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NO. 64340-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY C. WINFORD,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

In a prosecution for child molestation, is the defendant entitled to introduce evidence that he did not molest three girls other than the victim?

II. STATEMENT OF THE CASE

The Y. family owned camping property at Lake Connor Park. The Hurst family owned adjacent property. Ten-year-old S.Y. was a close friend of 11-year-old Dylan Schmid (the son of Lacey Hurst). The defendant, Anthony Winford, was also a friend of the Hursts. 8/18 RP 13-15, 58-61.

On February 13, 2009, the defendant visited the Hursts. S.Y. also came over to spend the night. Over the course of the evening, the defendant drank around 10 shots of tequila. He appeared drunk. 8/18 RP 44, 73.

S.Y. went to sleep on a "couch bed" with Dylan. The defendant went to sleep on a bunk bed. Some time during the night, the defendant came over and moved her feet, allowing him to sit down on the couch. He touched her on her butt, outside of her clothes. He then put his hand up her shirt, half way up her boobs. She moved his hand, and he went back to bed. 8/18 RP 26-27.

Around five minutes later, the defendant came over again and started rubbing her legs. He lifted up her pants and panties and touched her on her bare crotch. He rubbed her there for “about five minutes.” Then he went back to bed. 8/18 RP 27-29.

In the morning, S.Y. reported these events to Lacey Hurst. Ms. Hurst called S.Y.’s parents, who contacted police. 8/18 RP 70; 8/18 RP 98.

The defendant testified that he had been drinking tequila. He didn’t remember going to sleep. His next recollection was waking up the next morning. 8/19 RP 164-65.

The defendant was charged with first degree child molestation. CP 27-28. At trial, he sought to introduce character evidence. There are conflicting decisions on the admissibility of such evidence. Compare State v. Jackson, 46 Wn. App. 360, 365, 730 P.2d 1361 (1986) (evidence of sexual morality inadmissible) with State v. Griswold, 98 Wn. App. 817, 828-29, 991 P.2d 657 (2000) (per dicta, evidence of sexual morality admissible). In view of this conflict, the court decided that “the prudent thing is to allow character evidence.” The court limited this, however, to evidence of the defendant’s reputation. 8/19 RP 15. Based on this ruling, a witness testified that she had lived on a naval base with the

defendant from 2001 to 2003. During that time, the defendant had a good reputation for sexual morality. 8/19 RP 48-54.

The defendant offered the testimony of two other witnesses. One of these had been a friend of the defendant's daughter from 1999 (when she was 14) until 2003. She would testify that the defendant never acted towards her in a sexually inappropriate manner. 8/19 RP 68-72. The other witness was the defendant's wife. She had known the defendant for three years. She had two daughters, who were 15 and 17 years old when she met the defendant. She would testify that her daughters never complained about the defendant's behavior. 8/19 RP 76-79.

The defense argued that this testimony was admissible as both opinions of the defendant's character and specific incidents of his good conduct. 8/19 RP 12-14, 18-19, 81-83. The court ruled that neither of these kinds of evidence was admissible. The court also ruled that after reputation evidence had been admitted, other character evidence was cumulative.¹ The court therefore rejected

¹ The defendant's brief claims: "The trial court properly found this evidence of Mr. Winford's sexual morality was relevant." In support of this statement, the brief cites "8/15/09 RP 15; 8/19/09 RP 85." Brief of Appellant at 5-6. There is no "8/15/09 RP" – the trial began on August 17. In the portion of the court's ruling on 8/19 RP 85, there is no reference to the evidence being relevant. On the

the offer of proof. 8/19 RP 85-86. The jury found the defendant guilty as charged. CP 5.

III. ARGUMENT

A. BECAUSE SEXUAL MATTERS ARE SECRET AND NOT REFLECTED IN A PERSON'S REPUTATION, EVIDENCE OF CHARACTER WITH REGARD TO SEXUAL MATTERS IS INADMISSIBLE UNDER ER 404.

