

FILED
July 9, 2012
Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 30577-5-III

STATE OF WASHINGTON, Respondent,

v.

JEFFERY ALLAN EHART, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Jeffrey Ehart was convicted of first degree and second degree child molestation and communicating with a minor for immoral purposes following a jury trial. At trial, the State introduced evidence of prior sexual abuse of T.E. by playing her videotaped deposition to the jury. However, the State did not attempt to secure T.E.'s presence at trial; instead, the only explanation for her absence was that the witness was leaving the state to attend school and that it would be expensive to fly her back to Washington to testify at trial. Moreover, the evidence was not properly admitted under ER 404(b) as evidence of a common scheme or plan. Because the error in admitting T.E.'s videotaped deposition contrary to the rules of evidence and Ehart's Sixth Amendment right to confrontation was not harmless, the convictions should be reversed and the case remanded for a new trial.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in admitting the videotaped deposition of T.E. when the State did not attempt to secure T.E.'s attendance at trial.

ASSIGNMENT OF ERROR 2: The trial court erred in admitting evidence of prior sexual misconduct against T.E. under ER 404(b).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Is a witness unavailable for purposes of introducing a videotaped deposition in lieu of live testimony when the State does not attempt to secure the witness's presence but merely argues that it would be expensive and inconvenient to present live testimony? NO.

ISSUE 2: Is evidence of prior sexual misconduct admissible under ER 404(b) as proof of a common scheme or plan when the prior sexual misconduct was substantially different from the charged conduct? NO.

IV. STATEMENT OF THE CASE

Jeffery Ehart was charged with first and second degree child molestation against two victims, B.E.(1) and B.E(2),¹ and with communication with a minor for immoral purposes against B.E.(2). CP 72-73, 303-09. The State sought to introduce testimony from two additional women who claimed to have been sexually abused by Ehart, A.E. and T.E., as well as a prior conviction for possession of child pornography related to A.E.'s allegations. RP² 10, 12-13, 16-17, 21-22, 25-26, 50-51. The allegations of A.E. were the subject of prior charges

¹ Both victims share the same initials. Consequently, for purposes of clarity, this brief will refer to the younger victim as B.E.(1) and the older victim as B.E.(2).

² The Verbatim Report of Proceedings consists of ten volumes consecutively paginated and one volume of a hearing held on June 31, 2010. For purposes of this brief, the consecutively paginated volumes will be cited as "RP" and the remaining volume is not cited.

against Ehart that were dismissed except for the possession of child pornography charge. RP 12-13. The trial court ruled that the conviction for possession of child pornography was inadmissible, but it permitted the State to present testimony from A.E.³ and T.E. about the prior incidents, finding that they showed a common scheme or plan. RP 50-51.

Ehart's trial was continued multiple times. CP 8, 61, 71, 85, 86, 89, 91, 115, 116, 117, 145. The State moved to take a videotaped deposition of T.E. because she was moving out of the state and it would be expensive to bring her back to testify live at trial. CP 138-40, RP 305-07, 318-26. Ehart objected on confrontation grounds. RP 318-26. The trial court permitted the deposition to be taken, but it pointed out that a showing of her unavailability would have to be made at trial for her testimony to be admissible. RP 326-27.

In her deposition, T.E. testified that Ehart, her brother, began molesting her when she was fifteen years old. RP 40-41. According to T.E., Ehart would take her onto his lap and touch her genitals while viewing child pornography (as well as various other types of pornography) on a computer. RP 341-42, 345, 362-63. She claimed that he would make her look at the images on the computer. RP 380-81. She described Ehart

³ Ultimately, the State elected not to present A.E.'s testimony.

straddling her on a computer chair while touching her genitals. RP 346. T.E. claimed that shortly after she turned sixteen, Ehart began to take her to his room, remove her clothes and rape her. RP 344-45, 349. Sometimes he would masturbate and ask her to play with his penis. RP 358-60. Sometimes he would peek in on her in the shower without touching her. RP 363-65. T.E. said that on other occasions, Ehart took her under a bridge near the Yakima River under the pretence of going fishing. RP 351-53. She estimated that Ehart had raped her fifty times over the course of several years. RP 350-51. She also testified that he bought her a dildo and used it on her. RP 354, 362. T.E. claimed that on another occasion, he purchased bras so that he could wear them in front of her, which made her feel “grossed out.” RP 357.

