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NO. 68468-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

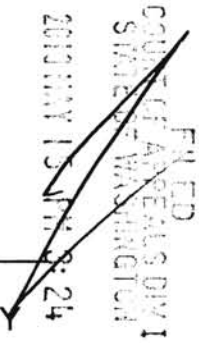
STATE OF WASHINGTON,

Respondent,

v.

KEVIN G. LARSON, SR.,

Appellant.



APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE RICHARD D. EADIE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

Statutes

Washington State:

Rules and Regulations

Washington State:

A. ISSUES PRESENTED

1. Larson's defense to the charge of child molestation was that victim A.O. misperceived his behavior that occurred while he was drunk. The trial court determined that Larson's prior sexual abuse of S.S., L.W., and B.O. was substantially similar to the current offense against A.O. The court reasoned that the similarity rendered the evidence highly probative of Larson's intent and whether sexual contact occurred (i.e., whether Larson acted for the purpose of his sexual gratification). The trial court concluded that the probative value of the evidence outweighed its prejudicial effect. Did the trial court properly admit Larson's prior sexual misconduct as evidence of a common scheme or plan under ER 404(b)?

2. A.O.'s testimony that Larson molested her was uncontroverted. Moreover, the evidence demonstrated that A.O. had no motive to make up the allegations, that she immediately reported the abuse, and that her demeanor upon reporting was consistent with events occurring in the manner that she described. The trial court gave a limiting instruction that warned the jury that the evidence of Larson's prior misconduct was not sufficient on its own to prove that he was guilty, and that Larson was not on trial for anything other than the charged conduct. The prosecutor properly

focused her argument on the similarities between the prior misconduct and the current offense, and how the prior misconduct demonstrated Larson's overarching plan. Was the trial court's failure to give a proper ER 404(b) limiting instruction harmless, when the outcome of the trial would not have been materially affected had the jury been properly instructed?

3. A trial court's decision to admit evidence is reviewed for an abuse of discretion. Here, the jury heard testimony from two adult witnesses about past abuse that they had suffered by Larson when they were children. The trial court determined that photographs depicting them as they appeared when the abuse occurred were relevant to the issue of age and similarity to the current victim, and that the probative value outweighed any prejudicial effect. Did the trial court act within its discretion in admitting photographs?

4. To obtain reversal based on cumulative error, Larson must establish the presence of multiple trial errors, and show that accumulated prejudice affected the verdict. Has Larson failed to establish that cumulative error deprived him of a fair trial?

B. STATEMENT OF THE CASE

1. BACKGROUND.

A.O. was born on July 27, 2001. 11/17/11 RP 98.[1] When A.O. was five years old, her mother, B.O., began dating Shon Larson.[2] 11/16/11 RP 9. In April of 2009, B.O. and Shon had a baby boy together, B.L. 11/16/11 RP 9; 11/17/11 RP 128. Shon considered A.O. to be his daughter, and referred to B.O. as his "wife." 11/16/11 RP 9.

Appellant Kevin Larson is Shon's father. 11/16/11 RP 10; 11/17/11 RP 129. When A.O. was nine years old, B.O. began working two jobs, and she and Shon relied on Larson to babysit A.O. and B.L. 11/17/11 RP 138-40. A.O. loved Larson and called him "grandpa" or "papa." 11/16/11 RP 13; 11/17/11 RP 99, 101.

On the days that Larson babysat, he would spend the night in the one-bedroom apartment that B.O., Shon, A.O., and B.L. shared. 11/17/11 RP 140-41. B.O. and Shon slept in the bedroom, along with A.O. and B.L., while Larson slept on the couch in the living room. 11/16/11 RP 22-23; 11/17/11 RP 141-42. Sometimes,

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[1] The report of proceedings consists of 12 volumes. The State adopts the same abbreviations used by appellant Larson.

[2] Because B.O. was also sexually assaulted by Appellant Larson, she will be referred to by her initials throughout this brief. Because Shon shares a surname with Larson, Shon will be referred to by his first name.

if they wanted to stay up late and watch television, B.O. and Shon would move their mattress to the floor of the living room and sleep there. 11/16/11 RP 24-25; 11/17/11 RP 143-44.

2. LARSON'S MOLESTATION OF A.O.

On September 19, 2010, B.O., Shon, and Larson spent the day watching football and drinking. 11/16/11 RP 23; 11/17/11 RP 142-43. Later that evening, B.O. and Shon pulled their mattress into the living room, planning to watch movies on the large television in the living room. 11/17/11 RP 143-44. A.O. and B.L. were asleep in the bedroom—A.O. in her princess bed, and B.L. in his playpen. 11/16/11 RP 22-25; 11/17/11 RP 144-45. When B.O. and Shon fell asleep in the living room, Larson was asleep on the living room couch. 11/16/11 RP 25; 11/17/11 RP 144.

