

NOTICE

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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JASON THOMAS ROGERS,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11165
Trial Court No. 3AN-09-8651 CR

MEMORANDUM OPINION

No. 6614 — March 28, 2018

Appeal from the Superior Court, Third Judicial District,
Anchorage, Gregory A. Miller, Judge.

Appearances: Brooke Berens, Assistant Public Advocate,
Appeals and Statewide Defense Section, and Richard Allen,
Public Advocate, Anchorage, for the Appellant. Eric A.
Ringsmuth, Assistant Attorney General, Office of Criminal
Appeals, Anchorage, and Michael C. Geraghty, Attorney
General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock,
Superior Court Judge.*

Judge MANNHEIMER.

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Jason Thomas Rogers was convicted of multiple counts of sexual abuse of a minor, based on evidence that he engaged in an ongoing sexual relationship with his stepdaughter, E.C., over a number of years. Rogers was also convicted of an additional count of sexual abuse of a minor based on evidence that Rogers sexually abused one of E.C.'s friends, J.T., during a sleepover.

In this appeal, Rogers contends that his trial judge committed error by allowing the State to introduce a lengthy videotaped interview between E.C. and a case worker with the Office of Children's Services. In this two-hour interview, E.C. described the sexual abuse by Rogers.

Rogers also claims that his trial judge committed error by allowing the State to introduce a letter that E.C. wrote to her friend J.T., apologizing for the fact that J.T. was sexually abused during the sleepover.

We agree with Rogers that, in each instance, the trial judge committed error by allowing the State to introduce the challenged evidence. However, for the reasons explained here, we conclude that these erroneous evidentiary rulings were harmless — *i.e.*, they did not affect the jury's decision. We therefore uphold Rogers's convictions.

Underlying facts

The victim in this case, E.C., was placed in foster care when she was a young girl because her mother abused and neglected her. While E.C. was in foster care, her mother met and married Jason Rogers.

When E.C. was seven or eight, she was returned to her mother's custody, and she began living with her mother and Rogers. E.C.'s mother had physical and mental health issues that affected her ability to function.

During the summer of 2006 (the summer when E.C. turned fourteen), E.C. took a job at a Carrs grocery store in Anchorage. Rogers would walk E.C. to work. Often, he would hang out in the store until the end of her shift, when he would walk her home.

Managers and co-workers at the grocery store became concerned after they observed Rogers and E.C. engaging in what appeared to be romantic behavior — such things as walking with their arms around each other, kissing each other on the lips, and Rogers’s placing his hand on E.C.’s buttocks through her clothing, reaching inside her back pocket. One of the store employees decided to notify the police.

As a result, E.C. was interviewed by the authorities in 2007. This interview was conducted at Alaska CARES, a clinic that provides sexual and physical abuse evaluations for children. During this interview, E.C. denied that Rogers had sexually abused her.

In 2009, when E.C. was sixteen, her grandmother lent a car to E.C. Two weeks later, E.C.’s mother reported that E.C. was a runaway — and, apparently under pressure from Rogers and E.C.’s mother, E.C.’s grandparents reported the car as stolen. Within a few days, the police located and arrested E.C., and she was taken to North Star Behavioral Health Center.

During E.C.’s stay at North Star, she told a staff member that she had been sexually abused, and the Office of Children’s Services was notified. OCS caseworker Virginia Moring was assigned to the case, and she arranged to interview E.C. at Alaska CARES. That interview took place on June 8, 2009, and it lasted two hours. Following the interview, Moring contacted the Anchorage Police, and the police opened a criminal investigation into Rogers’s relationship with E.C.

While the police were pursuing this investigation, E.C. wrote a four-page letter to J.T., a girl who had formerly been her best friend at school. In this letter, E.C.

described — and apologized for — an incident in which E.C. invited J.T. for a sleepover, and Rogers then engaged in a sexual “threesome” with both girls.

As a result of the police investigation, Rogers was charged with eleven counts of sexual abuse of a minor — ten counts involving E.C., and one count involving her school friend J.T.

At Rogers’s trial, both E.C. and J.T. testified for the State. E.C. was on the stand for five days. In her testimony, E.C. described how Rogers had sexually abused her from the time she was nine years old until the time she was sixteen — beginning with acts of fellatio, later progressing to anal sex, and finally to vaginal sex (after Rogers had taken the precaution of obtaining birth control for E.C.).

