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Nº. 38233-4-II

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

STATE OF WASHINGTON
Respondent,

v.

ARTHUR RUSSELL,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 08-1-00223-1
The Honorable Anna M. Laurie, Presiding Judge

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TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PRESENTED	
1. Did the trial court err in admitting evidence of alleged sexual misconduct by Mr. Russell without first requiring the State to prove the misconduct had occurred by a preponderance of the evidence? .	1
2. Did the admission of the evidence of the alleged sexual misconduct deprive Mr. Russell of a fair trial?	1
C. STATEMENT OF THE CASE.....	1
D. ARGUMENT	
1. The trial court erred in admitting evidence of alleged sexual misconduct by Mr. Russell.....	6
a. <i>The trial court abused its discretion in failing to require the State to prove by a preponderance of the evidence that the acts of sexual misconduct ever occurred.</i>	8
b. <i>The trial court abused its discretion in failing to identify what element of the crime the evidence of the alleged prior and subsequent sexual misconduct was relevant to proving.</i>	12
c. <i>The trial court abused its discretion in finding that the evidence of alleged sexual misconduct prior to and subsequent to the alleged crimes in Washington was relevant to the crimes charged.</i>	13

d. *The trial court abused its discretion in finding that the evidence was more probative than prejudicial*..... 16

2. The admission of the evidence of the alleged sexual misconduct deprived Mr. Russell of a fair trial. 17

D. CONCLUSION

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Proctor v. Huntington, 146 Wn.App. 836, 192 P.3d 958 (2008)..... 7

State v. Foxhoven, 161 Wn.2d 168, 163 P.3d 786 (2007) 7

State v. Holmes, 43 Wn.App. 397, 717 P.2d 766, *review denied*,
106 Wn.2d 1003 (1986) 18

State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002)..... 8, 9

State v. Latham, 100 Wn.2d 59, 667 P.2d 56 (1983)..... 17

State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995)..... 18

State v. McDonald, 96 Wn.App. 311, 979 P.2d 857 (1999),
affirmed 143 Wn.2d 506, 22 P.3d 791 (2001) 18

State v. Messinger, 8 Wn.App. 829, 509 P.2d 382 (1973), *review*
denied, 82 Wn.2d 1010 (1973), *cert. denied*, 415 U.S. 926,
94S.Ct. 1433, 39 L.Ed.2d 483 (1974) 14

State v. Miles, 73 Wn.2d 67, 436 P.2d 198 (1968) 17-18

State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991)..... 11

State v. Rice, 48 Wn.App. 7, 737 P.2d 726 (1987) 14

State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982) 7, 16

State v. Stein, 140 Wn.App. 43, 165 P.3d 16 (2007), *review*
denied, 163 Wn.2d 1045, 187 P.3d 271 (2008) 8, 9

State v. Thang, 145 Wn.2d 630, 41 P.3d 1159 (2002)..... 6-7, 12

Other Authorities

RCW 9A.44.073.....14-15

RCW 10.99.020 15

ER 401 13

ER 402 13

ER 403 16

ER 404 6

Black's Law Dictionary (7th ed., 1999) p. 579..... 14

A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence of alleged prior and subsequent sexual abuse by Mr. Russell against C.R.
2. The presentation of unproven and irrelevant yet highly prejudicial evidence deprived Mr. Russell of his right to a fair trial.

B. ISSUES PRESENTED

1. Did the trial court err in admitting evidence of alleged sexual misconduct by Mr. Russell without first requiring the State to prove the misconduct had occurred by a preponderance of the evidence? (Assignment of Error No. 1)
2. Did the admission of the evidence of the alleged sexual misconduct deprive Mr. Russell of a fair trial? (Assignment of Error No. 2)

C. STATEMENT OF THE CASE

Factual and Procedural Background

On February 20, 2008, Mr. Arthur Russell was charged with one count of first degree child molestation of his stepdaughter, C.R., occurring between February 1, 2000, and July 31, 2003, with the aggravating factor that the crime was one of domestic violence. CP 1-5.

On June 2, 2008, the charges were amended to first degree rape of a child occurring between February 1, 2000, and July 31, 2003, with the aggravating factor that the crime was one of domestic violence. CP 6-8.

