74814-9

FILED
Feb 10, 2017
Court of Appeals
Division I
State of Washington

NO. 74814-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN BRADLEY THOMAS,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. The trial court admitted evidence regarding the defendant's lustful disposition toward each of his two victims. Is lustful disposition evidence admissible when it shows motive, intent, and the lack of mistake?

2. The defendant was charged with six sex crimes committed against three children, two sisters and their cousin. The court severed three counts involving the cousin from the two counts involving the sisters, each of whom had cross-admissible testimony relevant to the crime against the other. When the evidence was of equal strength, the defense was a general denial, the jury was properly and repeatedly instructed on the use of evidence as to each victim and each count, has the defendant shown any prejudice that outweighed the need for judicial economy?

II. STATEMENT OF THE CASE

In October 2004, the then-52 year old defendant sexually molested his 9-year old niece, J.L. Between October 2003 and October 2004, he also molested his niece, C.L., who was then between 6 and 7 years old. And between November 2008 and

November 2012, he three times had sexual contact with his granddaughter TC who was between five and nine years old. [1]

J.L. (born 7/95) and her younger sister C.L. (born 1/97) are daughters to Sean. Sean's sister Colleen is married to the defendant. Colleen has a son, Brian, and a granddaughter, T.C. (born 11/03). 1/15/16 RP 716, 721, 723; 1/19/16 RP 1007; 1013; 1/21/16 RP 1316.

The defendant did not come into the girls' lives until October 2003. 1/20/16 RP 1146. When J.L. and C.L. were small, they spent a lot of time with the extended family, often at Colleen and the defendant's home. There, they would play and help with chores. The girls loved Colleen and the defendant like a second set of parents. The parts of the defendant's behavior that made them uncomfortable they simply ignored. The defendant was creepy but nice. 1/15/16 RP 723-27, 765-66; 1/19/16 RP 1009, 1012, 1015.

Sometime during his first year of contact with the girls, the defendant molested C.L. who was then six or seven. One day during that year, the two of them on his bed, snuggling and

[1] The defendant eventually pleaded guilty to two counts of indecent liberties against T.C. Supp. ___ CP __ (7/29/16 Statement of Defendant on Plea of Guilty). He has not appealed those convictions.

watching TV. As they lay there, the defendant reached over and put his hand under her underpants and touched the top of her vagina. He did not penetrate her vagina. Instead, he pulled his hand out, licked his fingers, and touched her vagina again. C.L. told no one because she was embarrassed. 1/19/16 RP 1019-1022.

Also within his first year of contact with them, the defendant molested nine-year old J.L. On October 25, 2004, J.L., her siblings, and T.C. were at the defendant's. J.L. remembered the day because their mother was in the hospital and their father had been in a car accident. J.L. was in the defendant's bed with T.C. while T.C. napped. RP 730-32.

The defendant came into the room and stood by the bed. He touched J.L.'s bottom, then moved his hand up to lift her shirt and rubbed her bare back. He then slid his hand down again and massaged her bottom, not fleetingly but for a couple of minutes. J.L. pretended to be asleep until he stopped. She told no one because she did not want to upset her family. 1/15/16 RP 730-33, 735-36.

Those were not the only times the defendant had touched each of the girls in a sexual manner.

The summer that T.C. (born in 2003) was a toddler, the family was on a camping trip. J.L. was teaching her how to bob in the water. The defendant came by in a boat with his penis in his hand. At first, J.L. thought he was urinating but then he kept playing with himself and looking at her. 1/15/16 RP 742-45.

In 2007, the family took a trip to Wyoming. 1/21/16 1261. The sisters shared a hotel room with the defendant and Colleen. One afternoon, J.L. found the defendant and C.L. lying together on the bed, their heads on the pillows. The sheet covering them was moving up and down. J.L. believed the defendant was fondling her sister under the covers. To protect her, J.L. sent C.L. downstairs and lay down in her place. C.L. remembered J.L. sending her away. When the defendant reached over and touched her leg, J.L. left the room. 1/15/16 RP 738-40; 1261.

That same year, the sisters first talked to each other about the defendant's behavior toward them. They did not go into specifics but J.L. asked C.L. if the defendant was doing the same thing to her. C.L. said that he was and told her not to tell anyone. 1/15/16 RP 769-70; 1/19/16 RP 1032-33.

