Supreme Court No. _____
COA No. 74804-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAY ADAM SPEAR,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Jay Adam Spear requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Spear, No. 74804-1-I, filed July 24, 2017. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Separate counts involving different complaining witnesses must be severed for separate trials if necessary to promote a fair determination of the defendant's guilt or innocence for either offense. Severance is particularly important in child sexual abuse cases, where the jury is likely to use other misconduct evidence to infer the defendant has a general disposition to molest children. Here, evidence supporting one count involving one complaining witness would not have been admissible in a separate trial on another count involving a different complaining witness. Does the trial court's failure to sever the counts, and the Court of Appeals' decision to affirm, warrant review?

2. Other misconduct evidence is not admissible if it is relevant only to show the defendant's criminal propensities. Even if the evidence is relevant to a material issue, it must be excluded if the jury

is likely to use the evidence to infer the defendant has a predisposition to commit sexual crimes. Did the trial court abuse its discretion in admitting other sexual misconduct evidence that was either not relevant to a material issue, or unfairly encouraged the jury to infer Spear had a predisposition to molest children?

C. STATEMENT OF THE CASE

Jay Spear was charged with one count of rape of a child in the first degree of his daughter, J.N.S., and one count of child molestation in the first degree of his niece, C.S.[1] CP 23-24.

Defense counsel moved to sever the charge involving J.N.S. from the charge involving C.S. RP 159-63, 1886-90; CP 17-22. The trial court denied the motion. RP 168-71, 1886-90.

The trial court admitted evidence of Spear's prior bad acts over defense objection. RP 72-76, 82-86, 105-11, 118-24.

At trial, twelve-year-old J.N.S. testified that Spear raped her one time in her bedroom. RP 1111. She said she thought it happened more

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[1] Spear was also charged with one additional count of rape of a child in the first degree involving J.N.S. CP 23-24. The State moved to dismiss that count due to insufficiency of the evidence and the court granted the motion. RP 1888; CP 203.

than once but she could not remember any other incident. RP 1112, 1115, 1119, 1180.

Sixteen-year-old C.S. testified that one time when she was five or six years old, she visited Spear's house. RP 1484. She, Spear's son Jayson, and Spear were all sitting on a futon. Spear took off her jeans and her underwear, then pointed to her vagina and said things about it. RP 1484-86. He touched her clitoris lightly. RP 1487. C.S. could not remember much else about the incident. RP 1488.

C.S. also said sometimes Spear would squeeze her breasts with one hand.[2] RP 1490.

The trial court admitted evidence of three other highly prejudicial, uncharged incidents. First, Jayson testified that one day while the children were living with their mother in North Fork, California, Jayson went into a bedroom and saw that J.N.S. was naked and Spear had no pants or underwear on. RP 1706-07, 1711-12. Jayson said he saw Spear put his penis in J.N.S.'s mouth. RP 1718. Spear then told Jayson to lick J.N.S.'s clitoris and try to put his penis

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[2] The jury received a Petrich instruction in regard to the child molestation count involving C.S. CP 197.

inside her vagina. RP 1713. The trial court admitted this evidence to show Spear's "lustful disposition" toward J.N.S. RP 82-83.

Second, J.N.S. testified that one time when she visited her father at a truck stop, he raped her in the sleeper bed of his semi-trailer truck. RP 1135-36. The court admitted this evidence also to show Spear's "lustful disposition" toward J.N.S. RP 82-83.

Third, both C.S. and Jayson testified about a "Truth or Dare" incident that allegedly happened when C.S. was around 11 or 12 years old. RP 1492, 1656-62. They said Spear dared C.S., Jayson and J.N.S. to run around the room naked. RP 1492. They all did. RP 1492, 1656-62. C.S. said she stopped playing when Spear dared Jayson to pull on her pubic hair with his lips. RP 1495. C.S. also said Spear asked her to get naked several times when she was around that age. RP 1496-97.

The trial court admitted evidence of the alleged "Truth or Dare incident" to show the family "dynamic." RP 106.

The jury found Spear guilty of both counts. CP 178-79.

Spear appealed, arguing the trial court abused its discretion in denying his motion to sever the count involving J.N.S. from the count involving C.S., and in admitting prior bad act evidence. The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Review is warranted because the trial court abused its discretion in refusing to sever the two unrelated counts.

