

No. 305775

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November 7, 2012  
Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

JEFFREY ALAN EHART,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY, WASHINGTON

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THE HONORABLE F. JAMES GAVIN

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BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUE PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in admitting the videotaped deposition testimony of a witness who had moved out of state prior to trial?
2. Whether the trial court erred in admitting ER 404(b) evidence of a common scheme or plan?

B. ANSWER TO ASSIGNMENTS OF ERROR.

1. On the facts present in this case, the court did not err in admitting the videotaped testimony. The witness was available to testify in person when a previous trial setting was continued over the State's objection, the case had been continued multiple time over two years, and the defendant was able to fully cross examine the witness. Alternatively, the admission of the testimony was harmless error.
2. The court did not abuse its discretion in admitting the ER 404(b) evidence as there were sufficient similarities between the testimony of the witnesses to show a common scheme or plan, and the court properly weighed the evidence and the reasons for its admission.

## II. STATEMENT OF THE CASE

The State adopts the Statement of the Case contained in Ehart's opening brief, but supplements that narrative here. RAP 10.3(b).

As Ehart notes in his opening brief, the case was continued multiple times. (CP 8,61,71,85, 86)

There were also changes in counsel. The attorney originally appointed to represent Ehart was disqualified. (CP 3, 92) A second attorney also withdrew. (CP 84)

After two years, the State objected to a defense motion to continue from a trial date of April 4, 2011. The deputy prosecutor explained that the witness (T.E.) would be moving three time-zones away to take a job, and would thus be unavailable. (RP 304-309) In its motion to take T.E.'s deposition, the State further explained that she had previously been flown in for an interview and to be present for a hard set trial date. (CP 139)

## III. ARGUMENT

**1. The admission of the videotape testimony did not violate Mr. Ehart's right of confrontation or ER 804, and in the alternative, any error was harmless.**

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The primary

guarantee of the confrontation clause is the right to effective cross-examination of adverse witnesses.” State v. Turnipseed, 162 Wn. App.60, 67, 255 P.3d 843 (2011) (citations omitted). In Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court has held that where a witness is absent, but the State wishes to present prior testimony of that witness at trial, it can do so only if the witness is truly unavailable and the defendant has had a prior opportunity to cross-examine the witness. *See, also*, Ohio v. Roberts, 448 U.S. 56, 74-75, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), (a witness is not unavailable for constitutional purposes “unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial,” *citing* Barber v. Page, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).)

The standard of review on a Confrontation Clause challenge is *de novo*. State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007), *cited in* Turnipseed, 162 Wn. App. at 68.

A violation of a defendant’s rights under the confrontation clause does not require reversal if the error is harmless. State v. Moses, 129 Wn. App. 718, 732, 119 P.3d 906 (2005), *review denied*, 157 Wn.2d 1006 (2006); Harrington v. California, 395 U.S. 250, 251-52, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969). Constitutional error is presumed to be

prejudicial, and the State bears the burden of proving that the error was harmless. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). The Washington Supreme Court has adopted an “untainted evidence” rule: a confrontation clause violation is considered harmless if the untainted evidence is “so overwhelming” that it necessarily leads to a finding of guilt. State v. Koslowski, 166 Wn.2d 409, 431, 209 P.3d 479 (2009); *see, also*, State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995).

ER 804(a)(5) requires that the proponent of a hearsay statement must show an inability to procure the declarant’s attendance “by process or other reasonable means.” Also, ER 804(b)(1) requires that prior testimony of an unavailable witness is admissible only if the party against whom it is offered “had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.”

Where former testimony fails to satisfy either the confrontation clause or ER 804, it is admissible. State v. DeSantiago, 149 Wn.2d 402, 411, 68 P.3d 1065 (2003). In DeSantiago, the court held that the prosecution did use reasonable means to locate witnesses to secure voluntary attendance of witnesses who could not be located, apparently relocated to Mexico, and their relatives refused to reveal their location. Id.

