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NO. 53269-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

MINGO GUILLERMO,
Appellant.

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

The Honorable Jerry T. Costello, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it admitted the Facebook messages pursuant to ER 404(b) because the messages are irrelevant to the charge of indecent exposure and constitute unfairly prejudicial propensity evidence.
2. The state failed to present sufficient evidence to support Mr. Guillermo's conviction for communicating with a minor for immoral purposes when it failed to prove that he sent any messages promoting Chloe's exposure to or involvement in sexual misconduct.

Issues Presented on Appeal

1. Did the trial court abuse its discretion when it admitted the Facebook messages pursuant to ER 404(b) and the messages are irrelevant to the charge of indecent exposure and constitute unfairly prejudicial propensity evidence?
2. Did the state present sufficient evidence to support Mr. Guillermo's conviction for communicating with a minor for immoral purposes when the Facebook

messages do not promote Chloe's exposure to or involvement in sexual misconduct?

B. STATEMENT OF THE CASE

Substantive Facts

Mingo Guillermo has been in a dating relationship with Cindy Joseph since 2013. RP 79, 178. Ms. Joseph has a niece, Chloe Joseph, who is currently 18 years old but was a minor before December of 2018. RP 77-78, 135. Chloe and Cindy¹ were very close before Cindy started dating Mr. Guillermo. RP 78-79, 179-80. Cindy paid for Chloe to have a cell phone and they saw each other frequently. RP 79, 136. After Cindy started to date Mr. Guillermo, Cindy and Chloe's relationship deteriorated and Chloe rarely got to see Cindy. RP 180. Cindy and Chloe continued to communicate through text messaging and social media. RP 180-84.

Chloe also occasionally communicated with Mr. Guillermo through Facebook messenger. RP 187. Chloe and Mr. Guillermo's conversations usually revolved around her school and any problems she was having with her cell phone. RP 188. Sometime in late June of 2018, Mr. Guillermo initiated a video chat with Chloe

¹ We refer to Cindy and Chloe Joseph by their first names only to avoid confusion caused by common names amongst family members. We intend no disrespect.

through Facebook messenger. RP 189-90. Chloe answered the call and saw Mr. Guillermo's face on her screen with Cindy laying down in the background watching television. RP 191-92. Chloe noticed that Mr. Guillermo was only wearing boxers but did not think it was strange because it was almost midnight and it looked like he was getting ready for bed. RP 192-93.

Chloe and Mr. Guillermo spoke for roughly 30 minutes about problems she was having with her cell phone and planned to get her a new one. RP 193. As their conversation was ending, the camera on Mr. Guillermo's cell phone flipped around to point in front of him instead of at his face. RP 194. The camera then pointed downward to show Mr. Guillermo's exposed penis. RP 194. Chloe observed Mr. Guillermo grab his penis and begin to rub it. RP 195. Neither Chloe nor Mr. Guillermo said anything while this was occurring, and Chloe ended the call after less than a minute. RP 195-96. Chloe testified that Cindy appeared to be watching television in the background of the video but did not appear to notice that Mr. Guillermo was video chatting with Chloe. RP 192. Chloe did not report this incident to the police or her family. RP 197.

Mr. Guillermo continued to send Chloe messages through

Facebook messenger. RP 198-99. Chloe began to take screenshots of some of the messages starting in September of 2017 because she felt that some of the messages were inappropriate. RP 198-202. In some of the messages, Mr. Guillermo complimented Chloe on her appearance and photos she had posted on social media. Ex. 1A-1E, Supp. CP. On December 23, 2017, Mr. Guillermo sent Chloe a message asking whether she would be his girlfriend once she was older. RP 208; Ex. 1D. On February 22, 2018, Mr. Guillermo sent Chloe a message that reads "I'm going to have to make you my future wife." RP 210; Ex. 1E. Chloe reported these messages and the video chat incident to her parents and the police in March of 2018. RP 210.

Procedural Facts

The state charged Mr. Guillermo with one count of felony communicating with a minor for immoral purposes based on the Facebook messages and one count of felony indecent exposure based on the alleged video chat. CP 195-96. The state also alleged that the indecent exposure was sexually motivated as a sentencing enhancement. CP 196. Mr. Guillermo elected to proceed to a jury trial. CP 122-24.