By refusing to sever the counts involving the two complaining witnesses, the trial court permitted the jury to use inflammatory evidence supporting one count as evidence of Spear's guilt for the other, unrelated count. This prevented the jury from reaching a fair determination of Spear's guilt or innocence for either count. The potential for unfair prejudice was particularly high because this was a sex offense prosecution and the jury was likely to use the other misconduct evidence to infer Spear had a general predisposition to molest children. Spear was unfairly prejudiced by the single trial and is entitled to new, separate trials on each count.

When a defendant demonstrates the manifest prejudice of joining counts for trial outweighs concerns for judicial economy, severance should be granted. State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990).

Although CrR 4.3(a) permits two or more offenses of similar character to be joined in a single charging document, "joinder must not be used in such a way as to prejudice a defendant." State v. Ramirez,

46 Wn. App. 223, 226, 730 P.2d 98 (1986). Washington courts recognize that "joinder is inherently prejudicial." Id. Even if multiple charges are properly joined in a single charging document, they must be severed for separate trials whenever "the court determines that severance will promote a fair determination of the defendant's guilt or innocence for each offense." CrR 4.4(b).

"Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition." State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Severance is particularly important when the alleged crimes are sexual in nature. Id. at 884. "In this context there is a recognized danger of prejudice to the defendant *even if the jury is properly instructed to consider the crimes separately*." Id. (emphasis added).

The factors the court considers in determining whether failure to sever prejudiced a defendant are: (1) the admissibility of evidence of the other charges even if not joined for trial; (2) the court's instructions

to the jury to consider each count separately; and (3) the strength of the State's evidence on each count.[3] Id. at 884-85.

A consideration of these factors shows the trial court's refusal to sever the charges unfairly prejudiced Spear.

First, contrary to the Court of Appeals' conclusion, the evidence presented in support of one charge would not have been admissible in a separate trial on the other charge. The only relevance of evidence regarding Spear's conduct toward one complaining witness, to his conduct toward the other complaining witness, was to show he had a general propensity to commit sex offenses against children. The evidence was unduly prejudicial. It was not cross-admissible.

Evidence of a defendant's "other crimes, wrongs or acts" is categorically excluded from trial if the only relevance of the evidence is to prove the defendant's character and to show he acted in conformity with that character. State v. Gresham, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012); ER 404(b). Other bad act evidence is admissible only if it is logically relevant to a material issue other than propensity, and

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[3] An additional factor the Court considers is the clarity of defenses as to each count. Sutherby, 165 Wn.2d at 884-85. That factor is not at issue in this case given that Spear's defense to each charge was the same—general denial.

the probative value of the evidence outweighs its potential for prejudice. State v. Saltarelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982). The rule is based on the fundamental notion that a defendant must be tried only for the offense charged. Sutherby, 165 Wn.2d at 886-87.

Juries are particularly prone in sex offense cases to draw the impermissible inference from other bad act evidence that the defendant must be guilty because he has a predisposition toward criminality. See, e.g., Gresham, 173 Wn.2d at 433 (pointing out the potential for prejudice from admitting prior acts is "'at its highest'" in sex offense cases) (quoting Saltarelli, 98 Wn.2d at 363); Sutherby, 165 Wn.2d at 886-87; State v. Coe, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984). That is because "[o]nce the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." Saltarelli, 98 Wn.2d at 363 (internal quotation marks and citation omitted).

Here, evidence presented to prove one charge would not have been admissible in a trial on the other charge because it was not relevant to a material issue. C.S.'s and Jayson's testimony that Spear

touched C.S.'s clitoris when she was five or six years old, C.S.'s testimony that Spear touched her breasts, and the witnesses' testimonies that Spear made comments about C.S.'s breasts, would not have been admissible in a separate trial on the charge of child rape involving J.N.S. Spear's conduct toward C.S. was simply not relevant or admissible to prove his conduct toward J.N.S.

Likewise, J.N.S.'s testimony that her father raped her, and Jayson's testimony about the alleged North Fork incident, which did not involve C.S., would not have been admissible in a separate trial on the charge of child molestation involving C.S. Whether or not Spear raped J.N.S. was simply not relevant to the question of whether he molested C.S.