According to T.E., Ehart frequently told her she was beautiful. RP 356. T.E. claimed she never told anybody because Ehart threatened to hurt their mother, or told her that she would be placed in foster care and never see her father again. RP 346-47. She also testified that he threatened to leave her at the bridge if she told anybody. RP 353. Although she testified that Ehart owned a number of knives, she emphasized that he never threatened her with them. RP 360-61. However, she did claim that he put her in a headlock and choked her so she couldn't breathe. RP 361-62.

The matter proceeded to jury trial. Both B.E.(1) and B.E.(2) testified, admitting that they had both initially denied any improper conduct with Ehart when they were questioned by law enforcement. RP 580-81; 722-23. However, both went on to describe several instances of sexual behavior directed at them.

B.E.(2) testified about an occasion when Ehart told B.E.(1) and B.E.(2) to take a shower, then came into the bathroom and began to wash B.E.(1), first on her back and then between her legs. RP 535-39. When he went to wash B.E.(2), she told him to leave and he did. RP 539-40.

She described another occasion when Ehart took her to Yakima to get fish for her birthday and Ehart suggested buying her a thong. RP 542. She refused and they left the store. RP 545. On the way home, he stopped next to a bridge and told her to get out of the truck. RP 545. According to B.E.(2), Ehart took her under the bridge and backed her up to it, putting his hands on both sides of her. RP 546-47. She slipped out under his arm and ran back to the truck. RP 547. Ehart got back into the truck and they went home. RP 548-49.

B.E.(2) described incidents when Ehart took B.E.(1) into his bedroom and locked the door. RP 551. She heard what sounded like B.E.(1) crying. RP 552. Other times, she claimed to see Ehart touching

B.E.(1) between her legs or on her chest in the bathroom. RP 566.

According to B.E.(2), Ehart told B.E.(1) that he would love to marry her. RP 570.

She also testified that Ehart would come upstairs to the girls' bedroom while they were dressing and watch her. RP 554-55. And he would squeeze her breasts when nobody was at home. RP 558-59. When other people were home, B.E.(2) claimed he would put her in his lap and rub her leg. RP 567-68. Sometimes when she had friends over, Ehart would sit next to them and B.E.(2) would sit between them so he wouldn't hurt them. RP 560-61. B.E.(2) said that sometimes when she went into her mom's room where the computer was, Ehart would be on the computer and he would close it quickly so she did not see what was on it. RP 568-69.

B.E.(2) also testified that she never told anybody about Ehart's actions, because she was afraid she was going to get into trouble. RP 550. B.E.(2) was afraid that her mother would be unhappy if she told, and she wanted her mother to be happy. RP 560. She also claimed that Ehart would hurt her when she made him really mad, including one time when he twisted her arm and almost sprained it. RP 556. Sometimes he would play with a butterfly knife when she made him mad. RP 557.

Like T.E., B.E.(2) testified that Ehart told her she was pretty. RP 569. Unlike T.E., B.E.(2) described gifts of jewelry or makeup that Ehart gave her. RP 569.

B.E.(1) also testified at trial. She also described Ehart coming into the bathroom to wash her chest but did not describe any touching between her legs. RP 681-84. On another occasion when they were making Avon deliveries, she said Ehart asked her if she wanted him to give her oral sex. RP 687. She claimed he asked her to marry him and also asked for regular sex. RP 688. She claimed Ehart would come up the stairs to watch the girls while they dressed. RP 697. She claimed Ehart would put her and B.E.(2) on his lap and touch their chests and genitals. RP 703-05. And she described an incident when Ehart took her into his bedroom, locked the door, and showed her pictures of bathing suits on the computer, telling her the suits would look pretty on her and talking about swim team. RP 695-96, 715.

B.E.(1) claimed that Ehart kept a knife behind the seat of his truck and told her he would kill her family and then kill her if she said anything. RP 690. She also described gifts he would buy for her, like Hannah Montana things. RP 707.

At trial, Ehart again objected to the introduction of deposition testimony by T.E. RP 621. Although no showing was made of T.E.'s unavailability for trial or the State's efforts to secure her presence, the trial court admitted the deposition testimony and allowed it to be played to the jury. RP 729, 737.

Ehart testified and denied having sexual contact with the girls. RP 764, 770-71, 773-76, 781. He presented evidence that the girls' mother signed his name to benefit checks and wrote checks on his account without his permission while he was in jail. RP 782-87. Once the checks stopped coming, the mother stopped visiting him in jail with the girls and the allegations of abuse followed. RP 580-82, 708-10, 788-90.

The jury convicted Ehart on all three counts.⁴ CP 319-21. He was sentenced to a term of 175 months to life. CP 336. He appeals. CP 345.

