

No. 65455-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

BRYAN ROSS,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. THE STATE'S USE OF UNRELATED AND UNPROVEN ALLEGATIONS OF DECADES-OLD PRIOR ACTS DENIED ROSS A FAIR TRIAL

The prosecution defends the trial court's admission of unrelated allegations against Ross by using an analysis that can be characterized, at best, as superficial. The Response Brief simply repeats parts of the court's rulings and recites the facts of a few cases, without applying the law to this case or addressing the failings of its case. Due to the lack of analysis posited by the State, Ross largely relies on his Opening Brief as a correct statement of the law and the facts of the case.

a. When the State fails to meet almost every mandatory criteria of RCW 10.58.090(6), allegations of unrelated and uncharged crimes are not admissible. RCW 10.58.090(6) sets forth eight factors the court "shall" consider to determine whether uncharged and unrelated allegations of prior sexual offenses are admissible at trial. Here, the trial judge found five of the mandatory

criteria did not support admissibility.¹ But rather than weighing those factors to defeat the State's claim of admissibility, it essentially ignored them and justified the admission of completely unrelated claims of sexual misconduct upon the remaining three factors.

The prosecution offers no theory upon which the court may admit such evidence after finding the record does not support five of the eight mandatory factors bearing upon admissibility of uncharged allegations. Instead, it assumes that the court may disregard any factors that do not weigh in favor of admissibility, as long as at least one factor cuts in favor of admitting the evidence. While the statute does not expressly require that each factor favor admissibility, it requires the court to consider each factor set out in the statute, and thus, none can be cast aside as superfluous. See State v. Lilyblad, 163 Wn.2d 1, 11, 177 P.3d 686 (2008). Penal statutes are strictly construed. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (When interpreting a criminal statute, "we give it a literal and strict interpretation."). The court does not

¹ The acts were remote in time; they were not frequent; there was no relevant intervening circumstances at issue; no allegation resulted in prosecution or conviction; and no other facts or circumstances favored admissibility. Opening Brief, at 14-15; RCW 10.58.090(6)(b),(c),(d),(f),(h).

“consider” each factor by merely acknowledging its existence and then deeming it irrelevant to admissibility.

The prosecution also disregards Ross’s critique of the few factors the court used to justify the admission of such testimony. It does not explain how the prior offenses were “necessary” to the State’s case. The statute requires the court to find the “necessity” of the allegations, which means “a great or absolute need.” See Opening Brief, at 19 (citing inter alia Webster’s Third New International Dictionary, p. 1511 (1993)); RCW 10.58.090(6)(e).

The prosecution does not even mention that it had conceded below that the evidence it sought to admit was not “absolutely necessary,” but said “necessity” should be viewed as “helpful,” and there is “no question it will help.” 3/4/09RP 41-42. “Helpful” is not the equivalent of necessary as required by RCW 10.58.090(6)(e).

The prosecution did not establish that the two prior incidents from many years ago were necessary to the case against Ross. In the charged incident, there were witnesses who saw Ross and the complainant immediately before and after the incident, she was thoroughly examined at the hospital by an experienced forensic nurse immediately afterward, and she was promptly interviewed by police investigators, who also searched Ross’s home and took his

statement close in time to the reported offense. See Opening Brief, 6-8, 18.

Additionally, the Response Brief never addresses the consequences of the State's failure to establish Ross's connection to Armstrong. It claimed in its proffer that Armstrong would testify that Ross perpetrated a remarkably similar offense in 1996, yet the court struck her testimony after Armstrong was unable to identify Ross. 4RP 778-98.² The court told the jury to disregard her testimony. 4RP 798. Thus, the State cannot bootstrap the admissibility of Husby's allegations under RCW 10.58.090 by using Armstrong's claims.

Armstrong's inability to testify that Ross committed a sexual offense highlights the importance of RCW 10.58.090(6)(f), which requires the court to consider whether there was a prior criminal conviction. The unreliability of Armstrong's unchecked, uninvestigated claim that Ross was the perpetrator should not have been disregarded by the court. The lack of police investigation and prosecution of the charge must weigh strongly against

² The State's Response Brief misleadingly recounts Armstrong's story as if it were admitted into evidence, rather than stricken. Resp. Br. at 14-15.

admissibility when the prior offense cannot be established at trial and when its admission taints the proceedings.

Even though the court struck Armstrong's testimony, it did not reevaluate whether the calculation of mandatory criteria under RCW 10.58.090 changed absent Armstrong's claims against Ross. The prosecution offers no further analysis on appeal. Instead, it insists the court did not abuse its discretion.

The State's cursory insistence that the court did not abuse its discretion does not make it so. The court's interpretation of the statute is reviewed *de novo*, not as an abuse of discretion. See State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). By disregarding the mandatory criteria of RCW 10.58.090 when those factors did not favor admissibility, the court misapplied the statute.