In J.T.’s testimony, she corroborated E.C.’s account of the sexual threesome, and she explained how she ended her friendship with E.C. following this incident.

Rogers’s defense at trial was that E.C. was a troubled child who had fabricated the allegations of sexual abuse in order to escape Rogers’s harsh parental discipline, and also to avoid the consequences of running away and stealing her grandparents’ car. Rogers’s attorney also argued that E.C. had convinced J.T. to give false testimony to support the fabricated charges.

The jury ultimately convicted Rogers of five counts of sexual abuse, but the jury acquitted him of the other six.

Rogers now appeals his convictions.

The litigation pertaining to the videotaped interview between E.C. and the OCS case worker

As we have explained, E.C. offered extensive testimony regarding the years of sexual abuse that Rogers inflicted on her.

Later, during the trial testimony of OCS caseworker Virginia Moring, the prosecutor offered the videotape of the entire two-hour interview that Moring conducted with E.C. in 2009. Rogers's attorney objected, but the trial judge admitted the evidence. The judge ruled that the entire interview was admissible as a "first report of sexual abuse" under *Greenway v. State*, 626 P.2d 1060, 1061 n. 4 (Alaska 1980). The judge also suggested that the entire interview was admissible as a "prior consistent statement" under Alaska Evidence Rule 801(d)(1)(B), on the theory that the interview rebutted Rogers's claim of "recent fabrication" — *i.e.*, his claim that E.C. was lying about the years of sexual abuse.

Both of these rulings were error.

With regard to the theory that the entire interview was a first report of sexual abuse, this Court has repeatedly explained — most recently in *Borchgrevink v. State*, 239 P.3d 410 (Alaska App. 2010) — that "first report" or "first complaint" evidence is limited to (1) the fact that a complaint was made, supplemented by (2) enough details of the complaint to allow the trier of fact to understand that the episode the victim was describing is the same episode that is being litigated. *Id.* at 415.

With regard to the theory that the entire interview was a prior consistent statement, Evidence Rule 801(d)(1)(B) requires the proponent of the evidence to establish that the witness's prior statement predated the witness's motive to fabricate. E.C.'s interview with Moring took place in June 2009 — after E.C. had run away from

home, had been arrested, and had been taken to North Star. The interview clearly did not pre-date E.C.’s motive to fabricate.

The trial judge may have understood this problem, because when he announced his ruling, he repeatedly referred to this Court’s decision in *Nitz v. State* — a case where this Court approved the admission of a child’s prior consistent statement even though that statement did not pre-date the child’s motive to fabricate.¹

Nitz holds that a witness’s prior consistent statement can be admitted even though the statement was made after the witness’s motive to fabricate arose — but only if the trial judge finds that the *circumstances* of the prior statement reasonably bolster the credibility of the witness’s trial testimony, apart from the mere fact that the prior statement is consistent with the witness’s trial testimony. We most recently explained this principle in *Lega v. State*, __ P.3d __, Alaska App. Opinion No. 2593 (March 16, 2018), 2018 WL 1354767 at *3-5.

In *Nitz*, for example, the defendant asserted that the victim had fabricated allegations of sexual abuse so that Nitz, her stepfather, would be removed from her family home.² But the evidence showed that the victim had “consistently been reluctant to discuss Nitz’s offenses” — that her early accounts of the abuse “included only partial details”, and that “considerable efforts had to be expended over a lengthy period of time before [the victim] was willing to discuss her experiences more fully and openly.”³ Given these circumstances, we concluded that the victim’s prior statements had relevance that derived, not so much from the fact that the prior statements were consistent with the victim’s trial testimony, but rather from the circumstances and manner in which the

¹ 720 P.2d 55, 67-71 (Alaska App. 1986).

² *Nitz*, 720 P.2d at 68.

³ *Ibid.*

victim made those prior statements.⁴ That is, the victim's repeated reluctance to fully discuss these matters was seemingly inconsistent with the defense assertion that the victim purposely made false allegations in order to rid herself of Nitz.

Returning to the present case, Rogers's trial judge made no finding that the circumstances of E.C.'s interview with Moring reasonably corroborated the trustworthiness of E.C.'s trial testimony. Instead, the judge apparently believed that the State only had to show that E.C.'s statements during that earlier interview were consistent with E.C.'s trial testimony. This was error.

