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NO. 62229-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH GLEN BLUE,

Appellant.

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

The Honorable Vickie I. Churchill, Judge
Superior Court Cause No. 07-1-00200-7

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES

1. Did the trial court abuse its discretion in admitting evidence of prior acts of sexual abuse, pursuant to ER 404(b)?

SHORT ANSWER: No. The evidentiary ruling was a proper exercise of the trial judge's discretion.

2. Should the conviction for second degree assault be vacated because it merged with the first degree rape conviction?

SHORT ANSWER: Yes. THE STATE CONCEDES that, if the rape conviction is upheld, the second degree assault conviction must be vacated.

3. Should the defendant have been ordered to reimburse the County for the cost of his court-appointed attorney?

SHORT ANSWER: Yes. Such an order is permitted under RCW 10.01.160.

4. Should the defendant have been ordered to pay the costs of crime-related counseling and medical treatment of the victim, where no restitution order was entered or reserved?

SHORT ANSWER: No. THE STATE CONCEDES that condition number 3 of Appendix A to the Judgment and Sentence should be stricken.

5. Should the defendant have been prohibited from holding a position of fiduciary responsibility?

SHORT ANSWER: No. THE STATE CONCEDES that condition number 8 of Appendix A to the Judgment and Sentence should be stricken.

II. STATEMENT OF THE CASE

A. Substantive Facts

Mr. Blue, in his opening brief, asserts the facts largely from the perspective of the defendant's witnesses. To the extent that he cites testimony from the State's witnesses, he couches their statements in words like "alleged," "reportedly," "claimed," and "in spite of" the testimony of Blue's witnesses. Here, a jury convicted Mr. Blue of the two counts charged – rape in the first degree and assault in the second degree – so it is reasonable to conclude the facts the jury found were those that supported the State's theory of the case. The Court should be reluctant to rely on Mr. Blue's Statement of the Case.

Jessica (Smith) Clark met Joseph Blue in May, 2006. RP 77. They began dating, and eventually took up residence together in the spring of 2007. RP 79-80. The relationship was sporadic, and characterized by

increasing abuse and control on the part of Mr. Blue. RP 80-84. He alternated between belittling her, and being “sweet” to her. *Id.*

On the night of August 18, 2007 and morning of August 19, 2007, the defendant raped, beat, and strangled Ms. Clark. Blue had suffered a fracture of his right arm on August 17, and it was placed in a “sugar tong” splint. RP 650-655. Blue was taking prescription Vicodin for his pain. RP 92. In addition, he was smoking marijuana and drank two 40-ounce malt liquors. RP 95-97. He also admitted to Clark that he had used cocaine that night. RP 107. Clark went out to buy wine and cigarettes. When she returned, Blue was suspicious that she had gone out to meet another man. RP 99-101. Blue then searched the call logs of her cell phone. RP 101-04. Blue interrogated Clark about whether she had talked to her ex-husband. RP 110. Blue had forbidden Clark from talking to him. RP 103, 688-89.

Blue had been trying to get Clark to watch a pornographic movie with him, and suggested that he would like to engage in a sexual “threesome” with her and another woman. RP 127-30. He also suggested to her that he would enjoy “rough sex.” RP 108-109, 124-27. The two had never engaged in consensual “rough” sex. RP 127-28. Blue told Clark that he wanted her to use a perfume bottle as a dildo. RP 110. She refused, which agitated him. *Id.* Shortly after, they argued about her not filling his

pipe with marijuana, as he had demanded, and he hit her across the face with his uninjured left hand. RP 111-12. He then held her on the ground by kneeling on her, and used his right elbow and forearm to hold her down, while squeezing her throat with his left hand. RP 114. She could not breathe. He told her she was a “bitch” and a “whore” and that he was “disgusted” by her.

