

NO. 66957-5-1

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

REC'D
OCT 17 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

BARUTI HOPSON,

Appellant.

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

The Honorable Michael C. Hayden, Judge

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 OCT 17 PM 4:20

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

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

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Trial Evidence</u>	3
3. <u>Evidence Admitted in Violation of ER 403 and 404(b)</u> ..	11
4. <u>Prosecutorial Misconduct</u>	14
C. <u>ARGUMENT</u>	16
1. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE THAT HOPSON PROMOTED PROSTITUTION WITH TWO OTHER YOUNG WOMEN AND MAY HAVE IMPREGNATED A THIRD.	16
a. <u>Evidence Hopson Had Promoted Prostitution With Other Young Women Was Not Admissible As Res Gestae</u>	18
b. <u>The Trial Court Also Erred When It Admitted Evidence That Hopson May Have Impregnated Another Young Female Prostitute</u>	26
2. PROSECUTORIAL MISCONDUCT DENIED HOPSON A FAIR TRIAL.....	28
D. <u>CONCLUSION</u>	32

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State ex rel. Carroll v. Junker</u> 79 Wn.2d 12, 482 P.2d 775 (1971).....	16
<u>State v. Belgarde</u> 110 Wn.2d 504, 755 P.2d 174 (1988).....	28
<u>State v. Bennett</u> 36 Wn. App. 176, 672 P.2d 772 (1983).....	17
<u>State v. Carleton</u> 82 Wn. App. 680, 919 P.2d 128 (1996).....	19, 23, 27
<u>State v. Clafin</u> 38 Wn. App. 847, 690 P.2d 1186 (1984) <u>review denied</u> , 103 Wn.2d 1014 (1985)	28
<u>State v. Coe</u> 101 Wn.2d 772, 684 P.2d 668 (1984).....	16
<u>State v. DeVincentis</u> 150 Wn.2d 11, 74 P.3d 119 (2003).....	18, 22
<u>State v. Echevarria</u> 71 Wn. App. 595, 860 P.2d 420 (1993).....	28
<u>State v. Goebel</u> 40 Wn.2d 18, 240 P.2d 251 (1952).....	16
<u>State v. Hughes</u> 118 Wn. App. 713, 77 P.3d 681 (2003) <u>review denied</u> , 151 Wn.2d 1039 (2004)	28
<u>State v. Lough</u> 125 Wn.2d 847, 889 P.2d 487 (1995).....	17, 22
<u>State v. McKenzie</u> 157 Wn.2d 44, 134 P.3d 221 (2006).....	29, 30

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Miles</u> 73 Wn.2d 67, 436 P.2d 198 (1968)	28
<u>State v. Mutchler</u> 53 Wn. App. 898, 771 P.2d 1168 <u>review denied</u> , 113 Wn.2d 1002 (1989)	19
<u>State v. Myers</u> 49 Wn. App. 243, 742 P.2d 180 (1987).....	17
<u>State v. Pirtle</u> 127 Wn.2d 628, 904 P.2d 245 (1995) <u>cert. denied</u> , 518 U.S. 1026 (1996)	29
<u>State v. Powell</u> 126 Wn.2d 244, 893 P.2d 615 (1995).....	19, 21
<u>State v. Saltarelli</u> 98 Wn.2d 358, 655 P.2d 697 (1982).....	17, 23
<u>State v. Smith</u> 106 Wn.2d 772, 725 P.2d 951 (1986).....	16
<u>State v. Tharp</u> 27 Wn. App. 198, 616 P.2d 693 (1980) <u>aff'd</u> , 96 Wn.2d 591, 637 P.2d 961 (1981)	16, 19, 20, 21
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
ER 401	1, 26
ER 403	1, 11, 17
ER 404	1, 11, 16, 18, 19, 22
ER 802	1, 27
McCormick's Evidence, § 190	19

A. ASSIGNMENTS OF ERROR

1. The trial court erred under ER 403 and 404(b) when it admitted evidence that appellant had committed the crime of promoting prostitution with two other women.

2. The trial court erred under ER 401, 403, 404(b), and 802 when it allowed hearsay evidence that appellant had impregnated another young girl engaged in prostitution.

3. Prosecutorial misconduct during closing argument denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Appellant was charged with promoting the commercial sexual abuse of a minor. Over defense objections, the court permitted the State to admit evidence that appellant had promoted the prostitution of two other young women under the res gestae exception to ER 404(b). Where the story of appellant's dealings and relationship with the alleged victim was complete without resort to evidence of these other crimes, did the trial court err and deny appellant a fair trial when it admitted the State's evidence?