Evidence of Spear's conduct toward one complaining witness would not have been admissible in a separate trial involving the other complaining witness because it was relevant only to show Spear had a general propensity to molest children. Gresham, 173 Wn.2d at 433; ER 404(b). The evidence was unduly prejudicial because it encouraged the jury to draw the impermissible inference that Spear was "a person of abnormal bent," driven to molest children. Saltarelli, 98 Wn.2d at 363. Due to this risk, severance of the charges was particularly important.

Sutherby, 165 Wn.2d at 883-84. Thus, this factor strongly supports the conclusion that Spear was unfairly prejudiced by the trial court's failure to sever the charges.

Second, the jury was not instructed they could not use evidence of one crime to decide guilt for a separate crime. The jury was provided the following instruction:

> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 190. This instruction was inadequate because it did not inform the jury that evidence of one crime could not be used to decide guilt for a separate crime. The jury was provided with no limiting instruction regarding the other bad act evidence.

Third, the nature of the evidence presented for each charge contributed to the unfair prejudice caused by the failure to sever the charges. In determining whether a defendant was unduly prejudiced by other misconduct evidence, the question is whether there is a reasonable probability the outcome of the trial would have been different without the other misconduct evidence. State v. Gower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014).

The failure to sever the unrelated charges was unfairly prejudicial because it is reasonably probable the jury's verdict on either charge was materially affected by the other misconduct evidence. The untainted evidence presented to support the charge involving J.N.S. consisted primarily of her uncorroborated testimony. Spear disputed her account. There were no eyewitnesses to the alleged incident and credibility was the main issue. See Gower, 179 Wn.2d at 858.

In regard to the incident involving C.S., the only evidence presented to corroborate her account was Jayson's testimony. Spear denied the incident occurred. No physical evidence was presented.

It is likely the jury was influenced by evidence that Spear committed sexual misconduct against one child to find he was guilty of misconduct against another child. See Sutherby, 165 Wn.2d at 885.

In sum, the evidence presented in support of one count would not have been admissible in a separate trial on the other count; the nature of the sexual misconduct evidence encouraged the jury to infer Spear had a general predisposition to molest children; and the jury instructions permitted the jury to use the evidence of one count to decide Spear's guilt for the other count, and to infer that Spear had a

general criminal disposition. The potential for prejudice was particularly high because of the lack of corroborating evidence.

In light of these factors, Spear's ability to receive a fair trial on each count was impermissibly compromised. His convictions must be reversed and remanded for separate trials. Sutherby, 165 Wn.2d at 883-85; CrR 4.4(b).

2. The trial court abused its discretion in admitting other bad act evidence that was either not relevant to a material issue, was overly prejudicial, or both.

Evidence of other misconduct is admissible only if it is logically relevant to a material issue other than propensity. Saltarelli, 98 Wn.2d at 361-62. The evidence must be relevant and necessary to prove an essential ingredient of the crime charged. State v. Powell, 126 Wn.2d 244, 258-59, 893 P.2d 615 (1995).

Even if the court identifies a proper purpose for admitting the evidence, that is not a "magic password[] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its] name." Saltarelli, 98 Wn.2d at 364 (internal quotation marks and citation omitted). The "other purposes" in ER 404(b) for which other act evidence may be admitted are not exceptions to the categorical bar on propensity evidence. Gresham, 173 Wn.2d at 420-21.

The potential for prejudice from admitting "other acts" evidence is "at its highest" in sex offense cases. Slocum, 183 Wn. App. at 442. "A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest." Saltarelli, 98 Wn.2d at 363-64.

The trial court abused its discretion in admitting evidence of the North Fork and truck stop incidents to prove Spear's "lustful disposition" toward J.N.S. See RP 82-83. Much of the evidence was not relevant to demonstrate Spear's so-called "lustful disposition" toward J.N.S. Even if some of the evidence was relevant to a material issue, it was overly prejudicial because it encouraged the jury to infer Spear must have committed the charged offenses because he engaged in sexual misconduct with J.N.S. in the past and had a predisposition to commit sexual offenses against children.

The only evidence presented of the alleged North Fork incident was Jayson's testimony. J.N.S. did remember any such incident. RP 1098. Jayson testified primarily about Spear's conduct toward him, not toward J.N.S. Jayson said Spear threatened him and coerced him to commit sexual acts against J.N.S. RP 1706-24. These alleged acts of

misconduct were not admissible or relevant to show Spear's "lustful disposition" toward J.N.S.

