

No. 469162

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

vs.

DAVID BINGMAN

Appellant.

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DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

BRIEF OF APPELLANT

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Washington State Evidence Rules

ER 404(b)1,2

A. IDENTITY OF THE APPELLANT

David Bingman is the Appellant.

B. ASSIGNMENT OF ERROR

1. The trial court erred when it improperly admitted evidence of the defendant's internet search history under Evidence Rule 404(b).

C. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Did the trial court err when it admitted evidence of the defendant's internet search history, including the URL of a pornographic website, under Evidence Rule 404(b), despite when such evidence was: (1) not directly related to a specific victim; (2) no information was provided about the identity of the website's participants; and (3) when such evidence's prejudicial effect greatly outweighed its probative value?

D. STATEMENT OF THE CASE

On August 21, 2014, a jury found David Bingman guilty of the following charges: Three counts of child molestation in the second degree, and two counts of assault in the fourth degree.(RP 86-89, 8-21-14). The two victims, Bingman's 13 year old biological daughter, and his 12 year old step daughter, at the time were living in the same house as Bingman. (CP 61, 62, 64, 68).

On the first day of trial during motions in limine, the defense argued that under ER 404B, that the State should not be allowed to submit evidence of pornographic websites that Bingman allegedly looked at, because they did not qualify under the lustful disposition exception.(RP 64, 8-21-14). The Court ruled that under lustful disposition, the State would be allowed to show evidence of websites that related to father/daughter – incest types of pornography, because it related directly to the two victims. (RP 67-68, 8-21-14). Bingman objected and argued that the websites should not be allowed in, because they did not relate specifically to the two victims.(RP 129-130, 8-21-14) Bingman argues that in order for the lustful disposition exception to be allowed, the websites could not be of third parties, but had to be evidence that was connected directly to the two victims. (RP 64, 8-21-14)

E. ARGUMENT

I. EVIDENCE UNDER ER 404(b), THE LUSTFUL DISPOSITION EXCEPTION MUST BE DIRECTLY RELATED TO A SPECIFIC VICTIM, NOT A THIRD PARTY, OR IT IS NOT RELEVANT AND SHOULD NOT BE ALLOWED IN AS EVIDENCE AT TRIAL.

In determining whether evidence of other crimes, wrongs, or acts was properly admitted under ER 404(b), the court first must analyze whether the evidence is logically relevant to prove an "essential ingredient" of the charged crime rather than simply to show the defendant had a propensity to act in a certain manner which he followed on that particular occasion. State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982). Second, the court must determine whether the evidence of other criminal acts is legally relevant, i.e., whether the probative value of the evidence is substantially outweighed by its prejudicial effect. If the misconduct is of only marginal relevance, because of remoteness in time or other considerations the balance may be tipped toward exclusion. ER 404(b)(20)(b).

Under ER 404(b), in order for the lustful disposition exception to be allowed at trial, the evidence in question must be both relevant, and more probative than prejudicial, by showing that the defendant had "a sexual desire for the **particular** female." State v. Ferguson, 667 P.2d 68, 71, 100 Wn.2d 131 (1983)(emphasis added). The evidence must show a

“lustful inclination of the defendant toward the offended female.” State v. Golladay, 470 P.2d 191, 203-204, 78 Wn.2d 121 (1970); State v. Medcalf, 795 P.2d 158, 161, 58 Wn.App. 817 (1990).

In the present case, the State made the following argument as to why the lustful disposition exception should be granted, stating:

“We are prepared to present pictures, present the evidence of the listed addresses in Mr. Bingman’s search or browser history which I indicated shows pre-teen sex –yeah, illegal, underage, pre-teen sex videos, watched video of a father having sex with daughter, daughter busted having sex by her father, father and daughter sex videos free, daughter caught parents having sex.” RP 57

The problem with this argument with regard to the lustful disposition exception is the following: Nobody knows exactly what was on the websites that Bingman allegedly looked at. Bingman was not charged with child pornography. The State didn’t find child pornography on his computer; they found website addresses that had been searched. There is no way to know exactly what was on those websites at the time Bingman searched, why Bingman typed in those website addresses, or if Bingman actually looked at those websites other than typing in the addresses. While the websites may have said that it was father/daughter, how likely is it that a father posted a film of him having sex with his daughter or vice versa? This could be that the websites list the videos as father/daughter, but in reality, use girls of age to pose as the teenage

daughters, making the porn salacious and titillating to some with that predilection, yet at the same time, legal for both the viewer and the website showing the video. Or it could be two people having sex, without even a father/daughter pretense, just a title that labels the content as father/daughter. There's no way to know, because these are only address searches that are listed, not actual videos or photos that were saved to the computer. Nobody knows exactly what Bingman actually looked at.

