66709-2

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NO. 66709-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

SALVADOR A. CRUZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Douglas A. North, Judge

REPLY BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENTS IN REPLY[1]

1. THE TRIAL COURT ERRED BY FAILING TO GRANT A MISTRIAL IN THE FACE OF A SERIOUS TRIAL IRREGULARITY.

Salvador A. Cruz contends the trial court erred by failing to grant his motion for mistrial after jurors learned a young woman related to Cruz's case (alleged child molestation victim D.G.) had climbed onto the courthouse roof during a break in the trial. Brief of Appellant (BOA) at 20-29. The State characterizes as "pure speculation" Cruz's assertion that a reasonable juror could infer that D.G. was an alleged victim who considered suicide rather than testify against Cruz. Brief of Respondent (BOR) at 25-27.

Cruz stands by what he considers a reasonable inference based on what the jurors knew and when they knew it. Notably, at the time of the irregularity, jurors had heard evidence tending to show Cruz sexually abused two young girls in the mid- to late-1990s and that at the time of trial, the "girls" were in their early 20s. BOA at 22-23. Two of the jurors learned the person on the roof was a young woman. 8RP 70-77. Two other jurors said the person threatened to or wanted to jump off the roof. 8RP 41, 64, 67-68. Further, the trial court had informed the jurors of the

[1] Cruz relies on the Brief of Appellant with respect to arguments 8 through 10.

charges against Cruz. Based on what the jurors knew, Cruz's inferential scenario is, therefore, not "pure speculation."

The State compares the irregularity addressed in State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997), for its contention Cruz fails to establish the degree of prejudice required for a mistrial. BOR at 23-25. One juror in Bourgeois reported "'a young person in the audience [had] point[ed] his finger . . . in the manner of holding a gun" at a State's witness as the witness testified about her fear of testifying against Bourgeois at his murder trial. 133 Wn.2d at 397-98. The parties stipulated that remaining jurors did not recall becoming aware of any unusual or inappropriate spectator action before giving their verdict. 133 Wn.2d at 398. Bourgeois moved for a new trial. The trial court concluded the hand gesturing was spectator misconduct, but decided the extrinsic evidence did not affect the guilty verdict. 133 Wn.2d at 398-99.

The Supreme Court labeled the irregularity "fairly serious." 133 Wn.2d at 409. The Court noted, however, there was no indication that Bourgeois directed the spectator to make the threat, or that the gesturing spectator was associated with him in any way. Bourgeois, 133 Wn.2d at 409. And while the trial court could not instruct the jury to disregard the irregularity because it did not come to light until after trial, the court did give the standard instruction that the evidence consisted solely of the

witnesses' testimony and admitted exhibits. The Court assumed the jurors followed the instruction. Id. In addition, the Court surmised Bourgeois would have declined an instruction to disregard for fear of highlighting the isolated incident. Finally, the court called "significant" the fact not one juror recalled hearing about the gesture from another juror. Id. at 410.

Bourgeois is readily distinguishable. While only one juror saw and knew about the gesture before the verdict in Bourgeois, all the jurors were aware of the rooftop incident at Cruz's trial. Cf. State v. Woodward, 32 Wn. App. 204, 210, 646 P.2d 135 (trial court did not abuse its discretion by denying motion for mistrial after learning only one juror saw a newspaper account of the trial, and that juror read only the first two lines of the article), review denied, 97 Wn.2d 1034 (1982).

Further, although there was nothing to suggest Cruz coerced or directed the young woman to climb out on the roof, the trial court did confirm the incident was related to the case. Because the case was all about sex offenses Cruz allegedly committed in the 1990s against several young girls, it was reasonable for a juror to believe Cruz played a role in D.G.'s desperate act.

Moreover, while the court urged jurors not to get caught up by news coverage about the case, it did not order the jury to disregard what it knew about the rooftop incident. 7RP 67-69. And unlike in Bourgeois,

here there was no reason to believe Cruz would have declined an instruction to disregard. Indeed, Cruz vehemently objected to continuing with the same jury and expressed disbelief when he learned the trial judge had informed the jury the rooftop incident bore some relation to his case. 8RP 7-12, 45-46.

