

NO. 40068-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANN MARIE SILVIS,

Appellant.

10 DEC 27 AM 11:30
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY  DEPUTY

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

The Honorable Frank E. Cuthbertson

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE PERTAINING TO JACK CASSIDY, SR. AS EVIDENCE OF A COMMON SCHEME OR PLAN UNDER ER 404(B).

The State argues that the trial court properly admitted evidence that Silvis received several checks in large amounts from Jack Cassidy, Sr. “as evidence of the defendant’s common scheme or plan to unlawfully obtain money from trusting, elderly adults that she had befriended for her own financial gain.” Brief of Respondent at 6-15. The State cites State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003) and State v. Kennealy, 151 Wn. App. 861, 214 P.3d 200 (2009), but both cases are clearly distinguishable from the case here because they involve the rape and molestation of young children where the prior acts are substantially similar. As this Court recognized in Kennealy, “substantially similarity between the acts does not require uniqueness, and courts generally admit evidence of prior sexual misconduct in child sexual abuse cases.” 151 Wn. App. at 887.

The State argues further that the evidence was admissible under State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995), but Lough undermines the State’s argument factually and legally. In Lough, the

Washington Supreme Court concluded that evidence that the defendant similarly rendered four other women unconscious with drugs and then raped them was properly admitted to show a plan, not propensity. The Court held that a common scheme or plan may be established by evidence that the defendant committed markedly similar acts of misconduct against similar victims under similar circumstances:

When a defendant's previous conduct bears such similarity in significant respects to his conduct in connection with the crime charged as naturally to be explained as caused by a general plan, the similarity is not merely coincidental, but indicates that the conduct was directed by design. To establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.

Lough, 125 Wn.2d at 852, 861.

Unlike in Lough, where the defendant's previous conduct was markedly similar, Silvis had a long established friendship with Cassidy. 3RP 24-33, 36; 11RP 799-801. According to his son, Cassidy spoke highly of Silvis and would not testify against her. 11RP 785-86. Cassidy was involved with many organizations, made charitable donations, and liked to help people. 11RP 799, 803-04. It is therefore not unusual for Cassidy to willingly write checks to Silvis in large amounts for various

reasons. The mere coincidence that Cassidy was also elderly and lived alone did not bear “such similarity in significant respects” to Finley’s situation that “such occurrence of common features” are “naturally to be explained as the cause of a general plan.” Contrary to the State’s assertion that this “was an apparent pattern of predatory behavior,” the fact that Silvis ended up receiving a large amount of money from Cassidy and Finley fails to establish a common scheme or plan. The “degree of similarity for the admission of evidence of a common scheme or plan must be substantial” and “more than merely similar results.” DeVincentis, 150 Wn.2d at 20.

The evidence that Silvis received several checks from Cassidy was prohibited under 404(b) because the evidence improperly suggested that Silvis had the criminal propensity to likely commit the crime charged. State v. Foxhaven, 161 Wn.2d 168, 174-75, 163 P.3d 786 (2007). Reversal is required because there is a reasonable probability that if the trial court had excluded the evidence, the outcome of the trial would have been materially affected. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). See Brief of Appellant at 17-21.

2. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN DENYING SILVIS' MOTION FOR A VIDEO DEPOSITION OF CASSIDY, AND IN THE ALTERNATIVE, DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE HIS TESTIMONY BY VIDEO DEPOSITION PRIOR TO TRIAL.

The State argues that the trial court properly denied Silvis' motion for a video deposition because Silvis failed to show that Cassidy was unavailable, that his testimony was material, and that it was necessary to prevent a failure of justice. Brief of Respondent at 16-17. The record belies the State's argument. Contrary to the State's claim that the court "pointed out that the defendant failed to show that the witness was unable to attend and testify," the record reflects that the court made no such finding. The court in fact stated that "it sounds like [Cassidy] may not be [available] if he's in a skilled nursing home at this time." 12RP 842. When defense counsel moved for a recess to have Cassidy's testimony taken by deposition, she explained that he unexpectedly fell and broke his hip and could not come to court to testify. Counsel informed the court that Cassidy would testify that he and Silvis were friends, he gave her the money, and she did not induce him in any way. Counsel argued that his testimony was essential to Silvis' defense to refute the State's claim that she scammed elderly people. 12RP 834-36, 839-40, 841-42. The following day, after the court denied the motion, defense counsel modified

and renewed her motion to present Cassidy's testimony from the nursing home where he was recovering via live webcam to avoid delaying the trial. 12RP 842-43; 13RP 1090-95. The record substantiates that Silvis met the conditions for the court to order a witness deposition under CrR 4.6(a). Consequently, the court erred in denying Silvis' motion for a deposition in violation of her due process right to present a defense. State v. Ellis, 136 Wn.2d 498, 527-28, 963 P.2d 843 (1998); U.S. Const. amend VI, XIV.

The State argues further that Silvis was not denied her constitutional right to effective assistance of counsel because defense counsel "could not be expected to foresee that Mr. Cassidy, Sr. would become unavailable to testify." Brief of Respondent at 20. Thus the State concedes that Cassidy was indeed unavailable, contrary to its previous contention that Silvis failed to show that he was unavailable. In any event, Cassidy's unavailability was certainly foreseeable in light of the fact that he was 97 years old. Counsel's failure to preserve the testimony of the key witness for the defense constitutes deficient performance, and Silvis was prejudiced by counsel's deficient performance because Cassidy's testimony was essential to rebut the State's theory of a common scheme or plan. His son's testimony notwithstanding, it was critically important for the jury to have the benefit of Cassidy's own testimony. See Brief of Appellant at 22-24.

