IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 84003-2
	)	
v.	)	En Banc
	)	
ALBERTO PEREZ-VALDEZ,	)	
	)	Filed October 13, 2011
Petitioner.	)	
	)	

OWENS, J. -- Alberto Perez-Valdez challenges two evidentiary decisions made by a judge of the Walla Walla County Superior Court during a trial that resulted in his conviction for one count of second degree rape of a child and one count of third degree rape of a child. He also challenges the trial court's denial of his motions for a mistrial based on a statement made by a state witness relating to the credibility of the victims. We hold that the trial court did not abuse its discretion in making these decisions. We therefore affirm the jury's conviction of Perez-Valdez.

FACTS

Perez-Valdez, with his wife, adopted several children, including A.V. and S.V.

The girls were both about four years old when the Perez-Valdezes adopted them. In

December 2004, when they were 13 and 14 years old, respectively, S.V. and A.V. both reported that Perez-Valdez was sexually abusing them. The girls testified at trial that he forced them to have sexual intercourse several times per month over the course of several years, the last incident being in December 2004.

Perez-Valdez denied the allegations and testified at trial that he did not rape or otherwise sexually assault either S.V. or A.V. His defense was centered on a theory that the girls were lying. To that point, several witnesses testified about the reputation of the girls for untruthfulness. The defense also introduced expert medical testimony that the specific rape allegations were statistically unlikely to have occurred based on the conditions of the girls' hymens and the fact that neither had become pregnant during the course of the alleged assaults.

Perez-Valdez also sought to introduce evidence that S.V. and A.V. committed arson at a subsequent foster home to show that the girls were willing to take extreme actions to be removed from homes where they did not like the rules, potentially including lying about rape. In order to lay the foundation for this, the defense presented evidence that the girls did not like some rules at the Perez-Valdez home, such as chores and dating restrictions. The defense also elicited testimony that the girls knew that a sexual abuse allegation would get them removed from the home because, years earlier, the State removed another girl, S.V.'s biological sister, from the

home based on that girl's allegations that Perez-Valdez sexually abused her.[1] The trial court, however, barred questioning about the arson, explaining to defense counsel:

> We are not going into the burning of the house. . . . you haven't really shown that she just hated this house. . . . The link just isn't there. And it is just so prejudicial. And it's prejudicial to the fact-finding process, not just to her. . . . And you can certainly, you are going to be able to make that argument and you will make it until you are blue in the face, that she did this to get out of the house. But you don't have to say she burned down a house to make that argument.

1 Verbatim Report of Proceedings (VRP) at 108; *see id*. at 194 (The court again concluded that "[the arson is] a collateral issue."). Still, the defense was able to establish and make the argument that the girls were removed from their subsequent foster placement because the girls did something serious in order to be removed.

The State called Karen Patton, the Child Protective Services (CPS) investigator assigned to this case, to testify at trial. During cross-examination, Patton stated her opinion about the victims' credibility. The testimony came in response to defense counsel's question during an exchange about the significance of S.V. and A.V.'s familiarity with their parents' bedroom:

> [Defense Counsel] Q. Are you telling me only children sexually abused would know what their mother and father's room looked like if they had been in there five, six, seven or eight years?

[1] The defense presented evidence that implied that this biological sister, who was removed from the Perez-Valdez home, might have lied about the abuse. S.V.'s biological sister testified at trial. Her testimony was primarily about S.V.'s disclosure to her of the abuse, which led to the present case. She did testify that she was removed earlier from the Perez-Valdez home because Perez-Valdez sexually abused her.

> [Patton] A. No, not at all . . . . I'm saying these children knew what the parents' bedroom looked like, and in addition, they were in there several times being sexually abused by their father.
>
> Q. Assuming they are telling you the truth?
>
> A. They are telling me the truth.

2 VRP at 301-02. Defense counsel immediately objected and moved for a mistrial. The trial court sustained the objection, saying, "I'm going to ask that the jury disregard her comment." *Id*. at 302. But the court denied the motion for a mistrial. Perez-Valdez moved twice more for a mistrial, before and after the verdict. The trial court denied both motions, explaining at one point: "[Patton] made a quick statement. I told [the jury] to disregard it. . . . I'm not convinced that that's tainted this jury." *Id*. at 324. The jury was further instructed to "disregard any evidence that either was not admitted or that was stricken by the court." Suppl. Clerk's Papers at 93.

