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No. 63749-5-1

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

2010 AUG 24 PM 4:52


STATE OF WASHINGTON, Respondent

v.

LARRY GRUBB, Appellant

APPELLANT'S AMENDED OPENING BRIEF

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I. ASSIGNMENTS OF ERROR:

- A. The trial court violated the Appellant's Constitutional Right to a Public Trial by conducting private voir dire in chambers, thereby precluding the public from observing the proceedings.
- B. The trial court erred in denying the Appellant's request for a bill of particulars where the State had specific information about the time frame of the alleged sexual assaults.
- C. The trial court erred in admitting prior bad acts evidence without conducting a proper analysis as to its relevance and prejudice against the defendant.
- D. The Trial Court abused its discretion by allowing the State to present an expert witness at trial without proper notice to the defense.
- E. The Cumulative Errors Denied Defendant a Fair Trial.

II. STATEMENT OF THE CASE.

A. Background Facts.

Larry Grubb was convicted by Jury of 7 counts of Rape of a Child in the First Degree in the Whatcom County Superior Court. On June 15th, 2009, Mr. Grubb was sentenced to a minimum term of 280 months in custody.

Larry Grubb is the step grandfather of ER, the alleged victim. RP 107, II. 11-14. ER is the daughter of Tami and Ralph Riddle. Tammi Riddle is Larry Grubb's stepdaughter.

The Grubbs would visit the parents of ER during the holidays. Larry's wife, Lynne, is a nurse and their visits to the Riddles were limited by Lynne's nursing schedule. RP 561-562.

With respect to the relevant charging period, the following facts were established at trial. The Grubbs did not travel to the Riddles for Thanksgivings, because Lynne always worked on Thanksgiving. RP 709, ll. 18-24. The Grubbs traveled up to the Riddles for Christmas Day, 2004. RP 575, ll. 10-19. The Grubbs spent Christmas 2005 at their house in Mukilteo. RP 575, ll. 23-25. For Christmas 2006, Lynne traveled to the Riddles by herself. RP 576, ll. 1-4. The Grubbs traveled to the Riddles and stayed the night on New Year's Eve, 2006. RP 696, ll. 15-25; 697, ll. 1-6. The Grubbs also traveled to the Riddle's house for Christmas in 2007. RP 576, ll. 5-12.

When the Grubbs celebrated Christmas with the Riddles, Larry would always document the occasions by videotaping the events. RP 119, ll. 16-22; RP 146, ll. 21-25; 147, l. 1; RP 577, ll. 2-11. Lynne had videos that Larry took from 2003-2007, but not one for 2006. RP 577, ll. 6-7, Defense Exhibit # 26.

On one unspecified date, ER and her little brother JR spent

the night at the Grubb's home in Mukilteo. RP 346, ll. 7-12; 760, ll. 2-10. ER and JR decided to sleep in the Grubb's bed with the Grubbs because the bed in the guest room squeaked. RP 349, ll. 2-7. During the night, Larry woke up because he was being repeatedly kicked by one of the Riddle children. RP 762. Larry removed the foot and got up and went to sleep in the other room. RP 762, ll.19-25; 763, ll. 1-5.

In July, 2008, Tami asked Lynne to take ER and JR to the Grubb home in Mukilteo because Tami had to work. RP 236, ll.16-18. ER and JR attended a relative's wedding with Lynne and spent the remainder of the weekend with the Grubbs. RP 303, ll. 9-25; 304, ll. 1-6. Upon ER's return home, in response to unprompted questioning from Tami, ER claimed that, while nothing happened that time, Larry had touched her inappropriately in the past. RP 306, ll. 3-18. According to Ralph Riddle, ER gave a detailed account of events where Larry had done things to her in the past. RP 116, ll. 14-22.

On August 7, 2008, Lynden Police Detective Beld met with ER and her family. RP 478, ll. 15-22. ER's account to Detective Beld was detailed. RP 121, ll. 9-18.

On August 25, 2008, Detective Beld prepared the following statement for ER to adopt:

The first time occurred, “[a]bout when I was 8 years old, my grandpa was over for either Christmas or Thanksgiving”, that it happened “approximately 9 times in all” occurring “about every Thanksgiving, Christmas, and New Years” and ER was “pretty sure it happened last on Christmas of 2007.”

Plaintiff's Exhibit #8.

