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

STATE OF WASHINGTON,

Respondent,

v.

GERALD SCOTT COMPLITA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-01538-3

BRIEF OF RESPONDENT

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SERVICE	Catherine E. Glinski Po Box 761 Manchester, Wa 98353 Email: cathyglinski@wavecable.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED October 25, 2018, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in allowing Complita to be impeached by his own prior inconsistent statements?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Gerald Scott Complita was charged by information filed in Kitsap County Superior Court with attempted second degree rape of a child and felony communication with a minor for immoral purposes. CP 1. A first amended information later omitted from the communication charge an alternative based upon the defendant having previously been convicted of the crime. CP 60.

The trial court instructed the jury on the defense of abandonment. CP 83.

Verdict of guilty were returned on each charge. CP 86. Complita was sentenced to a minimum term of 76.5 months and a maximum term of life. CP 117. Count II was a 12 month sentence concurrent with the other. CP 118. Complita timely filed a notice of appeal. CP 129.

B. FACTS[1]

Washington State Patrol Sergeant Rodriquez is assigned to the Missing and Exploited Children Task Force (MECTF). 1RP 79. One of the tasks of that organization is undercover operations directed at crimes against children. 1RP 81. Police place ads on social media in these operations. 1RP 82. They communicate with people who respond, move the conversation to text messaging, and if the person agrees to meet, the person is arrested. 1RP 82.

The operations involves posting on a section of Craigslist known as Casual Encounters where people go seeking no strings attached sex. 1RP 84. In the present case, On October 11, Sergeant Rodriquez posted a Craigslist add that said

> Young, looking for older daddy. Woman for male in Bremerton. I am young looking for daddy, long hair, looking for a guy that knows what he wants and can teach many things. Let's have some fun. I like showers, very clean. DDF, gifts always nice.

1RP 100. And in this case, a second ad was posted a day later that said

> Crazy and young, looking to explore, W4M, Bremerton. Bored and home alone. Been watching videos all day. Really looking to meet a clean DDF guy that can teach me what it's like to be an adult. HMU. I'm lots of fun.

1RP 101 (admitted as exhibit 2). "W4M" means woman for man. Id. "HMU" means hit me up if you are interested. Id. "DDF" means disease

[1] The trial VRP are denominate volumes one and two and the state will cite them as 1RP and 2RP. The other volumes are referred to by date.

and drug free. Id. Complita responded to both ads. 1RP 103.

Washington State Patrol Detective Kristl Pohl was employed in the present operation as a "chatter." 1RP 147-49. Detective Pohl communicated with targets on-line. 1RP 149. Complita responded to both the above quoted ads. Id. Detective Pohl then responded to Complita. 1RP 151.

On October 11, Complita responded to the first ad with "I am 52 near Gig Harbor. I want a young girl to spend time with." 1RP 153.[2] Detective Pohl testified to her initial communication with Complita. 1RP 153- 156. Complita ended this communication by saying that he does not like prison. 1RP 156.

Complita responded to the second ad. 1RP 158. The above quoted "Crazy and young" ad was answered by Complita saying "How crazy are you? I want to explore too, because that is all I do. I would explore you." 1RP 160. Complita advanced that the two should get acquainted and wondered whether the other party is afraid. 1RP 160-61. The detective responded suggesting text-message communication, and the two begin to converse in that medium. 1RP 161.

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[2] Exhibits including the conversations between detective Pohl and Complita were not ordered and are likely unnecessary given the single issue raised and that the relevant passages were orally repeated by the witnesses. Excerpts that track Detective Pohl's testimony are found in the "probable cause statement" attached to the original information at CP 5-10.

By text, Complita introduced himself as "Scott." 1RP 163. They exchange that they are wanting to meet each other. 1RP 164. When the detective says that she wants to learn to be a "real woman," Complita responds with "Touch yourself. Do it now and send a few pics of it." Id. This immediately followed by "Don't leave out your nipples." 1RP 165. The two discuss the sending of nude phots. Id. The detective deflected, saying that photos would cost money. Id. He told her that pleasing a man includes submission and obedience. 1RP 166.