2. Over a defense objection, the court permitted the State to introduce hearsay evidence that appellant had sex with

another young prostitute and may have impregnated her. Did this irrelevant and highly prejudicial evidence also deny appellate a fair trial?

3. During closing argument, and over a defense objection, the prosecutor focused on the potential harms to which the appellant exposed the alleged victim, including death, violent crime, pregnancy, and sexually transmitted diseases. The prosecutor also focused on the emotional toll the crimes would exact for the rest of the alleged victim's life. Did these appeals to jurors' passions and emotions constitute misconduct warranting a new trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Baruti Hopson with two counts of Promoting Commercial Sexual Abuse of a Minor, three counts of Rape of Child in the Third Degree, and one count of Assault in the Second Degree. CP 39-41. The alleged victim for all six counts was J.S., whose age was between 15 years, 6 months and 15 years, 10 months during the time periods charged. CP 39-41.

A jury found Hopson guilty as charged. CP 80-85. The court

sentenced him to a high-end standard range sentence of 318 months in prison, and Hopson timely filed his Notice of Appeal. CP 90, 92-93, 101-113.

2. Trial Evidence

In March of 2010, J.S. was a freshman at Auburn High School. 2RP¹ 18-20. After certain rumors surfaced at school about J.S. and a boy, J.S. ran away from home. She left a note for her parents indicating she needed to “find herself.” 2RP 21-22; 3RP 11-12. J.S. was gone nine days before she returned home. 2RP 22. During that period, she met a girl named Candace, who worked as a prostitute, and J.S. also engaged in acts of prostitution. 2RP 23; 3RP 12-13.

J.S. was home schooled thereafter, and her parents believed things were going well. 2RP 23-25; 4RP 27. But on June 11, 2010, J.S. ran away again. 2RP 25; 4RP 27-28. Candace had contacted J.S. and suggested the two go to California together. She told J.S. she already had bus tickets or the two could drive to California in Candace’s car. J.S. snuck out of her house and met Candace at the

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – January 18, 2011; 2RP – January 20, 2011; 3RP – January 24, 2011; 4RP – January 25, 2011; 5RP – January 26, 2011; 6RP – January 27, 2011; 7RP – March 29, 2011.

transit center in Auburn. 3RP 15-18.

In fact, Candace had not purchased tickets to California. Nor did she have her own car. 3RP 21-22. She suggested they could raise money for the tickets through prostitution. Candace posted online advertisements and, for the next several days, J.S. engaged in additional acts of prostitution. 3RP 22, 28-29.

For the next four months, J.S.'s parents had little contact with their daughter. On the morning of July 27, 2010, J.S. called her mother from a pay phone to wish her a happy birthday. They spoke for about five minutes. When her mother asked J.S. to come home, she said she could not. 2RP 28-29. J.S. called home again the morning of August 20, 2010. As before, she said she could not return home. 2RP 31-33. On September 5, 2010, J.S. sent an e-mail to her mother, but never replied when her mother sent a response. J.S. also sent a subsequent e-mail to her mother later that month. 2RP 34-36.

Police were finally able to locate and arrest J.S. on September 24, 2010. 2RP 37. This arrest was made possible by contact Bellevue Police had with J.S. two months earlier. To reduce prostitution in Bellevue, officers sometimes look at online ads, make a "date" with the woman advertising her services, meet the woman at

a motel, and then issue a notice of trespass, making it a crime for the woman to return to the property. 2RP 64-65.

On July 4, 2010, Bellevue Police Officer Tor Kraft responded to an ad on backpage.com and made a date at the Coast Hotel. 2RP 65-67, 73, 76-77. The prostitute for this date was J.S., who claimed her name was Lisa Robins and that she was born November 21, 1991, making her 18 years old. 2RP 68, 87-88. Based on her appearance, officers did not believe J.S. was 18. She was not carrying ID, however. 2RP 69. Kraft took her into custody, photographed her, took fingerprints, and attempted – without success – to determine her true identity. 2RP 73-75; exhibits 10-13. Because there was not probable cause to hold J.S. for a criminal offense, Kraft gave her a notice of trespass and released her. 2RP 76; exhibit 25.

Even after July 4, Kraft continued efforts to identify “Lisa Robins.” 2RP 76. Eventually, he was able to determine that “Lisa” was J.S. and that she was not yet 16 years old. 2RP 82-83; exhibit 9. Kraft continued to look at backpage.com in case J.S. ran another ad. 2RP 76-77, 82. On September 23, 2010, Kraft spotted a Backpage ad that looked similar to the one he had seen in July. 2RP 83-84.

