Supreme Court No. 90138-4

(Court of Appeals No. 69238-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

JOHN SHELBY,
Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

John Shelby, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Shelby appealed from his King County Superior Court convictions for child molestation. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUE PRESENTED FOR REVIEW

Evidence of acts other than the crime charged is not admissible to show a defendant's character or propensity to commit such acts. Although the trial court admitted evidence of another alleged act to show common scheme or plan and motive, the evidence was relevant only to imply John Shelby's alleged propensity to molest children. Where the trial court abused its discretion in admitting unfairly prejudicial evidence of alleged prior misconduct, was the Court of Appeals decision therefore in conflict with other decisions of the Court of Appeals and with decisions of this Court, requiring review? RAP 13.4(b)(1), (2)?

2. Mr. Shelby also requests this Court review each and every issue raised in his Statement of Additional Grounds. RAP 13.4(b)(1), (2), (3).

D. STATEMENT OF THE CASE

John Shelby and his wife LaTonya[1] have been living in the Seattle area since approximately 2003, when they moved to Washington from Kansas City. 6/18/12 RP 42-45. Due to the incarceration of one of Ms. Pratt's sisters, Ms. Pratt and Mr. Shelby offered to raise two of her children, including J.P. Id. at 53-55.

In February 2010, a CPS intake was received regarding J.P., who at that time was an eight year-old girl in the third grade. 6/14/12 RP 146-51; 6/18/12 RP 77-80. Due to noticeable marks on J.P.'s face, arms, and back, along with J.P.'s statements that her Aunt LaTonya regularly beat her with an extension cord, J.P. was removed from the home and law enforcement was contacted. 6/14/12 RP 154-56.[2]

A few weeks later, J.P. underwent a full examination at Harborview. 6/18/12 RP 66. Dr. Naomi Sugar, who conducted the examination, is the Director of the Center for Sexual Assault and Traumatic Stress at Harborview. Id. While Dr. Sugar was interviewing J.P., she asked her whether anyone ever

[1] LaTonya is referred to by first name in order to preserve the anonymity of J.P., the complaining witness, who shares a last name with her aunt; no disrespect is intended.

[2] LaTonya was arrested and charged with assault of a child in the third degree; she pled guilty in a separate proceeding and is not a party to the direct appeal or this petition. CP 6-7; 6/18/12 RP 22.

hurt her on her privates in a way she didn't like. Id. at 93-94.[3] J.P. told the doctor that her uncle, Mr. Shelby, had done so when he was drinking. Id.[4]

Mr. Shelby was charged with two counts of child molestation in the first degree. CP 6-7.

At trial, the jury heard testimony from J.P. concerning Mr. Shelby's alleged sexual contact with her. 6/19/12 RP 123-59. The trial court also permitted the jury to hear about an incident 21 years earlier, in which Mr. Shelby allegedly had sexual contact with another minor family member, A.P. Id. at 164-95. Over Mr. Shelby's objection, A.P. testified at length about this prior incident, as did the girls' grandmother. Id.

Mr. Shelby was convicted of both counts of child molestation after a jury trial. CP 61-62.

On March 10, 2014, the Court of Appeals affirmed Mr. Shelby's conviction. Appendix A.

Mr. Shelby now seeks review in this Court. RAP 13.4(b)(1), (2).

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[3] As to the leading question, Dr. Sugar stated that she "just threw it out there," due to J.P.'s previous references to "being told she didn't deserve to live," along with the abusive discipline, the whipping, not being provided with food, etc. 6/18/12 RP 93-94.

[4] J.P. described her uncle, while fully clothed, rubbing his body on her body, also while fully clothed; she said this occurred twice. 6/19/12 RP 140-50.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH OTHER DECISIONS OF THE COURT OF APPEALS AND WITH DECISIONS OF THIS COURT. RAP 13.4(b)(1), (2).

a. Evidence of acts other than the crime charged is not admissible to show a defendant's propensity to commit such acts, and must be excluded if more prejudicial than probative. "The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1998). Consistent with this purpose, 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.

The "forbidden inference" of propensity to act in conformity with prior acts "is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact finder to the merits of the current case in judging a person's guilt or innocence." Wade, 98 Wn. App. at 336.

