

**FILED**

JAN 21 2014

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**No. 318061**

COURT OF APPEALS  
DIVISION III  
OF  
THE STATE OF WASHINGTON

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**Brian Romer,**  
**Appellant**

**v.**

**Washington State University,**  
**Respondent**

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*Reply Brief of Appellant*

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**I. Factual clarifications.**

While the status of criminal proceedings are not relevant to student conduct proceedings, the Brief of Respondent (Response) mentions the status of Whitman County criminal proceedings against Mr. Romer in the “Proceedings Involving Mr. Romer.” Response at 3. The Response states that “it appears the criminal matter remains unresolved.” *Id.* The criminal matter has been resolved by dismissal after Mr. Romer completed a stipulated continuance for dismissal in the Whitman County District Court. *See*, Appendix A.

The Response notes that “the fraternity held an emergency meeting and suspended Mr. Romer” after the allegations surfaced. Response at 6-7 (*citing*, CP 175). The Response fails to detail the entire matter. Interviews with members of the fraternity established that no member of the fraternity “had witnessed the incident.” CP 161. One witness had known Mr. Romer for a long time and “wouldn’t expect this from him.” *Id.* However, the “allegations *alone*” were grounds for the fraternity’s sanction. *Id.* (emphasis added).

The Response emphasized the testimony of Complainant (AR) about a “woman who helped her the night of the incident.” Response at 7. The Response states: “AR was able to speak to the woman, who subsequently identified Mr. Romer to police.” *Id.* The Response ignores the complete substance of AR’s testimony. The testimony establishes that

AR spoke to a woman and said she turned the woman's name over to police. CP 60. AR testified that the woman spoke to police and "ID'd *him*, too." *Id.* (emphasis added). According to AR, this woman "recognized *him* from an incident of her helping, but she couldn't remember exactly which one, because she was used to helping out." *Id.* (emphasis added). The board chair indicated that the agency record and board "don't have any ... paper work on that." After AR told the board that the woman did not know what event she was talking about, the board chair said, "[t]hat's okay ... since we don't have anything on the file on that..." *Id.* Thereafter, AR told the board that this unknown woman "didn't want to ... participate." CP 61.

The Response couches Mr. Romer's argument on appeal as one of "mistaken identity." Response at 8. A claim of "mistaken identity" can only exist if the record contains substantial evidence of identity in the first place. Substantial information in the record establishes that Mr. Romer was the person *accused* of the misconduct. (Emphasis added). The question here is whether the agency's record before this Court contains sufficient information that establishes by a preponderance of evidence that Mr. Romer committed the violation conduct. The agency's record does not contain substantial information to support such a finding.

**II. The agency record lacks substantial information to establish by a preponderance of evidence that Mr. Romer committed the violation conduct.**

Romer does not, as the Response maintains, claim that “the burden of proof should be governed by Evidence Rule 404(b).” Response at 12. Since the burden of proof for student conduct proceedings and for admission of evidence under Rule 404(b) are identical, then 404(b) provides an analogous legal circumstance from which this Court may draw for reference. Rule 404(b) requires proof by a preponderance of evidence of a person’s connection to the “other act” before “bad act” evidence may be admitted at a trial. Brief of Appellant at 12 (citing *State v. Tharp*, 96 Wn.2d 591, 593-94, 637 P.2d 591 (1981) (evidence must show by a preponderance of evidence the “defendant's connection to them.”), *see also*, *State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998) (same).

At no time during her testimony at the hearing did AR identify Mr. Romer as the perpetrator. CP 47-61. AR did not point him out at the hearing, and she did not identify him by photograph to the board. *Id.* Additionally, the agency record lacked sufficient information to prove identity. The information AR reportedly gave to police after her Facebook research was not received by the board and not contained in the agency record.

The Response lists a number of facts it claims is proof that establishes that Mr. Romer's identity as the perpetrator. The response maintains that AR "got a good look at *Mr. Romer*," AR "provided police with a detailed description of *Mr. Romer*," and AR found a photograph of *Mr. Romer* "on his fraternity Facebook page and shared it with police. Response at 15. Nothing in the Response's agency record citations support these assertions.