It is true that where the prosecution is aware of a witness's location in another state, the Court of Appeals has found that the prosecution must resort to the Uniform Act to Secure the Attendance of Witnesses from Without a State In Criminal Proceedings, RCW chapter 10.55. State v. Sweeney, 45 Wn. App. 81, 86, 723 P.2d 551 (1986).

In State v. Hobson, 61 Wn. App. 330, 810 P.2d 70 (1991), the Court of Appeals observed that whether the State meets its obligation imposed by the confrontation clause to make a good faith effort is determined according to the particular facts of each case. Id., at 336, *citing* State v. Aaron, 49 Wn. App. 735, 740, 745 P.2d 1316 (1987). In that case, both parties were aware that the witness intended to take a three-week hunting trip, and the witness had been available for three weeks while the trial was continued for various reasons, other witnesses supplied critical testimony, and the defendant's confrontation and cross-examination rights were not infringed by the introduction of the videotaped deposition. Id.

The particular facts of the instant case demonstrate that T.E. was available for trial for over two years before the trial finally commenced. The State had flown her into Yakima for an interview and to be present for a prior trial setting. The State objected to the last two continuances of the trial, and alerted the court and the defense that T.E. would be moving

to attend school in another state, which would necessitate great expense to the State, and inconvenience to her if she were to be transported yet again for trial. The deposition testimony was taken before the court, and the defense had full opportunity to develop her testimony through cross examination, which was ultimately observed by the jury. The State made a good faith effort to secure her attendance at trial, and but for the repeated delays sought by the defense, would have testified in person.

In the alternative, the State would submit that any Confrontation Clause error was harmless. Both of the alleged victims in this case, B.E.(1) and B.E.(2) testified as to the acts committed against them by Ehart, several of which occurred at the same time, and in each other's presence. The State has met its burden of demonstrating that the untainted evidence was so overwhelming that it necessarily led to a finding of guilt.

**2. The ER 404(b) evidence was properly admitted.**

ER 404(b) provides:

Other Crimes, Wrongs, or Acts. 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.

Before admitting evidence of other crimes or wrongs under ER 404(b), a trial court must: (1) identify the purpose for which the evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove an element of the crime charged, and (3) weigh the probative value of the evidence against its prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995), *citing* State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). Additionally, the party offering the evidence has the burden of proving by a preponderance of the evidence that the misconduct actually occurred. Lough, 125 Wn.2d at 853, *citing* State v. Benn, 120 Wn.2d 631, 653, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 126 L. Ed. 2d 331, 114 S. Ct. 382 (1993). Admission of 404(b) evidence is reviewed for abuse of discretion. State v. Hernandez, 99 Wn. App. 312, 322, 997 P.2d 923 (1999), *review denied*, 140 Wn.2d 1015 (2000).

Evidentiary rulings, including those under ER 404(b), are reviewed for abuse of discretion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

In Lough, the Supreme Court approved of a less restrictive line of cases interpreting ER 404(b), holding that the trial court did not abuse its discretion in admitting prior, similar acts of sexual abuse involving the

drugging and rape of four other victims over a ten-year period. In part, the Supreme Court was persuaded by a Minnesota case, State v. Wermerskirchen, 497 N.W.2d 235 (Minn. 1993). In Wermerskirchen, the defendant was charged with sexually touching his nine-year old daughter. The trial court admitted testimony that the defendant had engaged in similar acts of sexual touching with a stepdaughter and two nieces, as the prior, similar acts of abuse were relevant to the disputed issue of whether the complaining witness fabricated or imagined the sexual contact. Lough, 125 Wn.2d at 862.

In Lough itself, the Supreme Court found that the trial court “scrupulously followed the criteria set forth by this court” in admitting the ER 404(b) evidence. 125 Wn.2d at 853. The trial court had identified in its findings that the “overarching, pre-existing scheme or plan” was “[t]he control of women by rendering them unconscious by the surreptitious use of drugs for the purpose of abusing them sexually.” Id., at 854. The Supreme Court affirmed the trial court’s admission of the evidence, concluding generally “that a common plan or scheme may be established by evidence that the Defendant committed markedly similar acts of misconduct against similar victims under similar circumstances.” Id., at 852.

