

FILED  
Court of Appeals  
Division II  
State of Washington  
9/6/2018 3:07 PM

NO. 51485-1-II

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

GERALD COMPLITA,

Appellant.

---

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Sally F. Olsen, Judge

---

---

BRIEF OF APPELLANT

---

---

CATHERINE E. GLINSKI  
Attorney for Appellant

Glinski Law Firm PLLC  
P.O. Box 761  
Manchester, WA 98353  
(360) 876-2736

## **TABLE OF CONTENTS**

A.	ASSIGNMENTS OF ERROR.....	1
	Issues pertaining to assignments of error.....	1
B.	STATEMENT OF THE CASE.....	1
C.	ARGUMENT.....	7
	1. IMPROPER ADMISSION OF ER 404(B) EVIDENCE PREJUDICED THE DEFENSE. ....	7
	a. ER 404(b) overview .....	7
	b. The trial court failed to identify a proper purpose for admission of the ER 404(b) evidence. ....	10
	c. The court erred in admitting the ER 404(b) evidence because it did not properly balance its probative value against its prejudicial effect on the record. ....	11
	d. The court’s error requires reversal. ....	12
	2. A SCRIVENER’S ERROR IN THE JUDGMENT AND SENTENCE MUST BE CORRECTED. ....	14
D.	CONCLUSION.....	15

## TABLE OF AUTHORITIES

### Washington Cases

<i>In re the Personal Restraint of Mayer</i> , 128 Wn. App. 694, 117 P.3d 353 (2005).....	15
<i>State v. Bacotgarcia</i> , 59 Wn. App. 815, 801 P.2d 993 (1990), <i>review denied</i> , 116 Wn.2d 1020 (1991) .....	14
<i>State v. Bowen</i> , 48 Wn. App. 187, 738 P.2d 316 (1987) .....	7
<i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	12
<i>State v. Dawkins</i> , 71 Wn. App. 902, 863 P.2d 124 (1993) .....	9
<i>State v. DeVincentis</i> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	9
<i>State v. Foxhoven</i> , 161 Wn.2d 168, 163 P.3d 786 (2007) .....	9, 10
<i>State v. Gresham</i> , 173 Wn.2d 405, 269 P.3d 207 (2013) .....	7, 8, 10, 11
<i>State v. Halstien</i> , 122 Wn.2d 109, 857 P.2d 270 (1993).....	11
<i>State v. Jackson</i> , 102 Wn.2d 689, 689 P.2d 76 (1984) .....	12, 13
<i>State v. Quismundo</i> , 164 Wn.2d 499, 192 P.3d 342 (2008).....	9
<i>State v. Saltarelli</i> , 98 Wn.2d 358, 655 P.2d 697 (1982) .....	8
<i>State v. Tharp</i> , 96 Wn.2d 591, 637 P.2d 961 (1981) .....	11
<i>State v. Wade</i> , 98 Wn.App. 328, 989 P.2d 576 (1999) .....	7

### Statutes

RCW 9.94A.507.....	14
--------------------	----

### Rules

ER 402 .....	8
ER 403 .....	5, 8

ER 404(b)..... passim

A. ASSIGNMENTS OF ERROR

1. Improper admission of ER 404(b) evidence prejudiced the defense.

2. The judgment and sentence contains a scrivener's error which should be corrected.

Issues pertaining to assignments of error

1. Where the court admitted ER 404(b) evidence without identifying a proper purpose and without balancing the probative value of the evidence against its prejudicial effect, does improper admission of the propensity evidence require reversal?

2. Where the judgment and sentence contains a scrivener's error, is remand for correction of the error the appropriate remedy?