With the assistance of the Seattle Police Department, officers arranged a date at the Silver Cloud Hotel near Safeco Field. J.S. was arrested in one of the hotel rooms after she and an undercover officer discussed sex for money. 2RP 84-85, 162-180. In her dealings with the officer, J.S. once again claimed her name was Lisa and that she was an adult. 2RP 174-175, 179. Following her arrest, she was uncooperative and confrontational with officers. 2RP 168.

Seattle Police also arrested 31-year-old Baruti Hopson. 4RP 93. Hopson was driving a car that arrived at the hotel parking lot around the same time J.S. arrived. 2RP 145-146, 166, 184-186. He was carrying a cell phone and \$590 in cash. 3RP 186-187; 4RP 34, 54.

Using a warrant, police obtained information from backpage.com regarding the ads for J.S.'s services. 2RP 77; exhibit 1. For each of the ads, backpage.com listed Baruti Hopson as its customer. The ads themselves identify the individual posting the ad as "Joy" and list her age as either 18 or 19. 2RP 77-79, 135-138; exhibits 15-23.

The personal and professional relationship between J.S. and Hopson was a matter of great dispute at trial.

When first arrested, J.S. told police that Hopson was her

boyfriend, they were not having sex, and he believed she was 18 years old because she had told him that. Moreover, he had seen paperwork indicating she was 18. She also told police that although Hopson knew she was a prostitute, he did not take money from her for these activities. 3RP 123-124, 160-161. By the time of trial, however, J.S. maintained that although she initially told Hopson she was 18, she later lead him to believe she was 16. Moreover, they were having sex, and Hopson was taking the money she earned through prostitution. 3RP 161-165.

Specifically, at trial J.S. testified that she met Hopson through Candace after she ran away from home the second time. She did not previously know him. 3RP 24-27. After she and Candace got into an argument, Candace kicked her out of the motel room where they were staying. J.S. had no other place to stay and called Hopson, who picked her up and took her to his apartment. 3RP 30-34.

According to J.S., Hopson asked her how old she was and she said 18. Hopson asked if she had an ID, and J.S. said she did not. 3RP 37. J.S. testified that her relationship with Hopson became sexual within the first few days she began staying with him. 3RP 36. And within a week, she was working for Hopson as a

prostitute. 3RP 38-40. Initially, Hopson would post the ads, but once J.S. memorized his credit card number, she would sometimes post. 3RP 41-42. On average, J.S. would meet men two to five times a week. 3RP 45. Hopson set the hourly rate, and J.S. gave him all the earnings. 3RP 40, 42-43, 45. J.S. was required to use a condom when she worked because she and Hopson continued to have sex. 3RP 44.

J.S. testified that toward the end of June or early July 2010, she temporarily left Hopson and worked for another pimp. 3RP 57-59. It was during this brief period that Bellevue Officer Kraft arrested her at the Coast Hotel and she maintained her name was Lisa Robins and her date of birth was November 21, 1991. 3RP 60-62.

Upon her release from that incident, J.S. went back to Hopson. 3RP 63-64. According to J.S., shortly thereafter, Hopson told her that although she claimed to be 18, he knew she was really 16 because Candace had told him. 3RP 66-67, 124, 179. Although she was in fact not yet 16, J.S. testified that she assured Hopson at that time that she was indeed 16. 3RP 124, 164-165. She also testified that Hopson suggested at that point that maybe she should get a fake ID, but she convinced him it was not necessary given police already believed her name was Lisa and that she was 18.

They agreed she would provide that information again if she were ever arrested. 3RP 68.

J.S. also described the incident leading to the assault charge. According to J.S., sometime in August 2010, Hopson was angry because she had spent too long with a client and the client's condom had broken. 3RP 78. When Hopson also found out that she had allowed the client to engage in a certain sex act with her, he hit her in the face and bloodied her nose. 3RP 79-80. After arriving back at Hopson's apartment, but while still in his car, she told him that she was leaving him. According to J.S., Hopson put his hands around her throat and choked her for several seconds before releasing her. 3RP 81-83. Hopson apologized and J.S. did not leave him. 3RP 84.

Hopson testified at trial and provided a very different description of his relationship with J.S. According to Hopson, he knew J.S. as Lisa Robins and did not learn her real name until after he was charged. 4RP 79-80. He testified that the two met at a bus stop near his apartment when J.S. asked to take a puff of a marijuana cigarette he was smoking. 4RP 80. She stayed in his apartment off and on for the next several months. 4RP 81.

Consistent with J.S.'s testimony, Hopson testified that J.S. claimed to be 18 years old when they first met, and he had no

reason to doubt her. 4RP 82. Hopson denied the conversation where he supposedly said he knew J.S. was actually 16. 4RP 90.

