IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 29888-4-III
Respondent,	)	
v.	)	
WILLIAM T. MILLER,	)	UNPUBLISHED OPINION
Appellant.	)	

Kulik, J. — A jury found William Miller guilty of four counts of second degree child molestation. Mr. Miller appeals, contending the evidence was insufficient to support the element of the crime that K.C. was under 14 years old at the time of the alleged abuse. In his statement of additional grounds for review, he also claims several evidentiary errors, juror bias, a speedy trial violation, and ineffective assistance of counsel.

K.C. testified she was possibly age 11, but definitely 12, when the acts of abuse occurred, during sixth grade, the year of her twelfth birthday. We defer to the jury's assessment of witness credibility.

Mr. Miller's contentions are without merit. We affirm the convictions.

FACTS

In 2004, Mr. Miller began dating K.C.'s mother, P.C.[1] Within a few months, Mr. Williams moved in with P.C. and her daughter K.C. K.C. was born in 1992. Mr. Miller and K.C. developed a strained relationship. On March 15, 2010, Mr. Miller and K.C. had a confrontation over Mr. Miller's parental boundaries. That day, K.C. moved in with her father.

On Father's Day in 2010, K.C.'s father found some letters in K.C.'s bedroom. K.C. wrote in the letters that Mr. Miller molested her. Concerned over the content of the writings, the father contacted law enforcement. A deputy arrived and K.C. reluctantly told the deputy that Mr. Miller molested her three years ago, and that the abuse occurred over the span of one year.

On June 29, 2010, Detective Randy Grant interviewed K.C. The interview was recorded. K.C. stated that Mr. Miller would touch her breasts and vaginal area while sitting on the recliner. K.C. could tell that Mr. Miller had an erection. K.C. also said that Mr. Miller would come into the bathroom while she was taking a shower and throw water on her. K.C. also stated that Mr. Miller would lie down in bed with K.C. straddling him.

[1] We use initials to protect K.C.'s identity.

He would hold her hips and make her move back and forth. There was always clothing or bedding between them; no penetration occurred. Detective Grant found that no physical evidence of the crime existed.

Detective Grant asked the trial court for permission to record a telephone call between Mr. Miller and K.C. The court granted the request, and K.C. voluntarily agreed to participate. During the conversation, K.C. asked direct and indirect questions about the inappropriate contact. Mr. Miller did not admit to the abuse. However, Mr. Miller apologized for everything that went wrong and for K.C. feeling bad.

Detective Grant and Detective Mitch Matheson interviewed Mr. Miller at the police station a few days later. Mr. Miller gave permission to record the interview. The detectives used various investigative methods to elicit information from Mr. Miller. Although Mr. Miller expressly denied inappropriate contact with K.C., he admitted that K.C. would sometimes sit in his lap and sometimes dance around the kitchen. Mr. Miller also said that K.C. initiated the contact. Detective Grant arrested Mr. Miller at the end of the interview.

The State charged Mr. Miller with four counts of second degree child molestation and two counts of third degree child molestation.

At trial, K.C. testified about the sexual contact by Mr. Miller. She also testified

that the sexual contact occurred throughout her middle school years and that the acts began when she was in sixth grade. K.C. celebrated her twelfth birthday that year. She stated that the acts continued frequently through seventh and eighth grade and ended prior to her freshman year in high school. Mr. Miller testified that he was 56 years old at the time of trial.

The jury heard the recorded telephone conversation between K.C. and Mr. Miller. The jury also heard portions of Detective Grant's recorded interview of Mr. Miller. The jury found Mr. Miller guilty of four counts of second degree child molestation and not guilty of third degree child molestation. The trial court sentenced Mr. Miller to 108 months of confinement.

Mr. Miller appeals, contending that the State presented insufficient evidence to prove that K.C. was less than 14 years old at the time the crime occurred. He also assigns error to several issues in his statement of additional grounds.

ANALYSIS

"The test for determining the sufficiency of the evidence is whether, after viewing all evidence in the light most favorable to the State, 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]ll reasonable inferences from the evidence must be drawn in favor of

the State and interpreted most strongly against the defendant." *Id*. In making the challenge, the defendant admits to the truth of the State's evidence and all reasonably drawn inferences. *Id*. The reviewing court will defer to the fact finder on issues of conflicting testimony, credibility of the witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Sufficient Evidence—Age of Victim. To prove second degree child molestation, the State needed to show that the defendant knowingly had sexual contact with the victim who was not his wife, when the victim was at least 12 years old but less than 14 years old at the time of the molestation. RCW 9A.44.086.

At trial, K.C. testified that she was possibly 11 years old but definitely 12 years old when the abuse happened. She testified that the sexual contact began when she was in the sixth grade, the year of her twelfth birthday. She also stated that the acts continued during her seventh and eighth grade school years, ending prior to her freshman year in high school.

Based on the testimony of K.C., any rational trier of fact could have found guilt beyond a reasonable doubt. Any conflicting statements given by K.C. during the initial investigation by detectives were to be weighed by the jury and are not a basis to set aside the verdict. Sufficient evidence supports the element that K.C. was at least 12 years old

but less than 14 years old at the time of the molestation.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Mr. Miller submitted a lengthy statement of additional grounds. The following issues are summarized below.

