

NO. 67111-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN BETTYS,

Appellant.

FILED
APR 23 11:23
COURT OF APPEALS
STATE OF WASHINGTON

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

The Honorable David R. Needy, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE TRIAL COURT PROPERLY APPLIED ER 404(b) AND EXCLUDED PROPENSITY EVIDENCE.

a. Introduction

Rejecting the State's argument to the contrary, the trial court in John Bettys' child molestation case excluded evidence of two 1993 child rape convictions under ER 404(b), finding "the only real purpose [for the evidence] would be to show that – acted in conformity therewith" 3RP 94. Instead, the court admitted the evidence solely under RCW 10.58.090, which the Washington Supreme Court has since found unconstitutional. State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012).

In response to the trial court's decision, the trial prosecutor asked, "Even though there is common scheme or plan that your Honor just went through in your analysis –" at which point the trial court said, "Correct." 3RP 94.

The State now claims the trial court misapplied ER 404(b) and erred by failing to admit the evidence as showing a common scheme or plan. The State asks this Court to ignore the trial court's express exclusion of the evidence under ER 404(b) and to find the evidence of earlier sexual

misconduct was properly before the jury. Brief of Respondent (BOR) at 30-42.¹ This Court should reject the State's arguments.

b. The State may not now challenge the trial court's ER 404 decision.

The State chose to rely on RCW 10.58.090 and ER 404(b) in the trial court, fully aware of this Court's decision in Scherner finding RCW 10.58.090 constitutional. 3RP 81-88.² But at the time of the December 22, 2010, pretrial hearing in Bettys' case, the state also knew review had been granted in Scherner. 168 Wn.2d 1036 (6/1/10). To hedge the State's bets, the prosecutor argued the trial court "can consider admissibility under either or both." 3RP 81. The State was aware reliance on the controversial statute was risky, but chose that strategy anyway, most likely because evidence admitted under the statute could be used to argue Bettys acted in conformity with his character. See Gresham, 173 Wn.2d at 429 ("RCW 10.58.090 makes evidence of prior sex offenses admissible for

¹ Despite the trial court's clear ruling, the State now inexplicably claims "the trial court excluded the admission of the evidence under ER 404(b) as unduly prejudicial." Brief of Respondent (BOR) at 35. This is false. The trial court instead found the evidence "not inadmissible under ER 403" and "not excluded under ER 403." 3RP 94. The State acknowledges as much by directly quoting the trial court finding that the evidence was "not excluded under 403." BOR at 39.

² State v. Scherner, 153 Wn. App. 621, 225 P.3d 248 (2009).

purpose of showing the defendant's character and action in conformity with that character.").

Now that its strategy has backfired, the State asks this Court for affirmative relief: reversal of the trial court's exclusion of the evidence under ER 404(b). As respondent in an existing appeal, however, the State may request affirmative relief only by timely filing a notice of cross-review unless the "necessities" of the case demand it. RAP 2.4(a); State v. Sims, 171 Wn.2d 436, 442-43, 256 P.3d 285 (2010). The State filed no notice, so this Court should decline to provide the requested relief.

The necessities of the case do not demand this Court's review of the trial court's ER 404(b) decision. The "necessities" provision generally applies when the appellant's argument "cannot be considered separately from issues a respondent raises in response." Sims, 171 Wn.2d at 444. That is not the case here. Bettys' claim is limited to whether the trial court's erroneous admission of the evidence under ER 10.58.090 was harmless under Gresham. BOA at 13-16. ER 404(b), having been rejected by the trial court as an appropriate alternative avenue for admission of the evidence, plays no role in Bettys' appellate claim.

As Division Two of the Court of Appeals recently observed, there are no published cases in which a reviewing court has reversed a trial court in favor of a respondent because of case "necessities" absent a cross

appeal. Singletary v. Manor Healthcare Corp., 166 Wn. App. 774, 787, 271 P.3d 356 (2012). The necessities of Bettys' case do not demand review of the State's ER 404(b) issue.