During the night, A.O. awoke to discover Larson kneeling over her, licking her feet and her legs. 11/17/11 RP 106-08. He sucked on her toes. Id. Larson also touched A.O.'s crotch with his hand, over her pajamas, and licked her crotch with his tongue, also over her pajamas. 11/17/11 RP 109-11, 114. A.O. rolled over, and when she did, Larson got off of his knees and fled the bedroom,

running toward the bathroom. 11/17/11 RP 106-07, 112. A.O. heard the bathroom door close. 11/17/11 RP 112.

A.O. felt scared and shocked. She ran out of her room and woke up her mother. 11/17/11 RP 114-15. B.O. and Shon were awoken around 4 a.m. by A.O., who was crying and shaking. 11/16/11 RP 26-27; 11/17/11 RP 146-49. They saw that Larson was no longer in the living room, as he had been when they fell asleep. 11/16/11 RP 27; 11/17/11 RP 147. A.O. told them that "grandpa was licking my legs." Id. B.O. felt that A.O.'s legs were "soaking wet." 11/17/11 RP 119, 146. While A.O. was telling them what had happened, Larson exited the bathroom. 11/16/11 RP 27; 11/17/11 RP 115, 147. When Larson emerged, B.O. pushed him out of the apartment. Id.

Understandably, B.O. was mad. 11/17/11 RP 148. She followed Larson out of the apartment, found him at a bus stop, and assaulted him. 11/17/11 RP 148. She was arrested by a passing police officer, who found her standing over Larson, hysterical. 11/17/11 RP 148-49; 11/21/11 RP 30-31. B.O. reported the events to the police, and the case was assigned to Detective Jess Pitts of the Seattle Police Department. 11/21/11 RP 31-33, 44-45.

3. THE INVESTIGATION.

On September 29, 2010, Detective Pitts and a CPS caseworker met with A.O. at her elementary school. 11/21/11 RP 47. A.O. described how she awoke to the realization that "somebody was licking me all over." Ex. 6, at 9. She realized that Larson was "touching me in places I didn't wanna be touched in." Id. She described how she saw Larson run out of the room when she pretended to "wake up" and moved a little bit. Id. Her legs were "soaked," and she described how she felt him licking her legs and toes and rubbing her chest. Ex. 6, at 13, 23-24.

On September 30, 2010, Advanced Registered Nurse Practitioner Joanne Mettler conducted a physical examination of A.O. 11/21/11 RP 64. During the exam, A.O. told Mettler that Larson had licked her crotch area and rubbed her stomach and chest. 11/21/11 RP 67. Mettler ultimately referred A.O. to a social worker for counseling. 11/21/11 RP 69.

4. LARSON'S EARLIER MOLESTATION OF S.S. AND L.W.

After the allegations involving A.O. came to light, two adult nieces of Larson's reported that he had molested them years earlier when they were children. 11/16/11 RP 52; 11/17/11 RP 41, 47, 71.

S.S. and her sister L.W. were close in age to Larson's children, their cousins. 11/16/11 RP 53-54; 11/17/11 RP 47-49. They often had sleepovers at the Larson home. 11/17/11 RP 49-51, 63-64.

When S.S. was approximately five years old, while spending the night at Larson's house, she awoke to find Larson on top of her, "humping" her. 11/17/11 RP 63-64. He rubbed his genitals on her legs in a rhythmic fashion. 11/17/11 RP 64-66. After several minutes, Larson fell asleep on top of S.S., and she was able to slowly move herself out from underneath him and went to sleep in the other bed with her cousin, Larson's daughter. 11/17/11 RP 66. Later, when S.S. was eleven or twelve years old, she spent the night at the home where Larson and his family were then living. 11/17/11 RP 67-68. S.S. awoke to find Larson's hand down her shirt, touching her breast. 11/17/11 RP 69.

When L.W. was somewhere between nine and twelve years old, her family lived in the same home with Larson for several weeks. 11/17/11 RP 18, 21. One evening during that time, L.W. was in the bathroom facing the mirror when Larson came in, put his arms around her, and pressed his erect penis into her backside. 11/17/11 RP 21-23. Also during the time that they were living in the same house, an incident occurred where Larson tickled L.W. on the

floor. 11/17/11 RP 25. Although it started out playfully, soon Larson pinned L.W. down on her stomach and he pressed his erection against her "butt." 11/17/11 RP 25-28. Although L.W. cried out for help, Larson did not free her for approximately one minute, and continued to press his erection against her backside. Id.