Complita told the detective that being a great cook will please a man. 1RP 166. Then, Complita sends that "The best way to please a man is to do all of the things other girls won't do or do it far better, even if it's completely vile and heinous." Id. He asked her how much experience she has with sex. 1RP 166-67. She said "I've been told I give good head." 1RP 167. He asks how many times she has done that and she responded three times. Id. He asks what skills she wants to acquire and she responded that she wants to be a "good fuck." Id. Complita said that she must be enthusiastic to allow longer performance by the male and he must be "hands-on" to help her learn. 1RP 167-68.

Complita asked about vaginal sex and she responded that she had done that once. 1RP 168. He asked if she liked it and she said it was not bad. Id. He responded "We need to get you to a point where you love,

crave it constantly." Id. He asked whether she had had sex with another girl and she said yes but she preferred men. Id. He asked her if she masturbates and she replied yes when she goes to bed. 1RP 169. He tells her it should be three times a day because "Guys love a girl that squirts." Id.

Complita sent her advice about shaving her private area and wearing revealing clothing and inquired about her breasts. Id. She described them as "perky." 1RP 170. He responded "Gee, I hope so." Id. He told her that he wanted to put his hands all over her and that she should tell him what feels good and what does not. Id. She said that that is what she wants and he responded "How do I find you." Id. He requested a picture and the detective sent one with the question "Can I see you?" 1RP 171. He sent his picture back. 1RP 172.

The two briefly discussed the exchanged images and Complita then texted that he was impatient and asked again "How can I find you." 1RP 173. She told him to come to a 7-Eleven store near her house. 1RP 173-74. He responded "I want you to masturbate for me as soon as you are in my truck. Will you do that?" 1RP 174. She asked how long he would be and he said 20 minutes. Id. She asked about condoms and he said he would get some. Id. They discussed his arrival, he texted that he was there and was in a hurry and the conversation soon ended because

Complita was in custody. 1RP 174-75.

1. Facts and Procedure regarding evidence of prior incident.

Complita testified. 2RP 258. During that testimony, Complita claimed that when he first heard Detective Pohl's supposed age, 13, he terminated the contact. 2RP 263. He said "I wasn't going to try and get with a kid off of Craigslist. There was – that wasn't my intention at all." Id. Later, he claimed that the conversation that he had with Detective Pohl would not have happened with a 13 year old. 2RP 266-67. He claimed that if a 13 or 14 year old had gotten into his truck at the 7-Eleven he would have told her to get out. 2RP 269-70. This because "I am not interested in dating kids or being with kids." 2RP 270. He goes on to say "I am not interested in having sex with kids." Id.

In response, the state asked the court for permission to present evidence from a similar incident involving Complita from 2015. 2RP 271. The state had mentioned the prior incident pretrial. 1RP 25-26. The state provided the 2015 email exchanges to the trial court. 1RP 31. The state discussed that the 2015 emails show that Complita had responded to an undercover detective posing as a 13 year old. 1RP 32. The state indicated that the 2015 incident would be offered only if Complita testified. 1RP 54-55. The defense indicated that it was in receipt of the 2015 information. 1RP 55; 2RP 292 (it had been disclosed in discovery). The trial court reserved ruling. 1RP 55-56.

After Complita testified, the state argued that his testimony opened the door for admission of the 2015 incident. 2RP 271. The trial court asked for a legal basis and the state responded that it would go to the absence of mistake and Complita had opened the door by claiming no intent to have sex with children. 2RP 271-72. The state added that the evidence would show intent and argued that the evidence falls within ER 404(b). 2RP 273-74.

The trial court reviewed the 2015 materials again and ruled "so this directly contradicts what he just said on the stand, so I am going to allow it." 2RP 276.

Complita was presented with and identified the 2015 email string on cross-examination. 2RP 289-90. That ad was posted on Craigslist in the Casual Encounters section. 2RP 290. The ad was nearly the same as the October 12, 2017 ad, saying "Crazy and young, W4M, Tacoma." Id. Complita admitted that he responded to this ad in 2015. Id.; 2RP 299.