Right to an Unbiased Jury. Whether the trial court erred in denying a new trial based on juror misconduct is reviewed for an abuse of discretion. *State v. Cho*, 108 Wn. App. 315, 320, 30 P.3d 496 (2001).

Article I, section 21 of the Washington Constitution provides that "[t]he right of trial by jury shall remain inviolate." The right of trial by jury means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct. *Alexson v. Pierce County*, 186 Wash. 188, 193, 57 P.2d 318 (1936).

"'It is the general rule that if a juror deceives or misleads a party by falsely testifying when being examined as to his competency, and as a result the juror, though in fact disqualified, is accepted, such conduct, when discovered, *after verdict*, will be ground for a new trial.'" *Grist v. Schoenburg*, 115 Wash. 335, 340, 197 P. 35 (1921) (quoting 20 Ruling Case Law *New Trial* § 27, at 242 (1918)).

If a party knows of an implied bias and fails to challenge on that ground, the challenge is waived. *See Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn. App. 747,

760-61, 812 P.2d 133 (1991).

The moving party bears the burden of proving that juror misconduct occurred. *State v. Barnes*, 85 Wn. App. 638, 668-69, 93 P.2d 669 (1997). The moving party may overcome the burden by submitting affidavits of persons with firsthand knowledge of the misconduct. *State v. Hawkins*, 72 Wn.2d 565, 568, 434 P.2d 584 (1967). On appeal, the party challenging the trial court's decision on the objection must show more than a mere possibility that the juror was prejudiced. *State v. Stackhouse*, 90 Wn. App. 344, 350, 957 P.2d 218 (1998).

Mr. Miller suggests that jurors 4 and 8 knew him but he presents no supporting evidence. Without proper evidence to support the allegation, this issue cannot be addressed. Even if this court was to examine this contention on its merits, his argument still fails because Mr. Miller does not offer new evidence of potential juror bias that was not known at trial. Mr. Miller stated that he recognized jurors 4 and 8 from the occasions they worked together. Despite this knowledge, the record does not show that Mr. Miller raised the issue of their relationship during voir dire or informed the court of the personal connection. Therefore, Mr. Miller waives the right to object on appeal.

Mr. Miller also contends that the trial court should have dismissed the jury after juror 41 heard another potential juror make a comment on how the juror knew the

defendant and how to save the county money in regard to Mr. Miller. Again, Mr. Miller fails to present a record of the court's treatment of this statement; the record only shows that the statement was brought to the attention of the trial court. Mr. Miller also fails to present affidavits to show how this statement prejudiced other jurors. Based on the record before us, the trial court did not abuse its discretion when deciding this issue.

Admission of Evidence—Recorded Telephone Conversation, Taped Interview, Notebook Pages and Letters. "Whether a prior statement is admissible under ER 801(d)(1)(ii) is within the trial court's discretion and will not be reversed absent a showing of manifest abuse of discretion." *State v. Makela*, 66 Wn. App. 164, 168, 831 P.2d 1109 (1992).

Errors assigned to the admission of evidence will not be reviewed on appeal unless the party objected at trial or if there is a manifest error affecting a constitutional right. *State v. Brush*, 32 Wn. App. 445, 456-57, 648 P.2d 897 (1982).

A statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is consistent with his testimony and offered to rebut an express or implied charge of recent fabrication. ER 801(d)(1)(ii).

Mr. Miller challenges the admission of the recorded telephone call, the taped interview, and notebook notes by K.C. His challenges fail. Mr. Miller did not object to

the admission of these items. In the taped interview, Mr. Miller stipulated to the admission of the recorded interview before trial; Mr. Miller's attorney worked in conjunction with the State to alleviate any objections that Mr. Miller would have raised at trial. Also, Mr. Miller cannot object to the admission of K.C.'s spiral notebook notes because Mr. Miller was the party who entered the spiral notebook into evidence. He cannot assign error to evidence for which he sought admission. *See Sullins v. Sullins*, 65 Wn.2d 283, 285, 396 P.2d 886 (1964).

Mr. Miller objected to the admission of the letters written by K.C. Mr. Miller contended that the letters contained hearsay statements and were not needed to show state of mind. Mr. Miller also contended that it was K.C.'s duty to establish the alleged conduct and the letters could not be used in place of K.C.'s testimony. The trial court ultimately determined that these letters could be admitted under ER 801(d)(1)(ii) to rebut an expressed or implied charge of fabrication against K.C.

The trial court did not abuse its discretion in admitting the letters under ER 801(d)(1)(ii). During Mr. Miller's cross-examination of K.C., Mr. Miller implied that K.C. instigated the charges against Mr. Miller for revenge. The letters were admitted to rebut the charges that K.C. falsified abuse allegations to get back at Mr. Miller.

Search Warrant—Telephone Call. This court will affirm a magistrate's order to

intercept a telephone call if the facts set forth in the application are minimally adequate to support the magistrate's decision to grant the order. *State v. Porter*, 98 Wn. App. 631, 634, 990 P.2d 460 (1999). A magistrate has considerable discretion in determining whether the statutory safeguards required to issue the order have been met. *Id*.