The defendant sought to introduce evidence of his character for sexual morality. The trial court allowed testimony concerning his good reputation. The court refused, however, to allow testimony that he had not molested three specific girls. On appeal, the defendant challenges the rejection of this evidence.

The trial court's ruling should be upheld for two reasons. First, evidence of the defendant's character sexual morality is not admissible at all in a prosecution for child molestation. Second, even if such evidence is admissible, the defendant's character cannot be proved by specific instances of good conduct.

Admissibility of character evidence is governed by ER 404(a):

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

following page, the court refers to the *opinion* evidence as "arguably helpful to the trier of fact" but cumulative. 8/19 RP 86.

(1) *Character of Accused*. Evidence of a pertinent trait of character offered by an accused. . .

Applying this rule, this Division has held that sexual morality is not a “pertinent trait of character” in a prosecution for child molestation.

The crimes of indecent liberties and incest concern sexual activity, which is normally an intimate, private affair not known to the community. One’s reputation for sexual activity, or lack thereof, may have no correlation to one’s actual sexual conduct. Simply put, one’s reputation for moral decency is not pertinent to whether one has committed indecent liberties.

Jackson, 46 Wn. App. at 365.

In Jackson, this court considered and rejected contrary dicta in a Division Two decision. Id., citing State v. Harper, 35 Wn. App. 855, 859-60, 670 P.2d 296 (1983), review denied, 100 Wn.2d 1035 (1985). Subsequently, Division Three has, in dicta, indicated its agreement with Harper and disagreement with Jackson. Griswold, 98 Wn. App. at 828-29. Neither Harper nor Griswold, however, refutes the central point raised in Jackson: that a person’s reputation on sexual matters often bears no relationship to the person’s actual conduct. The dicta from the other divisions provide no reason for this decision to overrule its decision in Jackson.

Under Jackson, the defendant in the present case should not have been allowed to present character evidence at all. Relying on Griswold, the trial court nonetheless allowed evidence as to the defendant's reputation. 8/19 RP 15. The defendant thus received the benefit of more evidence than he was entitled to. The trial court properly rejected additional evidence relating to specific instances of conduct.

B. EVEN IF CHARACTER IN SEXUAL MATTERS IS ADMISSIBLE, UNDER ER 405 IT CANNOT BE PROVED BY SPECIFIC INSTANCES OF CONDUCT.

Even if the defendant's character for sexual morality is considered admissible under ER 404, the method of proof is limited by ER 405:

(a) Reputation. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Under this rule, character can ordinarily be proved only by reputation. The rule does not allow criminal defendants to prove their good character by showing specific instances of conduct.

State v. Mercer-Drummer, 128 Wn. App. 625, 630-32 ¶¶ 15-20, 115 P.3d 454 (2005), review denied, 156 Wn.2d 1038 (2006); State v. O’Neill, 58 Wn. App. 367, 793 P.2d 977 (1990).

The defendant nonetheless claims that he was entitled to introduce specific instances of conduct under ER 405(b). That rule only applies when character is an “essential element” of a charge or defense.

In criminal cases, character is rarely an essential element of the charge, claim, or defense. For character to be an essential element, character must itself determine the rights and liabilities of the parties.

State v. Kelly, 102 Wn.2d 186, 196-97, 685 P.2d 564 (1984) (citations omitted). In Kelly, the court held that the defendant’s claim of self-defense did not allow the prosecutor to introduce specific incidents of the defendant’s conduct. Although the standard for self-defense may involve some consideration of the defendant’s character, “character is not itself an essential element of a self-defense claim.” Id. at 197.

In the present case, the State charged the defendant with molesting a particular child. His “defense” was a denial of this charge. His character was not *essential* to either the charge or the “defense.” He could have been a person of previously unsullied

character, who had never done another wrongful act in his life – but if he molested this child on this occasion, he was guilty. Conversely, he could have been a person of atrocious character, who had molested hundreds of children – but if this child was not one of them, he was not guilty. Since character was not an “essential element,” specific incidents of conduct were inadmissible under ER 405(b).

