No. 89958-4
Court of Appeals No. 68468-0-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN G. LARSON, SR.,

Petitioner.

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

The Honorable Richard D. Eadie

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Kevin G. Larson, Sr., petitioner here and appellant below, requests this Court grant review of the decision designated in Part B of the petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Mr. Larson requests this Court grant review of the unpublished decision of the Court of Appeals, No. 68468-0-I (November 25, 2013). Mr. Larson was convicted of one count of child molestation in the first degree. On appeal, Mr. Larson argued 1) the trial court erroneously admitted allegations of prior sexual misconduct to establish absence of mistake or accident and common scheme or plan; 2) the trial court erroneously failed to give an ER 404(b) limiting instruction; and 3) the trial curt erroneously admitted childhood photographs of two adult witness who alleged they were molested by Mr. Larson when they were minors. The Court of Appeals disagreed and affirmed his conviction. A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Evidence of alleged prior sexual misconduct is highly prejudicial and presumptively inadmissible. The trial court admitted evidence of alleged prior misconduct to establish a common scheme or plan and to rebut a claim of absence of mistake or accident, pursuant to RCW 10.58.090 and ER 404(b). The allegations consisted of incidents

involving two of Mr. Larson's nieces when they were children, twenty and twenty-seven years previously, which were similar in result only, and one incident four years earlier which involved similar conduct but a markedly dissimilar victim. Does the Court of Appeals ruling that the trial court did not abuse its discretion in admitting the allegations conflict with decisions of this Court and other decisions of the Court of Appeals analyzing RCW 10.58.090 and ER 404(b), and involve an issue of substantial public interest that should be determined by this Court?

2. When evidence is admitted pursuant to ER 404(b), a trial court must give a limiting instruction to the jury cautioning it to consider the evidence only insofar as it establishes a common scheme or plan or absence of mistake or accident. The trial court declined to give Mr. Larson's proposed limiting instruction, and instead gave an instruction tailored to RCW 10.58.090, which was subsequently ruled unconstitutional. Does the Court of Appeals ruling that the instructional error was harmless conflict with decisions of this Court and other decisions of the Court of Appeals analyzing RCW 10.58.090 and ER 404(b), and involve an issue of substantial public interest that should be determined by this Court?

3. Evidence is inadmissible if it is irrelevant, unfairly prejudicial, or confuses the issues at hand. The trial court admitted childhood

photographs of two of Mr. Larson's nieces that purported to depict their appearance at the time of Mr. Larson's alleged acts of misconduct against them, twenty and twenty-seven years previously. Does the Court of Appeals ruling that admission of the photographs was not prejudicial because the live testimony of the nieces was "far more damaging" conflict with decisions of this Court and other decisions of the Court of Appeals analyzing ER 401, ER 402, and ER 403, and involve an issue of substantial public interest that should be determined by this Court?

D. STATEMENT OF THE CASE[1]

Shon Larson and his girlfriend, B.O., invited Shon's father, petitioner Kevin Larson, Sr., to live with them and help care for their 16-month old son, and B.O.'s nine-year-old daughter, A.O. 11/16/11 RP 8-9, 10, 21-22. On September 19, 2010, the three adults spent the day watching television and drinking beer and vodka. 11/16/11 RP 23-24; 11/17/11 RP 142. At nighttime, the children went to sleep in the bedroom, and Shon, B.O., and Mr. Larson fell asleep in the living room. 11/17/11 RP 24-25, 143-44.

Very early the following morning, A.O. woke B.O. and reported that she was asleep until she felt "something" wet. 11/17/11 RP 101-02, 146, 149. A.O. alleged her pajama bottoms were rolled up to her thighs,

[1] A more complete recitation of the facts is set forth in Mr. Larson's briefing to the Court of Appeals and is incorporated herein.

and Mr. Larson licked her feet, toes, and legs, touched her genital area, licked her genital area over her pajamas, and rubbed her chest over her pajamas. 11/17/11 RP 105-07, 110, 112, 113-14. A.O. rolled over as if just waking up and Mr. Larson went into the bathroom. 11/17/11 RP 107-08, 114-15.

Mr. Larson was charged with child molestation in the first degree. CP 9. At trial, pursuant to RCW 10.58.090 and ER 404(b), the court admitted allegations of prior sexual misconduct by Mr. Larson involving B.O. four years previously and two adult nieces when they were minors, approximately twenty and twenty-seven years previously. 11/1/11 RP 77-103; 11/3/11 RP 4-16, 46-57; 11/7/11 RP 18-19, 21-22, 35-37; 11/14/11 RP 26-30; 11/21/11 RP 118-20. Thirty-one-year-old L.W. Mr. Larson's niece by marriage testified she had two "uncomfortable" encounters with Mr. Larson when she was eleven or twelve years old, and her family and Mr. Larson's family were temporarily living with another relative. 11/16/11 RP 18, 51, 52, 55; 11/17/11 RP 18. The first incident occurred when she was in front of the bathroom sink and Mr. Larson came in behind her, gave her a "bear hug," pushed her against the counter, and she felt his erection on her back. 11/17/11 RP 21. Within weeks of that incident, L.W. and Mr. Larson were wrestling and tickling each other

when Mr. Larson allegedly pinned her face down and she again felt his erection on her back. 11/17/11 RP 25.

