68429-9

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NO. 68429-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

HAROLD DONALD,

Appellant.

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

The Honorable Michael Hayden, Judge

REPLY BRIEF OF APPELLANT

JENNIFER L. DOBSON
DANA M. NELSON
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

APPELLANT WAS DENIED HIS RIGHT TO PRESENT A COMPLETE DEFENSE.

In his opening brief, appellant Harold Donald asserts his constitutional right to present a defense was infringed upon when the trial court excluded reverse 404(b) evidence that was offered in support of Donald's "other suspect" defense. Brief of Appellant (BOA) at 9-26. In response, the State begins by redirecting the issue away from the threshold constitutional question presented by Donald, thus, urging a lower standard of review. Brief of Respondent (BOR) at 14-22.

The State suggests the central issue presented here is whether the trial court abused its discretion when applying ER 404(b). BOR at 14-15. This misses the point. The heart of the debate over reverse 404(b) evidence – and the threshold question here – is whether a criminal defendant's constitutional right to present a complete defense is violated when the trial court uses 404(b) to exclude reverse 404(b) evidence that is offered by a defendant as a means of negating his guilt. As such, this case involves a question of constitutional law and the interpretation of an evidentiary rule in light of that constitutional question.

Consequently, the standard of review is de novo. State v. Griffin, 173 Wn.2d 467, 268 P.3d 924 (2012).

Next, the State misrepresents the presented issue by unreasonably broadening the scope of appellant's argument to ridiculous proportions and then arguing against its own caricature. The State argues Donald's argument boils down to a claim that criminal defendants have "the right to ignore the rules of evidence" (BOR at 17), the "right to introduce evidence irrespective of the rules of evidence" (BOR at 18), and the right to "suspend" the rules of evidence so that he may present his defense (BOR at 21, 22). In terms of logic, the State erected a classic straw man fallacy. Moreover, in its attempt to knock down its straw man, the State puts forth a parade-of-horribles, suggesting that if this Court were to agree with Donald's analysis the consequence would be a "chaotic free-for-all" in which the rules of evidence would no longer have meaning. BOR at 21-22.

Appellant asks this Court to reject the State's fallacious reasoning and review this issue within the scope raised. Appellant has argued (citing a considerable amount of persuasive authority) that one particular evidence rule -- ER 404(b) – constitutes an unreasonable restriction of a defendant's constitutional right to

present a defense when it is used to exclude reverse 404(b) evidence being offered to negate a defendant's guilt. BOA at 9-26. Thus, the actual question presented here is whether this particular court rule passes constitutional muster when reverse 404(b) evidence is at issue.

Next, the State devotes considerable briefing space to its discussion of cases that stand for the proposition that a criminal defendant possesses no right to present "irrelevant or inadmissible" evidence. BOR at 18-20 (emphasis in original). From this, it essentially argues that since ER 404(b) facially excludes propensity evidence, the defendant's constitutional right to present a complete defense cannot possibility include the right to present reverse 404(b) evidence which is inadmissible under ER 404(b). BOR at 16-21.

The State's argument is fundamentally flawed because it fails to recognize that even established evidence rules are subject to constitutional review. Ignoring this basic principle, the State engages in a backward analysis. Case law is clear, however, that evidence rules yield to legitimate constitutional rights, not vice-versa. E.g., Holmes v. South Carolina, 547 U.S. 319, 326, 126 S.Ct. 1727, 1732, 164 L.Ed.2d 503 (2006) (concluding a rule that

excluded evidence implicating third parties violated the defendant's right to have a meaningful opportunity to present his defense); Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (holding unconstitutional a rule prohibiting hypnotically refreshed testimony); Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (overturning a decision that prevented the defendant from attempting to show at trial that his confession was unreliable); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (finding unconstitutional Mississippi's evidentiary rules which denied the defendant the right to impeach his own witnesses and admit statements against penal interest); see also, State v. Hedge, 297 Conn. 621, 653-54, 1 A.3d 1051 (2010) (holding exclusion of reverse 404(b) evidence resulted in an unconstitutional restriction of the defendant's right to present his "other suspect" defense).[1]

The State also rests a large part of its argument on the fact that a defendant's right to present relevant evidence is not unlimited. BOR at 18. While this is true, the State overlooks the

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[1] The decisions cited in this paragraph (some of which were cited in appellant's opening brief) should sufficiently answer the State's unfounded claim that Donald did not "offer a single case in which the rules of evidence were suspended so that a defendant could present his defense." BOR at 21.

fact that any legitimate restriction placed upon this right must be reasonable. United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). As one Washington Court has recently explained:

> The right to present a complete defense, including a third party culpability defense, does not mean that a defendant may introduce whatever evidence he wishes, but it does mean that state-law evidentiary restrictions that are arbitrary or disproportionate to the purposes they are designed to serve must yield to a defendant's right to present a defense.