The typed statement also included the allegation that Larry Grubb rubbed ER's foot against his penis while she stayed at his house in Mukilteo (hereinafter, the “Mukilteo Incident.”). Plaintiff's Exhibit #8.

On August 28, 2008, Larry was charged in Whatcom County Superior Court with nine counts of Rape of a Child in the first degree, alleged to have occurred between July 29, 2005 and December 31, 2007. CP 150-52.

B. Procedural History

On January 14, 2009, the defense moved for an order directing a bill of particulars requiring the State to allege a narrower time frame for the alleged sexual assaults. Specifically, the defense wanted the State to identify the holidays that the assaults occurred on during the time frame alleged in the amended

information. The defense argued that they had a right to a bill of particulars in this case because the defense wanted to present an alibi defense. CP 31, p. 6.

The State opposed defendant's motion for a bill of particulars, asserting that: (1) the information was sufficient to put the defendant on notice of the crimes alleged; (2) that the bill of particulars would bind the State in this case and that was not practical; (3) that time was not an element of the offense; and (4) that defendant did not have a due process right to a bill of particulars. CP 31, pp. 7-11.

The trial court agreed with the State for the following reasons: (1) the State cannot know what the alleged victim will say about the dates; (2) access could be unchecked even if for a couple hours during a day visit; (3) time is not of the essence and not an element of the offense; (4) if defendant did not commit the alleged crimes he should be able to defend against them with or without specific dates; and (5) defense is aware that the holidays are at issue and that is sufficient to allow defense to prepare an alibi defense. CP 31, pp. 20- 25.

On January 14, 2009, the defense interviewed ER. RP 377, II. 5-11; Defense Exhibit #17. ER alleged specific information for the nine alleged events, by which dates could be determined with reasonable certainty.

- 1) The first alleged incident occurred around Christmas time, 2004, in her new house.
- 2) The second alleged incident occurred on an unknown date during Christmas time when the Grubbs came up to her house to babysit.
- 3) The third alleged incident occurred on Christmas, 2005, when the Grubbs came up to the Riddles on Christmas Eve and stayed the night.
- 4) The fourth alleged incident occurred between Christmas 2005 and New Year's Day, 2006. ER stated she was 8 years old at that time.
- 5) The fifth alleged incident occurred on New Year's Eve, 2005.
- 6) The sixth alleged incident occurred on Christmas, 2006. The Grubbs came up on Christmas Eve and stayed the night.
- 7) The seventh alleged incident occurred on an unknown date at Larry's house in Mukilteo.

8) The eighth alleged incident occurred on Christmas Eve, 2007.

9) The ninth alleged incident occurred two weeks after Christmas, 2007.

Defense Exhibit #17.

The week before trial, the State informed the defendant that it would be dismissing the Mukilteo incident. However, the prosecutor planned to seek admission of the incident as a prior bad act under Evidence Rule 404(b) and RCW 10.58.090; RP 39, II. 18-22. The State also informed the defense that Joan Gaasland-Smith, named on the witness list, would testify as an expert witness on issues of delayed reporting and denial of abuse. RP 57, 3-9.

On April 13, 2009, jury selection began with the Honorable Charles Snyder, Whatcom County Superior Court Judge, presiding. During the open voir dire session, Judge Snyder invited any of the prospective jurors to answer sensitive questions "in private." RP 20 (JVD).¹ Specifically, the trial judge stated the following in open court:

Counsel has reminded me of something which

¹ JVD shall designate the Jury Voir Dire transcripts.

I'm glad they did. We have three jurors who have noted on their questionnaires that they have some questions that they're uncomfortable about answering or speaking about in this large group. Is there anyone in this group who has any objection whatsoever to the attorneys and Mr. Grubb and myself and the court reporter going into my chambers and asking those questions and finding out what the discomfort the people have is in a private situation in my chambers rather than in the courtroom? Is there anybody here who has an objection? Is that all right with everybody? Okay, we're going to do that.

RP 30 (JVD).

The trial judge then conducted in camera voir dire, outside the presence of the public, with the prosecutor, defense counsel, the defendant, and 5 prospective jurors individually. RP 30-49 (JVD). The order of questioning went as follows. First, the trial judge asked a set of questions. Second, the prosecutor asked the juror questions. And finally, defense was permitted to ask questions. When the private session was over, the trial court resumed open voir dire. RP 49 et. Seq. (JVD).