In fact, J.S. had shown Hopson legal documents from two incidents that demonstrated she was 18.² The first is the Notice of Trespass Bellevue Police gave her on July 4, 2010, at the Coast Hotel. It lists her name as Lisa Robins and date of birth as 11/21/91. 4RP 82-84; exhibit 25. The second is a criminal citation related to a misdemeanor theft, dated July 13, 2010, and filed in Everett Municipal Court. It also lists her name as Lisa Robins and date of birth as 11/21/91. 4RP 88-91; exhibit 31. Another document from this same court, which Hopson also saw, similarly lists J.S.'s name as Lisa Robins. 4RP 170; exhibit 32.

Hopson conceded that he knew J.S. was a prostitute and conceded allowing her to use his credit card number to place ads. 4RP 84-85, 91, 171. Moreover, he sometimes drove her to meet dates. 4RP 165-166, 91. He helped her in this manner so that she would not have to walk the streets, which would keep her safer. 4RP 84-85, 137-140, 166, 171. But he never took any money from her. Rather, his source of income was selling marijuana. 4RP 91-92.

² J.S. testified that she did indeed show Hopson these documents. See 3RP 151, 154, 161, 178.

Hopson denied ever having sex with J.S. He testified that he loved her but, given her occupation, he did not want to have a sexual relationship with her. 4RP 86-87, 160. He also denied hitting her, choking her, or otherwise putting his hands on her in a violent way. 4RP 87-88.

The prosecution attempted to impeach Hopson with lyrics to rap music he had written. The lyrics describe the activities of a pimp. 4RP 106-115, 123-125; exhibits 35-36. Hopson denied the lyrics were based on his personal lifestyle. 4RP 112.

3. Evidence Admitted in Violation of ER 403 and 404(b)

Prior to trial, the defense moved under ER 403 and 404(b) to preclude evidence that Hopson had engaged in acts of promoting prostitution with other women. CP 10-12. The defense repeatedly lodged these same objections on the first day of trial. 1RP 19-25.

Despite the defense objections, the prosecution sought to introduce evidence that J.S. “was not the only girl that the Defendant . . . was pimping out, that there were other girls . . . at the time.” 1RP 18. According to the State, there were two other young women living with Hopson, one of whom in particular worked regularly for Hopson as a prostitute. 1RP 21. The State argued the evidence was relevant to assist the jurors in comprehending “that there’s really a

whole subculture involved with the pimp/prostitute relationship” with its own rules, vocabulary, and relationships. 1RP 18-19.

The trial court found the evidence involving other women admissible under the res gestae exception to ER 404(b) to explain “the whole atmosphere that [J.S.] was subjected to.” 1RP 19; see also 1RP 20, 22-24 (further explaining ruling).

Armed with a decision in its favor, the prosecution referred to this evidence in its opening statement:

[The Defendant] had at least one other girl who was working for him as a prostitute. And as you will hear in this case, the Defendant’s stable, or the other term that is used in this line of work as stable, is the collection of girls that work for a pimp. [J.S.] was the main girl. And sometimes that is referred – the main girl that works for a pimp is referred to as the bottom bitch. The pimp’s most trusted and loyal girl; the one that he’s known the most, the one that sometimes will look out for the other girls and tell the pimp if the other girls are disobeying or obeying. . . .

2RP 8.

The subject of “other girls” arose again during the State’s examination of Bellevue Officer Kraft. Kraft testified that the warrant for relevant documents served on backpage.com also generated exhibits 2 through 8, which contained pictures of “another young woman.” 2RP 80-81. In fact, these exhibits were ads involving two young women who were not J.S. 3RP 95-112; exhibits 2-8.

Exhibits 2 through 8 were admitted over another defense objection that they were improper propensity evidence. 2RP 130-133; 3RP 96-112. And they were the focus of significant attention during the State's examination of J.S.

J.S. testified that at some point Hopson brought in "a new girl" named "Goldie," who was 19 years old and prostituted for Hopson. 3RP 66, 75. Hopson sometimes shared his bed with J.S. and Goldie at the same time. 3RP 76. J.S. testified that exhibits 2 through 5 were backpage.com ads for Goldie's services, and that Hopson had posted them. 3RP 96-102.

J.S. also testified that a second young woman – "Candita" – lived in Hopson's apartment and that Hopson also posted Backpage ads for her services. 3RP 110-111. According to J.S., exhibits 6 through 8 were some of those ads. 3RP 111-113.

The prosecution raised the subject of these other prostitutes again during cross-examination of Hopson. The prosecutor had Hopson admit that he knew Goldie and Candita were prostitutes, that they stayed at his home, and he let them use his credit card number and computer to place ads with Backpage.com. 4RP 129-137.

