

NO. 41239-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

AARON OLSON,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. THE TRIAL COURT COMMITTED REVERSIBLE
ERROR IN ADMITTING EVIDENCE OF
ANOTHER RAPE UNDER ER 404(B).

The trial court allowed the State to call the victim from another rape case as a witness in this case, and to use that rape to prove Mr. Olson committed rape by forcible compulsion here. The court admitted the evidence under ER 404 (b) pursuant to the intent, motive, and common-scheme exceptions. As argued in appellant's opening brief, this ruling was erroneous. The evidence of the other rape was used for the forbidden purpose of proving action in conformity therewith. It was extremely prejudicial, and reversal is required.

The State does not defend the trial court's admission of the evidence to prove motive or intent. This Court should accept the implicit concession that the evidence was not admissible on either of these bases. See United States v. Real Property Known as 22249 Dolorosa Street, 190 F.3d 977, 983 (9th Cir. 1999) ("the government did not defend the district court's rationale, implicitly conceding the error").

The State argues only that the evidence of G.C.F.'s brutal rape was properly admitted under the "common scheme or plan"

exception to the rule against propensity evidence. The State is wrong.

This Court's opinion in State v. Harris is on point; indeed, the facts of that case are strikingly similar to the facts of this case. State v. Harris, 36 Wn. App. 746, 677 P.2d 202 (1984). In Harris, two co-defendants were accused of raping a woman after offering her a ride home on May 12, and of doing the same thing to a different woman on June 2. Id. at 747-48. The principal defense was consent. Id. at 748. The trial court denied a motion to sever counts, and the defendants were convicted. This Court reversed, holding the denial of the motion to sever was improper because evidence of one rape would not have been admissible in a separate trial for the other rape. Id. at 749-50.

The State argued that the "common scheme or plan" exception to ER 404(b) applied, because "both victims voluntarily entered vehicles with the defendants and in both instances the defendants drove the victims against their will to a location where the rapes occurred." Id. at 751. This Court disagreed. This Court noted that too often the ER 404(b) exceptions are invoked as "magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their

names.” Id. (quoting State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982)). This Court explained the definition of the common scheme or plan exception as:

An antecedent mental condition which evidentially points to the doing of the act planned. Something more than the doing of similar acts is required in evidencing design, as the object is not merely to negative an innocent intent, but to prove the existence of a definite project directed toward completion of the crime in question.

Id. (internal citation omitted). This Court concluded:

Under this definition, it is obvious the two rapes here do not qualify as links in a chain forming a common design, scheme or plan. At most they show only a propensity, proclivity, predisposition or inclination to commit rape. Such evidence is explicitly prohibited by ER 404(b).

Id.

The same is true here. Indeed, the two rapes here were less similar and less close in time than the rapes in Harris. As in Harris, the two rapes do not satisfy the common scheme exception and at most show only a propensity to commit rape. Such evidence is explicitly prohibited by ER 404(b).

The State cites Lough and DeVincentis for the contrary proposition, but those cases do not endorse the admission of other acts evidence in a case like this one. Lough and DeVincentis

approved the admission of other acts evidence when the degree of similarity is “substantial” and where “the existence of the crime is at issue.” State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003). Only when “the very doing of the act charged is still to be proved” may scheme or plan evidence be presented. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

The existence of the crime is not at issue here. Unlike the defendants in Lough and DeVincentis, Mr. Olson did not deny having sex with the victim, and did not even deny raping the victim. It was only the degree of the crime that was at issue. The State argued the rape was committed by forcible compulsion and Mr. Olson argued it was committed without consent. It was precisely as to this element that the G.C.F. rape and the K.B. rape were dissimilar. Most strikingly, the G.C.F. rape was committed with a gun, unlike the K.B. rape. The crimes were not “substantially similar” as to the relevant element and the existence of the crime was not at issue. Thus, Lough and DeVincentis are inapposite.

