

No. 64598-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

LESLIE STEPHENSON,

Appellant.

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

REPLY BRIEF OF APPELLANT

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2010 JUN 23 11:00 AM
COURT OF APPEALS
DIVISION ONE

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A. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF A 26-YEAR-OLD CHILD MOLESTATION CHARGE OF WHICH MR. STEPHENSON WAS ACQUITTED.

As explained in Mr. Stephenson's opening brief, the trial court abused its discretion in admitting evidence of a 26-year-old child molestation charge of which Mr. Stephenson was acquitted. The court initially excluded the evidence, but later ruled that Mr. Stephenson "opened the door" to cross-examination and rebuttal evidence regarding the prior allegation.

First, Mr. Stephenson did not "open the door" to this evidence because his statement that he "would never" do something like molest the complainant was a mere passing reference to his character and did not create a false impression given that he was acquitted of the prior charge. Second, even if Mr. Stephenson "opened the door" to evidence of the old accusation, the trial court erred in refusing to evaluate its admissibility under ER 403. Under ER 403, the evidence was substantially more prejudicial than probative because the accusation occurred over 25 years ago, Mr. Stephenson did not commit any crimes in the interim, and Mr. Stephenson was acquitted of the prior charge.

The State concedes that “[t]he open door doctrine is an equitable principle that prevents a party from leaving the jury with a false or misleading impression regarding a material issue.” Br. of Resp’t at 8. Mr. Stephenson did not leave the jury with a false or misleading impression. Mr. Stephenson was acquitted of the prior charge, so if he left the jury with the impression that he never molested a child, that impression was not false or misleading. Yet the State makes the conclusory statement that Mr. Stephenson’s testimony “created the false impression that he was the sort of person who would never ... do anything like sexually abusing a child.” Br. of Resp’t at 9, 14. Because the State utterly fails to explain how a true statement could leave a false impression, its argument should be rejected. Mr. Stephenson did not say he was “never ever accused” of molesting a child; he said it was something he would never do. His statement did not create a false impression, and therefore did not “open the door.”

For this reason, the State’s citation to Warren is unavailing. Br. of Resp’t at 11-12 (citing State v. Warren, 134 Wn. App. 44, 138 P.3d 1081 (2006), aff’d 165 Wn.2d 17, 195 P.3d 940 (2008)). In Warren, the defendant’s testimony that he would not touch the sexual parts of a girl created a false impression because he had

recently been convicted of molesting the victim's sister. Warren, 134 Wn. App. at 64-65. But Mr. Stephenson had no convictions for child molestation – or for anything else – so his statements did not create a false impression, and did not open the door to evidence of a decades-old accusation.

Even if Mr. Stephenson “opened the door,” the evidence was inadmissible under ER 403. The trial court erred as a matter of law in refusing to perform an analysis under this rule after finding Mr. Stephenson opened the door. The State does not deny that a trial court is required to perform an ER 403 analysis after finding a party opened the door. But it essentially argues that any error in failing to evaluate the issue was harmless because the evidence was not more prejudicial than probative. Br. of Resp't at 14-16. The State is wrong.

The State claims the evidence was highly probative because it directly contradicted Mr. Stephenson's testimony. Br. of Resp't at 15. But the State fails to address the fact that the accusation was decades old and resulted in an acquittal. These facts render the evidence of very limited probative value.

In contrast, the evidence was highly prejudicial. The accuser from the decades-old case testified that when she was 10 years old

Mr. Stephenson put his finger in her vagina, caused her physical and emotional pain, and threatened to kill her and her family. 4 RP 40-41. The State dismisses the prejudicial effect of this damning testimony by noting the jury here did not reach a verdict on the two child-rape counts. Br. of Resp't at 16. But the jury convicted Mr. Stephenson of the count that was identical to the old Florida charge.

Courts have recognized that allegations of prior sexual misconduct against a child are extremely prejudicial. State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). Because the evidence of the prior accusation was extremely prejudicial and of limited probative value, it should have been excluded even if Mr. Stephenson "opened the door." See Br. of Appellant at 15-26. This Court should reverse and remand for a new trial. The Court need not reach the alternative arguments below.

2. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING MULTIPLE HEARSAY STATEMENTS UNDER THE "FACT OF COMPLAINT" EXCEPTION TO THE HEARSAY PROHIBITION.

Over Mr. Stephenson's objections, the trial court allowed several people to testify that M. told them Mr. Stephenson sexually abused her. The trial court admitted the testimony even though (1)

it was hearsay, (2) M. made no such claims until after she had a heated argument with Mr. Stephenson over money, and (3) by M.'s own admission she "kept changing the story" thereafter.

The testimony was inadmissible hearsay. The trial court admitted the evidence pursuant to the "fact of complaint" doctrine, but this doctrine is not part of the Rules of Evidence, and is based on antiquated and sexist considerations. Even assuming the exception still exists, it applies only where the complaint was made immediately following the alleged crime. Here, M. did not tell anyone Mr. Stephenson molested her until well after he is alleged to have done so. Finally, even where the "fact of complaint" exception applies, a witness may not report the identity of the alleged perpetrator or other details of the complaint. But here, M. testified that she told Max that Mr. Stephenson sexually abused her, hit her, and almost raped her. For all of these reasons the trial court abused its discretion in admitting hearsay testimony under the "fact of complaint" doctrine, requiring reversal of Mr. Stephenson's conviction. See Br. of Appellant at 28-37.

The State responds that instead of abolishing the exception, this Court should expand it by eliminating the timeliness requirement. Br. of Resp't at 26. This Court should reject the

invitation. The State contends that the statements are “relevant” to M’s “credibility.” Br. of Resp’t at 24, 27. But relevant evidence is not admissible if barred by other rules of evidence. ER 402. Hearsay is barred by ER 801. It is inadmissible because not made under oath, not subject to cross-examination, and susceptible to inaccurate recall and interpretation. 5B K. Tegland, Washington Practice, Evidence § 801.3 at 319 (5th ed. 2007). Furthermore, the jury cannot observe the declarant’s demeanor during the statements. Id.

There are already rules that allow for the admission of prior out-of-court statements under circumstances where they would be reliable. As pertinent here, ER 801(d)(1)(ii) provides for the admission of prior consistent statements to rebut a claim of recent fabrication. Also, ER 803(a)(2) allows for the admission of excited utterances. But M’s statements do not fall within either of these categories. She did not accuse Mr. Stephenson of molestation until after he refused to give her money. And then, as she herself admitted, she “kept changing the story and telling other people different stories.” 2 RP 133. As explained in Mr. Stephenson’s opening brief, the repetition of these stories was inadmissible hearsay.

The State claims that Mr. Stephenson failed to preserve these issues. But as the State acknowledges, “Stephenson raised this issue in his trial brief, and he initially argued against the admission of any fact of complaint testimony on grounds that M.’s disclosures were not timely.” Br. of Resp’t at 19 (citing CP 23-25; 1 RP 36-37). Furthermore, Mr. Stephenson argued that there should be no reference to the identity of the alleged perpetrator and no reference to sexual abuse. 1 RP 38. Mr. Stephenson therefore properly preserved both the issue of admissibility and the issue of scope.

As explained in Mr. Stephenson’s opening brief, even if the “fact of complaint” exception still exists in Washington, it does not apply here because the complaint was not timely, and even if the complaint had been timely, the witnesses exceeded the scope of the exception by identifying the alleged perpetrator and describing the alleged acts. This Court should reverse.

3. THE TRIAL COURT ERRED IN ADMITTING OVER A HUNDRED TEXT MESSAGES BETWEEN MR. STEPHENSON AND THE COMPLAINANT.

a. The admission of the messages sent by Mr. Stephenson violated his constitutional right to privacy. Over Mr. Stephenson’s objection, the trial court admitted 107 text messages allegedly

exchanged between M. and Mr. Stephenson. Exs. 13-119. Eighty-one of the messages were sent by Mr. Stephenson to M. The seizure of these messages and their admission at trial violated Mr. Stephenson's constitutional right to privacy. Br. of Appellant at 37-42.

