69076-1 69076-1

NO. 69076-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VLADIMIR V. MISHKOV,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY V. WHITE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

CHRISTINE W. KEATING
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUES

1. Evidence of prior acts are admissible to show intent, knowledge, sexual motivation and common scheme or plan pursuant to ER 404(b) when there are marked similarities between the defendant's charged act of sexual misconduct and prior acts of sexual misconduct. Here, the State presented evidence of the defendant's two prior convictions for indecent exposure to prove that the defendant knew in this instance that his behavior was likely to cause reasonable affront and alarm and in response to the defendant's diminished capacity defense. Did the trial court properly exercise its discretion in admitting evidence of two prior instances of sexual misconduct based on marked similarities between those events and the charged act?

2. The State bears the burden of proving a defendant's offender score at sentencing unless the parties reach a negotiated plea agreement. Here, the defendant pled guilty to a new offense after his conviction at trial in this case and entered into an agreement regarding sentencing that incorporated both cases. Additionally, because indecent exposure is an unranked felony, the court sentenced the defendant based upon the correct standard range regardless of any alleged error. Because a negotiated plea

agreement was involved and the correct standard range was used by the Court, was the defendant properly sentenced within the correct standard range?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Vladimir Mishkov was charged by Second Amended information with felony indecent exposure with sexual motivation. CP 95A. A jury trial on that charge commenced on May 31, 2012 before the Honorable Jay V. White. 2RP 2.[1] On June 18, 2012, the jury returned a verdict of guilty and found both that the defendant had committed the offense with sexual motivation and that he had previously been convicted of indecent exposure. 10RP 63; CP 124-26.

Subsequent to Mishkov's conviction in this case, he was charged with another count of felony indecent exposure with sexual motivation for an incident that occurred while he was housed in the King County Jail during trial on this case. Supp. CP ___

[1] The Verbatim Report of Proceedings consists of twelve volumes, referred to in this brief as follows: 1RP (Feb 22, 24, 29, 2012); 2RP (May 31, 2012); 3RP (June 4, 2012); 4RP (June 5, 2012); 5RP (June 6, 2012); 6aRP (June 11, 2012); 6bRP (June 11, 2013); 7RP (June 12, 2103); 8RP (June 13, 2012); 9RP (June 14, 2012); 10RP (June 18, 2012); and 11RP (July 20, 2012).

(Information for 12-1-02549-1 KNT). On July 19, 2012, Mishkov pled guilty under that cause number to indecent exposure; the sexual motivation enhancement was dismissed as part of the plea agreement. Supp. CP ___ (Amended Information from July 19, 2012 in 12-1-02549-1 KNT); Supp. CP ___ (Statement of Defendant on Plea of Guilty for 12-1-02549-1 KNT).

On July 20, 2012, the trial court imposed a high-end standard range sentence on both cases (24 months total), to run concurrently in accordance with the plea agreement and joint recommendation of the parties. CP 146-57; Supp. CP ___ (Judgment and Sentence for 12-1-02549-1 KNT); 11RP 9. Mishkov then filed this timely appeal.

2. SUBSTANTIVE FACTS

On the morning of August 9, 2011, Jesse Maltos drove up to the Sweet Cheeks Espresso stand in Seatac, Washington. 7RP 27-29. Sweet Cheeks Espresso is a "bikini barista" stand. 7RP 13. Before Maltos could order coffee, Chelsea Connolly, the barista, directed his attention to a man standing against a nearby light pole. 7RP 19, 29. Maltos looked where he was directed and saw the defendant standing against the pole with his penis exposed and

erect. 7RP 19-20, 29-30. The defendant was actively masturbating while staring at Ms. Connolly. 7RP 31, 35-36. When Connolly declined to call police, Maltos dialed 911. 7RP 20, 30. Connolly later reported that Mishkov had been wandering around her workplace for roughly 45 minutes before he began masturbating. 7RP 17-19.