There is no indication in the record that the defense affirmatively requested special voir dire to be conducted in private. Furthermore, there is no indication in the record that Mr. Grubb

affirmatively waived his right to a public trial for the limited purpose of questioning the 5 prospective jurors in private. And finally, there is no indication in the record that the trial judge found a compelling need to conduct the limited voir dire in private in order to protect Mr. Grubb's constitutional right to a fair and impartial jury.

The Defense objected to the admission of the Mukilteo incident because the defense was not given notice of the prior bad act as required under both ER 404(b) and RCW 10.58.090. RP 39, II. 23-25; RP 40-43, I. 7; RP 52, II. 2-25; RP 53-54, I. 4.

The trial court permitted the State to introduce the Mukilteo incident at trial, concluding that the Mukilteo incident was admissible as a prior bad act under both RCW 10.58.090 and ER 404(b). RP 56, II. 6-12.

On February 17, 2009, the State filed its Witness List. CP 138. The list identified six witnesses including "Joan Gaasland-Smith – Prosecutors – Sex Aslt Spec." CP 138.

Prior to the weekend before trial, the defense had not received any information on Ms. Gaasland-Smith from the State, other than that she was named on the State's witness list. RP 57, II. 10-20; CP 138.

The defense had no reason to believe that Ms. Gaasland-Smith would be called as an expert witness in this case. On the first day of trial, at the hearing on the motions in limine, the defense informed the court of the late notice and moved for the witness to be excluded. RP 57, ll. 3-20.

The trial court ordered the State to present Ms. Gaasland-Smith for a defense interview so the defense could determine if they needed to obtain their own expert. RP 61, ll. 4-13.

The defense interviewed Ms. Gaasland-Smith the morning of the second day of trial. After the interview, the defense moved to exclude the witness from testifying at trial. RP 88, l. 25; 89, ll. 1-3.

The trial court determined that Ms. Gaasland-Smith's testimony was relevant but expressed concern about the State's lack of disclosure as a violation of Criminal Court Rule 4.7. RP 97, ll. 3-25; 98, 1-5. The trial court nevertheless concluded that the defendant's failure to seek a continuance prior to the jury being empanelled put the trial court in the untenable position of either declaring a mistrial or excluding the witness. RP 101, 5-6; RP 101, ll. 14-21. The trial court ruled that the expert witness would not be excluded, despite the State's violation of the rules of discovery. RP

103, ll. 4-9.

At trial, Tami O'Neill-Riddle testified that the Riddles and the Grubbs did not get together regularly for Thanksgivings as Lynne worked during that time. RP 218, ll. 23-25; 219, ll. 1. However, The Riddles sometimes went to the Grubbs for Thanksgivings. RP 219, ll. 3-5. When both the Grubbs came up to the Riddles to stay overnight, it was for a Christmas party. RP 219, ll. 24-25; 220, ll. 1-2. Tami only recalled that Larry came up for New Year's Eve, 2006. RP 222, ll. 4-10. Tami was uncertain whether the Grubbs came up for Thanksgiving at her house. RP 222, ll. 19-20. Tami was uncertain of whether the Grubbs attended all of Riddles' Christmas celebrations from 2004 to 2007. RP 222, ll. 21-25; 223, l. 1; RP 255, ll. 11-25; 256, ll. 1-17. Tami recalled that when the Grubbs did travel to the Riddles to celebrate Christmas, they usually came up Christmas morning. RP 224, ll. 6-22; 224, ll. 23-25; 225, l. 1. Tami agreed that Larry taped the holiday get-togethers. RP 251, ll. 16-25.

ER's trial testimony was as follows. ER testified that she sees the Grubbs on Christmas, Thanksgiving, and birthdays. RP 300, ll. 16-18.

The relevant parts of ER's testimony regarding the time

frame of the alleged sexual acts went as follows:

The first alleged incident occurred in her new house. RP 307, ll. 8-25. ER did not remember when the alleged incident occurred, or whether it was a holiday or not. RP 308, ll. 5-18.

The second alleged incident occurred a few months later, also at her house. RP 314, ll. 10-23; 315, ll. 17-19.

The third alleged incident occurred the next year, at her house, on an unknown holiday in 2005. RP 319, ll. 7-16; 320, ll. 7-13.

The fourth alleged incident occurred on New Year's Eve, 2005, at her house. RP 323, ll. 12-20; 324, ll. 1-4.