Historically, evidence of a defendant's "lustful disposition" has been admissible in Washington only to show a lustful disposition toward the specific complaining witness. See, e.g., Sutherby, 165 Wn.2d at 886 (explaining that pornography evidence is admissible only to show sexual desire for particular victim; otherwise, such evidence "would merely show Sutherby's predisposition toward molesting children and is subject to exclusion under ER 404(b)"); State v. Crowder, 119 Wash. 450, 451-52, 205 P. 850 (1922) (prior acts of sexual intercourse between parties admissible in rape prosecution to show lustful disposition of defendant toward complaining witness); State v. Whyde, 30 Wn. App. 162, 168, 632 P.2d 913 (1981) (defendant's attempt to kiss one tenant of apartment building was not relevant or admissible to show his "lustful disposition" toward a different tenant of the building). Critically, the evidence must show a sexual desire for the particular victim. State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). Such evidence is arguably relevant to a legitimate issue because it is not offered to show a general propensity to commit sexual crimes, but to demonstrate the nature of the

defendant's relationship to and feelings toward a specific individual, and is probative of the defendant's motivation and intent in subsequent situations with that same person. State v. Cox, 781 N.W.2d 757, 768 (Iowa 2010).

In this case, J.N.S. was the complaining witness, not Jayson. Spear's alleged misconduct toward Jayson during the North Fork incident was not relevant to his "lustful disposition" toward J.N.S. It was therefore inadmissible. Saltarelli, 98 Wn.2d at 361-62.

Even if evidence of the North Fork or California truck stop incidents was relevant to prove a material issue, it was overly prejudicial and should have been excluded. State v. Dawkins, 71 Wn. App. 902, 863 P.2d 124 (1993). In Dawkins, the State offered evidence that Dawkins had touched the complaining witness's breasts on three prior occasions. Id. at 905. The Court of Appeals held the evidence was relevant to show Dawkins's "lustful disposition" toward the complaining witness. Id. at 909. But Dawkins's attorney was ineffective for failing to object to the evidence because it was overly prejudicial. Id. at 909-10. There were no eyewitnesses to the act of sexual touching that was the basis of the criminal charge, nor any physical evidence. Thus, the question of guilt turned on the relative

credibility of the accused and the accuser. Id. The accuser's testimony that Dawkins had touched her on previous occasions cast him as "a person of abnormal bent, driven by biological inclination." Id. (quotation marks and citation omitted). "As such, it was relatively easy for the jury to believe Dawkins must be guilty because he could not help himself, and thus was more likely to be less credible in his recitation of events that morning than [the complainant] was." Id.

As in Dawkins, the testimony that Spear committed sexual misconduct against J.N.S. on two prior occasions in California should not have been admitted because it likely persuaded the jury to convict Spear on improper grounds. The only evidence presented of the sexual act that formed the basis of the charge involving J.N.S. was J.N.S.'s testimony. There were no eyewitnesses to the act. Spear disputed J.N.S.'s account. Thus, the question of guilt turned on the relative credibility of accuser and accused.

The evidence of prior acts of sexual misconduct unfairly tipped the balance of prejudice against Spear. The evidence cast him as "a person of abnormal bent, driven by biological inclination." Id. at 909-10. It was too easy for the jury to conclude he must be guilty of the

charged offense because he could not help himself. The evidence was overly prejudicial and should have been excluded. Id.

The court also abused its discretion in admitting evidence of the "Truth or Dare" incident. The trial court admitted this evidence to show the family "dynamic." RP 106.

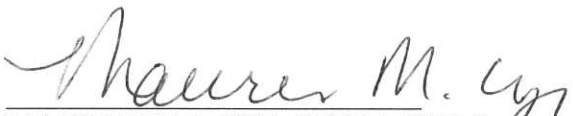
The trial court's ruling was in error because the evidence was not admissible to show the family "dynamic." Prior bad act evidence must be relevant to prove an essential ingredient of the crime charged. Powell, 126 Wn.2d at 258-59. The family "dynamic" was not an element of the charged crimes of first degree rape of a child or first degree child molestation. It was not a necessary component of the State's burden of proof. Therefore, the evidence was not admissible under ER 404(b). Powell, 126 Wn.2d at 258-59; Saltarelli, 98 Wn.2d at 361-64.