King County Sheriff's Detective Tim Gillette arrived shortly after the 911 call, pulling up behind the defendant. 6aRP 122. From his vantage point, he could see the defendant looking at the Sweet Cheeks Espresso stand, and noticed his arm moving quickly up and down in front of him. 6aRP 122. He ordered the defendant to show his hands but Mishkov refused to do so immediately, and appeared to be fumbling with something in front of him. 6aRP 12-26. He eventually stopped and the detective, along with Chief James Graddon, were able to place the defendant under arrest. 6aRP 128. Although Mishkov was fully clothed when officers arrested him, the detective could see his erection pushing out on his pants. 6aRP 136. The officers then asked Mishkov why he was masturbating, and he responded that he was thinking of ways to kill himself. 6aRP 130.

Later that day, Mishkov's community corrections officer (CCO) Iris Peterson arrived to take custody of him. 8RP 11. Upon placing him in her van, Mishkov told her, "I'm really sorry, Iris." 8RP 16. During a later conversation, he also told Peterson that he thought he was "screwed." 8RP 19.

At trial, Mishkov presented expert testimony suggesting that he was intoxicated and suffering from a drug and alcohol induced blackout on the date of the offense. 8RP 43-176. The same expert testified that Mishkov suffered from diminished capacity because of his major depressive disorder. 8RP 43-176. The State responded by presenting the testimony of Dr. Judith Kirkeby from Western State Hospital. 9RP 30. She testified that while defendant may have been depressed, the evidence did not support a finding of diminished capacity, nor was there credible evidence that he was in a blackout during the offense. 9RP 30-152.

During the State's case, the trial court allowed the State to present evidence of Mishkov's two prior King County convictions for indecent exposure pursuant to ER 404(b). In the first case, which occurred in 2006, the defendant was arrested after openly masturbating in the parking lot outside the drive-through of a Taco Bell restaurant. 7RP 83. In that case he had sought the attention

of victim Sandra Mondoza, a worker at Taco Bell, before engaging in his unlawful behavior. 7RP 101-06.

In the second case, which occurred in 2008, the defendant followed victim Mikele Scheffer around Linens and Things before then getting her attention in the parking lot as she left. 7RP 52-55. When she passed by the defendant's car as she returned to hers, Mishkov rolled his window down and whistled so Scheffer would see him masturbating with his pants pulled all the way down. 7RP 56-58.

Based on all of the above evidence, the jury returned a verdict of guilty on the same day the case was given to them for deliberations. CP 124-26; 10RP 51, 62.

C. ARGUMENT

1. THE COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ADMITTED MR. MISHKOV'S TWO PRIOR CONVICTIONS AND THEIR UNDERLYING FACTS PURSUANT TO ER 404(b).

Mishkov contends that the trial court abused its discretion in admitting evidence regarding his 2006 and 2008 convictions for indecent exposure rather than simply accepting his willingness to stipulate to their existence. This claim should be rejected. There

were sufficient similarities between the prior acts and the charged act to make the evidence admissible to show a common scheme or plan. Further, given Mishkov's defense at trial of diminished capacity, the evidence was extremely probative of his intent, knowledge and of sexual motivation. Its probative value was not substantially outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion in finding that the evidence was admissible under ER 404(b).

A trial court's decision to admit evidence under ER 404(b) is reviewed for abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.

ER 404(b) provides in pertinent part that "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." The purpose of 404(b) is to prevent the State from suggesting that a defendant is guilty of a

crime simply because he is a "criminal-type person," not to exclude relevant evidence. Foxhoven, 161 Wn.2d at 175.

