

FILED
Mar 20, 2012
Court of Appeals
Division III
State of Washington

NO. 28697-5-III

IN THE COURT OF APPEAL OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

PAUL BARR,

Appellant.

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

The Honorable James C. Lust, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ARGUMENT

THE SUPREME COURT'S DECISION IN GRESHAM
CONFIRMS A NEW TRIAL IS REQUIRED.

On January 5, 2012, the Supreme Court of Washington struck down RCW 10.58.090 as unconstitutional under the separation of powers doctrine. State v. Gresham, 173 Wn.2d 405, 428-432, 269 P.3d 207 (2012). Therefore, Judge Lust erred in Barr's case when he admitted N.H.'s testimony under this statute.

Another event subsequent to the filing of Barr's opening brief also warrants mention here. Judge Lust based his decision to admit evidence concerning N.H. on RCW 10.58.090. He did not address the requirements of ER 404(b) or common scheme or plan. See RP (10/31/08) 175-176. Consistent with Judge Lust's decision, Barr's opening brief addresses only RCW 10.58.090. See Brief of Appellant, at 22-41.

After receiving our opening brief, the Yakima County Prosecutor's Office proposed written findings and conclusions for Judge Lust's signature listing both RCW 10.58.090 *and* common scheme or plan as grounds for admission of N.H.'s testimony. They were signed more than a year ago, on February 9, 2011, but

the State has not taken any action to make them part of the appellate record.

The State may have realized it was improper to tailor written findings in response to Barr's opening brief and abandoned any notion of moving for their consideration. See State v. Head, 136 Wn.2d 619, 624-625, 964 P.2d 1187 (1998) (addressing tailoring). Indeed, these belated findings were not even required under ER 404(b) or RCW 10.58.090. Compare CrR 3.5(c), CrR 3.6(b), and JuCR 7.11(d) (mandating entry of written findings and conclusions).

The State also may have realized it violated the Rules of Appellate Procedure. See RAP 7.2(e) (for post judgment motions or actions, "If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision."); State v. Pruitt, 145 Wn. App. 784, 793-794, 187 P.3d 326 (2008) (appellate court permission required for entry of belated findings); State ex rel. Shafer v. Bloomer, 94 Wn. App. 246, 250, 973 P.2d 1062 (1999) (vacating trial court decision where permission not obtained in advance).

In any event, even if Judge Lust had ruled the evidence concerning N.H. admissible as proof of a common scheme or plan,

such a ruling would not have saved Barr's convictions because jurors were never instructed to limit consideration of the evidence to that narrow purpose.

Specifically, after Judge Lust found the evidence admissible under the statute, defense counsel requested a limiting instruction. That instruction was given immediately after N.H. testified and at the close of evidence. RP 17, 407, 460-461. It told jurors:

Evidence has been introduced in this case on the subject of the defendant's sexual relationship with [N.H.] for the limited purpose of showing similarity of the charged acts. You must not consider this evidence for any other purpose. Mr. Barr is not on trial for these allegations.

CP 96; RP 526.

By telling jurors the evidence of Barr's sexual offenses against N.H. could be considered to show "similarity of the charged acts," the court authorized jurors to use the prior crimes as evidence of Barr's propensity to commit such offenses. This is not surprising since RCW 10.58.090 was designed with this very purpose in mind:

RCW 10.58.090 makes evidence of a defendant's commission of other sex offenses admissible for the purpose of proving the defendant's character (e.g., the defendant is the "child-molesting type") in order to show that the defendant has committed the charged

offense in spite of ER 404(b)'s prohibition of admission for that purpose.

Gresham, 173 Wn.2d at 427.

Where a limiting instruction is requested, it must be correct. Gresham, 173 Wn.2d at 424. "An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character." Id. at 423-424.

In light of RCW 10.58.090's demise, the limiting instruction used at Barr's trial satisfied neither requirement. It did not tell jurors the evidence was only admitted to demonstrate a common scheme or plan and it did not tell them they were prohibited from using it as propensity evidence. Limiting jurors' consideration of the prior bad acts evidence to "similarity of the charged acts" was no limitation at all. Compare State v. Kennealy, 151 Wn. App. 861, 891, 214 P.3d 200 (2009) (limiting instruction correct because it stated "the jury could not use the testimony to judge Kennealy's character or propensity to commit such acts, but that it could only consider the testimony in determining whether it showed that

Kennealy had a common scheme or plan.”), review denied, 168 Wn.2d 1012 (2010); see also State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995) (noting court properly instructed jurors that evidence could only be considered for whether there was a common scheme or plan and not to prove defendant’s character).

The absence of a sufficient limiting instruction requires a new trial if, within reasonable probabilities, it materially affected the outcome at trial. Gresham, 173 Wn.2d at 425 (citing State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

As discussed in Barr’s opening brief, N.H. was a key prosecution witness. Without her testimony establishing Barr has a propensity to commit sex offenses against young women, conviction for the charged crimes was far from certain because:

- Barr denied any inappropriate contact with R.H. RP 979-980, 1023;
- R.H.’s father, mother, and brother never saw anything concerning despite clear opportunities to do so. RP 709-710, 719, 727-728, 756, 1133-1134;
- No one at the Dojo could corroborate R.H.’s claims of abuse on the premises. RP 1024;
- There was a dispute whether some of the alleged acts were possible. RP 585, 825, 1141, 1145-1146, 1155-1156;
- R.H. was sometimes inconsistent in her allegations. RP 600-601, 635-636, 655-656, 1017-1018, 1057-1059;

- R.H. claimed Barr was circumcised and may have only one testicle, both of which proved untrue. RP 601-602, 658-659, 900, 1025-1026; and
- Based on R.H.'s claims, certain items were tested for the presence of semen and none was found. RP 585, 621-623, 985-993, 1003-1005.

Due to these deficiencies in the State's case, N.H.'s testimony was extremely important. She was the first witness called, she provided lengthy and detailed testimony on her inappropriate relationship with Barr, and the prosecutor focused on her during the State's closing argument. RP 477-508, 1181-1189, 1210-1212. Jurors' ability to use this evidence – in violation of ER 404(b) – as proof that Barr had a propensity to commit sex crimes against young women, i.e., he was the "child-molesting type," ensured Barr's conviction for the charged acts. This error was extremely harmful and denied Barr a fair trial.

B. CONCLUSION

The only basis for admission of N.H.'s testimony currently before this Court is RCW 10.58.090, which was struck down as unconstitutional.

Even if the State could successfully modify the appellate record and add "common scheme or plan" as an additional basis,

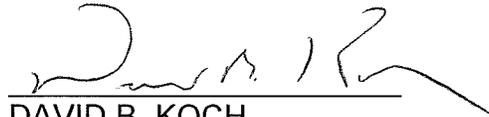
reversal is still required. Jurors were never instructed to only consider the evidence for whether there was a common scheme or plan. Nor were they instructed the evidence could not be used to conclude that the defendant has a particular character and has acted in conformity with that character.

For the reasons discussed in Barr's opening brief and above, this Court should reverse and remand for a new trial.

DATED this 20th day of March, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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State v. Paul Barr

No. 28697-5-III

Certificate of Service by email

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 20th day of March, 2012, I caused a true and correct copy of the **Supplemental Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4):

Kevin Eilmes
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Signed in Seattle, Washington this 20th day of March, 2012.

X *Patrick Mayovsky*

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DIVISION THREE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
vs.)	COA NO. 28697-5-III
)	
PAUL BARR,)	
)	
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 20TH DAY OF MARCH, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] PAUL BARR
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SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF MARCH, 2012.

x *Patrick Mayovsky*