Complita's 2015 responses included that he wanted to entertain and teach the advertiser. 2RP 300. The advertiser told Complita that she was too young to drive. Id. The advertiser told Complita that she is 13 years old and he continued the conversation. 2RP 301. Complita asks if the person represented as a 13 year old girl is looking for sex. 2RP 302. Upon her affirmative response, Complita turned the conversation to sex, telling the advertiser that "I could teach you all kinds of sex." Id. He asks

if she will let him play with her. Id. The advertiser was concerned about being kidnapped or raped and Complita said "I want to pleasure you, not rape, unless you don't want it." 2RP 303. Complita admitted to the advertiser that the sex might hurt but that he would be gentle. Id. He became more graphic referring to "light spanking, lingering around your holes." 2RP 304. The conversation went on with discussion of how and where to meet and the bringing of condoms. 2RP 304-06.

Eventually, Complita's emails show that he is getting cold feet about the enterprise, wondering whether when he goes to meet the advertiser he will be arrested. 2RP 311. He is reassured that the advertiser does not like boys her age. Id. Complita claimed concern about being arrested while telling the advertiser about the size of his penis. Id.

Having finished going through the communications in the 2015 incident, the prosecutor then confronted Complita with his previous testimony doubting that 13 year olds would be on Craigslist and denying his intentions with regard to sex with 13 year old children. 2RP 312. Complita maintained that he never believed the advertisers were that young. 2RP 312-13; 314; 315 (with regard to both incidents).

III. ARGUMENT

A. EVIDENCE OF COMPLITA'S STATEMENTS IN THE 2015 INCIDENT WERE ADMISSIBLE AS IMPEACHMENT BY PRIOR INCONSISENT STATEMENT UNDER ER 613.

Complita argues that the evidence of the 2015 incident was improperly admitted and prejudiced his case warranting a new trial. He asserts that the evidence falls within the purview of ER 404(b) and as such was either inadmissible or improperly admitted. This claim is without merit because the evidence is impeachment by prior inconsistent statement and was properly admitted for that purpose.

The trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. DeVincentis,* 150 Wn.2d 11, 17, 74 P.3d 119 (2003). But the trial court's interpretation of an evidence rule is reviewed de novo. *State v. Gresham,* 173 Wn.2d 405, 419, 269 P.3d 207 (2012). Taken together, if the trial court correctly interprets the rule, the admissibility question is a matter of discretion. Id.

Moreover, a trial court's evidentiary ruling may be affirmed on any correct ground. G*resham,* 173 Wn.2d at 419, *citing Nast v. Michels,* 107 Wash.2d 300, 308, 730 P.2d 54 (1986). A trial court must give a limiting instruction upon the request of the non-offering party. *Gresham,* 173

Wn.2d at 424. Finally, erroneous admission of ER 404(b) evidence constitutes a nonconstitutional error that may be analyzed under the nonconstitutional harmless error standard that asks "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Id. at 433.

1. The trial court did not follow the procedure for admission of ER 404(b) evidence because the evidence was admitted as impeachment.

ER 404(b) provides

> Evidence 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, plan, knowledge, identity, or absence of mistake or accident.

The rule "is a categorical bar to 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 (2012). It is that improper purpose the rule stands against. But there are "an unidentified number of proper purposes" under which this type of evidence may be admitted. Id.

In admitting such evidence, a trial court is required to engage an analysis that includes (1) finding by preponderance that the act occurred, (2) identifying the purpose for which the evidence is admitted, (3) determine whether the evidence is relevant to prove an element, and (4)

weigh probative value against prejudicial effect. *Gresham,* 173 Wn.2d at 421. The state as proponent of the evidence has the burden of establishing the occurrence, the purpose of the evidence, and its relevance. Id.

Here, the evidence offered may have fallen under a number of other purposes under the rule. As the state asserted below, it showed the absence of mistake and motive and can clearly stretch to cover issues of opportunity, intent, and plan. Nonetheless, even though the state and the defense discussed ER 404(b) with the trial court, the trial court did not engage in the required analysis. However, the trial court did not rule that the evidence either was or was not admissible under ER 404(b). Instead, the trial court carefully considered the nature and purpose of the offered evidence and concluded that it was admissible as contradiction of the defendant's testimony—it was impeachment evidence.