To avoid this result, the State relies on the related rule that permits an appellate court to affirm a trial court on any ground supported by the record. BOR at 36. This rule generally applies, however, only when the trial court either correctly ruled in the State's favor or did not consider the other ground. See, e.g., Gresham, 173 Wn.2d at 419-20 (trial court's admission of evidence under ER 404(b) upheld even though additional reliance on RCW 10.58.090 invalidated); State v. Norlin, 134 Wn.2d 570, 584, 951 P.2d 1131 (1998) ("[A]lthough the trial court did not address the question of whether the State had connected Norlin to the evidence of Nicholas's prior injuries before admitting it, we conclude that the record indicates that such a connection was established by a preponderance of evidence."); State v. Grier, ___ Wn. App. ___, 278 P.3d 225, 230-31 (2012) (trial court's admission of other act evidence affirmed despite its characterization of res gestae as "exception" to ER 404(b); such evidence "more appropriately falls within ER 401's definition of 'relevant' evidence, which is generally admissible under ER 402."); State v. Lakotiy, 151 Wn. App. 699, 706, 713, 214 P.3d 181 (2009) (trial court's denial of motion to suppress evidence affirmed, despite error in relying on apparent authority

doctrine, because appellant has no constitutionally protected privacy interest in area searched), review denied, 168 Wn.2d 1026 (2010); State v. Donery, 131 Wn. App. 667, 675, 128 P.3d 1262 (2006) (“[E]ven though the trial court appeared to base its decision to use leg restraints on grounds that might be, by themselves, impermissible, the entire record reveals that the trial court did not abuse its discretion.”); State v. Huynh, 107 Wn. App. 68, 74-76, 26 P.3d 290 (2001) (trial court erred by excluding evidence under ER 607, but exclusion affirmed because evidence contained inadmissible hearsay).

Here, in contrast, the trial court considered the other ground, ER 404(b), and expressly rejected it. The rule upon which the State relies does not apply to these circumstances. Reversing the trial court’s exclusion of the evidence under ER 404(b) would constitute affirmative relief. Because appellate courts should not usurp the trial court’s role, State v. Morales, 173 Wn.2d 560, 571 n.10, 269 P.3d 263 (2012), this Court should decline the State’s request and leave undisturbed the trial court’s evidentiary decision.

c. The trial court did not misapply ER 404(b).

Even if this Court chooses to reach the State’s claim, Bettys’ conviction should nevertheless be reversed because the trial court did not misapply ER 404(b) by excluding the other acts evidence under the rule.

The State contends the trial court misapplied ER 404(b) by "exclud[ing] the prior acts of sexual misconduct even though they were determined by the trial court to be common scheme or plan." BOR at 32-33. The State relies on this single exchange between the prosecutor (Ms. Dyer) and trial judge for its assertion the trial court "determined" the earlier sexual acts established a common scheme or plan:

MS. DYER: Are you finding this as well under both 404(b) and 10.58?

THE COURT: I'm finding it's not excluded under ER 403. I believe under 404(b) the only real purpose would be to show that – acted in conformity therewith, and I think that – I will exclude it under 404(b). I'm simply allowing it under 10.58.090. Subsection 1.

MS. DYER: Even though there is common scheme or plan that your Honor just went through in your analysis –

THE COURT: Correct.

3RP 94.

As this exchange indicates, the State reads too much into the trial court's explanation of its ruling. Just before this colloquy, the court found there were "similarities" between the 1993 cases and current case, particularly "family connections and ties and opportunities to spend time together on the property." 3RP 93. The court also found "the similarities are striking in terms of the next generation of children of that age coming in contact with the defendant." 3RP 93.

The trial court did not find the other acts established a common scheme or plan. It is important to remember that “the degree of similarity for the admission of evidence of a common scheme or plan must be substantial.” State v. DeVincentis, 150 Wn.2d 11, 20, 74 P.3d 119 (2003). The common aspects of the other acts and the charged crime must show the defendant committed “markedly similar acts of misconduct against similar victims under similar circumstances.” State v. Lough, 125 Wn.2d 847, 856–57, 889 P.2d 487 (1995) (quoting People v. Ewoldt, 7 Cal.4th 380, 399, 867 P.2d 757 (1994)).

The trial court in Bettys’ case did not find this degree of similarity. The court simply found the common features to be that the victims were related to Bettys and thus were often around, and that the victims were relatively the same age. Gresham, 173 Wn.2d at 422-23 (similarities were that Scherner approached young girls at night, after other adults were asleep, while either traveling elsewhere or while the girls were staying at his home during visits, and fondling their genitals); DeVincentis, 150 Wn.2d at 22 (similarities were that DeVincentis invited young girls whom he met through his daughter or a neighbor girl into his home, 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, asked for a massage, directed the girls to remove their clothes, and had the girls masturbate him

until he climaxed); Lough, 125 Wn.2d at 861 (evidence that defendant "rendered four other women, whom he had relationships with, unconscious with drugs and then raped them" established necessary pattern under ER 404(b)); State v. Williams, 156 Wn. App. 482, 491, 234 P.3d 1174 (rape victims were of similar age and involved with drugs, defendant promised drugs, attacked from behind with forearm across throat, and strangled each woman into unconsciousness during the rape), review denied, 170 Wn.2d 1011 (2010); State v. Carleton, 82 Wn. App. 680, 683–84, 919 P.2d 128 (1986) ("In each case, Carleton met a teenage boy through a youth organization, befriended him, and eventually had sex with him after describing himself as having a homosexual alternate personality. The unusual story about the alternative personality laid the groundwork for future sexual overtures[.]")

