Supreme Court No._____
Court of Appeals No. 74998-6-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

.

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA DAVID LARSON,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.3 and RAP 13.4(2)&(3), Joshua Larson, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals unpublished opinion in case number 74998-6-I, issued on February 5, 2018 affirming his conviction.[1]

B. ISSUES PRESENTED FOR REVIEW

The Court of Appeals affirmed the trial court's admission of five sexual assault allegations in Mr. Larson's trial, which the jury was instructed to consider to determine whether Mr. Larson touched E.V. for the "purpose of sexual gratification." This was not a valid non-propensity purpose. Mr. Larson requests review by this Court to clarify ER 404(b)'s requirement that other acts evidence not be used as propensity evidence, as this is a matter of substantial public interest that profoundly impacts a defendant's right to a fair trial.

The Court of Appeals affirmed the trial court's admission of other acts evidence that spanned twenty years and alleged very different acts against different victims as evidence of a common scheme or plan. The Court of Appeals ruling stretches the bounds of this Court's definition of common scheme or plan evidence, and Mr. Larson requests review by this

[1] The opinion is attached to this petition.

Court to provide guidance on the scope of "common scheme or plan" evidence so as to ensure a defendant's constitutional right to a fair trial.

Mr. Larson finally asks this court to explicitly decide whether a trial court is required to individually and incrementally weigh the probative value versus prejudice of each other alleged act of misconduct prior to admission under ER 404(b) when the State seeks to introduce numerous allegations of misconduct, or whether a generalized weighing of the probative versus prejudicial value of the numerous other acts as occurred here, is adequate.

C. STATEMENT OF THE CASE.

1. One charge, one count, one act.

The Snohomish County Prosecuting Attorney charged Mr. Larson with one count of child molestation in the first degree, asserting that on Thanksgiving Day of 2013, he had sexual contact[2] with his four-year-old niece. E.V. CP 537; 539-543. This supposedly occurred during a large gathering of relatives of all ages hosted by Mr. Larson's parents-in-law. CP 539; RP 1813, 1853.

Mr. Larson, who had a normal relationship with E.V.'s family, was there with his own wife and young son. RP 1833. That afternoon,

[2] "Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

E.V. told her mother "I wish Uncle Josh would stop touching my bottom." RP 1770-75. In responding, her mother said she would "look at [her] vagina." RP 1775. The dispute below focused on where, how, and why Mr. Larson touched E.V.[3]

The State's child forensic interviewer, Sue Lewis, testified the memory of children "is susceptible to suggestive, misleading, or leading information." RP 1703. The risk of tainting a child's perception is extremely high and suggestion can happen in any number of ways. RP 1710-11. For example, parents can insert their own beliefs into a child's mind, even by accident. RP 1716.

This interviewer was not there when E.V's parents talked with their daughter, but agreed that E.V.'s mother inserted the word "vagina" into the discussion initiated when the child asked that "Josh would stop touching her bottom." RP 1708-09. Marissa Hughes of the Oregon Department of Human Services met E.V. one week after Thanksgiving and also testified that children should not be interviewed using leading questions. RP 1559, 1560, 1584. Ms. Hughes recognized that breaking this cardinal rule creates a risk that a child will repeat what an adult said to

[3] When E.V.'s mother asked Mr. Larson about this, he said he did not know what E.V. was talking about. RP 1821. Later, when Mr. Larson was reading a book to his son, E.V. asked to go over and join them. RP 1829, 2058-61. In the weeks that followed, E.V.'s parents did not observe any concerning change in her behavior. RP 1666-68.

them. RP 1582. Ms. Hughes stated that E.V. told her that Mr. Larson had touched her vagina, "where her pee pee came out of," underneath her underpants. RP 1570-1572, 1597. However, the police officer who accompanied Ms. Hughes to this unrecorded meeting testified that it was Ms. Hughes who introduced the word "vagina" into this conversation, much like E.V.'s mother had done. RP 1632 ("that word was brought forth by Ms. Hughes"); RP 1633-34.

At first, E.V.'s parents were unsure how to respond to what her daughter said. They decided to notify law enforcement in part because E.V.'s father is a teacher and thus a mandatory reporter. RP 1835-36, 1847, 2062-63. The day after Thanksgiving, the parents questioned E.V. RP 1779, 1838-39 (child said to have "pointed to the front vaginal area of the doll."). The mother believed E.V. said that the touching was under her clothes, but the father remembered E.V. said the touching was "both" on top and under her clothes. RP 1780, 1839, 1850.

When E.V. told Ms. Smith she had been touched on her bottom by Mr. Larson, she did not say that was her vagina. RP 1671. Rather, the child "agreed to call… her front private vagina." RP 1656, 1670, 1719.