2. The evidence of the 2015 incident was independently admissible as impeachment by prior inconsistent statement.

First, the test for the admissibility of ER 404(b) is a bad fit for the evidence admitted here. There was no doubt that the incident occurred because Complita admitted that it did. 2RP 290. The trial court identified the purpose of the evidence—contradiction of direct testimony. The evidence, as impeachment, did not prove an element of the offense.

This bad fit is because here the evidence is admissible under ER 613 as impeachment by prior inconsistent statement. The rule provides

> (a) Examining Witness Concerning Prior Statement. In the examination of a witness concerning a prior statement made by the witness, whether written or not, the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.
>
> (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

"A witness may be impeached as to their credibility by a prior inconsistent statement." *State v. Garland,* 169 Wn. App. 869, 885, 282 P.3d 1137 (2012), *review granted, remanded for reference hearing on different issue* 390 P.3d 353 (2017). The rule applies to criminal defendants. Id. Such evidence is offered to show that the witness is untruthful and may not be used to argue for guilt in the pending matter. Id.

"A prior inconsistent statement is a comparison of something the witness said out of court with a statement the witness made on the stand." *State v. Spencer,* 111 Wn. App. 401, 409, 45 P.3d 209 (2002) *review denied* 148 Wn.2d 1009. Further,

> [t]o say that a witness' prior statement is "inconsistent" is to say it has been compared with, and found different from, the witness' trial testimony. This comparison, *without regard to the truth of either statement*, tends to cast doubt on the witness' credibility, for a person who speaks inconsistently is thought to be less credible than a person who does not.

State v. Williams, 79 Wn. App. 21, 26, 902 P.2d 1258 (1995) (emphasis by the court).

The present case is an application of ER 613. Here, Complita's own 2015 statements were inconsistent with his testimony in the present trial. He was shown the written inconsistent statements and he freely admitted that he had made the statements. 2RP 290. He was afforded an opportunity to explain the statements. Moreover, the state did not use this impeachment to argue other than the credibility issue that it raised.

The prosecutor's initial closing remarks cover approximately eight pages. 2RP 371-379. Complita maintains that a section of that argument evinces an attempt to use the 2015 incident to prove guilt. Brief at 6. However, that section of the prosecutor's closing was prefaced with

> Let's talk about credibility for a little bit because you are the sole judges of credibility. And you heard the defendant testify yesterday, but he certainly wasn't credible because everything that he said could be contradicted by the evidence.

2RP 376-77. Then, the prosecutor talks about his testimony being contrary to the evidence of the present incident before turning to the 2015 incident. 2RP 377. When discussed, the 2015 evidence was cast as directly contradictory to Complita's testimony. Id. That discussion entails two paragraphs, including a critique of Complita's attempts to explain the prior inconsistent statements. 2RP 378. The prosecutor ends the discussion of the 2015 incident with "He was not credible on the stand." Id. The prosecutor then turns back to the 2017 incidents. Id. Nowhere

does the prosecutor argue that the evidence of the 2015 incident proves his intent in the 2017 incident. Finally, there is no mention of the 2015 evidence in the prosecutor's rebuttal, save for saying "He was not credible on the stand." 2RP 391-394 (rebuttal argument); quote at 2RP 393.

ER 613 provided a proper ground for admission of Complita's prior inconsistent statements in this case. The state was true to the trial court's ruling by using the impeachment evidence on the issue of credibility only. The trial court may therefore be affirmed on this proper ground. *Nasty v. Michels,* 107 Wn.2d 300, 308, 730 P.2d 54 (1986) ("an appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court."). Complita was properly impeached by his own prior statements. There was no error.

IV. CONCLUSION

For the foregoing reasons, Complita's conviction and sentence should be affirmed.

DATED October 25, 2018.

Respectfully submitted,

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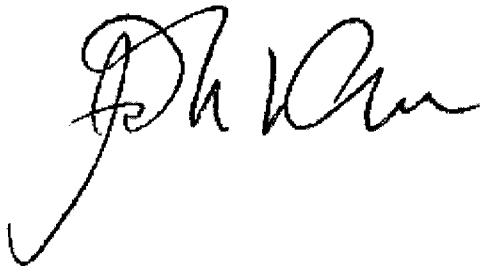

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