IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 64416-5-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
MICHAEL DEGALVEZ WILLIAMSON,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: June 6, 2011

spearman, j. — A jury convicted Michael Williamson of indecent exposure with a prior sex offense, and found the State had proved the aggravating factor of sexual motivation. Williamson argues the trial court erroneously admitted evidence of a prior act of indecent exposure. We reject this argument because the trial court properly admitted the evidence as part of a common scheme or plan under ER 404(b), and affirm the conviction for indecent exposure with a prior sex offense.

The exceptional sentence based on the sexual motivation aggravating factor, however, must be reversed. Under State v. Ryan, No. 64725-1, 2011 WL 1239796 (April 4, 2011) and State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), it is manifest constitutional error to instruct a jury that it must be unanimous in order to find the State failed to prove an aggravating factor. As was the case in Ryan, the jury was so instructed here. We vacate the exceptional sentence, and accept the State's concession of error regarding the seriousness level of Williamson's offense. We

otherwise affirm.

FACTS

Laurie Rowell boarded a King County Metro bus in downtown Seattle. Michael Williamson later boarded the bus and sat near Rowell. Rowell noticed that Williamson had a newspaper on his lap, saw it was moving up and down, and Rowell suspected Williamson was masturbating. Williamson uncovered his lap and exposed his erect penis to Rowell, while staring at her and masturbating. Rowell told Williamson to stop, and he moved to the front of the bus. Video surveillance from the bus shows Williamson getting on the bus and sitting across from Rowell, but does not show his full body after he sat down. Williamson admitted to the police that he was the person on the video, but denied exposing himself. Instead, Williamson told the police his penis may have become erect and he may have been straightening it within his pants.

The State charged Williamson with indecent exposure, which was elevated to a felony based on Williamson's prior sex offenses, i.e., his conviction for second-degree rape, and his multiple convictions for indecent exposure.[1] In addition, the State alleged that Williamson committed the crime with sexual motivation. The State also sought to introduce under RCW 10.58.090 and ER 404(b), evidence of one of Williamson's prior acts of indecent exposure at trial. The trial court granted the motion, admitting the act under both RCW 10.58.090 and ER 404(b). As a result, at trial Amy Phan testified in the State's case-in-chief that Williamson boarded a Metro bus in downtown Seattle, sat near her, and was masturbating underneath a messenger bag. She also testified that

[1] Williamson stipulated that the predicate prior sex offense existed.

Williamson exposed his erect penis to her, and continued to masturbate while looking at her.

Williamson testified at trial. He denied he exposed himself and masturbated. Instead, he claimed he was covering himself with a newspaper because he had soiled himself and had caught his foreskin in his zipper. He also claimed he did not know Amy Phan and had never seen her before. The jury convicted Williamson for indecent exposure with a prior sex offense. Regarding the sexual motivation aggravating factor, the jury was provided the following instruction:

> You will also be given a special verdict form for the crime of Indecent Exposure with a sexual motivation. If you find the defendant not guilty of Indecent Exposure, do not use the special verdict form. If you find the defendant guilty of Indecent Exposure, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

The jury found Williamson committed the indecent exposure with sexual motivation. At sentencing, the trial court concluded Williamson's conviction for indecent exposure with a prior sex offense carried a seriousness level of four. Based on the sexual motivation finding, the trial court imposed an exception sentence of 60 months, the statutory maximum. Williamson appeals.

DISCUSSION

Admission of Prior Act under ER 404(b)

In his opening brief, Williamson argues the trial court's admission of his prior act of indecent exposure under RCW 10.58.090 was error because the statute violates the separation of powers doctrine. The trial court, however, admitted the prior act under both RCW 10.58.090 and ER 404(b), and Williamson did not assign error to admission under ER 404(b) in his opening brief. Where an appellant fails to assign error to a trial court's decision or present argument in support of the assignments of error, this court ordinarily will not consider the issue. Ang v. Martin, 154 Wn.2d 477, 487, 114 P.3d 637 (2005); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a). In this case, however, it appears Williamson has sufficiently raised the issue in his RAP 10.10 Statement of Additional Grounds. We therefore address admission of Williamson's acts under ER 404(b).

"This court reviews the correct interpretation of an evidentiary rule de novo as a question of law." State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). "Once the rule is correctly interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." Id., (citing State v. Lough, 125 Wn.2d 847, 856, 889 P.2d 487 (1995)).

Because ER 404(b) explicitly prohibits admission of evidence to prove a defendant has a criminal propensity, a trial court must always begin with the presumption that evidence of prior misconduct is inadmissible. Id. But ER 404(b) also provides that evidence of prior misconduct may be admissible where it is relevant to

prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[2]

Here, the State sought to admit evidence of Williamson's prior act of indecent exposure to prove a common scheme or plan. Prior misconduct evidence is relevant to prove a common scheme or plan when the existence of the criminal act is at issue and there is "evidence of substantially similar features between a prior act and the disputed act[.]" DeVincentis, 150 Wn. 2d at 20. But before the evidence is admissible, the State must first establish that the prior misconduct is:

> "(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial."

Id. at 17 (quoting Lough, 125 Wn.2d at 852). Such evidence is not to be admitted lightly, however. Indeed, "the degree of similarity for the admission of evidence of a common scheme or plan must be substantial." Id. at 20.