Blue took Vicodin several times during the course of the attack, repeatedly hit her, pulled her hair, and bit her multiple times, leaving bite marks and drawing blood from her right ear. RP 133-140, 462. He urinated on her head while standing over her. RP 133-140. Clark was five foot and four inches tall, and weighed about 125 pounds. Blue, was approximately six feet tall, and weighed 260 pounds. RP 139.

Blue forced Clark to perform oral sex on him. RP 141. Afterward, he continued to hit her, and at one point, pushed his thumbs into her eye sockets. RP 141-144. Around dawn, Blue tried to penetrate her vaginally from behind, while pushing her face into a pillow. RP 144. When she struggled, he hit her again, and strangled her again until she briefly lost consciousness. RP 145. Throughout the attack, he called her demeaning names. RP 149-50. He forced her to take some of his Vicodin. RP 148.

In the morning, Clark told Blue that her grandmother was on her way to the apartment, to drop off Clark's children. RP 152. Blue quickly made arrangements to get picked up by his brother, and instructed Clark to apply make-up to her face to cover her injuries. RP 154. After Blue left, Clark called her mother and her grandmother, and told her Blue had beat her. RP 156, 460-61. Clark's mother instructed her to call 911, which she did. RP 159-60. Her grandmother drove to Clark's apartment, and then took her to the hospital after police arrived. (Clark declined to travel by ambulance). RP 462-63, CP 194 (transcript of deposition of Officer Clements).

Clark's injuries were corroborated by photographs RP 166-188. (Ex 25, 31, 34, 53, 38, 54, 55, 57, 58) and the testimony of Officers Porter (RP 365-383) and Clements (CP 172-205), and emergency room doctor Bruce Waterman, M.D. (RP 405-432). Clark's hair "scrunchie" tested positive for chemicals indicating the presence of urine, and for DNA that came from Blue. RP 566-579.

Blue denied assaulting or raping Clark when questioned by police. CP 192-194. Blue told Officer Clements that biting was part of consensual sex, and that Clark must have given herself a black eye. CP 193.

He told Detective Gardner that Jessica had no injuries when he left the apartment. RP 694. He later told Detective Teri Gardner:

Now, I can go ahead and say the bite marks, sure I can see myself maybe blanking out with pills on board and two forties on board, or her messing around me. I can see kinda' fucking sloppily, 'Going oh yeah, okay baby.' And maybe biting her a little than I had thought of. Now I've never done the whole back thing. But, again, I'm the only one there."

RP 699-700.

B. Facts Presented At Pre-Trial Motion To Admit Prior Rape Evidence Under ER 404(b)

The State presented evidence via police reports and declarations of Blue's two previous victims, Katherine Barella and Amy Banta, in its motion to admit evidence of their rapes by Blue. CP 348-396. The State also made an offer of proof of a prior incident of strangulation of Jessica Clark when she refused to perform oral sex on Blue. *Id.*

Katherine "Katie" Barella (formerly known as Katherine Johnson and Katherine Blue) was married to the defendant for approximately four months in Ft. Collins, Colorado in 2005. Ms. Barella told Detective Gardner that Mr. Blue first assaulted her about a week into their marriage by grabbing her and throwing her up against a wall.

Barella said the second time he assaulted her he “beat the crap out of her” and then slammed her hand in a car door, breaking it, causing permanent damage. Police reports from that incident indicate that Mr. Blue had hit her, and pushed her to the ground. She said that he dragged her into the truck. When she tried to escape, he pulled her back in by her hair, and called her names, like “whore.” When she finally got out of the truck, he slammed the door on her hand that was holding onto the door frame. CP 361-371.