B. STATEMENT OF THE CASE

In October 2017, the Missing and Exploited Children Task Force conducted an "undercover operation" for the purpose of arresting people who were trying to commit sex crimes with children. 3RP<sup>1</sup> 83. As part of this operation, detectives placed ads in the "Casual Encounters" section of Craigslist. 3RP 96-98. Craigslist allows users to place personal ads only

---

<sup>1</sup> The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP—12/4/17; 2RP—12/4/17, 2/16/18; 3RP—1/3, 4, 8/18; 4RP—1/9, 10/18; 5RP—1/10/18.

after they confirm that they are 18 years old or older. 3RP 85, 108. The Casual Encounters section is intended for use by adults looking to meet for “no strings attached sex.” 3RP 84.

Gerald Scott Complita responded to an ad placed by a detective on October 11 titled “Young, looking for older daddy.” 3RP 100, 103. The detective who was actually conducting the chat told him she was 13 years old. 3RP 154. Complita continued to chat for a while, including some sexually explicit conversation. 3RP 154-56. He then responded, “Oh, well, ... Prison doesn’t appeal to me anyway. Peace.” 3RP 156. That was the end of the conversation. 3RP 180.

The next day Complita responded to a different ad placed by detectives. This one was titled, “Crazy and young, looking to explore.” 3RP 102-03. The detective conducting the chat mentioned that Complita had already turned her down, saying he doesn’t like prison. 3RP 160. Complita responded that if she was able to keep it to herself, they should get acquainted. 3RP 160. The conversation continued through text messages. 3RP 161. When the detective asked for money for nude photos, Complita responded that she sounded like an old pro. 3RP 164. There was no other mention of age in the conversation. 3RP 183-84.

After some discussion about sexual experience, Complita asked where they could meet. 3RP 164-70. They agreed to meet at a 7-Eleven

in Bremerton. Complita said he could be there in 20 minutes, and the detective told him to get condoms. 3RP 173-74. Complita drove to the location the detective gave him, parked, texted that he was there, and a few seconds later drove away. 3RP 174; 4RP 253. He was arrested in a traffic stop and charged with attempted second degree rape of a child and felony communication with a minor for immoral purposes. 3RP 175; 4RP 251-52; CP 58-61.

Complita testified that he goes to Casual Encounters frequently, looking for people to hang out with. 4RP 261. He responded to the ad on October 11 thinking it was someone interested in dating an older man. 4RP 262. When the person claimed to be 13 years old he did not believe it, because he didn't think kids would use Craigslist. 4RP 263. The picture the detective sent him looked like it might be a teenager, however, and since he had no intention of getting together with a child, he ended the conversation and deleted it from his phone. 4RP 263-64.

Complita responded to a different ad the next day. 4RP 265. He asked for a picture in that conversation, and he didn't recognize the one he received as the same person in the picture from the day before. This person looked to be 17 or 18 years old. 4RP 265. But after he arrived at the 7-Eleven parking lot and was waiting for a response, he started to think

there might be a connection between this conversation and the one from the day before, so he decided he better go home. 4RP 266.

Complita admitted that he had had graphic sexual conversations in response to both ads, but he would not have had those conversations if he had believed the person he was talking to was 13 years old. 4RP 266-67. When he drove to the 7-Eleven, he believed he was going to meet an adult. 4RP 267. If a 13 year old had met him and gotten into his truck, he would have told her to get out. 4RP 270.

On cross examination Complita explained that he did not realize the person he was chatting with on October 12 was the same person he had chatted with the day before. The fact that she said he had already turned him down because he doesn't like prison did not make the connection for him. A lot of his Craigslist conversations end with him saying that when the person he is talking to asks for money to spend time with him. 4RP 282-83. He told the detective they could get acquainted if she could keep it to herself, because he did not want his girlfriend to know about their meeting. 4RP 285. When the conversation proceeded and she did not ask for money, he started thinking this was an operation run by law enforcement. 4RP 287.