AR testified "*he* was pretty pale, and *he*'s this big guy." CP 49 (emphasis added). Student Conduct Officer Buchanan wrote from an interview that AR said, "*his* lips look swollen and skin splotchy, very scary." CR 199 (emphasis added). In a written statement, AR said, "[*he*] was wearing a blue and white vertical striped button up the front shirt[,]...[*he*] had short cut hair and was a little flush...and [*his*] lips seemed bigger than normal." CP 200 (emphasis added). None of these facts identify specifically, Mr. Romer.

Facts about the Facebook identification fail to establish the identity of the perpetrator. AR testified at the hearing that she found a picture of "*him*" on Facebook. CP 59. AR reported to WSU that "she determined Respondent's identity by looking at photographs of [the fraternity] members on Facebook.com shortly after she reported the incident to the police[,]...[and] she said that after she determined the Respondent's identity, she shared the information with the investigating police who

contacted Respondent shortly thereafter.” CP 159. During an investigative interview with WSU, AR “identified *him* by going onto google and looking up the fraternity pictures on facebook (sic), and handed the info over to the police.” CP 199.

Neither the Facebook photograph as mentioned by AR, nor any information that AR provided to the Pullman police about the perpetrator’s identification, are contained in the agency record. Without something in the record as to what the Pullman police actually received from AR, only speculation or guess-work establishes what information was given to the police department.

No one from the Pullman police department appeared at the student conduct hearing. No one from the Pullman police department provided any information to the student conduct board. There is nothing in the agency record that documents what the police actually received.

The Response relies on a report of “the arrest of Mr. Brian Romer, a male WSU undergraduate student, in the local newspaper,” and the reported arrest for charges of “indecent liberties and unlawful imprisonment” as evidence establishing identity of the perpetrator. CP 157; *see*, Response at 15 (citing CP 157, 159, 175). These agency record references only establish that a Brian Romer was accused of the misconduct. These record references are not evidence that AR identified the perpetrator of the misconduct to the WSU investigators or to the board.

Next, the Response refers to a “woman who helped A.R. the night of the incident,” maintaining that this unknown woman “also identified Mr. Romer to police.” Response at 15. This is not born out in the agency record.

In fact, the board chair indicated at the hearing that the agency record did not contain that information. CP 60 (“we don’t have any ... paperwork on that”... “we don’t have anything in the file on that....”). Moreover, AR’s testimony simply establishes a woman she spoke with who remembered helping someone out, but does not remember who she helped, and does not remember when or where she helped out. According to AR, this woman did not want to participate. CP 61. This unknown woman did not participate at the hearing.

The Response references Mr. Romer’s opening and his closing remarks where he outlined significant efforts he made to mitigate the effects on AR, after he was accused of the violation conduct. The Response maintains that these remarks provides evidence of Mr. Romer’s identity as the perpetrator. Response at 15. Mr. Romer’s remarks are proof that he was the person accused by WSU of the violation conduct. It is not proof that he was the perpetrator. Mr. Romer’s remarks connected him to his post-accusation conduct to mitigate the effects of the accusations on AR, but his remarks did not connect him to the violation

conduct - in regards to the actual allegations, he exercised his right to remain silent.

Relying on Mr. Romer's opening and closing remarks as proof of his identity would render any rights guaranteed in the student conduct proceedings a nullity. *See, Alpha Kappa Lambda Fraternity v. Washington State University*, 152 Wn.App. 401, 416-17, 216 P.3d 451 (2009) (while a student does not have the same due process rights as a criminal defendant, they do possess limited due process rights). Mr. Romer exercised his right to remain silent at the hearing due to pending criminal proceedings against him. CP 36-37.

The Response aptly recognized that an accused student has a right to remain silent in the face of concurrent criminal proceedings. Response at 12 (citing, WAC 504-26-305). A student "gives up the opportunity to explain his or her version of events." WAC 504-26-305(1).

In that spirit, the board chair, recognizing he exercised his right to silence, informed Mr. Romer that he had the "opportunity to tell [the board] everything, maybe not about the facts of the case." CP 106. In the Responses view, however, when Romer chose to speak about his post-accusation conduct to mitigate any potential sanction, as was his right, and when he exercised his right to not speak "about the facts of the case," these circumstances are sufficient proof of his identity as the perpetrator.