If the State offers evidence of other acts, the court must "closely scrutinize" it to determine if it is truly offered for a proper purpose and its probative value outweighs its potential for prejudice. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Prior to the admission of misconduct

evidence, the court must (1) find by a preponderance of the evidence the misconduct 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 against the prejudicial effect of the evidence. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). ER 404(b) is "a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012) (citing Saltarelli, 98 Wn.2d at 362) (emphasis added).

Close scrutiny is required to ensure that the party offering the evidence is not invoking a seemingly proper purpose to admit evidence that in fact will be used for the improper purpose of showing action in conformity therewith. Otherwise "motive" and "intent" could be used as "magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names." Saltarelli, 98 Wn.2d at 364 (quoting United States v. Goodwin, 492 F.2d 1141, 1155 (5th Cir. 1974)).

ER 404(b) must be read in conjunction with ER 403, which mandates exclusion of evidence that would be substantially more prejudicial than probative. Fisher, 165 Wn.2d at 745. Evidence of prior acts should be excluded if "its effect would be to generate heat instead of diffusing light, or ... where the

minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). "[C]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest." State v. Sutherby, 165 Wn.2d 870, 886, 204 P.3d 916 (2009). In doubtful cases, "the scale should be tipped in favor of the defendant and exclusion of the evidence." Smith, 106 Wn.2d at 776.

b. The trial court improperly admitted propensity evidence and permitted it to be used to show action in conformity therewith. The trial court concluded A.P.'s allegations of molestation by Mr. Shelby from 21 years earlier were admissible to show a common scheme or plan and motive/intent under ER 404(b). CP 76; 6/4/12 RP 13-14. There are two types of evidence admissible to show a common scheme or plan under ER 404(b): (1) evidence of prior acts that are part of a larger, overarching criminal plan; or (2) evidence of prior acts following a single plan to commit separate but very similar crimes. State v. DeVincentis, 150 Wn.2d 11, 19, 74 P.3d 119 (2003).

The lack of similarity between the allegations made by J.P. and those made 21 years earlier by A.P., the remoteness in time of A.P.'s claim, as well as the fact that A.P.'s allegations were unreported and unproved, take this case out of the realm of common scheme and distinguish the instant case from

DeVincentis. The only actual purpose of this testimony was to improperly imply that because Mr. Shelby allegedly touched A.P. when she was a child living in his home, he must have improperly touched J.P., as well. This is precisely the purpose forbidden by ER 404(b); see State v. Pogue, 104 Wn. App. 981, 17 P.3d 1272 (2001) (reversing where this Court held, "[t]he only logical relevance of his prior possession is through a propensity argument: because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident."); see also State v. Holmes, 43 Wn. App. 397, 717 P.2d 766 (1986).

In Wade, 98 Wn. App. 328, the Court of Appeals similarly reversed a trial court's admission of prior acts to prove intent. This was so even though the prior acts were close in time to the charged act, and all involved drug dealing. Id. at 332. The court reminded the prosecution that "[w]hen the State offers evidence of prior acts to demonstrate intent, there must be a logical theory, other than propensity, demonstrating how the prior acts connect to the intent required to commit the charged offense." Wade, 98 Wn. App. at 334 (emphasis in original).

As in all of the above cases, the other bad act evidence in this case was ostensibly admitted for a proper purpose, but its only relevance was for the improper purpose of proving action in conformity therewith. Its admission therefore violated ER 404(b).

Additionally, the admission of the earlier allegations made by A.P. violated ER 403, under which evidence should be excluded if it is substantially more prejudicial than probative. To permit the jury to hear A.P.'s unreported and uninvestigated allegations – after 21 years – was unduly prejudicial. Moreover, the trial court in no way limited the testimony of the uncharged allegations, but instead permitted A.P. and her grandmother to testify emotionally and in as vivid detail as eight year-old J.P. did, herself.[5]

That propensity was the primary purpose of the prior-acts evidence is further illuminated by the prosecutor's closing argument. During closing, the prosecutor reminded the jury that when J.P. was taken into her aunt and uncle's home as an infant, the young child did not realize her entire family was worrying, "[G]osh, you know, is he going to do what he did to [A.P.] to [her]? She didn't know." 6/25/12 RP 7. The prosecutor also returned to this theme later in her closing argument, remarking upon the guilt A.P. must have felt after she left the home, leaving her younger cousins and sisters behind with Mr. Shelby, "when you know what he's capable of." Id. at 23.