Evidence of a defendant's past acts of sexual misconduct may be admissible under ER 404(b) to show a common scheme or plan where the prior acts demonstrate a single plan used repeatedly to commit separate but very similar crimes. State v. Gresham, 173 Wn.2d 422, 269 P.3d 207 (2012); State v. Sexsmith, 138 Wn. App. 497, 504, 157 P.3d 901 (2007). The prior acts must be "(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial." State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

In State v. DeVincentis, the Washington State Supreme Court squarely addressed the common scheme or plan exception to ER 404(b). 150 Wn.2d 11, 17-23, 74 P.3d 119 (2003). In that case, the Court focused specifically on the similarities between the defendant's prior crimes and the charged crime. Id. at 18-19. DeVincentis was convicted of molesting several young girls prior to committing the charged child molestation. Id. at 13-16. The State provided the testimony of one of his prior victims as proof of a

common scheme to meet, groom, and then molest, young girls. Id. The State Supreme Court noted that the court should focus on the similarity of the prior crimes rather than their uniqueness, ultimately adopting language from a California case that requires that the State prove that the defendant "committed markedly similar acts of misconduct against similar victims under similar circumstances." Id. at 19 (relying on People v. Ewoldt, 7 Cal.4th 380, 867 P.2d 757, Cal. Rptr.2d 646 (1994).

In State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995), the Washington Supreme Court greatly expanded the "common scheme or plan" exception to ER 404(b) to permit evidence where the defendant "devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." Lough, 125 Wn.2d at 855. The Court reasoned that if a defendant's previous conduct is not merely coincidental, but an indication that the conduct was directed by design. Lough, 125 Wn.2d at 860. In reaching its decision that prior bad act evidence should be admitted where the evidence is highly probative or the need for such proof is unusually great. Lough, 125 Wn.2d at 859. The Court even went so far as to say that such evidence should be admitted more frequently than traditionally seen by trial judges. Id. at 859-59.

In State v. Vars, this Court found that three prior convictions for indecent exposure were properly deemed admissible in the defendant's trial for a new indecent exposure case. 157 Wn. App. 482, 494-96, 237 P.3d 378 (2010). In finding that there were marked similarities between the case then at hand and the prior convictions, the Court reasoned that "[the] common elements permit the reasonable inference that the same motivation underlies his offending behavior in each instance....[and] that an objective trier of fact could logically infer from [his] record that Vars's indecent exposure...was sexually motivated as well." Vars, 157 Wn. App at 496. In finding that the trial court had not abused its discretion, this Court found that the probative value of the evidence was high, but also noted that the trial court had properly recognized the potential prejudicial impact of the prior convictions, and thus appropriately limited the evidence to three of eight prior convictions.

DeVincentis, Lough and Vars are all instructive here. In the present case, the State sought to admit evidence of Mishkov's two prior King County convictions for indecent exposure, as well as testimony that Mishkov had admitted to engaging in similar unreported behavior 200-300 times and that he liked to wax and tan

before exposing himself.[2] With respect to the two prior convictions, the court found that they had been proven by the State by a preponderance of the evidence as required. CP 130; 4RP 57. In finding that there were sufficient similarities in the circumstances of these incidents to make them probative, the court noted that in those cases, as in the present one, Mishkov had chosen women as victims, the women were all roughly of the same age range, each offense took place in the parking lot of a business, and the defendant made overt actions to draw the attention of his victims to him. 4RP 59-62. Given that, the Court found that the convictions were both relevant and necessary to prove knowledge, intent, sexual motivation, common scheme or plan, the element of prior conviction for indecent exposure and to rebut the defenses of diminished capacity, voluntary intoxication, and general denial. CP 130; 4RP 57-62. In fact, their relevance and probative value were heightened in this case, the court found, by the defendant's claim of diminished capacity and the fact that the defense expert

[2] It should be noted that the defense did not object to the fact of the convictions, as those were a necessary element of the charged offense; in fact, the parties agreed to facts of the convictions in a stipulation that was read to the jury. CP 90. The defense's objection focused entirely on the admissibility of the underlying facts of those convictions.

had relied heavily on the prior incidents in reaching his conclusions. 3RP 84, 125-30.

Nonetheless, out of caution and in fairness, as in Vars, the court limited the evidence of prior bad acts that could be admitted. CP 130; 4RP 54-55. Specifically, the court suppressed the proposed testimony that the defendant had engaged in many other unreported incidents, that he had continued exposing himself in the King County Jail while awaiting trial, and that he had a practice of tanning and waxing prior to exposing himself. CP 130; 4RP 53-55. The court also excluded any testimony that the 2008 case had resulted in a trial, confining the evidence to the facts and the subsequent conviction. With those limiting rulings, the trial court properly admitted evidence necessary for the State to prove its case but also limited it so as to avoid any undue prejudice. In short, not only did the court exercise its discretion, it did so in an exceptionally fair and nuanced manner. Mishkov's claim to the contrary should be rejected.