The state sought a pretrial ruling admitting the Facebook messages pursuant to ER 404(b) in order to prove the elements of indecent exposure. RP 62. The trial court allowed the state to make an offer of proof regarding the Facebook messages with testimony from Chloe. RP 135-57. Mr. Guillermo objected to the admission of the messages on the basis that their content was not relevant because it was not inherently sexual and constituted propensity evidence in violation of ER 404(b). RP 164-67.

The state argued that the content of the messages was relevant when viewed in context with the other evidence, to prove the sexual motivation sentencing enhancement, and because it was relevant to Mr. Guillermo's intent during the video chat where he allegedly masturbated on camera. RP 41-47.

The trial court ultimately overruled Mr. Guillermo's objections and admitted the Facebook messages. RP 164. The trial court found that the messages were relevant to the indecent exposure charge because they tended to prove that the incident alleged to have occurred during a video chat was sexual in nature. RP 161-62. The trial court instructed the jury that they may only consider the ER 404(b) evidence for the purpose of determining whether the

video chat was sexual in nature and to reach a verdict on the sexual motivation sentencing enhancement. CP 258.

The jury found Mr. Guillermo guilty as charged and returned an affirmative special verdict on the question of whether the indecent exposure was sexually motivated. CP 264-66. The trial court sentenced Mr. Guillermo to a standard range sentence. CP 365. Mr. Guillermo filed a timely notice of appeal. CP 390.

C. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED THE FACEBOOK MESSAGES PURSUANT ER 404(B) BECAUSE THEY ARE IRRELEVANT TO THE CHARGE OF INDECENT EXPOSURE AND UNFAIRLY PREJUDICIAL TO MR. GUILLERMO

a. Standard for admission under ER 404(b) and ER 403

ER 404(b) prohibits the admission of evidence showing prior misconduct to prove the commission of a new offense. ER 404(b). A trial court may admit such evidence under an exception to ER 404(b), but only if: (1) the state proves that the misconduct occurred by a preponderance of the evidence; (2) the trial court identifies the purpose for which the evidence is being introduced;

(3) the trial court determines that the evidence is relevant to proving an element of a charged crime; and (4) the trial court balances the evidence's probative value against its prejudicial effect. *State v. Asaeli*, 150 Wn. App. 543, 576, 208 P.3d 1136 (2009) (citing *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995)).

ER 404(b) should be read in conjunction with ER 403. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). ER 403 provides that "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. A trial court's decision to admit evidence pursuant to ER 404(b) is reviewed for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

b. The Facebook messages have no relevance to the charges of indecent exposure

Evidence is relevant if it has "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. To convict a defendant of felony indecent

exposure, the state must prove beyond a reasonable doubt that (1) the defendant made an open and obscene exposure of defendant's person, (2) the defendant acted intentionally, (3) the defendant knew such conduct was likely to cause reasonable affront or alarm, (4) the defendant has previously been convicted of sex offense, and (4) the act occurred in Washington. RCW 9A.88.010(2)(c). The Facebook messages are not relevant to proving these elements.

The text messages were sent between September and December of 2017, meaning the first text was sent roughly two months after the incident where Mr. Guillermo allegedly masturbated during a video chat with Chloe. RP 156. The state argued that the messages were admissible despite occurring after the charged crime because they were relevant to Mr. Guillermo's state of mind during the video chat incident, and do not make any reference to the charged incident. Ex. 1A-1E.

The trial court reasoned that the messages were relevant because they had a "tendency to show that the defendant was imagining sexual contact with Chloe at some future point" and because they are "corroborative of the alleged live video." RP 161. Even if the messages are probative to the facts the trial court

mentioned, whether Mr. Guillermo desired future sexual contact was not at issue in Mr. Guillermo's trial, and not relevant to the messages which occurred after the video- not in the future.

The state offered the messages to show Mr. Guillermo's state of mind during an incident that occurred months before the messages were sent. The messages do not contain any admission or reflection regarding the alleged video chat. Their content is not relevant to proving Mr. Guillermo committing the offense for which Mr. Guillermo was charged.