In sum, the only purpose for which the G.C.F. rape could have been used is the forbidden propensity purpose: Mr. Olson raped G.C.F. with forcible compulsion and therefore he must have

raped K.B. with forcible compulsion also. The admission of the G.C.F. rape violated ER 404(b).

As noted in Mr. Olson's opening brief, the admission of G.C.F.'s extensive testimony regarding her rape also violated ER 403 because her description of the horrific rape perpetrated upon her at gunpoint in the middle of the night was substantially more prejudicial than probative. Brief of Appellant at 15. The State does not respond to this legal argument, instead labeling it "shocking" and "offensive." Brief of Respondent at 17, 18. The State's response is bizarre, and mischaracterizes Mr. Olson's argument. Contrary to the State's claim, nowhere did Mr. Olson "say that one [rape] is more horrific than [sic] the other." Brief of Respondent at 18. Mr. Olson described the G.C.F. rape as "horrific" because it was. The State cannot reasonably dispute this characterization. Mr. Olson also pointed out that a gun was used in the G.C.F. rape but not the K.B. rape, and that the G.C.F. rape occurred in the middle of the night while the K.B. rape did not. These are facts in the record. They are legally relevant in two ways: (1) they go to show that the two incidents were not similar enough on the relevant element to be admissible under ER 404(b), and (2) they go to show that the admission of the G.C.F. rape was substantially more

prejudicial than probative in violation of ER 403. Indeed, the prosecutor's emotional response to the ER 403 argument reinforces this very point. "[I]n sex cases, ... the potential for prejudice is at its highest." State v. Sutherby, 165 Wn.2d 870, 886, 204 P.3d 916 (2009). The evidence of the G.C.F. rape was inadmissible under ER 403.

Finally, as explained in the opening brief, it is reasonably probable that Mr. Olson would have been convicted of the lesser included offense of third-degree rape rather than second-degree rape if not for the erroneous admission of G.C.F.'s testimony regarding the other rape. Brief of Appellant at 15-17. Accordingly, this Court should reverse and remand for a new trial at which evidence of the G.C.F. rape will be excluded.

2. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY ACCUSING MR. OLSON OF LYING, DESCRIBING THE VERDICT AS THE "TRUTH," AND ASKING THE JURY TO DRAW AN ADVERSE INFERENCE FROM MR. OLSON'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS.

In his opening brief, Mr. Olson identified five distinct instances of misconduct committed by the prosecutor in closing argument: (1) the prosecutor told the jury Mr. Olson "feigned tears," and said "he is manipulating you, he is manipulating the truth and

he is distorting the truth in an effort to avoid responsibility;" (2) the prosecutor told the jury, "you will return a verdict that represents the truth of the matter;" (3) the prosecutor claimed, "The truth is that Aaron Olson raped [K.B.] on May 18th;" (4) the prosecutor commented on Mr. Olson's exercise of his constitutional rights to appear, defend, and testify; and (5) the prosecutor repeatedly stated it was "no longer reasonable to doubt any of the elements" of the crimes charged. Brief of Appellant at 17-20.

Mr. Olson already cited relevant caselaw as to each instance of misconduct, but since the filing of the opening brief both this Court and the Supreme Court have decided additional relevant cases. This Court recently decided a case that is on point as to two of the instances of misconduct that occurred in Mr. Olson's case. State v. Evans, ___ Wn. App. ___, ___ P.3d ___, 2011 WL 4036102 (filed 9/13/11). In Evans, the prosecutor declared in closing argument that the presumption of innocence "kind of stops once you start deliberating, right? At that point, you start to evaluate evidence and decide if that has been overcome or not." Evans at *2. This Court held the comment was improper because "[t]he presumption of innocence continues throughout the entire trial and may only be overcome, if at all, during deliberations." Id. at *4

(citing State v. Venegas, 155 Wn. App. 507, 524, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010)).

