

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,

Respondent,

v.

JAMES RANDALL SCHNELLE,

Appellant.

DOCKET NUMBER WD74300

Date: March 19, 2013

Appeal from:
Putnam County Circuit Court
The Honorable Jack N. Peace, Judge

Appellate Judges:
Division One: Mark D. Pfeiffer, P.J., Victor Howard and Alok Ahuja, JJ.

Attorneys:
Richard A. Starnes, Jefferson City, MO, for respondent.
Alexa I. Pearson, Columbia, MO, for appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY
COURT OF APPEALS -- WESTERN DISTRICT

STATE OF MISSOURI

v.

JAMES RANDALL SCHNELLE,

Respondent,

Appellant.

WD74300

Putnam County

Following a jury trial, James Schnelle was convicted in the Circuit Court of Putnam County of first-degree burglary and first-degree assault, and was acquitted of forcible rape. The charges arose from an incident which occurred on June 28, 2009, during which Schnelle broke into the home of a 49-year-old woman, and assaulted and engaged in sexual intercourse with her. Schnelle appeals.

AFFIRMED AS MODIFIED.

Division One holds:

Schnelle first argues that the trial court erred by refusing to allow him to elicit testimony from two witnesses concerning the victim's poor reputation for truthfulness in the community. Such testimony may generally be offered to impeach the testimony of an adverse witness, like the victim here. However, witnesses offering such character testimony may only testify based on their knowledge of the reputation of the adverse witness in the community at large; the character witness may not testify to their personal opinion of the adverse witness' truthfulness.

In this case, the first witness Schnelle offered was equivocal as to whether he had only a personal opinion concerning the victim's truthfulness, or instead whether he had heard the opinions of sufficient community members to be able to testify to the victim's reputation in the community generally. Given that the first witness did not unambiguously testify that he had sufficient knowledge to offer character testimony, the trial court did not abuse its discretion in excluding his testimony.

The second witness Schnelle offered may stand on a different footing. That witness appeared to testify that he had spoken with, or overheard the conversation of, multiple members of the community concerning the victim's reputation, and that her reputation for truthfulness in the community was poor. Even if the second witness' testimony should have been admitted,

however, we conclude that its exclusion in this case was harmless beyond a reasonable doubt. Extensive other evidence was admitted at trial concerning the victim's veracity, including her two prior convictions for fraudulently attempting to obtain controlled substances; her admission that she had previously made false allegations of rape against her ex-husband to obtain a tactical advantage in dissolution proceedings; and testimony from her mother and the Chief of Police in her community that they questioned her veracity. In these circumstances, testimony of the second witness concerning the victim's poor reputation in the community would not have affected the outcome.

Schnelle also argue that the trial court erred in sentencing him as a persistent offender, because the State did not introduce sufficient evidence to establish his prior felony convictions. At trial, however, Schnelle stated that he had no objection to the circuit court entering the findings proposed by the prosecution, identifying his prior convictions; Schnelle thereby waived proof of his prior convictions, as permitted by § 558.021.5, RSMo, and cannot now complain of a lack of evidence.

Finally, Schnelle argues that the trial court erred by sentencing him both to serve a term of imprisonment, and to pay restitution to the victim. The State concedes that restitution may only be ordered where a defendant is placed on probation, and that the trial court erred in simultaneously ordering restitution and imprisonment. We agree. In this case, there is no question that the trial court would have sentenced Schnelle to the same term of imprisonment even if it had recognized that it could not order restitution. In these circumstances, Rule 30.23 authorizes us to modify the judgment of conviction to strike the resitution order, without remanding to the trial court for resentencing.

Before: Division One: Mark D. Pfeiffer, P.J., and Alok Ahuja and Gary D. Witt, JJ.

Opinion by: Alok Ahuja, Judge

March 19, 2013

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