While the messages would be relevant if they contained some discussion of the video chat incident or somehow revealed Mr. Guillermo's state of mind at the time the incident is alleged to have occurred, the messages do not contain any discussion of any aspects of that incident. The trial court's finding that the messages are relevant to prove sexual motivation or Mr. Guillermo's state of mind constitutes an abuse of discretion.

- c. The potential for unfair prejudice outweighs any probative value the messages might have

"When the State offers evidence of prior acts to demonstrate intent, there must be a logical theory, *other than propensity*,

demonstrating how the prior acts connect to the intent required to commit the charged offense.” *State v. Wade*, 98 Wn. App. 328, 334, 989 P.2d 576 (1999) (emphasis in original). “The probative value of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point.” *State v. Arrendondo*, 188 Wn.2d 244, 264, 394 P.3d 348 (2017) (quoting *Old Chief v. United States*, 519 U.S. 172, 185, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)). When performing an analysis under ER 403, doubtful cases should be resolved in favor of the defendant. *Wade*, 98 Wn. App. at 334 (citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)).

The record does not contain any logical theory to demonstrate how the Facebook messages, sent after the alleged indecent exposure, connect to Mr. Guillermo’s intent during an incident that allegedly occurred months before, except to suggest he has a propensity for sexual misconduct.

The messages do not discuss the video chat, and there is no mention of any other sexual acts. Ex. 1A-1E. The state’s only purpose in admitting the messages was to highlight the age discrepancy between Chloe and Mr. Guillermo to suggest he has a

propensity for sexual misconduct with minors because he commented on Chloe's appearance and suggested they could have a relationship when she was older.

Propensity evidence is inadmissible under ER 404(b); *Asaeli*, 150 Wn. App. at 576. Here, when balancing the unfair prejudice from propensity against the state's interest, the unfair prejudice heavily outweighs any probative value the messages may have.

The probative value of the messages is diminished because the other evidence post-dates the charged incident by several months and therefore cannot be relevant absent some connection not present in this case.

The Facebook messages constitute unrelated evidence meant to suggest a propensity for sexual misconduct in violation of ER 404. The potential for unfair prejudice outweighs the probative value of admitting the messages, therefore the trial court's decision to admit them was an abuse of discretion.

d. Remedy

The erroneous admission of evidence constitutes reversible error if there is a reasonable probability that admitting the evidence

affected the outcome of the trial. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). The trial court provided a limiting instruction, but the instruction allowed the jury to consider the messages as substantive evidence of Mr. Guillermo's intent during the alleged indecent exposure as follows:

Certain evidence has been admitted for a limited purpose. This evidence consists of screen shot communications. This evidence may be considered by you only for the purpose of determining whether the live video chat that you heard testimony about was of a sexual nature, and for the purpose of determining whether the alleged indecent exposure was done for the purpose of sexual gratification. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 258. This instruction permitted the jury to consider the erroneously admitted Facebook messages as substantive evidence of Mr. Guillermo's guilt of indecent exposure and as substantive evidence related to the sexual motivation sentencing enhancement. There is a reasonable probability that allowing the jury to consider the messages as substantive evidence affected the outcome of Mr. Guillermo's trial. This court should reverse his conviction, vacate the special verdict, and grant him a new trial. *Everybodytalksabout*, 145 Wn.2d at 468-69.

2. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE THE ESSENTIAL ELEMENTS OF COMMUNICATING WITH A MINOR FOR IMMORAL PURPOSES BEYOND A REASONABLE DOUBT

In a criminal case, the state bears the burden of presenting sufficient evidence to prove every element of the charged crime and any sentencing enhancements beyond a reasonable doubt. *State v. Phuong*, 174 Wn. App. 494, 502, 299 P.3d 37 (2013) (citing *Jackson v. Virginia*, 433 U.S. 307, 317-18, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). In evaluating the sufficiency of the evidence in a criminal case, the appellate court must determine “whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt.” *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)).

