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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS
DIVISION III
OF
THE STATE OF WASHINGTON

Brian Romer,
Appellant

v.

Washington State University,
Respondent

Brief of Appellant

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I. Introduction

Brian Romer appeals two orders entered in Whitman County Superior Court. Both orders affirmed Washington State University's (WSU) finding that he violated the student code of conduct. CP 444, 523 & 528. In the second order affirming WSU, entered after argument on a motion for reconsideration, the Superior Court concluded that "minimally sufficient evidence" in the Agency Record established Mr. Romer as the perpetrator of a sexual assault against the Complainant. CP 5623 & 528. Mr. Romer maintains that the Agency Record, together with evidence received by the Board at the student conduct hearing, failed to establish by a preponderance of evidence that he was the perpetrator. Therefore, substantial evidence in the record does not support the Board's finding.

II. Assignments of Error and Issue

Assignments of Error

No. 1 The Superior Court erred when it initially concluded that substantial evidence in the record established that Mr. Romer was the perpetrator of a sexual assault on Complainant, thus, affirming WSU. CP 444.

No. 2 The Superior Court erred when it concluded that "minimally sufficient evidence of Petitioner's identity is in the Agency Record - 000033 & 000073" after argument on Mr. Romer's motion for reconsideration. CP 528.

No. 3 The Superior Court erred in denying the request for attorney's fees and expenses. CP 444 & 523.

Issue Pertaining to Assignments of Error

Neither the Complainant, nor any other witness, brought before the Board at the student conduct hearing, identified Mr. Romer as the perpetrator. The Superior Court relied upon two references in the Agency Record from the WSU investigation to conclude that "minimally sufficient evidence" identified Mr. Romer. In the two references, the Complainant stated that she identified the perpetrator by looking at photographs of his fraternity on Facebook and then turned that information over to Pullman Police.

No. 1 Is the Complainant's statement that she identified the perpetrator by viewing a photograph sufficient to identify the perpetrator without evidence of what she actually viewed? Assignments of Error 1 and 2.

No. 2 Should there be an award of attorney's fees and expenses in this case? Assignment of Error 3.

III. Statement of the Case

On April 6, 2012, WSU notified Mr. Romer by letter that it had initiated an investigation on allegations that he "reached up the skirt of a girl at a Party" on Sunday March 4, 2012. The party was sponsored by the

fraternity of Pi Kappa Phi. CP 205. A computer generated photograph of Mr. Romer was placed in his student conduct file. CP 203.

A WSU investigator interviewed the Complainant on April 12, 2012. CP 199. The Complainant also submitted a detailed written statement outlining what had happened to her at the party. CP 200-02.

Nothing in the investigator's notes of the interview with the Complainant establish that the investigator had shown Complainant the photograph of Mr. Romer that was contained in the student conduct file. CP 199. In regards to identity, the investigator's notes state: "- identified him by going onto google and looking up the fraternity pictures on facebook, and handed the info over to the police." *Id.*

A report of WSU's investigation was completed. CP 157-62. The investigative report contains a detailed description of events from the Complainant. CP 158-60. This report does not indicate that the Complainant was shown the photograph in the student conduct file to determine if "Respondent" was, in fact, Mr. Romer. *Id.* The report does, however, contain the same detail about the facebook review that was contained in the investigator's notes. CP 159, *compare*, CP199.

Mr. Romer exercised his Fifth Amendment right to remain silent due to a pending criminal investigation by the Whitman County Prosecutor's Office. CP 189-90. During the WSU investigation, Mr. Romer appeared for an interview with an attorney, but declined to answer

questions, referencing a letter submitted earlier invoking his right to remain silent. CP 158. Mr. Romer submitted several character witness statements, attesting to his good moral character and informing WSU that such contact was not a part of Mr. Romer's character. CP 191-97.

Thereafter, WSU notified Mr. Romer that a hearing had been set on allegations that he violated the WSU Standards of Conduct for Students. He was charged with "Sexual Misconduct." In essence, WSU alleged that Mr. Romer forcibly held the Complainant and sexually contacted Complainant's private areas with his hands at a fraternity party. CP 151-53.

A student conduct hearing was held. CP 28. At the hearing, Mr. Romer again asserted his right to remain silent due to the pending criminal investigation after being apprised of each allegation. CP 35-37. The Board chair entered pleas of "not responsible." *Id.*

Kim Anderson, who headed up the WSU investigation, testified at the hearing. CP 37-43. Ms. Anderson's testimony did not contain any method by which the Complainant identified Mr. Romer as the assailant at the party on March 4, 2012. *Id.* There was no testimony from Ms. Anderson that she verified that Mr. Romer was the assailant by asking the Complainant to identify his photograph in the student conduct file. *Id.* Ms. Anderson did not possess Facebook photos Complainant said she had seen before giving the information to the police. Ms. Anderson did not

speak to the police, nor did she obtain or view the information

Complainant stated she handed to the Pullman Police.

