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Division II
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NO. 52452-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

ZACKERY TORRENCE,

Appellant.

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

The Honorable John Fairgrieve, Judge

REPLY BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. ARGUMENT IN REPLY

1. DR. JOHNSON'S ANTICIPATED TESTIMONY ON "GROOMING" WAS ADMISSIBLE UNDER ER 702, OR AS AN EXCEPTION TO THE RULE THAT "PROFILE" TESTIMONY IS NOT ADMISSIBLE

The State elicited testimony from Dr. Christopher Johnson,[1] a psychologistic at Vancouver Guidance Clinic, regarding the prevalence of delayed reporting of sex offenses. 4RP at 696-708.

During cross-examination, defense counsel asked Dr. Johnson if "grooming" was "a common phenomenon," and the prosecution objected on the basis that the testimony was outside the scope of direct examination and that it was not relevant. 4RP at 710, 711. Defense counsel notified the court that the defense would bring Dr. Johnson in its case-in-chief. 4RP at 710. Outside the presence of the jury, the State argued that "there's a very thin line when you start getting into the area of grooming between that and propensity evidence," and "that's the reason most of the time the State doesn't go into things like grooming." 4RP at 711. Defense counsel made an offer of proof regarding grooming behavior in child sex abuse cases. 4RP at 712. Dr. Johnson stated in the offer of proof that grooming behavior such as touching and physical contact is a form of grooming and that in his experience such behavior was common in child sex abuse cases.

[1]Dr. Johnson was subpoenaed to appear by both the prosecution and the defense. 4RP at 710.

4RP 712-13. The following exchange took place during the offer of proof:

> [Defense counsel]: Okay. And so it would be less common if you'd just suddenly jump right into complete—complete sexual contact- I mean complete sexual intercourse and then back off into more of a grooming function after that-that would be uncommon, wouldn't it?
>
> [Dr. Johnson]: Correct. The whole purpose of grooming is to develop a relationship so the child is less likely to report. So grooming assumes that there is a process and that occurs over time.

4RP at 713.

After additional argument, the trial court denied the motion to present evidence of grooming. The court stated:

> Basically what you're saying you want this expert to testify as to grooming and what constitutes grooming. Apparently so you can argue that there's no grooming—you know—that went on and thus he didn't do it.
>
> I tend to agree with the State. Facially this appears to be a type of character evidence or kind of reverse character evidence.

4RP at 719.

If construed as character evidence, the admissibly of the proposed testimony/character evidence offered by a criminal defendant, as to his or her own character, is governed by ER 404(a)(1):

> (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same[.]

In this case, the evidence is not properly categorized as impermissible character evidence under ER 404(a) because the profile

does not emphasize or identify a trait of the accused. Through the use of character evidence, "the defendant generally seeks to have the jury conclude that one of such character would not have committed the crime charged." ***State v. Kelly***, 102 Wash.2d 188, 195, 685 P.2d 564 (1984) (citing ***Michelson v. United States***, 335 U.S. 469, 475–76, 69 S.Ct. 213, 93 L.Ed. 168 (1948)). Although the concept of character is "amorphous," it is generally thought to include traits such as "honesty, temperance, [and] peacefulness." 1 McCormick on Evidence § 195 (Character and Habit), at 686 (John W. Strong, ed., 5th ed.1999); 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 404.2, at 383 (4th ed.1999). In ***State v. Eakins***, 127 Wash.2d 490, 495, 902 P.2d 1236 (1995), the Washington Supreme Court has held that the term "pertinent," as used in ER 404(a)(1) is synonymous with "relevant." Relevant evidence is "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." ER 401. "The threshold to admit relevant evidence is very low[; e]ven minimally relevant evidence is admissible." ***State v. Darden***, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

Mr. Torrence submits that the trial court and the State have conflated character evidence with "profile testimony." The court analyzed

the proffered testimony solely as character evidence and what it termed "reverse character evidence. 4RP at 719. The State in its response characterizes the proposed testimony as "propensity-type evidence" (Brief of Respondent at 10), and as "profile testimony." (BR at 12).