These cases demonstrate not only a degree of similarity higher than that established in Bettys' case, but also a type of calculated planning and sophistication that Bettys did not engage in. The similarities in Bettys' case – young ages and relatives – essentially inhere in first degree molestation and first degree rape, both of which require a victim under age 12. RCW 9A.44.073; RCW 9A.44.083. 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.").³

In any event, the court excluded the evidence under ER 404(b) after concluding the State's true purpose for presenting the evidence was to show Bettys had a propensity for sexually abusing children. This is consistent with Gresham, where the Court held that "[e]ven when evidence of a person's prior misconduct is admissible for a proper purpose under ER 404(b), it remains inadmissible for the purpose of demonstrating the person's character and actions in conformity with that character." Gresham, 173 Wn.2d at 429. This follows from the Court's conclusion that ER 404(b) categorically bars propensity evidence. Gresham, 173 Wn.2d at 420. It is also consistent with the presumption that evidence of prior misconduct is inadmissible. Gresham, 173 Wn.2d at 421.

Stated another way, evidence admitted to show the existence of, for example, a common scheme or plan, and evidence admitted to demonstrate actions in conformity with character, are not mutually exclusive. After all, ER 404(b) provides:

³ 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.

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, or absence of mistake or accident.

(Emphasis added); see Gresham, 173 Wn.2d at 420 (“The same evidence *may*, however, be admissible for any other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice; the list of other purposes in the second sentence of ER 404(b) is merely illustrative.”); See also State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648 (“The second sentence of ER 404(b) . . . counteracts the exclusionary language that precedes it, but it does not command that evidence of an uncharged crime be admitted.”), review denied, 124 Wn.2d 1022 (1994).

For these reasons, the trial court did not misapply ER 404(b).

- d. The trial court did not abuse its discretion by excluding the other acts evidence under ER 404(b).

The State maintains it satisfied each part of the four-part test for admission of evidence under ER 404(b). BOR at 36. Because the trial court correctly interpreted the rule, its decision to exclude the evidence is reviewed for an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A court does not abuse its discretion unless “the court’s decision is manifestly unreasonable or rests on untenable

grounds.” State v. Griffin, 173 Wn.2d 467, 473, 268 P.3d 924, 928 (2012).

To admit evidence under ER 404(b), the trial court must (1) determine by a preponderance of the evidence that the prior misconduct occurred; (2) identify the purpose for introduction of the evidence; (3) determine whether the evidence is relevant to prove an element of the crime charged and (3) weigh the probative value of the evidence against its prejudicial effect. Lough, 125 Wn.2d at 853.

At issue here is whether there is a proper purpose for introduction of the evidence. Establishing the existence of a common scheme or plan can be a proper purpose for admission of ER 404(b) evidence. Gresham, 173 Wn. 2d at 419. For reasons already discussed, the trial court properly concluded the State failed to prove the type of substantial similarities necessary to establish a common scheme or plan.

The State also maintains the evidence of prior sexual misconduct was relevant to rebut Bettys’ defense that the touching was part of an innocent diaper check of M.F. and therefore not for sexual gratification. BOR at 38-41. This matter was touched on only briefly during the pretrial hearing. 3RP 87-88. Furthermore, defense counsel noted Bettys’ only defense was “a flat denial,” which evidence of the prior acts did not rebut. 3RP 88-89. The court’s remarks were plainly focused on the similarities

and differences between the earlier misconduct and instant charged act. The court did not abuse its discretion by implicitly rejecting this as a proper purpose that would overcome its ruling on propensity.

The State also cites to the trial court's comment at the pretrial hearing that evidence of the earlier acts was "extremely proactive [probative] and that it does rebut even a general denial given the age of the child is extremely important information." 3RP 94. BOR at 39-41. When placed in context, however, the statement refers to the "prejudice" prong of the eight-factor test for admissibility under RCW 10.58.090(6)(g).⁴ This becomes even more evident when considering that immediately following this statement, the court explained to the prosecutor that it was finding the evidence was not excluded under ER 403, admissible "simply" under RCW 10.58.090, and inadmissible propensity evidence under ER 404(b). 3RP 94.

In ruling this way, the trial court recognized the chief difference between RCW 10.58.090 and ER 404(b):

⁴ RCW 10.58.090(6)(g) required a court to determine

[w]hether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence[.]