Thirty-three-year-old S.S., L.W.'s sister and Mr. Larson's niece by marriage, also testified about two incidents involving Mr. Larson when she was much younger. 11/17/11 RP 46, 47. First, when she was approximately five years old, S.S. was asleep in Mr. Larson's house and awoke when Mr. Larson lay on top of her and rhythmically moved up and down her leg, and he then fell asleep. 11/17/11 RP 64-66. Second, when she eleven or twelve years old, S.S. was asleep on a couch at a relative's house and awoke to feel Mr. Larson's hand under her shirt holding one breast. 11/17/11 RP 67, 69.

Thirty-year-old B.O. testified that she and Shon were living in the same apartment approximately four years earlier and Mr. Larson occasionally spent the night on the couch. 11/17/11 RP 131-32. One night when she and Shon were asleep in the bedroom she woke to Mr. Larson licking her genital area. 11/17/11 RP 132-33. Shon kicked Mr. Larson out of the apartment and they were estranged for several years until the birth of their son. 11/17/11 RP 133-34, 136. Mr. Larson eventually apologized for the incident, they resumed a relationship, and Shon and B.O. asked Mr. Larson to babysit their children. 11/16/11 RP 17, 17-18, 18-19; 11/17/11 RP 137, 139.

The trial court admitted a photograph of L.W. when she was approximately ten years old and a photograph of S.S. when she was eleven or twelve years old, pursuant to ER 402. 11/17/11 RP 3-7, 19, 68; Ex.1, 2. Also, the court instructed the jury that it could use the evidence of the alleged prior misconduct "for its bearing on any matter to which it is relevant." 11/21/11 RP 5-9, 114; CP 44 (Instruction No. 6). The court refused to give the defense proposed ER 404(b) limiting instruction. 11/21/11 RP 4-9; CP 31. In closing argument and in rebuttal, the prosecutor relied extensively on the allegations of prior misconduct and urged the jury to "use that testimony for any purpose you deem relevant." 11/22/11 RP 25-30, 50-53. Mr. Larson was convicted as charged.

Between the time of conviction and sentencing, this Court ruled RCW 10.58.090 was unconstitutional[2] and Mr. Larson moved for a new trial. CP 57-61. The court denied the motion on the basis that there was overwhelming evidence of guilt. 3/2/12 RP 13-14; CP 82.

On appeal, Mr. Larson argued, inter alia, the trial court erroneously admitted testimony regarding Mr. Larson's alleged prior sexual misconduct, erroneously admitted the childhood photographs of his nieces, and erroneously refused to give Mr. Larson's proposed ER 404(b) limiting instruction.

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[2] State v. Gresham, 173 Wn.2d 405, 426-32, 269 P.3d 207(2012).

The Court of Appeals disagreed and affirmed the conviction. The court ruled the allegations of prior sexual misconduct were properly admitted to rebut a claim of accident or mistake or to establish a common scheme or plan. Opinion at 5-9. The court also ruled the failure to give the proposed limiting instruction was harmless error. Opinion at 9-12. Finally, the court ruled that admission of the childhood photographs, even if in error, was not prejudicial because the niece's live testimony was "far more damaging." Opinion at 12-13.

E. ARGUMENT

1. The Court of Appeals' ruling that the allegations of prior sexual misconduct were admissible to establish a common scheme or plan or to rebut a claim of mistake or accident is contrary to decisions by this Court and other decisions of the Court of Appeals applying ER 404(b) and involves an issue of substantial public interest.

Evidence of prior misconduct is presumptively inadmissible. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). ER 404(b) provides several limited exceptions the presumption:

> Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts in 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.

"Prior to admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); accord State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). In a close case or where the probative value is outweighed by the prejudicial effect, the evidence should be excluded. State v. Perez-Valdez, 172 Wn.2d 808, 815, 265 P.3d 853 (2011); Fisher, 165 Wn.2d at 758 (Madsen, J. concurring); State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

The Court of Appeals ruled the allegations of prior sexual misconduct were admissible to establish absence of mistake or accident, as well as to establish a common scheme or plan. This ruling was in error.

a. Absence of mistake or accident.

To establish absence of mistake or accident, the allegations of prior misconduct must be sufficiently similar to the charged conduct to meet "a threshold of noncoincidence." State v. Baker, 89 Wn. App. 726, 735, 950 P.2d 486 (1997). The only commonality between the alleged prior misconduct and the instant charge, however, was the alleged victims' familial relationship with Mr. Larson and the purported result.