Here, the prosecutor's comment that the presumption "kind of stops" is just as troubling as the misconduct in Venegas. The presumption of innocence is the "bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). The presumption of innocence does not stop at the beginning of deliberations; rather, it persists until the jury, after considering all the evidence and the instructions, is satisfied the State has proved the charged crime beyond a reasonable doubt. Yet the prosecutor's comment invited the jury to disregard the presumption once it began deliberating, a concept that seriously dilutes the State's burden of proof.

Id.

Here, the prosecutor's repeated statement that it was "no longer reasonable to doubt any of the elements" is even more improper than the comments in Evans. The prosecutor in Evans at least implied that the presumption of innocence still existed at the time of closing argument, and stated that once deliberations started "you start to evaluate evidence and decide if that has been overcome or not." Evans at *2. But here, the prosecutor stated that at the time of closing argument, before the jury had even set foot in the deliberation room, it was "no longer reasonable to doubt that Aaron Olson is guilty." 8 RP 558. This constitutes flagrant

misconduct under Venegas and Evans. Evans at *4; Venegas, 155 Wn. App. at 525. The prosecutor's claim that "there is no error" in this argument is without merit. Brief of Respondent at 24.

Evans is also relevant on the "truth" argument. There, the prosecutor told the jury, "You decide who's telling the truth," and "I want you to peel back different layers of the onion to get to the truth." Evans at *2-*3. This Court held these statements constituted misconduct under State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009). Evans at *4. Because it is not the jury's job to "solve a case," a prosecutor's request that the jury "declare the truth" is improper. Id. "Here, as in Anderson, the prosecutor miscast the jurors' role as one of determining what happened and not whether the State had met its burden of proof." Id. at *5.

The same is true in Mr. Olson's case. The prosecutor's statement that "you will return a verdict that represents the truth of the matter" constitutes misconduct under Anderson and Evans. The prosecutor's claim in the response brief that "there is nothing improper about the State's argument" is incorrect in light of the above cases. Brief of Respondent at 23.

The Supreme Court also decided a relevant case after Mr. Olson filed his opening brief. State v. Martin, 171 Wn.2d 521, 252 P.3d 872 (2011). Martin is relevant to Mr. Olson's argument that the prosecutor in closing argument improperly commented on the exercise of his constitutional rights to appear, defend, and testify, by accusing him of tailoring his testimony to the third-degree rape statute. In Martin, as here, the defendant testified in his own defense as he has a right to do under article I, section 22 of the Washington Constitution. Id. at 524, 529; Const. art. I, § 22. On cross-examination, the prosecutor implied that the defendant had tailored his testimony to police reports, witness statements, and prior testimony. Id. at 525. On appeal, the defendant argued that this cross-examination constituted prosecutorial misconduct because accusations of tailoring encourage the jury to draw adverse inferences from the defendant's exercise of his constitutional rights to appear, defend, and testify. Id. at 526.

The Washington Supreme Court noted that the U.S. Supreme Court had held such accusations of tailoring do not offend the Sixth Amendment to the United States Constitution. Id. (citing Portuondo v. Agard, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000)). The majority in Portuondo found no constitutional problem

with a prosecutor accusing a defendant of tailoring, whether the accusation occurred during cross-examination or during closing argument. Martin, 171 Wn.2d at 527 (citing Portuondo, 529 U.S. at 69). But the Washington Supreme Court held article I, section 22 provides stronger protection against accusations of tailoring than the Sixth Amendment. The Court adopted the rule of the dissent in Portuondo. The Court held that accusations of tailoring are allowed only during cross-examination because “[i]t is during cross-examination, not closing argument, when the jury has the opportunity to determine whether the defendant is exhibiting untrustworthiness.” Martin, 171 Wn.2d at 535-36.