Finally, each of Cruz's jurors assured the court he or she could remain impartial in spite of the extraneous information. This Court must be mindful, however, that "[a]lmost any juror will disclaim the influence upon his own mind of what he has uttered or heard in violation of his duty." Ullom v. Griffith, 263 S.W. 876, 880 (Mo. App. 1924).

The irregularity in Cruz's case was serious and did not involve cumulative evidence. And the trial court did not instruct jurors to disregard the extraneous information. It is reasonably probable the jury's exposure to the rooftop incident, which the court said was related to Cruz's case, caused prejudice. The trial court thus erred by denying Cruz's motion for a mistrial.

2. THE TRIAL COURT ERRED BY FINDING OTHER ACTS ADMISSIBLE UNDER ER 404(b) AS SHOWING A "COMMON SCHEME OR PLAN."

The State correctly concedes the trial court erred by relying on RCW 10.58.090 to admit prior alleged acts of sexual abuse by Cruz against sisters F.P. and A.B. BOR 28-30. The State maintains the same

evidence was properly admitted as establishing a common scheme or plan under ER 404(b). BOR 30-36. Cruz disagrees.

The state bears a substantial burden when attempting to admit evidence of prior bad acts under an exception to ER 404(b). State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Mere similarities among separate acts are insufficient to establish the existence of a common scheme under ER 404(b). State v. Gresham, 173 Wn.2d 405, 422, 269 P.3d 207 (2012). Instead, there must be substantial and marked similarities. DeVincentis, 150 Wn.2d at 13, 18, 20-21. Random similarities are not enough. DeVincentis, 150 Wn. 2d at 18.

The State relies on DeVincentis for its contention separate acts can qualify as part of a common scheme or plan despite many factual differences between the acts. BOR at 32-34. DeVincentis invited young girls whom he met through his daughter or a neighbor girl into his home and eventually molested them. DeVincentis, 150 Wn.2d at 22. When the girls were at his home, the defendant walked about the house dressed only in a g-string or bikini underwear to reduce the girls' discomfort at seeing him in such a state of undress. DeVincentis, 150 Wn.2d at 22. The defendant asked each girl for a massage, directed them to remove their clothes, and had the girls masturbate him until he climaxed. DeVincentis, 150 Wn.2d at 22.

This evidence shows a calculated pattern designed to convince the girls they were safe and, ultimately, to commit acts of sexual misconduct without threats or force. According to F.P. and A.B., Cruz engaged in no such calculated conduct. Instead, he forced himself on each girl without first attempting to suggest he was doing nothing wrong. Whereas DeVincentis' misconduct was shrewd and sophisticated, Cruz's was crude, impulsive, random, and forceful.

Additionally, one of the chief commonalities in Cruz's case is the age of the young girls. But the fact F.P. and A.B. were, like the other girls except K.O., under 12 years old should not be considered because the age of the children was an element of the crimes of first degree rape of a child and first degree child molestation. RCW 9A.44.073; RCW 9A.44.083. If the elements of the crime are sufficient to show a common scheme or plan, then every prior incidence of the same offense would be admissible as a common scheme or plan. This would defeat the purpose of ER 404(b). The commonality, therefore, must be a fact that is not already inherent in the crime. See United States v. Bunty, 617 F.Supp.2d 359, 376 (E.D.Pa. 2008) ("The Government argues that the prior acts involving M.B. and C.B. are similar to the charged offenses because they demonstrate his

interest in pre-pubescent children, but such similarity is inherent in all Rule 414 evidence.").[2]

Further, the State misrepresents the facts by stating Cruz "also seems to have intentionally placed himself in situations where he had ready access to young girls." BOR at 35. Given the following evidence, the State's assertion is speculation.

Cruz became involved with V.C., mother of J.C. and D.G., in about 1992. When they moved into a Redmond apartment in 1993, J.C. was in elementary school and D.G. in daycare. 1RP 538-44. There is no evidence indicating Cruz befriended V.C. because she had young daughters.