Finally, the defense called several witnesses who testified to Perez-Valdez's reputation for good moral character. The State did not object to this testimony at the time it was offered but, the following day, moved to strike the character testimony and requested an instruction that the jury disregard it. The defense argued that the State's objection was untimely. The State countered that it would forgo its motion to strike the testimony on the condition that the defense "be precluded from [arguing] about moral character." 2 VRP at 367. Defense counsel did not expressly agree but

suggested this was of minimal concern. Absent objection to the proposal, the trial court accepted the compromise.

The jury returned a guilty verdict on both counts of second and third degree rape of a child. Under indeterminate sentencing for sex offenders, Perez-Valdez was sentenced to 136 months to life. On direct appeal, the Court of Appeals affirmed the conviction. *State v. Perez-Valdez*, noted at 153 Wn. App. 1011, 2009 WL 3823243. This court granted discretionary review on all issues. *State v. Perez-Valdez*, 168 Wn.2d 1031, 230 P.3d 1061 (2010).

ISSUES

Did the trial court err in refusing to (1) allow the defense to submit evidence of a bad act by the alleged victims to show that the girls had motive to falsely accuse Perez-Valdez, (2) declare a mistrial after a witness offered opinion testimony as to the victims' veracity, and (3) allow the defense to reference general character evidence about Perez-Valdez in its closing argument after the State's untimely objection?

ANALYSIS

A. *Standard of Review*

This court reviews trial court decisions on the admission of evidence for abuse of discretion. *State v. Bashaw*, 169 Wn.2d 133, 140, 234 P.3d 195 (2010). We also review the decision of whether a statement is so prejudicial as to require a mistrial for

abuse of discretion. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

B. *Evidence of Crimes, Wrongs, or Acts To Prove Victims' Motive To Lie*

At several points during his trial, Perez-Valdez sought to introduce evidence that S.V. and A.V. committed arson in the foster home where they lived after the State removed them from the Perez-Valdez home. There was no question the misconduct occurred, as both girls were convicted in juvenile court. Perez-Valdez argued that the arson evidence was relevant to establish their motive to falsely accuse him of rape. His theory was that, just as the girls committed arson to get removed from their foster home, they also falsely accused him of rape to get out of their adoptive home. Accordingly, Perez-Valdez argued that the arson evidence was relevant and admissible under the rules of evidence. The trial court gave the defense leeway to lay the foundation for the arson evidence and several times reconsidered whether to admit it, but the trial court ultimately found that the prejudice of the arson substantially outweighed its probative value.

Perez-Valdez now argues that the arson evidence should have been admitted pursuant to ER 404(b). However, ER 404(b) is a rule of exclusion, not a rule of inclusion. The rule prohibits "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith"; but it does not apply when such evidence is offered for other purposes, including "proof of

motive." ER 404(b). Even where such evidence is admissible despite ER 404(b), the trial court retains discretion to preclude it if it is irrelevant "to prove an element of the crime charged" or if the prejudicial effect substantially outweighs the probative value of the evidence. *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *see* ER 402, 403.

Here, because the arson evidence was not proposed to show conformity of action with personal character, but instead to show a motive for false accusation, it was not precluded by ER 404(b). Still, we defer to the trial court's discretion to bar the evidence as irrelevant or unduly prejudicial. A trial court's evidentiary ruling is an abuse of discretion only if it is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). We do not find such a basis to overturn the trial court's judgment in this matter.

The record indicates careful consideration by the trial court of whether to admit the arson evidence. The trial court conditionally granted the State's motion in limine to prevent the defense from raising the incident, explaining:

> If there is some testimony that [S.V. and A.V.] just couldn't wait to get out of the home of the defendant, and boy, they would do just about anything to get out of there, then maybe the fact that they did do something like this to get out of another foster home I'll take a long hard look at it. But we have to lay that foundation first. . . . So until I hear something like that, seems like it's way premature, and certainly prejudicial.

Suppl. VRP at 113-14. Ultimately, the trial judge found that the defense failed to adequately lay the foundation for the evidence:

> [Y]ou haven't really shown that she just hated this house. Was she unhappy? She is unhappy as half the teenaged kids in any house are. Everybody is unhappy with the parents. They don't like the rules, they don't like this or that, but we don't put in evidence of burning a house down. The link just isn't there.