S.S. alleged she was twice molested by Mr. Larson when she was eleven or twelve years old, nineteen to twenty years previously, first when Mr. Larson gave her a "bear hug" from behind and she felt an erection on her back, and, several weeks later, when they were wrestling and tickling each other and she again felt an erection on her back. 11/16/11 RP 55; 11/17/11 RP 18, 21, 25. Her age and the alleged conduct are entirely dissimilar from A.O.'s allegations in the instant case.

L.W. alleged she, too, was twice molested by Mr. Larson. First, when L.W. was five years old, twenty-seven years previously, she alleged she was asleep in Mr. Larson's house and awoke when Mr. Larson lay on top of her and rhythmically moved up and down her leg. 11/17/11 RP 64-65. Second, when L.W. was eleven or twelve years old, twenty-one years previously, she was asleep on a relative's couch and awoke to Mr. Larson holding one breast under her shirt. 11/17/11 RP 69. Again, however, her age and the alleged conduct are dissimilar to the instant allegations.

A.O.'s mother, B.O., alleged she was molested by Mr. Larson when she was twenty-eight years old, four years previously, when she awoke to Mr. Larson in her bed and licking her genital area. 11/17/11 RP 132-33. Although the alleged conduct is similar, the ages are clearly very dissimilar.

The Court of Appeals selected a few allegations and ignored others to create a composite of supposed similarity. Opinion at 7. There is no authority for this analysis. The proper analysis requires a comparison of each prior act, individually, to the case at bar, to determine whether the acts shared sufficient features to support a finding of markedly similar acts, victims, and circumstances. See, e.g., Lough, 125 Wn.2d at 850-81 (at trial for indecent liberties and attempted rape based on allegations that the defendant sexually assaulted the victim after providing her a drugged drink, court properly admitted ER 404(b) evidence from four witnesses, each of whom testified that they were sexually assaulted by the defendant after he gave them a drugged drink); Gresham, 173 Wn.2d at 414-15 (at trial for child molestation based on allegations the defendant abused the victim beginning when she was five years old by stroking her genital area both over and under her clothes while she was in bed, court properly admitted ER 404(b) evidence from four witnesses, each of whom testified the defendant abused them when they were prepubescent by rubbing their genital area or performing oral sex while they were in bed).

In light of the significant dissimilarities in each allegation, the "threshold of noncoincidence" was not met here, and the Court's composite analysis should be rejected.

b. Common scheme or plan.

To establish a common scheme or plan, the allegations of prior conduct must involve "markedly similar acts against similar victims in similar circumstances," not simply similar results. Lough, 125 Wn.2d at 852. The allegations are not admissible unless they are 1) proved by a preponderance of the evidence, 2) admitted for the purpose of proving a common scheme or plan, 3) relevant to prove an element of the offense charges or to rebut a defense, and 4) more probative than prejudicial. Id. at 852; accord State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984) (ER 404(b) evidence must "be logically relevant to a material issue before the jury" and "its probative value must ... outweigh its potential for prejudice.").

Here, the State's evidence failed to satisfy the second and fourth criterion. As discussed, the only commonality between the instant allegations and the alleged prior misconduct was the familial relationship and the result. The allegations by L.W. and S.S. were very distant in time, occurred when they were different ages than A.O., and involved markedly different conduct. Although the conduct alleged by B.O. was similar to that alleged by A.O., it occurred when she was an adult, whereas A.O. was nine years old. Therefore, the evidence did not establish a common plan or scheme.

Even if the allegations satisfy the second prong, the allegations were highly inflammatory and unfairly prejudicial. The potential for unfair prejudice is "at its highest" in sex abuse cases. State v. Salarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). This Court has identified three actors to consider when deciding whether evidence of prior acts of sexual misconduct was more probative than prejudicial: 1) whether the evidence followed the same design or plan; 2) whether the evidence was necessary because the victim could not clearly remember the alleged incident; and 3) whether the court gave a limiting instruction to ensure the evidence was not used to prove the defendant's bad character. Lough, 125 Wn.2d at 864. None of these factors is present here: the evidence did not follow the same design or plan, A.O. was able to provide detailed testimony, and the court did not give a properly limiting instruction.

Applying the Lough factors to the present case shows the allegations of prior sexual misconduct by Mr. Larson should have been excluded. The Court of Appeals ruling on this issue conflicts with decisions by this Court and with other decisions of the Court of Appeals, and involves an issue of substantial interest that should be determined by this Court. Pursuant to RAP 13.4(b) (1), (2), and (4), this Court should accept review.

2. The Court of Appeals' ruling that the failure to give an ER 404(b) limiting instruction was harmless error is contrary to decisions by this Court and other decisions of the Court of Appeals applying RCW 10.58.090 and ER 404(b), and involves an issue of substantial public interest.