The Court of Appeals has also held that other, uncharged acts of sexual abuse of children may be admissible to show a common scheme or plan to “groom” children for sexual contact. State v. Krause, 82 Wn. App. 688, 697, 919 P.2d 123 (1996). Following Lough closely, the Court of Appeals held that the trial court was within its sound discretion in determining that the defendant had a “systematic scheme” for getting himself into a position where he had access to the victims by befriending the parents of the victims, then gaining the victims’ affections by playing games with them, and taking them on outings. Id., at 694-95.

On appeal, Ehart argues that the trial court failed to find that the alleged misconduct against T.E. occurred, nor did it weigh the probative value of the testimony against its prejudicial effect on the record.

**3. The court did identify the purposes for which the ER 404(b) evidence would be admitted, and essentially weighed the potential prejudice of the evidence. In any event, any error was harmless.**

It is well-settled that a trial court may exclude relevant evidence if the danger of unfair prejudice substantially outweighs its probative value under ER 403. State v. Sexsmith, 138 Wn App. 505, 157 P.3d 901 (2007). Also, courts are required to conduct careful consideration of relevance, as well as an intelligent weighing of potential prejudice. State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982).

However, a failure to weigh prejudice on the record under ER 404(b) is harmless error if the record is sufficient for the reviewing court to determine that the trial court, if it had considered the relative weight of probative value and prejudice, would still have admitted the evidence. State v. Carleton, 82 Wn. App. 680, 686, 919 P. 2d 128 (1996). Also, any error in admission of prior misconduct evidence is harmless unless the reviewing court finds that the outcome of the trial would have been different had the error not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

Here, the record is more than sufficient for a reviewing court to determine that the evidence was properly admitted, and would still have been admitted, even in the absence of the court's full balancing of the ER 404(b) and ER 403 factors on the record.

First, the court identified the purpose of the ER 404(b) evidence: the accounts were so similar that they constituted a "common scheme or plan or design – and they are close enough in a relationship in each one of these cases to be very similar and I think they do go to common scheme, plan or design and are admissible . . . " **(CP 50-51)**

That the court considered the potential prejudicial effect of the proffered evidence is borne out by the court's refusal to admit any mention

that Mr. Ehart had previously been convicted of possession of child pornography. **(CP 51)**

The factual similarities between the circumstances of the abuse described by T.E., and that described by B.E.(1) and B.E.(2) are actually compelling.

B.E.(1) described that Ehart, after locking the door, would show her pictures on the computer of bathing suits, telling her they would look good on her. **(RP 695-96, 715)** On other occasions, when B.E.(2) would go to her mom's room, Ehart would be on the computer and would quickly close it before she could see what was on it. **(RP 568-69)** T.E. testified that Ehart would show her images of pornography on a computer while abusing her. **(RP 341-42, 345, 362-63, 380-81)**

T.E. testified that Ehart would peek at her while she was showering, **(RP 363-65)** Ehart watched B.E.(1) and B.E.(2) take a shower, and washed B.E.(1) between the legs **(RP 535-39)**

T.E. testified that Ehart took her under a bridge to abuse her, and purchased bras in order to wear them in front of her. **(RP 351-53; RP 357)**

Ehart suggested to B.E.(2) that they buy a thong for her. **(RP 542)** He also took her to a bridge, placing his hands on either side of her. **(RP 545)**

It is also quite clear from the record that the court engaged in the weighing process which is contemplated by ER 403 and the cases cited, while not citing the rule specifically. The analysis engaged in by the court was a “careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice.” Saltarelli, 98 Wn.2d at 363.

The State would submit that in light of the fact that the trial court properly considered the ER 404(b) evidence before admitting it, and was well within its discretion in doing so, this court need not address whether the outcome of the trial would have been different if the contested evidence were not admitted, pursuant to Jackson. There was no tainted evidence, and the court’s decision was supported by both the evidence rules and relevant case authorities.

#### IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions in this matter, as the issues raised on appeal are without merit.

Respectfully submitted this 7<sup>th</sup> day of November, 2012

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***Certificate of Service***

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant by depositing a copy in the U.S. Mail.

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