Also on June 2, 2008, the State made an oral motion under ER 404(b) to admit evidence that Mr. Russell allegedly began molesting the

alleged victim in this case, C.R., when C.R. was three years old when the family lived in Japan, and that the abuse continued, and escalated, as the family moved to Hawaii, Washington, Florida, and finally to Indiana, where the alleged abuse was finally reported. RP 15-17. Citing *State v. Guzman*, 119 Wn.App. 176, 79 P.3d 990 (2003), and *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991), the State sought to introduce evidence of alleged sexual misconduct both before, during, and after the Russell family lived in Washington as evidence of prior and subsequent sexual contact between Mr. Russell and the alleged victim, C.R., in order to show Mr. Russell's "lustful disposition" towards C.R. RP 15-17.

Mr. Russell objected to the introduction of the evidence relating to events in Florida, Japan, and Hawaii on the basis that the State had insufficient reliable evidence to establish that these events occurred, and the remoteness in time of the events rendered them more prejudicial to Mr. Russell than probative of any issue. RP 17-21.

The trial court ruled that no evidence could be introduced about any molestation which occurred in Japan, but that evidence of sexual misconduct occurring in Hawaii, Washington, Florida, and Indiana was admissible. RP 22-24. No offer of proof beyond the prosecutor's statements was made prior to the court ruling the evidence was admissible.

At trial, the State called two witnesses: the alleged victim, C.R.,

and the alleged victim's older sister, Kristal Russell. RP 242, 317.

C.R. testified that she was born on May 22, 1992, in the Philippines. RP 242-243. C.R.'s family moved numerous times because Mr. Russell was in the Navy. RP 248. In 1997, C.R.'s family moved to Hawaii. RP 246, 319. In the summer of 2000, C.R.'s family moved to Washington. RP 319. The family lived in Washington for three years, then moved to Florida. RP 247, 319-320. The family lived in Florida for one or two years, and then moved to Indiana. RP 247, 320.

C.R. testified that, while in Washington, the family lived in Bremerton and Mr. Russell would be gone from the home for six months at a time. RP 248-249. C.R. testified that she got along better with Mr. Russell than with her mother and that she was closer to Mr. Russell than to her mother. RP 249.

C.R. testified that when the family lived in Hawaii, Mr. Russell began touching C.R. inappropriately by caressing all parts of her body with his hands. RP 253. C.R. testified that this would happen in the family home, sometimes in Mr. Russell's room. RP 254.

C.R. testified that this inappropriate touching continued when the family moved to Washington, but that, once in Washington, Mr. Russell touched C.R. "orally" and made C.R. perform oral sex on him. RP 254-255. C.R. testified that these acts would take place in Mr. Russell's

bedroom but that she did not know if the events always took place in the bedroom. RP 256. C.R. testified that sometimes her mother was home when these acts occurred, but that Mr. Russell always locked the door or blocked it to prevent anyone from finding out what was going on. RP 256-257. C.R. testified that in Hawaii and Washington, Mr. Russell would touch her vagina with his mouth. RP 257.

C.R. testified that the abuse continued after the family left Washington and moved to Florida and that it got worse. RP 257-258. C.R. testified that she and Mr. Russell engaged in penile-vaginal intercourse in Florida several times. RP 269-270.

C.R. testified that the abuse continued when the family moved from Florida to Indiana. RP 258-259. C.R. testified that the penile-vaginal intercourse continued when the family moved to Indiana. RP 269-270. C.R. testified that she told her mother about the abuse in Indiana, but that her mother did not report the abuse or call the police because C.R. asked her not to. RP 259-261. C.R. told her school counselor about the alleged abuse because her mother put pressure on C.R. because C.R.'s mother and Mr. Russell were getting a divorce. RP 262-263.

C.R. testified that her mother wanted C.R. to talk to Mr. Russell about Mr. Russell sending her mother more money and that, if Mr. Russell refused to send more money, C.R. should start talking about the alleged

sexual abuse that happened between C.R. and Mr. Russell. RP 300. C.R. testified that her mother threatened to send C.R. to live with C.R.'s biological father in the Philippines if C.R. did not do what C.R.'s mother told C.R. to do. RP 301.

C.R. told her step-sister, Ms. Shanna Russell, that none of the allegations against Mr. Russell were true. RP 267. C.R. also told her sister-in-law Kristine that the allegations were not true. RP 267-268.

Kristal Russell testified that she never witnessed Mr. Russell sexually abusing C.R., but that she and C.R. shared a bedroom in Japan, Hawaii, Washington, Florida, and Indiana and sometimes she would wake up in the morning and find that C.R. was in Mr. Russell's bedroom with the door locked. RP 324.