The State wasn't just trying to bring in father/daughter websites under the lustful disposition exception; they were trying to bring in many other pornographic websites as well that were in the search history of Bingman's computer. It's very possible that Bingman had a lot of experience viewing pornography, and that he had stumbled across some of these father/daughter websites and realized that they were just adults playing the part of the daughter, and that they were actually not minors. Or that these were just regular adult pornography films with the title of father/daughter pornography.

However, we'll never know, because that's the only evidence that the State had with regard to the websites: Addresses of websites that had unknown third parties with no connection to the victims, and no actual video or photos that Bingman looked at. This is the problem with the way that the State and the Court want to use the lustful disposition exception;

there is no connection to the victim. It requires the trier of fact to take a huge leap and make an assumption, without having enough facts to support that assumption. That is why the lustful disposition exception in the case law has only been allowed when the lustful disposition actually involves the victim, and not unknown third parties.

In State v. Golladay, the defendant was on trial for a murder committed during a rape. The State tried to bring in evidence of the defendant knocking on a door where a prostitute supposedly lived. The Court ruled that it was inadmissible, because it was not connected to the victim. State v. Golladay, 470 P.2d 191, 78 Wn.2d 121 (1970)

In State v. Medcalf, the defendant had x-rated video tapes with children's titles, followed by x-rated titles. The State tried to get the evidence admitted, citing that it was relevant, because the videos were "a rather unique device to, one, entice children, and then two, apparently to show them exactly how to do it." State v. Medcalf, 795 P.2d 158, 161, 58 Wn.App. 817 (1990).

However, the victim testified that she had never been invited to Medcalf's apartment to watch videos, and did not watch any while she was there. Medcalf, at 161. The Court ruled that the evidence should have been excluded, that there was no lustful disposition to the offended female, and no connection to the child. Medcalf, at 161.

In State v. Ray. The Court allowed the evidence to come in under lustful disposition. However, the evidence was that Ray had initiated sexual contact with the victim on three other prior occasions. State v. Ray, 806 P.2d 1220, 116 Wn.2d 531 (1991).

Bingman believes that by allowing the father/daughter website addresses to come in as evidence, that his case was wrongfully prejudiced, and that he could not get a fair trial, because there was no evidence as to what Bingman actually looked at, and there was no evidence of any connection of those websites addresses with the victims in the case. The website addresses were more prejudicial than probative, and they were not relevant, because there was no connection to either of the two victims. All we have to go on are website addresses'. That's not enough to allow the lustful disposition exception in this case under ER 404(b).

F. CONCLUSION

Mr. Bingman respectfully requests the Court to rule that the website evidence was unduly prejudicial to Mr. Bingman's case, and that the evidence should have been excluded, not reaching the threshold of 404(b), under the lustful disposition exception, thus allowing Mr. Bingman to have a new trial.

Respectfully Submitted,



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Attorney for Appellant

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

STATE OF WASHINGTON,

Plaintiff,

v.

DAVID BINGMAN,

Defendant.

PROOF OF SERVICE

COURT OF APPEALS NO. 46916-2-II

SUPERIOR COURT NO. 13-1-00875-8

To: Clerk, Court of Appeals, Division II
And To: Cowlitz County Prosecutor's Office, Appellate Unit

On September 24th, 2015, I served this document (*Appellant's Brief*) upon the Court of Appeals, Division II, via US Postal Service to 950 Broadway, Suite 300 Tacoma, WA 98402. On this same date, I sent via United States Postal Service a copy of this document to Cowlitz County Prosecuting Attorney, located at Hall of Justice, 312 SW First Ave, Kelso, WA 98626. The defendant on this case, Mr. David Bingman #807054, was sent a copy of the attached document and proof of service via the United States Postal Service at Coyote Ridge Corrections Center, E-A37U, P.O. Box 769, Connell, WA 99326.

1 Dated this 24th day of September, 2015.

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