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

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

D.C.W.,

Appellant

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

NO. 18-8-00332-5

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

Terry J. Bloor, Deputy
Prosecuting Attorney
BAR NO. 9044
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court did not err by entering Conclusion of Law Number 2. (Conclusion of Law 2 reads, “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 defendant towards K.L.E., specifically, and 3) to counter the implication that this was an accidental, unknowing, or otherwise non-volitional act. CP 14-15.)
- Further, the trial court did not abuse its discretion in admitting the prior incident under ER 404 (b) and the trial court conducted an on the record analysis of the prejudicial effect weighed against the probative value of the evidence.
- B. The trial court did not err 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.” CP 14.)

- C. The trial court did not err when it entered Finding of Fact 10.
(“The Respondent’s touching of these areas was done for the sexual gratification of the Respondent.” CP 14.)
- D. The trial court did not err when it entered Finding of Fact 14.
(“The Respondent’s acts were done with volition.” CP 14.)
- E. The trial court did not err 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” CP 15.)

II. STATEMENT OF FACTS

The defendant’s date of birth is March 6, 2001. RP at 53. K.E.’s date of birth is September 13, 2004. RP at 71. They are cousins. RP at 55.

Sometime during the summer of 2017, the defendant asked K.E. to touch her breasts. RP at 111-12. She said no and the defendant did not do anything more at that time. RP at 116.

On New Year’s Eve, December 31, 2017, and going into the early morning hours of January 1, 2018, K.E. was with her family at her grandmother’s house, where the defendant also lived. RP at 56. Around 2:00 A.M., the defendant went to his room to sleep and K.E. followed him. RP at 139. K.E. was on her right side, with the defendant behind her.

RP at 79. His body, including his knees, chest, and legs, was touching her.

RP at 80.

The defendant put his hands below K.E.'s shirt, went under her bra and touched both of her bare breasts. RP at 88. K.E. testified that the defendant also touched her crotch. RP at 90. His hand was over her vagina, on top of her underwear, but did not touch her bare vagina. RP at 90, 92.

At some point, K.E. told him to move his hand, saying "[you are] my cousin and this is weird." RP at 128, 131. When she said this, the defendant moved his hand. RP at 131. After these events, K.E. went to the bathroom and thereafter slept on the floor of the bedroom. RP at 93.

K.E.'s sister, Kayleigh Ellsworth, found K.E. on the floor of the bedroom in the morning. RP at 57. K.E. told Kayleigh about the inappropriate touching a couple of months later. RP at 58. Kayleigh testified that K.E. was pretty upset and crying hard when K.E. disclosed the touching. RP at 59-60.

The defendant's version was that he slept through the entire night. RP at 144-45. He was probably trying to cuddle with a body pillow which is usually in his bed. RP at 139, 145. He stated he was not sexually attracted to K.E. RP at 139. Neither attorney asked about his statement to K.E. in the summer of 2017 about wanting to touch her breasts.

The trial court gave the benefit of the doubt to the defendant concerning his hand on her pubic area. RP at 177. The defendant did not do anything to remove her underwear or touch her bare vagina and there was a possibility the defendant was asleep. *Id.* However, regarding K.E.'s breasts, the defendant had to go under her shirt and her bra. *Id.* The trial court found him guilty of Child Molestation in the Second Degree for going through two layers of clothing and touching both breasts.

III. ARGUMENT

A. The trial court did not abuse its discretion in ruling that the defendant's statement to K.E. in the summer of 2017 that he wanted to touch her breasts was admissible.

1. Standard on review

The trial court's determination to admit or exclude evidence is reviewed for an abuse of discretion, including issues regarding ER 404 (b) evidence. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

2. The defendant's statement that he wanted to touch K.E.'s breasts could have been admitted as an admission of party opponent.

The State argued that the defendant's statement was admissible under ER 404 (b). However, this Court can affirm the trial court on any correct ground. *Id.* Here, the defendant directly told K.E. that he wanted to touch her breasts. This was perhaps 3-6 months before he actually touched her breasts on January 1, 2018.

The trial court was correct in ruling that the statement was also admissible under ER 404 (b). It was also admissible as an admission of a party opponent under ER 801 (d)(2).

