

NO. 66957-5-1

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

REC'D
MAR 13 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

BARUTI HOPSON,

Appellant.

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

The Honorable Michael C. Hayden, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE OF OTHER BAD ACTS.

a. Evidence of Prostitution With Other Women

The State cites State v. Lillard, 122 Wn. App. 422, 93 P.3d 969 (2004), review denied, 154 Wn.2d 1002 (2005), in support of the trial court's decision to admit evidence concerning Goldie and Candita as res gestae. BOR, at 16-17. That decision is not supportive, however.

Lillard was identified as an individual involved in the fraudulent use of Nordstrom gift cards. Lillard, 122 Wn. App. at 426. Lillard would purchase gift cards for nominal amounts (for example, \$10) and alter the numbers on the back strips of the cards to match accounts with much larger balances (hundreds of dollars). He would then purchase items using the modified cards and later return the items for cash. Id. at 425-426.

Security at the Bellevue Nordstrom observed just such a scheme on November 5, 2000. Purchased merchandise was loaded into a U-haul truck. Id. at 426. The following day, Bellevue Police spotted the truck approaching the mall again. Lillard and two accomplices returned items that had been purchased with

fraudulent cards before leaving the scene in the truck. Police stopped the truck and found clothing that had been purchased on November 5. Id. at 426-427.

Lillard was charged with possession of stolen property and convicted. Id. at 427. On appeal, he challenged the trial court's admission of "videotapes, testimony, and documentary evidence about a number of other thefts and incidents" related to the fraudulent scheme. Id. at 430. In rejecting the challenge, this Court reasoned:

A defendant cannot insulate himself by committing a string of connected offenses and then argue the evidence of the other uncharged crimes is inadmissible because it shows the defendant's bad character, thus forcing the State to present a fragmented version of the events. Under the *res gestae* or "same transaction" exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime.

Given the complex nature of this case, and the difficulty in setting the context of the alleged crime, the challenged evidence was properly admitted. The prosecutor's explanation for offering the evidence, to rebut Lillard's argument that he did not know the items were stolen, was reasonable. . . .

Id. at 431-432.

Lillard was properly decided under its facts because evidence of the fraudulent scheme truly was a “piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury.” State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981). As this Court recognized, excluding the evidence would have forced the prosecution to present “a fragmented version of events,” an unfair handicap given “the complex nature” of the case. Lillard, 122 Wn. App. at 431-432. The res gestae evidence also established Lillard’s knowledge the items were stolen. See RCW 9A.56.140 (1) (“possessing stolen property” means “knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen . . .”).

In contrast, exclusion of the evidence Hopson had promoted prostitution with Goldie and Candita would not have forced the prosecution to present a fragmented version of events. Unlike Lillard, this was not a complex case. Jurors would have understood events without this evidence based on the extensive testimony of J.S. and the other prosecution witnesses, including the State’s prostitution expert, Seattle Police Detective-Sergeant Ryan Long.

Alternatively, for the first time on appeal, the State suggests two other bases on which the trial court could have admitted evidence relating to Goldie and Candita had it been asked to do so.

First, the State argues the bad acts evidence was relevant to prove Hopson “operates or assists in the operation of a *house* or *enterprise* for the purpose of engaging in commercial sexual abuse of a minor,” one definition of “advances commercial sexual abuse of a minor.” BOR, at 19 (citing CP 55) (emphasis added in State’s brief).

The difficulty with this argument is that neither Goldie nor Candita was a minor. The fact Hopson lived with, and at times posted ads for, two adult prostitutes had far less probative value than similar activities involving other juveniles. Its greatest value was to demonstrate that because Hopson had pimped before, he did so again for J.S. In other words, Hopson was a serial pimp. See 5RP 43 (“Three – three data points, make a trend. Well we’ve got some data points here that – that are not only showing a trend, but can lead you to conclude what Mr. Hopson was all about. . . .”). Any proper probative value was far outweighed by the improper prejudice.

The State also argues the evidence was admissible to rebut Hopson's testimony that he was not a pimp, received no money from prostitution, and discouraged J.S. from engaging in prostitution. BOR, at 20 (citing Hopson's testimony). Again, however, the relevant inquiry for jurors was whether Hopson had promoted the commercial sexual abuse of a *minor* (J.S.), a charge he denied. See 4RP 92, 105, 138-139, 165. The fact he lived with two adult women whom he knew to be prostitutes does not, beyond propensity, have much probative value on that point. It is, however, extremely prejudicial for the reasons already discussed. Therefore, it is highly unlikely the trial court would have admitted the evidence on this alternative theory, either. It is not surprising the theory was not advanced below.

Finally, the State argues that even if it was error to admit evidence concerning the two other women, it was harmless error. As discussed in the opening brief, however, in light of the State's evidence that Hopson had a propensity for acting as a pimp for women, jurors would have been more likely to find that Hopson profited from J.S. (one means of proving the promotion of

commercial sexual abuse of a minor)¹ and more likely to reject his affirmative defense that he believed J.S. was 18 based on her representations and legal documents she had shown him. See Brief of Appellant, at 24.

