

NO. 67355-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

REC'D

Respondent,

NOV 29 2011

v.

King County Prosecutor
Appellate Unit

D.V-A.,

Appellant.

2011 NOV 30 PM 4: 27

COURT OF APPEALS DIV I
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY, JUVENILE
DIVISION

The Honorable Helen Halpert, Judge

BRIEF OF APPELLANT

ERIC J. NIELSEN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The court erred when admitted evidence of alleged prior sexual contact under ER 404(b).
2. The court erred in entering conclusions of law II, V and VI. CP 24-30.¹

Issues Pertaining to Assignments of Error

1. Did the trial court err when it admitted evidence of a number prior contracts between the alleged victim and the defendant under ER 404(b) for the purpose of showing the defendant had a sexual interest in the alleged victim?
2. Did the trial court err when it failed to articulate on the record the balance between the probative value of the ER 404(b) evidence and the prejudice in admitting the evidence?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor s Office charged D.V-A. with one count of second degree child molestation, in violation of RCW 9A.44.086. CP 1. At a bench trial, the Honorable Helen Halpert found D.V-A. guilty.

¹ The trial court's written findings of fact and conclusions of law are attached hereto as an appendix and incorporated herein.

RP 236-237²; CP 29. D.V-A received a standard range disposition and timely filed a Notice of Appeal. CP 9-13, 19-23.

2. Substantive Facts

A.M., who was 12 years old at the time of the alleged incident, moved to the United States from Mexico with her family a couple of years earlier. RP 16-17, 39-40. D.V-A. is A.M.'s mother's cousin but A.M. referred to him as her uncle. RP 17, 42. D.V-A., who was 17 years old, moved to the United States from Mexico in the summer of 2010. RP 43, 45, 177, 186. D.V-A.'s family and A.M.'s family would often socialize together on the weekends usually at D.V-A.'s house. RP 20, 26, 44.

In late March 2011, when A.M. and her family were visiting D.V-A.'s family, D.V-A. asked her to help him with something so she went with him to his bedroom. RP 52. A.M. said the room smelled like beer. RP 52.

There were two beds in the room. A.M. sat on one bed while D.V-A. sat on the other with his computer. RP 53. D.V-A. then came over to the bed where A.M. was sitting, grabbed her leg, kissed her and told her to take her pants off. Id. When she refused, D.V-A. pulled her pants down to below her knees. RP 54. A.M. was in her underwear and D.V-A. was

² RP refers to the verbatim report of proceedings for June 21, 22, 23 and 27, 2011, which are sequentially numbered.

wearing shorts. RP 55. D.V-A. then got on top of A.M. and he started to move his waist as if he were doing push-ups. A.M. felt something hard against her vagina. She thought it was D.V-A.'s penis. RP 56. A.M. then kicked D.V-A. and when he got off her A.M. left and went into the bathroom. RP 55-56.

A.M. thought she might be pregnant so a few days later she told her friend M. B. that she was raped. RP 59-61, 155-156. A.M. said she also told M.B. as early as September about other times D.V-A. accosted her. RP 50.

M.B., however, testified A.M. only told her about one incident that A.M. indicated happened sometime in February, 2011. RP 159-161. Following that incident, A.M. told M.B. she had been raped and was afraid she was pregnant. RP 156-157. M.B. convinced A.M. she needed to tell their teacher. RP 60, 157.

On April 4th A.M. and M.B. spoke with their teacher, Keri Rotton. RP 128. They told Rotton they were concerned because their friend was raped by her uncle and thought she might be pregnant. RP 129-130. A.M. then spoke to Rotton the next day and based on that conversation Rotten called police. RP 132-133.

A nurse and then a doctor eventually saw A.M. She told them about what happened with her uncle. RP 81-82, 172-173. Tests confirmed A.M. was not pregnant. RP 175.

D.V-A. also testified. He denied he ever touched A.M. inappropriately or sexually. RP 184. He denied he had ever pulled A.M.'s pants down. RP 185.

C. ARGUMENT

THE COURT ERRED IN ADMITTING EVIDENCE OF D.V-A.'S PRIOR ALLEGED SEXUAL CONTACTS WITH A.M.