L.W. and S.S. did not tell any adults about Larson's molestation, but they discussed it with each other and made a "pact" that they would not be alone with him. 11/17/11 RP 32-33, 70, 82-83. Approximately eight or nine years prior to the trial in this matter, S.S. told Larson's daughter about the abuse. 11/17/11 RP 74, 81-82. After S.S. heard from Larson's daughter that Larson had been arrested for molesting A.O., she contacted law enforcement. 11/17/11 RP 71, 73-74.

5. LARSON'S PRIOR SEXUAL ASSAULT OF B.O.

Several years prior to Larson's abuse of A.O., Larson sexually assaulted B.O. At the time, Larson would occasionally sleep over at Shon's and B.O.'s apartment. 11/17/11 RP 131. He slept in the living room. Id. One night, B.O. awoke to discover Larson performing oral sex on her. 11/17/11 RP 131-33. When

she stirred and realized that Larson was licking her vagina, she immediately moved and roused Shon, who observed Larson leaving the bedroom. 11/16/11 RP 17; 11/17/11 RP 133-34. B.O. told Shon what Larson had done, and Shon followed Larson out into the living room. Id. Larson pretended to be sleeping on the couch when Shon confronted him. 11/16/11 RP 17-18. Shon made Larson leave the apartment and did not see or speak to him again for several years, until shortly before the incident with A.O. 11/16/11 RP 18-22.

Shon reconnected with Larson because B.L. had been born, and he wanted his father to have a relationship with B.L. 11/16/11 RP 18-19. Larson apologized for what had happened with B.O., and promised that it would never occur again. 11/16/11 RP 19; 11/17/11 RP 137-38. Shortly after Larson and Shon reconciled, Larson began babysitting A.O. and B.L. 11/16/11 RP 20-22; 11/17/11 RP 139-40. The molestation of A.O. followed thereafter.

6. THE CHARGES AND THE TRIAL.

On December 9, 2010, the State charged Larson with one count of first-degree child molestation for molesting A.O. CP 1.

The State also charged Larson with two additional counts of child molestation for the sexual abuse of his niece, N.L.[3] CP 1-2.

The case proceeded to a jury trial in November of 2011. The trial court admitted evidence of Larson's sexual abuse of S.S., L.W., and B.O. under RCW 10.58.090. 11/07/11 RP 18-19, 22, 35-37; 11/14/11 RP 31. The trial court also admitted the evidence under ER 404(b). 11/21/11 RP 118-21.

The jury found Larson guilty of first-degree child molestation of A.O. CP 52. Following the verdict, but prior to sentencing, Larson moved for a new trial based on State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012), which had been decided in the interim.[4] CP 57-61. Larson also argued that the evidence had been erroneously admitted pursuant to ER 404(b), that the limiting instruction provided to the jury was flawed, and that the error was not harmless. CP 57-61; 03/02/12 RP 8-9. The State responded that despite the improper admission of Larson's prior sex offenses

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[3] During its investigation, law enforcement learned that Larson had subjected N.L. to long-term sexual abuse as an elementary and middle-school student. CP 6. However, post-charging investigation revealed that the molestation occurred in Pierce County. 11/01/11 RP 3. Because Larson refused to waive venue, King County dropped the two charges pertaining to N.L., with the understanding that Pierce County would pursue them. CP 9; 11/01/11 RP 3-4.

[4] In Gresham, the Washington State Supreme Court struck down RCW 10.58.090 as an unconstitutional violation of separation of powers. 173 Wn.2d at 432.

under RCW 10.58.090, the trial court had properly admitted the evidence pursuant to ER 404(b). CP 62-67; 03/02/12 RP 10-12. Affirming its prior decision to admit the evidence pursuant to ER 404(b), and finding that the instructional error was harmless, the trial court denied Larson's motion for a new trial. CP 82; 03/02/12 RP 13-15.

The trial court imposed an indeterminate sentence consisting of a maximum term of life and a minimum term of 60 months in prison. CP 72. This appeal follows.

C. ARGUMENT

1. BECAUSE EVIDENCE OF LARSON'S PAST SEXUAL MISCONDUCT WAS PROPERLY ADMITTED IN HIS TRIAL, REVERSAL IS UNWARRANTED.

In light of Gresham, the evidence of Larson's prior sexual misconduct against S.S., L.W. and B.O. was not admissible under RCW 10.58.090. However, the trial court properly admitted the evidence under ER 404(b). The court's findings were sufficient to support the admission of the evidence to establish a common scheme or plan. The court found by a preponderance of the evidence that the misconduct occurred and that the probative value

of the evidence outweighed its prejudicial impact. Therefore, the evidence was properly admitted at trial.

Moreover, given the manner in which the prior sexual misconduct evidence was presented and argued, this Court should hold that the failure to give a proper ER 404(b) limiting instruction was harmless. As a result, the trial court properly denied Larson's motion for a new trial, and reversal is unwarranted.

a. Relevant Facts.