After the trial judge announced his decision to admit the video recording of the 2009 interview, Rogers's attorney pointed out that, under the judge's rationale, E.C.'s prior statements should not be admitted as substantive evidence, but only for the purpose of corroborating her trial testimony. The defense attorney therefore asked the judge to give a limiting instruction to the jury. The prosecutor agreed that a limiting instruction should be given — an instruction telling the jury that E.C.'s statements during the interview could be used only for the purpose of corroborating E.C.'s trial testimony.

Although the trial judge initially rejected this approach, he later changed his mind and gave the jury the following instruction:

The video of E.C.'s 2009 interview at Alaska CARES has been introduced into evidence. This video is introduced for the limited purpose of determining the credibility of E.C.'s trial testimony. It should not be considered directly as proof that the matters asserted in the video are true. For the limited purpose for which it is admitted, you may give it the weight to which you believe it is entitled.

⁴ *Ibid.*

As it turned out, *both sides* relied on E.C.'s videotaped interview with the OCS case worker. Even though E.C. described many instances of sexual abuse in that 2009 interview, her statements in that interview did not completely track the testimony she gave at Rogers's trial. Some of the details that E.C. furnished during the interview were inconsistent with her trial testimony. In addition, during the interview, E.C. either failed to mention or even denied other things that she asserted in her trial testimony. Thus, when Rogers's attorney cross-examined E.C., he relied on several aspects of the videotaped interview.

Why we conclude that the admission of the 2009 interview was harmless

As we have explained, it was error for the judge to admit the entire two-hour interview. The remaining question is whether, because of that error, Rogers is entitled to a new trial.

E.C. was on the stand for several days at Rogers's trial, and Rogers implicitly concedes that most of the information in the two-hour videotaped interview was covered by E.C.'s trial testimony. However, in his brief to this Court, Rogers lists several ways in which the admission of the entire 2009 videotaped interview may potentially have harmed his case.

In particular, Rogers notes that the videotaped interview was the sole source of certain details relating to two specific acts of sexual abuse, as well as some of the strategies that Rogers pursued to prevent E.C. from reporting the abuse (*i.e.*, "grooming" E.C. by leaving flowers, chocolates, and stuffed animals in her school locker; repeatedly switching E.C.'s therapists so that she would never get comfortable enough with any of them to report the sexual abuse; and threatening E.C. that she would be prosecuted as his accomplice if she reported the abuse).

But these particular details of the videotaped interview were minor fixtures of the government's case. As the jury's verdicts show, the primary question in this case was E.C.'s credibility.

The transcript of Rogers's trial runs to more than 2800 pages, and the trial took 20 days of court time. E.C. was on the stand for five of those days, and Rogers's attorney cross-examined her at length.

In his summation to the jury, Rogers's attorney stuck to one theme: that E.C. was lying, and that she told her lies so well that she convinced the Office of Children's Services, the police, and the district attorney's office that she was telling the truth. The defense attorney argued that, after E.C. ran away, was apprehended by the police, and placed at North Star, E.C. decided that she would get herself out of trouble by falsely accusing her stepfather of sexually abusing her. The defense attorney conceded that the State had proved that Rogers was a bad father — that he hit his children, and that he was neglectful, rude, and vulgar. But the defense attorney contended that E.C.'s allegations of sexual abuse were complete fabrications — and that, somehow, E.C. had convinced her childhood friend, J.T., to go along with E.C.'s lies by falsely testifying that Rogers had sexually abused her during the sleepover.

The most important aspects of the defense case were (1) the defense attorney's extensive cross-examination of E.C., (2) the contents of E.C.'s 2007 interview (the earlier police interview in which the fourteen-year-old E.C. repeatedly denied that Rogers was sexually abusing her), and (3) the defense attorney's related arguments that E.C. was not to be trusted. It appears that the defense attorney's efforts had a significant effect on the jury's verdicts — because, of the eleven counts against Rogers, the jury

acquitted Rogers of six. The jury only convicted Rogers of the five counts where there was independent corroboration of E.C.'s accusations.⁵

⁵ Count IV was based on E.C.'s testimony that Rogers took her to Planned Parenthood on her twelfth birthday to get birth control, and that Rogers then began to have vaginal sex with her. The State called a witness from Planned Parenthood to verify that E.C. had come to the clinic and had received birth control.

Counts VI and VII were based on the threesome incident involving E.C. and J.T. in Rogers's motor home in July 2006. Count VI was based on Rogers's act of sexual penetration with J.T., while Count VII was based on Rogers's sexual penetration of E.C. during the same incident.

