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Court of Appeals
Division III
State of Washington

28327-5-III

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III

State of Washington
Respondent

v.

Rodolfo Ramirez Tinajero
Appellant

28327-5-III

On Appeal from the Yakima County Superior Court

Cause No. 07-1-01904-4

The Honorable Michael Schwab

REPLY BRIEF

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II. STATEMENT OF THE CASE

A full statement of the procedural and substantive facts is given in the Appellant's opening brief.

A jury convicted Rodolfo Ramirez Tinajero of first degree rape while armed with a deadly weapon. RCW 9A.44.040(1)(a); RCW 9.94A.602; RCW 9.94A.533. CP 38, 40. The sentencing court concluded Mr. Tinajero was a persistent offender under RCW 9.94A.575 and RCW 9.94A.030(34). The predicate offense was 1^o burglary with sexual motivation to which Mr. Tinajero entered an *Alford*¹ plea in 1994. Findings of Fact and Conclusions of Law, CP 14-16. Mr. Tinajero received a life sentence, plus a 24-month deadly weapon enhancement. CP8; RP 1314, 1318.

The Information alleged that an act of sexual intercourse between Rodolfo Tinajero and Maria Valdez on August 6, 2007, was not consensual. CP 99; RP 2.

At the jury trial, Ms. Valdez² claimed she met Mr. Tinajero in the early morning of August 6, 2007, while looking for field work. RP 648-

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

² At trial, the prosecutor addressed Ms. Valdez as 'Maria.' RP 646-680. The Respondent's Brief refers to her as M.V. BR 6, e.g. Neither is appropriate. Ms. Valdez is a fully functional adult, not a child.

49. She stopped her car and waited by the side of the road, but did not explain what she was waiting for. Ms. Valdez followed Mr. Tinajero's car off the highway. RP 653. She said Mr. Tinajero showed a knife, forced her out of her car and into an apple orchard, and made her submit to penile-vaginal intercourse. RP 658.

Mr. Tinajero said that Ms. Valdez claimed she desperately needed money and offered to have sex with him for \$50.00. RP 1071, 1074.

There were no witnesses.

Several months prior, a woman called Beatríz Serrano claimed a hispanic man with a knife had tried to rape her in an orchard. The police suspected Mr. Tinajero and a prosecution was pending. RP 5. As of the Valdez trial date, however, the defense had not been able to interview Ms. Serrano. RP 9. Ms. Serrano could not identify Tinajero. Finding 13, CP 27; RP 530. Nevertheless, the State moved to admit her accusation under RCW 10.58.090. The prosecutor also thought the evidence was admissible under ER 404(b). RP 600.

The court held a multi-purpose hearing comprising a CrR 3.5 hearing, a RCW 10.58.090 hearing, and an inquiry into the credentials of the interpreter at Tinajero's custodial interview. The focus continually switched back and forth. One thing the court did not do was to conduct an ER 404(b) inquiry on the record. RP 502-598. The court decided the

evidence was admissible under RCW 10.58.090 and also under ER 404(b) to prove identity, intent and common plan. Conclusion 3, CP 27. The court found that the evidence also satisfied ER 403. RP 612. The judge admitted testimony from Ms. Serrano and two Sheriff's deputies, as well DNA evidence and a pruning tool from the scene of the incident involving Ms. Serrano. RP 796, 800.

Mr. Tinajero was unable to testify in his own defense because the court ruled that taking the stand to defend himself against the Valdez charge would open the door to cross examination about the Serrano charge. RP 1122-31.

The jury found Mr. Tinajero guilty. CP 38, 40. At sentencing, the court imposed a persistent offender sentence of life without the possibility of parole. The predicate offense was a 1994 conviction for first degree burglary with sexual motivation, to which Mr. Tinajero had entered an *Alford* plea of guilty on March 15, 1994 in Cause Number 94-1-00123-5. CP 99; RP 1304-05; Sentencing Exhibit SI-2, 1994 Statement on Plea of Guilty.

Mr. Tinajero appeals the judgment and sentence.

III. **ARGUMENTS IN REPLY**

1. THE PRIOR ACUSATION WAS NOT
ADMISSIBLE UNDER ER 404(b).

The State asks the Court to affirm trial court's admission of the prior acts evidence based on ER 404(b). Brief of Respondent (BR) 2-8. Mr. Tinajero contends the State waived this argument by persuading this Court to stay this appeal for two years by arguing that the RCW 10.58.090 holding in *Gresham* is dispositive. If the State wished to seek affirmance under ER 404(b), it could and should have done so two years ago. Motion For Accelerated Review filed July 24, 2012.