The fifth alleged incident occurred around Thanksgiving, 2006, at her house. RP 330, ll. 14-22; 331, ll. 16-18; 332, ll. 1-7.

The sixth alleged incident occurred on Christmas Eve, 2006. RP 335, ll. 23-25. ER was sure about the date because the Grubbs normally come up Christmas Eve and stay the night. RP 336, ll. 4-5.

The seventh alleged incident occurred on Thanksgiving, 2007, at her house. RP 338, ll. 10-18; 339, ll. 1-2.

The eighth alleged incident occurred on Christmas Eve,

2007, at her house. RP 341, ll. 4-5; 341, ll. 14-15; 342, ll. 6-7.

With respect to the “Mukilteo incident,” on an unknown date, ER alleged that after she fell asleep in the Grubb’s bed, she woke up to find Larry holding her foot and rubbing it on his penis. RP 353, ll. 2-11; 355, ll. 1-14. A picture depicting the event, which was drawn by ER in a defense interview, was admitted into evidence. RP 356, ll. 3-25; 357-358, l. 1; Plaintiff’s Exhibit # 7.

Detective Beld testified that he intentionally prepared a vague written statement for ER per the advice of the Prosecutor. Essentially, after interviewing ER, he prepared a statement that covered the first incident that she remembered and the last incident that she remembered. RP 483, ll. 1-6. Details about the alleged events in between were intentionally left out.

Over the defense’s objection, Ms. Gaasland-Smith testified on why children deny or delay reporting instances of child abuse. RP 471, ll. 4-25; 472, ll. 6-18. Ms. Smith also testified that children will typically disclose sexual abuse to other children without telling their parents. RP 472, ll. 19-25; RP 473, ll. 1-11. Ms. Gaasland-Smith concluded her testimony by testifying that it is not unusual for parents to allow someone whom they suspect of abusing their child

to continue to have contact with their child. RP 475, II. 3-19.

Lynne Grubb, the defendant's wife, testified for the defense. Ms. Grubb testified that sometimes she went to the Riddle's without Larry. RP 573, II. 4-8; 12-14. Larry did not spend any holidays at the Riddle's without Lynne RP 573, II. 15-22. Due to Lynne's work schedule, the Grubbs did not celebrate Thanksgivings with the Riddles. RP 575, II. 7-9; 583, II. 4-9; 585, II. 10-25; 586, I. 1; RP 589, II. 16-20; RP 691, II. 2-5; 8-25; 692, II. 1-10. Due to Lynne's work schedule, the Grubbs did not spend New Year's Eve, 2004 or New Year's Day, 2005, with the Riddles. RP 583, II. 10-25; 584, II. 1-25; 593, II. 18-25; 594, II. 1-3. The Grubbs spent Christmas Eve and Christmas 2005 at their home in Mukilteo. RP 575, II. 23-35; RP 594, II. 18-25; 595, II. 1-2; Defense Exhibit 26.

The Grubbs did not spend New Year's Eve, 2005 or New Year's Day, 2006, with the Riddle's as Lynne worked on-call New Years Eve, 2005, and a full shift New Years Day, 2006. RP 587, II. 14-25; RP 595, II. 12-17.

On Christmas day, 2006, Lynne went to the Riddle's home without Larry. RP 573, II. 23-25; 574, II. 1-2; 576, II. 1-4; RP 596, II. 1-4.

Lynne Grubb testified that she went up to visit the Riddles once when she was on-call, for Christmas, 2007, but that was only after she had requested and was granted permission to do so. RP 649, II. 20-25; 650-51, I. 1.

Lynne had video, documenting their Christmas visits with the Riddles taken during 2004, 2005, and 2007. RP 577, II. 6-11; 595, II. 3-5; 596, II. 22-25; 597, II. 1-3; 655-659, I. 10, II. Defense Exhibit # 26.

Lynne Grubb's testimony, together with her work records and the videos presented at trial, demonstrated that Larry was only at the Riddles on Christmas Eve and Christmas, 2004, New Year's Eve, 2006, and Christmas, 2007.

Larry videotaped the Christmas and birthday gatherings. RP 749, II.9-13. Larry did not go to the Riddle's for Christmas of 2006. RP 749, II. 21-25; 750, II. 1-2. Larry recalled going to the Riddle's for Christmas Eve, 2007, and staying the night. RP 751, II. 8-25; 752, II. 1-6. Larry recalled travelling up to the Riddles on a New Years Eve, either 2005 or 2006, and staying the night. RP 753, II. 1-14. No Thanksgivings were spent at the Riddles. RP 753, II. 24-25; 754, I. 1. Larry recalled spending Christmas with the Riddles, twice,

in 2004 and 2007. RP 754, II. 2-3.