This argument served to inflame the passions of the jury against Mr. Shelby, and was substantially more prejudicial than probative. The argument also invited the jury to do precisely what is forbidden – to use the evidence of the uncharged prior act "for the purpose of proving his character and showing

[5] The record reveals that the testimony given by A.P. and J.P. is of approximately equal duration. 6/19/12 RP 123-59, 164-95.

that the person acted in conformity with that character." Gresham, 173 Wn.2d at 420-21

c. Review is required. Evidentiary errors require reversal if, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). "[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." Salas v. Hi-Tech Erectors, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010). In Salas, the Supreme Court held the trial court abused its discretion under ER 403 by admitting evidence of the plaintiff's immigration status in a personal-injury case. Id. at 672-73. The Court further held that reversal was required: "We find the risk of prejudice inherent in admitting immigration status to be great, and we cannot say it had no effect on the jury." Id. at 673.

If the risk of prejudice inherent in admitting immigration status is great, the risk of prejudice inherent in admitting evidence of an alleged prior sexual molestation is at least an order of magnitude greater. Indeed, "in sex cases, ... the prejudice potential of prior acts is at its highest." Saltarelli, 98 Wn.2d at 363. As in Salas, this Court cannot say the admission of the improper evidence had no effect on the jury.

Here, the jury was instructed to consider the testimony concerning the uncharged sexual abuse incident for only the limited purpose of whether the conduct "was part of a common scheme or plan, motive, and/or intent." CP 50 (Jury Instruction 6). This instruction was inadequate and came far too late in the proceedings to mitigate the prejudice created by the admission of the propensity evidence, which had irrevocably altered the jurors' perceptions of Mr. Shelby. It is well settled that certain violations cannot be cured by a jury instruction. See, Holbrook v. Flynn, 475 U.S. 560, 568, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) ("Our faith in the adversary system and in jurors' capacity to adhere to the trial judge's instructions has never been absolute").

It is reasonably probable that Mr. Shelby would not have been convicted if not for the erroneous admission of the uncharged allegations made by A.P. Other than J.P. herself, there were no eyewitnesses, no physical evidence, and the record revealed suggestive questioning at the medical examination. 6/18/12 RP 93-94. Without the admission of the propensity evidence and the prosecutor's emphasis upon it during closing, a reasonable jury would have reached a different result. Accordingly, the Court of Appeals decision upholding the conviction was in conflict with decisions of other decisions of the Court of Appeals, and of this Court.

For the above reasons, Mr. Shelby respectfully requests review. RAP 13.4(b)(1), (2).

MR. SHELBY PRESERVES FURTHER REVIEW OF ALL OTHER ISSUES PREVIOUSLY RAISED IN BRIEFING AND IN HIS STATEMENT OF ADDITIONAL GROUNDS.

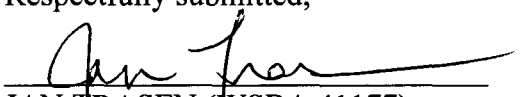
Mr. Shelby's petition for review focuses on the issues discussed above. Mr. Shelby does not, however, abandon the other arguments or assignments of error raised in his briefing, either by counsel or in his Statement of Additional Grounds. Each of these arguments is expressly reserved for further review.

F. CONCLUSION

For the above reasons, the Court of Appeals decision requires review, as it is in conflict with other decisions of the Court of Appeals and with decisions of this Court. RAP 13.4(b)(1), (2).

DATED this 10th day of April, 2014.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHN SHELBY, Appellant.	)	No. 69238-1-I DIVISION ONE UNPUBLISHED OPINION FILED: March 10, 2014

SPEARMAN, A.C.J. — John Shelby appeals his conviction on two counts of child molestation in the first degree, arguing that the trial court erred in admitting evidence that he molested his stepdaughter twenty-one years earlier to show a common scheme or plan, motive, and intent. In his statement of additional grounds for review, Shelby also argues that the prosecutor committed misconduct and violated his right to a fair and impartial jury, and that his counsel was ineffective in failing to respond appropriately. Finding no reversible error, we affirm.