F.P. and A.B. lived with their mother in the same Redmond apartment. 1RP 546. They often played with J.C. and D.G. 1RP 546-48. When F.P., A.B., and their mother moved to a house in Bellevue, V.C., her daughters, and Cruz visited about two or three times a week. 1RP 550-51. V.C. later got evicted from her apartment and they moved in with F.P.'s mother. 1RP 557-60. There is no evidence that Cruz encouraged

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[2] The court refers to Federal Rule of Evidence (FRE) 414, which allows admission of evidence of other acts of child molestation against a defendant accused of molesting a child below age 14. FRE 413 is identical, but applies to a "sexual assault" charge.

V.C. to associate with F.P., A.B. and their mother. Rather, the occurrence can best be described as happenstance.

Cruz met 14-year-old K.O. through friends in fall 1997. K.O., who had given birth to twins in May 1997, willingly began having sex with Cruz shortly after they met. 14RP 82-86, 100-01; 15RP 85; 16 RP 72-74. No evidence indicates Cruz befriended K.O. for the purpose of having access to K.O.'s nine-year-old sister, B.B. Cruz's access to B.B. therefore appears to have happened through no design of Cruz.

The same is true of O.J. O.J. and B.B. were close friends in late 1997. 1RP 579-80. O.J. was invited to B.B.'s birthday in February 1998. 13RP 77-79. During the party she went downstairs and found herself alone with Cruz. 13RP 9-11. Again, there is no evidence to indicate Cruz knew O.J. was invited to the birthday party or lured her into the basement. Rather, their meeting happened by chance.

In summary, there is no support for the State's claim that Cruz "seems to have intentionally placed himself in situations where he had ready access to young girls." This Court should reject this claim.

Nor were the similarities between the charged allegations and Cruz's purported misconduct against F.P. or A.B. anything more than random and common. All of the targets were young girls. There were only so many ways for Cruz to sexually molest the prepubuscent girls, and

he tried or accomplished all of them. He did this while alone with the girls and when other adults were around. Indeed, B.B. testified it seemed at times like Cruz wanted to get caught. 1RP 598-99. And K.O. said Cruz sometimes stayed with her in her bed at her parents' home. 14RP 97-98.

The state failed to establish Cruz's alleged misconduct with F.P. or A.B. was part of a common scheme or plan that encompassed the charged offenses. The trial court erred by admitting the evidence under ER 404(b). For the reasons set forth in Brief of Appellant at 32-35, the error was not harmless.

3. INSTRUCTION 7 WAS AN UNCONSTITUTIONAL COMMENT ON THE EVIDENCE.

The trial court gave an instruction that attempted to apply to RCW 10.58.090. Instruction 7, which bears repeating, provided:

> In a criminal case in which the defendant is accused of an offense of sexual assault or child molestation, *evidence of the defendant's commission of another offense or offenses of sexual assault or child molestation* is admissible and may be considered for its bearing on any matter to which it is relevant.
>
> However, *evidence of a prior offense on its own* is not sufficient to prove the defendant guilty of the crime charged in the Information. Bear in mind as you consider this evidence at all times, the State has the burden of proving that the defendant committed each of the elements of the offense charged in the Information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the Information.

CP 162 (emphasis added).[3]

Cruz contends the instruction was an unconstitutional comment on the evidence because it conveyed to jurors the trial court believed the testimony of F.P. and A.B. BOA at 40-43. For this contention Cruz relies on State v. Dewey, 93 Wn. App. 50, 966 P.2d 414 (1998), abrogated on other grounds by DeVincentis, 150 Wn.2d at 21.

Dewey challenged a limiting instruction applicable to other acts evidence admitted under ER 404(b), contending the instruction was a comment on the evidence. In pertinent part, the instruction provided as follows: "'Evidence has been introduced in this case, on the subject of the *rape* of [A.N.R.] in June of 1994, for the limited purpose of showing if....'" Dewey, 93 Wn. App. at 58 (quoting instruction). The Court of Appeals agreed with Dewey, holding the instruction permitted jurors to infer the judge accepted A.N.R.'s testimony as true. Id., 93 Wn. App. at 59.

The State distinguishes Dewey thusly: "In instructing the jury, the court did not give a generic limiting instruction like the court did here." BOR at 42. Instead, according to the State, the instruction in Dewey called the acts committed against A.N.R. a rape even though that was an issue for the jury. Id.

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[3] The State proposed this instruction. Supp. CP __ (sub. no. 156, filed 11/17/2010).