A.M. was allowed to testify that when she was between the ages of seven and nine and living in Mexico, D.V-A. occasionally grabbed her legs, kissed and licked her and sometimes touched her vaginal area. RP 45-46. She was also allowed to testify that in August or early September 2010, soon after D.V-A. moved to the United States, he grabbed her thighs, butt and kissed her on three or four prior occasions. RP 48.

Over D.V-A.'s objection, the court admitted the evidence under ER 404(b) to show a D.V-A.'s "long-standing sexual interest" in A.M. RP 69. The court concluded, without comment, the probative value of the evidence outweighed its prejudicial impact. Id.

In determining whether to admit ER 404(b)³ evidence, a trial court must (1) find by a preponderance of the evidence that the misconduct actually occurred; (2) identify a non-propensity purpose for introducing the evidence; (3) determine that the evidence is materially relevant to that purpose; and (4) find that the probative value of the evidence outweighs its prejudicial effect. State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002). Evidence offered under ER 404(b) should be excluded in doubtful cases. State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Evidence of a defendant's prior misconduct or acts is inadmissible to demonstrate his propensity to commit the crime charged. ER 404(b). Case law recognizes evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the offended female. State v. Ray, 116 Wn.2d 531, 547 806 P.2d 1220 (1991); State v. Camarillo, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); State v. Ferguson, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983). Conduct that proves lustful disposition is whatever would

³ ER 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

naturally be interpreted as the expression of sexual desire. State v. Thorne, 43 Wn.2d 47, 60-61, 260 P.2d 33 (1953) (citation omitted).

Relevant evidence is defined in ER 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, the court admitted evidence of D.V.-A.'s prior conduct with A.V. to show he had a long-standing sexual interest in A.V. The conduct A.V. described consisted of kissing, licking her cheek and neck and grabbing her leg and butt. Although she stated D.V.-A. "sometimes" touched her vaginal area, that was in response to the prosecutor's leading question and she gave no details that would indicate the touching was sexual in nature. The conduct described by A.V. does not demonstrate D.V.-A.'s sexual desire or "interest" in A.V. Therefore, it was improperly admitted because it was not materially relevant for that purpose.

Moreover, the court failed to balance, on the record, the probative value of the evidence against its unfair prejudice. The court merely concluded the probative value of the evidence outweighed its prejudicial impact. RP 69. The failure to articulate the balance between the probative value and the prejudice is error. State v. Carleton, 82 Wn.App. 680, 686,

919 P.2d 128 (1996), citing State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984).

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). This Court assess whether the error was harmless by measuring the admissible evidence of guilt against the prejudice caused by the inadmissible evidence. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

The prejudice potential of prior bad acts evidence is at its highest in sex abuse cases. State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (citation omitted). A.M.'s testimony was the only evidence of guilt. D.V-A. denied the allegation. The court found A.M. credible and specifically found D.V-A. was not credible. CP 29 (finding of fact 35). Evidence that D.V-A kissed and touched A.M. in the past, even though that evidence failed to show D.V-A.'s sexual interest in A.M., likely influenced the court's credibility determination because it allowed the court to infer that if something similar happened in the past A.M. must be telling the truth about the alleged incident. The improper admission of the evidence was not harmless.

D. CONCLUSION

For the above reason, D.V-A.'s conviction should be vacated.

DATED this 30 day of November, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ERIC J. NIELSEN
WSBA No. 12773
Office ID No. 91051
Attorneys for Appellant

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KING COUNTY WASHINGTON

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

1	STATE OF WASHINGTON,)	
2)	
3)	
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6)	
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8	vs.)	
9	DANTE VILLASENOR-ALCARAZ)	No. 11-8-00844-6
10	B.D. 12/20/1993)	FINDINGS OF FACT AND
11)	CONCLUSIONS OF LAW
12)	PURSUANT TO CrR 6.1(d) AND
13)	JuCR 7.11
14)	
15	Respondent.)	
16)	
17)	