In addition to J.S.'s testimony that Hopson was a pimp for Goldie and Candita, J.S. also was permitted to testify – over yet

another defense objection – that when J.S. ran away with Candace, Candace told her that she (Candace) might be pregnant with Hopson's child. 3RP 24.

During closing argument, the prosecutor reminded jurors of the evidence concerning Goldie and Candita:

Just like w – ladies and gentlemen, (pause) at the – not only [J.S.] at his house, in terms of what he was doing – what he was engaged in, but the other women that he w – that were posting, using his computer, using his credit card, using his home. Well, they were engaged in prostitution; he knew that – you know? Is that a coincidence? Well, sure, he said. It's a coincidence. Got a friend who's a researcher and – and they have got an expression they use. Three – three data points, make a trend. Well we've got some data points here that – that are not only showing a trend, but can lead you to conclude what Mr. Hopson was all about. . . .

5RP 43.

4. Prosecutorial Misconduct

During its closing argument, the State also focused on the emotional damage done to J.S.:

We account for the bad choices teens may make some times, and we hold the adult responsible. We hold the adult responsible, who takes it upon himself to facilitate and promote and profit from that child and her body, being out on the street, exposing herself to all those things we heard about in this trial.³ Starting at

³ The State elicited testimony that prostitutes in general face certain risks, including being killed, raped, and contracting a sexually transmitted disease. 4RP 103-104.

the very top – murder, rape, robbery, assault, pregnancy, sexually transmitted disease, and I daresay, ladies and gentlemen a lifetime – a lifetime of knowing what for four or five months, this child has done. A lifetime of knowing five years from now, 10 years from now, 35 years from now.

Defense: Objection, Your Honor, to improper argument.

Court: Overruled.

Prosecutor: This is not [sic] a fact, these five months of her life will be with her for her life. You cannot erase them. . . .

5RP 33.

During the defense closing, counsel tried to mitigate the harm from this argument, reminding jurors they were not to decide the case based on sympathy, calling the argument a distraction, and asking jurors to put aside their emotions. 5RP 48-49, 59.

In rebuttal, the prosecutor addressed this subject directly:

he is guilty of Promoting The Commercial Sexual Abuse of [J.S.]; he's guilty of raping her, and it does matter. It does matter that he prostituted her out. It does matter that he put her out on the street and exposed her to those dangers. It does matter that she sold her body for money; it does matter that she's going to have that memory, with her, for the rest of her life. It matters. Thank you for your time; I ask you to find the Defendant guilty on all counts.

5RP 63-64 (emphasis added).

Hopson now appeals.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE THAT HOPSON PROMOTED PROSTITUTION WITH TWO OTHER YOUNG WOMEN AND MAY HAVE IMPREGNATED A THIRD.

A defendant must only be tried for those offenses actually charged. Consistent with this rule, evidence of other crimes must be excluded unless shown to be relevant to a material issue and to be more probative than prejudicial. State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

The prosecution's attempts to use evidence of other crimes or bad acts must be evaluated under ER 404(b), which reads:

(b) Other Crimes, Wrongs, or Acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

Admission of evidence under this rule is reviewed for an abuse of discretion. State v. Tharp, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980), aff'd, 96 Wn.2d 591, 637 P.2d 961 (1981). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The court abused its discretion in Hopson's case.

Before admitting evidence under ER 404(b), the trial court must engage in a three-part analysis. First, the court must identify the purpose for which the evidence is being admitted. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Second, the court must determine that the proffered evidence is logically relevant to an issue. The test is "whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged." State v. Saltarelli, 98 Wn.2d 358, 362, 74 P.3d 119 (1982) (quoting Goebel, 40 Wn.2d at 21). Evidence is logically relevant if it is of consequence to the outcome of the action and tends to make the existence of the identified fact more or less probable. Saltarelli, 98 Wn.2d at 361-62.

Third, assuming the evidence is logically relevant, the court must then determine whether its probative value outweighs any potential prejudice.⁴ Saltarelli, 98 Wn.2d at 362-63. "Evidence of

⁴ Similarly, ER 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury"

prior misconduct is likely to be highly prejudicial, and should be admitted only for a proper purpose and then only when its probative value clearly outweighs its prejudicial effect." State v. Lough, 125 Wn.2d 847, 862, 889 P.2d 487 (1995). In a doubtful case, [t]he scale must tip in favor of the defendant and the exclusion of the evidence." State v. Myers, 49 Wn. App. 243, 247, 742 P.2d 180 (1987); State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983).

The State's burden when attempting to introduce evidence of other bad acts under one of the exceptions to ER 404(b) is "substantial." State v. DeVincentis, 150 Wn.2d 11, 17, 20, 74 P.3d 119 (2003).

