

No. 46355-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Paulo Botello-Garcia,

Appellant.

Lewis County Superior Court Cause No. 12-1-00217-1

The Honorable Judge James Lawler

Appellant's Reply Brief

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ARGUMENT

I. THE TRIAL COURT MISINTERPRETED ER 404(B) AND VIOLATED MR. BOTELLO-GARCIA'S RIGHT TO DUE PROCESS BY ADMITTING EXTENSIVE EVIDENCE REGARDING AN UNCHARGED, UN-PROVEN ALLEGATION THAT ALLEGEDLY OCCURRED MONTHS AFTER THE CONDUCT FOR WHICH HE WAS CHARGED.

Over Mr. Botello-Garcia's objection, the trial court permitted extensive evidence regarding an uncharged, un-proven allegation of attempted rape supposedly occurring several months after the alleged pattern of abuse had ended. RP (2/3/14) 15-20, 64-73. The court reasoned that "all prior conduct is admissible" in child abuse and domestic violence cases. RP (2/3/14) 16-17, 20.

G.R. described the California allegation in much more detail than the conduct for which Mr. Botello-Garcia was actually charged. RP (2/3/14) 41-72. The allegation of attempted penile-vaginal rape was also arguably worse than the actual molestation charges.

The evidence was completely irrelevant to the elements the state needed to prove at trial. It likely inflamed the jury and encouraged them to convict Mr. Botello-Garcia based on propensity. The court admitted evidence of the California allegation in violation of ER 403, ER 404(b), and of Mr. Botello-Garcia's right to due process. *Garceau v. Woodford*, 275 F.3d 769, 776, 777-78 (9th Cir. 2001), *reversed on other grounds at*

538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); *State v. Slocum*, 183 Wash. App. 438, 442, 333 P.3d 541 (2014).

1. The state concedes that the court did not conduct the proper inquiry regarding admissibility of the California allegation on the record.

Before admitting misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *Slocum*, 183 Wn. App. at 448.

The court must conduct this inquiry on the record. *Id.* Doubtful cases are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008).

Here, Respondent acknowledges that the court did not determine whether the evidence was more prejudicial than probative or find that the California allegation had actually occurred.¹ Brief of Respondent, p. 20. The state completely ignores the requirement that the court consider

¹ Respondent notes only that there was “no argument that the incident did not occur.” Brief of Respondent, p. 20. The state neglects the fact that it is the state’s burden to demonstrate that evidence is admissible under ER 404(b). *Slocum*, 183 Wn. App. at 448. It was not Mr. Botello-Garcia’s responsibility to prove a negative in order to avoid the introduction of inadmissible and highly-prejudicial evidence.

whether the evidence was relevant to prove any element of the charged crimes. *See* Brief of Respondent, pp. 18-27.

The court erred by failing to conduct the required inquiry regarding the admissibility of the California allegation on the record. *Slocum*, 183 Wn. App. at 448. As outlined below and in Mr. Botello-Garcia’s Opening Brief, the court would have found the evidence inadmissible if it had conducted the required analysis and applied the correct legal standards. Mr. Botello-Garcia’s convictions must be reversed. *Id.*

2. Evidence of the California allegation was not admissible as *res gestae* of the charges against Mr. Botello-Garcia because it was not part of an “unbroken chain of events.”

Res gestae or “same transaction” evidence can be admissible to “complete the story of the crime.” *State v. Mutchler*, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989). Such evidence must compose “inseparable parts of the whole deed or criminal scheme.” *Id.* *Res gestae* evidence involving other crimes or bad acts must also meet the requirements of ER 404(b). *Id.* The evidence remains inadmissible to show that the accused has acted in conformity with his/her alleged bad character. *Id.*

Here, the California allegation took place six months after G.R. and her mother had moved out of Mr. Botello-Garcia’s home. RP (2/4/14) 112; RP (2/10/14) 430. The alleged pattern of abuse had long ended. Far from being an integral part of the charges against Mr. Botello-Garcia,

G.R.'s testimony about the California trip presented an entirely separate allegation. The evidence was not admissible as *res gestae* of the charges. *Id.*

Respondent acknowledges that *res gestae* evidence must constitute a “link in the chain of an unbroken sequence of events.” Brief of Respondent, p. 21 (*citing State v. Hughes*, 118 Wn. App. 713, 725, 77 P.3d 681 (2003)). Still, the state relies on the *res gestae* exception to argue that the evidence of the California allegation was admissible against Mr. Botello-Garcia.

Hughes addressed admission of the accused's armed involvement in a confrontation with several people, which eventually ended in the murder of one of them. *Hughes*, 118 Wn. App. at 718-20. The entire episode lasted a few hours. *Id.* The reasoning of that case is irrelevant to whether the additional allegation in Mr. Botello-Garcia's case – which occurred several months after the charging period – constituted *res gestae* of the offense. The state's reliance on *Hughes* is misplaced.

The state also attempts to draw an analogy to *Brown*. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997), *as amended* (Aug. 13, 1997). That case dealt with two nearly identical violent attacks that occurred within two days of each other. *Id.* at 541-48.