When evidence is admissible for one purpose but not admissible for another purpose, the court, upon request, shall restrict the evidence to its proper purpose and instruct the jury accordingly. ER 105; State v. Russell, 171 Wn.2d 118, 121, 249 P.3d 604 (2011). It is critical "to stress to the jury that the testimony was admitted only for a limited purpose and may not be considered as evidence of the defendant's guilt." State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990); accord State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985) (such caution to the jury is both "proper and necessary").

The trial court erroneously instructed the jury that it could consider the allegations of prior misconduct for any matter to which it was relevant. CP 44 (Instruction No. 6). The instruction comported with RCW 10.58.090, which was later ruled unconstitutional, and was consistent with the State's use of the allegations to demonstrate Mr. Larson's propensity for sexual misconduct. Although the allegations of prior misconduct were also admitted pursuant to ER 404(b), the court refused to give the defense proposed ER 404(b) limiting instruction.

The Court of Appeals ruled the instructional error was harmless. Opinion at 9-12. In so ruling, the court emphasized various sections of the prosecutor's closing argument, including, surprisingly, the argument that the allegations demonstrated that Mr. Larson "molests children while they sleep." Opinion at 10. This argument clearly invited the jury to use the allegations to establish a lustful propensity, in violation of ER 404(a), especially because only S.S. alleged she was asleep and a child when Mr. Larson touched her. The court did not mention the prosecutor's argument in rebuttal, "Mr. Larson molests children. He has a physical, visceral response to having physical contact with children." 11/22/11 RP 50-51. This argument reinforced the prosecutor's invitation to improperly consider the evidence to establish propensity.

Failure to give an ER 404(b) limiting instruction is harmless only if the outcome of the trial is not materially affected. Gresham, 173 Wn.2d at 425. Courts have recognized that the unfair prejudicial impact of evidence of prior sexual misconduct cannot always be neutralized even with a proper limiting instruction. "Courts have often held that the inference of predisposition is too prejudicial and too powerful to be contained by a limiting instruction." State v. Krause, 82 Wn. App. 688, 696, 919 P.2d 123 (1996).

The likelihood that the erroneous admission of highly prejudicial prior bad acts evidence materially affected the verdict, as discussed, combined with the improper instruction permitting consideration of that evidence to establish Mr. Larson's criminal propensity was not harmless. The Court of Appeals ruling on this issue conflicts with decisions by this Court and with other decisions of the Court of Appeals, and involves an issue of substantial interest that should be determined by this Court. Pursuant to RAP 13.4(b) (1), (2), and (4), this Court should accept review.

3. The Court of Appeals' ruling that admission of the childhood photographs was harmless error is contrary to decisions by this Court and other decisions of the Court of Appeals applying ER 401, ER 402, and ER 403, and involves an issue of substantial public interest.

ER 401 provides:

> "Relevant evidence" means 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.

To be "relevant," the evidence must be both probative and material, that is, it must prove or disprove a fact that is of consequence to the outcome of the trial. 5 K. Tegland, Washington Practice § 401.2, at 258 (5th ed. 2007).

ER 402 provides:

> All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of the state. Evidence which is not relevant is not admissible.

Contrary to the above rules, the trial court admitted photographs of Ms. Wilhelm and Ms. Smith when they were ten or eleven years old, where the photographs were both irrelevant and unfairly prejudicial.

The photographs purporting to depict L.W. and S.S. when they were somewhat close in age to the alleged misconduct twenty to twenty-seven years previously were irrelevant to any fact of consequence. The State did not argue they were physically similar to A.O. Rather, the State argued the photographs established L.W. and S.S. were children and vulnerable at the time of their allegations; 11/17/11 RP 3-7. But minor children are inherently vulnerable. A photographic depiction of their appearance somewhat close in time to some of the allegations did not make any fact of consequence more or less probable and added nothing to the State's position. Tellingly, the State did not offer a photograph of S.S. when she was five years old, her age at the first alleged instance of misconduct. Certainly, a five-year old child would appear more "vulnerable" than an older child. The State's justification was at odds

with its offered evidence and did not establish the relevance of the photographs.

Even if marginally relevant, the photographs were unfairly prejudicial and confused the issues. ER 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

"'[U]nfair prejudice' is that which is more likely to arouse an emotional response than a rational decision by the jury [and which creates] ... an undue tendency to support a decision on an improper basis...." State v. Haq, 166 Wn. App. 221, 261, 268 P.3d 997 (2012) (internal quotation and citations omitted). As the prosecutor acknowledged, he offered the photographs to illustrate the vulnerability of L.W. and S.S. But L.W. and S.S. were not the alleged victims of the charged offense and vulnerability was neither an element of the charged offense nor an issue at trial. The photographs were nothing more than an improper, unabashed appeal to the emotions of the jury. See State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995) ("When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.").