Moreover, the State's ER 404(b) argument fails.

Evidence of other crimes is not admissible to prove that a person acted in conformity with a criminal propensity. ER 404(b). This is not because such evidence is irrelevant, but because it carries too much weight with juries who are likely to prejudge a person with a bad general record and deny him a fair opportunity to defend against the particular charge. *State v. Herzog*, 73 Wn. App. 34, 49, 867 P.2d 648, review denied, 124 Wn.2d 1022 (1994), quoting *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed. 168 (1948).

Our courts have long recognized that accusations of sexual misconduct are particularly likely to inspire abhorrence. *State v.*

Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982), citing Slough, M. & Knightly, J., OTHER VICES, OTHER CRIMES, 41 Iowa L. Rev. 325, 323-34 (1956). The trial court must beware of straining “the minute peg of relevancy” with the weight of “dirty linen hung upon it.” *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986), quoting *State v. Goebel*, 36 Wn.2d 367, 379, 218 P.2d 300 (1950).

Accordingly, a trial court must initially presume that any evidence of prior bad acts is inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Here, the State failed to overcome that presumption.

(a) ***Prior Act Evidence Not Necessary***. the court erroneously concluded that the prior acts evidence was necessary. Conclusion 7, CP 28. This is not supported by the record. The State had DNA evidence that rendered any additional identity evidence completely superfluous. RP 796, 800.

(b) ***Prior Act Not Proven by Preponderance***. The State did not prove the accusation by Ms. Serrano by a preponderance of the evidence. Serrano described a person of Tinajero’s general hispanic appearance, but that person checked out to an address that was completely unconnected to Tinajero. RP 762. And Ms. Serrano could not identify Mr. Tinajero, either in a photomontage or in person. Finding 13, CP 27; RP 530.

(c) ***Identity Was Undisputed:*** Prior bad acts evidence is not relevant to prove identity where, as here, identity is not in dispute. *State v. Thang*, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002). Here, identity was not at issue. Mr. Tinajero freely admitted having intercourse with Ms. Valdez. His defense was consent. RP 602. That fact alone should have ended the inquiry.

Moreover, a prior act cannot establish identity unless both crimes are committed by essentially unique means that demonstrate a pattern so peculiar that both crimes must have been perpetrated by a single individual. *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984).

(d) ***No Common Scheme or Plan.*** If current and prior alleged incidents are similar enough, ER 404(b) permits evidence of prior sexual conduct to refute a consent defense. *State v. Lough*, 125 Wn.2d 847, 857, n. 14, 889 P.2d 487 (1995).³ at 270. To be admissible under this exception, the prior act should show the defendant's design — not merely disposition — to commit the charged crime. *State v. Krause*, 82 Wn. App. 688, 694-95, 919 P.2d 123 (1996), *review denied*, 131 Wn.2d 1007 (1997). The similarity must be clearly more than coincidental; it must indicate conduct created by design. *Lough*, 125 Wn.2d at 860.

³ Cited in Blythe Chandler, BALANCING INTERESTS UNDER WASHINGTON'S STATUTE GOVERNING THE ADMISSIBILITY OF EXTRANEOUS SEX-OFFENSE EVIDENCE, 84 Wash. L. Rev. 259 (2009).

Specifically, legitimate “common scheme or plan” evidence includes more than similar acts. Its purpose is to establish a scheme whereby one act is directed toward the subsequent completion of another. *State v. Harris*, 36 Wn. App. 746, 751, 677 P.2d 202 (1984). So-called “common plan” evidence is not admissible in sex offense cases simply to show conformity with a prior act. *See, e.g.*, Edward J. Imwinkelried, UNCHARGED MISCONDUCT EVIDENCE § 3:21 (1995). The prior act here is “spurious” plan evidence that shows no more than a “plan” to commit a string of similar unlinked crimes. Such “pattern of criminality” exception is a “guise” under which to admit pure propensity evidence. *Harris*, 36 Wn. App. at 751; Imwinkelried, §§ 3:21-:23.

The State finds support for the common scheme or plan idea in *State v. Sexsmith*, 138 Wn. App. 497, 504, 157 P.3d 901 (2007). BR 4. But that case is distinguishable. There, the alleged molestations of two children exhibited substantial similarity. The defendant was a father figure to both. The children were about the same age. The defendant molested both of them in a basement. He took nude photographs of them both. He forced both to watch pornography and to fondle him. *Sexsmith*, 138 Wn. App. at 505. The reviewing court determined that “cumulative similarity between the two suggests a common plan rather than coincidence.” *Sexsmith*, 138 Wn. App. at 505.