Finally, the prosecution does not acknowledge its efforts to make use of Armstrong's stricken testimony, or to undermine the limiting instruction given for Husby's testimony. In her closing argument, the prosecutor emphasized Ross's repeat offender status as a theme. Even though Armstrong's testimony had been stricken, the prosecutor spoke as if Ross engaged in such bad acts repeatedly. 5RP 838, 848. Even though Armstrong's testimony was stricken, the prosecution's insinuation of Ross's pattern of

behavior drew upon these allegations as well, and the likelihood that the jury would speculate that Armstrong would allege similar bad acts against Ross. 5RP 838.

b. The single claim of a bad act from 2000 does not establish a common scheme or plan. The prosecution's ER 404(b) common scheme or plan analysis puts on blinders, similarly to those it uses in its RCW 10.58.090 discussion. The prosecution never explains whether the legal analysis changes after evidence of one of the two alleged prior bad acts is stricken and it is left with a single complaint of misconduct on a single date in 2000, almost one decade before the charged offense. It sets out the facts of two common scheme or plan cases, DeVincentis and State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995), without explaining how those cases apply here.

The prosecution claims that the "existence of the crime at issue" would be hard to prove here, like in DeVincentis, 150 Wn.2d at 21. Resp. Br. at 24. But unlike DeVincentis, there were witnesses who saw the complainant immediately before and after the incident. And she was examined at a hospital by a forensic nurse and interviewed by a police detective. There was physical evidence. In DeVincentis, there was no corroborating evidence

available to show that any sexual conduct occurred at all – the alleged sexual contact left no physical trace and the complainant did not report the incident until much later. 150 Wn.2d at 13-14. Here, there was evidence of sexual contact from sperm protein, P 30, in the vaginal area, an immediate report of the incident to family and police, and witnesses who saw the demeanor of the complainant and Ross immediately before and after. 3RP 456-57, 460, 541, 633. While this evidence alone may not have convinced the jury beyond a reasonable doubt based on inconsistencies or questions about the complainant's accuracy, it is not like DeVincentis where there was no evidence whatsoever of any sexual contact, criminal or consensual, beyond the word of the child complainant who did not report the incident for several months. The prosecution's comparison to DeVincentis is inapt, as discussed in the Opening Brief.

Its comparison to Lough is similarly flawed and conclusory. The prosecution does not make Ross's case like Lough by setting out the facts of Lough and declaring that the court did not abuse its discretion here. Response Brief at 24-26. Lough requires "markedly similar acts of misconduct against similar victims under similar circumstances." 125 Wn.2d at 852. Ross was accused of

reaching out to Husby in a platonic way: chatting with her, offering advice, having lunch, and then, after a significant period of friendship, engaging in unwanted sexual contact. But with Shaffer, he was accused of immediately and persistently expressing his romantic interest in her: telling her they were soulmates, asking her out on dates, expressing his love for her, and then, at the their first meeting, engaging in unwanted sexual conduct. The prosecution claims that the cases are similar because he expressed a possible future together, but that is an incorrect rendition of Husby's testimony and a disingenuous portrayal of his efforts to get Shaffer to go out on a date with him, which Shaffer largely rebuffed. The Sate's claim of marked similarities falters upon examination and relies on Armstrong's unproven claims without acknowledging this failure. The allegations against Ross are nothing like those in Lough and there is no markedly similar plan between the two incidents that would otherwise be difficult for the jury to understand and weigh.

c. The State's cursory analysis demonstrates the open door with which it treats RCW 10.58.090 and the common scheme exception to ER 404(b). The State's summary treatment of the issue on appeal illustrates its expansive view of the

admissibility of extremely prejudicial uncharged and unproven allegations. In its view, the broadest similarity suffices. Any offense that occurs in a private setting justifies allegations of uncharged and unproven claims of misconduct on other occasions.

The prosecution does not address the insidious way the evidence affected the jury when it had to strike Armstrong's testimony as she prepared to allege Ross had sexually assaulted her in an uncharged and unproven incident in 1996. It does not own up to or explain its efforts to encourage the jury to view Ross as a repeat offender who must be stopped.

The State muddled the case when it offered testimony from a witness whose allegations were from more than 10 years earlier, which were never investigated by the police, and then the witness could not identify Ross in court despite being given multiply opportunities to try. The court's analysis under RCW 10.58.090 and ER 404(b) was fundamentally flawed by its disregard for the criteria of the statute and the inapplicability of the evidentiary rule to the claims against Ross. Had the court given proper weight to the unreliability of the uncharged prior acts that had occurred many years ago, it would not have admitted the evidence. Because the court erroneously admitted the evidence alleging Ross was a

repeat offender, the jury was encouraged to convict him on a basis of old and unrelated claims, rather than upon the charge against him, which denied Ross a fair trial.

