FILED
Dec 13, 2016
Court of Appeals
Division I
State of Washington

74814-9

No. 74814-9

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

STEVEN THOMAS,

Appellant.

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

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

Court Rules

A. ASSIGNMENTS OF ERROR

1. The court erred in admitting other acts evidence in violation of ER 404(b).

2. The court erred in denying Steven Thomas's motion to sever the separate charges.

B. ISSUES PRESENTED

1. ER 404 categorically bars admission of evidence of other acts offered to show a person's propensity to act a certain way. Other acts evidence offered to prove "lustful disposition" is by definition evidence offered to show a person's propensity to act a certain way. Did the trial court err in permitting admission of this other acts evidence?

2. A motion to sever should be granted where necessary to ensure a defendant a fair trial. Mr. Thomas moved to sever charges involving separate alleged victims from one another. The court denied the motion, resulting in a trial where not only did the jury hear evidence of other acts involving a single victim, they heard evidence of other acts involving both victims, thus magnifying the already existing prejudice. Did the court's denial of Mr. Thomas's motion to sever deny him a fair trial?

C. STATEMENT OF THE CASE

Twenty-year old J.L. testified that when she was nine, she was napping with at the home of her aunt and uncle, Mr. Thomas. 1/15/16 RP 732-33. Mr. Thomas entered the room and briefly rubbed J.L.'s bottom over her pants and then rubbed her back under her shirt. *Id.* at 733-35.

Eighteen year-old C.L., J.L.'s sister, testified that when she was six or seven, she was napping at Mr. Thomas's house, and her uncle placed his hand in her pants and touched her vagina. 1/19/16 RP 1018-19.

The State charged Mr. Thomas with two counts of first degree child molestation. CP 10-11.

D. ARGUMENT

1. The trial court erred and deprived Mr. Thomas a fair trial when it admitted evidence of his other acts which had no relevance beyond establishing he was a bad person.

a. ER 404 bars admission of other-acts evidence offered to prove character.

Evidence of prior acts of the defendant offered solely to prove propensity to commit an offense is not admissible. ER 404(b). The rule provides:

> 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.

"Properly understood . . . ER 404(b) is a categorical bar to the admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012); *see also*, *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993) (the purpose of ER 404(b) is to prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct).

> ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather 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) (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

> To admit evidence of other acts 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 that purpose is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014)).

The Court has explained the necessary analysis to determine the relevance of such evidence. First, the trial court must identify a proper purpose for admission. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

> This has two aspects. First, the identified fact, for which the evidence is to be admitted, must be of consequence to the outcome of the action. The evidence should not be admitted to show intent, for example, if intent is of no consequence to the outcome of the action. Second, the evidence must tend to make the existence of the identified fact more or less probable.

Id. at 362-63. Then, if the court determines the evidence is relevant it must weigh the probative value against the prejudicial effect.

Thus, there are two parts to the relevance analysis, the identification of a consequential purpose, and some tendency to make that consequential purpose more or less likely. Importantly, this second consideration cannot rely on propensity. *State v. Wade*, 98 Wn. App. 328, 334-35, 989 P.2d 576 (1999) *(*citing *Saltarelli*, 98 Wn.2d at 362). In doubtful cases, the evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

b. The trial court admitted what it termed "lustful propensity" evidence which by definition sought only to prove the defendant had a propensity to engage in the criminal act.

The State charged Mr. Thomas with first degree child molestation involving J.L. based on her claim that in October 2004 he rubbed her "bottom" over her clothing and then rubbed her back under her shirt. 1/15/16 RP 732-35. The State charged Mr. Thomas with another count involving C.L. based upon her claim that in a single incident, eight to ten years earlier, Mr. Thomas put his hand into her pants and touched her vagina. 1/19/16 RP 1018-19.

Over Mr. Thomas's objection, the trial court permitted the State to present testimony from J.L. regarding other incidents in the following years in which Mr. Thomas had openly masturbated in front of her, digitally penetrated her vagina, and made her masturbate him when she was a teenager. 6/19/15 RP 9-10; 1/15/16 RP 738, 741-42, 745-47, 756. The trial court admitted the evidence concluding it established Mr. Thomas's "lustful propensity." 6/19/15 RP 16, 1/8/16 RP 59. The court also reasoned that this evidence describing acts at various later dates and each in different locations established the res gestae of the crime. 6/19/15 RP 45.

Washington courts have long repeated the same justification for the admissibility of evidence of lustful disposition. Courts have reasoned "[s]uch evidence is admitted for the purpose of showing the lustful inclination of the defendant toward the offended female, which in turn makes it more probable that the defendant committed the offense charged." *State v. Thorne*, 43 Wn.2d 47, 60, 260 P.2d 331 (1953), *see also*, *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). That justification, first voiced prior to the adoption of ER 404, is wholly at odds with that rule.