Reversal is required because the trial court erred in denying Silvis' motion for a video deposition, or if this Court concludes that the court properly exercised its discretion, Silvis was denied her right to effective assistance of counsel which requires reversal.

3. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GIVE A GOOD FAITH CLAIM OF TITLE INSTRUCTION WHERE SILVIS PROVIDED SUFFICIENT EVIDENCE TO SUPPORT THE INSTRUCTION.

The State argues that the trial court properly declined to give the good faith claim of title instruction because Silvis failed to produce evidence that the money was taken openly and avowedly and in good faith. Brief of Respondent at 20-23. The State's argument fails because the court did not decline to give the instruction based on a finding that Silvis failed to affirmatively show that the money was taken openly and avowedly and in good faith. The record reflects that the court refused to give the instruction as a result of its erroneous view of the law. 13RP 1147-49, 1153-54, 14RP 1172-73. The court's refusal was based on its mistaken reliance on State v. Self, 42 Wn. App. 654, 713 P.2d 142 (1986), which is clearly distinguishable from this case. See Brief of Appellant at 25-28.

Overlooking the court's erroneous basis for failing to instruct the jury, the State argues that the taking was not open and avowed given the testimonies of McCollough and Symmons, but their testimonies were disputed by Silvis. Importantly, Silvis explained that Finley never mentioned her nieces until she told Silvis that they were moving her out of Gibson House. 13RP 1083. Silvis' testimony was supported by the testimonies of Lucinda Pivac and Elaine Block who both worked and lived at Gibson House. Pivac did not recall ever meeting or speaking with Symmons and Block never saw Finley with any family members. 12RP 860-61, 877, 899-900, 910.

Misstating the record, the State argues further that the money was not received in good faith because "the victim did not remember writing the checks or giving the defendant the money" and "the evidence showed that the victim did not write the checks." Brief of Respondent at 22-23. To the contrary, Finley testified that Silvis was very good to her and she wanted to give her money but did not know how much and she did not realize how much money she gave her. 7RP 645; 8RP 548. Detective Visnaw testified that during his interview with Finley, she gave inconsistent statements but acknowledged that she intended to give the monies to Silvis. 8RP 629-30. Brett Bishop, a forensic scientist with the Washington State Patrol Crime Lab, examined the checks written to Silvis

but only concluded that some of the checks “probably” were not signed by Finley, that some were “probably” signed by Finley, and that Finley “cannot be identified or excluded as the writer” on the other checks. 10RP 52-66.

Reversal is required because the trial court abused its discretion in failing to give the good faith claim of title instruction based on its erroneous view of the law and where Silvis provided sufficient evidence to support the instruction. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); State v. Hicks, 102 Wn.2d 182, 186-87, 683 P.2d 186 (1984).

4. THE TRIAL COURT ERRED IN ENTERING AN ORDER TO APPLY FUNDS FROM A JOINT BANK ACCOUNT TOWARD RESTITUTION.

The State argues that the trial court properly ordered funds from a joint account to apply toward restitution primarily relying on Clayton v. Wilson, 168 Wn.2d 57, 227 P.3d 278 (2010) and McHenry v. Short, 29 Wn.2d 263, 186 P.2d 900 (1947). Brief of Respondent at 25-27. The State’s reliance on Clayton and McHenry is misplaced because they involve civil proceedings and consequently have no application to this case which is a criminal proceeding. Clayton, 168 Wn.2d at 60; McHenry, 29 Wn.2d at 264. Furthermore, the State misapprehends the holding in Bergman v. State, 187 Wash. 622, 60 P.2d 699 (1932). Brief of

Respondent at 26. Bergman was convicted of arson for setting fire to a building where the family business was located. 143 Wash. at 623. The Washington Supreme Court considered Bergman's conduct as a criminal act and held that because "he alone could be, and was, prosecuted and convicted, the judgment, both as to the penalty and as to its incident, the costs, operated upon him and him alone." 143 Wash. at 628. The Court emphasized that the judgment "arose out of a criminal prosecution in which the marital community was not legally concerned, and for the results of which it was not legally liable." *Id.* Importantly, the Supreme Court reaffirmed its Bergman decision in Dean v. Lehman, 143 Wn.2d 12, 30, 18 P.3d 523 (2001).

The State argues further that Silvis failed to present evidence of any accounting of the joint bank account but the record reflects that there was never a dispute that the joint bank account constituted community property. Citing Bergman, the trial court recognized, "this is a criminal action and not a tort action." 16RP 12. Nonetheless, the court disregarded the holding in Bergman and ordered funds from the joint bank account to satisfy restitution.

Reversal of the court's order is required pursuant to the Supreme's Court's holdings in Bergman and Dean.

5. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED SILVIS HER CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, a defendant may be entitled to a new trial where errors cumulatively produced a trial that was fundamentally unfair. In re Personal Restraint Petition of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The doctrine applies to instances where 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). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992).

Here, the record substantiates that an accumulation of errors affected the outcome of the trial: 1) the trial court erroneously admitted evidence that Silvis received money from Cassidy as evidence of a prior bad act under 404(b); 2) the trial court erroneously denied Silvis' motion to present Cassidy's testimony by deposition where his testimony was material to her defense; and 3) the trial court erroneously refused to give the good faith claim of title instruction where the evidence supported the defense.

Reversal is required because cumulative error denied Silvis her constitutional right to a fair trial.

D. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Ms. Silvis' convictions and remand for a new trial.

DATED this 23rd day of December, 2010.

Respectfully submitted,



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Attorney for Appellant, Ann Marie Silvis

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Thomas Roberts, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of December, 2010 in Kent, Washington.


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