On this latter defense, the State notes that Hopson “testified that he never asked to see [J.S.’s] identification.” BOR, at 22 (citing 4RP 170). While true, Hopson’s testimony – and J.S.’s testimony – made it clear there was no need to ask for her identification because J.S. voluntarily produced the legal documents from Bellevue Police and Everett Municipal Court, which indicated she was 18 years old. See 3RP 151, 154, 161, 178; 4RP 82-84, 88-91, 170. Without the propensity evidence, jurors would have been more likely to find this satisfied “a bona fide attempt” in compliance with the statutory affirmative defense.

Hopson has also explained the impact this propensity evidence would have had concerning the rape and assault charges. See Brief of Appellant, at 25. The State does not argue harmless error as to these convictions.

¹ The opening brief cites CP 52 for the instruction setting forth the “profit” means of committing the offense. The proper citation is CP 53.

b. Evidence Hopson May Have Impregnated Candace

The State argues that evidence Hopson may have impregnated Candace “gave context to how [Hopson and J.S.] met and the ensuing relationship between J.S. and Hopson.” BOR, at 24. But the State does not explain why evidence Hopson may have caused Candace’s pregnancy was necessary. Excluding only that fact would not have hampered in any way the State’s ability to explain how the two met or their subsequent relationship.

The State also argues that Hopson cannot complain about the admission of this evidence over his objection because he never requested a limiting instruction. BOR, at 24-25. Rather than a limiting instruction, however, jurors needed a curative instruction. See State v. Thang, 145 Wn.2d 630, 645, 41 P.3d 1159 (2002). The defense objection should have been sustained. Jurors should never have heard this damaging evidence.

The State argues this error was harmless because, although it undermined Hopson’s claim that he did not have sex with J.S., Hopson’s attorney did not focus on the absence of sex with J.S. when contesting his guilt on the rape charges. Rather, counsel primarily argued it did not matter if they had sex because Hopson

reasonably believed J.S. was sixteen. BOR, at 25. While Hopson's reasonable belief was also a defense, Hopson himself made clear that he did not have intercourse with J.S. because he did not want to have sex with a prostitute. See 4RP 86-87, 160. Regardless of counsel's focus when speaking to jurors, the pregnancy evidence improperly removed one of Hopson's defenses to the rape charges. It was not harmless.

2. PROSECUTORIAL MISCONDUCT ALSO DENIED HOPSON A FAIR TRIAL.

The State notes that defense counsel only objected the first time the trial deputy made the comments in question and not the second time, during the State's rebuttal argument. BOR, at 26, 29, 32.

The absence of a second objection is not important. Defense counsel's initial objection was overruled. 5RP 33. The purpose of an objection is to alert the trial court to the error "so that any mistakes can be corrected in time to prevent the necessity of a second trial." State v. McDonald, 74 Wn.2d 141, 145, 443 P.2d 651 (1968). Where, as here, another objection would have been a futile gesture, it is not required. See State v. Moen, 129 Wn.2d 535, 547-48, 919 P.2d 69 (1996) (where no corrective purpose can

be served by an objection, the lack of an objection will not preclude appellate review); State v. Cantabrana, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996) (issue properly before appellate court where objection would have been "a useless endeavor").

The State argues that the prosecutor's assertions were a "fair reply" to defense counsel's argument that it did not matter – for purposes of the rape charges – whether Hopson and J.S. had sex so long as Hopson reasonably believed J.S. was 16. BOR, at 32. It is not clear how. The initial assertions were made before defense counsel gave his closing. See 5RP 33. Moreover, the State fails to explain how the trial deputy's argument that Hopson exposed J.S. to murder, rape, pregnancy, STDs, and "a lifetime of knowing" what she had done addresses defense counsel's focus on Hopson's belief about her age.²

Nor does the State explain how the deputy's rebuttal argument – "It does matter that he prostituted her out. It does matter that he put her out on the street and exposed her to those

² The State notes that defense counsel did not object when the prosecutor elicited from Hopson the dangers of prostitution. BOR, at 31. This is true. More important, however, is the fact defense counsel objected when the prosecutor tried to use these dangers during closing argument as reasons to find Hopson guilty. 5RP 33.

dangers. It does matter that she sold her body for money; it does matter that she's going to have that memory, with her, for the rest of her life. It matters" – is in any way responsive to defense counsel's legal argument on the rape charges. See 5RP 63-64.

In asking this Court to find the misconduct harmless, the State suggests jurors would not have noticed the offending remarks because "they occurred at the beginning of a lengthy closing argument, and they constituted a very small part of the State's closing argument." BOR, at 33. The State also argues that jurors would have followed the court's instructions, which warned them not to base their verdict on emotion. BOR, at 33.

But the misconduct did not occur solely at the beginning of the prosecutor's remarks. It also occurred at the very end of his remarks. See 5RP 63-64. This made it more likely jurors would heed his advice and focus on the physical and emotional impact on J.S. when deciding Hopson's guilt. And while jurors were instructed not to base their verdicts on emotion, it cannot be presumed jurors ignored the misconduct when the court expressly permitted its consideration by overruling the defense objection.

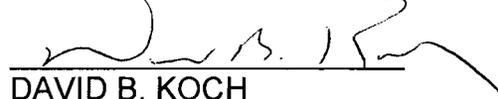
B. CONCLUSION

For the reasons discussed in Hopson's opening brief and above, this Court should reverse.

DATED this 13th day of March, 2012.

Respectfully submitted,

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DIVISION ONE**

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v.)	COA NO. 66957-5-I
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)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF MARCH 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BARUTI HOPSPN
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SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF MARCH 2012.

x *Patrick Mayovsky*

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