To convict a defendant of felony communication with a minor for immoral purposes, the state must prove beyond a reasonable doubt that the defendant (1) communicated with another person for immoral purposes of a sexual nature, (2) that the other person was a minor or the defendant believed they were a minor, (3) the act occurred in Washington, and (4) that the defendant sent the other

person an electronic communication for immoral purposes. RCW 9.68A.090(2).

The allegations that Chloe was a minor at the time she received the messages, that she received them while in Washington, and that they were electronic communications were undisputed at trial. However, Mr. Guillermo disputed the allegation that the communications were for an immoral purpose and of a sexual nature.

The phrase “immoral purposes” in RCW 9.68A.090 refers specifically to sexual misconduct. *State v. Falco*, 59 Wn. App. 354, 358, 796 P.2d 796 (1990). This statute prohibits communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct. *State v. Hosier*, 157 Wn.2d 1, 9, 133 P.3d 936 (2006).

The Facebook messages were admitted as five separate exhibits at trial. Ex. 1A-1E. The messages in the first three exhibits compliment Chloe on photos she had posted publicly on social media. Ex. 1A-1C; RP 202-06. In the fourth exhibit, Mr. Guillermo asks Chloe whether she will be his girlfriend when she “grows up” and is “older.” Ex. 1D; RP 208. Finally, in the final exhibit Mr.

Guillermo says he's going to make Chloe his "future wife." Ex. 1E; RP 210.

None of the Facebook messages contain any sexual language or indicate that Mr. Guillermo wishes for Chloe to engage in sexual misconduct. Even the messages in exhibits 1D and 1E do not discuss any sexual acts and only refer to a possible romantic relationship with Chloe when she reached an appropriate age. Ex. 1D, 1E.

Even if these messages are interpreted to implicitly involve a sexual purpose, a person cannot be punished for communications to a minor about sexual conduct that would be legal if performed. *State v. Luther*, 65 Wn. App. 424, 427-28, 830 P.2d 674 (1992). The facts analyzed in *Luther* illustrate this principle.

In *Luther*, the defendant was 16 years-old when he asked a 16-year-old girl whether she would perform oral sex on him as she had previously promised. *Luther*, 65 Wn. App. at 425. Although he was convicted of communication with a minor for immoral purposes at trial, the Court of Appeals held that the evidence was insufficient to support the conviction because the communications discussed consensual sexual activity between two minors and such activity is

legal. *Luther*, 65 Wn. App. at 427-28.

Mr. Guillermo's case is analogous to *Luther* because the messages do not contemplate any sort of sexual relationship with Chloe until she had reached the age of consent, meaning such a relationship would no longer be illegal and constitute "sexual misconduct" for the purposes of communicating with a minor for immoral purposes. The messages do not promote Chloe's involvement in or exposure to sexual misconduct and cannot support a conviction for communicating with a minor for immoral purposes. Even viewing the messages in light favorable to the state, no trier of fact could find beyond a reasonable doubt that they were sent to promote Chloe's exposure to or involvement in sexual misconduct

The remedy when an appellate court reverses for insufficient evidence is dismissal of the charge. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (citing *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). This court should reverse Mr. Guillermo's conviction for communication with a minor for immoral purposes and order dismissal of that charge.

D. CONCLUSION

Mr. Guillermo respectfully requests that his court reverse his conviction for indecent exposure and order a new trial based on the erroneous admission of unfairly prejudicial ER 404(b) evidence during the state's case-in-chief. Additionally, Mr. Guillermo respectfully requests that this court reverse his conviction for communication with a minor for immoral purposes and order dismissal of that charge based on the state's inability to prove the elements of the offense beyond a reasonable doubt.

DATED this 23rd day of October 2019.

Respectfully submitted,

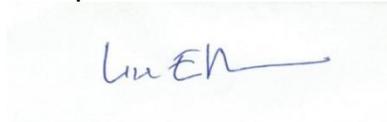


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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcecf@co.pierce.wa.us and Mingo Guillermo/DOC#927872, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326a true copy of the document to which this certificate is affixed on October 23, 2019. Service was made by electronically to the prosecutor and Mingo Guillermo by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

Signature

LAW OFFICES OF LISE ELLNER

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