The Court of Appeals ruled "even if the court abused its discretion in admitting the photographs, a new trial is not warranted," on the grounds

the live testimony of the nieces "was far more damaging." Opinion at 12, 13. This was in error. An inordinate portion of the trial was consumed by the testimony of misconduct involving L.W. and S.S., even though their allegations were not the basis of the charged offense. The photographs unduly emphasized their allegations and improperly bolstered the State's reliance on their testimony to demonstrate Mr. Larson's alleged lustful disposition. The Court of Appeals ruling conflicts with decisions by this Court and with other decisions of the Court of Appeals, and involves an issue of substantial interest that should be determined by this Court. Pursuant to RAP 13.4(b) (1), (2), and (4), this Court should accept review.

E. CONCLUSION

For the foregoing reasons, Mr. Larson requests this Court accept review of the Court of Appeals decision in this case.

DATED this 25th day of February 2014.

Respectfully submitted,

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APPENDIX A

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

STATE OF WASHINGTON, Respondent,	)	No. 68468-0-I
v.	)	UNPUBLISHED OPINION
KEVIN GARNETT LARSON, SR., Appellant.	)	FILED: November 25, 2013

SCHINDLER, J. — In this prosecution for child molestation, the trial court properly admitted evidence of prior sexual misconduct under ER 404(b) to rebut the defense of accident or mistake and to show common scheme or plan. While the court failed to give a proper limiting instruction, the court did not abuse its discretion in ruling that the error was harmless and did not warrant a new trial. We affirm.

FACTS

The State charged Kevin Garnett Larson, Sr. with one count of first degree child molestation of nine-year-old A.O. on September 20, 2010.[1] Prior to trial, the State moved to admit evidence that Larson had sexually assaulted A.O.'s mother B.O. several years earlier, and had molested his nieces S.S. and L.W. many years earlier. The court admitted the evidence under RCW 10.58.090.

[1] RCW 9A.44.083. Although King County also charged Larson with molesting his niece, N.L., those charges were dropped when it was determined that the molestation occurred in Pierce County.

At trial, the evidence established that in August 2010, Larson moved into an apartment with his son Shon Larson, Shon's girlfriend B.O., their 16-month-old son, and B.O.'s nine-year-old daughter A.O. Shon, B.O., and the children slept in the bedroom and Larson slept on the living room couch.

On September 19, 2010, Shon, B.O., and Larson spent the day watching television and drinking beer and vodka. That evening, the children went to sleep in the bedroom. Shon and B.O. fell asleep on a mattress in the living room and Larson fell asleep on the couch.

A.O. testified that she woke up in the middle of the night because she felt something wet on her feet. The light from the television allowed her to see Larson kneeling beside the bed. Her pajama bottoms were rolled up to her thighs and Larson was sucking on her toes and licking her feet and shin. Her thighs were wet. Larson eventually touched and licked A.O.'s genital area over her clothes. When A.O. rolled over, Larson immediately left the bedroom and went into the bathroom. A.O. then ran to her mother and woke her up.

B.O. testified that around 4:00 a.m., A.O. came into the living room crying and shaking. A.O. told her mother that Larson had been in her bedroom licking her legs. B.O. said she had never seen A.O. so scared. B.O. shoved Larson out of the apartment and followed him to a bus stop where she assaulted him. A passing police officer found her standing over Larson, crying and yelling hysterically. Shon corroborated B.O.'s testimony.

On cross examination, A.O. and B.O. testified that A.O.'s pajamas "were soaked" after Larson left the bedroom. Defense counsel also elicited testimony from Shon about the amount of beer Larson consumed that day and the fact that A.O. smelled strongly of beer.

Seattle Police Department Detective Jess Pitts testified that she tape-recorded an interview with A.O. nine days after the incident. The court played the tape recording for the jury. A.O.'s statements during the tape-recorded interview were consistent with her testimony at trial.

Joanne Mettler, a registered nurse practitioner and child abuse specialist, testified that she examined A.O. the day after the interview with Detective Pitts. A.O. made essentially the same allegations to Mettler that she had made previously to her mother and Detective Pitts.

L.W., Larson's niece by marriage, testified to incidents that occurred roughly 20 years earlier when she was between nine and 12 years old. One incident occurred when she was standing at the bathroom sink. L.W. said that Larson gave her a "bear hug" from behind and pressed what felt like an erect penis against her back. In another incident when L.W. and Larson were wrestling and tickling each other, he pinned her face-down and again pressed his erect penis against her back. L.W. told her sister S.S. what happened and they agreed to never be alone with Larson. L.W. did not report the incidents to anyone else until she was an adult.

