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COURT OF APPEALS
DIVISION II

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NO. 37123-5-II
STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II *em*
DEPUTY

STATE OF WASHINGTON,

Respondent

vs.

JAMES B. JONES,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Gary R. Tabor, Judge

Cause No. 07-1-00426-6

PATRICIA A. PETHICK, WSBA NO. 21324
Attorney for Appellant

P.O. Box 7269
Tacoma, WA 98417
(253) 475-6369

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the State to present inadmissible ER 404(b) testimony regarding alleged subsequent incidents involving S.R.J. over Jones's motion in limine where these alleged acts occurred well after the incidents which form the basis for the charges in Counts I and II.
2. The trial court erred in not taking the case from the jury on Count III involving N.K.S. where the jury found Jones guilty of child molestation in the second degree and the evidence does not establish beyond a reasonable doubt that the crime was committed when N.K.S. was between 12 and 14 years of age.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in allowing the State to present inadmissible ER 404(b) testimony regarding alleged subsequent incidents involving S.R.J. over Jones's motion in limine where these alleged acts occurred well after the incidents which form the basis for the charges in Counts I and II? [Assignment of Error No. 1].
2. Whether the State elicited sufficient evidence to prove beyond a reasonable doubt that Jones was guilty on Count III involving N.K.S. where the jury found Jones guilty of child molestation in the second degree and the evidence does not establish beyond a reasonable doubt that the crime was committed when N.K.S. was between 12 and 14 years of age? [Assignments of Error No. 2].

C. STATEMENT OF THE CASE

1. Procedure

James B. Jones (Jones) was charged by first amended information filed in Thurston County Superior Court with two counts of child molestation in the first degree (Counts I and II), and one count of child

molestation in the second degree or in the alternative child molestation in the third degree (Count III). [CP 15-16].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. However, prior to trial, Jones made several motions in limine including a motion to prevent the State from presenting ER 404(b) evidence as to the alleged victims, particularly S.R.J.¹—the victim in Counts I and II, which the court denied. [CP 17-20; Vol. I RP 5-19]. Jones was tried by a jury, the Honorable Gary R. Tabor presiding. Jones had no objections and took no exceptions to the court’s instructions to the jury. [CP 25-37; Vol. I RP 234]. The jury found Jones guilty of Count I and Count II, and found Jones guilty in Count III of child molestation in the second degree. [CP 40, 41, 42, 43; Vol. I RP 244-249].

The court then sentenced Jones to standard range sentences of 106-months on Count I, of 106-months on Count II, and 75-months on Count III based on an uncontested offender score of 6 (counting “other current offenses” towards the offender score but no prior offenses) for a total sentence of 106-months. [CP 44-65, 84-98, 99, 100; 12-11-07 RP 9-16].

Timely notice of appeal was filed on December 11, 2007. [CP 66-81]. This appeal follows.

¹ This court should note that the victims in this case were juveniles at the crimes and as such out of respect for their privacy will be referred to by their initials throughout this brief.

2. Facts

S.R.J., Jones's biological daughter, testified that she lived with her father, stepmother—Bonnie Jones, and step-siblings including her older stepsister N.K.S. two times when she was growing up. [Vol. I RP 43-45]. The first time she lived with her father she was 7-10 years old. [Vol. I RP 43-45, 49]. During this time of living with her father, S.R.J. described two occasions where Jones touched her breasts and genital area. [Vol. I RP 46-49]. The second time she lived with her father S.R.J. was older and described incidents in which Jones would make her model her bras and panties for him because he claimed he wanted to make sure they fit her. [Vol. I RP 51].

N.K.S., Jones's step-daughter, testified that on one occasion she had fallen asleep in her mother and stepfather's (Jones's) bed and had awoken to find Jones touching her breast. [Vol. I RP 76-77, 86-87, 107]. N.K.S. testified that this incident had occurred when she was 13 or 14 years old (she wasn't exactly sure of her age at the time). [Vol. I RP 76-77, 86-87, 107]. N.K.S. told her mother, Bonnie Jones of the incident and that she was uncomfortable with it. [Vol. I RP 87-88]. During this same time period, N.K.S. also testified about incidents in which Jones had made her model her bra and panties because he wanted to make sure they fit properly. [Vol. I RP 80-82].

The two girls, S.R.J. and N.K.S., eventually spoke together of their experiences and reported the same to N.K.S.'s aunt, Roberta Lee, who contacted authorities regarding the incidents. [Vol. I RP 52-53, 95-96, 157].

While Jones did not testify in his own defense, Detective Kolb testified that he interviewed Jones regarding the allegations and that Jones denied any inappropriate contact with S.R.J and N.K.S.. [Vol. I RP 129-136].

D. ARGUMENT

- (1) THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT INADMISSIBLE 404(b) TESTIMONY REGARDING ALLEGED SUBSEQUENT INCIDENTS INVOLVING S.R.J. OVER JONES'S MOTION IN LIMINE WHERE THESE ALLEGED ACTS OCCURRED WELL AFTER THE INCIDENTS WHICH FORM THE BASIS FOR THE CHARGES IN COUNTS I AND II.

To be admissible, evidence must be relevant. ER 402. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence. ER 401. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the likelihood it will mislead the jury. ER 403.