2. THE COURT MISUSED ITS SENTENCING
AUTHORITY BY RELYING ON INFORMATION
THAT WAS NOT PROPERLY BEFORE IT

At the time of sentencing, Ross was 51 years old and had a criminal history score of "0." CP 5, 16. He had never been convicted of, or charged with, a felony offense. 4/29/10RP 50. His conviction in the case at bar was for a single incident and involved a single count. CP 32, 163.

Over Ross's repeated objection, the trial court listened to lengthy speeches about allegations that Ross was a horrible person from people unconnected to the victim of the charged crime. Debbie Jones detailed her failed relationship with Ross and pleaded with the judge to sentence him to "the full extent of the law" even though her complaints about Ross had nothing to do with the offense of which he was convicted. 4/29/10RP 44. Armstrong berated Ross and insisted he was the man who had attacked her in 1996, even though she had been unable to identify him in the courtroom when testifying. 4RP 780 ("I don't think he is here" in

the courtroom); 4/29/10RP 47 (“sir, I’m here to tell you that that man attacked me in 1996.”).

When pronouncing sentence, the court explained how “helpful” it was to hear from Armstrong and Jones. 4/29/10RP 52-53. Even though Husby’s claims had not been admitted for their truth at trial, and she did not appear at the sentencing hearing, the court accepted as true her allegations, as well as the complaints of Armstrong and Jones, when sentencing Ross to the maximum term available. *Id.* at 52-54; CP 30. The judge did not hide his reliance on these extraneous claims against Ross when sentencing him. He said, “it is not just one victim, it’s all of those of you who have experienced what Ms. Shaffer has gone through in this case; and so we need to be aware of that in determining an appropriate and just sentence for Mr. Ross.” 4/29/10RP 53. He added that Ross had violated the “trust he owed to Shaffer and all others with whom he has come in contact.” 4/29/09RP 54.

The prosecution essentially ignores the court’s own explanation for the sentence imposed. It insists that the court did not need Armstrong or Jones’s remarks to give Ross the sentence it imposed. Response Brief at 30. While the court had the legal authority to impose the high end of the standard range, the court

did not have the authority to impose that sentence based on allegations of numerous uncharged crimes. RCW 9.94A.530(2). The court could not have reached the conclusion that Ross was a “vicious predator” had it not relied on the allegations of Armstrong and Jones, raised for the first time at a sentencing hearing over Ross’s objection. 4/29/10RP 59. Nor was Husby’s allegation “proved” at trial, since it was introduced with the limiting instruction that it was only to be used to evaluation Shaffer’s credibility or the existence of a common scheme or plan. CP 30.

The court deliberately elicited information about Ross that it knew it was not supposed to consider at sentencing, and used that information to deem Ross a vicious predator who is not amenable to treatment. If the information was irrelevant to the court’s sentencing decision, as the State asserts in its brief, then there was no reason for it at the sentencing hearing. But the information cannot be disregarded as irrelevant when the judge’s comments demonstrate that he relied on it when imposing as long a sentence as legally possible, given that there was no possibility of an exceptional sentence when the State had not charged any aggravating factors.

The remedy for the court's reliance on so many uncharged allegations in violation of the terms of RCW 9.94A.530(2) is to afford Ross a new sentencing hearing before a different judge. See State v. Aguilar-Rivera, 83 Wn.App, 199, 203, 920 P.2d 623 (1996) (when trial court inadvertently omits allocution until after intended sentence announced "the remedy is to send the defendant before a different judge for a new sentencing hearing."). Ross should receive a new sentencing hearing and the improperly offered allegations regarding uncharged offenses should be stricken.

3. THE STATE PROPERLY CONCEDES THAT
THE COURT IMPOSED NUMEROUS
IMPROPER SENTENCING CONDITIONS

The State correctly acknowledges that the trial court imposed a number of conditions of community custody that are either unauthorized or contrary to the constitutional requirements of due process of law and freedom of expression. Without the necessary factual predicate, the trial court improperly entered special conditions of community custody forbidding Ross from accessing the internet absent DOC approval, or from possessing or consuming alcohol, entering establishments where alcohol was the primary commodity for sale, and possessing drug paraphernalia. These conditions are not authorized by the sentencing statutes because they are not crime-related. The court also exceeded its authority by imposing the unduly vague restrictions barring Ross from accessing pornographic materials or from exchanging information with women in any setting. The prosecution properly concedes these conditions must be stricken. Response Brief at 30-31.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Ross respectfully requests this Court remand his case for further proceedings.

DATED this 13th day of June 2011.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 65455-1-I
)	
BRYAN ROSS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF JUNE, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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