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Court of Appeals
Division III
State of Washington
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No. 36682-1

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

STATE OF WASHINGTON, Respondent

v.

D.C.W., Appellant

APPEAL FROM THE SUPERIOR COURT
OF BENTON COUNTY
THE HONORABLE JUDGE ALEX EKSTROM

BRIEF OF APPELLANT

Marie J. Trombley, WSBA No. 41410
PO Box 829
Graham, WA
253-445-7920

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INTRODUCTION

The State charged D.W. with child molestation in the second degree. The issue in this matter is whether the State proved D.W. intentionally and volitionally touched intimate areas of K.E. D.W. testified he was sound asleep during the timeframe in which the molestation was alleged to have occurred. K.E., the alleged victim testified she did not know if he was awake when his hand touched her. To assist in making a judgment, the court admitted testimony of an alleged conversation between D.W. and K.E. about touching her breasts, which had occurred during the previous summer. When asked about the conversation K.E. did not initially remember it. With a refreshed recollection she testified she was unsure if she initiated the conversation, and she had thought little about it. The trial court relied on the 'prior bad act' conversation when it made its conclusion: "In the absence of the admissibility and persuasiveness of the prior incident, the Court would not be persuaded beyond a reasonable doubt that this offense was committed."

I. ASSIGNMENT OF ERROR

A. The trial court erred when it entered Conclusion of Law 2:

The prior incident of the Respondent requesting to touch the breast of K.L.E. was proven to have occurred by a

preponderance of the evidence and was admitted as substantive evidence for the non-propensity purposes of showing 1) the Respondent's intent for sexual gratification with females, generally, 2) for the lustful disposition of the Respondent towards K.L.E. specifically, and 3) to counter the implication that this was an accidental, unknowing, or otherwise non-volitional act.

LEGAL ISSUE: The appellate Court reviews a trial court's analysis under ER 404(b) for an abuse of discretion. Did the trial court abuse its discretion when it deemed admissible testimony about a past conversation for the delineated purposes?

LEGAL ISSUE: Did the trial court err when it did not conduct an on the record analysis of the prejudicial effect weighed against the probative value?

- B. The trial court erred when it entered Finding of Fact 1: On or about the intervening time between December 31, 2017 and January 1, 2018, the Respondent committed child molestation in the second degree.

LEGAL ISSUE: Where the ultimate issue is whether the defendant committed child molestation in the second degree,

must the reviewing Court conduct a de novo review of an erroneously labeled finding of fact as a conclusion of law?

- C. The trial court erred when it entered Finding of Fact 10: The Respondent's touching of these areas was done for the sexual gratification of the Respondent.
- D. The trial court erred when it entered Finding of Fact 14: The Respondent's acts were done with volition.
- E. The trial court erred when it entered Conclusion of Law 4: The Respondent is guilty beyond a reasonable doubt of committing the offense of child molestation in the second degree, in violation of RCW 9A.44.086.

LEGAL ISSUE for assignment of errors B,C,D,E: Was the evidence insufficient to sustain an adjudication of guilty?

II. STATEMENT OF FACTS

On the evening of December 31, 2017, sixteen-year-old D.W. and his cousins spent the night at their grandmother's home. RP 55. D.W., his mother and brother lived with his grandmother. RP 135. Around 2 o'clock in the morning one cousin went to sleep on the couch. RP 56; CP 1. D.W. and his 13-year-old female cousin, K.E. went to sleep in D.W.'s bedroom. RP 56.

D.W.'s bed was a bunk bed, with a queen size mattress for the bottom bunk. They got in the bottom bunkbed, in a spooning position, and he had one arm over her waist. RP 78, 81. She said at some point his hand slid up under her shirt and he touched her chest. She reported he put his hand inside of her sweatpants, but not inside of her underwear. She said it touched her crotch area, but his hand did not move. RP 88, 90. She reported he was half asleep and she whispered, "what are you doing?" RP 129, 130,149. She said he made a noise, adjusted, and went back to sleep. She could not remember if she removed his hand or if he moved it himself. RP 127, 128,131. There was no testimony there was any hand movement on her chest or pubic area. K.E. said she did not know if he was even awake. RP 130. All the parties agreed that if D.W. was asleep there was no specific intent crime. RP 171, 174, 176,177.