- a. Evidence Hopson Had Promoted Prostitution With Other Young Women Was Not Admissible As Res Gestae.

The trial court in Hopson's case admitted evidence that Hopson had promoted prostitution with Goldie and Candita as res gestae of the charged crimes, i.e., to provide context and explain the circumstances surrounding the charged conduct. See 1RP 19-25.

From the court's comments on the record, the court was under the impression evidence admitted as res gestae is not

subject to ER 404(b) or its analytical framework. The court rejected the notion this evidence could be interpreted as propensity evidence. See 1RP 19-20, 22-23 (distinguishing between acts J.S. did not know about (propensity) and acts about which J.S. knew that occurred at the same time as the charged conduct (not propensity)); see also 2RP 131-132 (same). The court did not weigh the prejudicial impact of this evidence against its probative value, even when the State asked the court to assume ER 404(b) applied. See 1RP 24-25.

This was error. When proposed *res gestae* evidence contains evidence of other crimes or bad acts, it must satisfy ER 404(b). State v. Mutchler, 53 Wn. App. 898, 900-01, 771 P.2d 1168, review denied, 113 Wn.2d 1002 (1989). The court's failure to analyze the State's proffered evidence under ER 404(b), including its failure to weigh prejudice against probative value, was error. State v. Carleton, 82 Wn. App. 680, 685-686, 919 P.2d 128 (1996).

Under the proper analytical framework for ER 404(b), evidence that Hopson had promoted prostitution with two other young women was not admissible at trial. It fails the second and third steps of the analysis.

This evidence fails the second step because it was not relevant and necessary proof of the charged crimes. Washington courts have recognized the res gestae exception, "[w]herein evidence of other crimes is admissible '[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.'" Tharp, 27 Wn. App. at 204 (quoting McCormick's Evidence, § 190, at 448); State v. Powell, 126 Wn.2d 244, 263, 893 P.2d 615 (1995). But to fall within this exception, the other acts must be a "piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury." Tharp, 96 Wn.2d at 594.

The facts of Tharp illustrate what constitutes "necessary" evidence under the res gestae exception. During the course of one evening, someone stole three items from inside an automobile. Someone then stole several items from the home of a second victim, including a gun. Items from the first victim were left at the home of the second victim, indicating that one person had committed both crimes. Someone also stole a car from a third victim. Later that night, a fourth victim was found shot and killed. Police found the third victim's car and stolen items from the second victim near the body, indicating that one person had committed all

four crimes. Eventually, the police located Tharp. He was in possession of stolen items from the first and second victims, including the stolen gun, which turned out to be the murder weapon. Tharp was charged only with the murder of the fourth victim. Tharp, 27 Wn. App. at 200-01.

At trial, the court permitted admission of the first three crimes to prove Tharp had committed the fourth crime, the charged homicide. Tharp, 27 Wn. App. at 201. That ruling was correct in the context of the case. Evidence of the uncharged crimes truly formed a "mosaic," the completion of which depended on each related piece of evidence. Without hearing the evidence of the uncharged crimes, the jury would not have been able to understand and appreciate the sequence of events, knowledge of which was critical to deciding the case.

Similarly, State v. Powell demonstrates the proper use of the res gestae exception. Powell was charged with the murder of his wife. The trial court allowed the prosecution to introduce evidence of acts and statements made in the days just prior to the murder. The Supreme Court affirmed, recognizing this evidence proved the hostilities between Powell and his wife shortly before her death. "This continued hostility was particularly significant in light of the

absence of eyewitness testimony to the murder." Powell, 126 Wn.2d at 263. Without evidence of the events leading up to the murder, the jury would have been placed in a vacuum, left only to speculate why Powell had ever been considered a suspect.

Unlike Tharp and Powell, the State's ability to prove the charges against Hopson did not rest on evidence he had promoted prostitution with other women. In Tharp and Powell, the acts admitted as res gestae were necessary to explain parts of the story that otherwise could not be explained. In contrast, the story of Hopson's relationship and dealings with J.S. was complete without evidence concerning Goldie and Candita.

In successfully arguing for the admission of this evidence, the State maintained the evidence was relevant to assist the jurors in comprehending "that there's really a whole subculture involved with the pimp/prostitute relationship" with its own rules, vocabulary, and relationships. 1RP 18-19. But evidence concerning Goldie and Candita was not necessary for this purpose, either. J.S. testified at length on this subculture. 3RP 22-24, 40-56. The prosecution also called an expert on prostitution – a Detective-Sergeant with the Seattle Police Department's Vice and High-Risk Victim's Unit – to further explain this subculture in detail, including the promotion of

juvenile prostitutes. See 2RP 102-161. The evidence regarding Goldie and Candita was simply not necessary for this purpose.