In 2011, the family attended T.C.'s mother's wedding in Chicago. 1/20/15 RP 1049-50. Both girls remembered sleeping in the defendant's room in a hide-a-bed. J.L. woke to find the defendant massaging her feet and legs. He pulled down her shorts and underwear and asked if she had ever been fingered. She said no. He said every girl should know what that felt like, rubbed her vagina, and penetrated it with his finger. J.L. pulled her pants up and rolled over. 1/15/16 RP 746-47; 1262; 1/20/16 RP 1049-50.

In 2012, Sean went to a funeral in New Mexico and left his girls with the defendant. As J.L. sat with him on a couch watching TV, the defendant rubbed her chest, legs, and vagina over her clothing. He put her hand on his naked penis until he ejaculated. The next day he got the children doughnuts and told J.L. she could have whatever she wanted. 1/15/16 RP 756, 764; 1/21/16 RP 1263.

After the New Mexico trip, J.L. told Colleen "generally" what defendant had done to her. She told only because she was worried he might do the same to someone else. Colleen told J.L. not to tell anyone because the defendant was just sick and needed help. 1/15/16 RP 771-72; 775; 1/19/16 876, 899.

Not long thereafter, the defendant confronted J.L. saying, "You ratted me out," and, "We are not going to have a problem, are we?" 1/15/16 RP 773. Subsequently, when he was massaging C.L., he said, "This is OK. You're not going to rat me out like your sister." When C.L. asked what he was talking about, he said J.L. had ratted him out to Colleen. 1/20/16 RP 1048.

On other occasions, the defendant slapped both girls on their bottoms and massaged their bottoms. He touched C.L.'s chest when he was teaching her to bench press. He once gave them a sex talk and said that just touching a "guy part" could get them pregnant. 1/20/16 RP 1045-48, 1073-75.

The defendant also talked to J.L. about why people wore clothes or did not wear underwear. He asked her if she shaved or waxed her "pubes". When she was swimming, he pulled the string of her bikini top which would fall off. 1/15/16 RP 765-66.

In 2013, just before she turned 18, Brian's wife Anastasha took J.L. for a "normal girl" checkup. When medical personnel asked if she had been sexually active, she broke down and said, yes, but not by choice. She disclosed to Anastasha what the defendant had done. She still did not want to tell anyone else, afraid it would ruin her family. 1/15/16 RP 775-76, 779.

Anastasha convened a small family meeting at which J.L. told her father and other family members what the defendant had done to her. Within days, they went to the police. C.L. was out of town at the time. When she returned, Sean asked her if the defendant had done anything to her. She told him what had happened because she did not want to lie. RP 780-83; 1/20/16 RP 1053, 1103.

The State initially charged the defendant two counts of child molestation in the first degree, Count I for the molestation of J.L. in October 2004, and Count II for the molestation of C.L., later amended to define a charging period of October 2003-04. CP 5-6, 103-04.[2]

The defendant moved to sever all six counts. CP 105-124. The State moved to admit ER 404(b) evidence of the defendant's lustful disposition toward each of the sisters. CP 28-52. A hearing was held on June 9, 2015, following which the court issue a written ruling that contained extensive findings of fact. 6/9/15 RP; CP 105-124.

[2] After a series of disclosures, the State added four counts of rape in the first degree based on allegations that the defendant had raped then-six-year old granddaughter T.C. in 2012. CP 10-14.

As to ER 404(b) evidence, the court ruled that it would admit each incident offered by the State to show the defendant's lustful disposition toward each of his victims.[3] The State had proved the prior misconduct had occurred and identified its purpose, to show intent, motive, and absence of mistake, or lustful disposition. The court "seriously" considered the impact of the evidence on the defendant's ability to receive a fair trial but found the evidence highly probative. It noted that the evidence would be admissible to reveal a sexual desire for each named victim. 6/19/15 RP 29; CP 105-124.