3. The defendant's statement was also admissible under ER 404 (b).

a. The defendant is incorrect that the trial court did not balance the probative versus prejudicial effect of the evidence on the record.

Please review the Court's decision on the ER 404 (b) at RP at 120-22. Not only did the trial court balance the probative value versus the prejudicial effect, but the court researched the issue. "And then here, we get to probative versus prejudicial, probative value versus prejudicial effect" RP at 121. The trial court cited *State v. Guzman*, 119 Wn. App. 176, 79 P.3d 990 (2003). The trial court also cited *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991). RP at 121-22.

Both cases are relevant because they deal with the admissibility of prior sex acts. The trial court concluded that the risk of unfair prejudice was reduced because the defendant's request to K.E. to touch her breasts was more recent than in either the *Guzman* or *Ray* cases. RP at 122.

The defendant's citation to *State v. Tharp*, 96 Wn.2d 591, 637 P.2d 961 (1981), does not help his case. The *Tharp* court held that "there is no indication that the trial court did more than accept the State's contention

that the disputed evidence was admissible to show motive.” *Id.* at 598.

Here, the trial judge went through the trouble of doing his own research on the issue of probative value versus prejudicial effect and then fully articulated his reasons to admit evidence. There was no error in failing to articulate his reasons to admit the evidence, including a balancing of probative versus prejudicial.

b. The trial court did not abuse its discretion in finding that the prejudicial effect of the evidence did not outweigh the probative value.

The defendant argues that the evidence that he asked to touch K.E.’s breasts about 3-6 months earlier is not too probative. On the contrary, touching her breasts is exactly how he committed the crime. The touching of her breasts came fairly soon after he requested to touch her breasts. Both the request and the actual touching of her breasts came when she and the defendant were in his bed. RP at 112.

This is admissible under ER 404 (b) to show a lustful disposition toward K.E. See *Guzman*, 199 Wn. App. at 182 and *Ray*, 116 Wn.2d at 547. It is also admissible to rebut the defendant’s claim that he was sleeping and may have accidentally cuddled K.E. thinking it was his body pillow. RP at 145. As stated in *State v. Olsen*, 175 Wn. App. 269, 282, 309 P.3d 518 (2013), when a defendant asserts that certain conduct is

accidental, evidence of prior misconduct is *highly* relevant as it will tend to support or rebut such a claim.

B. In the light most favorable to the State, the evidence was sufficient to convict the defendant.

1. Standard on Review

Sufficiency of the evidence claims are reviewed in the light most favorable to the State to determine whether any rational trier of fact could have found the elements beyond a reasonable doubt.

2. There was sufficient evidence to convict.

The trial judge had direct testimony from the victim, K.E., that the defendant puts his hands under her shirt, then under her bra and touched her breasts. She was emotional when testifying about this and emotional when she first revealed the abuse. RP at 59-60, 81. There were no previous problems between the defendant and K.E. and no motive for her to make up an allegation. RP at 143-44.

The defendant's version that he was asleep and might have confused K.E. for his body pillow is not credible. He had to go through two layers of K.E.'s clothing to touch her bare breasts. He previously asked about touching her breasts. His attorney asked him to explain that comment.

The trial judge was in the best position to determine the credibility of the defendant and K.E. There is sufficient evidence for his findings and conclusions.

IV. CONCLUSION

The conviction should be affirmed.

RESPECTFULLY SUBMITTED on February 3, 2020.

ANDY MILLER
Prosecutor

A handwritten signature in black ink, appearing to read "T. J. Bloor", is written over a horizontal line. The signature is stylized and cursive.

Terry J. Bloor, Deputy
Prosecuting Attorney
Bar No. 9044
OFC ID NO. 91004

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Marie J. Trombley
P.O. Box 829
Graham, WA 98338

E-mail service by agreement
was made to the following
parties:
marietrombley@comcast.net

Signed at Kennewick, Washington on February 3, 2020.


Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

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Filing on Behalf of: Terry Jay Bloor - Email: terry.bloor@co.benton.wa.us (Alternate Email: prosecuting@co.benton.wa.us)

Address:
7122 W. Okanogan Place
Kennewick, WA, 99336
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