Mr. Russell testified and denied ever touching C.R. in a sexually inappropriate way or engaging in oral or penile-vaginal sex with C.R. RP 340-341. Mr. Russell testified that sometimes he would have conversations with his children behind closed and locked doors, including in his bedroom, for privacy. RP 349.

The trial court did not give, and counsel for Mr. Russell did not request, a jury instruction informing the jury to limit its consideration of the evidence of prior and subsequent sexual misconduct to certain issues and to not use it to infer Mr. Russell had a general propensity of raping

C.R.

The jury found Mr. Russell guilty of first degree rape of a child and found that the crime was one of domestic violence. CP 32-33.

Notice of appeal was timely filed on August 15, 2008, and September 11, 2008. CP 48, 49.

D. ARGUMENT

1. **The trial court erred in admitting evidence of alleged sexual misconduct by Mr. Russell.**

Pretrial, the State moved to introduced evidence of other alleged acts of sexual misconduct by Mr. Russell against C.R. under ER 404(b) as evidence of Mr. Russell's "lustful disposition" towards C.R. RP 15-24.

The trial court admitted this evidence without any offer of proof from the State. This was error.

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.

In *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002), the court held,

To admit evidence of other wrongs, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the

evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. In doubtful cases, the evidence should be excluded.

(internal citations omitted).

This analysis must be conducted on the record, and if the evidence is admitted, a limiting instruction must be given to the jury. *State v.*

Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

[The Court of Appeals] review[s] a trial court's evidentiary rulings for an abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.

Proctor v. Huntington, 146 Wn.App. 836, 852, 192 P.3d 958 (2008).

“Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion.” *Foxhoven*, 161 Wn.2d at 174, 163 P.3d 786.

“A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest.” *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

- a. *The trial court abused its discretion in failing to require the State to prove by a preponderance of the evidence that the acts of sexual misconduct ever occurred.*

Mr. Russell acknowledges that the Washington Supreme Court has previously held that the trial court is not required to hold an evidentiary hearing to determine whether or not the State has sufficient evidence to establish by a preponderance of the evidence whether or not alleged prior bad acts have occurred. *See State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002).

Mr. Russell also acknowledges that this court has previously held,

A trial court may determine that uncharged crimes probably occurred based solely on the State's offer of proof. And where a trial court rules on the admissibility of ER 404(b) evidence immediately after both parties have argued the matter and the court clearly agrees with one side, an appellate court can excuse the trial court's lack of explicit findings.

State v. Stein, 140 Wn.App. 43, 66, 165 P.3d 16 (2007), *review denied*, 163 Wn.2d 1045, 187 P.3d 271 (2008).

However, in both *Kilgore* and *Stein*, the offer of proof given by the State was far more detailed than the offer of proof given by the State in this case.

In *Kilgore*,

Kilgore was charged...with four counts of child molestation and three counts of rape of a child. The State alleged in the

information that Kilgore raped and molested his stepdaughter, molested two brothers-in-law, and raped and molested a step-niece.

In an offer of proof, the deputy prosecuting attorney said that Kilgore's step-niece would testify about "five or six" other incidents in which she was molested by Kilgore...Kilgore's stepdaughter, the deputy prosecutor asserted, would testify about three other incidents in which Kilgore "touched [her] privates with his hands," had her "touch his penis" and touched her "privates with his penis."...The deputy prosecutor also said that the...stepdaughter would testify about an incident where she saw pornographic materials inside Kilgore's home. Finally, the deputy prosecuting attorney averred that one of the brothers-in-law would testify about "other instances where he was touched by [Kilgore]."...According to the State, all of the evidence summarized in its offer of proof was admissible because it showed Kilgore's lustful disposition toward the victims of the charged crimes.

Kilgore, 147 Wn.2d at 290-291, 53 P.3d 974.

In *Stein*, the State presented a "detailed offer of proof" which included details of the guilty pleas of two individuals who had been charged as codefendants to Stein's prior criminal acts and a jury verdict in a civil case finding Stein had committed the criminal acts by a preponderance of the evidence. *Stein*, 140 Wn.App. 65-66, 165 P.3d 16.