1 VRP at 108; *see id*. at 110 ("[T]o parlay [the arson] into what motivates this crime is simply a stretch.").

Although another trial judge might well have admitted the same evidence, the decision to not allow admission of the arson evidence is neither manifestly unreasonable nor based on untenable grounds or reasons. It is of legitimate concern that the arson was too removed from a false accusation of rape to necessarily be considered evidence of motive to lie. It is reasonable to conclude that the defense did not establish excessive hatred by the girls of their subsequent foster home to lay the foundation that the arson was related to an effort to be removed from the home. *Cf. State v. Lubers*, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996). Moreover, the defense was still able to argue its theory of the case, including by presenting substantial evidence about S.V.'s and A.V.'s reputations for untruthfulness. Yet the jury, which saw the girls and all other witnesses testify, was convinced of Perez-Valdez's guilt.

Perez-Valdez alternatively argues that the same evidence was admissible to

impeach Virginia Eileen "Ginger" Burnette, the foster parent at whose home the girls set a fire. *See* ER 607. Under examination by defense counsel, Burnette rejected the idea the girls had taken extreme measures to get out of her home. Still, her answer was not a direct "no." Rather, Burnette qualified her response, saying, "In my opinion, and this is my opinion, I would say, no. Because things that foster children do we're trained to not be shocked at." 1 VRP at 192. Perez-Valdez sought to impeach Burnette by juxtaposing her testimony with the arson evidence. After the trial court again refused to allow specific questioning about the arson, the defense elicited acknowledgment from Burnette that the girls did something serious enough that caused the State to remove them from her home. She said, "Every time the State moves a child they think it's a serious reason. . . . It's always serious." *Id*. at 196-97. Because of the clearly subjective and qualified nature of her characterization of the incident, evidence of the arson arguably would not directly contradict her statement. The trial court deemed the arson to be a collateral issue, and a "witness cannot be contradicted on a collateral matter." 5A Karl B. Tegland, Washington Practice: Evidence Law and Practice § 607.17, at 407 (5th ed. 2007).

Thus, we again arrive at the same point of deference in our analysis. While the rules of evidence may have allowed for the arson evidence to come in, the trial court did not abuse its discretion in finding it collateral to Burnette's testimony. Nor did the

trial court abuse its discretion by finding the arson evidence too remote and unduly prejudicial and therefore inadmissible when offered to show the victims' motives, as discussed above.

C. *Motion for a Mistrial*

A witness's expression of personal belief about the veracity of another witness is inappropriate opinion testimony in criminal trials. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Admission of such testimony may be reversible error. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Here, the trial court did not admit the challenged testimony. Rather, the court found that the State's witness, Patton, gave improper testimony when she stated that "[the victims] are telling me the truth." 2 VRP at 302. Upon objection by the defense, the trial court immediately instructed the jury to disregard the statement. *Id*. The question before this court is whether the statement was so egregious that it necessitates a mistrial. *See* CrR 7.5(a)(5), (6).

Courts look to three factors to determine whether a trial irregularity warrants a new trial: "(1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could be cured by an instruction." *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992). Considering these factors with deference to the trial court, we hold that

the trial court did not abuse its discretion in denying Perez-Valdez's motions for a new trial.

First, there was an irregularity. Patton vouched for the victims' credibility, which is serious because this case hinged on whether the jury found the two victims to be credible. *See State v. Fitzgerald*, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985). Next, however, Patton's statement was essentially cumulative of the rest of her testimony. *Cf. State v. Ramos Escalona*, 49 Wn. App. 251, 255, 742 P.2d 190 (1987) (finding that a statement about a past crime of stabbing "was not cumulative or repetitive of other evidence"). She was the CPS investigator, and the outcome of her investigation was to permanently remove the children from the home. To some extent, her testimony implied that she believed the two victims, although she should not have expressly said that. Finally, the trial court immediately gave a curative instruction striking the statement. During jury instructions, the trial court reemphasized that the jury was not to consider stricken evidence. The trial court adopted the jury instructions proposed by the defense, with only slight modifications unrelated to this issue, and further offered to give the defense another instruction related to the improper and stricken testimony if the defense wanted one. No such request was made. We presume that juries follow the instructions and consider only evidence that is properly before them. *State v. Johnson*, 60 Wn.2d 21, 29, 371 P.2d 611 (1962)

(quoting *State v. Priest*, 132 Wash. 580, 584, 232 P. 353 (1925)).

