

FILED
Court of Appeals
Division II
State of Washington
8/6/2018 2:07 PM

No. 51360-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JONATHON L. TAYLOR,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondent.

BRIEF OF APPELLANT

Hannah M. Weaver, WSBA# 49779
Vail, Cross-Euteneier & Associates
819 Martin Luther King Jr. Way
P.O. Box 5707
Tacoma, WA 98415-0707
(253) 383-8770
Attorney for Jonathon Taylor

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

I. INTRODUCTION.....1

II. ASSIGNMENT OF ERRORS.....1

III. ISSUE.....2

IV. STATEMENT OF THE CASE.....2

V. STANDARD OF REVIEW.....7

VI. ARGUMENT.....9

 A. The Superior Court Abused its Discretion in Admitting
 Evidence of the Terms of Mr. Taylor’s Felony Conviction
 When Such Evidence was Overwhelmingly More
 Prejudicial than Probative.....9

 B. Admission of Such Evidence was not Harmless Error, and
 Thus a New Trial is Warranted.....11

V. CONCLUSION.....12

TABLE OF AUTHORITIES

Cases

<i>Davis v. Globe Mach. Mfg. Co.</i> , 102 Wn.2d 68, 684 P.2d 692 (1984).....	8
<i>Fenimore v. Donald M. Drake Constr. Co.</i> , 87 Wn.2d 85, 549 P.2d 483 (1976).....	8
<i>Groff v. Dep't of Labor and Industries</i> , 65 Wn.2d 35, 395 P.2d 633 (1964).....	7
<i>Lockwood v. A C & S</i> , 109 Wn.2d 235, 256, 744 P.2d 605 (1987).....	9
<i>McClelland v. I.T.T. Rayonier</i> , 65 Wn.App 386, 828 P.2d 1138 (1992).....	7
<i>McLaren v. Dep't of Labor & Indus.</i> , 6 Wn.2d 164, 107 P.2d 230 (1940).....	8
<i>Ravsten v. Dep't of Labor & Indus.</i> , 108 Wn.2d 143,736 P.2d 265 (1987).....	7
<i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 644, 230 P.3d 583 (2010).....	8
<i>State v. Britton</i> , 27 Wn.2d 336, 178 P.2d 341 (1947).....	11
<i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	9
<i>State v. Craig</i> , 82 Wn.2d 777, 514 P.2d 151 (1973).....	11
<i>State v. Cunningham</i> , 93 Wn.2d 823, 613 P.2d 1139 (1980).....	11
<i>State v. Dennison</i> , 115 Wn.2d 609, 801 P.2d 193 (1990).....	8
<i>State v. Gatalski</i> , 40 Wn. App. 601, 699 P.2d 804 (1985).....	9

<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	8
<i>State v. Rogers</i> , 83 Wn.2d 553, 520 P.2d 159 (1974).....	11
<i>State v. Schrager</i> , 74 Wn.2d 75, 442 P.2d 1004 (1968).....	11
<i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	11
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	8
<i>Washburn v. Beatt Equip. Co.</i> , 120 Wn.2d 246, 283, 840 P.2d 860 (1992).....	8

Statutes

Wash. Rev. Code § 51.52.060	7
Wash. Rev. Code § 51.52.050	7
Wash. Rev. Code § 51.52.110.....	7

Rules of Evidence

ER 401	9
ER 402	9
ER 403	9
ER 404(b)	10

I. INTRODUCTION

The admissibility of evidence concerning a person's past crimes is limited to specific circumstances. Child molestation, in particular, has such a prejudicial influence as to make such a crime relevant only in very limited instances. A jury, instructed that a party has a felony conviction and a sentencing term that forbids that party from being around children, will draw only one conclusion as to the nature of that party's conviction.

As described below, the term of Mr. Taylor's felony conviction for Third Degree Child Molestation, namely, that he be required to stay away from children, is inherently prejudicial. The trial court mitigated some of the prejudicial nature of Mr. Taylor's felony by excluding the nature of the conviction as well as the requirement that he register as a sex offender. However, the jury was allowed to hear that Mr. Taylor was a felon, and that one of the requirements of his conviction was that he stay away from children. The trial court committed reversible error in admitting such inherently prejudicial evidence, and a new trial is warranted.

II. ASSIGNMENTS OF ERROR

- A. The Superior Court erred in allowing in evidence that as part of Mr. Taylor's conviction, he is not allowed to be around minors without another adult present.