Thus, the State's offer of proof in *Kilgore* contained assertions that multiple witnesses would give detailed accounts about numerous incidents, and the State's offer of proof in *Stein* included guilty pleas from

accomplices and a jury verdict establishing that Stein had committed the acts by a preponderance of the evidence. The prosecutors' offers of proof in *Stein* and *Kilgore* contain far more evidence as to the existence of the prior bad acts than did the State's offer of proof in the instant case.

Here, the State made no formal offer of proof. Rather, at pages 15-17 in the report of proceedings, the State summarized the backgrounds facts of the case, summarized the allegations of the case, informed the court that the alleged victim did not remember any sexual abuse occurring in Japan, and that the alleged victim did have a recollection of abuse occurring in Hawaii, Washington, Florida, and Indiana. RP 15-17. The State made no representations as to what testimony would be offered by any witness. The closest the prosecutor came to making a true offer of proof as to what witnesses would testify to was the prosecutor's statements that the alleged victim remembered the abuse occurring in Hawaii, Washington, Florida, and Indiana, however, the prosecutor did not lay out the details of such testimony. Further, the "proof" in the State's offer of proof was limited entirely to the prosecutor's representations of what the alleged victim remembered. No other witnesses or proof was referenced by the prosecutor.

The offers of proof provided by the State in *Kilgore* and in *Stein* were far more detailed and contained far more evidence than the offer of

proof in this case. The offers in *Kilgore* and *Stein* contained summaries of the testimony of several witnesses and details as to the contents of the witnesses' presumptive testimony. Further, the offers contained such details as statements of prior codefendants or jury verdicts. This is in stark contrast to the offer of proof in this case which contained reference to only one potential witness and no discussion of what that witness would say on the stand. The State's offer of proof, like the State's evidence of Mr. Russell's guilt, consisted entirely of the unsubstantiated accusations of a 15 year old girl regarding events which allegedly occurred beginning when she was three to five years old.

An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review.

State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991).

At best, the prosecutor's offer of proof in this case only informed the court of the legal theory under which the alleged prior bad acts was being offered: to establish Mr. Russell's lustful disposition towards the alleged victim. RP 17, 22. The State's offer failed to inform the court of the specific nature of the offered evidence and utterly failed to create an adequate record for review.

While it is true that the trial court could find that the State had

established the prior and subsequent alleged sexual misconduct had occurred based solely on the State's offer of proof, the State's offer of proof in this case was insufficient to establish the existence of these acts by a preponderance of the evidence.

b. The trial court abused its discretion in failing to identify what element of the crime the evidence of the alleged prior and subsequent sexual misconduct was relevant to proving.

As discussed above, when admitting evidence of other wrongs, the trial court must identify the purpose for which the evidence is sought to be introduced and determine what element of the crime charged the evidence is relevant to proving. *Thang*, 145 Wn.2d at 642, 41 P.3d 1159.

Here, the only purpose identified by the prosecutor for which the evidence of the alleged prior and subsequent sexual misconduct would be admissible was to demonstrate Mr. Russell's "lustful disposition" against towards C.R. RP 22. In its ruling admitting the evidence, the trial court stated,

It is probative, as the State says. It shows the progression; it shows the escalating conduct; it shows the continuing nature of the relationship on a track that can be traced. The fact that there was intercourse between these two people in Florida is, standing alone, prejudicial, but I don't think it is overly prejudicial in view of the other testimony and what happens in Indiana.

What's implicit from what's being said but not explicit is that they continued to have intercourse in Indiana when

these disclosures were taking place. And so identifying the first instant [sic] of intercourse in Florida seems to me part and parcel of the relationship. And just presenting the jury with the false impression that it started in Indiana seems a bad practice.

RP 23-24.

Thus, trial court ruled that the evidence of alleged prior and subsequent sexual misconduct was relevant to prove the nature of Mr. Russell's alleged sexual relationship with C.R., and, possibly, since the court never explicitly stated it, relevant to the issue of Mr. Russell's lustful disposition towards C.R. However, this was error since the nature of Mr. Russell's relationship with C.R. and whether or not Mr. Russell had a "lustful disposition" towards C.R. are not elements of the crimes Mr. Russell is charged with having committed.

c. *The trial court abused its discretion in finding that the evidence of alleged sexual misconduct prior to and subsequent to the alleged crimes in Washington was relevant to the crimes charged.*

ER 402 prohibits the admission of irrelevant evidence. Evidence is relevant if it has "any tendency to make the existence of any fact that is of **consequence** to the determination of the action more probable or less probable than it would be without the evidence." ER 401 (emphasis added).