K.E. got up and went to the bathroom. RP 94. When she returned, she said he mumbled. RP 94. She took a blanket and slept on the floor. RP 94.

During K.E.'s testimony, the prosecutor wanted to introduce an uncharged prior bad act. RP 95, 101. The State proffered K.E.'s statement to a forensic investigator that at a different time, D.W.

had asked if he could touch her breasts and she said 'no'. RP 99. The State said the conversation was within a year of the New Year's Eve allegation. RP 104.

The State argued the account of the incident was to show the intent or motive was for sexual gratification and possibly absence of mistake. RP 99-101. Defense counsel objected because if the incident occurred, it was an uncharged offense of communication with a minor for immoral purposes, was overly prejudicial, and amounted to character evidence. RP 101. And when interviewed by the defense, K.E. reported there were no prior incidents. RP 103.

The court allowed an offer of proof. RP 99. Upon questioning K.E. testified she did *not* converse with D.W. before December 31, 2017, about him touching her breasts. RP 106. Defense counsel objected on ER 404(b) grounds, because the act could not be found to have occurred by a preponderance of the evidence. RP 107. The court overruled the objection. RP 107. On further questioning, K.E. wavered on her answer, saying "maybe" if she heard her recorded forensic interview it would refresh her memory. The State had her listen to a portion of her recorded forensic interview. RP 110.

After hearing the tape, K.E. said she “kind of” remembered the conversation. RP 111. In further questioning, she speculated the conversation might have occurred during the summer but did not know if she had been the one to actually initiate the conversation with D.W. RP 112-113. Over the course of questioning, she said later he asked, and she denied the request. She thought it a little weird but did not think that it meant anything¹. RP 116.

Defense counsel argued against admission because K.E. initially denied the conversation took place, but even after hearing her interview statement she did not know who initiated the conversation. RP 119-120. Counsel also pointed out that the probative value of the information was not significantly outweighed by the prejudicial content. RP 120.

The court found by a preponderance of the evidence the conversation occurred. RP 121. The court found the identified purpose was to show a lustful disposition, sexual gratification and

¹ There was some confusion in the testimony about a separate time in which she had been in D.W.’s bed and he had his arm around her waist, but nothing questionable occurred. RP 119.

left open the argument that the information was more prejudicial than probative. RP 121-122. The Court never made a clear ruling on whether the information was more prejudicial than probative.

D.W. testified he had difficulty with his sleep and kept stuffed animals and a body pillow on his bed. He always slept hugging the pillow. RP 139. That night he moved the extra pillows next to the wall and the last thing he remembered was turning off his stereo. RP 139-140. When he awakened the next morning, she was not in his room. RP 141.

The court found the evidence of the alleged prior request to touch K.E.'s breasts was the persuasive factor for the court. RP 177; CP 15. The court found the State met all the elements for the charged crime. RP 177; CP 15. The court entered findings of fact and conclusions of law. CP 13-15. The court imposed a three-day jail sentence. RP 199. D.W. makes this timely appeal. CP 28-31.

III. ARGUMENT

- A. The Trial Court Erred When It Admitted And Relied On ER 404(b) Evidence As The Persuasive Factor In Adjudicating Guilt.

1. Standard of Review

A trial court's decision to admit evidence of prior misconduct is reviewed for an abuse of discretion. *State v. Griswold*, 98 Wn.App. 817, 823, 991 P.2d 657(2000). "Judicial discretion is a composite of many things among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously." Abuse of discretion occurs when the trial court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The court must begin with the presumption that any evidence of prior bad acts is inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P3d 19 (2003). Erroneous admission of evidence is grounds for reversal if within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

2. Admissibility of ER 404(b) Requires An On The Record Analysis.

For evidence of other bad acts to be admissible, the trial court must conduct an on the record analysis. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). It must find by a preponderance of the evidence that the misconduct occurred, identify the purpose for which the evidence is to be introduced, determine whether the evidence is relevant to an element of the crime charged, and weigh the probative value against the prejudicial effect. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

Here, in its analysis of admissibility, the court found by a preponderance of the evidence the conversation occurred. The identified purpose was to show a lustful disposition to meet the element of sexual gratification. Yet, the court did *not* weigh the probative value against the prejudicial effect in either its oral ruling or its conclusion of law. CP 14-15. This was error. *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). The record must show, in some way, that the court weighed the consequences of admission and then consciously determined to admit or exclude the evidence. *State v. Tharp*, 96 Wn.2d at 597.