Ms. Anderson's investigation included interviews with members of Pi Kappa Phi, Mr. Romer's fraternity and residence. CP 40. While none of the members interviewed saw anything at the March 4 party, one member told Ms. Anderson that he had "known Mr. Romer for a long time and he would not expect this sort of thing from him." CP 41.

Additionally, Ms. Anderson received character references that included "general character assessments ... of good character." CP 42.

The Complainant testified at the hearing. CP 44-64. The Complainant and Mr. Romer were separated and in different rooms throughout the proceeding. CP 33, 43-44. The Complainant described the events that occurred at Pi Kappa Phi on March 4. CP 45-55. During her testimony, the Complainant testified, "Mr. Romer started dancing with me." CP 47. The Board Chair interrupted Complainant's testimony and verified with Complainant that she "did not know it was Mr. Romer" who was dancing with her at the party. CP 47.

The Complainant was then asked how she identified the perpetrator. CP 59. The Complainant responded that she "went onto [Pi Kappa Phi's] Facebook page and ... found a picture of him." *Id.* The Facebook picture was not entered into evidence. *Id.* The Board did not ask Complainant to identify the photograph in the student conduct file to

verify that the Facebook photograph she saw depicted the same person. *Id.* Since Mr. Romer and the Complainant were in separate rooms, the Complainant did not verify that the person who was attending the hearing was the perpetrator. CP 44-64.

A student witness was called by the Board. 65-85. She recalled the events at the fraternity party, and recalled when “he started dancing with her.” CP 68. This student told the Complainant that if she felt uncomfortable to “pull her arm, do anything ... [b]ut that never happened.” CP 69. This witness did not see the Complainant leave the dance area. CP 68. The next morning the Complainant asked this witness “if [the witness] remember[ed] what the guy looked like.” CP 70. The witness did not remember. *Id.*

Another student witness was called by the Conduct Board. CP 86. This witness was not at the party and could not identify the Complainant’s assailant. CP 86-90.

At the hearing, Mr. Romer continued to exercise his right to silence. CP 107. However, he called a student witness to vouch for his character. CP 93-104. She had known Mr. Romer for over a year. HT 68. She indicated to the Board that the allegation against Mr. Romer were “something he would absolutely never do.” CP 98.

After a student conduct hearing, the Board concluded that Mr. Romer was responsible for violating the student conduct policies, and

ordered Mr. Romer to refrain from entering the Campus of the University until December 31, 2018. CP 133-35. Mr. Romer filed an administrative appeal, claiming that the record lacked substantial information to support the Board's finding that he committed the acts against the Complainant. CP 130-32. The appeal was denied by letter which constituted the "Final Order," dated December 14, 2012. CP 127-28.

Thereafter, Mr. Romer petitioned the Whitman County Superior Court to review WSU's findings. CP 1-2. He claimed that the Agency Record lacked substantial information to support a finding that he was the perpetrator of the sexual assault. CP 2-7, 381-88, and 426-31.

Superior Court affirmed WSU, recognizing that the issue of Mr. Romer's identity as the perpetrator is "a close question," stating,

[Complainant] did describe what he looked like, what he was wearing, even what he tasted like when he forced his tongue into her mouth. But that doesn't identify Mr. Romer, but it does show that she got a look at the person and saw who this person was.

And then you have evidence in the record here that she went the next day to the fraternity Facebook page. The next day that she looked at pictures on that web page, reviewed those photographs, and from the photographs, again of this particular fraternity and of members of the fraternity she identified a photograph of the person that she claimed to believe was the perpetrator and obtained the name of Ryan Romer. And then she turned around, reported Mr. Romer's identity from what she had acquired from the Facebook page, reported that to the police. WSU doesn't pick up on it, from my understanding of the evidence, from the police or from the Complainant. They initially discover it from a newspaper report or something.

But from that they conduct - is it the EOC? They conduct an investigation that includes the information that was provided by the Complainant as to not only what happened, but what she observed and who she observed and what she did to identify the person. And they obtained the information as to her identification from the Facebook page of Mr. Romer. And then all of this information from their investigation is in the record. Mr. Romer appears at the hearing. I do not believe and will not find here the fact that he remained silent or merely appeared or defended in any fashion can be used as proof that he's the guy that did the bad thing. But I do feel that, particularly given the fact that there is evidence from him and others that he is a member of this particular fraternity. And, again, the same fraternity that had the Facebook page where the day after the event occurred the Complainant went and looked and from the pictures picked out that particular fraternity member.