Probative evidence is "evidence that tends to prove or disprove a

point in issue.” Black’s Law Dictionary (7th ed., 1999) p. 579. The probative value of evidence is directly linked to the relevance of the evidence: “To be relevant, evidence must meet **two** requirements: (1) the evidence must have a tendency to prove or disprove a fact (**probative value**), and (2) **that fact must be of consequence** in the context of the other facts and the applicable substantive law (materiality).” *State v. Rice*, 48 Wn.App. 7, 12, 737 P.2d 726 (1987) (emphasis added). Therefore, evidence that is not probative is not relevant.

Further, the true test of whether evidence of activities subsequent to a crime should be admitted is whether the evidence is necessary and relevant to prove an essential ingredient of the crime charged. *State v. Messinger*, 8 Wn.App. 829, 836, 509 P.2d 382 (1973), *review denied*, 82 Wn.2d 1010 (1973), *cert. denied*, 415 U.S. 926, 94S.Ct. 1433, 39 L.Ed.2d 483 (1974), *citing*, *State v. Lew*, 26 Wn.2d 394, 174 P.2d 291.

Mr. Russell was charged with committing rape of a child in the first degree, contrary to RCW 9A.44.073, with the aggravating factor that the crime was one of domestic violence, contrary to RCW 10.99.020.

Under RCW 9A.44.073, “A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.” Thus, the

elements of first degree rape of a child which the State must prove at trial were: (1) that Mr. Russell had intercourse with C.R.; (2) that C.R. was less than 12 years old; (3) that Mr. Russell and C.R. were not married; and (4) that Mr. Russell was more than 24 months older than C.R. Because of the domestic violence allegation, under RCW 10.99.020(5) the State had the additional burden of proving that Mr. Russell and C.R. were members of the same family or household. These were the only elements the State had to prove to the jury.

The only disputed element was whether or not Mr. Russell had intercourse with C.R. The nature of Mr. Russell's relationship with C.R. is simply not probative of that element. As discussed above, the State had failed to present sufficient evidence to establish that the alleged prior and subsequent misconduct even occurred, so the trial court was in error in finding that the alleged misconduct was probative of the relationship between Mr. Russell and C.R. Even if the State had presented sufficient evidence to establish the alleged misconduct occurred, beyond the facts that Mr. Russell and C.R. were members of the same family but were not married, the nature of Mr. Russell's and C.R.'s relationship was simply irrelevant. Similarly, whether or not Mr. Russell had a "lustful disposition" towards C.R. was also irrelevant towards any element the State had the burden of proving.

Any evidence relating to any alleged sexual misconduct prior or subsequent to any sexual misconduct occurring in Washington was simply irrelevant evidence relating to collateral events. The State's burden was to prove the crimes it alleged occurred in Washington, not to prove events which happened in other States. Even if this court find that the evidence of sexual misconduct which occurred prior to any events in Washington was admissible for purposes of showing Mr. Russell's lustful disposition towards C.R., any alleged sexual misconduct occurring after any events in Washington is highly irrelevant and inadmissible under *Messinger, supra*.

d. The trial court abused its discretion in finding that the evidence was more probative than prejudicial.

As quoted above, "A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest." *Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697.

Under ER 403, relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice."

As recognized by the court in *Saltarelli*, evidence of prior sexual misconduct is the most prejudicial evidence which can be admitted in a

trial for a sex crime, especially when the victim of the alleged prior sexual misconduct is the same as the alleged victim of the current charges. The danger that the jury would use such evidence to infer Mr. Russell had a propensity to commit the charged crime in this case was extreme. At the same time, as discussed above, the evidence of the alleged prior and subsequent sexual misconduct was wholly irrelevant to any issue before the jury. The probative value of evidence that Mr. Russell had a “lustful disposition” towards C.R. was far outweighed by the prejudice this evidence had on Mr. Russell.

For the reasons discussed above, the trial court erred in admitting the evidence of alleged sexual misconduct before and after Mr. Russell and C.R. lived in Washington.

2. The admission of the evidence of the alleged sexual misconduct deprived Mr. Russell of a fair trial.

Both the United States Constitution and the Washington State Constitution article I, section 22, guarantee the criminal defendant a fair trial by an impartial jury. *State v. Latham*, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983).