III. LEGAL AUTHORITY/ARGUMENT

A. **The Trial Court violated The Appellant's Constitutional Right to a Public Trial by conducting private voir dire sessions in chambers, thereby precluding the public from observing the proceedings.**

A criminal defendant's claim that the trial judge violated his constitutional right to a public trial is of constitutional magnitude that is reviewed *de novo* and may be raised for the first time on direct appeal. State v. Strode 167 Wn. 2d 222, 225 (2009). The constitutional right to a public trial includes jury selection and must be protected unless the defendant affirmatively waives that right knowingly, intelligently, and voluntarily. State v. Momah, 167 Wn. 2d 140, 153 (2009). Additionally, the trial judge may close the courtroom and order private proceedings outside the presence of the public only under special limited circumstances upon satisfying the five enumerated requirements set forth in State v. Bone-Club, 128 Wn.2d 254, 258-259 (1995). *See also*, State v. Momah, 167 Wn. 2d at 148.

Absent the defendant affirmatively waiving the right to a public trial, the trial judge must conduct a "Bone-Club" hearing

addressing the following five factors before authorizing a closed proceeding:

- 1) The proponent of the closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious imminent threat" to that right.
- 2) Anyone present when the closure motion is made must be given an opportunity to object to the closure.
- 3) The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
- 4) The court must weigh the competing interests of the proponent of closure and the public.
- 5) The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn. 2d at 258-59.

If the defendant affirmatively seeks to close parts of voir dire for tactical reasons, then the record must establish that the defendant is making this decision knowingly, intelligently, and voluntarily in order to protect the right to a fair and impartial jury. The defendant, and only the defendant, must make this decision knowingly, intelligently and voluntarily. If the record does not establish the knowing, intelligent, and voluntary waiver, the trial

court's decision to permit a closed proceeding will violate the constitutional right to a public trial absent a Bone-Club hearing. See, State v. Bowen, 2010 Wash. App. LEXIS 1523 (Div. II, 7/20/2010).

In the instant case, the trial judge acknowledged during voir dire that several prospective jurors wanted to speak in private. Without conducting a Bone-Club analysis, the trial judge simply asked if anyone had an objection to private questioning in chambers. Moreover, there is no indication in the record that Mr. Grubb made an affirmative request to have a closed proceeding.

Even if the record suggests that Mr. Grubb is not opposed to a closed proceeding, the trial court must still be satisfied that Mr. Grubb is making this decision to have a closed proceeding knowingly, intelligently, and voluntarily. The record simply fails to establish whether Mr. Grubb made any such waiver of his right to a public trial for the limited purpose of having a closed voir dire session. Together with the fact that the trial court also failed to conduct a proper Bone-Club analysis, the court's decision to conduct a closed voir dire session amounted to structural constitutional error. Reversal is therefore required.

B. The trial court erred in denying the Appellant's request for a bill of particulars where the State had specific information about the time frame of the alleged sexual assaults.

An accused has a constitutional right to be informed of the nature and cause of the accusation against him so as to enable the accused to prepare a defense. U.S. Const. amend. 6; Wash. Const. art 1, § 22, amend. 10.

Where an information does not allege the nature and extent of the crime with which the defendant is accused, so as to enable the defendant to properly prepare his or her defense, a bill of particulars is appropriate and is specifically authorized by court rule. *State v. Bergeron*, 105 Wn.2d 1, 18-19, 711 P.2d 1000 (1985) (citing *State v. Holt*, 104 Wn.2d 315, 320-21, 704 P.2d 1189 (1985) and CrR 2.1(e) (now CrR 2.1(c)).

CrR 2.1(c) provides in pertinent part:

The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10 days after arraignment or at such later time as the court may permit.

The granting of a bill of particulars is within the discretion of

the trial court and will not be disturbed absent a showing of abuse of discretion. *State v. Noltie*, 116 Wn.2d 831, 844, 809 P.2d 190 (1991), citing *State v. Devine*, 84 Wn.2d 467, 471, 527 P.2d 72 (1974) and *State v. Brown*, 45 Wn.App. 571, 578, 726 P.2d 60 (1986). The function of such a bill is to amplify or clarify particular matters considered essential to the defense. *Noltie*, 116 Wn.2d at 845, citing *Holt*, 104 Wn.2d at 321.