Following Complita's testimony on direct examination, the State moved admit evidence of an email conversation Complita had had with an

undercover operative in 2015. 4RP 271. The defense had moved in limine to exclude this evidence under ER 403 and ER 404(b), and the State agreed it was inadmissible in its case in chief. CP 11; 3RP 54. The State argued, however, that Complita's testimony that he had no intent to get with children, that he did not know children used Craigslist, and that he was not interested in sex with children opened the door to the 2015 undercover operation. 4RP 271. The State also suggested the evidence was admissible to show knowledge or rebut the claim of accident or mistake. 4RP 273.

Defense counsel responded that although Complita had carried on an email conversation with the detective in 2015, he did not go through with trying to meet up with her. Nothing Complita testified to on direct exam opened the door to the 2015 conversation. 4RP 272.

The court read through the emails. It noted the State wanted to admit the emails to show Complita intended to have sex with a 13 year old, because the emails show that was his intent in 2015, since he continued to talk about having sex after the detective told him she was 13. 4RP 275-76. The court concluded, "this directly contradicts what he just said on the stand, so I am going to allow it." 4RP 276.

The State asked Complita about the email conversation he had had in response to a Craigslist ad in 2015. 4RP 290. The ad and the emails

were admitted as exhibits and published to the jury, and the State went through them line by line. 4RP 298-312. In the emails the detective told Complita she was 13 years old, they had a graphic sexual conversation and talked about meeting, and then Complita ended the contact. *Id.* Complita testified that he knew this was a sting operation. He could tell the emails were not from a child, and once the sexual discussion started he did not believe the person he was talking to was 13, regardless of what she said. 4RP 312-14. He had no intention of getting with a child in 2015, and he was not planning to have sex with an underage girl when he drove to the 7-Eleven on October 12, 2017. 4RP 313, 320.

The State relied on the 2015 emails in closing argument to show that, contrary to his testimony, Complita intended to have sex with a 13 year old:

He told you that he had no intent of harming a child, and he had no idea that this kind of thing was happening on Craigslist; that there were children for sale on Craigslist. But that was directly contradicted by the fact that he has done this – he had done this in a 2015 operation, so he knew. He took part in that.

He talked to that undercover officer thinking that she was 13 years old for a three-day period about all sorts of sexual things that he wanted to do to her.

4RP 377.

C. ARGUMENT

1. IMPROPER ADMISSION OF ER 404(B) EVIDENCE PREJUDICED THE DEFENSE.

a. ER 404(b) overview

Under ER 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, planning, knowledge, identity, or absence of mistake or accident.” ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person’s character and showing that the person acted in conformity with that character. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2013). “ER 404(b) forbids such inference because it depends on the defendant’s propensity to commit a certain crime.” *State v. Wade*, 98 Wn.App. 328, 336, 989 P.2d 576 (1999).

Evidence of other misconduct is prejudicial because jurors may convict on the basis that the defendant deserves to be punished for a series of immoral actions. *State v. Bowen*, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Such evidence “inevitably shifts the jury’s attention to the defendant’s general propensity for criminality, the forbidden inference; thus, the normal ‘presumption of innocence’ is stripped away.” *Bowen*, 48

Wn. App. at 195. “This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person’s guilt or innocence.” *Wade*, 98 Wn. App. at 336.

Evidence of prior misconduct “*may*, however, be admissible for any other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice.” *Gresham*, 173 Wn.2d at 420. “ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation, but in conjunction with other rules of evidence, in particular ER 402<sup>2</sup> and 403<sup>3</sup>.” *State v. Saltarelli*, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). ER 404(b) incorporates the relevancy and unfair prejudice analysis found in ER 402 and ER 403. *Saltarelli*, 98 Wn.2d at 361-62. The evidence must be logically relevant to a material issue before the jury, which means the evidence is “necessary to prove an essential ingredient if its probative value is substantially outweighed by the danger of unfair prejudice.” *Id.* at 361-62. In considering whether evidence is admissible

---

<sup>2</sup> “All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.” ER 402.

<sup>3</sup> “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403.

under ER 404(b), doubtful cases should be resolved in favor of the defendant. *Wade*, 98 Wn. App. at 334.