At Rogers's trial, J.T. took the stand and provided detailed corroboration of E.C.'s description of the night when Rogers sexually abused both of them. Rogers's attorney conducted only the most minimal cross-examination of J.T., and he asked her nothing of substance.

The two remaining guilty verdicts (Count VIII and Count X) were both based on incidents where Rogers gave E.C. rings.

Count VIII was based on an incident that took place on July 31, 2006 — E.C.'s 14th birthday. Rogers bought her a ruby ring, and then he proposed marriage to her in the Walmart parking lot. According to E.C., they had sex that night in Rogers's motor home.

Count X was based on an incident that took place exactly two years later, on July 31, 2008 — E.C.'s 16th birthday. Again, Rogers gave her a ring — this time, a more expensive silver and diamond ring. Again, according to E.C., they had sex in the motor home that night.

These accusations were corroborated because, when the police searched Rogers's apartment, they found these two rings. (E.C. left the rings behind when she ran away from home, and Rogers had apparently kept the rings when he moved out of the residence and rented his own apartment.)

For these reasons, we conclude that the erroneous admission of the 2009 videotaped interview was harmless; it did not appreciably affect the jury’s verdicts.⁶

The letter that E.C. wrote to her childhood friend J.T.

During the testimony of Detective Kimberley Trujillo, the State introduced a letter that E.C. had written to her childhood best friend, J.T., in which E.C. described and apologized for an incident where Rogers engaged in a sexual threesome with both of them.

Apart from this letter, both E.C. and J.T. offered detailed descriptions of this threesome incident when they testified at Rogers’s trial.

When the prosecutor moved for admission of E.C.’s letter to J.T., the defense attorney objected (correctly) that the letter was hearsay, but the prosecutor argued (incorrectly) that the letter was admissible under *Greenway* as a first complaint of sexual abuse. (Even though this letter may have been E.C.’s first mention of the particular incident involving J.T., E.C. had already made a detailed complaint about the years of sexual abuse that Rogers inflicted on her.)

The trial judge accepted the prosecutor’s argument, overruled the defense attorney’s hearsay objection, and erroneously allowed the prosecutor to introduce the letter under *Greenway*.

Rogers’s attorney then requested a limiting instruction — an instruction that the letter was not admissible for the truth of the matters asserted in it, but only to the extent that it corroborated E.C.’s testimony. Indeed, this limited use of the letter flowed

⁶ See *Love v. State*, 457 P.2d 622, 634 (Alaska 1969) (holding that, for instances of non-constitutional error, the test for harmlessness is whether the appellate court “can fairly say that the error did not appreciably affect the jury’s verdict”).

directly from the judge’s ruling that the letter was only admissible as a “first complaint” under *Greenway*.⁷

But the prosecutor then offered the specious argument that if the letter was admitted to corroborate E.C.’s testimony, this was the legal equivalent of saying that the letter *was* admissible for the truth of the matters asserted. The trial judge did not reject this mistaken argument outright. Rather, the judge compromised by instructing the jury: “As jurors, you are of course in the position of weighing [the letter], and giving it the weight that you think is appropriate — whether that’s limited weight or otherwise.”

This ruling, too, was error. The remaining question is whether the erroneous admission of the letter requires reversal of Rogers’s convictions.

Rogers concedes that the contents of the letter added nothing substantive to the trial testimony that E.C. and J.T. gave concerning the threesome incident. But he argues that the letter was “emotionally inflammatory”, and that the erroneous admission of this letter allowed the State to improperly present one more repetition of the threesome allegation, beyond the trial testimony given by E.C. and J.T.

While the trial judge was wrong to admit the letter as a “first complaint” under *Greenway*, the letter could scarcely have been more “emotionally inflammatory” than the detailed testimony that both E.C. and J.T. gave about the threesome incident. Nor do we think that the introduction of this letter added any appreciable force or credibility to the trial testimony of the two young women. Accordingly, we conclude that the error in admitting this letter was harmless.

⁷ See *Borchgrevink v. State*, 239 P.3d 410, 417-18 (Alaska App. 2010) (explaining this aspect of “first complaint” evidence under *Greenway*).

Conclusion

Although we agree with Rogers that the challenged evidentiary rulings were erroneous, we conclude that these erroneous rulings did not appreciably affect the outcome of Rogers's trial. Accordingly, the judgement of the superior court is AFFIRMED.