Mr. Grubb wanted to develop an alibi defense. Accordingly, defendant sought a bill of particulars to determine the exact dates of the allegations.

The original Information in this case charged the defendant with committing nine acts of Rape of a Child in the first degree over a two and one-half year period. CP 150-52.

During discovery, Defendant received a copy of ER's statement. Plaintiff's Exhibit #8. ER's statement was notably vague on the dates of the alleged acts, alleging that it began when she was "about 8" that the acts occurred "approximately 9 times" and "about every Thanksgiving, Christmas, and New Years" and ended, "I'm pretty sure" on "Christmas of 2007". Exhibit #8.

The defense wanted the State to specify the exact holidays

of the alleged abuse. On January 14, 2009, the trial court heard arguments on the defendant's request for a bill of particulars. The trial court was made aware that the incidents were alleged to have occurred three times a year during major holidays of Thanksgiving, Christmas, or New Years. CP 130, 13-14. Defense made an offer of proof that the times at issue were a matter of hours and two or three times a year, at most. CP 130, p. 16. Defense requested that the State be required to narrow its focus to those dates that ER was alleging. Yet, the Court declined to require the State to identify the specific holidays of the alleged abuse. CP 130.

The defendant was denied a bill of particulars in the present case because the trial court presumed that ER did not possess the knowledge from which the specific dates could be determined.

Prior to trial, ER presented specific holiday dates to law enforcement and the prosecutor about the alleged abuse. Accordingly, the prosecuting attorney was in a position to file a charging information alleging specific dates.

However, the information provided in ER's statement typed by Detective Beld when he met with ER again on August 25, 2008, was not detailed. Plaintiff's Exhibit #8. It is now known that the

vague nature of the statement Detective Beld typed for ER, specifically regarding the lack of dates for the alleged acts, was not an accurate description of the information ER alleged, but was generalized on the advice of the State.

Detective Beld testified at trial that he was acting on advice from the Whatcom County Prosecuting Attorney's Office when he only took the first and last dates of the occurrences and did not get specifics regarding the other alleged acts. RP 482, ll. 12-25.

ER's interview with the defense also established that she was able to identify specific dates of the alleged abuse. Defense Exhibit # 17.

A defendant's fundamental right to due process is implicated where the evidence may be so general that it effectively precludes mounting a successful defense, such as alibi or misrepresentation. State v. Brown, 55 Wn.App. 738, 748, 780 P.2d 880 (1989). Whether a defendant has been afforded due process depends in part upon the defense available to him. *Id.*

The question is whether or not a defendant's due process rights are violated when the alleged victim possesses sufficient information to determine the alleged dates supporting the charges

yet the charging information remains vague and non-specific. The purpose of a bill of particulars is to allow preparation of a defense attorney by providing sufficient notice of the charge and eliminating surprise. State v. Peerson, 62 Wn. App. 755, 768-70 (1991). A departure from the bill of particulars in the evidence or instructions does not warrant relief so long as the defendant was on notice of a possible departure and his defense was not prejudiced. State v. Peerson, 62 Wn. App. at 768-770.

We assert that when a complaining witness can give specific dates to the prosecuting attorney, then the prosecuting attorney must allege the specific dates in the charging information. If not, then the trial court must order a bill of particulars so as to provide sufficient notice of the charge and further eliminate surprise. In Mr. Grubb's case, the trial court's denial of defendant's motion for a bill of particulars denied defendant his due process right to a fair trial since the State was aware of the specific dates of the alleged assaults.

At trial, ER surprised the defense by changing her statements from the specific dates she gave in her interview to general times, thereby circumventing defendant's alibi defense.

Defendant was denied his due process right to a fair trial by the denial of his request for a bill of particulars in the present case.

The distinguishing factor involving Mr. Grubb is that this case is clearly cannot be classified as a “resident offender” case as Mr. Grubb did not live with the alleged victim during the period of alleged abuse. Accordingly, Mr. Grubb never had “unchecked access” to the victim. See, State v. Jensen, 125 Wn.App. 319, 323, 104 P.3d 717 (2005); Hayes, 81 Wn.App. at 433; State v. Cozza, 71 Wn.App. 252, 271, 858 P.2d 270 (1993).