The State gave notice that it sought to offer, under both RCW 10.58.090 and ER 404(b), the testimony of three prior victims of sexual abuse: S.S., L.W., and B.O. CP 10-29. A pre-trial evidentiary hearing took place, where the court heard testimony from the three women. 11/01/11 RP 71-98; 11/03/11 RP 3-31, 46-59. As recounted above, Larson had molested his two nieces (S.S. and L.W.) when they were children, and he had sexually assaulted his son's fiancé B.O., several years prior to his molestation of A.O. Id.

Larson objected, arguing that the evidence was inadmissible under both RCW 10.58.090 and ER 404(b). 11/14/11 RP 26-28; 11/21/11 RP 118. The court held that evidence relating to all three

prior victims would be admitted under both RCW 10.58.090 and ER 404(b). 11/07/11 RP 18-19, 22, 35-37; 11/14/11 RP 31; 11/21/11 RP 118-21.

With respect to ER 404(b), the trial court determined that the evidence was relevant to Larson's intent (i.e., sexual gratification) when he touched and licked A.O., and that it rebutted his theory that A.O. misperceived the events.[5] 11/21/11 RP 118-20. Although the court did not specifically state that the prior misconduct established a common scheme or plan, it made findings which support that conclusion. 11/21/11 RP 118-21.

Additionally, during its analysis under RCW 10.58.090, the court made the specific finding that the probative value of the prior misconduct outweighed the danger of unfair prejudice to Larson. 11/14/11 RP 24-26. Later, when making its decision as to the admissibility of the evidence under ER 404(b), the court affirmatively adopted those findings. 11/21/11 RP 120.

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[5] Having already determined that the evidence was admissible pursuant to RCW 10.58.090, the trial court waited and made its ER 404(b) findings at the close of the evidence. 11/21/11 RP 118-21. Although Larson did not testify, the State correctly anticipated that he would argue to the jury that the incident was misperceived, and that Larson had simply spilled his beer on A.O., "and in his own drunken inept way" had tried to "clean it up." 11/14/11 RP 29; 11/21/11 RP 115; 11/22/11 RP 41. Larson admits on appeal that his theory of the case was that he "was an alcoholic, he was intoxicated at the time of the incident and in a relatively unfamiliar apartment, he stumbled into the bedroom where A.O. misconstrued his conduct." Brf. of Appellant at 5.

At the close of the case, the court gave a limiting instruction to the jury:

> 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 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.

CP 44 (Court's Instruction to the Jury, No. 6).

b. Larson's Prior Sexual Abuse Of S.S., L.W., And B.O. Was Properly Admitted Under ER 404(b).

In Gresham, the court did not hold that the admission of past sexual misconduct evidence violated any constitutional provision. Rather, the court determined that the legislature's enactment of RCW 10.58.090 violated the separation of powers doctrine and thus the statute is unconstitutional. 173 Wn.2d at 428-32. In light of Gresham, the State concedes that one of the two independent

bases relied on by the trial court for admission of Larson's past sexual misconduct was erroneous.

However, a trial court's ruling on the admissibility of evidence will not be disturbed on appeal if it is sustainable on alternative grounds. Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). When admitting evidence of Larson's prior sexual abuse of S.S., L.W., and B.O., the trial court made the relevant findings necessary to admit the evidence under an ER 404(b) analysis. The past misconduct established a common scheme or plan on Larson's part and was highly probative of both an element of the offense—that Larson had sexual contact with A.O., and an implied defense—that A.O. did not simply misperceive the actions of a drunk. The court held that the probative value of the evidence outweighed the danger of unfair prejudice. Because the evidence was admissible under ER 404(b), the jury's consideration of it was proper.

Evidence of a defendant's prior acts of sexual misconduct may be admissible under ER 404(b) in order to show a common scheme or plan, where the prior acts demonstrate a single plan used repeatedly to commit separate but very similar crimes. State v. Sexsmith, 138 Wn. App. 497, 504, 157 P.3d 901 (2007). To be

admissible for this purpose, the prior acts must be proved by a preponderance of the evidence, must be relevant to prove an element of the crime charged or to rebut a defense, and more probative than prejudicial. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

"Where a defendant is charged with child rape or child molestation, the existence of 'a design to fulfill sexual compulsions evidenced by a pattern of past behavior' is probative of the defendant's guilt." Sexsmith, 138 Wn. App. at 504 (quoting State v. DeVincentis, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003)). The degree of similarity must be substantial, but the level of similarity does not require the evidence of common features to show a unique method of committing the crime. DeVincentis, 150 Wn.2d at 20-21. "[T]he trial court need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it." Id. at 13.