As to severance, the court granted the motion in part. It severed Counts III-VI, the alleged rapes of T.C. It left Counts I and II joined for trial. It found that the State's evidence was of similar strength on each count; that the defense to each count was clear; that it would instruct the jury as to what evidence it was to consider for each crime. It found that some of the evidence was "inextricably intertwined and probative of the charged sexual contact in each count." That was because each of the victims had background

[3] The court mistakenly used the term "lustful propensity" once during the 1500+ pages of the transcript, never in its written ruling. That slip of the tongue that does not change the court's ruling or this court's analysis. When the court used that term, it corrected itself almost immediately and thereafter used the phrase "lustful disposition." 1/8/16 RP 59, 60.

information regarding exhibits, scenes, and ER 404(b) incidents which were intertwined. Moreover, the girls had initially disclosed to each other in 2007. Were separate trials held, each victim would be required to testify in both. The court "carefully considered" the balance between judicial economy and prejudice and found that the defendant had not shown that any specific allegation of prejudice that outweighed the interest in judicial economy. 6/19/15 RP 43-46, 47-48; CP 105-124. Id.

The trial ran from January 8 to January 25, 2016. Motions and jury selection consumed the first five days. Testimony was elicited for parts of the next five. Both victims, their father, several family members, and law enforcement testified as did the defendant and his wife. Supp. __ CP __ (Trial Minutes, sub.no.75).

J.L. testified first, followed by C.L. Before C.L. testified, the court instructed the jury:

> We are about to start testimony of another person who is named as an alleged victim in the information. I have a special instruction about that. And that is, a separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other count.

1/19/16 RP 1006.

Each time ER 404(b) evidence about to be introduced through a witness, the court instructed the jury:

> You may only consider this testimony to determine whether the defendant demonstrated a lustful disposition toward this witness and a lack of mistake but for no other purpose.

1/15/19 RP 737; 1/20/16 1044; 1073. At the close of ER 404(b) testimony, the court gave the following instruction:

> That concludes the portion of the testimony for the limited purpose of determining whether the defendant demonstrated a lustful disposition or lack of mistake as to this witness.

1/15/16 RP 768; 1/20/16 RP 1047.

When the defendant testified, he was asked a series of questions about whether each of the charged incidents and each of the ER 404(b) incidents had occurred. To each question, he answered, "No." 1/22/16 RP 1406.

At the close of the case, the court again instructed the jury regarding ER 404(b) evidence:

> Certain evidence has been admitted in this case for only a limited purpose. The evidence consists of testimony regarding other incidents of alleged sexual contact or communication with or displays to J.L. This evidence may be considered by you only for the purpose of determining the following aspects of the alleged crime committed by the defendant against J.L.: the defendant's lustful disposition toward J.L. and whether the alleged conduct was a mistake or

> accident. You may not consider it for any other purpose. Any discussion of the evidence during deliberations must be consistent with this limitation.

CP 185. The court gave a virtually identical instruction that named C.L. CP 186. It also again instructed the jury to consider each count separately.

> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other count.

CP 187.

The jury convicted the defendant on both counts. CP 190, 192. Based on his offender score of six and his 1994 conviction for rape of a child first degree, he was sentenced to life in prison on each. CP 248-58.

After the trial, the State filed a third amended information that abandoned Count V and amended the remaining two counts to indecent liberties on one incapable of giving consent. Supp. ___ CP __ (6/29/16, Third Amended Information). The defendant pleaded guilty and the court imposed consecutive sentences of 116 months on each count to be served concurrently with the life sentence previously imposed. Supp. ___ CP ___ (6/29/16 Felony Judgment and Sentence as to Counts 3 and 4).

III. ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF OTHER ACTS THAT SHOWED THE DEFENDANT'S LUSTFUL DISPOSITION TOWARD EACH OF HIS VICTIMS.

"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." ER 404(b). The same evidence may be admissible for another purpose, such as to prove motive, intent, or lack of mistake or accident. Id. If the trial court has correctly interpreted an evidentiary rule, its determination to admit evidence is reviewed for an abuse of discretion. State v. Gresham, 173 Wn.2d 405, 419, 260 P.3d 207 (2012). An abuse of discretion occurs when the court's ruling is manifestly unreasonable or based on untenable grounds. State v. Hassan, 184 Wn. App. 140, 151, 336 P.3d 99 (2014).

ER 404(b) is not a categorical bar to the use of evidence of prior acts. Gresham, 173 Wn.2d at 420-21. It is only a bar to use of such evidence to show character or propensity. The list of permissible uses is illustrative only and is not exclusive. Id.