At time of trial, E.V. was six years old. When led by the prosecutor, she admitted a lack of memory about the alleged incident. RP 1746. In court, E.V. told the jury Mr. Larson touched her vagina when

they were together in his son's room. RP 1746, 1750, 1753, 1763. She said this was in Port Townsend, in a two-story home. RP 1754. She remembered blue sheets and a dollhouse. RP 1755. She testified she was visiting her cousin because there was a party, but no other children were there. RP 1756-57.

Adult witnesses contradicted E.V.'s testimony. The holiday gathering was at E.V.'s grandparents' home in Stanwood, not at Mr. Larson's home in Port Townsend. CP 539; RP 1765-66. The Stanwood residence is a one-story rambler, not a two-story dwelling. RP 1767, 1814.

The room where Mr. Larson supposedly did something, in the midst of the family gathering, was the grandmother's small sewing room, not Mr. Larson's son's bedroom. RP 2022, 2039, 2055. E.V.'s mother testified there was a yellow bedspread there, but no blue sheets. RP 1799, 1816. And there was no dollhouse. RP 1819, 1829.

The day after Thanksgiving, Mr. Larson spoke by phone with E.V.'s parents and other family. RP 1785, 2061. He relayed E.V. was playing with a peg game toy in the sewing room and he told her "it was dangerous for the smaller kids and that [he] wanted to put the toy away." RP 1786, 2050. E.V. "kind of hesitated or kind of resisted, kind of scooched back into the corner," when Mr. Larson asked for the toy. RP

2039, 2050, 2055. He asked again, but she held onto it, so he "kind of picked her up and took the toy from her." RP 2050-51.

There was nothing improper; he picked up E.V. "just like I pick my son up." RP 2051. The movement was "kind of awkward," and his "hand was on her bottom," but not vagina. RP 2052. Mr. Larson's purpose in picking E.V. up was to support her weight and he did not touch her for sexual gratification. RP 2052, 2075. This is what he later conveyed to the police. RP 2065.

2. Three additional complainants and five other bad acts.

Before trial, the State alleged that Mr. Larson sexually abused other children and moved to admit this evidence under ER 404(b). CP 369-391. The State asked that the acts be admitted "as proof of a common scheme or plan of the defendant," "as proof of absence of mistake by the defendant," and to show Mr. Larson touched E.V. for his sexual gratification. CP 369; RP 314.

Mr. Larson objected vigorously. CP 360-368; 319-330; 277-279; 275-276; RP 270-80. After an evidentiary hearing, the lower court granted the State's motion. RP 23-149; 313-335.

In opening statement at the retrial,[4] the prosecutor recited the other bad acts as if they were established fact and without explaining any limits on admissibility. RP 1522-1525, 1527. The prosecutor then only briefly discussed the Thanksgiving 2013 allegation involving E.V. RP 1526 ("that is the ultimate crime that you're here to decide today").

The prosecutor's review of the other alleged crimes in opening statement required that the jury be sent out. RP 1529-31 (objection as to argument sustained). The trial court noted that what the prosecutor told jurors about the other crimes came across as propensity evidence:

> I don't believe a jury can just be told common scheme and plan and not understand that that's not propensity. A layperson -- as a lawyer of many years, I can barely wrap my head around that distinction. **So, common scheme and plan means he does it all the time. To them, propensity and common scheme and plan may not be different.**

RP 1531 (emphasis added).

The prosecutor let the jurors know they would be instructed on the meaning of common scheme or plan later, and continued. RP 1538. Before L.C., S.A., and C.S. testified, the trial court instructed the jury the other bad act evidence could be considered to determine "whether any

[4] The State's first attempt to convict Mr. Larson of child molestation of E.V. failed. CP 84-85 (order discharging deadlocked jury). Notably, the State's opening statement at the first trial was very different. The prosecutor discussed the charge first (RP 612-18) and only then addressed the ER 404(b) allegations (RP 618-23.)

alleged touching of [E.V.] by Joshua Larson on November 28, 2013, if any such touching occurred was for the purpose of sexual gratification; and/or… was part of a common scheme or plan." RP 1916-17; CP 77.

L.C., S.A., and C.S. all testified, presenting in graphic detail allegations other than what Mr. Larson was actually on trial for.

a. L.C.'s testimony about two offenses alleged to have occurred in King County in 1994 which were never charged.

L.C. testified about what she said happened twenty years earlier, in 1994 when she was eight. RP 1955. She said that she slept over at the house her older sister Kim shared with Mr. Larson. RP 1956-1960. L.C. said she was woken up by a cat and then saw that Mr. Larson walked out naked from a bedroom and put on a robe. RP 1960. She continued to detail a memory of seeing him by the couch, staring at her, before he went into the kitchen and she heard water running. RP 1961. She said that Mr. Larson, with the robe "still open," returned to the foot of the couch where she was lying and stroked his erect penis. RP 1962, 1963.

