

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

STATE OF WASHINGTON,	)	
	)	No. 64340-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
ANTHONY G. WINFORD,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: June 4, 2012
_____	)	

Becker, J. — Character evidence offered under ER 404 must be proved by the methods set forth in ER 405. In this prosecution for child molestation, Anthony Winford contends the trial court abused its discretion in excluding some of his proposed character testimony for noncompliance with ER 405. Because we conclude the court did not abuse its discretion or violate Winford’s right to present a defense, and because Winford’s statement of additional grounds for review raises no meritorious issues, we affirm.

**FACTS**

Based on allegations that Winford sexually molested S.Y., the State charged him with first degree child molestation. At trial, Winford sought to call several witnesses to testify to his good character, specifically his sexual morality. He maintained the testimony was admissible as a pertinent trait of character

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under ER 404(a). The State argued that if such evidence was admissible, it had to be proven by reputation evidence under ER 405. Winford disagreed, arguing that his sexual morality could also be proved by opinion testimony or specific instances of conduct.

Winford proceeded to make an offer of proof, calling three witnesses. One testified that she had lived on a naval base with Winford from 2001 to 2003, and that he had a good reputation for sexual morality. The other witnesses did not testify to Winford's reputation but instead testified that he acted appropriately around other teenage girls between 1999 and the time of trial.

The court admitted the reputation testimony but excluded the other proposed testimony for failing to comply with the proof requirements of ER 405. The court also noted that the excluded evidence "would, to a significant degree, be cumulative" of the reputation testimony.

The jury found Winford guilty as charged. He appeals.

### **DECISION**

Winford contends the trial court abused its discretion in excluding the proposed testimony that he had not engaged in sexually inappropriate behavior when in the presence of other teen age girls. We disagree.

A trial court's decision to admit or to exclude evidence is reviewed for abuse of discretion, State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Winford contends the excluded testimony in this case was admissible as

character evidence under ER 404 and 405. Although character evidence is generally inadmissible to prove conformity therewith on a particular occasion, an exception exists for “evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.” ER 404(a)(1). To be admissible, such character evidence must be proved in one of two ways:

**(a) Reputation.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

**(b) Specific Instances of Conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person’s conduct.

ER 405(a), (b).

Assuming without deciding that the excluded testimony in this case was admissible as a pertinent trait of character under ER 404,<sup>1</sup> it did not conform to the accepted methods of proof in ER 405(a) and (b). As the trial court noted, it was not presented in the form of reputation testimony. And while it arguably encompassed specific instances of conduct, that method of proof was

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<sup>1</sup> Compare State v. Jackson, 46 Wn. App. 360, 365, 730 P.2d 1361 (1986) (trial court in statutory rape prosecution properly excluded testimony concerning defendant’s reputation for sexual morality and decency because it was not a pertinent character trait) with State v. Griswold, 98 Wn. App. 817, 829, 991 P.2d 657 (2000) (rejecting Jackson and holding that sexual morality was a pertinent character trait in child molestation case), abrogated on other grounds by State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003).

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inapplicable because character was not an “essential element” of the charge or Winford’s defense. ER 405(b); see State v. Mercer-Drummer, 128 Wn. App. 625, 632, 116 P.3d 454 (2005) (“character is rarely an essential element of the charge, claim, or defense. For character to be an essential element, character must itself determine the rights and liabilities of the parties.’ Because character does not determine a party’s rights and liabilities incident to an assault, obstruction of a law enforcement officer, or resisting arrest, character therefore is not an essential element of any charge, claim, or defense to the crime with which Mercer-Drummer was charged.”) (quoting State v. Kelly, 102 Wn.2d 188, 196-97, 685 P.2d 564 (1984)), review denied, 156 Wn.2d 1038 (2006); State v. Hutchinson, 135 Wn.2d 863, 959 P.2d 1061 (1998) (specific act character evidence concerning victim’s propensity for violence is not an essential element of self-defense), cert. denied, 525 U.S. 1157 (1999).

Winford argues, however, that specific instances of conduct are an acceptable method of proof even when character is not an essential element of the charge or defense. Noting that ER 405(a) states that “proof *may* be made by testimony as to reputation,” he contends subsection (a) implicitly allows other methods of proof, including specific instances of conduct, without the essential elements restriction in ER 405(b). (Emphasis added.) Our courts have rejected such a reading of the rule. See State v. O’Neill, 58 Wn. App. 367, 370, 373, 793 P.2d 977 (1990) (dissent arguing that use of word “may” in ER 405(a) indicates

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that reputation is not the exclusive way to prove character under subsection (a)); Mercer-Drummer, 128 Wn. App. at 630-32 (following O'Neill majority and rejecting argument that reputation testimony is not the exclusive way to prove character under ER 405(a)). Reading ER 405(a) in the manner Winford suggests would directly conflict with, and undermine, the limitations on proof by specific instances of conduct set forth in ER 405(b). We therefore reject Winford's interpretation of the rule.

Finally, Winford contends the court's ruling violated his constitutional right to present a defense. But the right does not extend to inadmissible evidence. State v. Aguirre, 168 Wn.2d 350, 363, 229 P.3d 669 (2010) (although defendant has "a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence"); State v. Mee Hui Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006) (defendant has right to present a defense "consisting of relevant evidence that is not otherwise inadmissible") (quoting State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993)), review denied, 159 Wn.2d 1022 (2007). Because the excluded evidence was not admissible under ER 405, its exclusion did not violate Winford's constitutional right to present a defense.

In a pro se statement of additional grounds for review, Winford contends his conviction should be reversed based on the report of a defense expert,

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psychologist Dianne Learned, who testified at trial. The State has moved to strike the report and the statement of additional grounds because the report is not part of the appellate record. We agree that the report must be stricken.

There is no reason to strike the statement of additional grounds, a document that Winford is entitled to file under RAP 10.10. In essence, Winford argues that his conviction should be reversed because the victim's testimony was the result of leading questions posed to her during the investigation. But the weight, credibility, and persuasiveness of the evidence are matters for the trier of fact and are not subject to review by this court. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Affirmed.

Becker, J.

WE CONCUR:

Schiveller, J.

Edington, J.