“A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible.” *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). When determining admissibility under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against the prejudicial effect. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). This analysis must be conducted on the record. *Foxhoven*, 161 Wn.2d at 175.

“If the trial court properly analyzes the ER 404(b) issue, its ruling is reviewed for abuse of discretion.” *State v. Dawkins*, 71 Wn. App. 902, 909, 863 P.2d 124 (1993). A trial court abuses its discretion when it applies the wrong legal standard, basis its ruling on an erroneous view of the law, or otherwise fails to adhere to the requirements of an evidentiary rule. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); *Foxhoven*, 161 Wn.2d at 174.

- b. The trial court failed to identify a proper purpose for admission of the ER 404(b) evidence.

Before admitting ER 404(b) evidence, the court must identify its purpose on the record. *Foxhoven*, 161 Wn.2d at 175. If the only relevant purpose for the evidence is to establish the defendant's criminal propensity, it must be excluded. *Gresham*, 173 Wn.2d at 420.

The trial court concluded the 2015 emails were admissible because they directly contradicted Complita's testimony that he did not intend to have sex with a 13 year old. 4RP 275-76. There is nothing in the prior emails that contradicts Complita's testimony, however. Complita testified that he did not think the person he was talking to in this case was 13 years old, he would not have gone to meet her if he did, and he did not intend to have sex with a child. 4RP 263, 266-67, 270. The 2015 emails are consistent with this testimony. They show that he carried on a sexual conversation with someone who claimed to be 13 but that he ended the conversation without making any attempt to meet her. 4RP 312-14.

But the court's ruling allowed the State to present, line by line, Complita's sexually explicit conversation with a detective claiming to be 13. The printed conversation was also admitted as an exhibit. This evidence served no purpose other than to make Complita seem like an unsavory character who was likely to commit the charged offense. The

court erred in admitting the evidence because it served no legitimate purpose.

- c. The court erred in admitting the ER 404(b) evidence because it did not properly balance its probative value against its prejudicial effect on the record.

Even if the court was correct in determining that the ER 404(b) evidence was relevant to contradict Complita's testimony on intent, the court erred in failing to balance the probative value of this evidence against its prejudicial effect on the record.

Evidence of prior misconduct *may* be admissible for a non-propensity purpose only if its probative value outweighs the danger for unfair prejudice. *Gresham*, 173 Wn.2d at 420; *Salterelli*, 98 Wn.2d at 361-62. Evidence of prior bad acts, including acts which are unpopular or disgraceful, must not be admitted "without a careful consideration of relevance and a realistic balancing of its probativeness against its potential for prejudice." *Salterelli*, 98 Wn.2d at 364-65; *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). The Supreme Court held long ago that "[w]ithout such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted." *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981).

"[A] judge who carefully records his reasons for admitting evidence of prior crimes is less likely to err, because the process of

weighing the evidence and stating specific reasons for a decision insures a thoughtful consideration of the issue." *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). For this reason, a trial judge errs when she does not enunciate the reasons for her decision. *Jackson*, 102 Wn.2d at 694. "Careful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest." *State v. Coe*, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984). There must be an "intelligent weighing" of potential prejudice against probative value." *Salterelli*, 98 Wn.2d at 363.

The record in this case fails to show that the court gave any consideration, much less careful consideration, to the balance of probative value and prejudicial effect. The court admitted evidence of the 2015 emails without any reference to these factors, stating only that Complita continued to talk about having sex after the detective told him she was 13, and "this directly contradicts what he just said on the stand, so I am going to allow it." 4RP 275-76.

d. The court's error requires reversal.

Had the court considered how the ER 404(b) evidence might prejudice Complita, it likely would not have admitted it. The prejudice began with admission of the 2015 emails as an exhibit. This started the painting of Complita as a criminal type with the propensity to commit the

crimes with which he was charged. The prejudice continued through lengthy cross examination regarding every detail of the prior emails, and into the State's closing argument, where the prosecutor claimed the 2015 emails demonstrated Complita's intent in the charged offense.