That said, any error in admitting evidence of the prior incidents was harmless. An error in the admission of propensity evidence is not a constitutional error and is subject to harmless

error analysis. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). Such an error requires reversal only if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Id. The evidence of the incident itself in this case was strong. The State presented three witnesses, including a police officer, who all witnessed at least a portion of defendant's criminal behavior. 6aRP 110; 7RP 12, 27. The State also presented evidence that Mishkov had apologized to his Community Corrections Officer for his behavior, and had later also acknowledged that he was "screwed." 8RP 16, 19. Finally, the State's expert explained numerous reasons why the defendant was not suffering from diminished capacity or a drug-induced blackout at the time of the incident, including the fact that he had appeared in Seattle Municipal Court during this so-called blackout. 9RP 30, 51-54. She also explained that masturbating is qualitatively a goal-directed behavior. 9RP 52. Given the strength of the State's case independent of the 404(b) evidence, there is no reasonable probability that the outcome of the trial would have been different if the prior incidents had not been admitted. Any error in admitting the prior incidents was harmless.

2. MISHKOV WAS PROPERLY SENTENCED WITHIN THE CORRECT STANDARD RANGE.

Mishkov next contends that the trial court miscalculated the defendant's offender score because the State did not provide proof of three prior juvenile convictions from Pennsylvania. His claim should be squarely rejected for two reasons. First, the defendant affirmatively acknowledged his offender score for purposes of being sentenced in this case. Second, even if the State did not meet a necessary burden, the offender score here is of no moment because the Court sentenced the defendant based on the correct standard range.

It is well established in Washington that the State bears the burden of proving the existence and comparability of a defendant's prior out-of-state convictions by a preponderance of the evidence. State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584; State v. Ross, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004). It is similarly well-established, however, that a defendant can relieve the State of its burden to do so in the course of a plea or by some other affirmative acknowledgement: "the right to argue that an offender score has been miscalculated can be waived. When a defendant affirmatively acknowledges that a foreign conviction is properly

included in the offender score, the trial court does not need further proof of classification before imposing a sentence based on that score." State v. Collins, 144 Wn. App. 547, 555, 182 P.3d 1016 (2008) (citing State v. Ford, 137 Wn.2d 472, 483 n.5, 973 P.2d 452 (1999)).

Here, the guilty verdict in this case was the result of a jury finding. CP 124-26. Had nothing else occurred prior to sentencing, the State would arguably have had the burden to establish Mishkov's foreign convictions for the trial court absent an affirmative acknowledgement by the defendant. However, the posture of this case is unique: subsequent to the verdict, the defendant was charged with a new case of indecent exposure with sexual motivation. Supp. CP. ___ (Information for 12-1-02549-1 KNT). As a result of the new charge, the defendant elected to enter into a plea agreement that, in essence, incorporated both the 2011 trial case and the new 2012 charge. Supp. CP___ (Statement of Defendant on Plea of Guilty) and Supp. CP ___ (Statement of Prosecuting Attorney).

In that plea agreement, the defendant affirmatively acknowledged his offender score and agreed to concur with the State on a high-end recommendation in both cases. Supp. CP___

(Statement of Defendant on Plea of Guilty) and Supp. CP ___ (Statement of Prosecuting Attorney). This was done in exchange for a dismissal of the sexual motivation aggravator on the subsequent charge and a recommendation that the time imposed on both cases be served concurrently. Supp. CP___ (Statement of Defendant on Plea of Guilty) and Supp. CP ___ (Statement of Prosecuting Attorney). Mishkov also agreed not to seek an exceptional sentence downward as he had originally intended. 11RP 4. Thus, although the instant case may have reached a verdict via a jury, it became the subject of a plea agreement, and in entering into such an agreement, Mishkov relieved the State of its burden to prove his prior convictions.