A trial court's failure to articulate the balance between probative value and prejudicial effect is not reversible only when

within reasonable probabilities the record as a whole is sufficient to permit an appellate court to determine the question of admissibility. *State v. Thomas*, 35 Wn.App. 598, 607-09, 668 P.2d 1294 (1983).

3. The Evidence Was Inadmissible Because The Prejudicial Effect Outweighed Its Probative Value.

The record in this case is sufficient for this Court to determine the prejudicial effect outweighed the probative value of the conversation evidence. *State v. Hepton*, 113 Wn.App. 673, 688, 54 P.3d 233 (2002). While Washington Courts have held that evidence of collateral sexual misconduct may be admitted under ER 404(b)² where it shows the defendant's lustful disposition, the court must still weigh prejudicial effect against probative value. *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991).

As a baseline premise, the admission of other alleged misconduct is highly prejudicial because there exists a significant

² ER 404 provides Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on an occasion....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.

risk that the trier of fact may place undue weight or overestimate the probative value of the other bad acts. Further, evidence of other acts of misconduct unsurprisingly shifts the trier of fact's "attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." *State v. Bowen*, 48 Wn.App. 187, 195, 738 P.2d 316 (1987)(abrogated on other grounds by *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995)).

Substantial probative value is needed to outweigh the potential prejudicial effect of ER 404(b) evidence. *State v. Sexsmith*, 138 Wn.App. 497, 506, 157 P.3d 901 (2007). On its face, the exception to ER 404(b) evidence casts a wide net regarding collateral sexual misconduct. Case law trims that net with examples of behavior where the probative value significantly outweighs the prejudicial effect.

In *Ray*, the Court found three previous sexual contacts, including intercourse, between the defendant with his daughter was admissible because the conduct revealed his lustful inclination toward her. *State v. Ray*, 116 Wn.2d at 547.

In *State v. Ferguson*, 100 Wn.2d 131, 67 P.2d 68 (1983), the defendant was accused of indecent liberties by causing his

stepdaughter to have sexual contact with him. The Court found relevant and not overly prejudicial the evidence that during a family nude photo shoot the defendant told her to put her mouth on his penis. *Id.* at 133-134.

In *State v. Guzman*, 119 Wn.App. 176, 79 P.3d 990 (2003), the court rightly admitted testimony about an incident, six years prior, when the victim awoke to the defendant, her brother in law, touching her shoulder and breasts. *Id.* at 183-184.

In contrast to the above cited cases, K.E. gave a short and confusing account of an alleged conversation of which she had no independent recollection. She did not even remember if she initiated the exchange. She was not alarmed or upset by it. It was not clear exactly when the conversation occurred. There was no context to this single alleged exchange³. The alleged conversation was not indicative of a lustful disposition.

In this matter, the trial court abused its discretion because the ruling was not right under the circumstances. *State ex rel*

³ At trial the prosecutor attempted to draw a conclusion that the alleged conversation occurred during yet another time when K.E. slept in D.W.'s bed. However, the context of the testimony was there were two incidents: one time she was in the bed and he had placed his arm around her waist without incident. There was no context regarding the conversation. The court drew the distinction in its summary of the testimony. RP 118,120-21.

Carroll v. Junker, 79 Wn.2d at 26. The probative value was not substantial enough to outweigh the potential prejudice of the evidence. Nor did the evidence make it more probable he committed the charged offense. *State v Ray*, 116 Wn.2d at 547.