III. ISSUE

Whether the trial court abused its discretion in admitting the terms of Mr. Taylor's felony conviction when the prejudicial nature of such evidence overwhelmed any probative value, and whether such admission constitutes reversible error, requiring a new trial.

IV. STATEMENT OF THE CASE

This case originates under RCW Title 51, the Industrial Insurance Act from an Administrative Law Review appeal from an April 3, 2015 Proposed Decision and Order of the Board of Industrial Insurance Appeals ("the Board"). Clerk's Papers (CP) at 41. Mr. Taylor sustained an industrial injury on June 9, 2008 while working for Mason County Forest Products. CP at 40. Mr. Taylor filed a claim for that injury on June 19, 2008, which was allowed by the Department of Labor and Industries ("the Department"). CP at 55. The claim was closed on July 25, 2008. *Id.* The Department issued an order on May 3, 2013, affirming this closing order, and issued an order on October 18, 2013, affirming its May 3, 2013 closing order. CP at 56. Mr. Taylor filed an appeal with the Board on December 11, 2013. CP at 35.

The Board heard testimony from: Mr. Taylor; Christina Casady, an occupational therapist; Dr. Guy Earle, an occupational medicine provider; Dr. Timothy Weber, Mr. Taylor's treating physician; and Carl Gann, a

vocational rehabilitation counselor. CP at 35, 76, 102, 143, 250, 203. The Department presented the testimony of: Dr. D. Casey Jones, an orthopedist; Dr. Gregory Zoltani, a neurologist; and Barbara Berndt, a vocational rehabilitation counselor. CP at 35, 279, 371, 424. As part of his hearing, Mr. Taylor was asked about his October 20, 2008 conviction for third-degree child molestation. CP at 94. His conviction resulted in a nine-month period of incarceration, 12 months of community supervision, a requirement that he register as a sex offender, and no contact with minors unless there was another adult around. CP at 96. Both Carl Gann and Barbara Berndt were asked about Mr. Taylor's conviction and sentence. CP at 236-237, 451-455. Counsel for Mr. Taylor objected to the testimony as more prejudicial than probative. CP at 94, 96, 236-237, 451-455.

Industrial Appeals Judge Craig C. Stewart issued a Proposed Decision and Order on April 3, 2015, with the following Findings of Fact:

1. On February 18, 2014, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. Jonathon L. Taylor sustained an industrial injury on June 9, 2008 when he was shoveling debris and sustained a lumbosacral strain.

3. The June 9, 2008 industrial injury did not proximately cause disc protrusion or herniation at L4-5 and L5-S1.
4. As of October 18, 2013, Mr. Taylor's low back condition, proximately caused by the industrial injury, did not have objective signs of permanent impairment and did not need further medical treatment.
5. Between June 9, 2008 and October 18, 2013, and thereafter, Mr. Taylor was able to obtain and perform work on a reasonably continuous basis because there were no physical restrictions proximately caused by the June 9, 2008 industrial injury.

CP at 40-41.

IAJ Stewart also made the following Conclusions of Law:

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of this appeal.
2. The June 9, 2008 industrial injury did not proximately cause Jonathon L. Taylor's disc protrusion/herniation at L4-5 and L5-S1.
3. On October 18, 2013, Mr. Taylor's low back condition, proximately caused by the June 9, 2008 industrial injury, was not in need of further necessary and proper medical treatment as contemplated by RCW 51.36.010.

4. On October 18, 2013, Mr. Taylor did not have a permanent partial disability, within the meaning of RCW 51.32.080, proximately caused by the industrial injury.
5. Mr. Taylor was not a temporarily totally disabled worker within the meaning of RCW 51.32.090 from June 9, 2008 through October 18, 2013.
6. Mr. Taylor was not a permanently totally disabled worker within the meaning of RCW 51.08.160, as of October 18, 2013.
7. The October 18, 2013 order of the Department of Labor and Industries is correct and is affirmed.

CP at 41.

The objections to the testimony concerning Mr. Taylor's conviction and sentence were overruled. CP at 35.

Mr. Taylor appealed the Proposed Decision and Order by filing a Petition for Review on May 20, 2015. CP at 10. The Board denied the Petition for Review on June 5, 2015. CP at 2. Mr. Taylor then appealed to Mason County Superior Court. CP at 1.