⁴ Before the verdict, the trial court ruled that insufficient evidence supported elevating the charge of communicating with a minor for immoral purposes to a felony. RP 671-72. Consequently, Ehart was convicted of the charge as a gross misdemeanor rather than as the felony charged in the third amended information.

V. ARGUMENT

The videotaped testimony of T.E. should not have been introduced, and its admission unfairly prejudiced Ehart's trial. First, it should not have been admitted because the State did not meet its threshold burden of establishing that T.E. was unavailable for trial. Second, it should not have been admitted because the abuse she described was vastly different from the experiences shared by B.E.(1) and B.E.(2). The trial court abused its discretion in admitting the testimony under the "common scheme or plan" exception to ER 404(b). Under the circumstances of this case, the error was not harmless, because in light of the discrepancies between the testimony of B.E.(1) and B.E.(2), together with the delay in their disclosures until after their mother stopped receiving Ehart's benefit checks and cashing them, it is probable the jury would have reached a different verdict had the testimony not been improperly buttressed by the story of T.E. The verdict should be reversed and the case remanded for a new trial.

I. The expense and inconvenience of securing the appearance of an out-of-state witness is insufficient, alone, to show that the witness is “unavailable” for purposes of introducing prior sworn testimony at trial over Ehart’s right to confront the witness.

A defendant has a constitutional right to confront the witnesses against him. U.S. Const. Amend. VI. In *Crawford v. Washington*, the U.S. Supreme Court held that testimonial hearsay cannot be introduced into evidence at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004). There is no reasonable debate in the present case that T.E.’s sworn statements were testimonial hearsay. Whether their admission violated T.E.’s confrontation rights turns on whether she was unavailable.

Likewise, under the rules of evidence, prior sworn testimony is hearsay but will be admitted if the witness is “unavailable,” which means the witness:

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

ER 804(a).

In *Crawford*, the U.S. Supreme Court analyzed the intent of the framers, pointing out that the historical context in which the Sixth Amendment was drafted would have limited the admissibility of out-of-court statements unless the declarant were both unavailable *and* the defendant had a prior opportunity to cross-examine based on the common laws of evidence existing at the time. 541 U.S. at 53-53 (“[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”). As such, the unavailability of the witness implicates not only the admissibility of prior testimony under ER 804(b)(1), but also a criminal defendant’s constitutional confrontation rights.

A witness may be unavailable for confrontation purposes when the State cannot, through good faith efforts, compel the witness to attend. *Ohio v. Roberts*, 448 U.S. 56, 74, 100 S. Ct. 2531, 65 L.Ed.2d 597 (1980) (abrogated on other grounds in *Crawford*, 541 U.S. 36). Mere inability to effectuate service, alone, does not establish unavailability; “the lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.” *Roberts*, 448 U.S. at 74 (quoting *California v. Green*, 399 U.S. 149, 189 n. 22, 90 S. Ct. 1930, 26 L.Ed.2d 489 (1970)). In Washington, the Supreme Court has held that for a witness to be unavailable, because she is beyond the reach of a subpoena, the prosecution must make an effort to secure the voluntary attendance of the witness at trial. *State v. DeSantiago*, 149 Wn.2d 402, 412, 68 P.3d 1065 (2003) (citing *Rice v. Janovich*, 109 Wn.2d 48, 57, 742 P.2d 1230 (1987)). Moreover, the State can be required to show that it attempted to serve out-of-state witnesses under the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, Chapter 10.55 RCW. See, e.g., *State v. Sweeney*, 45 Wn. App. 81, 723 P.2d 551 (1986).

Here, the explanation provided by the State was that T.E. was entering school in another state and it would be expensive to fly her back. RP 318-26. There was no evidence that the State used any means, formal or informal, to secure her presence for trial. While the expense of travel

costs is unfortunate, there is no legal authority for the proposition that the State's desire not to purchase a plane ticket renders the witness unavailable within the meaning of ER 804(a). To the contrary, the weight of authority plainly establishes that if the State knew where T.E. was, it needed to exercise some effort to bring her back to testify in person.

The burden of establishing that the witness is unavailable, such that prior sworn testimony is admissible, is on the State. *Roberts*, 448 U.S. at 74-75. The State failed to meet its burden here, and the admission of T.E.'s deposition testimony violated ER 804, as well as violated Ehart's confrontation rights.

II. The trial court abused its discretion in permitting testimony about the systematic rape of T.E. as part of a common scheme or plan with the fondling of B.E.(1) and B.E.(2).

ER 404(b) provides, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” However, “other acts” evidence may be admissible for other purposes, so long as it is not proffered to show propensity and a limiting instruction is given to that effect. *State v.*

Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012) (citing *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)).