Williamson argues generally that his prior act of indecent exposure was not similar to his current charge. We disagree. In fact, the prior act of indecent exposure and the act at issue in this case are markedly similar. Both complainants were young women in their twenties. Both boarded metro busses downtown. Both were seated near Williamson. Williamson exposed his erect penis to both women. He attempted to hide his penis, in one case with a messenger bag, and in the other with newspapers. He

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[2] ER 404(b) provides:

> **Other Crimes, Wrongs, or Acts**. 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.

masturbated in front of both women while looking at them. Under these circumstances, the trial court properly interpreted ER 404(b) and did not abuse its discretion in admitting evidence of the prior indecent exposure.[3]

Seriousness Level of Offense

"A trial court exceeds its authority when it imposes a sentence beyond what the legislature expressly confers." State v. Steen, 155 Wn. App. 243, 247, 228 P.3d 1285 (2010) (citing In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618 (2002)). Williamson contends the trial court erroneously concluded his conviction for indecent exposure with a prior sex offense carried a seriousness level of four, when in fact the crime is an unranked felony. The State concedes error on this issue, and the concession is well taken. Indecent exposure with a prior conviction for a sex offense is not assigned a seriousness level. See RCW 9.94A.515; Steen, 155 Wn. App. at 248-49. Rather, it is an unranked felony, and the standard range is 0-12 months confinement. RCW 9.94A.505(2)(b); Steen, 155 Wn. App. at 249. As such, we vacate Williamson's sentence and remand for further proceedings.

Exceptional Sentence

Williamson also argues his exceptional sentence must be reversed because the jury instruction for the aggravating factor of "sexual motivation" was faulty under Bashaw

[3] Williamson also argues that before the trial court could admit the prior act, the State was required to prove he committed the acts of indecent exposure in some unique manner that would distinguish them from other acts of indecent exposure committed by other people. But Williamson relies on State v. Dewey, 93 Wn. App. 50, 966 P.2d 414 (1998) for this proposition, and Dewey was expressly rejected by the Supreme Court in DeVincentis: "Dewey reflects a misreading of Lough because our analysis in Lough requires similarity of the acts, not uniqueness . . . . The Dewey court also confused the common scheme or plan exception under ER 404(b) with the unique modus operandi exception . . . ." DeVincentis, 150 Wn.2d. at 21. In light of our resolution of this issue, we need not address Williamson's challenge to the constitutionality of RCW 10.58.090.

and Ryan. We agree and vacate the exceptional sentence for the reasons stated herein.

The trial court in this case instructed the jury that if it found the defendant guilty of indecent exposure, it would then fill out a special verdict form as to whether Williamson acted with sexual motivation. The instruction, however, informed the jury that in order to answer the special verdict form "no," the jury must *unanimously* have a reasonable doubt as to whether Williamson acted with sexual motivation:

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

This is the exact language that we recently held amounted to constitutional error in Ryan. In that case, the jury convicted Ryan of second degree assault and felony harassment, and found Ryan committed the crimes with the aggravating circumstances of a pattern of abuse and domestic violence. Ryan, 2011 WL 1239796 at *5. We held the instruction relieved the State of its burden to prove its allegations beyond a reasonable doubt:

> The State's burden is to prove to the jury beyond a reasonable doubt that its allegations are established. If the jury cannot unanimously agree that the State has done so, the State has necessarily failed in its burden. To require the jury to be unanimous about the negative – to be unanimous that the State has not met its burden – is to leave the jury without a way to express a reasonable doubt on the part of some jurors.

Ryan, 2011 WL 1239796 at *6 (footnotes omitted).

The State contends any error was not of constitutional magnitude, and as such, cannot be raised for the first time on appeal. We disagree. As we held in Ryan, our

Supreme Court's decision in Bashaw, "compels the conclusion the error is both manifest and constitutional" and can be raised for the first time on appeal. Ryan, 2011 WL 1239697 at *6. We acknowledge that Division Three of this court has reached the opposite conclusion on this issue. See State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011). But we disagree with Nunez, adhere to Ryan, and vacate the exceptional sentence.

Statement of Additional Grounds

In his statement of additional grounds, Williamson argues the State "misapplied" RCW 10.58.090 in admitting evidence of his prior act of indecent exposure. We reject this argument in light of our holding that the trial court properly admitted the evidence under ER 404(b).

Williamson also contends the prosecutor committed misconduct by telling the jury Williamson was not honest regarding his interrogation. We reject this argument. During closing argument, the prosecutor told the jury:

> He also indicated that when he was interviewed by the detectives that he was never read his Miranda rights. Now, you heard Detective Young who took the stand after him and said, yes in fact, he did, and he always reads Miranda rights before he interviews someone and he did on this occasion.

This statement is correct; the record reflects the officer did read Williamson his Miranda[4] rights, and the officer so testified.

Williamson also argues the trial court erroneously concluded his testimony at the CrR 3.5 hearing was not credible. But credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850

[4] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

(1990).

Finally, Williamson claims trial counsel was ineffective for failing to obtain a Metro bus surveillance video that he claims shows a different camera angle of the incident at issue in this case. But because this argument appears to rely on matters outside the record, it is not reviewable on direct appeal. State v. McFarland, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

We affirm Williamson's conviction. Because of the instructional and sentencing errors discussed above, we vacate his exceptional sentence and remand for further proceedings.

Spearman, J.

WE CONCUR:

Ellington, J.

Becker, J.