L.W.'s sister S.S. testified to incidents with Larson during roughly the same time period. S.S. testified that when she was approximately five years old and sleeping at

Larson's house, she awoke to find him laying on top of her and moving rhythmically up and down her leg. When he fell asleep several minutes later, S.S. moved to a bed across the room.

A similar incident occurred when S.S. was around 11 or 12 years old. S.S. said she was sleeping on a couch at a relative's house and woke up to find Larson's hand under her shirt holding her breast. S.S. told L.W. about the second incident but, like her sister, did not report it to others until she was an adult. Over defense objections, the trial court admitted photographs of L.W. and S.S. when they were children. The court concluded the photographs were relevant to show the similarity in the ages of Larson's victims and were not so prejudicial as to warrant exclusion under ER 403.

B.O. testified to an incident that occurred in the same apartment four years before the incident involving A.O. B.O. said that she awoke to find Larson licking her genital area. Shon kicked Larson out of the apartment and they were estranged for several years. After Larson later apologized for the incident with B.O., he and Shon reconciled.

At the close of the evidence, the court ruled that in addition to being admissible under RCW 10.58.090, Larson's prior sexual misconduct was admissible under ER 404(b) to rebut the defense of accident or mistake.

The jury convicted Larson of child molestation in the first degree of A.O. After the verdict but prior to sentencing, the Washington Supreme Court held in State v. Gresham, 173 Wn.2d 405, 429, 269 P.3d 207 (2012), that RCW 10.58.090 was unconstitutional. Larson filed a motion for a new trial, arguing that absent RCW

10.58.090, the prior misconduct evidence was admissible only under ER 404(b). Because the court had not given a proper limiting instruction, Larson claimed he was entitled to a new trial. The court denied the motion for a new trial, ruling the error was harmless because the other evidence against Larson was overwhelming. Larson appeals.

ANALYSIS

Larson contends the trial court abused its discretion in admitting evidence of his prior sexual misconduct under RCW 10.58.090 and ER 404(b). The State concedes that under Gresham, the court erred in admitting the evidence under RCW 10.58.090. But the State argues that the court properly admitted the evidence under ER 404(b). We agree.

We review evidentiary rulings for abuse of discretion. Gresham, 173 Wn.2d at 419. Under ER 404(b), evidence of prior sexual misconduct may be admitted to show, among other things, common scheme or plan or the absence of mistake or accident.

In this case, the court admitted Larson's prior sexual misconduct to show the absence of mistake or accident. The defense theory at trial was that Larson is an alcoholic, he was intoxicated while in a relatively unfamiliar apartment, and he stumbled into the bedroom "where A.O. misconstrued his conduct." In closing argument, defense counsel argued that what A.O. felt on her leg was "not saliva. It's beer. He spilled beer on her. And that's what happened. He spilled beer on her, and in his own drunken inept way he is trying to clean it up." But on appeal, Larson focuses exclusively on the common scheme or plan basis for admitting the prior sexual misconduct evidence under

ER 404(b). Because common scheme or plan and absence of mistake are distinct alternatives for the admission of evidence under ER 404(b), Larson's failure to provide any argument or authority as to the latter basis for admitting the evidence is fatal to his contention. RAP 10.3(a)(6); State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004); see State v. Baker, 89 Wn. App. 726, 732-37, 950 P.2d 486 (1997) (distinguishing common scheme or plan and absence of mistake or accident bases for admission under ER 404(b)).

Furthermore, even if Larson had properly challenged the court's basis for admitting the evidence, he could not demonstrate an abuse of discretion. ER 404(b) provides:

> 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.[2]

ER 404(b) misconduct evidence may be admitted to rebut a claim of mistake or accident if it is sufficiently similar to the charged acts to "meet a threshold of noncoincidence." Baker, 89 Wn. App. at 734-35. The threshold is crossed when the recurrence of similar acts creates an improbability of coincidence that tends to negate a defense of accident or mistake. Baker, 89 Wn. App. at 735. Under the doctrine of chances, "recurrence or repetition of the act decreases the likelihood that the act was

[2] (Emphasis added.)

an accident."[3]

Here, the repetition and similarity of Larson's prior acts support admission under ER 404(b) to rebut the defense of accident or mistake. Larson had a familial relationship or lived in the same household with all four victims. Larson took advantage of the living situation to commit his offenses. With respect to S.S., B.O., and A.O., he snuck into their rooms at night and sexually assaulted them while they were sleeping. S.S., L.W., and A.O. were all young girls at the time Larson molested them. Although B.O. was an adult victim, the manner in which Larson sexually assaulted her was strikingly similar to the manner in which he molested A.O. In short, the repetition and similarities between Larson's prior sexual misconduct and his current offense were sufficient to demonstrate noncoincidence.[4]

The prior acts of misconduct were also admissible to show a common scheme or plan under ER 404(b). Prior misconduct evidence may be admitted to show a common scheme or plan if it 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.' "

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[3] Eric D. Lansverk, Admission of Evidence of Other Misconduct in Washington To Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b), 61 Wash. L. Rev. 1213, 1226-28 (1986) ("The doctrine of chances may be used to negate a claim of accident by showing the improbability that the act was inadvertent. . . . Under the doctrine, recurrence or repetition of the act decreases the likelihood that the act was an accident or the result of a mistaken belief. . . . The judge must decide whether sufficient similarity exists to justify a reasonable finding by a rational jury of noncoincidental acts. . . . In making the threshold determination, judges must focus on the factors that make the coincidence objectively or statistically improbable: repetition of and similarity between the acts.").

