IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DOUGLAS R. ELY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11710 Trial Court No. 1WR-12-91 CR MEMORANDUM OPINION No. 6496 — July 19, 2017

Appeal from the Superior Court, First Judicial District, Wrangell, Trevor Stephens, Judge.

Appearances: Marjorie Mock, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. June Stein, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

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

Judge SUDDOCK.

Douglas R. Ely appeals his two convictions for sexually abusing his eight-year-old daughter, S.E. He argues that the trial court erred in excluding evidence offered

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

by him to prove that S.E. had previously lodged two false allegations of sexual misconduct committed against her by two young male relatives. The judge found that S.E.'s previous allegations described conduct that did not amount to sexual abuse and that Ely had not proven these allegations to be false. We conclude that the judge did not err in excluding evidence of these prior incidents.

Background facts and proceedings

S.E. disclosed sexual abuse by her father in August of 2012, when she was eight years old. The State charged Ely with two counts of first-degree sexual abuse of a minor and one count of second-degree sexual abuse of a minor.[1]

Before trial, Ely moved to introduce evidence that S.E. had made two prior false accusations of sexual misconduct committed against her by two of her male relatives, aged eight and nine. Superior Court Judge Trevor Stephens held a hearing at which three family members testified: S.E.'s mother, S.E.'s maternal grandmother, and S.E.'s fifteen-year-old aunt (her mother's younger sister).

Testimony at the hearing revealed that S.E.'s young aunt would often babysit S.E., the eight- and nine-year-old boys, and other children. Earlier in the summer of 2012, S.E. told her aunt that the eight-year-old boy had asked her to lower her trousers, but that she had not done so. S.E. told her aunt that the boy asked her to do this when the two were behind a living room couch.

Later that summer, S.E. told her aunt that the nine-year-old boy had asked her to do the same, but that once again she had not complied. She told her aunt that the boy had asked her to do this in the children's fort beyond the backyard of the family house.

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[1] AS 11.41.434(a)(1) and AS 11.41.436(a)(2), respectively.

The aunt's memory of these events was vague. She testified that because she monitored the children closely, S.E. and the nine-year-old boy could not have left the yard long enough to go to the fort. S.E.'s grandmother testified that the alleged incident with the eight-year-old boy could not have occurred, because the couch was flush against the living room wall. Neither of the young boys testified.

The judge concluded that Ely had failed to prove that S.E.'s reports were false. He noted that no witness testified to confronting the two boys with these allegations, or that they had ever denied them. As to the eight-year-old, he found that the children could easily have pulled the couch away from the wall to create a private space. As to the nine-year-old, the judge concluded that the babysitter aunt did not have the children under constant supervision, and that the children could readily have slipped away to the nearby fort unbeknownst to the aunt.

Judge Stephens further noted that S.E. had not accused either boy of conduct that would constitute the crime of sexual abuse. S.E. had only described requests by the two boys that S.E. expose herself to them.

In sum, the judge ruled that Ely failed to prove by a preponderance of the evidence that S.E. made prior false reports of sexual abuse. The judge therefore denied the defense request to introduce this evidence at trial.

Why we uphold the judge's ruling

Generally, a litigant can attack a witness's character for truthfulness only in the form of reputation or opinion evidence; testimony relating to specific instances of untruthfulness is prohibited.[2] But this Court has held that in a sexual assault prosecution, evidence of a victim's prior false accusations of sexual misconduct can be admissible to

[2] *See* Alaska Evid. R. 405 and 608.

challenge the credibility of the current accusation if the defendant shows "by a preponderance of the evidence that the prior accusation was both actually and knowingly false."[3] We review a trial court's resolution of this question for clear error.[4]

Ely argues on appeal that his witnesses at the evidentiary hearing established by a preponderance of the evidence that the incidents alleged by S.E. could not have occurred. But Ely views the record in the light most favorable to himself. The judge's findings that Ely failed to prove that S.E.'s allegations were actually false were not clearly erroneous.

In light of this holding, we need not reach Ely's argument that S.E.'s alleged false reports of sexualized conduct by other children (not amounting to sexual abuse) could qualify as admissible evidence, if they were proven to be false.

Conclusion

We AFFIRM the judgment of the superior court.

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[3] *Copeland v. State*, 70 P.3d 1118, 1124 (Alaska App. 2003); *Morgan v. State*, 54 P.3d 332, 333 (Alaska App. 2002).

[4] *Morgan*, 54 P.3d at 333.