THE ABOVE-ENTITLED CAUSE having come on for fact-finding on June 21, June 22, June 23, and June 27, 2011, before the Honorable Judge Helen Halpert, in the above-entitled court; the State of Washington having been represented by Deputy Prosecuting Attorney Kelsey Schirman; the respondent appearing in person and having been represented by his attorney, John Crowley, the court having heard sworn testimony and arguments of counsel, now makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. A. M-A, the victim in this case, was born on December 4, 1998. A. M-A was twelve years old in March of 2011.
2. A. M-A lives with her mother, Lucia Alvarez-Alcaraz, her step-father, Heriberto Alvarez Campos, and her thirteen year old brother, Juan Medina-Alvarado. The victim has been living in the United States of America (US) for one and a half to two years. The victim and her family are from Mexico.
3. The respondent, Dante Villasenor-Alcaraz, was born on December 20, 1993. The respondent was seventeen years old in March of 2011.
4. The respondent is the cousin of A. M-A's mother; the victim and her brother refer to the respondent as an "Uncle." Lucia Alvarez-Alcaraz, the victim's mother, has known the

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) - 1

Daniel T. Satterberg,
Prosecuting Attorney
Juvenile Court
1211 E. Alder Street
Seattle, Washington 98104

ORIGINAL

- 1 respondent his entire life. The respondent has been living in the US since last summer. The
2 respondent is from Mexico.
- 3 5. When the victim was seven years old, both herself and the respondent lived in the same
4 town in Mexico. The respondent began inappropriately touching the victim at that time.
- 5 6. Initially, the respondent would run his hands on the victim's legs and occasionally rub the
6 victim's vaginal area; this would generally happen when the victim would wear a skirt.
- 7 7. This touching continued when the victim was eight or nine years old. At that age, the
8 respondent, began kissing and licking the victim's cheek and neck. The respondent would
9 grab the victim's buttocks and touch other parts of her body.
- 10 8. When the victim moved to the US approximately one and a half to two years ago, the
11 touching temporarily stopped as the respondent was still in Mexico.
- 12 9. Last summer, the respondent moved from Mexico to the United States. The respondent
13 lives with his mother, brother, aunt, and uncle. The respondent's brother's name is Oscar
14 and he is around the same age as the victim and her brother. The victim and her family
15 would frequently visit the respondent's home to visit family. They would spend 2-4
16 weekends per month at the respondent's home.
- 17 10. The respondent lives in Shoreline, Washington.
- 18 11. When the respondent moved to the United States, he recommenced the inappropriate
19 touching of his cousin. At the victim's brother's birthday in October 2010, a family event,
20 the respondent hugged the victim and grabbed her buttocks. In December 2010, at the
21 victim's birthday, the respondent hugged the victim, grabbed her buttocks, and made
22 inappropriate comments about the victim maturing and that he was going to be there to
enjoy it. Aside from these two incidents, on three to four occasions, the respondent would
inappropriately touch the victim by touching and rubbing the victim's legs, over her clothing.
He would kiss her on her cheek, neck, and mouth. He would also lick the victim on the
cheek, neck, and ear.
12. Whilst all of the touching was going on throughout the years, the respondent would tell the
victim that he was her uncle and can do whatever he wants. He also told her "poor you if
you tell your mom."
13. The victim told her close friend, Molly Baer, about the touching. Molly goes to the same
school as A. M-A, Jane Adams Elementary School. Molly was someone that the victim felt
she could trust.
14. Sometime between March 1, 2011, through March 31, 2011, the victim, her mother and her
brother, went over to the respondent's house in the evening to socialize with family. The
victim's mother was helping out with the victim's aunt who had a new baby. When they