[4] See Baker, 89 Wn. App. at 735 (similarities in relationships, ages, scenarios, and touching supported admission of prior acts evidence to rebut defense of accident).

State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) (quoting State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995)).

Larson contends the second and fourth factors are not satisfied here. As to the second factor, he correctly points out that a common scheme or plan "may be established by evidence that the Defendant committed markedly similar acts of misconduct against similar victims under similar circumstances." Lough, 125 Wn.2d at 852. Evidence of such a plan " 'must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.' " DeVincentis, 150 Wn.2d at 19 (quoting Lough, 125 Wn.2d at 860). Contrary to Larson's assertions, there were marked similarities between his prior misconduct and his molestation of A.O. As previously discussed, the incidents with S.S. and L.W. occurred under circumstances markedly similar to those involving A.O.[5] And with the exception of the victims' ages, the sexual assault of B.O. was essentially identical to the molestation of A.O.

With respect to the fourth element, Larson contends the trial court abused its discretion by concluding that the probative value of his prior misconduct outweighed its prejudicial effect. "Generally, courts will find that probative value is substantial in cases

[5] See e.g., State v. Kipp, 171 Wn. App. 14, 21-22, 286 P.3d 68 (2012) (facts showed common scheme or plan where victims were of similar ages, were defendant's nieces, and were molested in his house and their grandparents' house); Gresham, 173 Wn.2d at 422-23 (evidence showed common scheme or plan where defendant took trips with young girls and fondled their genitals at night when other adults were asleep); State v. Kennealy, 151 Wn. App. 861, 889, 214 P.3d 200 (2009) (facts showed "design or pattern to gain the trust of children . . . in order to sexually molest them" where charged victims were between ages of 5 and 7 and lived in same complex, uncharged victims were nieces and daughter between ages of 7 and 13, acts with all victims occurred out of view of others, children trusted defendant because of family relation or gifts and conversation, victims were touched under and outside of their clothing on their vaginas, and sexual acts occurred more than once with most of the victims).

where there is very little proof that sexual abuse has occurred, particularly where the only other evidence is the testimony of the child victim." State v. Sexsmith, 138 Wn. App. 497, 506,157 P.3d 901 (2007). Here, the State's case rested in large part on the credibility of A.O. Moreover, the misconduct evidence was highly probative of the defense theory of the case, i.e., that the touching was accidental or misinterpreted. Accordingly, the court did not abuse its discretion in concluding that the probative value of the prior misconduct evidence outweighed any resulting prejudice.

Larson next contends, and the State concedes, that the trial court erred in failing to give an instruction limiting the jury's use of the misconduct evidence to the purposes for its admission under ER 404(b). When a court admits evidence under ER 404(b), the defendant is entitled to an instruction informing the jury of the specific purpose of the evidence and prohibiting them from using it to conclude that the defendant has a particular character and acted in conformity with that character. Gresham, 173 Wn.2d at 423-24; see State v. Griswold, 98 Wn. App. 817, 825, 991 P.2d 657 (2000) ("the court should give limiting instructions to direct the jury to disregard the propensity aspect of the evidence and focus solely on its evidentiary effect tending to show common scheme or plan"). No such instruction was given in this case. That omission was error. Gresham, 173 Wn.2d at 424-25.

However, an error under ER 404(b) is harmless unless " 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.' " Gresham, 173 Wn.2d at 433 (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). In denying Larson's motion for a new trial, the trial

court ruled the error was harmless "because of the overwhelming nature of the remainder of the evidence." We review a trial court's denial of a new trial for an abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997); State v. Slone, 133 Wn. App. 120, 130, 134 P.3d 1217 (2006) ("We find no abuse of discretion in the trial court's ruling that this violation of its order in limine was a nonprejudicial, harmless error."). We conclude the court did not abuse its discretion for several reasons.

First, while Larson correctly points out that the court's instruction regarding the misconduct evidence allowed the jury to use it for "any matter to which it is relevant," the instruction also emphasized that the evidence was contextual in nature and not to be given conclusive weight:

> In a criminal case in which the defendant is accused of an offense of sexual assault or child molestation, evidence of the defendant's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.
>
> However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crime charged in the Information. Bear in mind as you consider this evidence at all times, the State has the burden of proving that the defendant committed each of the elements of the offense charged in the Information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the Information.[6]

Second, the prosecutor repeatedly told the jury that the evidence had a limited, nonpropensity purpose:

> Now, this testimony is not admitted again to show that Mr. Larson is a bad person or you shouldn't like him or any of those things. It's admitted to corroborate [A.O.'s] testimony. . . . That this man molests children while they sleep . . . .

