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No. 71820-7
King County Superior Court No. 13-1-12992-9 SEA

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

STATE OF WASHINGTON,
Plaintiff-Appellee,

v.

CRAIG CHARLES BROWN,
Defendant-Appellant.

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

The Honorable Bruce E. Heller, Judge

APPELLANT'S REPLY BRIEF

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I.
REPLY ARGUMENT

A. THE STATE DOES NOT ADDRESS THE ARGUMENT THAT MR. BROWN WAS ENTITLED TO CHALLENGE THE DETECTIVE'S INVESTIGATION

In addition to asking for a mistrial based on improper 404(b) evidence, the defense asked in the alternative to admit portions of the video interrogation. *See* AOB at 11. The State responds that Mr. Brown's statements were not admissible as prior consistent statements. But even if that is true, there were other grounds for admissibility. In particular, the defense had a right to challenge the adequacy of the investigation. The video showed Mr. Brown offering several leads that would corroborate his account, and the detective declining to follow up. *See* AOB at 14-18. The State does not address that argument at all.

B. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO PRESENT WITNESSES TO TESTIFY REGARDING MR. BROWN'S UNUSUAL DRIVE TO HELP STRANGERS

The State notes that a general reputation for good moral character is not relevant to certain sex offenses because it does not rebut any element of the offense. *See State v. Perez-Valdez*, 172 Wn.2d 808, 819, 265 P.3d 853 (2011). In that case, the charge of rape of a child did not include any mental element. *See* RCW 9A.44.076.

But when a defendant's intent is an element of the crime, reputation evidence is admissible if it tends to rebut that element. *City of Kennewick v. Day*, 142 Wn.2d 1, 11 P.3d 304 (2000). In *Day*, the defendant was charged with possession of drug paraphernalia, which required the City to prove possession with intent to use. *Id.* at 7.

Day persuasively argues that because the charge requires the City to prove he used or intended to use paraphernalia to ingest marijuana, his reputation for sobriety from drugs and alcohol is 'pertinent' to the element of intent.

Id. See also *State v. Callahan*, 87 Wn. App. 925, 935, 943 P.2d 676, 681-82 (1997) ("Where intent ... is an essential element of an offense and the defendant denies having the mental state necessary to form the requisite intent, character evidence may be relevant and admissible to support an inference that the defendant lacks the necessary mental state.")

Similarly, in Mr. Brown's case, the State was required to prove that he intended to have sex with an underage girl. He claimed he did not have such intent, but rather that he pretended to be interested in sex so that he could meet and help the girl. Reputation evidence that Mr. Brown is unusually inclined to help others – and particularly strangers – would have been pertinent to his intent.

The State next argues that Mr. Brown cannot show that he had this reputation in any relevant community. As the Washington Supreme Court

established over 20 years ago, however, the definition of a “community” is a functional one, and not limited to archaic factors such as the neighborhood in which the defendant or witness lives. *See State v. Land*, 121 Wn.2d 494, 497-98, 851 P.2d 678 (1993). “[R]eputation may be derived from any community or society in which the person has a well-known or established reputation.” *Id.* at 498, quoting *State v. McEachern*, 283 N.C. 57, 67, 194 S.E.2d 787 (1973).

The State maintains that family members cannot constitute a relevant community, citing *State v. Gregory*, 158 Wn.2d 759, 804, 147 P.3d 1201 (2006). But the *Gregory* ruling was based on the facts of that case. The community at issue consisted of only two people including the one seeking to testify. *Id.* at 804. Further, the witness’s knowledge was “too remote in time to be relevant.” *Id.* at 805. The Court did note that “the inherent nature of familial relationships *often* precludes family members from providing an unbiased and reliable evaluation of one another.” *Id.* (emphasis added). But it did not rule out the admissibility of family communities in appropriate cases.

In this case, 34 people attested to Mr. Brown’s unusual and sometimes infuriating drive to help others in need. This included 18 members of his extended family, four co-workers, five members of his church, and seven friends/neighbors. CP 67-118. This amounts to four

distinct communities, all aware of Mr. Brown's character for helping others.

Of course, the sentencing letters did not necessarily speak in terms of "reputation" rather than specific acts. But when so many people from a community share the same impression of a person's character, it is obvious that they could vouch for his reputation in the community.

The letters likewise show that witnesses could have testified that Mr. Brown's habit or routine practice was to help out anyone in need who happened to cross his path.

This Court should keep in mind that *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh'g denied*, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984), does not require conclusive proof of prejudice, but only a reasonable likelihood that the result would have been different if not for counsel's errors. Here, it is very likely, based on the sentencing letters, that Mr. Brown could have proved his reputation and habit at trial, and that this proof would likely have changed the result.

In the alternative, if this Court finds that the sentencing letters do not supply competent proof that exculpatory evidence could have been presented at trial, Mr. Brown should have the opportunity to revisit the issue in a personal restraint petition. He could then obtain and present declarations from witnesses specifically focusing on the standards for

reputation and habit evidence. Thus, rather than denying the ineffective assistance claim on the merits, the Court should find that it cannot review the claim at all. *See, e.g., State v. McFarland*, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995) (Where trial counsel failed to file a suppression motion, the record was “inadequate to determine whether the defendant was prejudiced,” and the prisoner could file a personal restraint petition if he wished to bring matters outside the record to the Court’s attention).

II. CONCLUSION

For the foregoing reasons, this Court should reverse Mr. Brown’s conviction and remand for a new trial.

DATED this 26th day of March, 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served in the manner listed below, one copy of this brief on the following:

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