In reviewing a challenge to admission of ER 404(b) evidence, this court considers *de novo* whether the trial court correctly interpreted the rule and, if so, whether the trial court abused its discretion in admitting the evidence. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Before admitting such evidence, the trial court must determine, on the record, (1) that the prior misconduct occurred by a preponderance of the evidence; (2) that there is a lawful purpose for admitting the evidence; (3) whether the evidence is relevant to prove any of the charged elements; and (4) that the probative value outweighs the prejudicial effect. *Gresham*, 173 Wn.2d at 421. The burden is on the party proffering the evidence to establish its admissibility under the first three factors. *Id.*

Here, the trial court did not expressly find on the record that the alleged misconduct against T.E. occurred, nor is the trial court's weighing of probative value versus prejudicial effect set forth in the record. When a trial court fails to make a record of its reasoning, the error may be harmless if the record as a whole is sufficient to permit appellate review. *State v. Gogolin*, 45 Wn. App. 640, 645, 727 P.2d 683 (1986).

Evidence of prior bad acts may be admissible to show the existence of a common scheme or plan. *State v. DeVincentis*, 150 Wn.2d 11, 19, 74 P.3d 119 (2003); *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). Under the “common scheme or plan” rule, two types of circumstances may permit introduction of the evidence: (1) when the prior bad act is causally related to the current charge, such as the theft of burglary tools used in a subsequent burglary; or (2) the prior acts evidence a single plan that is used to repeatedly carry out separate, but highly similar, crimes. *DeVincentis*, 150 Wn.2d at 19. The second circumstance is at issue in this case.

The common scheme or plan doctrine requires that the evidence not be merely *somewhat* similar, but so similar as to reflect the existence of a single plan and repeated efforts to carry it out:

[T]he 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.

DeVincentis, 150 Wn.2d at 19 (*quoting Lough*, 125 Wn.2d at 860). Thus, the degree of similarity between the conduct comprising the current charge and the prior bad act must be substantial. *DeVincentis*, 150 Wn.2d at 20. Mere similarity of results is insufficient. *Gresham*, 173 Wn.2d at 422.

In the present case, the differences between the allegations of T.E. and the allegations of B.E.(1) and B.E.(2) are stark. Most dramatically, T.E. alleged that Ehart raped her repeatedly for years, while B.E.(1) and B.E.(2) described groping that did not involve intercourse or even penetration. T.E. described Ehart asking her to masturbate him and touching her genitals with a dildo, neither of which acts were alleged to have occurred with B.E.(1) or B.E.(2). T.E. alleged that Ehart frequently viewed pornography, including child pornography, and that he made her view it with him. By contrast, only B.E.(1) reported viewing any images with Ehart on the computer, and they were images of bathing suits, not pornographic images. And while both B.E.(1) and B.E.(2) reported that Ehart gave them gifts, T.E. did not report any such behavior.

In short, any plan evidenced by the alleged acts against T.E. was to groom her by showing her pornography, fondling her, and escalating to acts of intercourse and mutual masturbation. This plan does not look much like the alleged opportunistic groping of B.E.(1) and B.E.(2), and the pattern of behavior is not “substantially similar.” Ehart did not attempt to acclimate B.E.(1) and B.E.(2) to sexual behavior by showing them pornographic images as he was alleged to have done with T.E. He did not attempt to seduce T.E. with gifts as he was alleged to have done with B.E.(1) and B.E.(2). Lastly, there was no indication that Ehart ever

attempted to do more with B.E.(1) and B.E.(2) than grope them and make inappropriate comments. Certainly, there was no evidence that his conduct toward B.E.(1) and B.E.(2) rapidly escalated to rape, penetration and requests to play with his penis as alleged by T.E. The dissimilarities in the reported acts raise serious questions as to whether a “common plan” can reasonably be inferred when the acts do not plainly reflect a similar purpose or goal.

In *Gresham*, the Supreme Court held that evidence of multiple instances in which the defendant took trips with young girls and fondled them at night while the other adults slept were sufficiently similar to evidence a common scheme or plan, notwithstanding some minor differences such as the presence of oral sex. 173 Wn.2d at 422-423. In *DeVincentis*, the defendant engaged in a pattern of behavior in which he met young girls through a safe channel, such as a friend or neighbor, introduced the girls into his home, wore bikini or thong underwear in front of them, requested and gave massages, took the girls to an isolated room, removed their clothes, and directed the girls to masturbate him. 150 Wn.2d at 22. In *Lough*, the evidence showed that the defendant engaged in relationships with five different women before drugging them and raping and sodomizing them while they were incapacitated. 125 Wn.2d at 850-51. These three cases illustrate the requirement that there be “such a

concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.” *Lough*, 125 Wn.2d at 856 (quotation omitted).