- 1 arrived at the house, Ms. Alvarez-Alcaraz went to the victim's aunt's room. The victim
2 began walking towards where her brother Juan was going, which was to play video games
with their other "uncle," Oscar.
- 3 15. The respondent then asked the victim to help him put music on his I-Pod. The victim agreed
4 and the respondent took the victim to his room.
- 5 16. The victim was not afraid of the respondent, as she trusted her "uncle," it had been a while
6 since he had touched her, and she thought he had changed.
- 7 17. The respondent's room smelled of beer. The victim sat on Oscar's bed and the respondent
8 approached her. The respondent began whispering inappropriate ("nasty") comments to the
9 victim. Some of the comments included that the respondent told the victim she looked
10 "hot."
- 11 18. The respondent then began kissing the victim on her cheek and neck with his lips and
12 tongue. The respondent told the victim to take her pants off. The victim replied, "No." The
13 respondent told the victim "yeah" and the victim again said "no." The victim then began to
14 cry. The respondent then pulled down the victim's pants; the victim attempted to stop this,
15 but the respondent pulled the victim's hands away.
- 16 19. The victim placed her hand over her mouth to muffle her own cries and screams. The
17 victim did not want anyone to hear. She did not want her mom to walk in, see them doing
18 bad stuff, and think badly about what they were both doing.
- 19 20. The respondent then got on top of the victim. The respondent was touching the victim's
20 buttocks and legs with his hands. The respondent put his penis on her vagina. When this
21 happened, the victim and respondent both had only their underwear on. The victim could
22 feel a hard shape when the respondent put his penis on her vagina. The victim believed the
hard shape to be the respondent's penis.
- 21 21. The respondent, while in a push-up position, repeatedly put his penis on the victim's vagina.
Although there was no penetration, the Court finds that this contact was not fleeting or
accidental or equivocal.
- 22 22. The victim was eventually able to kick the respondent off of her and run away to the
bathroom. The victim went to the bathroom for thirty minutes; the victim cried and then
cleaned off her face.
23. The victim did not want to report it for fear that her family would not believe her.
24. After the incident in March, the victim told Molly that she had been raped. Molly insisted
that the victim tell someone about the incident. The victim became concerned that she was
pregnant, despite the fact that both the victim and respondent's underwear was on when the
incident occurred and there was no penetration.

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25. The day before the victim told her teacher, the victim asked her mother hypothetical questions. The victim asked her mother what her "friend" should do. She said that this "friend" has an uncle who touches her and it is gross and it is like rape. The victim's mother said that this "friend" is stupid and should tell someone.
26. Ms. Alvaraz-Alcaraz noticed that the victim, in the month prior to the incident being reported, had been angry and fighting a lot with her. Also, she noticed that the only activity that the victim would want to do is sleep and was less social.
27. On April 5, 2011, the victim spoke to her teacher, Keri Rotton, about a hypothetical friend who had been raped by an 'uncle' and this "friend" thought that she may be pregnant. Molly was present at the meeting to act as emotional support.
28. The next day Ms. Rotton spoke to the victim again. During this conversation, the victim was extremely upset, as evidenced by her demeanor; the victim was crying. Ms. Rotton then contacted the principal who called the Seattle Police Department. Ms. Rotton referred the victim to the Group Health Cooperative run teen health center at Nathan Hale and the victim took a pregnancy test, which was negative.
29. Ms. Rotton had noticed a change in the victim's behavior some time after February 2011. Ms. Rotton noticed that the victim's interest in school had decreased.
30. When the victim went to the Group Health Cooperative, the victim met with Kathleen Lange, an Advanced Registered Nurse Practitioner (ARNP) for Group Health. The victim disclosed to ARNP Lange that the respondent, about a month ago, started kissing the victim, pulled down her pants, and laid on top of her. The victim yelled "no" and "stop," and was able to kick the respondent and escape. The victim told ARNP Lange that her underwear was never removed and she believed he had been drinking. The victim told the ARNP that she had concerns she was pregnant since she missed her period. The victim also told the ARNP that she is worried her family will be angry.
31. On April 11, 2011, the victim went to the Harborview Center for Sexual Assault and Traumatic Stress (HCSATS) for a medical examination. The victim was examined by Dr. Naomi Sugar. The victim told Dr. Sugar that one day she went to the respondent's house with her mother and brother. The victim went to the respondent's room to help him with his iPod. The victim told Dr. Sugar that after she sat on the respondent's bed, the respondent started to kiss her neck and mouth with his tongue. She stated that he then told the victim to take her pants off; the respondent then pulled them down. The victim indicated that both she and the respondent had their underwear on. The victim stated she was able to kick the respondent and run away. The victim stated she then went to the bathroom where she cried and cleaned her face. Afterwards, the respondent acted as if nothing happened.
32. After this incident was reported, the victim and her family no longer visited the respondent's home.