Further distinguishable, none of the defendants in the cited cases sought a bill of particulars, or even presented an alibi defense, at trial. Hayes, 81 Wn.App. at 440, 441; Cozza, 71 Wn.App. at 257; Jensen, 125 Wn.App. at 323-24; Brown, 55 Wn.App. at 748.

Finally, the cited cases stand largely on the fact that the alleged victims in each case could not provide the alleged dates. Brown, 55 Wn.App. at 741-42; Jensen, 125 Wn.App. at 326-27; Cozza, 71 Wn.App. at 272; Hayes, 81 Wn.App. at 429.

The trial court’s order cannot be considered harmless. The bill of particulars was denied based largely on the trial court’s

mistaken assumption that ER could not provide the requested information. ER gave specific dates in her interview. Defendant relied upon those dates in preparing his alibi defense. Defendant presented a compelling alibi defense at trial that was undermined when ER reverted at trial to general statements. The prejudice to defendant was not harmless.

Accordingly, defendant requests that this Court find that defendant's due process right to a fair trial was violated and that violation was not harmless error.

C. The Trial Court erred in admitting prior bad acts evidence without conducting a proper analysis as to its relevance and prejudice against the defendant.

The Trial Court Abused its Discretion by Admitting the Mukilteo Incident as a Prior Bad Act Under RCW 10.58.090. A trial court's interpretation of the rules of evidence is reviewed de novo and the rulings as to admissibility are reviewed for abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

RCW 10.58.090(1) provides:

In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible,

notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

RCW 10.58.090(6) requires the court to consider the following factors to reach its decision on whether or not to admit the evidence under this statute:

When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, **the trial judge shall consider the following factors:**

- (a) The similarity of the prior acts to the acts charged;
- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.

(Emphasis added).

In the present case, the trial court made the following findings:

I find the statute to be curious because it says in its initial paragraph that these things **shall be admissible** regardless of 404(b). . . . [I]t's pretty clear that the statute [RCW 10.58.090(1)] says these acts

shall be admissible unless 403 prohibits and precludes them and so we have to look at 403, and frankly, if the *Guzman* case and the other cases say that under 404(b) such acts are admissible, and routinely admissible which I think they are routinely admissible as long as it involves the same victim and having to do with lustful disposition, under those circumstances, they are presumptively admissible under 403, **because of the reasons under 403 could exclude some of those things. I can see where they might be excluded.**” RP 54, ll. 5-7; RP 54, ll. 19-25; RP 55, ll. 1-5.

(Emphasis added).

The trial judge clearly did not develop legally sufficient reasons for admitting the prior bad acts evidence. The judge failed to conduct the proper analysis because the judge failed to apply any of the enumerated factors required by RCW 10.58.090(6).

The trial court abused its discretion by failing to consider the factors mandated by the legislature, when using this statute, which it largely relied upon to admit the prior bad act. More important, the trial judge failed to conduct any sort of ER 403 balancing test to determine if the probative value outweighed any prejudice. See, *State v. Baker*, 89 Wn.App. 726, 731-32, 950 P.2d 486 (1997) (citing *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995)).

Furthermore, The State failed to notify the defendant of its

intent to use ER 404(b) evidence at trial. As such, admitting the prior bad act amounted to an abuse of discretion since the only notice to the defense came the week before trial. RP 39, ll. 18-23. The defendant was both surprised and prejudiced when the State informed the defense, right before trial that it still intended to seek to admit the prior bad act that it had previously agreed to dismiss. The State's assertion that it discussed other ways to admit the Mukilteo incident with defense prior to trial does not cure the surprise to defendant. Without actual notice, defendant had no reason to expect that the evidence would be admitted against him.

In the present case, the trial court bootstrapped its ER 404(b) analysis with its analysis of RCW 10.58.090. RP 54, ll. 19-25; 55, ll. 1-5. The trial court did identify the purpose for admitting the Mukilteo incident as a prior bad act, however, the trial court failed to: (1) find that the Mukilteo incident occurred by a preponderance of the evidence; and (2) failed to conduct an ER 403 analysis, weighing the prejudicial value of admitting the Mukilteo incident against its probative value.