One of those permissible purposes, long recognized by Washington courts, is to show a defendant's lustful disposition toward a specific victim. State v. Ray, 116 Wn.2d 531, 547, 806

P.2d 1220 (1991); State v. Camarillo, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); State v. Ferguson, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983); State v. Scherner, 153 Wn. App. 621, 543, 225 P.3d 248 (2009), affirmed in Gresham, 173 Wn.2d 405); State v. Medcalf, 58 Wn. App. 817, 822-23, 794 P.2d 168 (1990) (misconduct not admissible to show general sexual proclivities).

Before admitting ER 404(b) evidence, the court must (1) find by a preponderance that the acts occurred; (2) identify the purpose for which it is introduced; (3) determine if it is relevant to prove an element of the crime; and (4) weigh the probative value against the prejudicial effect. Gresham, 173 Wn.2d at 421. The proponent must show the first three elements, the opponent the fourth. The third and fourth elements insure admissibility under ER 402 and 403. Id.

In the present case, the defendant first argues that lustful disposition evidence is inadmissible under ER 404(b) because it is always propensity evidence. As discussed above, Washington State Supreme Courts have routinely rejected this argument. This court is bound by their decisions. And, as the trial court found, evidence of the defendant's lustful disposition toward each victim was relevant to show motive, intent, and lack of mistake.

The defendant next argues that the trial court abused its discretion when it admitted evidence of his lustful disposition toward J.L. for two reasons, first because the acts were committed "nearly a decade" after he molested her, and second, because the acts were dissimilar. That argument disregards the facts and the law.

The basis for Count 1 was an occasion when the defendant molested J.L. in 2004 during his first year of contact with her. In 2007, he fondled her leg when they were laying on his bed. At around the same time, he masturbated in front of her. In 2011, he digitally penetrated her vagina. In 2012, he had her masturbate him. Each of the incidents occurred within three to seven years of the first. None occurred a decade later.

Even if they had occurred a decade later, there is no time limit on evidence of lustful disposition arose. That decision is completely within the trial court's discretion. Ray, 116 Wn.2d at 547 (evidence of lustful disposition occurred ten years before crime charged); State v. Guzman, 119 Wn. App. 176, 183-4, 80 P.3d 990 (2003), review denied, 151 Wn.2d 1036 (2004).

In Guzman, the defendant was convicted of raping his young sister-in-law in 2001. At trial, she testified about the rape and about an occasion time five years earlier when the defendant had touched

her breast and asked to kiss her. The reviewing court found the decision to admit that evidence well within the trial court's discretion. It did not matter that the defendant had had regular contact with the victim during the years between the incidents. The evidence was highly probative of his lustful disposition and outweighed any prejudice to the defendant. Id. at 983.

The same is true here. Regardless of the passage of time, evidence of the defendant's lustful disposition was extremely probative of motive and lack of mistake when he molested J.L. That, coupled with testimony about his on-going inappropriate sexual talk and massages, was relevant to prove that the incident in 2004 was not a mistake and that the touching was for his sexual gratification, something the State was required to prove. See State v. T.EH., 91 Wn. App. 908, 916, 950 P.2d 441 (1998) (charge of molestation requires showing of sexual gratification).

Any argument that the evidence was inadmissible because it was dissimilar to the conduct that formed the basis for Count 1 should also fail. The "key inquiry" is not whether the conduct was the same but rather it "demonstrates sexual desire for the particular victim". Ferguson, 110 Wn.2d at 133-34. The evidence must be that which would naturally be interpreted as an expression of

sexual desire. State v. Thorne, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953).

That is precisely what the evidence showed here. All of the evidence admitted under ER 404(b) was evidence that showed that this defendant had a sexual desire toward each of his particular victims.

The trial court carefully weighed the possible prejudice to the defendant and refused to exclude this highly probative evidence. There was no abuse of discretion.

B. THE TWO COUNTS WERE PROPERLY TRIED TOGETHER BECAUSE CONCERN FOR JUDICIAL ECONOMY OUTWEIGHED ANY POTENTIAL PREJUDICE.

A trial court has discretion to grant severance when appropriate or necessary "to promote a fair determination of the guilt or innocence of a defendant." CrR 4.4(c)(2)(i). The defendant has the burden to show that sufficient facts warrant the exercise of discretion in his favor. State v. Emery, 174 Wn.2d 741, 752, 278 P.3d 653 (2012). Separate trials are disfavored. Id. Properly joined offenses should stay joined for trial unless the defendant can show that a joint trial would be so prejudicial that it would outweigh the concern for judicial economy. State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990).

