

NO. 84307-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ARTHUR RUSSELL,

Respondent.

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STATE OF WASHINGTON
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ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 38233-4-II
Kitsap County Superior Court No. 08-1-00223-1

SUPPLEMENTAL BRIEF OF PETITIONER

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Bryan Hershman
Ste. 100 535 Dock St
Tacoma, WA 98402

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DATED August 16, 2010, Port Orchard, WA

Original: Supreme Court

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I. ARGUMENT

NO WASHINGTON CASE HAS EVER HELD THAT THE FAILURE TO GIVE A LIMITING INSTRUCTION REGARDING ER 404(B) EVIDENCE IS MANIFEST CONSTITUTIONAL ERROR.

The State's argument was thoroughly set forth in its petition for review. To summarize, Washington appellate courts will generally not consider claims for the first time on appeal unless the appellant establishes manifest constitutional error. *See State v. Kirkpatrick*, 160 Wn.2d 873, ¶ 7, 161 P.3d 990 (2007); RAP 2.5(a). Prior to the publication of the opinion below, *no* Washington case had ever held that the failure to give ER 404(b) limiting instruction could be raised on appeal where no such instruction was requested below.

This Court, in another ER 404(b) case, recently reiterated the reasons for this rule:

On appeal, a party may not raise an objection not properly preserved at trial absent manifest constitutional error. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007); RAP 2.5(a)(3). We adopt a strict approach because trial counsel's failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). We will not reverse the trial court's decision to admit evidence where the trial court rejected the specific ground upon which the defendant objected to the evidence and then, on appeal, the defendant argues for reversal based on an evidentiary rule not raised at trial. *State v. Korum*, 157 Wn.2d 614, 648, 141 P.3d 13 (2006); *State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68 (1983); *State v. Koepke*, 47 Wn. App. 897, 911, 738 P.2d 295

(1987) (“A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial.”) (citing *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985)).

State v. Powell, 166 Wn.2d 73, ¶ 19, 206 P.3d 32 (2009). This rule extends to limiting instructions regarding ER 404(b) evidence. *E.g.*, *State v. Ellard*, 46 Wn. App. 242, 244, 730 P.2d 109 (1986), *review denied*, 108 Wn.2d 1011 (1987) (“the trial court will not be reversed for failure to give the correct limiting instruction sua sponte.”); *see also* cases cited in Petition for Review.

In his answer to the State’s petition for review, Russell asserts that a different rule applies in cases involving sexual misconduct. Answer to Petition for Review at 4. Nothing in the cases he cites compels such a conclusion. Indeed, Russell’s argument is directly contrary to this Court’s decision in *State v. Myers*, 133 Wn.2d 26, 941 P.2d 1102 (1997).

In that case the defendant was convicted of sexual exploitation of a minor based on his videotaping of his seven-year-old daughter while she was bathing. He claimed on appeal that the trial court erred, *inter alia*, in failing to give a limiting instruction when it allowed the State to introduce videotapes he had made of other children. This Court declined to consider that claim because the defendant had not requested an instruction at trial. *Myers*, 133 Wn.2d at 36.

Notably, in support of his proposition that “sex is different,” Russell cites to *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). In discussing that case he notes that *Lough* relied on *State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989). *Lough* did cite *Brown* for the general rule that “the trial court should explain the purpose of the evidence and give a cautionary instruction to consider it for no other purpose.” *Lough*, 125 Wn.2d at 860 n.18. Notably, however, *Brown* was not a sex case but a theft case, and the other acts evidence pertained to prior theft convictions. *Brown*, 113 Wn.2d at 529. Plainly, under ER 404(b), the same rules apply in sex cases as in other criminal proceedings. Likewise, Russell identifies no reason RAP 2.5(a) should not also apply in prosecutions of sexual offenses. Nor does he cite to any authority that has so held.

The decision of the Court of Appeals was a clear departure from established precedent. Neither that court, nor Russell, have provided any reasoned justification for the departure. That court should have applied RAP 2.5(a), and declined to consider issues of evidentiary and non-constitutional error for the first time on appeal.

II. CONCLUSION

For the foregoing reasons, and those set forth in the petition for review, the judgment of the Court of Appeals should be reversed and Russell's conviction and sentence should be affirmed.

DATED August 16, 2010.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RAS', with a long horizontal stroke extending to the right.

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

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