

No. 42725-7-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

Vs.

ROBERT GARCIA, JR.

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 11-1-00160-3

REPLY BRIEF OF APPELLANT

CASEY M. ARBENZ
WSB #40581

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant
1008 South Yakima Avenue, Suite 302
Tacoma, Washington 98405
(253) 272-2157

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I. STATEMENT OF THE CASE

At Mr. Garcia's trial, his daughter was allowed to testify, over objection, that Mr. Garcia had previously molested her. She alleged the following:

- When she was four years old Mr. Garcia performed oral sex on her and forced her to perform oral sex upon him. RP 131 (8/3/2011).
- On a road-trip to California, Mr. Garcia penetrated her vagina with his fingers. RP 134 (8/3/2011).
- "Any time he got a chance when [they] were alone" Mr. Garcia would touch Lorraine's vagina "under the clothes" and Mr. Garcia would make Lorraine "touch him." RP 135 (8/3/2011).
- Mr. Garcia "made [her] kiss him one time." RP 135 (8/3/2011).

Mr. Garcia's granddaughter Lorena, the alleged victim in this case, alleged different types of contact. Specifically, she alleged the following:

- She was called into Mr. Garcia's bedroom and told to "get on top of him" and made to grab his penis *over* his pajamas. RP 76 (8/2/2011).
- She was laying and watching a movie when Mr. Garcia "stuck his hands down [her] pants" – without penetration. RP 76 (8/2/2011); RP 120 (8/3/2011).
- Mr. Garcia twice touched her breasts "over the clothes" when she was "about ten." RP 86, 88, 91 (8/2/2011).\
- Mr. Garcia would kiss her "every time [he] saw [her] or ... was alone with [her]." RP 87 (8/2/2011).

At trial, Mr. Garcia adamantly denied the allegations. RP 250 (8/4/2011). The State never showed any type of "scheme or plan" on the part of Mr. Garcia to molest children. Moreover, Mr. Garcia never

suggested, as a defense, that his contact with Lorena was inadvertent or some sort of mistake or accident. See Transcripts Generally.

II. ARGUMENT

A. **This Court must reverse Mr. Garcia's conviction where the trial court erroneously allowed prior sex crime evidence under ER 404(b).**

Respondent has argued that the trial court did not err in allowing the prior sex crimes evidence against Mr. Garcia at trial. Respectfully, for the following reasons, this is incorrect.

1. Because the trial court did not properly interpret ER 404(b), the standard of review Is *de novo*.

Respondent first alleges that this court should review the trial court's admission of ER 404(b) evidence for abuse of discretion. However, the appropriate standard of review is *de novo* where the trial court fails to properly interpret an Evidence Rule. See State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009).

Here, the trial court failed to properly interpret ER 404(b) where it allowed the evidence for the following purposes when it stated:

Certainly under 404(b) evidence of other misconduct, and the Court does note that these are not charges or convictions. But evidence of other misconduct for purposes other than proof of general character is admissible. The other purposes offered by the State include the opportunity, intent, preparation, absence of mistake, or accident in terms of the similarity of the offense or the touching between Lorraine and Lorena both going for a period of approximately ten years, ending when each of the girls were 13 or 14. The similarity of the types of offense or touching, fondling, kissing, over the clothes, similarity of the words, both the similarity in positions of trust and

influence over both girls, despite the testimony that appears to be consistent that Mr. Garcia was fun to be with.

Factor B, closeness in time. That has a variety of interpretations. In this case, the interpretation is the age when the alleged offenses began and when they terminated, rather than the closeness in time between Lorraine and Lorena's alleged touching.

The frequency from the offer of proof appears to be very consistent in terms of the frequency and type. Intervening circumstances in the case of Lorraine: Went off to the Military when she was 18 and returned to this area.

The necessity of the evidence, the Court certainly agrees, Mr. Steele, the information is prejudicial. The necessity of the evidence is probably the most compelling in these types of cases because these types of cases present with no forensics, no medical evidence, no witnesses. In Mr. Garcia's case, there are no convictions. But the Court finds that the probative value substantially outweighs the clear prejudice to the defendant.

RP 46-47 (8/1/2011).