State v. Sanchez, __ Wn. App. __, 288 P.3d 351, 368 (2012) (citation and internal quotations omitted); see also, Holmes, 547 U.S. at 324. Thus, if a court rule unreasonably restricts a defendant's constitutional right to present a defense, the rule is unconstitutional and inapplicable. In such circumstances, admissibility will be fairly determined through the application of ER 401 and 403. As the United States Supreme Court has summed up:

> While the Constitution thus prohibits the exclusion of defense evidence under rules ... that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

Holmes, 547 U.S. at 326 (citations omitted).

Applying these principles here, the threshold question is whether ER 404(b)'s exclusion of a other-crimes evidence that is offered in support of an other-suspect defense is disproportionate to the purpose ER 404(b) is designed to serve. While the State correctly points out that federal case law pertaining to reverse 404(b) evidence has been neither consistent nor precise in answering this question (BOR at 24-29), a survey of the cases demonstrates that the majority of reviewing courts have properly followed the analytical structure set forth by the Unites States Supreme Court.

First, the majority of reviewing courts have examined the purpose underlying courts rules that exclude propensity evidence. These courts found the prohibition against propensity evidence is generally designed to bar evidence of a defendant's other crimes because there is a fear the jury might convict a person who has a propensity to commit crimes without worrying too much about whether the government has proved his guilt of the crime of which

he is currently accused.[2] See, e.g., cases cited in appellant's opening brief. BOA at 12, n.13.

Having identified the policy, these courts next appear to examine whether this policy is served by the exclusion of reverse 404(b). They explain that when the government rather than the defendant invokes Rule 404(b), the policy concern with the poisonous effect on the jury is negligible. Therefore, the majority of courts have found that since the jury is not being asked to judge the other-suspect's guilt, the primary evil that may result from admitting bad-acts evidence — i.e. tainting the defendant's character and securing a conviction based on propensity alone —is not present. Thus, the policy behind the rule does not support its application to exclude reverse 404(b) evidence. And with that rule inapplicable, the majority of courts have concluded the only legitimate bar to admission of reverse 404(b) evidence is whether the probative value of the evidence is slight, which should be addressed with a

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[2] The Washington Supreme Court has recognized a similar policy, concluding ER 404(b) is designed "to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)

straight-forward ER 401/403 analysis.[3] Id.; see also, United States v. Gonzalez–Sanchez, 825 F.2d 572, 582 n. 25 (1st Cir.1987) ("Inasmuch as [Reverse 404(b)] evidence does not concern past criminal activity of [the defendant], Rule 404(b) is inapplicable"); United States v. Reed, 259 F.3d 631, 634 (7th Cir.2001) ("In deciding whether to admit such evidence, a district court should balance the evidence's probative value under Rule 401 against considerations such as prejudice, undue waste of time and confusion of the issues under Rule 403");[4] Aboumoussallem, 726

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[3] When considering the probative value of the evidence Courts might consider the list of exceptions under ER 404(b) as part of its analysis; however, the rule may not be applied "mechanistically" to defeat the defendant's efforts to present a complete defense. See, Chambers, 410 U.S. at 302.

[4] The State takes specific issue with appellant's representation of the Seventh circuit's position on reverse 404(b) evidence. BOR at 27, n. 13. It suggests the Seventh Circuit applies a "standard FRE 404(b) analysis." Id. However, the Seventh Circuit's most recent review of the issue shows otherwise. In U.S. v. Alayeto, 628 F.3d 917 (2010), the Seventh Circuit reviewed a trial court's decision to exclude "propensity evidence" and concluded, while the admission of such evidence is generally prohibited, a defendant may introduce propensity evidence regarding a third party's other crimes or conduct to support his defense if it tends, alone or with other evidence, to negate his guilt of the crime charged. Id. at 921. Thus, it did not mechanistically apply 404(b), but instead concluded the proffered propensity evidence was properly excluded under ER 403 because of the evidence's scant probative value in that case. Id. at 921-22; see also, United States v. Murray, 474 F.3d 938, 939 (explaining that the primary evil sought to be avoided by 404(b) is

F.2d 906 (2nd Cir. 1984) (When reverse 404(b) evidence is at issue, "the only issue arising under Rule 404(b) is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense"); Krezdorn, 639 F.2d at 1333 ("When the evidence will not impugn the defendant's character, the policies underlining 404(b) are inapplicable").