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2 33. The Court finds that the this incident occurred in March of 2011 as the victim testified that
3 she knew it happened just a few days before she started dating her boyfriend on March 25.
4 Also, Ms. Alvaraz-Alcaraz testified that she was certain the incident happened in March
5 based on when she visited the respondent's home to see the child who was recently born to a
6 family member. Moreover, even the respondent testified the incident occurred in March,
7 despite denying sexual contact.

8 34. The Court finds that the sexual contact that the respondent engaged in with the victim was
9 clearly for sexual gratification.

10 35. The Court finds the victim's testimony credible. The Court also finds Juan's testimony
11 credible. The Court did not find the respondent's testimony to be credible.

12 And having made those Findings of Fact, the Court also now enters the following:

13 CONCLUSIONS OF LAW

14 I.

15 The above-entitled court has jurisdiction of the subject matter and of the Respondent, DANTE
16 VILLASENOR-ALCARAZ, who was born 12/20/1993, in the above-entitled cause.

17 II.

18 The Court permitted testimony from the victim, regarding prior acts of sexual contact from the
19 victim, under ER404. After hearing testimony from the victim, the Court found by a preponderance
20 of the evidence that these acts occurred. The Court found these prior acts to be relevant to show a
21 long-standing sexual interest, or lustful disposition, of the respondent to his cousin/niece, the victim.
22 The court further found that this evidence's probative value substantially outweighed any unfair
prejudice.

III.

The Court permitted testimony from Dr. Naomi Sugar and Advanced Register Nurse Practitioner
Kathleen Lange, regarding statements the victim made to them, as a proper foundation was laid
during their testimony. The Court found that this hearsay qualified under the ER 803(a)(4)
exception regarding statements made for medical diagnosis.

IV.

The Court permitted testimony from Molly Baer, under the fact-of-complaint doctrine. The Court
restricted this testimony; the witness was not permitted to discuss the details of the disclosure from
the victim, including who the perpetrator was. The Court denied the State request to permit Juan

1 Medina-Alvarado and Keri Rotton to testify to the disclosures that the victim made to these
2 witnesses approximately one month after the incident occurred. The Court would not permit these
3 witnesses to testify about the victim's disclosure's to them, under the fact-of-complaint doctrine, as
the timing was too far out from when the incident occurred to when it was disclosed to these
witnesses.

4 V.

5 The State has proven the following elements of Child Molestation in the Second Degree, contrary to
6 9A.44.086, beyond a reasonable doubt:

- 7 a. That during a period of time intervening between March 1, 2011, through March 31,
- 8 2011, the respondent had sexual contact with A. M-A (DOB 12/4/1998); and
- 9 b. That A. M-A was at least twelve years old but less than fourteen years old at the time of
- 10 the sexual contact and was not married to the respondent; and
- 11 c. That A. M-A was at least thirty-six months younger than the respondent; and
- 12 d. That this act occurred in the State of Washington.

13 In making these findings, the court relied upon the testimony of witnesses and evidence introduced
at trial.

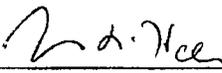
14 VI.

15 The respondent is guilty of the crime of Child Molestation in the Second Degree as charged.

16 VII.

17 Judgment should be entered in accordance with Conclusions of Law VII. In addition to these
18 written findings and conclusions, the Court hereby incorporates its oral findings and conclusions as
reflected in the record.

19 SIGNED this 19 day of JULY, 2011.

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21 _____
22 Judge Helen Halpert

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Presented by:



Kelsey Schirman, WSBA #41684
Deputy Prosecuting Attorney



John Crowley, WSBA #19868
Attorney for Respondent

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) - 7

Daniel T. Satterberg,
Prosecuting Attorney
Juvenile Court
1211 E. Alder Street
Seattle, Washington 98104

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67355-6-1
)	
D.V-A.,)	
)	
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 30TH DAY OF NOVEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] D.V-A.
 1804 1ST AVENUE N.E.
 SHORELINE, WA 98155

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF NOVEMBER 2011.

x *Patrick Mayovsky*