She claimed he then "flung up the blanket, threw the cat off of [her], knelt down beside [her]… reached over and began to touch [her] private area." RP 1963-64. She said he "ripped" the blanket off, "like, it was really aggressive." RP 1965. She said he touched her vagina with his

fingers. RP 1964. She was scared, frozen. She said this went on for "five to ten minutes." RP 1965-66.

She said Mr. Larson threw the robe back into the laundry and went back to the bedroom. RP 1966. He said nothing. RP 1985. Mr. Larson and Kim took L.C. home in the morning. RP 1967. L.C. "didn't tell anybody right away." RP 1967. She suggested that she was having "problems" at school and then "knew [she] needed to tell somebody." RP 1968. L.C. said that when her parents talked to her sister and Mr. Larson about this, he lied and joked about it. RP 1970, 1971.

At some later point, her sister asked L.C. to come back and spend the night again. RP 1971, 1972 ("I was starting to think that, you know, if I stayed the night and nothing happened, then it was all in my head.") L.C. was clear that her sister, not Mr. Larson, wanted this. RP 1972 ("It was her brilliant idea for me to sleep in the bedroom.").

L.C. said that on this second occasion she woke up and "felt this hand on top of my vagina… jumped up…" RP 1973. She believed this was Mr. Larson's hand. RP 1974. L.C. said that Mr. Larson again got away with harming her. RP1976 ("my sister said it didn't happen, you need to go apologize to Josh right now, and my mom agreed and I did it"); RP 1977-78 (witness testifying no prosecution came of this); See also CP

372 (records showing Mr. Larson was not charged with any crime against L.C. even though allegations reported to law enforcement in 1998).

b. S.A.'s testimony about two more offenses alleged to have occurred in Jefferson County in 2013.

Nine-year-old S.A.'s younger brother was friends with Mr. Larson's son. The two families spent time together. RP 1991-92. S.A. testified she once Mr. Larson took her into a bedroom, shut the blinds, pulled down her pants and underwear, and licked her vagina. RP 1992-93. She said his son was right there, licking Mr. Larson's arm, as if copying what Mr. Larson was doing to her. RP 1993. S.A. believed she was about three and a half years old when that happened. RP 1996.

S.A. also said there was another time when the kids built a fort in the Larson house and Mr. Larson joined them. RP 1997-2001. She said that Mr. Larson got "in the middle" and touched her vagina, under her pants but over her underwear. RP 2000-2002. He did not say anything and she fell asleep. RP 2002. These allegations were pending in Jefferson County at the time of the Snohomish County trial. CP 535.

c. C.S.'s testimony about one more offense alleged to have occurred in Clallam County in 2014 of which Mr. Larson was acquitted.

C.S. lives in Clallam County with her family, including her older and younger siblings. RP 1920. In 2014, when she was eight or nine, her family attended a party at a public pool. RP 1920. C.S. spoke with a little

boy who was playing a game in the water. RP 1922. A man was throwing the rings for the boy to retrieve and C.S. joined in. RP 1923, 1934-35. Her father was nearby. RP 1922.

C.S. said she would bring the rings back to the man and he would touch her, over her swimsuit, by her vagina. RP 1923-1924. She said that happened four to six times over. RP 1924. The man did not say anything. RP 1925.C.S. went to a deeper part of the pool with the man. RP 1927.

Her father testified the man asked if this would be OK with him. RP 1946. C.S. eventually left with her family. RP 1947, 1951. A few days later, she told her mother that the stranger "at the pool was very touchy." RP 1929-30. Her father identified Mr. Larson as the man tossing the rings. RP 1945.

Mr. Larson was acquitted of the C.S. allegations by a Clallam County jury on March 19, 2015. CP 376. This was half a year before the instant Snohomish County case involving E.V. went to trial.

When Mr. Larson testified about the "not guilty" verdict in Clallam County, the prosecutor turned the acquittal against him:

> Q. And you testified about the trial involving [C.S.] correct?
> A. Correct.
> Q. And [S.A.] didn't testify, correct?
> A. Correct. It wasn't about [S.A.].
> Q. And [E.V.] didn't testify, correct?
> A. Correct. It wasn't about [E.V.]
> Q. But they didn't testify, did they?
> A. Correct. They did not testify.

RP 2096-2097.

On January 27, 2016, Mr. Larson was convicted. CP 63.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

REVIEW BY THIS COURT IS NEEDED TO CORRECT AND CLARIFY ER 404(B)'S REQUIREMENT OF A VALID NON-PROPENSITY PURPOSE FOR OTHER ACTS EVIDENCE AND TO GUIDE COURTS IN THE SCOPE OF COMMON SCHEME OR PLAN AND WEIGHING THE PREJUDICE AND PROBATIVE VALUE WHEN ADMITING ALLEGATIONS OF NUMEROUS BAD ACTS.