I do feel that that is sufficient evidence to establish identity, particularly given the evidentiary standards that apply in these types of hearings, but sufficient to establish that that Mr. Romer, the Phi Kappa Pi fraternity member was the person that committed the assault.

CP 517-19

On reconsideration, Mr. Romer pointed out to the Superior Court that it had relied on a misunderstanding of the Agency Record in the facts underlying his oral ruling affirming WSU. CP 465-66. The Superior Court incorrectly found that the Complainant had acquired Mr. Romer's name from Facebook and turned his *name* over to the Pullman police. CP 518 (emphasis added). Neither page 33 nor page 73 of the Agency Record establish that Complainant gave a name to police. Both references establish that the Complainant gave "information" to the police. CP 159 ("shared the information with the ... police") & CP 199 ("handed the info

over to the police.”).

The Agency Record does not detail what information the Complainant gave to the police. CP 33 & 73. No representative from the Pullman police department was called to testify before the Board at the hearing. *See*, CP 466-67; CP 28-112. Thus, the Board never learned what Complainant saw on Facebook and what the Pullman Police possessed. Nonetheless, the Superior Court concluded that pages 33 and 73 of the Agency Record contained “minimally sufficient evidence” to establish Mr. Romer was the perpetrator. CP 523.

IV. Summary of Argument.

No evidence admitted at the hearing identified Mr. Romer as the perpetrator of the sexual assault against Complainant. The Agency Record also lacks substantial information to establish that Mr. Romer was the perpetrator.

Agency Record pages 33 and 73, relied upon by the Superior Court to affirm WSU, do not identify perpetrator, nor do they provide a name of the perpetrator. Pages 33 and 73 do not specify what information was given to the Pullman Police by the Complainant. WSU investigators did not speak to the police, nor did they obtain the information given to the police by the Complainant.

The Agency Record does not establish what Complainant actually viewed on Facebook. At the hearing, the Board never received evidence

of what the Complainant actually viewed on Facebook. Therefore, the finding that Mr. Romer was the perpetrator is not supported by substantial evidence.

V. Argument.

1. The record on appeal lacks the necessary substantial evidence to support a finding by a preponderance of evidence that Appellant was the perpetrator.

As this Court has noted, “[u]niversity students do not have the same rights in conduct hearings as defendants in criminal proceedings.” *Alpha Kappa Lambda Fraternity v. Washington State University* 152 Wn.App. 401, 416, 216 P.3d 451 (2009). However, conduct hearings are not completely lacking in due process safeguards. *See*, WAC 504-26-403. For example, a university board’s determination that a student has violated the university’s code of conduct must be “made on a preponderance of evidence; that is, whether it is more likely than not that the accused student violated the standard of conduct for students.” WAC 54-26-403(4)(a)(x).

On review of an agency’s decision, appellate courts determine if substantial evidence in the record supports the board's findings. *See*, *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wash.2d 22, 29, 891 P.2d 29 (1995). “The test of substantial evidence is whether evidence is sufficient to persuade a fair-minded person of the truth of the declared premise.” *Christianson v. Snohomish Health Dist.*, 133 Wash. 2d 647,

653, 946 P.2d 768, 771 (1997) (citing *Sparks v. Douglas County*, 127 Wash.2d 901, 910, 904 P.2d 738 (1995)). The burden is on the challenging party to show that the decision is not supported by substantial evidence. See, *Nordstrom Credit, Inc. v. Department of Revenue*, 120 Wash.2d 935, 939-40, 845 P.2d 1331 (1993). Finally, proof of a fact cannot rest on mere “guess, speculation, or conjecture.” *State v. Berg*, 41167-9-II, 2013 WL 5538720, at * 14 (Wash. Ct. App. Oct. 8, 2013) (*State v. Colquitt*, 133 Wn.App. 789, 796, 137 P.3d 892 (2006)).

The Board’s burden of proof was no different from the burden required for a party attempting to admit evidence under Rule of Evidence 404(b). Before other act evidence may be admitted under Rule 404(b), the proponent of the “other act” evidence must show by a preponderance of evidence the “defendant's connection to them.” *State v. Tharp*, 96 Wn.2d 591, 593-94, 637 P.2d 591 (1981); see also, *State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998) (holding that to admit prior acts of a criminal defendant, the State must connect the defendant to the prior acts by a preponderance of evidence).

While the standard of proof is not the same as it is in a criminal case, the types of evidence that establish identity are the same. This Court has previously held in a criminal case that identification must be based on “independent evidence that ‘the person named ... is the defendant in the present action...’” *State v. Santos*, 163 Wn.App. 780, 784, 260 P.3d 982

(Div. 3 2011). This Court recognized identification may be established by admission of “booking photographs or fingerprints, eyewitness identification, or distinctive personal information.”