Joinder may be particularly prejudicial in sex cases. State v. Sutherby, 165 Wn.2d 870, 884, 204 P.3d 916 (2009). However, any inherent prejudice can be offset by certain factors, none of which is which more important than the others. They are: (1) the strength of evidence on each count; (2) the clarity of defenses on each; (3) court instructions; and (4) cross-admissibility of evidence. Id. at 884-85; State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994), cert.denied, 614 U.S. 1129 (1995). Severance is not required simply because evidence on separate counts may not be cross-admissible; the burden is on the defendant to show prejudice, that is, a reasonable probability that the jury would not have found him guilty of both counts beyond a reasonable doubt. Bythrow, 114 Wn.2d at 721.

In the present case, each of those factors supported the trial court's decision not to sever the two counts. First, the evidence on each count was similarly strong, consisting of the testimony from each victim. Second, the defenses did not conflict as both were general denial.

Third, the jury was properly instructed that a separate crime was charged in each count. See Bythrow, 114 Wn.2d at 723. In fact, the jury was repeatedly instructed that a separate crime was

charged in each count. It was so instructed at the beginning of C.L.'s testimony and during the court's closing instructions. Additionally, it was repeatedly instructed that any ER 404(b) evidence could be used only insofar as it showed the defendant's lustful disposition toward a particular victim. No more was required.

Fourth, although evidence of the crimes themselves would not have been cross-admissible in separate trials, other evidence was. Both victims testified about the defendant's conduct toward both girls. The victims first disclosed the sexual abuse to each other. Each had a conversation with the defendant about "ratting him out" for his sexual advances toward them. Both disclosed to the police at around the same time. They and other witnesses would have been called for two trials to testify about times the girls spent at the defendant's house, his hotel room, and in his bed. The need for judicial economy outweighed any possible prejudice.

In State v. Kalakosky, 121 Wn.2d 525, 536, 852 P.2d 1064 (1994), the Supreme Court affirmed the denial of a severance motion on five counts of rape/attempted rape. The evidence available on each count of rape was similar in nature. In the first, a man in a ski mask armed with a gun and a knife kidnapped a 13-

year old, taped her up, and raped her. In the second, a man in a ski mask kidnapped a girl at gunpoint, bound her, and raped her. In the third, a man in a ski mask and armed with a gun broke into the victim's home, taped her up, raped her, and threatened to shoot her baby. In the fourth, a man with a ski mask kidnapped a woman, bound her, and raped her after hitting her with a gun. In the fifth, a man in a ski mask kidnapped a 17-year old, blindfolded her, and raped her in an alley. The evidence was not cross-admissible under ER 404(b), but a joint trial was proper because evidence on each count was similarly strong and a jury would be able to compartmentalize it. Id. at 539.

In the present case, the issues were similarly separate and distinct. The testimony lasted only five days. When the issues are relatively simple and the trial lasts a short time, the jury can be reasonably expected to compartmentalize the evidence. Bythrow, 114 Wn.2d at 721.

Joint trials are inherently prejudicial but the law still favors them. Bythrow at 713. Only if a defendant can point to specific prejudice has he overcome the need for judicial economy. Id. An even stronger showing of prejudicial effect must be made in a

severance motion than in an ER 404(b) motion to exclude evidence. Id. at 722-23.

Any prejudice that the defendant might have suffered in a joint trial was overcome by the court's careful and on-going instructions to the jury. The need for judicial economy outweighed any prejudice the defendant might have suffered.

IV. CONCLUSION

For the foregoing reasons, the conviction should be affirmed.

Respectfully submitted on February 8, 2017.

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

THE STATE OF WASHINGTON, Respondent, v. STEVEN BRADLEY THOMAS, Appellant.	No. 74814-9-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 8th day of February, 2017, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Washington Appellate Project; wapofficemail@washapp.org; greg@washapp.org

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

Dated this 8th day of February, 2017, at the Snohomish County Office.

Diane K. Kremenich
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