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NO. 64340-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY WINFORD,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

The trial court denied Mr. Winford his right to present a defense in violation of the Sixth Amendment to the United States Constitution and Article I, §section 22 of the Washington Constitution.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The Sixth Amendment's guarantee of the right to present a defense and the Fourteenth Amendment guarantee of due process, along with similar guarantees of the Washington Constitution, are violated where a trial court bars a defendant from presenting relevant evidence. Washington courts have concluded that so long as evidence is minimally relevant the refusal to admit violates a defendant's rights unless the State can establish the relevance is outweighed by potential prejudice to the fairness of process. Where the trial court found the evidence was relevant but nonetheless not admissible, even in the absence of any showing of prejudice by the State, did the court violate Mr. Winford's Sixth and Fourteenth Amendment rights as well as his rights under Article I, section 22?

C. STATEMENT OF THE CASE

Mr. Winford spent a night at a campsite with his close friends the Hurst family. Also there was S.Y., a ten-year-old friend of one of the Hurst children.

Lacey Hurst and Mr. Winford remained near the campfire drinking while the Hurst children and S.Y. went to bed in the family's trailer. 8/18/09 RP 63. Lacey Hurst testified S.Y. was sleeping on a bunk bed to the rear of the trailer. 8/18/09 RP 65. Ms. Hurst had asked Mr. Winford to sleep on the pull-out bed with her son Dylan. 8/18/09 RP 65-67. Dylan testified that he fell asleep on the pull-out couch alone. 8/19/09 RP 59.

S.Y. testified, however, that she fell asleep on the pull-out bed with Dylan. 8/18/09 RP 21-22. S.Y. testified she awoke during the night on the pull-out bed and found Mr. Winford moving her feet. 8/18/09 RP 26. S.Y. testified she moved his hands away when he tried to place them under her shirt. Id. at 26. According to S.Y., Mr. Winford returned to the pull-out bed a few minutes later, moved aside her underwear, and began rubbing her vagina for about five minutes. Id. 27-28. S.Y. testified he stopped again when she pushed his hands aside. Id. S.Y. testified that in addition to

Dylan, the Hursts' two large dogs were also sleeping on the bed during the time the alleged acts were occurring. 8/18/09 RP 31.

S.Y. claimed she woke Dylan and told him what had occurred. 8/18/09 RP 30. Dylan testified he had no recollection of S.Y. waking him. 8/19/09 RP 59.

The following morning, S.Y. told Lacey Hurst the details of her claims. 8/18/09 RP 70. When Ms. Hurst confronted him with the allegations, Mr. Winford had no recollection of such events. 8/19/09 163-65.

The State charged Mr. Winford with one count of first degree child molestation. CP 27-28.

Despite the inconsistencies between S.Y.'s testimony and that of the other witnesses a jury convicted Mr. Winford as charged. CP 5.

D. ARGUMENT

THE TRIAL COURT'S EXCLUSION OF RELEVANT EVIDENCE DEPRIVED MR. WINFORD OF HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE

1. The Sixth Amendment guarantees an individual the right to present a defense. The Sixth Amendment guarantees a defendant the right to present a defense. Davis v. Alaska, 415 U.S.

308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide “where the truth lies.” Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). “[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt.” Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

So long as evidence is minimally relevant

“. . . the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” The State's interest in excluding prejudicial evidence must also “be balanced against the defendant's need for the information sought,” and relevant information can be withheld only “if the State's interest outweighs the defendant's need.”

(Internal citations omitted.) Jones, 168 Wn.2d at 720 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)).

2. The trial court's refusal to permit admission of relevant evidence denied Mr. Winford his right to present a defense. Evidence of a defendant's sexual morality may be

relevant and admissible as character evidence of the accused, if a proper foundation is laid. State v. Grisvold, 98 Wn.App. 817, 829, 991 P.2d 657 (2000), abrogated on other grounds, State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003).¹

Mr. Winford made an offer of proof setting forth evidence from Kathleen Thompson who had been a close friend of Mr. Winford's daughter in high school. 8/19/09 RP 69. Ms. Thompson testified that during that period she spent a lot of time at Mr. Winford's home, on occasion alone with him, and that he never flirted or otherwise acted inappropriately towards her. 8/19/09 RP 71-72. Mr. Winford also made an offer of proof of the testimony of Mary Beth Winford, his wife, who testified that when she and Mr. Winford married she had two teen-aged daughters. Id. at 77. Ms. Winford testified neither daughter ever complained that Mr. Winford acted inappropriately. Id. at 79.