In Sexsmith, the defendant was charged with molesting and raping his girlfriend's daughter. The trial court admitted evidence that, years earlier, Sexsmith had molested his own daughter. 138 Wn. App. at 503. The Court of Appeals held that the prior sexual abuse was admissible under the common scheme or plan

exception to ER 404(b) because there was a "substantial similarity" between the sexual abuse of both victims. Id. at 505. The court noted that Sexsmith held a position of authority over both girls, that both girls were about the same age when molested, and that the abuse occurred in the same location. Id. Though there had been "a significant lapse of time," the court concluded that the evidence of Sexsmith's earlier victim was properly admitted because "while the individual features of the prior and charged acts of abuse are not in themselves unique, the cumulative similarity between the two suggests a common plan rather than coincidence." Id.

Similarly, in Gresham, the Supreme Court affirmed the trial court's decision to admit evidence that defendant Scherner had molested four other young girls under ER 404(b)'s common scheme or plan exception. 173 Wn.2d at 415-23. Scherner was charged with molesting his granddaughter, and the other victims were relatives of Scherner and the child of a close friend. Id. at 414-15. The court noted the similarities between some of the prior incidents and the charged crime: while traveling with the girls, Scherner molested them at night when the other adults were asleep. Id. at 422-23. "Though there are some differences (e.g., the presence of oral sex), these differences are not so great

as to dissuade a reasonable mind from finding that the instances are naturally to be explained as 'individual manifestations of the same plan." Id. at 423.

The decision to admit prior bad act evidence lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997). While reasonable minds might disagree with the trial court's evidentiary ruling, that is not the standard. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail on appeal, Larson must prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). Larson has not met this burden.

Here, when admitting Larson's prior sexual misconduct (under RCW 10.58.090 as well as ER 404(b)), the trial court conducted the analysis required for ER 404(b) common scheme or plan evidence. The court specifically found the crimes were more similar than dissimilar, the difference being B.O.'s age at the time of the abuse. 11/03/11 RP 102-04; 11/21/11 RP 118-21. Of significance to the court was the fact that, like A.O., S.S. and B.O. were also sleeping when Larson abused them. 11/03/11 RP

102-03. Like A.O., B.O. specifically awoke to find Larson licking her. Id. The court also found it an important similarity that S.S. and L.W. were young girls like A.O., and that he was able to take advantage of their circumstances to abuse them. 11/03/11 RP 102-03; 11/21/11 RP 119-20.

The court's observations were supported by the testimony, both pretrial and trial. There were marked similarities between Larson's prior acts of molesting S.S., L.W., B.O., and his current molestation of A.O. Larson had a familial relationship – or lived in the same household – with all four victims. He was able to take advantage of this living situation to commit his offenses. In the instances of S.S., B.O., and A.O., he snuck into their rooms at night and sexually assaulted them while they were sleeping, fleeing only when they awoke. S.S., L.W., and A.O. were all young girls at the time Larson abused them. And with respect to the only victim who was *not* a young child, B.O., the manner in which Larson abused her was nearly identical to the manner in which he molested A.O. Thus, there were sufficient similarities between Larson's prior abuse of S.S., L.W., B.O., and his current offense against A.O. that

the trial court could properly find that Larson used a common plan to sexually assault his victims.[6]

Because of these similarities, the prior misconduct evidence demonstrated that Larson had a common scheme or plan, which was then relevant to prove that events occurred the way that A.O. described, and that she did not misperceive what happened. Stated another way, Larson's common scheme or plan, as evidenced by his prior misconduct, demonstrated his intent—that his touching of A.O. was for his sexual gratification.

To convict Larson of first degree child molestation, the State was required to prove that he had "sexual contact" with A.O. RCW 9A.44.083(1); CP 48. "Sexual contact" is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party." RCW 9A.44.010(2); CP 46. This definition "clarifies the meaning such that it excludes inadvertent touching or contact from being a crime."

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[6] Larson argues that the passage of time renders the commonality between his prior misconduct and the current offense "tenuous." Brf. of Appellant at 12. While the passage of time is properly considered when determining the existence of a common scheme or plan, it is not dispositive. In Sexsmith, the court concluded that the cumulative similarity between the prior misconduct and the current offense suggested a common scheme despite the "significant lapse of time." 138 Wn. App. at 505. Although here there was a substantial time lapse between the prior misconduct involving S.S. and L.W. and the current offense, the substantial similarity between the acts is not diminished to the point where this Court can say that no reasonable judge would have found the existence of a common scheme or plan.

State v. Lorenz, 152 Wn.2d 22, 34, 93 P.3d 133 (2004). The trial court's finding Larson's prior sexual misconduct was relevant to show Larson's intent (sexual gratification), and that A.O. did not misperceive his actions, was reasonable. See 11/21/11 RP 119-20.