The admission of other crimes, wrongs or acts is governed by ER 404 (b). Under the rule, “(e)vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). To admit such evidence, the trial court must first determine whether the evidence is relevant and, if so, whether its probative value outweighs its potential for prejudice. ER 401; State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984); ER 403; State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). Additionally, evidence admissible under ER 404(b) requires proof by a preponderance of the evidence of the commission of the alleged wrong or act and the defendant’s connection to it. State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981).

Here, Jones moved in limine to exclude evidence that he had required S.R.J. and N.K.S. to model their bras and panties for him. [CP 17-20]. The court denied Jones’s motion conducting the required balancing and finding that the alleged acts demonstrated Jones’s “lustful disposition” towards the victims. [Vol. I RP 19-24]. Of note is the fact that the acts related to N.K.S. were contemporaneous with the crime for which Jones was charged against this victim in Count III and could in fact be found to be a “lustful disposition” towards N.K.S. however the alleged acts related to S.R.J. were subsequent to any charges involving S.R.J. and

no crimes were charged against this victim during this time period. All that can be said of the alleged subsequent acts related to S.R.J. were that they demonstrated Jones's general sexual proclivities.

The court's rationale for admission of the subsequent acts involving S.R.J. is unpersuasive. While it is true that evidence of a defendant's prior sexual acts against the same victim is admissible to show the defendant's "lustful disposition" toward that victim, *see State v. Guzman*, 119 Wn. App. 176, 182, 79 P.3d 990 (2003); *citing State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991), and that ER 404(b) applies to evidence of other acts regardless of whether they occurred before or after the alleged crime, such acts must reveal more than a defendant's general sexual proclivities. *See State v. Medcalf*, 58 Wn. App. 817, 822-23, 795 P.2d 158 (1990). Given the circumstances of the charges against Jones in Counts I and II involving S.R.J. when she was under 12 years of age and the fact that the subsequent act of requiring her to model her bras and panties occurred years after the alleged crime, especially since no additional crimes were charged based on these latter acts, the subsequent acts were nothing more than evidence of Jones's general sexual proclivities and not evidence of his "lustful disposition" towards S.R.J.. These subsequent acts should not have been admitted as proper ER 404(b)

evidence since given the nature of the crimes (child molestation where there is no physical evidence of the crime) were highly prejudicial.

The evidence should not have been allowed. And the error was not harmless. This court examines evidentiary, non-constitutional error to see if the error, within reasonable probability, materially affected the outcome of the trial. *See State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). It is within reasonable probability that but for the admission of the evidence the jury would have acquitted Jones in Count I and II. The admission of the evidence was clearly introduction of Jones's propensity and character, which ER 404(b) forbids.

The prejudice resulting from the introduction of the evidence denied Jones his right to a fair and impartial jury trial and outweighed the probative value, if any, of the evidence as demonstrated by the State's closing argument in which it emphasized these subsequent acts as establishing Jones's guilty on the offenses charged in Counts I and II. [Vol. I RP 196-200, 207]; *see also State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Oughton*, 26 Wn. App. 74, 612 P.2d 812 (1980). And the evidence materially affected the outcome by confirming that Jones had sexual proclivities beyond the norm and that he must have committed the crimes for which he was charged against S.R.J. even though these acts occurred well after the incidents forming the basis for

the charge and there were no allegations of similar acts that could have formed the basis for additional charges from the later date. The error was of major significance and not harmless.

- (2) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO FIND JONES GUILTY BEYOND A REASONABLE DOUBT IN COUNT III OF CHILD MOLESTATION IN THE SECOND DEGREE WHERE THE EVIDENCE DOES NOT ESTABLISH THAT N.K.S. WAS BETWEEN 12 AND 14 YEARS OF AGE AT THE TIME OF THE COMMISSION OF THIS CRIME.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, the State charged and Jones was convicted in Count III of child molestation in the second degree. The State bore the burden of establishing beyond a reasonable doubt that the victim of this count, N.K.S., “was at least 12 years old but less than 14 years old” at the time of the crime. [CP 34]. This is a burden the State cannot sustain.

The sum of the evidence elicited at trial, most particularly the undisputed testimony of the victim, N.K.S., merely establishes that the incident of molestation occurred when she was 13 or 14 years old—the victim was uncertain as to the exact time of the incident and no other testimony was proffered by the State to conclusively establish this element (the victim’s age at the time of the incident) of the crime for which Jones was convicted. [Vol. I RP 76-77, 86-87, 107]. Given this uncertainty and the fact that Jones was charged in the alternative with child molestation in the third degree (requiring the victim to be 14 years or older) on this count, [CP 15-16, 34-35], the State has failed to establish beyond a reasonable doubt an element of the crime for which Jones was convicted. Jones should only have been convicted of child molestation in the third degree given the facts of this case.

This court should reverse and dismiss Jones’s conviction for child molestation in the second degree.

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E. CONCLUSION

Based on the above, Jones respectfully requests this court to reverse and dismiss his convictions.

STATE OF WASHINGTON
BY _____
DEPUTY

DATED this 19th day of June 2008.

Patricia A. Pethick
PATRICIA A. PETHICK
Attorney for Appellant
WSBA NO. 21324

CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 19th day of June 2008, I delivered a true and correct copy of the Petition for Review to which this certificate is attached by United States Mail, to the following:

James B. Jones
DOC# 762936
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Carol La Verne
Thurston County Dep. Pros. Atty.
2000 Lakeridge Drive SW
Olympia, WA 98502
(and the transcript)

Signed at Tacoma, Washington this 19th day of June 2008.

Patricia A. Pethick
Patricia A. Pethick