“The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined.” *Wade*, 98 Wn. App. at 333. Evidentiary errors under ER 404(b) are reversible if, within reasonable probabilities, the outcome of the trial would have differed had the error not occurred. *Jackson*, 102 Wn.2d at 695. Here there is a reasonable probability the outcome of Complita's trial would have been different but for the erroneous admission of propensity evidence.

It was undisputed that Complita ended the conversation on October 11 without any plans to meet the person he was talking to. It was also undisputed that, after driving to the 7-Eleven on October 12, Complita left the area without waiting to meet the person he had been chatting with. He testified that he never believed the person he was conversing with was underage, and he had no intent to have sex with a child. In fact, he headed home as soon as he made the connection that the person he was going to meet might be the same person who had said she was 13 the day before. Without the ER 404(b) evidence detailing his sexually explicit conversation with an undercover operative claiming to be 13 two years

earlier, there is a reasonable probability the jury would have had a reasonable doubt about the charges in this case.

A jury's natural inclination is to reason that having previously committed bad acts, the accused is likely to have reoffended by acting in conformity with that character. *State v. Bacotgarcia*, 59 Wn. App. 815, 822, 801 P.2d 993 (1990), *review denied*, 116 Wn.2d 1020 (1991). The admission of the ER 404(b) evidence allowed the jury to follow its natural inclination and infer Complita acted in conformity with his character and therefore likely committed charged offenses. Erroneous admission of the ER 404(b) evidence prejudiced the defense, and Complita's convictions must be reversed.

2. A SCRIVENER'S ERROR IN THE JUDGMENT AND SENTENCE MUST BE CORRECTED.

Complita was convicted on two counts. Count I is attempted rape of a child in the second degree, an offense subjecting him to community custody for life; Count II is felony communication with a minor for immoral purposes, an offense requiring 12 months of community custody. CP 116-18; RCW 9.94A.507. The judgment and sentence in this case orders a life term of community custody, but it incorrectly identifies count II as the count to which that term attaches. CP 119. The error must be corrected. The proper remedy is remand to the trial court for correction of

the scrivener's error. *In re the Personal Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

D. CONCLUSION

The improper admission of ER 404(b) evidence prejudiced the defense, and reversal is required. In addition, a scrivener's error in the judgment and sentence must be corrected.

DATED September 6, 2018.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

---

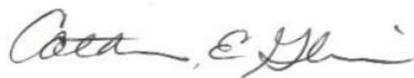
CATHERINE E. GLINSKI  
WSBA No. 20260  
Attorney for Appellant

Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant in  
*State v. Gerald Complita*, Cause No. 51485-1-II as follows:

Gerald Complita DOC# 404868  
Coyote Ridge Corrections Center  
P.O. Box 769  
Connell, WA 99326

I certify under penalty of perjury of the laws of the State of Washington  
that the foregoing is true and correct.



---

Catherine E. Glinski  
Done in Manchester, WA  
September 6, 2018

**GLINSKI LAW FIRM PLLC**

**September 06, 2018 - 3:07 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51485-1  
**Appellate Court Case Title:** State of Washington, Respondent v. Gerald Complita, Appellant  
**Superior Court Case Number:** 17-1-01538-3

**The following documents have been uploaded:**

- 514851\_Briefs\_20180906150635D2428229\_8005.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was 51485-1-II State v Complita Brief of Appellant.pdf*

**A copy of the uploaded files will be sent to:**

- kcpa@co.kitsap.wa.us
- rsutton@co.kitsap.wa.us

**Comments:**

---

Sender Name: Catherine Glinski - Email: glinskilaw@wavecable.com

Address:

PO BOX 761

MANCHESTER, WA, 98353-0761

Phone: 360-876-2736

**Note: The Filing Id is 20180906150635D2428229**