But here, the accusations of tailoring to which Mr. Olson objects occurred during closing argument. This is improper because “a jury is, at that point, unable to ‘measure a defendant’s credibility by evaluating the defendant’s response to the accusation, for the broadside is fired after the defense has submitted its case.’” Martin, 171 Wn.2d at 535 (quoting Portuondo, 529 U.S. at 78 (Ginsburg, J., dissenting)). Mr. Olson does not challenge the fact that the prosecutor elicited during cross-examination a statement from Mr. Olson that he had read the rape statute. But the

accusations of tailoring during closing argument constitute misconduct. Martin, 171 Wn.2d at 535-36.

For the reasons set forth in the opening brief, the aforementioned instances of prosecutorial misconduct prejudiced Mr. Olson, requiring reversal. Mr. Olson respectfully requests that this Court reverse and remand for a new trial.

3. CUMULATIVE ERROR DENIED MR. OLSON A FAIR TRIAL.

Even if each of the above errors individually does not warrant a new trial, they do in the aggregate. "Under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant [his] right to a fair trial, even if each error standing alone would be harmless." Venegas, 155 Wn. App. at 522. Here, as in Venegas, the improper evidentiary ruling combined with prosecutorial misconduct denied Mr. Olson his right to a fair trial.

The State argues there was no cumulative error because there was no individual error. For the reasons set forth above and in Mr. Olson's opening brief, this Court should reject that argument.

4. THE SENTENCING COURT ERRED IN IMPOSING COSTS AND FEES AND IN IMPOSING A NO-ALCOHOL CONDITION.

a. The sentencing court erred in imposing costs because Mr. Olson is indigent and lacks the ability to pay. As explained in Mr. Olson's opening brief, the sentencing court erred in imposing attorney costs and fees upon Mr. Olson because substantial evidence does not support a finding that Mr. Olson has or will have the ability to pay. Appellant's Brief at 23-25; CP 134.¹

In response, the State confuses the rule regarding costs and fees with the rule regarding restitution and other mandatory fines. It is true that restitution and mandatory assessments may be imposed regardless of ability to pay, so long as an individual is not later incarcerated for nonwillful failure to pay. State v. Curry, 118 Wn.2d 911, 918, 829 P.2d 166 (1992). But the rule is different for costs and fees. For discretionary costs, the ability-to-pay determination must be made at the time of imposition. Id. at 914-16. Repayment may not be ordered unless the defendant is or will be able to pay. Id. at 915. The financial resources of the defendant must be taken

¹ The opening brief cites the incorrect CP number. The clerk's papers counsel received do not have page numbers on them, and counsel misread the index when attempting to map the page numbers to the correct documents.

into account. Id. A repayment obligation may not be imposed if it appears there is no likelihood a defendant's indigency will end. Id.

For the reasons set forth in Mr. Olson's opening brief, the imposition of discretionary costs and fees in this case was improper. This Court should remand with instructions to strike the discretionary costs imposed.

b. The sentencing court erred in imposing a no-alcohol condition of community custody because it is not crime-related.

Finally, Mr. Olson argued that the sentencing court erred in imposing a no-alcohol condition of community custody, where the record showed alcohol had nothing to do with the crimes in question. Brief of Appellant at 25-29; CP 138.² The State in response defends only the substance abuse condition apparently set forth in Appendix H. There is no Appendix H in the record Mr. Olson received and in any event Mr. Olson did not challenge conditions prohibiting the use of controlled substances; he challenged the condition prohibiting the consumption of alcohol. The State appears to agree that this condition is improper, and it should be stricken.

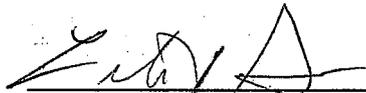
² The opening brief cites the incorrect CP number. The clerk's papers counsel received do not have page numbers on them, and counsel misread the index when attempting to map the page numbers to the correct documents.

B. CONCLUSION

For the reasons set forth above and in his opening brief, Mr. Olson respectfully requests that this Court reverse his convictions and remand for a new trial. In the alternative, the costs and no-alcohol condition should be stricken from the sentence.

DATED this 21st day of September, 2011.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 41239-0-II
)	
AARON OLSON,)	
)	
APPELLANT.)	

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