By its very description, evidence of "lustful disposition" is character evidence offered to show the defendant acted in conformity therewith. Indeed, even the trial court understood this, referring to the evidence as "lustful propensity." RP 59. This evidence is squarely within the "categorical bar" that *Gresham* identified.

Even assuming there could be a valid nonpropensity purpose in admitting evidence of prior acts involving an alleged victim to demonstrate a defendant's intent on a later date, or perhaps a common scheme, no such valid purpose exists in this case. Here the State argued acts committed years after the alleged crimes revealed Mr. Thomas's intent on the earlier dates. The acts were dissimilar and remote in time

to the charged act. A sexual assault involving a post-pubescent teenager in no way demonstrates the sexual intent of an seemingly innocuous touching of a nine year-old nearly a decade before, except as propensity evidence. Indeed, that is precisely what the trial court called it: "lustful propensity." That evidence simply invites the jury to conclude from the subsequent and remote bad act that the person had the same propensity years earlier and acted accordingly. That is the singular inference barred by ER 404(b).

The trial court erred in admitting the evidence of subsequent acts.

c. The prejudice greatly outweighed any potential probative value.

Without conceding this evidence had any probative value at all beyond its propensity use, it is clear its prejudice greatly outweighed any conceivable probative value.

The State's evidence of the alleged crime consisted of J.L.'s description of single incident in 2004 of what could be readily described as innocuous touching. 1/15/16 RP 732-35. If the jury had to decide the question of whether Mr. Thomas touched J.L. for purpose of sexual gratification from that evidence alone the State faced a much tougher road.

The other acts evidence described incidents in later years of unquestionably sexual behavior. The other acts evidence is different in kind and in weight from the evidence of the charged incident itself. This evidence allowed the jury to readily convict Mr. Thomas where the evidence of the actual incident was thin. The evidence permitted the jury to do so solely on the basis of the conclusion that Mr. Thomas must have acted for purpose of sexual gratification because the later incidents reveal he was predisposed to so; that is he had the propensity. The prejudice is real and there is no relevant nonpropensity purpose justifying admission of the other acts evidence. A proper balancing should have led to exclusion of the evidence.

Rather than weigh the probative value of evidence of a lustful disposition against the resulting prejudice, the court concluded the evidence was "highly probative of the defendant's lustful disposition." 6/19/15 RP 17. Its relevance as proof of lustful disposition begs the question what necessary element is the supposed lustful disposition probative of, independent of its use as propensity. Of course, this class of evidence has no probative value independent of its use as proof of propensity or predisposition.

The required analysis must ask whether the identified purpose established by the other acts evidence outweighs the prejudice and not merely whether the other acts evidence is probative to establish the identified purpose. If it were otherwise the probative value would always outweigh the prejudice as the evidence will always be relevant to prove the identified purpose. Put another way, the probative value of other acts is not in its ability to establish a nonpropensity purpose. Rather the weighing must focus on the probative value of the nonpropensity purpose, established by the other acts evidence, in proving a necessary element as compared to the prejudice. The trial court never engaged in that balancing.

A proper balancing of this evidence reveals the prejudice outweighed any probative value.

The trial court also reasoned the evidence was a part "of the res gestae." 6/19/2015 RP 17. The court explained "these collateral facts are intertwined and will provide the jury a full picture of what was happening here." *Id*. The evidence does not fit within the category of "res gestae" evidence. The "'res gestae' or 'same transaction' exception [permits] evidence of other crimes . . . to complete the story of the crime on trial by proving its immediate context of happenings near in

time and place." *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (Internal quotations and brackets omitted.). Evidence of acts occurring years after the alleged crime, and in some instances in other states, does not prove the immediate context of the offense and is most certainly not evidence of acts near in time and place. The evidence did not and could not establish the res gestae of the alleged crime. Where the evidence cannot establish the res gestae of the offense, its admission for that purposes cannot outweigh the resulting prejudice.

Any probative value was outweighed by the real and identified risk that the evidence would be misused and prejudicially so.

d. <u>The error in admitting the other-acts evidence requires reversal</u>.

The erroneous admission of ER 404(b) evidence requires reversal if the error, within reasonable probability, materially affected the outcome. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). This court must assess whether the error was harmless by measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

The harmless-error standard asks more than simply whether the remaining evidence is sufficient to sustain the convictions. *Gunderson*

recognized in that case "[a]lthough the evidence may be sufficient to find Gunderson guilty, it is reasonably probable that absent the highly prejudicial evidence of Gunderson's past violence the jury would have reached a different verdict." 181 Wn.2d at 926. It is more than reasonably probable that this evidence altered the outcome, it seems almost certain.