This evidence also fails the third step of the analysis under ER 404(b) because the prejudicial impact far outweighs any probative value. Bad acts evidence should be admitted only where “its probative value clearly outweighs its prejudicial effect.” Lough, 125 Wn.2d at 862. And the court’s consideration of prejudice is particularly important in cases involving sex crimes, where the potential for improper prejudice is at its highest. DeVincentis, 150.2d at 24; Saltarelli, 98 Wn.2d at 363.

Having heard that Hopson promoted prostitution with two other young women, jurors were far more likely to believe J.S.’s version of events and find that he had done the same with her. Indeed, the court – apparently not recognizing this as a problem – identified this very likelihood when discussing its ruling. The court noted that without evidence of the two other women, “people might say, you know isn’t it strange that he would be uh, promoting prostitution and she’s the only one he’s doing. That – we don’t – we tend to disbelieve her because of that. This is (pause) context.” 1RP 25.

Where prior misconduct evidence is erroneously admitted,

reversal is required if “within reasonable probabilities . . . the outcome of the trial would have been different if the error had not occurred.” Carleton, 82 Wn. App. at 686.

In the absence of the improper evidence of character and propensity, Hopson presented plausible defenses. Regarding the promoting charges, he denied receiving any money from J.S.’s prostitution activities. See CP 52 (one means of committing offense is profiting from a minor engaged in sexual conduct). Moreover, Hopson testified that he always believed J.S. was 18 based on her representations and the legal documents from Bellevue Police and Everett Municipal Court, which J.S. admitted showing him. 3RP 151, 154, 161, 178; exhibits 18, 31, 32. It is an affirmative defense to the promoting charges that “the defendant made a reasonable bona fide attempt to ascertain the true age of the minor by requiring the production of a . . . governmental or educational identification card or paper” CP 59.

Whether jurors found Hopson credible when he denied that he had profited from J.S.’s activities and denied that he knew she was under 18 or, instead, found J.S.’s contrary testimony credible was critical to determining Hopson’s guilt on the promoting charges.

As the court itself recognized, jurors were more likely to believe J.S. once they heard evidence that Hopson had promoted other young women. See 1RP 25. This was certainly true in light of the State’s opening statement (referring to Hopson’s “stable” and “collection of girls”) [2RP 8] and the State’s closing argument, where the prosecutor expressly argued that Hopson was guilty of promoting J.S. because he had done the same thing with Goldie and Candita. See 5RP 43. (“three data points make a trend. Well we’ve got some data points here that – that are not only showing a trend, but can lead you to conclude what Mr. Hopson was all about. . . .”).

Regarding the rape charges, Hopson denied any sexual contact with J.S. 4RP 86-87, 160. Moreover, it was an affirmative defense that Hopson believed J.S. had already celebrated her 16th birthday. CP 70. J.S. herself testified that she led Hopson to believe she was already 16. 3RP 124, 164-165. It was not a stretch for jurors to find that Hopson believed this given that J.S. was close to 16 during the charged periods. See CP 39-41. But if jurors found Hopson not credible – more likely given the evidence of his other crimes against other women – they were more likely to convict him of rape. This is true for the single assault charge, too.

In the end, the erroneous admission of evidence that Hopson promoted the prostitution activities of other women had a significant impact on the jury's evaluation of all the charges. This evidence made it impossible for Hopson to receive a fair trial.

b. The Trial Court Also Erred When It Admitted Evidence That Hopson May Have Impregnated Another Young Female Prostitute.

The trial court also erred when it permitted J.S. to testify that, according to Candace, Candace might be pregnant with Hopson's child. 3RP 24.

When defense counsel objected to this evidence on relevance grounds, the trial court stated, "Overruled. The same – and the same reason." 3RP 24. This appears to be a reference to a ruling the court had made shortly before this objection, when it overruled a defense hearsay objection to J.S. testifying that Candace told her the name of her pimp. See 3RP 20. In overruling that prior objection, the court explained that it was doing so because the testimony was "not necessarily being offered" for its truth, "but what information was being conveyed to this witness at this time." 3RP 21.

The court's ruling concerning Candace's pregnancy was error. That Hopson had sex with Candace – another young

prostitute – and possibly got her pregnant, was not relevant for any non-hearsay purpose. That this information was conveyed to J.S. did not make any fact of consequence more or less probable. See ER 401 (“relevant evidence” means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

The resulting prejudice from this evidence was quite high. Not only did it reflect negatively on Hopson’s character, it improperly undermined one of Hopson’s defenses to the rape charges – that he never had sex with J.S. His stated reason for not having intercourse with J.S. was that he did not want to have sexual relations with a prostitute. 4RP 86-87, 160. Evidence that Hopson had sex with Candace (another prostitute) and may be the father of her child improperly undermined this evidence. If jurors believed Hopson had sex with Candace, they were more likely to believe he also had sex with J.S.