By contrast, in *State v. Wade*, the State sought to introduce evidence of the defendant’s prior convictions for possession of a controlled substance with intent to deliver in order to establish his intent in the current case. 98 Wn. App. 328, 332, 989 P.2d 576 (1999). There, the Court of Appeals observed,

[u]se of prior acts to prove intent is generally based on propensity when the only commonality between the prior acts and the charged act is the defendant. To use prior acts for a non-propensity based theory, there must be some similarity among the facts of the acts themselves.

Id. at 335. The *Wade* court reversed the conviction, holding that the lack of similarity between the crimes meant the only reasonable inference to be drawn was that since the defendant had previously had the requisite criminal intent, he must be predisposed to have the intent, such that he was guilty in the present case. *Id.* at 337.

Likewise here, the similarity between the prior acts and the charged acts was attenuated. The primary inference to be drawn was that because he had previously seriously abused T.E., he had probably also

seriously abused B.E.(1) and B.E.(2). This inference is devastatingly prejudicial.

The lack of commonality between the acts renders the contention that they were part of a common plan highly implausible. Indeed, the State did not explain what the “plan” was as to B.E.(1) and B.E.(2); it asserted that the use of child pornography to groom T.E. and A.E. for sexual intercourse was part of a common plan, but the State never presented any evidence that Ehart used child pornography to similarly groom B.E.(1) and B.E.(2). RP 52-53. If such a plan existed, it does not appear B.E.(1) or B.E.(2) was part of it.

Because no reasonable person could construe the highly dissimilar courses of conduct toward T.E. and the girls in the present case as part of the same plan, the State failed to meet its burden to show that T.E.’s allegations were admissible for a lawful, non-propensity purpose.

III. The admission of T.E.’s deposition testimony contrary to ER 804, U.S. Const. Amend. VI and ER 404(b) was not harmless.

The error in admitting the evidence was not harmless. Both girls initially denied Ehart had done anything to them when first questioned by

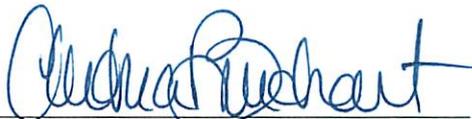
law enforcement. RP 580-81; 722-23. Moreover, there were significant inconsistencies in the reports of B.E.(1) and B.E.(2). For example, B.E.(1) testified that Ehart showed her a knife and threatened to kill her and her family if she told. RP 707. By contrast, B.E.(2) did not describe any such threats, explaining that she did not report the incidents because she did not want to make her mother sad. RP 550, 560. And the disclosures were made under circumstances that raised questions about their reliability; namely, the disclosures were made after the girls initially denied any improper contact, and after their mother was no longer able to keep cashing checks made out to Ehart without his permission. RP 782-90. Thus, there were ample reasons why, had the testimony not been buttressed by T.E.'s allegations, reasonable doubt would likely have existed in the mind of the jury as to Ehart's guilt.

“[I]n sex cases ... the prejudice potential of prior acts is at its highest.” *Gresham*, 173 Wn.2d at 433 (quoting *Saltarelli*, 98 Wn.2d at 363). Because there is a reasonable likelihood that but for the admission of T.E.'s highly prejudicial testimony, the jury's verdict would have been different, the judgment should be reversed and the case remanded for a new trial.

VI. CONCLUSION

The admission of T.E.'s deposition testimony was contrary to ER 804 because the State failed to show that she was unavailable for trial or that it had made reasonable, good faith efforts to secure her presence. Because the testimony was admitted without establishing that she was unavailable, its admission violated Ehart's right to confront adverse witnesses. Lastly, the testimony violated ER 404(b) because it was dissimilar to the acts charged such that an inference that it evidenced a common scheme or plan could not reasonably arise. And the error was not harmless because it was highly prejudicial and served primarily to bolster the apparent weaknesses in the State's case. There is no reasonable probability that a jury, if it believed T.E.'s allegations, could not have viewed them as indicating a propensity on T.E.'s part to sexually harm little girls. This trial was rendered fundamentally unfair to Ehart. Accordingly, he should receive a new one.

RESPECTFULLY SUBMITTED this 9th day of July, 2012.



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DECLARATION OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 9th day of July, 2012 in Walla Walla, Washington.



Andrea Burkhart