Finally, the trial court determined that the probative value of the evidence outweighed the danger of unfair prejudice. 11/14/11 RP 24-26; 11/21/11 RP 120. Although Larson argues the contrary on appeal, he has not established that no reasonable judge would make such a determination. See Lough, 125 Wn.2d at 863 (the trial court's balancing is reviewed for abuse of discretion).

"The principal factor affecting the probative value of the evidence of the defendant's prior misconduct is the tendency of that evidence to demonstrate the existence of a common design or plan." Lough, 125 Wn.2d at 863. Here, Larson's prior acts established the existence of a plan or scheme to take advantage of a familial living situation to molest his victims, all but one of whom were sleeping when the abuse occurred. His prior misconduct was significantly probative of the element of sexual contact, and whether a sleeping nine-year-old misperceived his actions. The fact that Larson's prior victims suffered similar abuse clearly

showed that he had followed the same common scheme or plan on a number of occasions. This Court cannot say that no reasonable trial court would have found the probative value of the evidence outweighed its prejudicial effect.

The trial court's decision to admit the prior misconduct was not an abuse of discretion. Because the evidence was admissible under ER 404(b), the jury's consideration of it was not error.

c. The Failure To Give An ER 404(b) Limiting Instruction Was Harmless.

Had the evidence been admitted solely under ER 404(b), Larson would have been entitled to a limiting instruction upon his request. Gresham, 173 Wn.2d at 423. An adequate ER 404(b) limiting instruction must tell the jury for what purpose they may consider the evidence and that they may not use it to conclude that the defendant has a particular character trait and acted in conformity with that trait. Id. at 424.

Here, Larson asked that the jury be instructed:

> During the course of this trial, testimony was presented regarding alleged prior sexual misconduct with people other than [A.O.] Such testimony may be considered by you as evidence of a possible common scheme or plan involving both the prior alleged victims and [A.O.] You are not to consider the prior allegations as evidence that the defendant's conduct

in this case conformed with the conduct alleged in the prior allegations.

CP 31. Larson's request that the jury be told it could not consider the prior misconduct "as evidence that the defendant's conduct in this case conformed with the conduct alleged in the prior allegations" was an incorrect statement of the law. In fact, that is precisely what the jury could consider it for. See Gresham, 173 Wn.2d at 424 ("[s]howing conformity between the charged conduct and a common scheme or plan, as evidenced by prior conduct, is precisely what makes the evidence relevant."). Therefore, the trial court's refusal to give Larson's requested jury instruction was proper even had the prior bad acts evidence been admitted on the basis of ER 404(b) alone.

Because Larson requested a limiting instruction (albeit an erroneous one), the trial court had an obligation to correctly instruct the jury as to the limitations on their consideration of the evidence. Gresham, 173 Wn.2d at 424. The failure to give an ER 404(b) limiting instruction is harmless "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Id. at 425 (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). Here, the

failure to give a proper ER 404(b) limiting instruction was harmless because the trial court provided an instruction that cautioned against placing too much weight on the prior misconduct evidence, and the prosecutor's discussion of Larson's prior sexual misconduct was consistent with its admission as common scheme or plan evidence. In light of A.O.'s immediate report of the molestation and her uncontroverted testimony, the instructional error was harmless.

The trial court gave a limiting instruction that informed the jury that it could consider evidence of other sexual offenses "for its bearing on any matter to which it is relevant." CP 44. The instruction further warned the jury that the evidence of the prior misconduct "on its own is not sufficient to prove the defendant guilty of the crime charged" and that "the defendant is not on trial for any act, conduct, or offense not charged in the Information." Id.

While the instruction did not expressly mention that the jury could consider the prior misconduct evidence to show Larson's "common scheme or plan," the prosecutor's discussion of the evidence was consistent with that purpose. The prosecutor argued that:

> [T]he defendant's prior acts against [L.W], [S.S.], and even [B.O.] are similar. So you can use those to corroborate [A.O.'s] testimony. But is also – also use

> those acts to leave no doubt in your mind what Mr. Larson's intent as when he entered that room. What the purpose of that touching was when he entered that room.
>
> I want to talk first about the incident with [B.O.] And similarity, and how it corroborates [A.O.'s] testimony, and how it shows that you that there is no doubt what Mr. Larson's intent was when he entered that room and touched [A.O.] [B.O.] told you quite candidly defendant's assault to her when she awoke to the defendant in the very same room, I might add, in the very same room, in the very same apartment, at the very similar time of night, middle of the night, early morning hours, awoke to the defendant licking her vagina.
>
> Now, this was skin to skin, and [B.O.] is an adult, and [A.O.] was a child but the contacts are similar. The licking. The unmistakable licking of a very personal part in that same room in that same apartment. The same time of night. That's the defendant's thing.