The State erroneously calls Instruction 7 in Cruz's case a "generic limiting instruction." It is not. Neither the instruction nor the statute limits the use of "another sex offense or sex offenses" when the defendant goes on trial for a sex offense. RCW 10.58.090(1). See State v. Gresham, 173 Wn.2d 405, 427, 269 P.3d 207 (2012) ("RCW 10.58.090 makes evidence of a defendant's commission of other sex offenses admissible for the purpose of proving the defendant's character (e.g., the defendant is the "child-molesting type") in order to show that the defendant has committed the charged offense in spite of ER 404(b)'s prohibition of admission for that purpose.").

Furthermore, Instruction 7 did not limit itself to the language of RCW 10.58.090(1), which provides:

> In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of *another sex offense or sex offenses* is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

(Emphasis added). Instead, Instruction 7 specifies the offenses Cruz committed against F.P. and A.B. by stating in pertinent part, "evidence of the defendant's commission of another offense or offenses of *sexual assault or child molestation* is admissible . . . ." (Emphasis added). In this sense, Instruction 7 suffers from the same flaw as the instruction in

Dewey: the instruction allowed the jury to infer the judge believed the testimony of F.P. (sexual assault, i.e., rape) and A.B. (child molestation).

A pattern instruction for RCW 10.58.090 evidence was devised and published before Cruz's trial commenced. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 5.40 (3d ed. 2010).[4] WPIC 5.40 provides:

> Evidence has been admitted in this case regarding the defendant's commission of [a] previous sex offense[s]. The defendant is not on trial for any act, conduct, or offense not charged in this case.
>
> Evidence of [a] prior sex offense[s] on its own is not sufficient to prove the defendant guilty of the crime[s] charged in this case. The State has the burden of proving beyond a reasonable doubt that the defendant committed each of the elements of the crime[s] charged.

This pattern instruction highlights the flaw in Instruction 7. Specifically, WPIC 5.40 refers generally to "previous sex offense[s]". It does not specify the offenses of sexual assault or child molestation.

In any event, WPIC 5.40 is also a comment on the evidence because it does not refer to the earlier acts as "alleged," i.e., "regarding the defendant's *alleged* commission of [a] previous sex offense[s]." (Emphasis added); see BOA at 40-41 (comparing Instruction 7 with instructions 8 and 9). A commonsense reading of WPIC 5.40 permits a

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[4] The State did not propose this instruction.

reasonable juror to infer the judge believed the defendant actually committed the earlier crimes.

Furthermore, the instruction serves no proper purpose. It is not a limiting instruction. And it merely reiterates the State must prove the charged crimes beyond a reasonable doubt. To the extent the instruction emphasizes one particular type of evidence over all others, it is improper. See State v. Allen, 161 Wn. App. 727, 743 n.7, 255 P.3d 784 ("The Washington Supreme Court Committee on Jury Instructions does not recommend instructions on flight, because it singles out and emphasizes particular evidence."), review granted, 172 Wn.2d 1014 (2011).

To summarize, the State fails to adequately distinguish Dewey. Instruction 7 is an unconstitutional comment on the evidence.

The State also claims Instruction 7 was approved of in United States v. Benally, 500 F.3d 1085 (10th Cir. 2007). BOR at 38 n.7. This is not accurate. Although the instruction was given in Benally, the defendant did not challenge its language. Benally instead contended: (1) the trial court erroneously concluded the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice; (2) the prior acts had little probative value; (3) the earlier incidents occurred when he was an alcoholic, which was no longer the case; and (4) the other acts evidence was not necessary. Benally, 500 F.3d at 1089.

For the aforesaid reasons, Instruction 7 is an unconstitutional comment on the evidence. The State's arguments to the contrary are not persuasive.

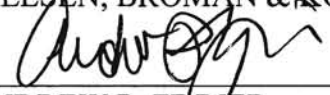
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, Cruz asks this Court to reverse the convictions and remand for a new trial on all counts.

DATED this 11 day of June, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ANDREW P. ZINNER
WSBA No. 18631
Office ID No. 91051

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66709-2-I
	)	
SALVADOR CRUZ,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF JUNE 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SALVADOR CRUZ
DOC NO. 769590
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF JUNE 2012.

x Patrick Mayovsky