Respectfully, the trial court's main rationale for allowing the evidence was not allowable as an exception to ER 404(b), but rather the type of evidence ER 404(b) was created to prevent against. Specifically, the trial court committed reversible error where it allowed the evidence because it was "necessary" to help the state prove its case. As will be addressed below, this evidence is forbidden under ER 404(b) and trial courts are advised to be particularly cautious of this type of evidence in sex cases. Because the trial court did not interpret ER 404(b) properly, this Court should, respectfully, review this case *de novo*.

2. There is nothing to support admission of the evidence as part of a "common scheme or plan" or any other exception to ER 404(b)'s general exclusion of character or propensity evidence.

The state argues heavily that the prior sex abuse evidence was necessary to show a “common scheme or plan” on the part of Mr. Garcia. See BOR at 9. Importantly, the trial court did not allow the evidence under that exception. See RP 46-47 (8/1/2011). Nonetheless, there is simply no evidence that Mr. Garcia was involved in any “scheme” or “plan” so as to molest children. The details of the molestation alleged by Lorraine or Lorena were different – which is significant – but more importantly, the state has never been able to show evidence that the alleged molestation occurred because of any scheme or plan on the part of Mr. Garcia. The reality is that the evidence only showed Mr. Garcia’s alleged propensity for inappropriately touching his female family members and as such, his bad character – the exact type of evidence ER 404(b) was created to prevent against.

In State v. Harris, 36 Wn.App. 746, 751, 677 P.2d 202 (1984), this Court defined “Common Scheme or Plan” and warned of the pitfalls in the state’s argument.

The State argues that each rape was part of a common scheme or plan, thus coming within the “Goebel exception” for the admission of such evidence, now codified in ER 404(b). In its effort to justify admission the State points out that “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.” In so urging, the State has fallen into the common error of equating acts and circumstances, which are merely similar in nature with the more narrow common scheme or plan. As noted in Saltarelli, at 364, quoting from United States v. Goodwin, 492 F.2d 1141, 1155 (5th Cir. 1974), only too often this error leads to a lack of analysis

and reliance on the exceptions as "magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names." Saltarelli held that, under ER 404(b), evidence of an otherwise unconnected sexual assault was not admissible to prove intent, such not being an issue where intercourse was admitted and consent of the victim was the sole issue.

Common scheme, plan or design has been described 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 negate an innocent intent, but to prove the existence of a definite project directed toward completion of the crime in question.

Harris, 36 Wn.App at 751 (some internal citations omitted).

Here, without an articulated scheme or plan, the state's suggestion that the alleged prior sex offense evidence was allowable is incorrect. There is simply no evidence of a "definite project" aimed at completion of the alleged crimes. The allegations by Lorraine and Lorena were different and the only similarity is that the end result was the same: Mr. Garcia allegedly touched his young female family members inappropriately. Furthermore, that Mr. Garcia never asserted a defense of mistake or accident, etc., is important where the trial court admitted the evidence for these unrelated purposes.

In sum, the purpose of the evidence was to show that Mr. Garcia was a person of poor character and that he had a propensity for inappropriately touching his young female family members. There was no evidence of any ruse or plan or scheme on Mr. Garcia's part to obtain his allegedly desired result. The trial court essentially admitted as much when it

allowed the evidence based on its “necessity” to help prove the state’s case. This is not an allowable reason for admission of the evidence. As such, respectfully, this Court should reverse Mr. Garcia’s conviction and grant him a new trial.

III. CONCLUSION

Based on the above cited rules, files and authorities, Mr. Garcia respectfully requests that this court reverse his convictions in this case and remand the matter for new trial.

Dated this 30th day of August, 2012.

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant



CASEY M. ARBENZ
WSB #40581

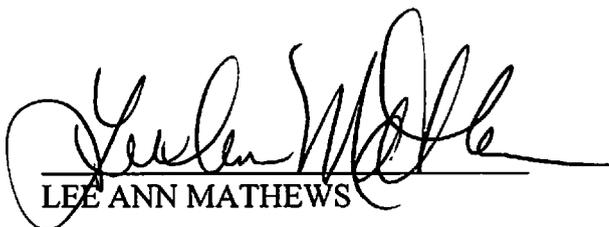
CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the reply brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Kathleen Proctor, WSB #14811
Deputy Prosecuting Attorney
946 County-City Building
Tacoma, WA 98402

Robert Garcia Jr.
c/o Jane Garcia
729 Dawn Avenue
Shelton, WA 98584

Signed at Tacoma, Washington, this 30th day of August, 2012.



LEE ANN MATHEWS

HESTER LAW OFFICES

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