"Profile testimony" is testimony that does nothing more than identify a person as a member of a group more likely to commit the charged crime and, generally speaking, is inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice. See e.g., ***State v. Petrich***, 101 Wn.2d 566, 683 P.2d 173 (1984). Washington courts have defined inadmissible profile testimony as evidence which merely identifies a person as a member of a group that is more likely to commit a crime. ***State v. Avendano-Lopez***, 79 Wn. App. 706, 710, 904 P.2d 324 (1995); ***Petrich***, 101 Wn.2d at 576; ***State v. Braham***, 67 Wn. App. 930, 936, 841 P.2d 785 (1992); ***State v. Maule***, 35 Wn. App. 287, 293, 667 P.2d 96 (1983); ***State v. Claflin***, 38 Wn. App. 847, 690 P.2d 1186, rev. denied, 103 Wn.2d 1014 (1985).

As a general rule, 'profile testimony that does nothing more than identify a person as a member of a group more likely to commit the charged crime is inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice.' ***Braham***, 67 Wn.App. at 936. In ***Braham***, Division One of the Court of Appeals held the trial court

abused its discretion in admitting the evidence, reasoning that the testimony was nothing more than an effort to establish, through unfair prejudice, that Braham fit a profile allegedly common to child molesters. ***Braham***, at 937-38. Braham's conviction was reversed and the case remanded for a new trial. ***Braham***, at 939-40. 'Perpetrator profile testimony clearly carries with it the implied opinion that the defendant is the sort of person who would engage in the alleged act, and therefore did it in this case too.' ***Braham***, 67 Wn.App. at 939 n. 6;

Profile evidence suggests that a defendant possesses one or more behavioral characteristics typically displayed by another person engaged in crime. ***State v. Crow***, 8 Wn.App.2d 480, 438 P.3d 541 (2019) (citing ***State v. Haskie***, 242 Ariz. 582, 585, 399 P.3d 657 (2017)). "With profile evidence, the State attempts in part to convict the accused on evidence beyond the individual circumstances of the case and on one or more traits the accused possesses in common with others who purportedly commit the same crime." ***Crow***, 8 Wn. App.2d at 495.

Dr. Johnson is licensed in Washington as a psychologist and as a sex offender evaluator and treatment specialist, which is a separate discipline that requires a doctorate degree as a psychologist, followed by a resident and clinical internship. 4RP at 697-700. His anticipated testimony pertains to grooming behavior and that grooming was, in his

experience, common in child sex abuse cases. 4RP at 712-13. Assuming arguendo that the testimony is properly characterized as "profile" evidence, some courts nevertheless permit profile evidence under limited circumstances. For instance, when the testimony is admitted purely for background material, such as the modus operandi of a drug-trafficking organization. ***United States v. Hernandez-Cuartas***, 717 F.2d 552, 555 (11th Cir. 1983); ***State v. Gonzalez***, 229 Ariz. 550, 278 P.3d 328, 332 (Ct. App. 2012). Law enforcement officers frequently are permitted to present profile evidence to support the State's conclusion of guilt about a defendant when listing characteristics that, in the opinion of law enforcement officers, are typical of a person engaged in a specific illegal activity. ***United States v. Robinson***, 978 F.2d 1554, 1563 (10th Cir. 1992). Similarly, in this case, if "true" or actual profile testimony, Dr. Johnson's testimony was admissible as background information regarding the types of behavior commonly seen in child abuse cases, precisely as officers are permitted to testify in broad terms regarding drug culture and drug sales. Here, the testimony, if termed profile evidence, was admissible as background as to the circumstances and behaviors involving grooming that Dr. Johnson commonly sees in his practice.

