that an officer looked around his apartment in the first police visit, Dillon waived any possible error by consenting to the entry. *State v. Morse*, 156 Wn.2d 1, 8, 123 P.3d 832 (2005). The police officer knocked on the door and entered with Dillon's consent. Dillon does not contest that he provided consent but alleges only that the officer did not inform him of his reasons for being there. Because Dillon unconditionally consented to whatever search might have occurred, he cannot now challenge the police officer's presence in his house. *Morse*, 156 Wn.2d at 8. This argument fails.

We affirm the conviction for second degree child rape and the sentencing enhancement.

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 in accordance with RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Hunt, J.

Worswick, C.J.