Similarly, in *State v. Huber*, Division II stated:

Because “in many instances men bear identical names,” the State cannot [prove identity] by showing “identity of names alone.” Rather, it must show, “by evidence independent of the record,” that the person named therein is the defendant in the present action.

The State can meet this burden in a variety of specific ways. Depending on the circumstances, these may include otherwise-admissible booking photographs, booking fingerprints, eyewitness identification, or, arguably, distinctive personal information. But the State does not meet its burden merely because the defense opts not to present evidence; if the State presents insufficient evidence, the defendant's election not to rebut it does not suddenly cause it to become sufficient.

129 Wn.App. 499, 502-03, 119 P.3d 388, 390 (2005).

In this setting, the Court should also determine if substantial “independent evidence” in the record that establishes Mr. Romer’s identity as the perpetrator by a preponderance of evidence. This case presents the Court with an opportunity to define the line of demarcation between substantial evidence and speculation.

Here, the student conduct file contained a photograph of Mr. Romer. CP 203. Additionally, Mr. Romer appeared at the Student Conduct hearing. CP 29. Neither the Complainant, nor any other witness who appeared at the hearing, identified Mr. Romer as the perpetrator. CP

28-112. No witness pointed him out at the hearing, and no witness identified him from the photograph in the student conduct file. *Id.*

The only evidence from the student conduct hearing relating to identification was in this exchange in Complainant's testimony: When asked, "how did you identify him?," the Complainant responded, "I went onto their Facebook page and I found a picture of him." CP 59. The picture was never entered into evidence. *Id.* Without seeing the actual Facebook photograph, the Board could not find that a photograph depicted Mr. Romer.

The same is true about Agency Record pages 33 and 73, referenced in the Superior Court's order denying reconsideration. CP 523. WSU did not report seeing the Facebook photograph to confirm it depicted Mr. Romer. Based on the two references, the Board could not find that a Facebook photograph depicted Mr. Romer.

Furthermore, WSU did not call any representative of the Pullman Police Department to testify at the hearing. The Board could not determine what "information" was given to police by the Complainant identified the perpetrator.

The Superior Court detailed a series of events that culminated in Mr. Romer's appearance at the hearing. 517-19. Without some evidence establishing that what the Complainant actually viewed or what the Pullman Police actually received from the Complainant, a finding that Mr.

Romer was the perpetrator is based on guess, speculation and conjecture. *Berg*, 2013 WL 5538720, at * 14. Therefore, substantial evidence does not support the finding by the Board that Mr. Romer was the perpetrator.

2. Appellant is entitled to an award of attorney's fees before the Superior Court and on Appeal.

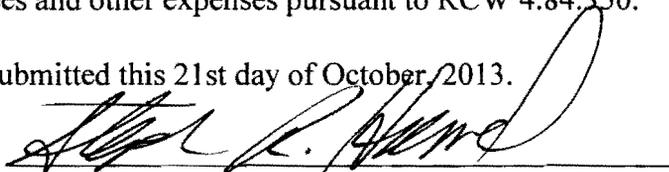
This Court should award attorney fees and other expenses accrued before the Superior Court and this Court should Mr. Romer prevail on direct review. RCW 4.84.350.

In this case, the Board's finding that Mr. Romer committed the violation conduct is not supported by substantial information. Thus, the Court is warranted in granting Mr. Romer his request for attorney fees. RCW 4.84.350(1) provides that a court "shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust." A qualified party prevails if it "obtain[s] relief on a significant issue that achieves some benefit" that the party sought in the judicial review proceeding. RCW 4.84.350(1). *Alpha Kappa*, 152 Wash. App. at 423. If Mr. Romer prevails, he should be entitled to attorney fees, as he would receive a benefit from a significant issue in this case.

VI. Conclusion.

Based on the foregoing, it is requested that the Court reverse the Superior Court's order affirming WSU, and reverse the finding of the Board that Mr. Romer is responsible for the student conduct violations, and dismiss this action. It is also requested that the Court impose reasonable attorney fees and other expenses pursuant to RCW 4.84.350.

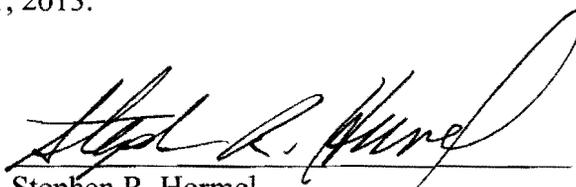
Respectfully submitted this 21st day of October, 2013.



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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing Brief of Appellant to Danielle A. Hess, Senior Assistant Attorney General, 332 French Administration Building, Post Office Box 641031, Pullman, WA 99164-1031, on this day, October 21, 2013.



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