Even more compelling, however, is the contention that Dr. Johnson's testimony was not improper perpetrator profile testimony, but

instead admissible as expert opinion testimony. Dr. Johnson did not identify any group as being more likely to commit grooming or child abuse. Instead, the proposed testimony is more correctly characterized as permissible expert opinion; the anticipated testimony would explain the concept of "grooming," and that it is commonly seen in child abuse cases and thus was helpful to the trier of fact in understanding the evidence presented and the lack of evidence of grooming in this particular case. See ER 702.[2] See also, ***State v. Cruz***, 77 Wn.App. 811, 814 n. 1, 894 P.2d 573 (1995) (after hearing argument on proffered "typical" heroin transactions testimony, trial court delineated those matters about which detective could testify).

Testimony may be based on training, experience, professional observations, and acquired knowledge. ***State v. Ortiz***, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992), ***State v. Sanders***, 66 Wn.App. 380, 386, 832 P.2d 1326 (1992). Under this principle, the court erred by excluding Dr. Johnson's anticipated testimony regarding grooming seen in child sex cases because an adequate foundation existed in his professional experience and observations. 4RP at 697-702.

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[2]ER 702 provides:
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Furthermore, the testimony was not improper because, in contrast to improper perpetrator profile testimony, 'when the finder of fact is asked to infer that a victim fits a profile, this does not directly cast the accused in a menacing and prejudicial light.' See, e.g., ***Braham***, 67 Wn.App. at 939 n. 6. The testimony does not suggest the guilt of the defendant regarding the frequency of grooming typically seen in child sex cases and does not relate directly to an inference of guilt of the defendant.

When the trial court commits an evidentiary error, such an error justifies reversal if it results in prejudice. ***State v. Bourgeois***, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Prejudice from an evidentiary error occurs where, within reasonable probabilities, the error materially affects the outcome of the trial. ***Bourgeois***, 133 Wn.2d at 403. Harmless error occurs if the evidence is of minor significance compared with the overwhelming evidence as a whole or where other evidence establishes the same facts. ***State v. Yates***, 161 Wn.2d 714, 766, 168 P.3d 359 (2007), cert. denied, 554 U.S. 922, 128 S.Ct. 2964, 171 L.Ed.2d 893 (2008).

Dr. Johnson's testimony should have been admitted either as an exception to the general prohibition against profile testimony or under ER 702 as expert testimony, so that the allegation would not be presented in a vacuum and without context. Improper exclusion of this evidence constitutes reversible error because it necessarily prejudiced Mr. Torrence

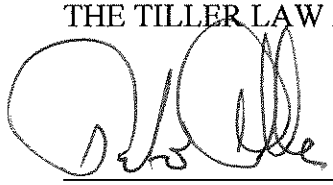
and prevented him from receiving a fair trial. ***State v. Smith***, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). The case consists of accusations made by A.K.A. against Mr. Torrence years after the alleged offenses. No physical evidence linking Mr. Torrence to the offense was presented. Testimony regarding absence of allegations of grooming would have permitted the jury to fully evaluate A.K.A.'s credibility. Although the State produced multiple witnesses, only A.K.A. claimed to have witnessed the offenses she alleged. Thus, A.K.A.'s credibility was essential to the outcome of this case. Therefore, the evidentiary error here harmed Mr. Torrence, requiring reversal of his convictions.

B. CONCLUSION

For the reasons stated herein, and in the opening brief, Mr. Torrence respectfully requests this Court to vacate the convictions and remand to the trial court for dismissal, or in the alternative, reverse the convictions and remand for new trial.

DATED: September 3, 2019.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for Zackery Torrence

CERTIFICATE

I certify that I sent by JIS a copy of the Reply Brief of Petitioner to Clerk of Court of Appeals and to Mr. Colin Hayes, Deputy Prosecuting Attorney, and mailed copies, postage prepaid on September 3, 2019, to appellant, Zackery Torrence:

Colin Hayes
Clark County Prosecuting Attorney
PO Box 5000
Vancouver, WA 98666-5000
Colin.hayes@clark.wa.gov

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Zackery Torrence
DOC # 355318
Coyote Ridge Correction Center
PO Box 769
Connell, WA 99326
LEGAL MAIL/SPECIAL MAIL

DATED: September 3, 2019.

THE TILLER LAW FIRM

PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

THE TILLER LAW FIRM

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