

NO. 41256-0-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL LOPEZ,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT.

1. MR. LOPEZ WAS DENIED A FAIR TRIAL BY
THE IMPROPER AND PREJUDICIAL
ADMISSION OF PROPENSITY EVIDENCE

RCW 10.58.090 permits the court to admit, in a criminal action in which the defendant is accused of a sex offense, “evidence of the defendant's commission of another sex offense or sex offenses . . . notwithstanding Evidence Rule 404(b).” RCW 10.58.090(1). Over objection, the court admitted evidence that Mr. Lopez had pleaded guilty to the charge of Communication with a Minor for Immoral Purposes in 1994. CP 58-62.

Before admitting this sort of propensity evidence:

the trial judge shall consider the following factors:

- (a) The similarity of the prior acts to the acts charged;
- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether 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; and
- (h) Other facts and circumstances.

RCW 10.58.090(6).

The State's response treats these criteria as some sort of checklist, and so long as the court mentions the factor it is irrelevant that the trial court did not engage in a meaningful analysis of the factor. For example, the State's brief devotes one sentence each to the factors of frequency and lack of intervening circumstances. Brief of Respondent at 6. But like the trial court before it, the State fails to engage in any analysis of how these two factors are to be weighed. Plainly, the statute contemplates a balancing. The passage of time and singularity of the prior offense must mean something; and should be addressed in that balancing as factors weighing against the relevancy of the evidence. Yet, neither the State in its reply nor the trial court in its analysis has done so. In that way, the court essentially disregarded the factors weighing against admission to focus instead upon the factors supporting admission.

Beyond its erroneous balancing, the court refused to permit Mr. Lopez to offer evidence that the prior offense was merely a gross misdemeanor. RP 263. Defense counsel argued that evidence was relevant to the jury's assessment of what weight to give the propensity evidence. RP 264. Indeed, if the jury is going to be tasked with assessing the relevance of the prior offense, then

the jury must be provided evidence of what the prior offense entailed, and part of that assessment is the degree of punishment which the law attaches to the behavior. Instead, the jury was presented with evidence of a prior conviction of "Communication with a Minor for Immoral Purposes," but was not informed that despite the ominous title, the offense is not so serious under the law -- merely a gross misdemeanor. If the classification of the prior offense is not relevant to the jury's assessment, then the same is true of the name of the prior offense. If the only relevance is the existence of a prior offense then that is all the jury should have heard.

The State does not address this argument in its response, yet claims the court properly balanced and limited the prejudice. Brief of Respondent at 8. But by excluding this relevant evidence regarding the prior offense, the court did the opposite. The court's refusal of this mitigating evidence left the jury with a skewed understanding of the nature of the prior offense one that improperly heightened the prejudicial effect.

2. THE TRIAL COURT ERRED IN IMPOSING
LEGAL FINANCIAL OBLIGATIONS IN
EXCESS OF THOSE PERMITTED BY
STATUTE AND WHICH WERE NOT
SUPPORTED BY THE RECORD

“A trial court only possesses the power to impose sentences provided by law.” In re the Personal Restraint Petition of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). The imposition of a sentence in excess of that statutory authority is appealable regardless of whether an objection was made below. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (“established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”)

RCW 10.01.160 permits a sentencing court to impose costs as a part of its sentence. However, RCW 10.01.160 only permits the imposition of costs on a criminal defendant for those “expenses specially incurred by the state in prosecuting” and convicting the defendant. RCW 10.01.160(2). Mr. Lopez’s challenge to the costs imposed is that the State did not establish they were “expenses specially incurred by the state in prosecuting” and convicting the defendant, and thus, the imposition exceeds the court’s statutory authority.

The State responds that the absence of a record is due to Mr. Lopez's failure to object below. Brief of Respondent at 10-11. Such a claim mirrors the prosecutor's argument in Ford. But, as the Court in Ford recognized "[t]his argument . . . fails to recognize the State's duties and obligations" at sentencing. 137 Wn.2d at 479. Because due process requires the State bear the burden of proving facts related to punishment, "it is the State, not the defendant, who bears the ultimate burden of ensuring the record supports" the sentence imposed. Id. at 480.

Thus, Mr. Lopez's failure to object below did not relieve the State of its obligation to provide the court the facts necessary to support the sentence imposed.

B. CONCLUSION.

For the foregoing reasons, Mr. Lopez respectfully requests this Court find he was denied a fair trial as well as a fair sentencing hearing due to the allegations of uncharged conduct, and order his cases remanded for further proceedings.

Respectfully submitted, this 22nd day of September, 2011.


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STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 41256-0-II
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MICHAEL LOPEZ,)	
)	
APPELLANT.)	

DECLARATION OF SERVICE ON APPELLANT

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF SEPTEMBER, 2011, I CAUSED A TRUE COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE FILED BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF SEPTEMBER, 2011

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Court of Appeals Case Number: 41256-0

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Answer/Reply to Motion: _____

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