In sum, although not directly stated, the majority of courts have worked within the framework set forth by the United States Supreme Court for assessing when the right to present a defense trumps the application of an exclusionary evidence rule. See, Holmes, 547 U.S. at 326. In so doing, they have concluded that ER 404(b)'s bar against propensity evidence must yield to the defendant's constitutional right to present a defense right. Instead, the admissibility of reverse 404(b) is governed by ER 401 and 403.

Next, the State suggests that even if reverse 404(b) evidence is not subject to exclusion under ER 404(b), the evidence proffered by appellant (i.e. Leon's prior crimes) would still have to meet the requirements of ER 404(a) and 405. BOR at 30-31.

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not presence in the context of reverse 404(b) evidence and concluding that a straightforward balancing under 403 is "all one needs to keep 'other crimes' evidence within bounds").

However, ER 404(a) and 405 govern the admission of general character evidence used to establish a person's character or a trait of character. By contrast, "reverse 404(b) evidence" consists of a third-party's specific crimes, wrongs, or acts. Thus, the admissibility of this type of evidence falls squarely within the more specific provisions of ER 404(b), not the general provisions of ER 404(a) and 405. See, Flight Options, LLC v. Dep't of Revenue, 172 Wn.2d 487, 504, 259 P.3d 234 (2011) (explaining more specific provisions prevail over general ones).

Finally, the State claims the trial court correctly excluded Donald's proffered evidence under ER 403. BOR at 32-33. As explained in detail in appellant's opening brief, none of the primary prejudice concerns embodied in ER 403 exist here. BOA at 25-26. Moreover, as the State indicates, the trial court's ER 403 ruling was based primarily on its concern that it appeared unfair to hold State to the constraints under ER 404(b), while the defense would not be so held. Id. (citing to the transcripts). Whether at first blush, this result appears unfair, the policy reasons for the rule's exclusion of propensity evidence support such an asymmetrical application of the rule. See, e.g. Aboumoussallem, 726 F.2d at 91 (explaining why the asymmetrical applicable of ER 404(b) is not unfair).

Indeed, asymmetrical application of the rule has been accepted under circumstances quite similar to those presented here. In Hedge, the defendant was facing a drug charge and sought to introduce the other-suspect's criminal history, which included prior drug convictions. Hedge, 297 Conn. at 633. The State responded that the defendant also had a criminal record involving drug sales. Id. Despite the apparent inequity of allowing the defense to present propensity evidence while excluding the state's proffered evidence, the Connecticut Supreme Court concluded – after reviewing the federal case law and the policy behind the rule -- that the trial court erroneously excluded the reverse 404(b) evidence. Id. The same result should occur here.

In conclusion, for the reasons stated above and in appellant's opening brief, this Court should apply the analytical framework provided by the United States Supreme Court for determining when a defendant's right to present a defense trumps an exclusionary evidence rule and hold that ER 404(b) cannot be applied mechanistically to exclude reverse 404(b) evidence. Additionally, it should hold that asymmetrical application of the rule does not establish sufficient prejudice under ER 403 to merit

exclusion of reverse 404(b) evidence and, thus, the trial court erred when it concluded otherwise.

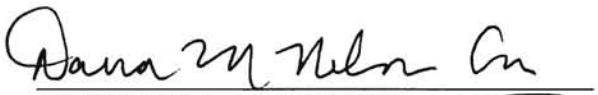
B. CONCLUSION

For reasons stated herein and all those stated in appellant's opening brief, this Court should reverse appellant's conviction.

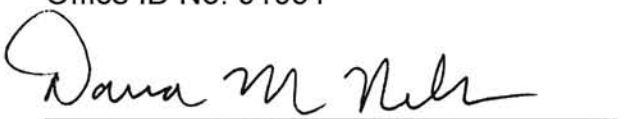
DATED this 3rd day of January, 2013

Respectfully submitted,

NIELSEN BROMAN & KOCH, PLLC.



JENNIFER L. DOBSON,
WSBA 30487
Office ID No. 91051



DANA M. NELSON
WSBA No. 28239

Attorneys for Appellant

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	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 4TH DAY OF JANUARY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] HAROLD DONALD
DOC NO. 322028
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF JANUARY 2013.

X Patrick Mayovsky