FACTS

When J.P. was four months old, she went to live with her aunt and uncle, LaTonya and John Shelby. J.P. referred to them as "mom and dad." Clerk's Papers (CP) at 4. On February 1, 2010, when J.P. was eight years old, a school official called CPS after noticing marks on J.P.'s body. When a Child Protective Services' (CPS)

social worker asked J.P. about the marks, J.P. said that LaTonya beat her with an extension cord.[1] CPS removed J.P. from her home and contacted law enforcement.[2]

On February 22, 2010, J.P.'s foster mother brought her to Dr. Naomi Sugar, director of the Center for Sexual Assault and Traumatic Stress at Harborview Medical Center, for an evaluation in connection with the physical abuse. In the course of interviewing J.P. about the physical abuse, Dr. Sugar asked J.P. whether "anyone had hurt her on her privates in a way she didn't like." 6 Verbatim Report of Proceedings (VRP) at 93. J.P. replied "just my dad when he was drinking too much, . . ." 6VRP at 94. Dr. Sugar asked J.P. what happened, and J.P. described at least two different incidents that allegedly occurred when J.P. was between six and eight years old.

One evening, six-year-old J.P. stayed up late watching television. After everyone else went to bed, Shelby brought J.P. into the kitchen. J.P. said Shelby "'pulled me through his knees, then he started to squeeze me with his legs.'" 6VRP at 94. He positioned her face down on the floor and got on top of her. She could "feel him on my butt going up and down." 6VRP 142. Both were fully clothed. CP at 184. J.P. said it felt "weird" and she "didn't like it." CP at 4. Afterwards, Shelby told J.P. not to tell her mom what happened. J.P. eventually disclosed the incident to her sister, and her sister told LaTonya. Later that evening, during a family bible study, Shelby apologized to J.P. and said he wouldn't do it again.

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[1] We refer to Ms. Shelby by her first name, LaTonya, for clarity. No disrespect is intended.

[2] LaTonya pled guilty to assault of a child in the third degree in a separate proceeding, and is not a party to this appeal.

J.P. said it happened again when LaTonya went to visit family in Kansas City. J.P. was eight years old at that time. It was night, and J.P.'s sisters were upstairs. Shelby again took J.P. into the kitchen, laid her on the floor, got on top of her, and starting moving up and down. J.P. said she could feel "lumps, bumps that just goes down and up" against "my butt." 6VRP at 149.

Shelby was charged with two counts of child molestation in the first degree. Before trial, the State sought to admit evidence that Shelby had sexually molested his adult stepdaughter A.P. twenty-one years earlier.[3] This evidence included a transcript of A.P.'s witness statement, a transcript of an interview of A.P., and a transcript of an interview of A.P.'s grandmother, who corroborated A.P.'s version of events.

A.P. said the first incident happened shortly after Shelby married LaTonya and moved in with them. A.P. was around seven years old at that time. LaTonya was at nursing school during the day, and A.P. was out of school for the summer. A.P. went into the living room and started clearing the table where Shelby was sitting. Shelby pulled A.P. down on his lap and began moving her around. She could feel his erect penis against her bottom. A.P. was fully clothed and Shelby was wearing a red bathrobe. A.P. jumped up and went to her room. A.P. said it happened again on multiple occasions during the summer, when Shelby came home for lunch in the middle of the day. A.P. said Shelby took her into a back room, positioned her so she was straddling him in the front, then "danced" and rubbed his erect penis against her. Both

[3] A.P. did not live with J.P. She learned of J.P.'s allegations from her grandmother and a social worker after CPS removed J.P. from Shelby and LaTonya's home.

were fully clothed. Sometime later, A.P. disclosed the abuse to her grandmother, Shelby, and LaTonya. Shelby denied wrongdoing.

One night when A.P. was nine or ten, she woke up and felt someone touching her lower back. She turned around and saw Shelby sitting on her bedroom floor in his underwear. Shelby said, "'don't tell your mom'" and walked away. 6VRP at 178. A.P. told her mother, who said she would "take care [of] the situation." CP at 138. No further sexual abuse incidents occurred after that. The family did not report any of these incidents to law enforcement.