11/22/11 RP 26. And later, the prosecutor told the jury:

> Now, this testimony is not admitted again to show that Mr. Larson is a bad person or you should like him or any of those things. It's admitted to corroborate [A.O.'s] testimony.
>
> That this man molests children while they sleep, and [S.S.] told you about that. . . . She then told you about a very – an incident that is eerily similar to the incident with [A.O.] That she was asleep on the couch in the living room at her aunt and uncle's house. That she awoke to the defendant with his hand on her bare breast.

CP 26-27. Even if she did not speak the words "common scheme or plan," the prosecutor argued that the similarity between Larson's

prior misconduct and his molestation of A.O. demonstrated an overall plan on his part. She encouraged the jury to consider the prior misconduct precisely because it was a manifestation or example of Larson's overarching plan. Thus, the prosecutor's remarks were exactly the type of argument permissible under ER 404(b).

Larson did not testify. 11/21/11 RP 112. Rather, he argued to the jury that he was "in an alcoholic daze," and that because A.O. "smelled of alcohol," and was "soaked" and "damp" when she woke her mother and reported the molestation, she must have misperceived events:

> [U]nless Kevin Larson drools like some sort of tree [sloth] it's not saliva. It's beer. He spilled beer on her, and in his own drunken inept way he is trying to clean it up.

11/22/11 RP 41. Larson argued that A.O. could not possibly have felt or seen him licking her through her pajamas and that, "When you are talking about a child that young it's a question of perception." 11/22/11 RP 42-45. He argued that passing out and doing a "face plant" does not equate to sexual contact, and that the jury should find a reasonable doubt. 11/22/11 RP 46-47.

In her rebuttal argument, the prosecutor once again discussed that the purpose of the prior misconduct evidence was to demonstrate Larson's overall plan to molest his victims and how that manifested itself in the current offense:

> 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. . . . And the reason that that testimony came in, and the reason that you have a jury instruction on how to use that evidence, is 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.] It goes to the very meat of what Mr. Newcomb is talking about.
>
> This is sexual contact that was – it was done for the defendant's sexual gratification. Mr. Larson molests children. He has a physical, visceral response to having physical contact with children. And we know that from [S.S.]'s testimony.

11/22/11 RP 50-51. She continued:

> 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.

11/22/11 RP 53.

Accordingly, given the manner in which the prior misconduct evidence was presented and argued, this Court should hold that the failure to give an ER 404(b) limiting instruction was harmless. This is especially evident considering that A.O. had no motive to make up the allegations, that she immediately reported the abuse, that her demeanor upon reporting was consistent with events occurring the way she described, and that her testimony was uncontroverted at trial.

In fact, the trial court, who was in the best position to evaluate the effects of the error, found it to be harmless. CP 82; 03/02/12 RP 13-15. This Court should defer to the trial court's reasoned determination that had a proper instruction been given, it would have had no material effect on the outcome of the trial.

d. The Trial Court Properly Denied Larson's Motion For A New Trial.

Generally, a reviewing court will not disturb a trial court's ruling on a motion for new trial absent a showing of abuse of discretion. State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). An abuse of discretion occurs if the trial court adopts a view that no reasonable person would take, or arrives at a decision outside the range of acceptable choices. State v. Rohrich, 149

Wn.2d 647, 641-42, 71 P.3d 638 (2003) (citations omitted). The trial court also abuses its discretion if bases its decision on untenable grounds, by applying the wrong legal standard. Id.

Following the jury's verdict, Larson moved for a new trial based on the decision in Gresham. CP 57-61. The trial court affirmed its prior decision to admit the testimony of S.S., L.W., and B.O. pursuant to ER 404(b), and determined that the failure to provide a correct limiting instruction was harmless in light of the overwhelming evidence of Larson's guilt. CP 82; 03/02/12 RP 13-15. For the reasons argued above with respect to harmless error, the trial court's denial of Larson's motion for a new trial was not outside the acceptable range of choices. This Court should affirm.

2. THE COURT ACTED WITHIN ITS DISCRETION TO ADMIT PHOTOGRAPHIC EVIDENCE.

The admissibility of photographs is within the discretion of the trial court. State v. Noltie, 116 Wn.2d 831, 852, 809 P.2d 190 (1991) (citing State v. Crenshaw, 98 Wn.2d 789, 806, 659 P.2d 488 (1983)). An abuse of discretion occurs only when this court concludes that no reasonable person would have taken the position adopted by the trial court. Robtoy, 98 Wn.2d at 42.