In response, the State first claims that there was no state action when the police viewed the private text messages Mr. Stephenson sent to M. The State is wrong. Detective Christopher Young testified, "I took [M.'s] phone away. She wasn't thrilled about that, but she understood." 1 RP 130. Detective Young is a state actor. Pasco v. Shaw, 161 Wn.2d 450, 460, 166 P.3d 1157 (2007) (a person is a state actor if he functions as an agent or instrumentality of the government).

Second, the State argues the text messages were not "private affairs" protected by article I, section 7, because once Mr. Stephenson "sent the text messages, he relinquished control over them." Br. of Resp't at 30-31. This argument ignores Boland, Miles, Gunwall, and Jorden.¹ See Br. of Appellant at 38-42. The State attempts to distinguish Boland by stating:

¹ State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990); State v. Miles, 160 Wn.2d 236, 156 P.3d 864 (2007); State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986); State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007).

In Boland, the court held that a person has a privacy expectation in garbage because the person places it on the curb “in expectation that it would be picked up by a licensed garbage collector,” not the police. Boland, 115 Wn.2d at 578.

Br. of Resp’t at 34. But the same is true here: a person has a privacy interest in a text message because he sends it in expectation that it will be read by the recipient, not the police. The State cannot reasonably claim that people expect their trash to be more private than their personal messages. Because the private text messages Mr. Stephenson sent to M. were searched and seized without authority of law, the trial court erred in denying the motion to suppress.²

b. The messages sent from M. to Mr. Stephenson were inadmissible hearsay. Twenty-six of the messages the trial court admitted were sent from M. to Mr. Stephenson. Exs. 13-26, 28, 30-31, 33, 35, 37, 50, 54, 57, 97, 99, 106. One read, “Because im a teenage who hates life and u didn’t make it any better.” Ex. 16. Another said, “Maybe the opposite place cindy went. Cindi didn’t rape ppl either.” Ex. 20. Another stated, “Because it was true. I

² The State also sets up a straw man and knocks it down, arguing that the interception of the communications did not violate the Privacy Act. As noted, Mr. Stephenson did not argue that the search violated the Privacy Act, so he will not reply to the State’s new issue. The search of the text messages violated article I, section 7 because it constituted an invasion of private affairs without authority of law. Br. of Appellant at 37-42.

needed to tell someone anyway.” Ex. 24. The prosecutor emphasized these messages, especially the one reading “Cindi didn’t rape ppl either,” in closing argument. 4 RP 110.

As explained in Mr. Stephenson’s opening brief, the messages that were sent from M. to Mr. Stephenson were inadmissible hearsay, and the trial court erroneously concluded that because there was no confrontation-clause violation there was no evidentiary problem. Br. of Appellant at 42-43.

The State does not defend the trial court’s reasoning, but argues that the above messages were properly admitted to “show the nature of M. and Stephenson’s relationship.” But there is no “nature of the relationship” exception to the rule against hearsay. The State clearly introduced these statements for the truth of the matters asserted – that Mr. Stephenson did not make M.’s life any better, that M.’s accusations regarding Mr. Stephenson were true, and that unlike Cindi, Mr. Stephenson committed rape.

At trial, the State used these statements not to show “the nature of the relationship,” but to show Mr. Stephenson sexually abused M. In closing argument, the prosecutor said:

State’s exhibit 20 is a text message that [M.] sent to Mr. Stephenson right in the middle of this whole exchange. It was sent on September 27, 2008, at

10:11 a.m. where [M.] says, "Maybe the opposite place Cindy went. Cindy didn't rape people either." **[M.] does use the term "rape" during this e-mail exchange on September 27th when she is texting back and forth with Mr. Stephenson.**

...
She also says, actually right before in a text message, "because I'm a teenager who hates life, and you didn't make it any better." **This is about [M.] and what the defendant did to [M.].**

4 RP 110-11 (emphasis added). In sum, the trial court abused its discretion in overruling the hearsay objection. The messages sent by M. should have been excluded.

c. All of the messages should have been excluded as irrelevant, cumulative, and substantially more prejudicial than probative. As explained in the opening brief, in addition to the above issues, all of the messages should have been excluded as irrelevant, substantially more prejudicial than probative, and cumulative. Br. of Appellant at 44-45. Mr. Stephenson rests on his opening brief for this issue.

4. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT.

As explained in Mr. Stephenson's opening brief, the prosecutor committed misconduct in closing argument by telling the jury its job was to find the truth, by vouching for her witnesses, by implying that the jury had to find the State's witnesses were lying in

order to acquit, and by alluding to M.'s lost innocence. The State is correct that because Mr. Stephenson did not object below, this arguments are subject to a stricter standard of review. But for the reasons given in the opening brief, this Court should hold the State committed flagrant and ill-intentioned misconduct, requiring reversal.

The State argues that the prosecutor did not commit misconduct when arguing that Mr. Stephenson took M.'s childhood, that M. will bear an invisible scar, and that when M. looks back on her childhood she will not remember trips to Disneyland but will instead remember Mr. Stephenson's abuse. Br. of Resp't at 43. The State claims these are "reasonable inferences from the evidence," but that is incorrect. They are reasonable inferences only if one assumes Mr. Stephenson is guilty. The prosecutor's job is to argue that Mr. Stephenson's guilt is a reasonable inference from the evidence, but the additional leap to this vague psychic harm is an improper appeal to passion and prejudice. State v. McKenzie, 157 Wn.2d 44, 60, 134 P.3d 221 (2006) (prosecutor's references to 12-year-old's lost innocence were improper).

As to the statement that it took courage for M. to testify, Mr. Stephenson did not argue that this was an improper appeal to

passion and prejudice. Br. of Resp't at 44. Rather, it – along with other statements – constituted improper vouching. Br. of Appellant at 51-52.

Just as it was improper for the prosecutor to vouch for her witnesses, it was improper for her to argue that Mr. Stephenson “absolutely has a reason not to be truthful with you,” and to repeatedly describe Mr. Stephenson as a “manipulator”. 4 RP 78-79, 82. A prosecutor may not assert her opinion of the credibility or guilt of the accused. State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (finding misconduct where prosecutor called defendant a “liar and manipulator”). The State contends, “The fact that Stephenson had a motive to lie in this case is obvious from the seriousness of the charges against him.” Br. of Resp't at 46. This logic applies to all defendants in all cases, but it does not give the prosecutor carte blanche to call defendants liars in every closing argument.

The State also claims there was nothing wrong with stating that if the jurors concluded that M. was telling the truth, then they were convinced of Stephenson's guilt beyond a reasonable doubt. Br. of Resp't at 44. The State ignores the fact that a complaining witness may tell the truth, yet her statements may not support the

elements of the crimes charged. The jury must make each of these determinations independently.

In sum, the prosecutor's misconduct in closing argument provides another independent basis for reversal in this case.

5. CUMULATIVE ERROR DENIED MR. STEPHENSON
A FAIR TRIAL.

Even if none of the errors that occurred in this case individually warrants a new trial, they certainly do in the aggregate. Mr. Stephenson was forced to defend a 26-year-old charge of which he had already been acquitted, face improper hearsay allegations from no fewer than five witnesses, address over a hundred text messages which had been admitted in violation of his right to privacy and the Rules of Evidence, and hear the prosecutor urge the jury that its job was to "find the truth in the voice" of a child who admitted her allegations were a "story" that she had changed multiple times. This Court should reverse and remand so that Mr. Stephenson may have a fair trial.

B. CONCLUSION

For the reasons set forth above and in his opening brief, Mr. Stephenson asks this Court to reverse his conviction and remand for a new trial.

DATED this 19th day of November, 2010.

Respectfully submitted,


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DIVISION ONE**

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)	
Respondent,)	
)	NO. 64598-6-I
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)	
LESLIE STEPHENSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **REPLY 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:

<input checked="" type="checkbox"/> ANDREA VITALICH, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> LESLIE STEPHENSON 254678 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF NOVEMBER, 2010.

X _____ *grd*

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