Notably, the court never ruled nor instructed jurors they could not consider this evidence for its truth. The court simply said it was “not necessarily being offered” for its truth. 3RP 21. This left open the possibility the evidence was indeed being offered for this

purpose, a violation of the prohibition against hearsay. See ER 802 (hearsay not admissible unless subject to an exception).

Like the evidence that Hopson had promoted prostitution with Goldie and Candita, this evidence requires reversal because there is a reasonable probability the outcome of the trial would have been different had this evidence not been allowed. Carleton, 82 Wn. App. at 686. For the reasons just explained, this evidence was perhaps most damaging to Hopson's defense against the rape charges. But it also would have impacted jurors' deliberations on the promoting prostitution and assault charges. Jurors were less likely to believe, and more likely to convict, a defendant who had sex with, and may have impregnated, another young prostitute.

2. PROSECUTORIAL MISCONDUCT DENIED HOPSON A FAIR TRIAL.

"A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). A prosecutor is forbidden from appealing to the passions of the jury and encouraging it to render a verdict based on emotion rather than properly admitted evidence. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988);

State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).

This includes comments encouraging jurors to sympathize with the victim because of the emotional impact of the crime. State v. Clafin, 38 Wn. App. 847, 849-850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985).

Misconduct is grounds for reversal when the conduct “was both improper and prejudicial in the context of the entire record and circumstances at trial.” State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), review denied, 151 Wn.2d 1039 (2004). The defendant bears the burden of establishing both. Id. Prejudice is established if there is a substantial likelihood the misconduct affected the jury’s verdict. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996).

There is no doubt that the prosecutor’s focus on the impact of the crimes with which Hopson was charged was an improper appeal to sympathy and emotion. The prosecutor emphasized that Hopson had exposed J.S. to the risk of violent crime (murder, rape, robbery, assault), as well as pregnancy and sexually transmitted diseases. 5RP 33. The prosecutor also focused on J.S.’ lost innocence, noting that because of Hopson, J.S. would retain memories of what was done to her for the rest of her life. 5RP 33

•
•
•

(“a lifetime of knowing what for four or five months, this child has done. A lifetime of knowing five years from now, 10 years from now, 35 years from now. . . . these five months of her life will be with her for her life. You cannot erase them. . . .”).

In State v. McKenzie, 157 Wn.2d 44, 60, 134 P.3d 221 (2006), the Supreme Court “agree[d] with the Court of Appeals that, in drawing attention to [a 12-year-old girl]’s lost innocence,” the deputy prosecutor committed misconduct, but – in light of defense counsel’s failure to object – found the argument was not “so flagrant and ill-intentioned” that it could not have been cured with an instruction.

In Hopson’s case, however, the misconduct was more severe. Not only did the prosecutor focus on the fact J.S. would never forget what happened to her, he also focused on the extreme dangers she had been subjected to, including the risk of death, pregnancy, and sexually transmitted diseases. Moreover, unlike McKenzie, counsel for Hopson *did* object, but the objection was overruled, allowing sympathy and emotion to cloud jurors’ minds.

Defense counsel did the best he could to deal with this misconduct. He called the State’s sympathy ploy a distraction and asked jurors to put aside their emotions. 5RP 48-49, 59.

Unfortunately, in light of the court's decision to allow the improper argument, the prosecutor was able, in rebuttal, to tell jurors that in deciding Hopson's guilt, it did in fact matter that he put her on the street and exposed her to these dangers and it did matter that she would have these memories for the rest of her life. 5RP 63-64. Hopson has established prejudice.

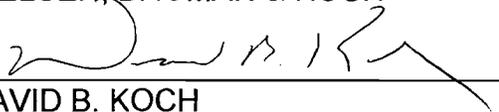
D. CONCLUSION

For The foregoing reasons, Mr. Hopson respectfully asks this Court to reverse his convictions and remand for a new trial.

DATED this 17th day of October, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 66957-5-1
)	
BARUTI HOPSPN,)	
)	
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 17TH DAY OF OCTOBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BARUTI HOPSPN
 DOC NO. 347630
 COYOTE RIDGE CORRECTIONS CENTER
 P.O. BOX 769
 CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF OCTOBER 2011.

x *Patrick Mayovsky*

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 OCT 17 PM 4:20