Evidence is relevant if it has a tendency to make the existence of any material fact more probable or less probable than without it. ER 401. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. Because any potentially incriminating evidence is "prejudicial" to the defendant in the sense that it may contribute to his being convicted, the proper focus is on whether the prejudice was *unfair*. State v. Bernson, 40 Wn. App. 729, 736, 700 P.2d 758 (1985). Unfair prejudice means an undue tendency to suggest a decision on an improper basis, such as emotion. State v. Cameron, 100 Wn.2d 520, 529, 674 P.2d 650 (1983)).

Here, the State introduced two photographs of L.W., taken sometime when she was between nine and twelve years old. 11/17/11 RP 19; Ex. 1, 2. One of the photographs included her sister, S.S., when S.S. was eleven or twelve years old. 11/17/11 RP 68; Ex. 2. L.W. testified that her depiction in the photographs fairly represented how she appeared at the time she was molested by Larson. 11/17/11 RP 20. S.S. testified that her image in Exhibit

2 accurately depicted how she appeared as a child when she awoke to find Larson's hand on her breast.[7] 11/17/11 RP 68-70.

Larson objected to the photographs on the grounds of relevancy. 11/17/11 RP 3. The trial court recognized that a showing of "commonality" and "similarity" between S.S., L.W., and A.O. was necessary under an ER 404(b) common scheme and plan analysis. 11/17/11 RP 5. The court found that the ages of S.S. and L.W. were relevant to show commonality and that while the jury "can understand what ten years old is" in a general sense, the photographs would aid their assessment of the evidence. 11/17/11 RP 6. The court determined that the probative value outweighed the risk of unfair prejudice. 11/17/11 RP 7.

This Court cannot say that no reasonable person would have adopted the position of the trial court. The State offered evidence of Larson's prior misconduct under ER 404(b) and argued that his molestation of S.S. and L.W. demonstrated his overarching plan, consistent with his abuse of A.O. 11/17/11 RP 5. The photographs allowed the jury to see how S.S. and L.W. appeared to Larson at

[7] S.S. suffered the other instance of abuse at Larson's hands when she was approximately 5 years old. 11/17/11 RP 63. No photograph of S.S. at age 5 was offered or admitted.

the time he abused them, and made the existence of a common scheme or plan more probable than without the photographs.

Moreover, the admission of the photographs was not *unfairly* prejudicial. S.S.'s and L.W.'s testimony was admissible because of the similarities between their ages and abuse and A.O.'s age and abuse. Because S.S. and L.W. were adults at the time of their testimony, the similarities were not visibly apparent to the jury. Providing the jury with evidence that demonstrated those similarities was clearly probative, and was not likely to arouse an emotional response that would interfere with the jury's rational decision making. The trial court's decision that the photographs were not unfairly prejudicial was not an abuse of discretion.

3. LARSON DID NOT RECEIVE A FUNDAMENTALLY UNFAIR TRIAL.

Larson argues that the cumulative error doctrine warrants reversal. His claim must be rejected because he was not denied a fair trial.

The cumulative error doctrine is limited to cases where there have been "several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390

(2000). The doctrine does not apply to cases where the defendant has failed to establish multiple errors, or where the errors that have occurred have "had little or no effect on the outcome at trial." Id.; see also State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (cumulative errors denying defendant a fair trial included discovery violations, three types of bad acts evidence being improperly admitted, the impermissible use of hypnotized witnesses, and improper cross examination of the defendant); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (errors that operated to deny defendant a fair trial included improper hearsay about the details of child sex abuse and the abuser's identity, the court challenging defense counsel's integrity in front of the jury, a counselor vouching for the victim's credibility, and prosecutorial misconduct).

As outlined above, this Court should determine that the failure to provide a proper ER 404(b) limiting instruction had no material effect on the verdict. Having failed to establish any other error, Larson cannot obtain reversal based on the cumulative error doctrine. Moreover, even if the admission of the photographs was error, Larson has not shown that the errors prejudiced the outcome of the trial. He has failed to demonstrate that he was denied a fair trial.

D. CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court affirm Larson's first-degree child molestation conviction.

DATED this 16th day of May, 2013.

Respectfully submitted,

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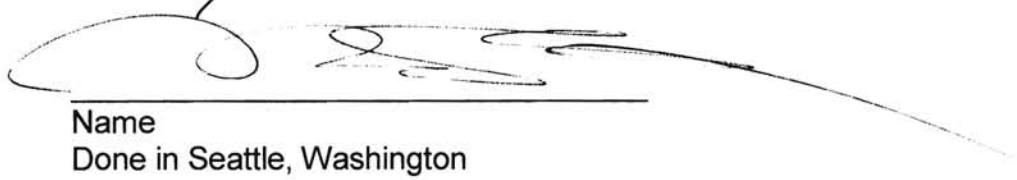
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to SARAH HROBSKY, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. KEVIN G. LARSON, SR., Cause No. 68468-0 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 16 day of May, 2013



Name
Done in Seattle, Washington