“A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

Where a defendant is denied the right to a fair trial, the proper remedy is reversal of the conviction and remand for a new trial. *State v. McDonald*, 96 Wn.App. 311, 979 P.2d 857 (1999), *affirmed* 143 Wn.2d 506, 22 P.3d 791 (2001).

ER 404(b) prohibits evidence of prior acts to prove the defendant's propensity to commit the charged crime. *See State v. Holmes*, 43 Wn.App. 397, 400, 717 P.2d 766 ("once a thief always a thief" is not a valid basis to admit evidence), *review denied*, 106 Wn.2d 1003 (1986). Substantial prejudicial effect is inherent in ER 404(b) evidence. *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995).

As discussed above, the evidence relating to the alleged sexual misconduct occurring before and after the time Mr. Russell and C.R. lived in Washington was both irrelevant and highly prejudicial. Despite this, the trial court admitted this evidence under ER 404(b) on the basis that it was probative of Mr. Russell's "lustful disposition" towards C.R.

In this case, especially, it is difficult to distinguish the inference that Mr. Russell had a "lustful disposition" towards C.R. from the inference that "Mr. Russell molested C.R. before and after they lived in Washington, so he probably did it while they lived in Washington." This is precisely the propensity inference ER 404(b) prohibits, yet it is the only inference possible which can possibly be drawn from the evidence of the

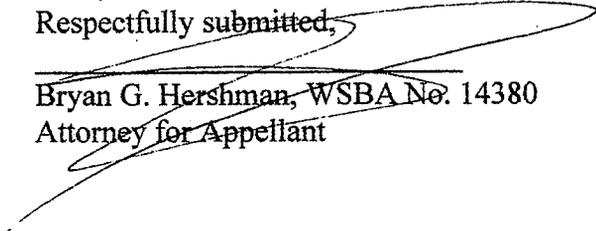
alleged prior and subsequent sexual misconduct. Hearing this evidence, the jury almost certainly drew the inference that, because Mr. Russell molested C.R. before and after they lived in Washington, Mr. Russell molested C.R. while they lived in Washington. The likelihood that the jury drew this impermissible propensity inference is heightened by the fact that the trial court did not give, and defense counsel did not request or propose, a limiting instruction. The absence of an instruction properly limiting the purposes for which evidence of the alleged prior and subsequent sexual misconduct could be used left the jury free to draw the prohibited propensity inferences from this evidence. Thus, the erroneous introduction of this irrelevant yet highly inflammatory evidence deprived Mr. Russell of his right to a fair trial.

E. CONCLUSION

For the reasons stated above, this court should vacate Mr. Russell's conviction and remand the case for a new trial. Parenthetically, the evidence in this case was as "thin" as it could have been. Appellant believes this heightened the prejudice associated with the subject error set forth in this brief.

DATED this 20th day of March, 2009.

Respectfully submitted,


Bryan G. Hershman, WSBA No. 14380
Attorney for Appellant

FILED
COURT OF APPEALS
DIVISION II

09 MAR 26 PM 2:00

STATE OF WASHINGTON

BY Cm
DEPUTY

**IN THE UNITED WASHINGTON STATE COURT OF APPEALS
DIVISION II, SITTING IN TACOMA**

STATE OF WASHINGTON,

NO. 38233-4-II

Respondent,

**CERTIFICATE OF SERVICE,
RE: APPELLANT'S OPENING BRIEF**

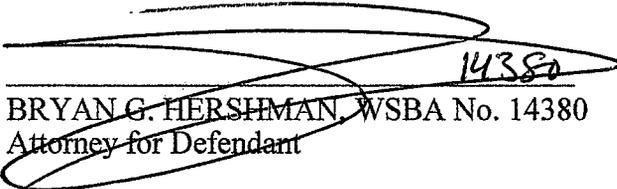
v.

ARTHUR RUSSELL,

Appellant.

THIS IS TO CERTIFY that copies of Appellant's Opening Brief, has been mailed to the Appellant ARTHUR RUSSELL DOC# 319357, at the Washington Corrections Center, W. 2321 Dayton Airport Rd., Post Office Box 900, Shelton, WA. 98584.

DATED at Tacoma, Washington, this 23rd day of March, 2009.


BRYAN G. HERSHMAN, WSBA No. 14380
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RE: APPELLANT'S OPENING BRIEF - 1**

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