Here, by contrast, the prior accusation and the charged offense share but a single common element — that something allegedly occurred in an orchard. As trial counsel argued, two assaults in orchards are no more remarkable than two assaults in houses. RP 609. And even that similarity was not clearly more than mere coincidence.

The conduct of the perpetrator was entirely different in the two cases. Serrano alleged a complex scheme to lure women with a radio announcement. CP 26, Findings 3-5. No such element of design was manifested in the charged crime which involved a random encounter. RP 684. The two alleged incidents were entirely unconnected. There is simply no indication of a common design, even if similarities were established. The evidence shows no more than a disposition to rape. *See Harris*, 36 Wn. App. at 451, citing *Goebel*, 40 Wn.2d at 21. The words “common scheme or plan” are not an “open sesame” whose “mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names.” *Harris*, 36 Wn. App. at 751, quoting *Saltarelli*, 98 Wn.2d at 364. The State also cites *State v. Williams*, 156 Wn. App. 482, 490, 234 P.3d 1174 (2010). BR 5. That case also is distinguishable. The common scheme or plan in *Williams* included startling similarities such as promising to supply the victims with drugs and an identical method of attack in which both victims were attacked

within days of each other “from behind with a forearm across the throat, [and] strangled into unconsciousness during the rape.” *Williams*, 156 Wn. App. at 491-92. This is a far cry from two incidents in an orchard, months apart, one the result of a clear design and the other of a random chance encounter.

Finally, the State cites to the clearly distinguishable facts of *Scherner*, the companion case discussed in *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012). BR 6. There, three years elapsed before the currently alleged child molestation came to light, and the State offered testimony of four prior child victims to support the current victim’s testimony that something happened. All the children were molested in an eerily similar fashion in their homes after the other adults had gone to sleep. *Gresham*, 173 Wn.2d at 415. Here, there was no question that intercourse took place between Tinajero and Valdez, and the prior accusation bore no similarity to the current charge.

Contrary to the State’s argument, the record does not support the trial court’s conclusion that Serrano’s accusation is supported by a preponderance. BR 7. Rather, the conclusion relies solely upon a finding that Ms. Serrano experienced an attempted assault. CP26-27. This is not sufficient; the State must show by a preponderance that Mr. Tinajero assaulted her. But the court found that Serrano was not able to identify

Tinajero as her attacker and was not certain that it was the same man.

Finding 13, CP 27.

(e) ***Prior Act Not Relevant to Intent***: ER 404(b) does not permit evidence of an unconnected sexual assault to prove intent, where, as here, intercourse is admitted and the sole jury question is consent. *Harris*, 36 Wn. App. at 751.

Rather, a prior act may be admitted to prove state of mind solely if mental state at the time of the alleged offense is relevant. *State v. Acosta*, 123 Wn. App. 424, 434-35, 98 P.3d 503 (2004). That is, some logical theory other than propensity must connect the intent manifested in the prior act and an intent element of the charged offense. *State v. Wade*, 98 Wn. App. 328, 334, 989 P.2d 576 (1999). The trial court recognized that intent is not an element of rape, but nevertheless admitted the prior acts evidence “because the State wants to argue intent as an issue.” RP 1140. This ruling constitutes a clear abuse of discretion. It is the duty of the court to ensure that both parties comply with the law, including the State. The court erroneously conflated a non-existent intent element with the essential element of forcible compulsion. RP 1140. The Serrano incident was not admissible to prove intent. The trial court found that the logically unrelated Serrano incident was probative under ER 403 to prove compulsion. RP 1140. But the sole purpose was to bolster the credibility

of Valdez. This is not a sufficient reason under ER 404(b). *State v. Cook*, 131 Wn. App. 845, 853-54, 129 P.3d 834 (2006).

The prior accusation evidence here could not have been admitted under ER 404(b) because it showed nothing more than propensity. Therefore, if it was admissible, it could only have been under RCW 10.58.090, and notwithstanding ER 404(b).

(f) ***Prejudice***. Finally, any de minimis probative value of the Serrano accusation is outweighed by its indisputably prejudicial effect.