We review a trial court's decision to deny a new trial for an abuse of discretion based on "'the oft repeated observation that the trial judge,' having 'seen and heard' the proceedings, 'is in a better position to evaluate and adjudge than can we from a cold, printed record.'" *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967)). Here, about Patton's statement and the subsequent curative instruction, the trial court stated:

> That happened so quickly [the jury] didn't even understand what was going on. It happened quickly. She made a quick statement. I told them to disregard it. I am convinced if we ask them, remember what that was all about? I'm convinced they wouldn't even remember what I was talking about. So I'm not convinced that that's tainted this jury.

2 VRP at 324. Given this assessment, in light of the factors of analysis for a new trial and the context of Patton's statement, we hold that the trial court did not abuse its discretion in denying a new trial. Patton's statement was not so inherently prejudicial that it rendered the curative instruction ineffective and necessitated a new trial.

D. *General Moral Character Evidence*

Finally, Perez-Valdez argues that the trial court erred when it prevented the defense from referencing evidence about his good moral character in closing arguments. Although the evidence rules state that character evidence is generally not admissible for proving propensity to commit a charged crime, there is an exception

allowing "[e]vidence of a *pertinent* trait of character offered by an accused, or by the prosecution to rebut the same." ER 404(a)(1) (emphasis added). "'[P]ertinent,' as used in ER 404(a)(1), is synonymous with 'relevant,'" and therefore "'a pertinent character trait is one that tends to make the existence of any material fact more or less probable.'" *City of Kennewick v. Day*, 142 Wn.2d 1, 6, 11 P.3d 304 (2000) (quoting *State v. Eakins*, 127 Wn.2d 490, 495-96, 902 P.2d 1236 (1995)).

Here, the defense called witnesses who testified to Perez-Valdez's reputation for good moral character. Though the State did not object at the time the testimony was offered, it later correctly argued that a general reputation for good character is not pertinent under ER 404(a)(1) to a specific element of the charged crime, rape of a child. *See State v. Griswold*, 98 Wn. App. 817, 829, 991 P.2d 657 (2000), *abrogated on other grounds by State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003); *cf. Day*, 142 Wn.2d at 15 (holding that a "reputation for sobriety from drugs and alcohol is 'pertinent' to the charge of possession of drug paraphernalia because 'intent to use' is an element of the offense"). The trial court did not strike the good moral character evidence or otherwise tell the jury to disregard it. Rather, the trial court merely prevented the defense from presenting argument about evidence that, upon later objection, the court deemed to be inadmissible.[2]

[2] The Court of Appeals affirmed this trial court decision on the basis that it was made pursuant to an agreement by the defense with the State. *Perez-Valdez*, 2009 WL 3823243, at *3 (citing *Nghia Nguyen v. Sacred Heart Med. Ctr.*, 97 Wn. App. 728, 735,

There is nothing offensive about a trial court precluding a party from taking further advantage of evidence that was admitted but later deemed inadmissible. *See State v. Rodriguez*, 146 Wn.2d 260, 272, 45 P.3d 541 (2002) (noting that the court could have used "an appropriate curative instruction, even after [the witness's] testimony" after the defense failed to make a timely objection that the witness was in shackles). Accordingly, we affirm the trial court's handling of this evidentiary issue, as it is not error to bar argument about a nonpertinent trait of the defendant, namely his general reputation for good character.

CONCLUSION

The trial court did not abuse its discretion when making the challenged evidentiary decisions or denying a new trial. Rather, the trial court acted with careful consideration and within the bounds of its lawful discretion. The jury was convinced that Perez-Valdez was guilty of second and third degree rape of a child. Finding no abuse of discretion by the trial court, we affirm the convictions.

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987 P.2d 634 (1999) ("An agreement arrived at on the record is binding on the parties and will not be reviewed on appeal unless the party contesting it can show that the concession was a product of fraud or that the attorney overreached his authority.")).

AUTHOR:

Justice Susan Owens

WE CONCUR:

Justice Mary E. Fairhurst

Justice James M. Johnson

Justice Gerry L. Alexander

Justice Debra L. Stephens