The trial court found that the prior misconduct described by A.P. had been proven by a preponderance of the evidence. The court then ruled that evidence of Shelby's prior sexual abuse of A.P. was admissible under ER 404(b) to show common scheme or plan, motive, and intent. J.P., A.P., and A.P.'s grandmother testified at trial. Shelby did not testify. The trial court gave a limiting instruction regarding the testimony of A.P. and her grandmother, as Shelby requested. The jury returned a guilty verdict on both counts, and the trial court imposed a standard range sentence. Shelby appeals.

ANALYSIS

Shelby argues that the trial court committed reversible error by admitting evidence of prior uncharged incidents of sexual misconduct with A.P. to show a common scheme or plan. He contends that this evidence was improperly used for the forbidden purpose of demonstrating his propensity to commit such crimes, and that it was more prejudicial than probative. We disagree.

ER 404(b) prohibits a court from admitting "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." "A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible." State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Such evidence "may, however, be admissible for any other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice" State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). "If the evidence is admitted, a limiting instruction must be given to the jury. . . ." Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

"One proper purpose for admission of evidence of prior misconduct is to show the existence of a common scheme or plan." Gresham, 173 Wn.2d at 420. "Proof of such a plan is admissible if the prior acts are (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." State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

We review the trial court's decision to admit evidence under ER 404(b) for abuse of discretion. Foxhoven, 161 Wn.2d at 174. Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court did not abuse its discretion in finding that A.P.'s testimony was admissible to show common scheme or plan. "Evidence of past acts may be admissible 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, 504-05, 157 P.3d 901 (2007). "Such evidence is relevant when the existence of the crime is at issue." DeVincentis, 150 Wn.2d at 21. The prior misconduct and the charged crime must show "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." Lough, 125 Wn.2d at 855 (internal citations omitted). Where identity is not at issue, a unique method of committing the crimes is not required. DeVincentis, 150 Wn.2d at 21.

Here, the evidence showed marked similarities between Shelby's abuse of A.P. and J.P. Shelby was in a position of authority over both girls. He was A.P.'s stepfather and the primary father figure for J.P. since she was an infant. Both girls were about the same ages when Shelby molested them. And both girls said that Shelby brought them to a certain room and molested them by holding them in a certain position and rubbing his penis against them while fully clothed.

Shelby further argues that the evidence is inadmissible as a common scheme or plan because A.P.'s unreported allegations took place twenty-one years earlier. We acknowledge that "the lapse of time may slowly erode the commonality between acts and reduce the relevance of the prior acts." State v. DeVincentis, 112 Wn. App. 152, 162, 47 P.3d 606 (2002). However, this factor is not determinative. The "time lapse between the prior bad act and the present one affects weight rather than "the admissibility of the evidence." State v. Evans, 45 Wn. App. 611, 617, 726 P.2d 1009 (1986). The trial court did not abuse its discretion in concluding that Shelby's actions

were admissible as individual manifestations of a common scheme or plan to sexually molest young girls in his care.[4]

Shelby also contends that the probative value of this evidence was substantially outweighed by extreme prejudicial effect. Although the elapsed time weighs against admission, other factors present in this case strongly favor admissibility. "The purpose of ER 404(b) is to prohibit admission of evidence designed simply to prove bad character; it is not intended to deprive the state of relevant evidence necessary to establish an essential element of its case." Lough, 125 Wn.2d at 859. Because there was no physical evidence that J.P. was sexually molested and no other witnesses to the events she described, the State's case rested on the testimony of J.P., A.P., and A.P.'s grandmother. J.P.'s credibility was the central issue. "Generally, courts will find that probative value is substantial in cases where there is very little proof that sexual abuse has occurred, particularly where the only other evidence is the testimony of the child victim." Sexsmith, 138 Wn. App. at 506. It is not unusual for Washington courts to uphold evidence of prior bad acts in child sexual abuse cases, even where the elapsed time between the prior acts and the charged crime is substantial. See DeVincentis, 112 Wn. App. at 161 (15 years); State v. Baker, 89 Wn. App. 726, 734, 950 P.2d 486 (1997) (11 to 15 years); State v. Krause, 82 Wn. App. 688, 691-92, 919 P.2d 123 (1996) (14 or