(i) When the State offers a prior unrelated incident for the purpose of assessing the credibility of an alleged victim, as it did here, the jury is likely to consider it for propensity purposes, even with a limiting instruction. *Cook*, 131 Wn. App. at 853-54. Jurors lack interpretative tools, so they must receive an explanation of the legitimate purpose of prior acts evidence and a cautionary instruction to consider it solely for that purpose. *Saltarelli*, 98 Wn.2d at 362.

(ii) Here, the jury did not receive a meaningful explanation. They were told they could consider the Serrano assault as evidence of a “common scheme or plan,” but were never told what that means. RP 827-28. No instruction prevented the jury from interpreting “common scheme or plan” to mean, “he did it before, so he probably did it again.”

(iii) The court conceded that the evidence labeled Tinajero a sexual predator, but did not deem this prejudicial enough to outweigh legitimate probative value. RP 611. This is wrong. This evidence seriously prejudiced Tinajero's consent defense by simultaneously bolstering the credibility of Ms. Valdez while undermining that of Mr. Tinajero by means of an impermissible inference.

(iv) In addition, the "fruit of the poisonous tree" doctrine precludes the State from offering infected evidence in any Washington court at any time for any reason. *State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007); *State v. White*, 97 Wn.2d 92, 110-12, 640 P.2d 1061 (1982); *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Here, potentially constitutionally incompetent evidence reached the jury in such a way that the defense could not respond. Under the banner of RCW 10.58.090, the State introduced only evidence of guilt concerning the prior accusation — not the conduct of the investigation. Therefore, the defense was unable to move to suppress any evidence that was unlawfully obtained. This effectively stripped Mr. Tinajero of the protection of art 1, § 7 and the Fourth Amendment.

It would be per se deficient representation for defense counsel to fail to seek suppression if a viable ground exists for doing so. *State v.*

Nichols, 161 Wn.2d 1, 14, 162 P.3d 1122 (2007). But Mr. Tinajero's counsel was not permitted to mention that his client had been charged in the Serrano case. RP 612. Therefore, counsel could not challenge the constitutionality of that investigation — specifically, the existence of probable cause to detain Tinajero. The manner in which the prior act evidence was introduced divested him of his constitutional right in the current prosecution to seek suppression of any evidence unlawfully obtained in the other prosecution, which constituted an end-run around the exclusionary rule and deprived Mr. Tinajero of the protections of art. 1, § 7 and the Fourth Amendment.

(v) Finally, criminal defendants have a fundamental right to testify. *Rock v. Arkansas*, 483 U.S. 44, 50, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). This right is implicit in the Fifth, Sixth, and Fourteenth Amendments. *Id.* at 51-52. In Washington, the right to testify is explicit in Const. art 1, § 22. *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1992).

Mr. Tinajero informed the court he wanted to testify in his own defense. RP 19, 1122. He moved in limine to limit the scope of cross examination to matters raised on direct — where his counsel would address solely the Valdez incident with which he was charged. RP 1122. The prosecutor insisted the State could and would cross examine Tinajero

about Serrano if he “opened the door” by taking the stand. RP 1122-25. The trial court did not request, and the prosecutor did not offer, any authority for the proposition that the State’s right to cross examine a criminal defendant with no restraints outweighs the defendant’s trial rights. RP 1124. Defense counsel argued that the separate prosecution pending on that charge invoked Mr. Tinajero’s Fifth Amendment right to remain silent regarding the Serrano allegations. RP 1123. The prosecutor’s threat to use the propensity evidence in cross examination inhibited Mr. Tinajero from testifying. This was irreparably prejudicial, because the crux of his defense lay in matching his own credibility against that of Ms. Valdez. But to testify would be to subject himself to interrogation under oath on the subject of the ongoing Serrano prosecution. This violated his fundamental right to testify.

The question before this Court is “whether a reasonably prudent and disinterested observer would conclude [the defendant] obtained a fair, impartial, and neutral trial.” *See, State v. Dominguez*, 81 Wn. App. 325, 330, 914 P.2d 141 (1996). A procedure that deprives the accused of the chance to testify affects “the framework within which the trial proceeds. *In re Det. of Kistenmacher*, 163 Wn.2d 166, 185, 178 P.3d 949 (2008) (Sanders, J., concurring in part, dissenting in part), quoting *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

This is a structural error that requires automatic reversal because it renders the trial “fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Washington v. Recuenco*, 548 U.S. 212, 219, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), quoting *Neder*, 527 U.S. at 8, 9. Such an error is never harmless. *Kistenmacher*, 163 Wn.2d at 185, quoting *State v. Frost*, 160 Wn.2d 765, 779, 161 P.3d 361 (2007), *cert. denied*, 128 S. Ct. 1070, 169 L. Ed. 2d 815 (2008).