Absent a timely motion by the defense to suppress unlawfully gained evidence, the trial court is not obligated to conduct an evidentiary hearing on a suppression hearing. *State v. Williams*, 7 Wn. App. 164, 167, 499 P.2d 60 (1972). Failing to object to the admission of a taped conversation waives any challenges on appeal. *State v. Sengxay*, 80 Wn. App. 11, 15, 906 P.2d 368 (1995).

Mr. Miller contends the application to intercept the telephone conversation was invalid. Before trial, Mr. Miller did not move to suppress the taped telephone call. On appeal, he waived the right to challenge the legality of the application.

Defense's Decision Not to Call the Expert Witness. The right to confront adverse witnesses is an issue of constitutional magnitude, which this court may consider for the first time on appeal. *State v. Clark*, 139 Wn.2d 152, 156, 985 P.2d 377 (1999) (quoting RAP 2.5(a)(3)).

Under the Sixth Amendment to the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

against him." Along with the opportunity to be confronted, the amendment also gives a criminal defendant the opportunity to confront witnesses who are against him or her. *Clark*, 139 Wn.2d at 158.

Mr. Miller maintains that the exclusion of his expert witness violated the confrontation clause. Here, the expert witness was a defense witness that was to be used to rebut K.C.'s testimony. Defense counsel chose not to call the expert witness. The expert was not an adverse party against Mr. Miller. The confrontation clause is not implicated, and Mr. Miller's contention fails.

Speedy Trial. A trial court's decision to grant a continuance is reviewed for an abuse of discretion. *State v. Flinn*, 119 Wn. App. 232, 243, 80 P.3d 171 (2003) (quoting CrR 3.3), *aff'd*, 154 Wn.2d 193, 110 P.3d 748 (2005). Moving for a continuance "by or on behalf of any party waives that party's objection to the requested delay." CrR 3.3(f)(2).

Mr. Miller contends that the trial court violated his right to a speedy trial by granting multiple continuances. Mr. Miller requested three continuances. Mr. Miller did not object to the other continuance raised by the prosecution; instead, he agreed to it. Therefore, Mr. Miller waived his right to raise a speedy trial violation because he either requested the continuance or failed to object.

Ineffective Assistance of Counsel. A defendant may assign error based on ineffective assistance of counsel for the first time on appeal because the error involves an issue of constitutional magnitude. *State v. Greiff*, 141 Wn.2d 910, 924, 10 P.3d 390 (2000).

To prevail in an ineffective assistance of counsel claim, the defendant must meet both parts of the two-part test showing that (1) defense counsel was deficient, and (2) that the deficient performance by counsel prejudiced the defense. *State v. Denison*, 78 Wn. App. 566, 574-75, 897 P.2d 437 (1995). Deficiencies by defense counsel must involve "'errors so serious that counsel was not functioning as the "counsel" guaranteed . . . by the Sixth Amendment.'" *Id*. at 575 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). "[P]rejudice is defined as 'errors . . . so serious as to deprive the defendant of a fair trial.'" *Id*. (quoting *Strickland*, 466 U.S. at 687).

Mr. Miller alleges ineffective assistance of counsel. His specific claims of ineffective assistance mirror the issues he raised in his statement of additional grounds for review.

Mr. Miller's contention involving juror bias and ineffective assistance of counsel cannot be addressed because Mr. Miller does not offer evidence to support juror bias.

Defense counsel did not display deficient performance in respect to K.C.'s letters. He objected to the prejudicial evidence and was overruled by the trial court.

Defense counsel did not act ineffectively in offering the evidence of K.C.'s notebook notes. Counsel reasonably offered this evidence to show that K.C. changed her testimony between the time she wrote the notes and the time of trial. A comparison of the notes and trial testimony shows these discrepancies. This appeared to be part of defense counsel's strategy that K.C. fabricated the allegations to invoke revenge against Mr. Miller. Defense counsel also did not act ineffectively by agreeing to admit the recorded telephone call and interview. Both of these items offer evidence of Mr. Miller's innocence.

Defense counsel's actions do not support a conclusion of deficient performance. Defense counsel's decision not to call the expert witness was a tactical decision. Defense counsel stated to the trial court that the purpose of the expert witness was to rebut contrary statements made by K.C. at trial. However, the trial court excluded the expert witness from being present in the courtroom during K.C.'s testimony. Based on this ruling, defense counsel could have reasonably considered the expert witness's testimony irrelevant and made a tactical decision not to call the expert witness at trial.

Mr. Miller's counsel requested continuances because he needed additional time to

prepare. The other continuances, one by defense and the other by the prosecution, involved medical issues. Defense counsel did not act ineffectively by requesting or agreeing to the continuances.

Because Mr. Miller fails to show that his counsel acted deficiently, his claim for ineffective assistance fails.

We affirm the convictions for four counts of second degree child molestation.

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

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Kulik, J.

WE CONCUR:

_____ _____
Sweeney, J. Siddoway, A.C.J.