RCW 10.58.090 makes evidence of prior sex offenses admissible for the purpose of showing the defendant's character and action in conformity with that character. In other words, RCW 10.58.090 makes admissible evidence that ER 404(b) declares inadmissible.

Gresham, 173 Wn.2d at 429.

Rather than committing error, as the State contends, the trial court properly applied ER 404(b), heeding the Supreme Court's warning that care must be taken in deciding whether to admit evidence of prior acts, "particularly important in sex cases, where the prejudice potential of prior acts is at its highest." State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

- e. The admission of evidence of the earlier rapes was not harmless.

The real issue here is whether the erroneous admission of the other acts evidence was harmless. Gresham, 173 Wn.2d at 432-33. For reasons explained in the Brief of Appellant, the error was not harmless. BOA at 14-16. By failing to address this issue, the State implicitly concedes the other acts evidence was not harmless. See e.g., In re Detention of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("by failing to argue this point, respondents appear to concede it.").

Furthermore, the jury was free to use evidence of Bettys' earlier molestation of young boys to infer he likely did it again. The trial court gave the following instruction with respect to the earlier crimes:

Evidence has been admitted in this case regarding the defendant's commission of previous sex offenses. The defendant is not on trial for any act, conduct, or offense not charged in this case.

Evidence of prior sex offenses on its own is not sufficient to prove the defendant guilty of the crimes 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 crimes charged.

CP 198 (instruction 4). This instruction did not limit the jury's use of the evidence for a particular purpose.

Had the evidence been admitted under ER 404(b), the jury would have received a limiting instruction upon a defense request that would have directed the jury not to use the evidence "for the purpose of proving the character of a person in order to show that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d at 420.⁵

The State vaguely suggests Bettys' somehow *benefited* from admission of the prior acts evidence, because witnesses testified that

⁵ The pattern limiting instruction states as follows:

Certain evidence has been admitted in this case for only a limited purpose. This [evidence consists of _____ and] may be considered by you only for the purpose of _____. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

WPIC 5.30.

because of the earlier incidents, they tried to shield M.F. from being alone with Bettys. BOR at 43. The State goes so far as to assert that “[t]he prior misconduct which the defendant admitted to and the prior victims testified about provided the full theory of both sides.” BOR at 43. The prosecutor’s attempt to minimize the harmlessness of the evidence is specious.

The State first asserts, “The allegations arose because of the awareness of relatives of the prior misconduct.” BOR at 43. This is untrue. M.F. made his disclosure on July 12, 2009, when he was five years old. 8RP 23, 35-40. There is nothing in the record to suggest M.F. was aware of the earlier rapes by Bettys when he announced Bettys “poked” his penis.

Moreover, it was the trial prosecutor – not defense counsel -- who continually elicited testimony about the relatives’ knowledge of the earlier offenses. 8RP 29 (M.F.’s grandmother); 8RP 100 (M.F.’s great-grandmother); 8RP 129 (great-aunt); 12RP 93 (M.F.’s mother).

The State claims Bettys used evidence of the prior misconduct “to assert that the initial disclosure was based upon prodding questioning and not based on a spontaneous disclosure[.]” BOR at 43. This claim is made without citation to the record. This Court should therefore ignore it. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d

549 (1992) (arguments not supported by legal authority or the record need not be considered).

The State also claims Bettys called Bacca [Michael Bettys, a victim of one of the two earlier child rapes] as a witness “to assert he had not played video games with M.F. which M.F. recalled occurring prior to the touching[.]” BOR at 43. This is false. Defense counsel elicited testimony from Bacca that he played video games at Bettys’ house with M.F. “[m]aybe once or twice.” 11RP 126.

The State also claims the defense called Bacca “to testify he was careful about having Bettys around children.” BOR at 43. Bacca did testify to this. In response to a question from the prosecutor. 11RP 131.

For these reasons, this Court should reject the State’s claim Bettys was not prejudiced by admission of the other acts evidence.

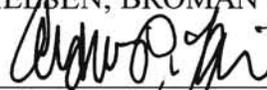
B. CONCLUSION

For the reasons stated above and in the Brief of Appellant, this Court should reverse the conviction and remand for a new trial.

DATED this 23 day of July, 2012.

Respectfully submitted,

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ANDREW P. ZINNER

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67111-1-I
)	
JOHN BETTYS,)	
)	
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 23RD DAY OF JULY 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] ERIK PEDERSEN
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SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF JULY 2012.

x *Patrick Mayovsky*

JUL 23 4:23 PM '12
COURT OF APPEALS DIV 1
STATE OF WASHINGTON