Evidentiary errors under ER 404 are not of constitutional magnitude, and a reviewing court must determine, therefore within reasonable probability, if the outcome of the trial would have been different if the error had not occurred. *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982). Here, the court clarified both in its oral ruling and written findings that the outcome of the trial would have been absolutely different had it not considered the prior bad acts evidence. The error was not harmless. The remaining untainted evidence did not overwhelmingly support a finding of guilt. *State v. Carleton*, 82 Wn.App. 680,686-87, 919 P.2d 128 (1996).

The trial court abused its discretion. This matter must be reversed.

B. The State's Evidence Was Insufficient To Sustain The Conviction Beyond A Reasonable Doubt

As a preliminary matter, the trial court entered finding of fact no. 1: "On or about the intervening time between December 31, 2017 and January 1, 2018, the Respondent committed child

molestation in the second degree.” CP 14. This is a conclusion of law not a finding of fact. A mislabeled finding of fact or conclusion of law is reviewed as what they it is and not as what it is labeled. *State v. Conway*, 8 Wn.App.2d 538,552 n.8, 438 P.3d 1235 (2019). As a conclusion of law, it must be reviewed de novo. *State v. Z.U.E.*, 178 Wn.App. 769,778, 315 P.3d 1158 (2014).

Due process requires the State to prove each element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend XIV; Const. art. I§3. In reviewing a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980). A claim of insufficient evidence admits the truth of the State’s evidence and all reasonable inferences from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Credibility issues are for the finder of fact to decide, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

Following a bench trial, the reviewing Court determines whether substantial evidence supports the findings of fact and, if so whether the findings support the conclusions of law. *State v. Homan* 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). “Substantial evidence” is defined as evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. *Id.* at 106.

RCW 9A.44.086(1) defines the crime of child molestation in the second degree. It prohibits sexual contact with someone over 12 years of age, but less than 14 years at the time, is not married to the person, and was at least 36 months younger than the person. “Sexual contact is an essential element of the crime.

“Sexual contact” means a touching of the sexual or other intimate parts done “for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2). “Sexual gratification” is a clarifying term meant to define the essential element of sexual contact. *State v. Lorenz*, 15 Wn.2d 22, 34-35, 93 P.3d 133 (2004). Thus, to prove child molestation, the State had to prove that D.W. acted intentionally. Intent or volition was an issue because the crucial question was whether D.W. was actually asleep when he touched K.E.

Because intent is a component of sexual contact, inadvertent sexual contact does not constitute a crime. *State v. T.E.H.*, 91 Wn.App. 908, 915, 960 P.2d 441 (1998); *State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006).

Here, the facts were that K.E. testified she did not know if D.W. was fully conscious at any time that night. She said he mumbled, made noises, and only possibly moved in response to external stimuli. He did not move when she got up to go to the bathroom and did not talk to her. D.W. testified he was asleep the entire time.

The record does not support the trial court's finding of fact 10: The Respondent's touching was done for the purpose of sexual gratification. The record does not support finding of fact 14: Respondent's acts were done with volition. Therefore, the findings do not support the conclusion of law finding D.W. guilty of child molestation in the second degree.

IV. CONCLUSION

The absence of proof beyond a reasonable doubt of an element requires reversal of the conviction and dismissal of the charge with prejudice. *State v. Green*, 94 Wn.2d at 221. Retrial of a case dismissed for insufficient evidence is barred by the Double

Jeopardy Clause. Const.art.I §9. Because the State failed to prove that D.W. acted intentionally, and the court unreasonably relied on an alleged prior bad act, this matter must be reversed and dismissed.

Respectfully submitted this 4th day of December 2019.



Marie Trombley
WSBA 41410
P O Box 829
Graham, WA 98338

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on December 4, 2019, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Benton County Prosecuting Attorney (at prosecuting@co.benton.wa.us) and D.W. at 307 Greentree Ct. Unit 3, Richland WA 99352



Marie Trombley
WSBA 41410
PO Box 829
Graham, WA 98338

MARIE TROMBLEY

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Comments:

Sender Name: Marie Trombley - Email: marietrombley@comcast.net
Address:
PO BOX 829
GRAHAM, WA, 98338-0829
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