Reversal is required.

2. EVIDENCE WAS INSUFFICIENT TO PROVE A DEADLY WEAPON.

The State does not direct the Court to any evidence sufficient to establish the use of a deadly weapon in this case. BR 11-12.

A knife with a blade longer than three inches is a deadly weapon by definition. RCW 9.94A.825. But testimony that the alleged victim was terrified by the appearance of a knife and a jury instruction defining the characteristics of a deadly knife do not constitute sufficient evidence of a deadly weapon. *State v. Zumwalt*, 79 Wn. App. 124, 130, 901 P.2d 31 (1995). The State must present evidence regarding the characteristics of the particular weapon.

3. THE STATE FAILED TO ESTABLISH
PERSISTENT OFFENDER STATUS.

The court sentenced Tinajero to life in prison as a persistent offender pursuant to RCW 9.94A.575 and former RCW 9.94A.030(33).⁴ 2 Supp. RP 3, 34-35.⁵ The predicate offense was a 1994 Alford plea. *Id.* at 6. This was error.

The State cites to no authority for basing persistent offender status based on a prior *Alford* plea in which evidence of guilt was neither proved nor admitted. BR 13-14.

The Sentencing Reform Act (SRA) defines a “conviction” as “an adjudication of guilt” that can result from either a verdict or a plea of guilty. RCW 9.94A.030(10). This definition applies throughout the SRA unless the context “clearly requires otherwise.” RCW 9.94A.030. *State v. Monson*, 149 Wn. App. 765, 769, 205 P.3d 941(2009).

An Alford plea is not a conviction by this definition. “The facts supporting a prior conviction for sentencing purposes must either be proved beyond a reasonable doubt or admitted by the defendant.” *State v. Releford*, 148 Wn. App. 478, 489, 200 P.3d 729 (2009); *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005). The mere existence of an Alford plea is not sufficient to establish that the underlying

⁴ Now RCW 9.94A.030(34).

⁵ This is the sentencing hearing held the morning of July 6, 2009.

facts were admitted or proved beyond a reasonable doubt. *Clark v. Baines*, 150 Wn.2d 905, 912-14, 84 P.3d 245 (2004). It does not, therefore result in a conviction for all purposes. *In re Pers. Restraint of Spencer*, 152 Wn. App. 698, 715, 218 P.3d 924 (2009) (remedy was to withdraw plea, not reverse conviction). Where crucial evidence of guilt is never introduced, the guilty plea does not constitute a conviction. *Spencer*, 152 Wn. App. at 715. In his Statement on Plea of Guilty, Mr.

Tinajero stated:

I deny the accusation against me. I did not do what the State claims I did. However, after reviewing the reports, I believe there is a substantial basis upon which a jury could find me guilty and therefore plead guilty to take advantage of the State's recommendation.

Plea Statement, Ex. SI-2, paragraph 12. Mr. Tinajero repeated his denials at the plea hearing. 3/15 RP⁶ 8 (lines 12, 23), 12, 16. As in *Spencer*, the State offered no crucial facts and none were admitted or proved. 3/15 RP 9-10. A Sheriff's employee matched Tinajero's 2009 prints with the arrest prints from 1994, but this proved merely an arrest, not guilt. 2 Supp. RP 15, 20.

The State suggests no reason why evidence that is insufficient to add a point to an offender score based on an alleged out-of-state

⁶ 3/15RP refers to the March 15, 1994, Alford plea hearing, Ex. SI 5.

conviction should be deemed sufficient to condemn a man to life in prison as a persistent offender. BR 13-14.

Accordingly, the 1994 Alford guilty plea cannot constitute a predicate offense sufficient to incarcerate Mr. Tinajero for the rest of his life as persistent offender.

IV. **CONCLUSION**

Multiple evidentiary errors resulted in denial of fundamental due process a conviction on inadmissible evidence. The Court should reverse and dismiss with prejudice or remand for a new trial. The Court should reverse the sentence of life without parole.

Respectfully submitted this 26th day of July, 2013.

Jordan B McCabe July 26, 2012
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CERTIFICATE OF SERVICE

I certify that opposing counsel was served with the foregoing Reply Brief by e-mail via Division III's upload portal: kevin.eilmes@co.yakima.wa.us

A hard copy was deposited in the U.S. Mail, first class postage prepaid, addressed to:

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