The erroneous admission of ER 404(b) evidence was not harmless. This Court should grant review and reverse the Court of Appeals.

E. CONCLUSION

For the reasons provided, this Court should grant review.

Respectfully submitted this 17th day of August, 2017.



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JAY ADAM SPEAR, Appellant.	No. 74804-1-I DIVISION ONE UNPUBLISHED OPINION FILED: July 24, 2017

BECKER, J. — Appellant Jay Spear, convicted of child rape and child molestation against his daughter and niece, contends the trial court erred in denying his request to sever the charges. He also challenges the admission of prior acts of uncharged misconduct. Spear's prior acts were admissible as evidence of a common scheme or plan to make the two young girls accept sexual touching between family members as normal so as to facilitate his abuse of them. The charged acts involving each girl were cross admissible for the same reason. We affirm.

The State charged Spear with two counts of first degree child rape and one count of first degree child molestation. The alleged victim of the rape charges was Spear's daughter, JN. The alleged victim of the molestation charge was C, Spear's niece.

JN was 12 at the time of trial. Until she was 10, JN lived with her father, grandparents, and two brothers in Maple Valley. She shared a bedroom with Spear. Witnesses testified that JN and her father often slept in the same bed and watched TV together in bed.

JN testified that her father raped her in the Maple Valley house "at least two times." She was able to recall details of only one incident: they were in her bedroom, in bed, and Spear took off her pants and underwear and inserted his penis in her vagina. JN testified that Spear raped her again later, after she had moved to California to live with her mother. On this occasion, JN visited Spear at a truck stop and he had vaginal intercourse with her in the back of his truck.

JN's older brother, J, testified that when Spear was visiting the children in North Fork, California, he observed his father in bed with JN. He saw that JN was naked and Spear had no pants on. Spear told J to take his pants off and perform sex acts on JN. Spear told him that "people have sexual relationships with their siblings all the time." J saw Spear put his penis in JN's mouth during this incident.

Spear's niece, C, was 16 at the time of trial. As a child, she had often visited the Maple Valley house when Spear and his children lived there. C testified that when she was 5 or 6 years old, Spear removed her pants and underwear and started talking about her vagina. At one point, he touched her vagina and told her that when she got older "this part, when you rub it, will feel good." She said that when she was around 11 or 12, Spear often suggested she

get naked. He would make comments about her breasts and sometimes squeezed them.

Spear's son testified that he once witnessed Spear sitting on a futon while C stood in front of him with her pants down. Spear pointed out different parts of C's body. He and C both testified about a time when Spear had the children play a game of "Truth or Dare," during which he dared them to run around naked and dared J to put his mouth on C's vagina.

At the close of the State's evidence, the trial court granted the State's motion to dismiss one of the rape counts involving JN.

Spear testified. He denied having sexual contact with JN and C.

The jury convicted Spear as charged. He was sentenced to 160 months of confinement.

On appeal, Spear contends the rape and molestation charges should have been tried separately. He brought two unsuccessful motions to sever, one before trial and one at the close of the State's evidence. We review the trial court's denial of these motions for an abuse of discretion. State v. Kalakosky, 121 Wn.2d 525, 536-37, 852 P.2d 1064 (1993).

Offenses that are properly joined may be severed if the trial court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense. CrR 4.4(b); State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). A defendant must demonstrate that "a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." Bythrow, 114 Wn.2d at 718. Severance is important when

there is a risk that the jury will use evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Joinder can be particularly prejudicial when the alleged crimes are sexual in nature. Sutherby, 165 Wn.2d at 884.

In determining whether to sever charges, a court considers: the admissibility of evidence of the other charges even if not joined for trial, the strength of the State's evidence on each count, the court's instructions to the jury to consider each count separately, and the clarity of defenses as to each count. Sutherby, 165 Wn.2d at 884-85. Spear contends that the first three factors support severance. He does not make an issue of the fourth factor, as his defense to both charges was the same: a general denial.

Cross admissibility of the evidence supporting each charge is the most significant factor in this case. Spear argues that under ER 404(b), evidence that he raped JN would not have been admissible in a separate trial involving his alleged molestation of C and vice versa. He contends the only relevance was to show he had a general propensity to commit sex offenses against children.