In the attack that ended their relationship, Ms. Barella said he put a pillow over her face and tried to smother her. She described an incident where she had declined to accept a drink from the defendant, then later accepted a margarita from a mutual male friend, sending the defendant into a fit of jealous anger. He held her down on their bed, and he covered her mouth and nose. He then held a pillow over her face to smother her. She believed he was going to kill her. He would not let her leave that night. The next day, she escaped, and never returned to him. She reports that during her relationship with him, he called her names like “slut,” “bitch,” “cunt,” and “whore.” She reports that he would often force sex on her. According to police reports, the smothering incident occurred on September 12, 2005. CP 361-65, 372-80

Amy Banta reported to Detective Gardner that she met Blue when she was 15 and he was 14 years old. Blue and Banta conceived a child together, and in 2002 moved to Arizona. On July 31, 2003, they had been at a bar and argued over Mr. Blue inviting other women to their house to set them up with his cousin. CP 381-96.

When they returned home, he began to hit her. She tried to escape, and he banged her head into the wall so hard it left a 4x5" indentation in the wall, according to police reports. CP 385. There was blood spatter on the wall from where her head hit. Ms. Banta and Mr. Blue both reported he was very intoxicated, and had vomited several times on the way home from the bar. Ms. Banta reported that he had punched her in the head. She said Blue then got her on the floor, and choked her until she lost consciousness. Ms. Banta told Detective Gardner that he poured water on her to revive her, and then raped her. Police reports indicate that Blue told Banta to clean the blood off of her face. CP 385-96. She said she had not reported the rape to Phoenix police at the time. CP 381-84.

After forcing himself on her, Blue became ill and vomited. Ms. Banta used this chance to escape, and bolted naked from the house. Blue later told police that Ms. Banta had "flipped out" and that he had not done anything wrong. Ms. Banta reports that Blue frequently called her

demeaning names like “bitch” and “cunt” and that he would force her to perform oral sex on him. CP 381-96.

Blue concedes that “with minor exceptions, Clark, Barella and Banta testified consistently with the state’s offer of proof in its motion in limine.” App Br. at 21. Blue does not challenge the facts as set forth in the trial court’s ruling on the ER 404(b) motion. CP 300, 302.

III. ARGUMENT

A. The Trial Court Acted Within Its Discretion When It Admitted Evidence Of The Defendant’s Prior Acts Of Abuse Under ER 404(b).

“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.” ER 404(b). This is not an exclusive list. Here, the trial court found the evidence of Blue’s prior sexual assaults was relevant to prove a common scheme or plan, motive, and absence of mistake or accident. CP 306.

To justify the admission of prior acts under ER 404(b) there must be a showing that (1) the evidence serves a legitimate purpose, (2) the

evidence is relevant to prove an element of the crime charged or to rebut a defense, and (3) the probative value outweighs its prejudicial effect. *State v. Magers*, 164 Wn.2d 174, 184, 189 P.3d 126, 132 (2008); *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). Evidence is relevant if it has a tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401.

A trial court's decision to admit the evidence is reviewed for an abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119, 123 (2003)(citing *State v. Lough*, 125 Wn.2d 847, 856, 889 P.2d 487 (1995)). "An abuse of discretion occurs when the trial court bases its decision on untenable grounds or exercises discretion in a manner that is manifestly unreasonable." *State v. Zunker*, 112 Wn.App. 130, 140, 48 P.3d 344 (2002) (citing *State v. Valdobinos*, 122 Wn.2d 270, 279, 858 P.2d 199 (1993)), *review denied*, 148 Wn.2d 1012, 62 P.3d 890 (2003).

Here, *Lough* and *DeVincentis* are directly on point. In both cases the Supreme Court upheld the admission of evidence that the defendant had committed similar acts of sexual violence against other victims because such acts were part of a common scheme or plan. Both cases recognized that there are two different types of "plans" that are within the

ambit of ER 404(b). One involves multiple crimes that constitute parts of a larger, overarching criminal enterprise, in which the prior acts are causally related to the crime charged. *Lough*, 125 Wn.2d at 855. The second type of common scheme or plan, the type relevant to this case, concerns prior acts as evidence to use a single plan repeatedly to commit separate, but very similar crimes. *DeVincentis*, 150 Wn.2d at 18-19.