[6] (Emphasis added.)

> . . . .
>
> I was very clear in my closing arguments about why -- that the testimony of [S.S.] and [L.W.], in addition to the evidence about the assault on [B.O.] was introduced. It's not to throw dirt around. I don't want you to convict Mr. Larson because you think he is a drunk or not a good person or whatever. I want you to convict Mr. Larson because he molested [A.O.] And the reason that that testimony came in, and the reason that you have a jury instruction on how to use that evidence, it's not because I decided that I want to throw some dirt around. It's because the law allows victims of prior assaults to come in and testify about their experiences, and that you can use that testimony for any purpose that you deem relevant. And the reason it's relevant is it goes to what Mr. Larson's intent was when he touched [A.O.]
>
> . . . .
>
> The reason this evidence comes in is because it is evidence of what Mr. Larson's intent was when he entered [A.O.'s] bedroom. It is evidence that goes against this cockamamie theory that Mr. Larson entered that bedroom, and accidentally spilled a beer on [A.O.], and that's why she is wet.[7]

Thus, the prosecutor clearly indicated that the evidence was admitted to show either a common scheme or plan or the absence of mistake or accident. Significantly, the prosecutor never encouraged the jury to use the evidence for propensity.[8]

Third, A.O.'s testimony did not stand alone but, rather, was strongly supported by those who heard her statements and observed her condition mere moments after the incident. A.O.'s testimony was also consistent with her statements to others.

Fourth, while misconduct evidence cannot be used to show that the defendant has a certain character and acted in conformity with that character, such evidence can be used to show that the defendant's conduct in the current case conformed to the

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[7] (Emphasis added.)

[8] See State v. Williams, 156 Wn. App. 482, 492, 234 P.3d 1174 (2010) ("[T]he prosecutor effectively gave the jury a limiting instruction during closing argument" by telling them they could not consider prior convictions for propensity and could only consider it for "a common scheme or plan."); City of Seattle v. Patu, 108 Wn. App. 364, 377, 30 P.3d 522 (2001) (noting that City "did not argue that the conviction made it more likely that Patu was a bad person or that he had a propensity to obstruct the police").

conduct alleged in the prior allegations. Gresham, 173 Wn.2d at 423-24. In other words, where misconduct evidence is admitted because of its similarities to the charged conduct, the proper and improper uses of the evidence are almost indistinguishable. Given the subtlety of this distinction, it is highly unlikely that a proper limiting instruction would have affected the jury's verdict.

Finally, in the context of all the evidence presented, the defense theory that Larson merely spilled beer on A.O. and that she misperceived the incident strained credulity.

In sum, considering the evidence, instructions, and arguments, and given the trial court's superior position for determining the impact of any errors,[9] we conclude the court did not abuse its discretion in denying Larson's motion for a new trial.

Larson also contends the court abused its discretion in admitting photographs of his nieces taken around the time he allegedly molested them. Larson contends the photos were not relevant, and even if relevant, were more prejudicial than probative under ER 403. He argues that when combined with the court's instructional error, the error in admitting the photographs warrants a new trial. We disagree.

Under the cumulative error doctrine, trial errors that do not warrant a new trial by themselves may warrant a new trial when considered cumulatively. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, even if the court abused its discretion in admitting the photographs, a new trial is not warranted. Viewed in the context of all the

[9] Cf. State v. Walton, 5 Wn. App. 150, 152-53, 486 P.2d 1118 (1971) ("We believe the trial judge was in the most favorable position to observe the impact of the statement, and do not find in the record evidence of a sufficient nature to allow us to hold that there has been an abuse of discretion by the trial court."); State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) (trial court is in best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial).

evidence in this case, the photographs generated little prejudice. The live testimony of the women depicted in the photographs was far more damaging to the defense than the two photographs. And as the trial court noted in its ruling denying a new trial, the totality of the evidence against Larson was overwhelming. Any cumulative error did not warrant a new trial.

Affirmed.

Schindler, J.

WE CONCUR:

Cox, J.

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68468-0-I
v.	)	
	)	
KEVIN LARSON, SR.,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **PETITION FOR REVIEW** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] AMY MECKLING	(X)	U.S. MAIL
KING COUNTY PROSECUTING ATTORNEY	( )	HAND DELIVERY
APPELLATE UNIT	( )	_____
KING COUNTY COURTHOUSE		
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

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STATE OF WASHINGTON
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SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF FEBRUARY, 2014.

X _____

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