

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,
Respondent,

v.

ERIC DAVID BOWMAN,
Appellant.

No. 44626-0-II

STATEMENT OF
ADDITIONAL GROUNDS
FOR REVIEW

STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

I, Eric David Bowman, have received and reviewed the opening brief prepared by my attorney. I received a copy of the record on August 15, 2013. Summarized below are the additional grounds for review that are not addressed in my attorney's brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1: The testimony of Megan Bowman should have been excluded under ER 404(b).

Megan Bowman was improperly allowed to testify. Evidence Rule 404(b) prohibits admission of evidence of prior bad acts for the purpose of proving a person's character in order to show they acted in conformity therewith. The State told the court that its primary purpose was to show

that I was “grooming” the girls for sexual abuse. The court accepted this purpose. This is nothing more than trying to prove my character—that I was a “child abuser” and that I acted in conformity with that character and abused Courtney. This is exactly the kind of purpose that the Rule prohibits, and the court allowed it. The court should be reversed so I can have a fair trial without this improper evidence.

“To admit evidence of other wrongs, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charges, and (4) weigh the probative value against the prejudicial effect.” *State v. Thang*, 41 P.3d 1159, 145 Wn.2d 630 (Wash. 2002).

“Rule 404(b) thus provides that prior misconduct is not admissible to show that a defendant is a ‘criminal type’, and is thus likely to have committed the crime for which he or she is presently charged.” *State v. Lough*, 889 P.2d 487, 125 Wn.2d 847 (Wash. 1995). Because substantial prejudicial effect is inherent in ER 404(b) evidence, uncharged offenses are admissible only if they have substantial probative value and are necessary to prove an essential ingredient of the crime charged. *State v. Lough*, 889 P.2d 487, 125 Wn.2d 847 (Wash. 1995).

Evidence of “grooming” for abuse is not relevant to prove an element of the crime charged. “Grooming” is not an element of the crime of child molestation. The only element the State could have been trying to prove with this evidence is that I had sexual contact with Courtney Bowman. But Megan’s testimony that I had been naked around her or showed her pictures or stared at her does not make it more likely that I actually touched Courtney—the crime charged.

In cases where testimony of past abuse was admitted, it is always just that—actual abuse—actual, physical contact of the same kind alleged in the charged crime. That is the kind of past act that is required to establish a common scheme or plan under the Rule and to make the probative value of the evidence greater than its prejudicial effect. That is not the case here. Megan never testified I touched her. There is no evidence that I did anything to Megan that would constitute child molestation in the first degree. There is no common scheme or plan under the Rule. Megan’s testimony was not relevant to prove that I ever actually touched Courtney.

Admitting the evidence of “grooming” had an extremely prejudicial effect on the jury. People are scared of child abusers. They react emotionally. Megan’s testimony and the State’s argument about “grooming” made me out to be a “criminal type”—a child abuser. The

jury could not help but react emotionally to stop a child abuser instead of considering rationally whether I actually had sexual contact with Courtney. The prejudicial effect of Megan's testimony substantially outweighed its probative value. It should have been excluded.

Additional Ground 2: The recorded interview of Courtney Bowman should have been excluded under the Child Hearsay Statute.

The Child Hearsay Statute, RCW 9A.44.120, allows hearsay statements of a child under 10 years old at the time of the statement to be admitted as evidence in certain, limited circumstances. The court must hold a hearing outside the presence of the jury to determine whether the circumstances of the statement provide sufficient indicia of reliability, and the child must testify at the trial. What the court ignored was the limit on the kind of statements that the statute allows:

“A statement made by a child when under the age of ten **describing any act of sexual contact** performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings,

including juvenile offense adjudications, in the courts of the state of Washington.” RCW 9A.44.120

The Child Hearsay Statute only allows statements describing acts of sexual contact to be admitted into evidence at the trial. But the court allowed the State’s witnesses to testify about their entire interviews with Courtney, and admitted the entire recording of an interview with Courtney. These interviews covered much more than Courtney’s descriptions of acts of sexual contact. Any other statements by Courtney during the course of these interviews were not admissible under the statute and should have been excluded as hearsay. They did not qualify under any other hearsay exception.

The only statements that are admissible under the statute are statements describing sexual contact or attempted sexual contact. Statements to Detective Reinhold or Ms. Hanna-Truscott that I was naked in front of Courtney or that I showed her pictures on my computer do not describe sexual contact or attempted sexual contact and should have been excluded. Courtney was available to testify on the stand about those things. Allowing the jury to hear them again through inadmissible hearsay statements only served to inflame the jury’s emotions against me.

The court was free to hear and consider these other statements in the pre-trial hearing, in order to determine whether the statements

describing sexual contact had sufficient indicia of reliability to allow them to be admitted under the statute, but those other statements should not have been admitted into evidence at trial. They are outside the scope of the statute. This is precisely why the statute requires that the hearing be held outside the presence of the jury—so that the jury is not exposed to more hearsay evidence than would be proper.

The court allowed the State to repeat, over and over again, Courtney's statements relating to the State's "grooming" theory. It may have been proper for Courtney to testify to these things on the stand, once. But to allow the State to present this "grooming" testimony multiple times, and tie it in with the inadmissible testimony of Megan Bowman, transformed it into improper character evidence for the purpose of portraying me as a child abuser and inflaming the emotions of the jury to find me guilty.

The only hearsay statements that could have been properly admitted under the statute were Courtney's descriptions of sexual contact. Anything else was beyond the scope of the statute and unfairly prejudicial. None of the "grooming" testimony made it any more likely that I had actually had sexual contact with Courtney at any time. The admission of these improper hearsay statements requires a new trial with proper limitations on the evidence.

Additional Ground 3: The jury verdict was based on emotion, not reason.

The State's theory of "grooming" was not supported by evidence that I had ever had sexual contact with any other child. Yet the State hammered on that evidence, insisting that I had a "common scheme or plan" to groom my daughters for abuse. This could have no other possible effect on the jury but to inflame their emotions against me, seeing me as a dangerous child abuser who must be stopped.

This theory of "grooming" and the State's repetition of that term and other emotionally-laden terms like "victim" and "abuse" ensured that the jury would be unable to ignore their emotions and consider the evidence rationally.

This inflaming of the jury's emotions began during jury selection in the manner of the State's questioning. My appointed attorney on appeal did not have jury selection transcribed, but there was one particular statement by a potential juror that further fanned the flames of the jury's emotions. The prospective juror told the court and the other jurors that they could tell by looking into my eyes that I was guilty.

From the very beginning, the jury's emotions were raised against me. The State's "grooming" theory and presentation of inadmissible evidence served only to further inflame the jury's emotions and make it

impossible for them to rationally consider the evidence to determine the central issue of the case: whether I actually had sexual contact with Courtney or whether, as I testified and maintain to this day, I did not. The result was an unfair trial. Justice has not been served. I ask this court to reverse my conviction and sentence.

Dated 16 of September, 2013


Eric David Bowman