The Supreme Court recognized that a trial court's discretionary decisions regarding this type of evidence will be very fact-specific. *Lough*, 125 Wn.2d at 856. The Court went so far as to examine the facts of cases from other jurisdictions in deciding *Lough* and *DeVincentis*.

The *DeVincentis* court emphasized that the prior crime need not be identical, or that the similarities between the crimes be unique to the crime, or even uncommon. *Id.* The defendant in *DeVincentis* was charged with second degree rape of a child and second degree child molestation. In 1998, he had enticed a 12-year-old girl, K.S., who was friends with DeVincentis' neighbor, to mow his lawn and clean his house for money. When she showed up to clean his house, DeVincentis would remain in the house, wearing nothing but bikini underwear, or a g-string. Eventually, he convinced the victim to give him a massage, followed by him massaging her unclothed body. This led to sexual activity on more than one occasion

where K.S. masturbated the defendant, and DeVincentis digitally penetrated her vagina, and rubbed her breasts.

At trial, the State sought to admit evidence that, in 1983, DeVincentis had made it a practice to wear nothing but bikini underwear or g-string when his daughter's 10-year-old friend, V.C., was visiting, which she did several nights a week. V.C. testified that she became used to DeVincentis' appearance in bikini underwear. Eventually, DeVincentis started showing her pornographic images. On one occasion, DeVincentis massaged this girl while she was sitting between his legs on a rowing machine. V.C. testified that she felt DeVincentis' erect penis against her back, and that he put his hand in her "private areas."

The trial court ruled that the prior acts in 1983 were sufficiently similar to support a common scheme or plan. In particular, the court found that he wore bikini underwear to desensitize the girls to his nearly naked appearance, making it easier to move from nudity to skin-to-skin contact, to sexual activity. *Id.* at 16. The court found this evidence relevant to whether he had sexual contact with K.S. The Court of Appeals affirmed.

The Supreme Court affirmed the Court of Appeals, rejecting a decision from Division Two that suggested the common attributes of the

crime also had to be unique to the particular defendant's method of committing the crime. *Id.* at 21. Uniqueness is only relevant when identity is at issue. *Id.* The Supreme Court concluded:

In sum, admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. Such evidence is relevant when the existence of the crime is at issue.

DeVincentis, 150 Wn.2d 11, 21 (citing *Lough*).

In *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995), the defendant was charged with surreptitiously drugging and raping the victim, identified by her initials, "P.A." The Court affirmed a trial court ruling allowing the admission of testimony by four other women who said that, while they had been in relationships with the defendant, he had given them a drink, and shortly afterward they became unconscious. In each of these incidents, which occurred over a ten-year period, the victims reported that when they regained consciousness, they were suffering pain and bleeding in their anuses. The defendant denied drugging any of them, and denied having sex with three of them. He admitted to having had consensual anal intercourse with one of them. None of the four women, or P.A. knew each other.

P.A., the victim in the charged crime, reported that she and the defendant had met at her house to watch a rented video together. She said

that after she drank a drink he had mixed for her, she became disoriented and confused. She had vague memories of sexual contact. She awoke naked from the waist down, and found her pants and underpants folded on the arm of the sofa. The defendant claimed he had consensual sexual intercourse with P.A.

The Supreme Court ruled 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.” *State v. Lough*, 125 Wn.2d 847, 852 (1995). The court identified the common plan as “[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.

Here, it is the existence of the crime that is at issue. The common plan and the motive is the control of Blue’s romantic partners by violence and psychological abuse. Like sex crimes against children, sexual assaults against a person’s romantic partner are necessarily committed behind closed doors. Moreover, they are far outside the common experience and understanding of ordinary people. Like sex crimes against children, strangulation and sexual assaults against romantic partners often come down to questions of the victim’s credibility. Even if there is physical

evidence, a claim of consent focuses the entire case on the credibility of the victim. Thus, like *DeVincentis* and *Lough*, the prior acts are highly relevant to prove the existence of the crime.