Prior to trial, Mr. Taylor moved to renew the objections raised concerning testimony of Mr. Taylor's conviction and sentence. CP at 556-557. Following arguments by counsel for Mr. Taylor and for the Department, the Honorable Judge Sheldon ruled to exclude the nature of

Mr. Taylor's conviction, as reference to his requirement that he register as a sex offender. Verbatim Report of Proceedings (VRP), Taylor v. Department of Labor and Industries, 10/17/17, 10/18/17, 10/20/18 at 12-16. Judge Sheldon did, however, allow in testimony concerning Mr. Taylor's restriction that he not work around children. *Id.* at 16-17.

The jury trial was held on October 17, 2017 through October 20, 2017 before the Honorable Judge Sheldon in Mason County Superior Court. CP at 788. At trial, Mr. Taylor appealed only the issues of causation of disc protrusion/herniation, the need for further medical treatment, and temporary total disability from June 9, 2008 through October 18, 2013. VRP, Taylor v. Department of Labor and Industries, 10/17/17, 10/18/17, 10/20/18 at 22. At the conclusion of the trial, a jury found that the Board was correct in deciding that Mr. Taylor's industrial injury did not proximately cause disc protrusion or herniation at L4-5 and L5-S1. CP at 786. Counsel for the Department referenced Mr. Taylor's limitation that he could not work around children in both opening and closing statements. VRP, Taylor v. Department of Labor and Industries, 10/17/17, 10/18/17, 10/20/18 at 64; VRP, Taylor v. Department of Labor and Industries, 10/20/18 at 22.

Mr. Taylor appeals. CP at 790.

V. STANDARD OF REVIEW

A party aggrieved by an order of the Board may appeal to superior court. RCW 51.52.060. The superior court's review of the decision and order of the Board is de novo but based on the same evidence and testimony received by the Board. RCW 51.52.110. The appealing party has the burden to "establish a prima facie case for the relief sought." RCW 51.52.050. The superior court is empowered to reverse or modify the Board's decision if the court determines the Board incorrectly construed the law or found the facts. "The court may substitute its own findings and decision for the Board's if it finds from a fair preponderance of credible evidence that the Board's findings and decision are incorrect." *McClelland v. I.T.T. Rayonier*, 65 Wn.App 386, 390, 828 P.2d 1138 (1992); *See also Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987) (holding that the appellant must "establish that the Board's findings are incorrect by a preponderance of the evidence.").

On appeal from the superior court, the appellate court must ascertain whether there was substantial evidence to support the findings of the trial court. *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 41, 395 P.2d 633 (1964). "If, in the opinion of the reviewing court, the evidence as to a factual issue is evenly balanced, the finding of the department [now board of industrial insurance appeals] as to that issue must stand; but, if the

evidence produced by the party attacking the finding preponderates in any degree, then the finding should be set aside.” *McLaren v. Dep't of Labor & Industries.*, 6 Wn.2d 164, 168, 107 P.2d 230 (1940).

A trial court’s decision on admissibility of evidence is reviewed under an abuse of discretion standard. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (citing *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 283, 840 P.2d 860 (1992); *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193(1990); *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 91-92, 549 P.2d 483 (1976)). Abuse of discretion occurs when a trial court’s exercise of discretion is “manifestly unreasonable or based upon untenable grounds or reasons.” *Davis v. Globe Mach. Mfg. Co.*, 102 Wn. 2d 68, 77, 684 P.2d 692 (1984) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971). A court’s decision is manifestly unreasonable when it adopts a view “no reasonable person would take.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 644, 669, 230 P.3d 583 (2010)(internal quotations and citations omitted).

VI. ARGUMENT

A. The Trial Court Abused its Discretion in Admitting Evidence Concerning The Terms of Mr. Taylor's Conviction Where The Evidence Was Overwhelmingly More Prejudicial Than Probative.

ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Relevant evidence is admissible except when limited under the Constitution or by statute or rule. ER 402.

Evidence deemed relevant may still be excluded under ER 403 if the probative value of such evidence is “substantially outweighed” by the danger of unfair prejudice, confusion of issues, misleading the jury, or if such evidence would create an undue delay, waste of time, or is needlessly cumulative. Trial courts have broad discretion in balancing the probative value of evidence against any potential harmful consequences. *Lockwood v. A C & S*, 109 Wn.2d 235, 256, 744 P.2d 605 (1987)(citing *State v. Coe*, 101 Wn.2d 772, 782, 684 P.2d 668 (1984); *State v. Gatalski*, 40 Wn. App. 601, 610, 699 P.2d 804, review denied, 104 Wn.2d 1019 (1985)). “Unfair prejudice” is prejudice that results from “evidence that is more likely to cause an emotional response than a rational decision by a jury.” *Id.* at 257.