The trial court properly found this evidence of Mr. Winford's sexual morality was relevant. However, the court then improperly limited Mr. Winford's ability to introduce that relevant evidence. The court reasoned that Mr. Winford could only offer such evidence

¹ DeVincentis abrogated the holding of Grisvold requiring a heightened showing of uniqueness prior to admission of other acts evidence as proof of a common scheme or plan under ER 404(b). 150 Wn.2d at 18-21.

by way of reputation evidence under ER 405(a). 8/15/09 RP 15; 8/19/09 RP 85. The court rejected, without explanation, the notion that ER 405(b) allowed Mr. Winford to offer evidence of specific instances of conduct.

First, ER 405(a) does not require proof of character be made by evidence of reputation but rather the plain language of that rule merely allows that manner of proof. The rule provides

In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

ER 405(a).

Courts rely on the rules of statutory construction to interpret court rules. State v. Blilie, 132 Wn.2d 484, 492, 939 P.2d 691 (1997). Generally, courts attempt to give effect to the plain terms of a statute. Tommy P. v. Board of Cy. Comm'rs, 97 Wn.2d 385, 391, 645 P.2d 697 (1982); see also, State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) (every statutory term is intended to have some material effect). ER 405(a) uses the word “may” rather than “shall” in describing the manner of proof which may be employed. Use of the word “shall” creates a mandatory requirement whereas “may” confers discretion. See e.g., State v. Krall, 125 Wn.2d 146,

148-49, 881 P.3d 1040 (1994). Thus, the allowance in ER 405(a) for proof of character by reputation evidence is not a prohibition of proof by specific instances of conduct.

But in any event, ER 405(b) specifically permitted Mr. Winford to prove his character by specific instances of conduct.

That rule allows:

In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Here, the State argued, and the court agreed, Mr. Winford's character trait was not an essential element of the "charge" and thus could not be proved by evidence of specific instances of conduct. 8/19/09 RP 22-24. But the rule is not limited simply to cases where the character trait is an essential element of a charge. Instead the rule also applies in cases where the trait is an element of a "claim [or] defense." ER 405(b). Mr. Winford's sexual morality was an essential component of his defense and claim that he did not do what he was accused of doing and that he was not the type of person to do that. The evidence was relevant and plainly admissible pursuant to ER 405(b).

Applying the standard set forth in Jones, the court found the evidence relevant. Thus, the State was required to prove the evidence was “so prejudicial as to disrupt the fairness of the fact-finding process at trial” and that this prejudice outweighed Mr. Winford’s need for the evidence. Jones, 168 Wn.2d at 720. The State did not meet that burden. The State made no showing of prejudice at all much less a showing that admission of this relevant evidence would upset the fairness of the proceeding. The trial court’s erroneous ruling deprived Mr. Winford of his Sixth Amendment right to present a defense.

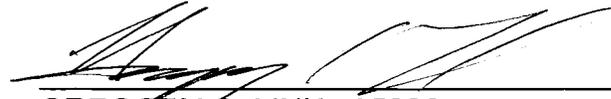
3. This Court must reverse Mr. Winford’s conviction so that he may have a trial that satisfies his right to present a defense and his right to due process. A constitutional error requires reversal unless the State can establish beyond a reasonable doubt the error “did not contribute to the verdict obtained.” Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United States v. Neder, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). To meet its burden here, the State must prove beyond a reasonable doubt that none of the jurors could have entertained a doubt as to Mr. Winford’s guilt after hearing evidence that he had not acted inappropriately towards girls even when presented the

opportunity. The State simply cannot meet that standard here, and this Court must reverse Mr. Winford's conviction.

E. CONCLUSION

For the reasons above, the Court must reverse and dismiss Mr. Winford's conviction.

Respectfully submitted this 30th day of August 2011.



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