

No. 42848-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Ronald Newmiller,

Appellant.

Kitsap County Superior Court Cause No. 11-1-00102-2

The Honorable Judges Karlynn Haberly and Jay B. Roof

Appellant's Reply Brief

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ARGUMENT

I. THE EVIDENCE OF PRIOR SEXUAL MISCONDUCT SHOULD HAVE BEEN EXCLUDED.

Evidence of prior misconduct is presumptively inadmissible, and the state has a substantial burden of proving otherwise. *State v. DeVincentis*, 150 Wash. 2d 11, 17-19, 74 P.3d 119 (2003). Doubtful cases are resolved in favor of exclusion. *State v. Thang*, 145 Wash. 2d 630, 642, 41 P.3d 1159 (2002).

Here, the trial judge admitted evidence of prior misconduct because of its strong probative value, without evaluating its potential for unfair prejudice. RP (6/14/11) 10; CP 6-8. The trial judge should have evaluated the risk that the evidence of misconduct would provoke an emotional response rather than a rational decision. See *City of Auburn v. Hedlund*, 165 Wash. 2d 645, 654, 201 P.3d 315 (2009) (defining unfair prejudice). In fact, the nature of the prior misconduct magnified the danger of unfair prejudice. *State v. Saltarelli*, 98 Wash.2d 358, 363, 655 P.2d 697 (1982). Had the court made the proper evaluation of the potential for prejudice—examining the risk of an emotional response—it would have excluded the evidence.

The trial court erred by applying the wrong legal standard. Because of this, it abused its discretion as a matter of law. *State v.*

Thompson, 173 Wash. 2d 865, 870, 271 P.3d 204 (2012) (discretionary decisions untenable if based on the wrong legal standard).

Respondent mischaracterizes the trial court’s oral ruling (and, presumably, its written findings) as “shorthand,” and thus excuses the trial court’s failure to evaluate the danger of unfair prejudice on the record.¹ Brief of Respondent, p. 14. Even if Respondent’s premise—that the judge mentally assessed the risk that jurors respond emotionally rather than deciding rationally—were correct, reversal would still be required.

This is so because the balancing of probative value and prejudice must be transparent—it must be done on the record. *Brundridge v. Fluor Fed. Services, Inc.*, 164 Wash. 2d 432, 444-45, 191 P.3d 879 (2008). Respondent does not address this requirement. Brief of Respondent, pp. 8-14. The trial court mentioned prejudice, but did not evaluate the potential for an emotional response. RP (6/14/11) 11.

Prior sexual misconduct will almost inevitably provoke jurors to respond emotionally rather than to decide rationally. *Saltarelli*, *supra*. Because of this, it is critical that a trial court carefully balance probative value against the risk of unfair prejudice, and that the balance be spelled

¹ Respondent also spends several pages arguing that the prior conviction is relevant to show lustful disposition and a common scheme or plan. Brief of Respondent, pp. 8-12. But Mr. Newmiller did not challenge the court’s assessment of relevance. See Appellant’s Opening Brief.

out on the record. The trial court's failure to do so in this case requires reversal.² Thang, at 642. If the court had applied the correct legal standard, it would not have admitted the evidence. Id.

II. MR. NEWMILLER'S CONVICTIONS WERE BASED IN PART ON PROPENSITY EVIDENCE, IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

Respondent erroneously characterizes Mr. Newmiller's argument as simply a claim that the trial court gave an inadequate limiting instruction. Brief of Respondent, p. 15. This is incorrect. Mr. Newmiller's argument is that his conviction was based in part on propensity evidence, in violation of his Fourteenth Amendment right to due process. See Appellant's Opening Brief, pp. 11-15.

The U.S. Supreme Court has expressly reserved the issue of "whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). That is the issue raised here. Respondent faults Mr. Newmiller for citing cases that do not directly control the issue. Brief of Respondent, pp. 18-19. This criticism applies equally to Respondent. It

² Respondent implicitly suggests that any error was harmless, arguing that "one more act of sexual abuse" would not have "tipped the scales..." Brief of Respondent, p. 14. Respondent fails to take into account that the evidence of this act included Mr. Newmiller's guilty plea, and not just more testimony from L.N.

does not appear that there is controlling authority addressing the issue directly. Accordingly, it is appropriate to argue by analogy to persuasive authority, as Mr. Newmiller has done. Other than attempting to distinguish this persuasive authority, Respondent has made no effort to cite authority supporting its position. Brief of Respondent, pp. 18-20.

Because the guilty verdicts were based in part on propensity evidence, they were entered in violation of Mr. Newmiller's Fourteenth Amendment right to due process. Accordingly, his convictions must be reversed and the case remanded for a new trial.

III. MR. NEWMILLER WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Newmiller stands on the argument set forth in his Opening Brief.

IV. THE TRIAL COURT VIOLATED BOTH MR. NEWMILLER'S AND THE PUBLIC'S RIGHT TO AN OPEN AND PUBLIC TRIAL BY CONDUCTING PROCEEDINGS BEHIND CLOSED DOORS.

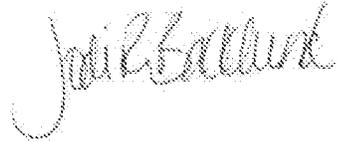
This issue will likely be controlled by the Supreme Court's decision in *State v. Sublett*, 156 Wash.App. 160, 181, 231 P.3d 231, review granted, 170 Wash.2d 1016, 245 P.3d 775 (2010). Accordingly, Mr. Newmiller rests on the argument set forth in the Opening Brief.

CONCLUSION

Mr. Newmiller's convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on July 30, 2012,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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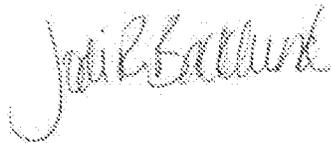
With the permission of the recipient, I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 30, 2012.



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