However, an accused student has a right to attend a hearing on allegations of student misconduct. WAC 504-26-403(4). Indeed, if an accused student does not attend the hearing, the an adverse decision may be made in the accused's absence based solely on information presented at the hearing in support of the complaint. WAC 504-26-404(6).

Had Mr. Romer not appeared at the hearing, the board could have administered more severe sanctions in his absence, including suspension or expulsion for school. WAC 504-26-405(i) and (j). Adopting the Response's rationale would allow a students appearance at a conduct hearing as evidence of identification. The Response essentially asks this Court to take advantage of Mr. Romer's exercise of his right to appear at the hearing, and the exercise of his right to silence, and hold that his choice to speak in an effort to mitigate potential sanctions is sufficient evidence, when no evidence in the agency record from the accuser specifically identified him as the perpetrator.

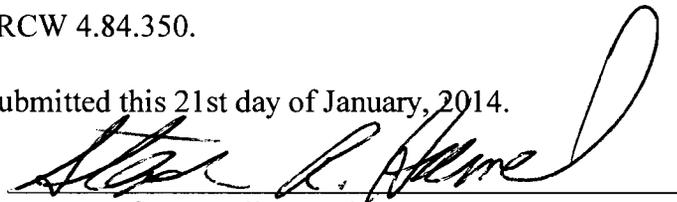
Is the evidence in this case "the type of evidence that reasonable members of the university community would rely in the conduct of their own affairs?" Response at 14 (citing WAC 504-26-403(a)(xi)). The agency record consists of unknown information given to the police from a Facebook search, and a report in the local news paper of the arrest of a Brian Romer, a WSU student. Neither the agency record, nor the testimony at the hearing, established that AR actually identified Mr.

Romer by pointing him out at the hearing, or by identifying him from a photograph maintained in WSU's record.

**VI. Conclusion.**

Based on the foregoing, it is requested that the Court reverse the Superior Court, reverse the finding of the Board that Mr. Romer is responsible for the student conduct violations, and dismiss this action. It is also requested that the Court impose reasonable attorney fees and other expenses pursuant to RCW 4.84.350.

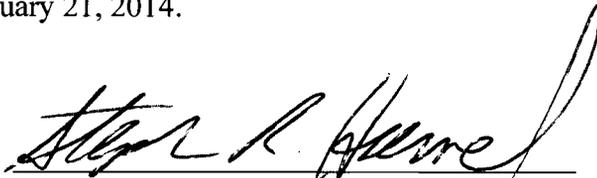
Respectfully submitted this 21st day of January, 2014.



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**CERTIFICATE OF SERVICE**

I certify that I mailed a copy of the foregoing Reply Brief of Appellant to Danielle A. Hess, Senior Assistant Attorney General, 332 French Administration Building, Post Office Box 641031, Pullman, WA 99164-1031, on this day, January 21, 2014.



Stephen R. Hormel  
WSBA # 18733

# **Appendix**

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WHITMAN

STATE OF WASHINGTON, )  
 ) No. PI2 1184  
 Plaintiff, )  
 ) MOTION AND ORDER TO DISMISS  
 v. Brian Roman )  
 Defendant. )

COMES NOW the Plaintiff, State of Washington, by and through the Office of the Whitman County Prosecuting Attorney, and hereby moves the Court to dismiss the charge(s) of:

1. ASSAULT w/ Sev Motivation
2. \_\_\_\_\_
3. \_\_\_\_\_

with/out prejudice, for the following reason:

- |   |  |
|---|--|
| <input type="checkbox"/> Pursuant to plea agreement | <input type="checkbox"/> Insufficient evidence                   |
| <input type="checkbox"/> In the interest of justice | <input checked="" type="checkbox"/> CFD satisfactorily completed |
| <input type="checkbox"/> Other _____                |  |

DATED this 2nd day of December 2013.

Wendy Jensen  
Deputy Prosecuting Attorney WSB# 410912

ORDER

BASED UPON the motion of the Plaintiff herein, IT IS HEREBY ORDERED that the charge(s) listed above on file herein be dismissed with/out prejudice.

DATED this 9th day of Dec 2013.

White: Court  
Yellow: Prosecutor  
Pink: Defendant

D. Williams  
DISTRICT COURT JUDGE/PROTEM/COMMISSIONER