[4] See Sexsmith, 138 Wn .App. at 505 (evidence showed common scheme or plan when defendant was in position of authority, isolated girls of the same age, and forced them to perform similar sex acts); State v. Kennealy, 151 Wn. App. 861, 888-889, 214 P.3d 200 (2009) (common scheme or plan where prior acts of molestation occurred with defendant's young daughter and nieces and were substantially similar to charged crimes); Gresham, 173 Wn.2d at 422-23 (slight differences in details between prior bad acts and charged crimes did not outweigh common occurrence of fact with remaining details).

more years). We also note that the trial court minimized the danger of unfair prejudice by giving a limiting instruction to the jury. The trial court did not abuse its discretion in concluding that the probative value of this evidence outweighed the prejudicial effect.[5]

Shelby raises two additional issues in his statement of additional grounds for review, both arising from the same event. On June 5, 2012, the prosecutor told the court that a member of her office staff had received a phone call from the staff member's mother, who had been one of the potential jurors on this case, but who had been released. The call was about Juror No. 37, who was excused for cause, on motion of Shelby's counsel, during individual voir dire. The caller reported that while they were in the jury room, Juror No. 37 "expressed complete disdain for the State, went so [sic] to far as calling all prosecutors liars, that they bring cases without evidence, that they bring cases on false accusations." 3VRP at 2. The prosecutor stated that she had discussed the situation with defense counsel, and that they agreed to ask the court to strike the jury panel and begin anew.

Shelby argues that the prosecutor committed misconduct and violated his Sixth Amendment right to a fair and impartial jury by accepting a phone call from a potential juror and asking the court to strike the entire jury pool. To establish a claim for prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's conduct was both improper and prejudicial. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). Shelby has not made this showing. The record

[5] Shelby also argues that the trial court erred in concluding that the evidence was admissible under ER 404(b) to prove motive and intent. Because we conclude that the evidence was admissible to prove common scheme or plan, we need not address these arguments.

demonstrates that the prosecutor did not communicate directly with a juror. Rather, she received a call from a member of her office staff, who had obtained information about events that occurred in the jury room. The prosecutor promptly reported the incident to the trial court. The prosecutor's actions were not improper. Moreover, the prosecutor's actions were not prejudicial. Both the federal and state constitutions provide a criminal defendant the right to trial by an impartial jury. U.S. Const. amend. VI; Wash. Const. art. I, §22 (amend. x). And Shelby does not contend that the jury that actually heard the trial was biased in any way. Moreover, even if Shelby preferred to retain the first jury panel, "[a] defendant has no right to be tried by a particular juror or by a particular jury." State v. Gentry, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995).

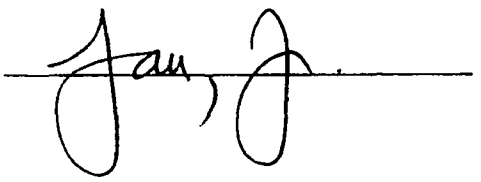
Shelby further argues that he received ineffective assistance of counsel because his attorney did not heed his request to challenge the prosecutor's motion or ask for an evidentiary hearing to determine what happened in the jury room. To demonstrate ineffective assistance of counsel, a defendant must show that defense counsel's representation was deficient and that counsel's deficient representation caused prejudice. State v. MacFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We presume that counsel's representation was effective. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). The presumption can be overcome by a showing that counsel's "representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." In re Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004) (quoting Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)).

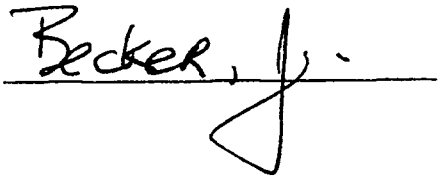
Shelby has not met this standard. "Under the laws of Washington, the right to a jury trial includes the right to an unbiased and unprejudiced jury." State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000) (citing State v. Parnell, 77 Wn.2d 503, 507, 463 P.2d 134 (1969)). When the prosecutor moved to dismiss the jury panel, defense counsel told the court that she agreed Juror No. 37's comments may have tainted the jury pool to the possible detriment of both parties. Her response was a reasonable tactical decision. Furthermore, Shelby's desire for an evidentiary hearing does not mandate a different result. Differences of opinion regarding trial strategy or tactics will not support a claim of ineffective assistance. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

Affirmed.

Spearman, A.C.J.

WE CONCUR:





DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69238-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Lindsey Grieve, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 10, 2014