ER 404(b) governs admissibility of past crimes, stating that evidence of other crimes, wrongs, or acts is inadmissible to prove “the character of a person in order to show action in conformity therewith.” However, such evidence may be admissible to show “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or action.” ER 404(b).

In this instance, ER 403 properly governs the admissibility of the terms of Mr. Taylor’s sentence, since the trial court properly excluded the nature of the conviction. Judge Sheldon, in her ruling, determined that the requirement that Mr. Taylor not be around minors without the presence of another adult had bearing on his ability to work. VRP, *Taylor v. Department of Labor and Industries*, 10/17/17, 10/18/17, 10/20/18 at 12-13. She acknowledged that reference to Mr. Taylor’s conviction of Third Degree Child Molestation was extremely prejudicial, and that “it’s something that is probably more concerning to the average juror than – than many other things.” *Id.* at 12.

Although the exclusion of the nature of Mr. Taylor’s conviction as well as one of his sentencing requirements minimized the prejudicial effect, the jury was allowed to hear that he was convicted of a felony, and that he was required to stay away from children as part of that sentence.

There is no way to guarantee that a jury would not infer from such evidence that Mr. Taylor had committed a sex crime against a child, and as such, any exclusion of his specific conviction is of minimal impact. The jury was given all of the information required to draw such a conclusion. As such, the admission of such evidence, although probative, was overwhelmingly prejudicial to Mr. Taylor.

B. Admitting Such Evidence Was Reversible Error Requiring a New Trial

Generally, admission of evidence is not grounds for reversal unless such evidence has been prejudicial. *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (citing *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). In order to find reversible error, the Court must find that, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Cunningham*, 93 Wn.2d at 831 (citing *State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974); *State v. Craig*, 82 Wn.2d 777, 514 P.2d 151 (1973); *State v. Schragger*, 74 Wn.2d 75, 442 P.2d 1004 (1968); *State v. Britton*, 27 Wn.2d 336, 178 P.2d 341 (1947)).

Judge Sheldon, in her ruling, indicated that Mr. Taylor’s work restrictions were important and relevant, but that the nature of his conviction would be “waving the flag that it is a particular type of sex

offense or that he has to register isn't really what's important." VRP, Taylor v. Department of Labor and Industries, 10/17/17, 10/18/17, 10/20/18 at 16-17. By allowing a jury to hear that Mr. Taylor is a convicted felon, and that one of the terms of his sentence is that he is restricted from working around children, there is simply no other conclusion for a jury to draw than to infer that Mr. Taylor's conviction is a sex crime against a child. Given the inherently prejudicial nature of such an offense, it is impossible to say whether Mr. Taylor received a fair trial, free of such prejudice. A new trial is thus warranted.

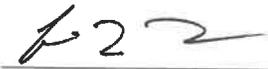
VII. CONCLUSION

Mr. Taylor respectfully requests that the Court grant him a new jury trial in which evidence concerning his felony conviction and sentence are properly excluded.

Dated this 6 day of August, 2018.

Respectfully submitted,

VAIL, CROSS-EUTENEIER and
ASSOCIATES

By:  _____

HANNAH M. WEAVER
WSBA No. 49779
Attorney for Appellant

CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 6th day of August, 2018, the document to which this certificate is attached, Appellant's Brief of Appellant, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Jordyn Christine Jones
Assistant Attorney General
PO Box 40121
Olympia, WA 98504-0121

DATED this 6th day of August, 2018.


LYNN M. VENEGAS, Secretary

VAIL CROSS AND ASSOCIATES

August 06, 2018 - 2:07 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51360-9
Appellate Court Case Title: Jonathon L. Taylor, Appellant v. Dept. of L & I, Respondent
Superior Court Case Number: 15-2-00348-1

The following documents have been uploaded:

- 513609_Briefs_20180806140634D2566329_2627.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Taylor - Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- LlolyCE@atg.wa.gov
- jordynj@atg.wa.gov

Comments:

Sender Name: Lynn Venegas - Email: lynn@davidbvail.com

Filing on Behalf of: Hannah Weaver - Email: hannah@davidbvail.com (Alternate Email: lynn@davidbvail.com)

Address:
PO Box 5707
Tacoma, WA, 98415-0707
Phone: (253) 383-8770

Note: The Filing Id is 20180806140634D2566329