C. SINCE CHARACTER EVIDENCE HAS MINIMAL PROBATIVE VALUE AND STRONG POTENTIAL FOR PREJUDICE, THE LIMITATIONS ON SUCH EVIDENCE IN ER 404 AND 405 ARE CONSTITUTIONALLY VALID.

The defendant also contends that he has a constitutional right to present evidence of his specific instances of good conduct.

The defendant’s right to present evidence is not absolute:

Defendant’s have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence. If relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. The State’s interest in excluding prejudicial evidence must also be balanced against the defendant’s need for the information sought, and relevant information can be withheld only if the State’s interest outweighs the defendant’s need.

State v. Jones, 158 Wn.2d 720 ¶ 10, 230 P.3d 576 (2010) (court’s emphasis, citations omitted). In determining whether the evidence is unduly prejudicial, the court should consider whether the

evidence “may confuse the issues, mislead the jury, or cause the jury to decide the case on an improper or emotional basis.” State v. Hudlow, 99 Wn.2d 1, 13-14, 659 P.2d 514 (1983).

Applying similar constitutional standards, courts in other jurisdictions have upheld rules similar to ER 405. For example, the Supreme Judicial Court of Maine held that the defendant in an assault case had no constitutional right to present evidence of specific instances of his good conduct:

The constitutional right does not guarantee unrestricted admission in evidence of all type of character-reference material supportive of the accused, anymore [*sic*] than a defendant’s constitutional right to confront and impeach the witnesses against him warrants unrestrictive admission in evidence of all materials of an impeaching nature.

...

The following considerations served to compel the imposition of judicial strictures upon the admissibility of character evidence in a criminal trial: 1) ... evidence of good character presented by the defendant might infuse into the case an excess of sympathy in his favor; 2) such evidence, when viewed in the overall aspect of proof and disproof, has a tendency to create a side issue with resulting distraction and confusion among the members of the jury; 3) the likelihood of substantial extension of judicial time merely in the development of the issue, and 4) the risk of unfair surprise to either of the parties unprepared to meet a somewhat collateral issue.

State v. Wells, 423 A.2d 221, 233 (Me. 1980).

Similarly, the Wisconsin Court of Appeals upheld the exclusion of specific instances of the complaining witness's false statements in a prosecution for child molestation:

Character evidence is of very slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of the fact to reward the good and to punish the bad because of their respective characters despite what the evidence in the case shows actually happened.

State v. Evans, 187 Wis.2d 66, 522 N.W.2d 534, 560 (Wis. App.), review denied, 527 N.W.2d 334 (Wis. 1994). Because the rules governing character evidence bar "potentially prejudicial evidence of little probative value," enforcement of those rules do not infringe on any constitutional right. Id., 522 N.W.2d at 560-61.

In the present case, the evidence offered by the defendant was not even minimally relevant. In essence, he offered to prove that he had known three girls and not molested them. 8/18 RP 68-72, 77-79. These girls were 14 to 17 years old when he met them, substantially older than the 10-year-old victim in this case. Additionally, with respect to two of the girls, the proffered witness

did not even have personal knowledge – she could only testify that the girls had not *reported* any abuse. 8//19 RP 78-79.

The testimony of these witnesses had no bearing on the crime charged. Few things are more idiosyncratic than sexual attraction. It depends on many factors, including age, appearance, and personality. Furthermore, attraction does not always give rise to sexual behavior. Behavior as well depends on numerous idiosyncratic factors, including the nature of the relationship and the degree of any intoxication. If a man fails to make sexual advances towards a particular female, that failure tells nothing about whether he engaged in sexual behavior with some other female on a different occasion.

Even if this evidence were considered to have some slight relevance, its probative value is far outweighed by the prejudicial factors identified in Evans and Wells: confusion of the issues, waste of time, and generating undue sympathy for the defendant. ER 404 and 405 are constitutionally valid.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on September 16, 2011.

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