ER 404(b) bars propensity evidence, that is, evidence of other crimes, wrongs, or acts intended to prove a person's character and show the person acted in conformity with that character. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). But evidence of other crimes, wrongs, or acts is admissible for different purposes, including as proof of a common plan or scheme. ER 404(b); Sutherby, 165 Wn.2d at 887.

One fact pattern in which evidence is admissible to show a common plan or scheme is when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes. Gresham, 173 Wn.2d at 421-22. The prior act and charged crime must be markedly and substantially similar, but the commonality need not be a unique method of committing the crime. Gresham, 173 Wn.2d at 422, citing State v. DeVincentis, 150 Wn.2d 11, 19-21, 74 P.3d 119 (2003).

In ruling on the severance issue, the trial court found that evidence involving each complaining witness showed a common plan or scheme. This determination was consistent with DeVincentis and similar cases, a line of precedent that Spear does not acknowledge or distinguish. Spear's conduct with his daughter and with his niece had common features. Both victims were young girls when the abuse began. Both were Spear's family members, and Spear involved his son in the sexual touching as well. Spear's conduct manifested a scheme to get the children to accept nudity and intimate touching and sexual activity between family members as normal for the family although something to be kept secret from others. A rational trier of fact could find that Spear acted on a plan to groom children he already had a close and trusting relationship with, over an extended period of time, so that he could create opportunities to have sexual contact with them. See DeVincentis, 150 Wn.3d at 22; State v. Krause, 82 Wn. App. 688, 694-95, 919 P.2d 123 (1996), review denied, 131 Wn.2d 1007 (1997). The fact that this plan led to different results, insofar as Spear was

charged with raping JN and molesting C, does not disprove that he used a common plan to get to those results.

Because the evidence for both charges was cross admissible under ER 404(b), the first factor supports the trial court's decision to deny severance. We briefly review the other severance factors.

The second factor is whether the strength of the State's evidence was comparable for each count. JN testified that Spear raped her. C testified that Spear molested her. The girls' accounts were supported by other witnesses who testified that Spear engaged in regular, intimate contact with both girls. Spear denied having sexual contact with either girl. The jury's determination thus came down to an assessment of witness credibility. Because the State's evidence was of comparable strength for each count, this factor did not favor severance.

The trial court satisfied the third factor instructing the jury to consider each count separately: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." Spear contends this instruction was inadequate because it did not inform the jury that evidence of one crime could not be used to decide guilt for a separate crime. Cf. Sutherby, 165 Wn.2d at 885-86. This case is like DeVincentis, not like Sutherby. Under the circumstances of this case, with the evidence cross admissible to prove a common scheme or plan, an instruction phrased as Spear proposes would not have been correct.

When evidence of a defendant's other misconduct is admitted, the defendant is entitled to a limiting instruction stating that the evidence may not be

used for the purpose of concluding that the defendant has a criminal propensity. Gresham, 173 Wn.2d at 423-24. But Spear did not request a limiting instruction, and the court was not required to give one sua sponte. Gresham, 173 Wn.2d at 214 n.2.

In sum, Spear did not demonstrate that trying both counts together "would be so manifestly prejudicial as to outweigh the concern for judicial economy." The trial court did not abuse its discretion by denying severance.

Spear separately challenges the trial court's admission of evidence related to three specific events: the truth or dare incident, the truck stop incident, and the North Fork incident. These incidents did not form the bases for the charges against Spear. They are instances of other alleged misconduct, and therefore admission of the evidence must satisfy ER 404(b).

We find no abuse of discretion in the admission of evidence about the truck stop, truth or dare, and North Fork incidents. As discussed above, the evidence tends to show a common scheme, relevant to proving the charged crimes by showing them to be manifestations of the common scheme.

The trial court admitted evidence of the truck stop and North Fork incidents on the additional basis that they demonstrated Spear's "lustful disposition" towards JN. Spear contends the evidence was irrelevant for that purpose and unduly prejudicial under State v. Dawkins, 71 Wn. App. 902, 863 P.2d 124 (1993). Given our conclusion that the evidence was admissible to show a common plan or scheme, we need not address whether it was also admissible to show lustful disposition.

Affirmed.

Becker, J.

WE CONCUR:

Verellen, J.

Mann, J.

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. 74804-1-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:

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Date: August 17, 2017

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