As set out above the direct evidence established little more than innocuous touching. The other-acts evidence encouraged the jury to readily convict Mr. Thomas based entirely on propensity.

As in *Gunderson*, the error requires reversal.

2. The trial court erred in denying Mr. Thomas's motion to sever.

a. Mr. Thomas moved to sever the counts in this case.

Prior to trial Mr. Thomas made a motion to sever the charges in this case. 6/19/15 RP 29. The court reasoned that typically evidence of lustful disposition regarding one person should not be heard in a trial involving an additional alleged victim. *Id*. at 45. However, the court continued, "in this particular case there's an exception under ER 404(b) under res gestae where the facts are so intertwined and the fact pattern here is intertwined such that it would be allowed." *Id* at 45-46.

The court denied the motion to sever. *Id*. at 44-45. Mr. Thomas subsequently renewed the motion. 1/19/16 RP 1002.

b. A court should sever joined offenses where necessary to preserve a fair trial.

The rules governing severance are based on the fundamental concern that an accused person receives "a fair trial untainted by undue prejudice." *State v. Bryant*, 89 Wn. App. 857, 865, 950 P.2d 1004 (1998); U.S. Const. amends. V, XIV; Const. Art. I, §§ 3, 22; CrR 4.4(b).

Although a severance determination is reviewed under an abuse of discretion standard, a trial court abuses its discretion when its decision "is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Rohrich*, 149 Wn.2d 647, 653, 71 P.3d 638 (2003). A court abuses its discretion by using the wrong legal standard or by failing to exercise discretion. *Id*. "Indeed, a court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.'" *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

> Judicial discretion "means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and

> which is directed by the reasoning conscience of the judge to a just result."

Fisons, 122 Wn.2d at 339 (quoting *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 462, 303 P.2d 290 (1956)).

An exercise of the trial court's discretion over whether severance is appropriate rests on an evaluation of whether severance promotes a fair determination of guilt or innocence. *In re Davis*, 152 Wn.2d 647, 711, 101 P.3d 1 (2004); CrR 4.4(b). In this case, the court refused to sever the counts concluding the res gestae exception applied to the evidence.

Four criteria guide a court in the assessment of whether to sever counts: (1) the relative strength of the evidence on each count; (2) the clarity of defenses; (3) court instructions to the jury to consider each count separately; and (4) the cross-admissibility of evidence of the remaining charges in separate trials. *State v. Sutherby*, 165 Wn.2d 870, 884-85, 204 P.3d 916 (2009). Where joined offenses are sex offenses they are particularly prejudicial and there is a "recognized danger" that that prejudice will persist even where the jury is instructed to consider counts separately. *Id.* at 883-84 (citing *Saltarelli*, 98 Wn.2d at 363; *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984)).

A joint trial merely multiplied the prejudicial effect of the admitted propensity evidence increasing the likelihood that the jury would misuse the evidence. The court's ruling itself illustrates how easily such evidence is misused. The court's reasoning that the evidence established the res gestae of both offenses relies entirely on its use as propensity evidence. The evidence does not supply "context of happenings near in time and place." *Lane*, 125 Wn.2d at 831. The only way the evidence provides "context" of intertwined acts, as the trial reasoned, is by permitting the jury to conclude Mr. Thomas was the sort of person that molested children. And the only way the evidence was cross-admissible would be to allow the jury to reason that J.L.'s allegations bolstered the truth of C.L.'s allegations and vice-versa. This is a wholly impermissible use of the evidence. This evidence was not cross-admissible.

Indeed, despite having concluded at the outset that the evidence was cross-admissible to establish the res gestae of intertwined events, the court then instructed the jury at the conclusion of trial that it must separately consider the evidence of lustful disposition pertaining to J.L. and C.L. If this evidence was not cross-admissible, there was no justification to deny the motion to sever.

The evidence had the very real likelihood of tainting the jury's verdicts. A joint trial on all counts denied Mr. Thomas a fair trial. The court erred in denying his motion to sever.

E. CONCLUSION

For the reasons above this Court should reverse Mr. Thomas's convictions and remand for a new trial.

Respectfully submitted this 13th day of December, 2016.

s/Gregory C. Link
GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, STEVEN THOMAS, Appellant.	)))))))))	NO. 74814-9-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF DECEMBER, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA [sfine@snoco.org] SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X]	STEVEN THOMAS 728933 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 13TH DAY OF DECEMBER, 2016.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711