The court held that the second attack was admissible in the trial for the first one because it was relevant to prove motive, intent, preparation, premeditation, and plan. *Id.* at 573. The *Brown* court also found that the attacks were part of an unbroken chain of events because the accused was contacting and planning the second victim while still conducting the attack on the first one. *Id.* at 575. He also used money stolen during the first attack to finance his trip to commit the second one. *Id.* Finally, the trial court in *Brown* instructed the jury that it was not permitted to use the 404(b) evidence to draw a propensity inference. *Id.* at 570.

Here, on the other hand, the evidence regarding the California allegation was not relevant to prove any element of the offenses with which Mr. Botello-Garcia was actually charged. The state does not argue otherwise. Brief of Respondent, pp. 18-27.

The California allegation occurred several months after the charging period, long after G.R. and her mother had moved out of Mr. Botello-Garcia's home. It was not part of the alleged pattern of abuse. The additional uncharged allegation was nowhere near a "link in the chain of an unbroken sequence of events." Indeed, the only purpose of the evidence was to make Mr. Botello-Garcia look worse and to encourage the jury to infer that he was the type of person who would commit multiple

acts of molestation. The California evidence was not admissible under the *res gestae* exception. *Mutchler*, 53 Wn. App. at 901.

3. The state appears to concede that the evidence of the California allegation was not admissible to establish a common scheme or plan.

Respondent does not argue that the G.R.'s testimony regarding the allegation in California was admission to establish a common scheme or plan. The state's failure to address the issue can be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

4. Mr. Botello-Garcia was prejudiced by the erroneous admission of propensity evidence.

G.R. described the California allegation in far more detail than the conduct for which Mr. Botello-Garcia was actually charged. RP (2/3/14) 41-72. The alleged conduct was also more shocking and offensive than that underlying the charges. Indeed, the court stated upon admitting the evidence that "it goes towards proving the state's case." RP (2/3/14) 20. It is apparent that the judge believed the evidence had the ability to affect the outcome of the trial.

The potential for prejudice from admission of other bad acts evidence is "at its highest in sex offense cases." *Slocum*, 183 Wn. App. at 442 (quoting *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012)). Such evidence is inadmissible 'not because it has no appreciable

probative value but because it has too much.” *Id.* There is a significant danger that the jury will convict not because of the strength of the evidence of the charges but because of the jury’s overreliance on evidence of other acts. *Id.*

Still, the state argues, essentially, that the evidence was not prejudicial because the jury acquitted Mr. Botello-Garcia of one count and because the evidence was sufficient to convict for the others. Brief of Respondent, pp. 25-26.

But the jury acquitted Mr. Botello-Garcia of child molestation in the first degree because there was insufficient evidence that G.R. was under the age of twelve during any of the allegations. That fact is inapposite to whether the jury made an impermissible propensity inference to convict him of the remainder of the charges.

The other evidence against Mr. Botello-Garcia was not overwhelming. Several months after the alleged “pattern of abuse” had ended, G.R., fourteen-years-old at the time, volunteered to go on a lengthy road trip alone with Mr. Botello-Garcia. RP (2/10/14) 458; RP (2/4/14) 132.

G.R. did not report the alleged abuse until her mother threatened to get back together with Mr. Botello-Garcia. RP (2/10/14) 475. She had

previously said that she would rather see Mr. Botello-Garcia dead than dating her mother again. RP (2/11/14) 615.

G.R.'s allegations against Mr. Botello-Garcia changed significantly over time. RP (2/3/14) 64-73, 112; RP (2/4/14) 140, 159.

There is a reasonable probability that the improper admission of the California allegation affected the outcome of Mr. Botello-Garcia's trial. *Id.* at 550.

Additionally, the court failed to give a limiting instruction. The judge did not warn jurors against using the California incident as evidence of Mr. Botello-Garcia's propensity to commit the charged crimes. CP 38-65; *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014). Mr. Botello-Garcia was prejudiced by the erroneous admission of the propensity evidence. *Id.*

5. Even if the evidence of the California allegation had been admissible, the court abused its discretion by failing to instruct the jury that it could not consider it to draw a propensity inference.

If evidence is admitted under one of the exceptions to ER 404(b), the court must give a limiting instruction to the jury. *Gunderson*, 181 Wn.2d at 923. The court gave no such instruction in Mr. Botello-Garcia's case. *See* CP 38-65. As a result, the jury was left believing that it was permitted to infer that Mr. Botello-Garcia was more likely to have

committed the charged offenses because he had allegedly attempted rape in California.

The Supreme Court's holding in *Gunderson* that "trial court must also give a limiting instruction to the jury if the evidence is admitted [under ER 404(b)]" is not qualified in any manner. *Id.* Still, Respondent argues that the Supreme Court does not mean what it says. Brief of Respondent, pp. 23-24. The state's argument hinges on the fact that the *Gunderson* court relies on prior cases that state such a rule in dicta. Notably, the state does not contend that the rule statement in *Gunderson*, itself, constitutes dictum. Brief of Respondent, pp. 23-24.