Even if the Court finds that he did not specifically waive his right to have the State provide proof of his prior offenses, such a result really is mandated by the posture of the case. By way of illustration, in State v. Collins, the defendant entered into a plea agreement to recommend a specific sentence that was based upon an agreed-upon offender score that included out-of-state convictions. Collins, 144 Wn. App. at 549. At sentencing, he then argued that the State was obligated to prove the comparability of the foreign convictions. Id. As a result, the trial court found that

Collins had breached the plea agreement and reinstated his original charges. Id. The Court of Appeals affirmed, and stated that had "the matter proceeded to sentencing upon the plea agreement, the trial court would have properly included the [out-of-state] convictions in Collins' offender score without further proof of classification." Id. at 556.

Here, as described above, Mishkov entered a plea agreement that encompassed both a jury verdict and a voluntary plea. He was sentenced on both at the same time in the same hearing. 11RP 2-19. Further, based on the plea agreement, the agreed sentence on one directly impacted the charge and sentence on the other. Id. To require proof of the existence and comparability for Mishkov's Pennsylvania convictions in the trial case, but allow the sentencing court and the State to accept his acknowledgement in his companion case for the *exact same convictions* would be to reach an absurd result. Indeed, such a result would allow a defendant in a similar situation to effectively breach a plea agreement but still gain its benefit by requiring proof of other convictions under a separate but concurrent cause number. In essence, this type of result is contemplated and prohibited by Collins.

Even if the Court believes the State neglected its obligation to prove the existence and comparability of Mishkov's Pennsylvania cases, the sentence imposed by the trial court should stand. Under the Sentencing Reform Act of 1981 (SRA), the real issue in sentencing a defendant is whether the sentence handed down was authorized—in other words whether it was based upon a correct standard range. Chapter 9.94A RCW; In re Toledo-Sotelo, 176 Wn.2d 759, 767, 297 P.3d 51 (2013). Outside of helping establish the correct standard range, a defendant's offender score has no role. Toledo-Sotelo, 176 Wn.2d at 768. In Toledo-Sotelo, the judgment and sentence had incorrectly listed *both* the offender score and the seriousness level of the crime of which the defendant was convicted. Id. Nonetheless, the judgment and sentence listed the proper sentencing range, and the trial court entered a sentence within that range. Id. In agreeing that the sentence should stand, the Court said "we are interested in whether the sentencing range is accurately calculated. For an erroneous offender score to poison an otherwise accurate and statutorily authorized sentencing range would not advance any policy purpose articulated in RCW 9.94A.010."

In the instant case, even if we assume for the sake of argument that Mishkov's Pennsylvania convictions were erroneously included in the calculation of his offender score,[3] the sentencing range used by the trial court in imposing a sentence was correct. Indecent exposure, a Class C felony, is unranked under the SRA. This means its standard range sentence, *regardless of offender score*, is zero to twelve months; with the sexual motivation enhancement added, the standard range becomes twelve to twenty-four months. That is precisely the range used by the trial court in imposing sentence in this case. CP 147. Within that range, the trial court then followed the recommendation of *both* parties in imposing a twenty-four month sentence. CP 149-50. Because the sentencing court arrived at the correct sentencing range the sentence should stand. Toledo-Soleto, 176 Wn.2d at 768-69. Moreover, because the court imposed a high-end sentence based on the joint recommendation of the parties, there is no reasonable belief that the court would have sentenced Mishkov differently had the juvenile adjudications not been included in his offender score. The defendant was properly sentenced and his sentence should stand.

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[3] It should be made clear that the State is not conceding this point.

D. <u>CONCLUSION</u>

For all the foregoing reasons, the State asks this Court to affirm Mishkov's conviction for indecent exposure with sexual motivation as charged.

DATED this 15th day of November, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: [signature] #18887
for CHRISTINE W. KEATING, WSBA #30821
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. VLADIMIR MISHKOV, Cause No. 69076-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

11-15-13

Name | Date

Done in Seattle, Washington