Courts should apply “common sense” in considering the admissibility of “other acts” evidence as evidence of a common scheme or plan, especially in sexual crimes. *DeVincentis*, 150 Wn.2d at 24-25. The *DeVincentis* court recognized that in many sex crime cases, “the doing of the act is difficult to prove.” *Id.* In *DeVincentis* and *Lough*, the Supreme Court relied on the following quote from Wigmore’s treatise on evidence:

The committing of a single previous rape, or rape attempt, upon another woman may not in itself indicate such a design.... Nevertheless, a single previous act, even upon another woman, *may*, with other circumstances, give strong indication of a design (not a disposition) to rape.... Courts have shown altogether too much hesitation in receiving such evidence. Even when rigorously excluded from any bearing it may have upon character ..., it may carry with it great significance as to a specific design or plan of rape.... There is room for much more common sense than appears in the majority of the rulings.

2 John H. Wigmore, *Evidence* § 357, at 335-42 (James H. Chadbourn rev. ed. 1979).¹

¹ The Washington Legislature has taken a common sense approach to expanding the admissibility of prior sex offenses. It enacted Laws 2008 Ch. 90, which became effective one month before the trial of this matter. Now codified as RCW 10.58.090, the statute provides that in a sex crime trial, “evidence of the defendant’s commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b)...” There

The Court's "reliance on this passage reflects [its] concern that trial courts give special consideration to the probative value of such evidence when balancing against the prejudicial effect of such evidence, especially when corroborating evidence is not available." *DeVincentis*, 150 Wn.2d at 25.

In the instant case, the trial court made findings that the prior incidents did occur by a preponderance of evidence. CP 305. Blue does not challenge that finding on appeal. The trial court concluded that they were properly admitted to show (1) a common scheme or plan, (2) motive, and (3) absence of mistake or accident. CP 306. The trial court found the acts were relevant to prove the existence of the crimes charged, since they were allegedly committed behind closed doors, and "become a credibility issue as to which romantic partner is telling the truth." CP 307.

The trial court did not abuse its discretion in reaching these conclusions. These grounds are not untenable, and the court's justification is not manifestly unreasonable. To the contrary, the court's ruling is consistent with recent developments in this area of evidentiary law.

The trial court went to great lengths to discuss the similarities between events, including a spreadsheet showing each incident. CP 308-

are factors a trial court must consider, and the evidence must not be inadmissible under ER 403.

311. Here, the similarities in the events, are inextricably wrapped up in the defendant's common scheme and his motives: he used violence and intimidation to control his romantic partners when he felt the status quo of their relationship was threatened. The tactics he used were the same: creating the fear of death (and his control over their lives) through suffocation, the use of demeaning names, physical violence, and ultimately rape. In each case, he applied the combination of all four avenues of control and subjugation.

That is the common plan he used in these three similar acts. Blue asserts that the use of the "commons scheme or plan" exception requires proof of premeditation, and aforethought. App. Br. at 27. His is too narrow a reading of ER 404(b), and out of step with the direction the courts have taken in applying the rule in light of Wigmore's observations. Moreover, in each of the incidents in this case, Blue's acts were not a simple "explosive" reaction, but an extended series of events involving physical brutality, strangulation or suffocation, demeaning verbal abuse and sexual assault, all administered over the course of hours.

Blue used a common scheme or plan to respond to a problem he perceived in his relationship, just as *Lough* and *DeVincentis* used a common scheme to respond to their abnormal sexual drives. The degree

of “aforethought” that went into the plan is not a consideration in determining the admissibility of the evidence. The point of the rule is to ensure that juries have a complete picture of all the evidence. It is especially probative in cases where consent is a defense and where there are unlikely to be eye witnesses.