Finally, the introduction of the Mukilteo incident was extremely prejudicial to the defendant. The only other evidence

facing the defendant in this trial was the uncorroborated testimony of ER. The defendant presented an alibi defense at trial to show that he was not present on many of the alleged occurrences at the Riddle's home. Due to the highly prejudicial nature of the Mukilteo incident, the trial court's errors committed in admitting the Mukilteo incident was not harmless error.

D. The Trial Court abused its discretion by allowing the State to present an expert witness at trial without proper notice to the defense.

CrR 4.7 requires the State to provide notice to the defendant of any expert witness it intends to call at trial together with the subject of his/her testimony.

CrR 4.7 provides in pertinent part:

a. Prosecuting Authority's Obligations.

(ii) The prosecuting attorney shall disclose to the defendant:

(ii) **any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney; ...**
(Emphasis added).

(h) Regulation of Discovery.

(7) Sanctions.

(i) [I]f at any time during the course of the

proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action **or enter such other order as it deems just under the circumstances.** (Emphasis added).

The State's failure to disclose its expert witness prior to trial was a violation of the rules of discovery. It is undisputed that the State's expert witness was in the State's possession or control. The expert works for the prosecutor's office. RP 476, ll. 2-4.

The State asserted that it had sent the defense a copy of the expert's curriculum vitae. However, the State provided no proof supporting this contention and defense counsel proffered that he never received a copy of the curriculum vitae. RP 91, ll. 4-7.

The State's failure to notify defendant of its expert witness and the nature of the expert witnesses' testimony was a violation of CrR 4.7.

The Trial Court also erred in failing to exclude the State's expert witness. Exclusion of a witnesses' testimony is a proper remedy for a violation of the rules of discovery. *State v. Wilson*, 149 Wn.2d 1, 65 P.3d 657 (2003) (citing *State v. Hutchinson*, 135

Wn.2d at 880-84).

A trial court's decision on whether or not to exclude a witness for a discovery violation is reviewed for an abuse of discretion. See *Hutchinson*, 135 Wn.2d at 882. A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or when untenable reasons support the decision. *State ex rel. Carroll. v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A review of the *Hutchinson* factors in the present case favors exclusion.

(a) The Effectiveness of Less Severe Sanctions.

There were no less severe sanctions available to the trial court. At the point in the proceedings where defendant raised his objection, the only options available to the Court were to either admit or exclude the State's expert witness. Because the State failed to notify the defense of its intent to call the witness as an expert, the trial court should have excluded the State's expert.

(b) The Impact of Suppression on the Evidence at Trial and the Outcome.

The suppression of the expert's testimony would have

impacted the State's case as the expert's testimony served to legitimize, to the jury, issues in this case such as initial denial and delayed reporting, matters which went to the very credibility of ER's uncorroborated accusations.

(c) The Extent to which the Objecting Party will be Prejudiced or Surprised by the Evidence.

The defense was both surprised and prejudiced by the State's failure to properly notify the defendant that they intended to call someone from their office to testify on matters going to the credibility of the alleged victim. The Defense only learned of the State's expert witness immediately before trial, and had interviewed her that morning. The expert's testimony served to bolster the credibility of the State's fact witnesses, and was highly prejudicial to the defendant. The trial court was faced with a clear violation of the rules of discovery by the State. The expert testimony added no substantive evidence to the trial, but was used to bolster the credibility of the alleged victim. In such a case, the trial court should have excluded the State's expert's testimony as the only proper remedy available to the trial court at that time for the State's lack of proper notice to the defendant.

The trial court abused its discretion by failing to exclude the expert witness. The Defendant was prejudiced by the trial court's abuse of discretion.

E. The cumulative errors denied the Defendant a Fair Trial.

Finally, the cumulative errors in this case denied the defendant his Due Process Right to a fair trial. The cumulative error doctrine applies to cases in which "there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

In the present case, the errors cited herein, even if not determined to individually deprive the defendant of a fair trial, when taken into consideration as a whole, denied defendant his right to a fair trial.

IV. CONCLUSION

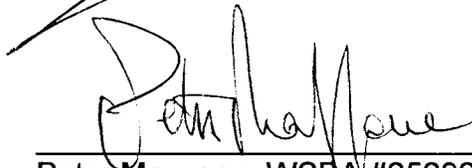
The numerous errors that occurred in this trial deprived The Defendant of his due process right to a fair trial.

For the foregoing reasons, The Defense respectfully requests that this Court vacate the convictions and remand for a new trial.

Respectfully submitted this 19th day of August, 2010.



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