The state does not provide any basis upon which this court may refuse to apply the rule as clearly stated in *Gunderson*. Brief of Respondent, pp. 23-24.

The trial court in Mr. Botello-Garcia's case failed to give a limiting instruction as required by the Supreme Court. Accordingly, the jury was permitted to consider the evidence of the California allegation for any purpose and convict Mr. Botello-Garcia based on propensity alone. Mr. Botello-Garcia's conviction must be reversed. *Gunderson*, 181 Wn.2d at 923.

II. THE INFORMATION CHARGING MR. BOTELLO-GARCIA WAS CONSTITUTIONALLY DEFICIENT BECAUSE IT FAILED TO ALLEGE CRITICAL FACTS.

Mr. Botello-Garcia relies on the argument set forth in his Opening Brief.

III. THE COURT ERRED BY ORDERING MR. BOTELLO-GARCIA TO REIMBURSE THE LEWIS COUNTY JAIL.

A. The court exceeded its authority by ordering Mr. Botello-Garcia to contribute to the cost of his incarceration when he does not have the current ability to pay those costs.

A sentencing court may only order a person to pay the cost of his/her incarceration upon finding that s/he “*at the time of sentencing*, has the means to pay the cost of incarceration.” RCW 9.94A.760(2) (emphasis added). The plain language of the statute permits the court to require payment of incarceration costs only of someone who has the *current* ability to pay. RCW 9.94A.760(2).

Here, the court did not check the box next to the boilerplate finding that Mr. Botello-Garcia had the “present means to pay the cost of incarceration.” CP 105. In fact, the court found Mr. Botello-Garcia indigent on the day of sentencing. CP 122-23. Even so, the court ordered him to pay \$1,000 to the Lewis County Jail. CP 109.

The state does not dispute that the statute limits imposition of incarceration costs to those whom the court has found are presently able to

pay them. *See* Brief of Respondent, pp. 27-30. Even so, Respondent argues that there is not enough evidence that Mr. Botello-Garcia is unable pay the cost of his incarceration to address this issue. Brief of Respondent, p. 29.

The state misunderstands the inquiry. The court found Mr. Botello-Garcia indigent at the end of trial. CP 122-123. The court explicitly declined to find that he had the “present means to pay the cost of incarceration.” CP 105. Accordingly, the court was not permitted to order him to pay those costs. RCW 9.94A.760(2). No further evidence is required.

The court exceeded its statutory authority by ordering Mr. Botello-Garcia to pay the cost of his pre-trial incarceration when he did not have the means to do so at the time of sentencing. RCW 9.94A.760(2); *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied*, 172 Wn.2d 1021, 268 P.3d 224 (2011). The order that Mr. Botello-Garcia pay \$1,000 to the Lewis County Jail must be vacated. *Id.*

B. This court should address Mr. Botello-Garcia’s claim regarding the improper order that he pay the cost of his incarceration.

The Supreme Court recently recounted the extensive problems with the current Washington system, which regularly imposes extensive legal financial obligations (LFOs) on indigent people. *See State v.*

Blazina, No. 89028-5, 2015 WL 1086552, at *4, --- Wn.2d ---, --- P.3d --- (Mar. 12, 2015). Accordingly, the *Blazina* court held that a sentencing court must actually consider each offender's ability to pay before imposing discretionary LFOs. *Id.* at * 5. No such inquiry was conducted in Mr. Botello-Garcia's case.

Still, the state argues that this court cannot consider whether the trial court exceeded its authority by ordering Mr. Botello-Garcia to pay the cost of his incarceration. Brief of Respondent, pp. 27-30. Respondent argues that the issue is not ripe because the state has not yet attempted to collect payment. Brief of Respondent, pp. 30-31.

The *Blazina* court explicitly rejected the same argument. *Blazina*, at *7, n. 1, --- Wn.2d at ---. The court found that challenges to LFOs meet each of the three requirements of the ripeness doctrine and may be reviewed on direct appeal. *Id.*

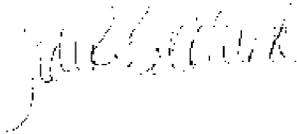
The trial court ordered DOC to begin deducting payment toward Mr. Botello-Garcia's LFOs immediately even though he is indigent. CP 110. This court should consider Mr. Botello-Garcia's claim and remand his case to vacate the order for him to pay \$1,000 toward the cost of his incarceration in the county jail.

CONCLUSION

Mr. Botello-Garcia's convictions must be reversed for the reasons set forth above and in his Opening Brief. In the alternative, the order that Mr. Botello-Garcia pay \$1,000 to the Lewis County Jail must be vacated.

Respectfully submitted on March 31, 2015,

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CERTIFICATE OF SERVICE

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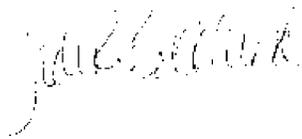
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 31, 2015.



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