In this case, the difference between “motive” and “common scheme or plan” admittedly is not sharply defined. It is the motive that drives his similar acts, and the acts that reveal his motive. That is the common thread between this case, and the *Lough* and *DeVincentis* cases. There, of course, the cases involved a purely sexual motivation. Here, the motive is more obviously about feelings of jealousy and loss of control over his romantic relationships. All three cases involve crimes of an intimate nature: crimes that are hidden from the light of day, from eye witnesses, and in the case of *Lough* and *Blue*, crimes for which consent may be a defense.

It is only by seeing other examples of the defendant’s behavior that a jury can evaluate whether he was motivated by lawful sexual desire, or unlawful violation of the victim’s personal security. It is only by hearing this evidence, that a jury may reliably evaluate *Blue*’s claim that any sexual acts were consensual, and part of their established romantic

relationship. This evidence was necessary in this case, as it was in *Lough*, to permit the jury to make a reliable evaluation of those competing claims.

Besides being admissible as evidence of motive and a common scheme or plan, the evidence is also admissible to rebut Blue's claim of accidentally biting Clark. When considering the evening's brutality as a whole, the biting was simply one of the many ways he inflicted pain on Clark. Because of his broken arm, he could not inflict the same kind of beating he delivered to Banta and Barella. Though Blue's claim that Clark inflicted some injuries on herself is not literally a claim of mistake or accident, it is another reasonable application of ER 404(b). The same logic that would permit prior bad acts evidence to rebut a claim of accident ought to also admit the evidence to rebut a claim of self-infliction by the victim. Such evidence is highly probative, and allows the jury to make a more informed decision.

It should be noted that the trial court made these same evaluations, in balancing the probative value of the evidence versus the prejudicial effect. In this case, she reasonably concluded that the probative value outweighed its prejudicial effect because of the defenses that had been, and would be asserted in a sex crime prosecution.

B. The State Concedes The Conviction For Assault In The Second Degree Merges With The Rape Conviction.

If the Court upholds the conviction for rape in the first degree, the State concedes the crimes merge, and the assault conviction must be vacated. *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2006); *State v. Johnson*, 92 Wn.2d 671, 600 P.2d 1249 (1979), *disapproved on other grounds*, *State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999).

C. The Order To Reimburse The County For Costs Of Court Appointed Attorney Is Appropriate.

A court may order a criminal defendant to pay costs incurred by the State in prosecuting the defendant. RCW 10.01.160. Costs may include recoupment of the expense of court-appointed counsel. *State v. Barklind*, 87 Wn.2d 814, 817, 557 P.2d 314, 317 (1977)(citing *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974)).

Blue claims the order of recoupment violates his due process rights, because the trial court did not make an inquiry into his ability to pay. Blue's complaint is premature. "Constitutional principles will be implicated ... only if the government seeks to enforce collection of the [costs] 'at a time when [the defendant is] unable, through no fault of his own, to comply.'" *State v. Crook*, 146 Wn.App. 24, 27, 189 P.3d 811, 812 - 813 (2008)(internal citations omitted). "[C]ommon sense dictates that a

determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer.” *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213, 1220 (1997). The trial court did not err in ordering Blue to pay the costs of his court-appointed counsel.

D. The State Concedes That Two Of The Conditions Of Blue’s Sentence Were Not Authorized By Law.

An appendix to Blue’s judgment and sentence says he should pay the costs of crime-related counseling and medical treatment of the victim. No costs were ordered, as the victim did not seek any restitution. The State has no objection to striking that provision, and would have agreed to it had the matter been raised in the trial court.

Likewise, that State agrees that there is nothing in the crimes for which Blue was convicted to indicate he should be specifically prohibited from employment in a position of fiduciary responsibility.

IV. CONCLUSION

For the reasons set forth above, the State urges this court to affirm the trial court’s admission of evidence of Mr. Blue’s prior sexual misconduct, and affirm his conviction for rape in the first degree. In

addition, Mr. Blue should continue to be responsible for the costs of his defense.

Respectfully submitted this 31st day of August, 2009.

ISLAND COUNTY PROSECUTING ATTORNEY



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