1. Other misconduct can never be used to prove a character trait and action in conformity therewith.

"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, 269 P.3d 207 (2012). This rule against propensity to commit crime evidence has no exceptions. *Id.* at 421.

In other words, the State can never suggest once a rapist, always a rapist. *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487(1995). To give effect to the rule against using other bad acts to show criminal propensity, the State bears a "substantial burden" of justifying admission with a valid non-propensity purpose. *State v. DeVincentis*, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003).

Non-propensity purposes for admitting other bad acts may include "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). Before a trial court admits evidence of prior misconduct, it must: (1) find by a preponderance of the evidence that the prior misconduct occurred, (2) identify the non-propensity purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. ER 404(b); *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); *DeVincentis*, 150 Wn.2d at 17.

A trial court's decisions as to the admissibility of evidence is reviewed for an abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). However, close cases must be resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P3.d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008). "The potential for prejudice from admitting prior acts is "'at its highest'" in sex offense cases. *State v. Gower*, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014) (quoting *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982)).

The prejudice flowing from other acts in sex cases is so high 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." *Id*. (quoting Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325, 333-34 (1956)).

2. Allowing the other acts evidence to establish that Mr. Larson touched E.V. "for the purpose of sexual gratification" is not a valid non-propensity purpose under ER 404(b).

The trial court skipped the step of identifying a non-propensity purpose for the evidence by instructing the jury that it could consider the other acts evidence to determine whether Mr. Larson touched E.V. for "the purpose of sexual gratification." CP 77; RP 333; 1916-1917; *Devincentis*, 150 Wn.2d at 18-19; *Gresham*, 173 Wn.2d at 420.

ER 404(a) is a categorical bar against using other bad acts to establish a character trait and show action in conformity therewith. *Gresham*, 173 Wn.2d at 420. When the State offers such evidence, it must justify its admission with a valid non-propensity purpose. *Devincentis*, 150 Wn.2d at 18-19. Here, telling the jury to consider the five other allegations of sexual assault was the same as telling the jury the accused was a lifelong child molester who acted on his abnormal bent. CP 77. The trial court confused "motive" and "intent" with "purpose:"

> I do find that the evidence is relevant to an issue in this case—that is lack of mistake or accident—**and to issue of motive or intent** which I'm using to mean to prove that any touching was **for the purposes of sexual gratification.**

RP 333 (emphasis added). But the trial court acknowledged that Mr. Larson did not assert accident or mistake as a defense. RP 332; 1901. For the prosecution and the trial court, the purpose of "sexual gratification" was the same as intent. But *Saltarelli* is clear that one criminal offense cannot be used to establish a motivation to commit another similar offense, except by showing a propensity to commit that type of a crime: "It is by no means clear how an assault on a woman could be a motive or inducement for defendant's rape of a different woman almost 5 years later." 98 Wn.2d at 365.

Certainly Mr. Larson's alleged offending against L.C. in 1994 could not have been a motive for what he allegedly did toward E.V., who was not born until 2009. And it is equally absurd to suggest that what he allegedly did to C.S. in May of 2014 was a motive for what occurred six months earlier in November 2013.

This two decades' worth of allegations may have been relevant to analyzing whether Mr. Larson touched his niece for sexual gratification, but only under a prohibited propensity theory. The Court of Appeals accepted this confusion of motive and intent with propensity. Opinion at 14-15. This Court should accept review to clarify this distinction for the lower courts.

3. The six offenses, which differed in terms of acts, victims, and circumstances, did not constitute a common scheme or plan.

The Court of Appeals accepted the trial court's strained effort to derive a "common scheme or plan" from random acts that shared as many similarities as differences. Opinion at 7-12. The five other acts were not conduct that was "directed by design," as is required for a plan to exist. *Lough*, 125 Wn.2d at 860. Indeed, admission of other acts under this theory requires more than merely similar results. *DeVincentis*, 150 Wn.2d at 20. Evidence of prior acts may be admissible to demonstrate a "single plan used repeatedly to commit separate but very similar crimes." *State v. Sexsmith*, 138 Wn. App. 497, 505, 157 P.3d 901 (2007) (citing *DeVincentis*, 150 Wn.2d at 19). Here, there was no single plan to the random acts alleged to have occurred over twenty years in different ways to differently aged girls and boys. The Court of Appeals wrongly affirmed the trial court's extraction of a common scheme or plan from random disconnected events.

4. The Court of Appeals erroneously affirmed the trial court's "en masse" admission of five other alleged acts of misconduct.

The Court of Appeals affirmed the trial court's wholesale admission of other acts evidence rather than requiring an *individualized* inquiry into the relative probative value versus prejudice of the vastly differing allegations. Opinion at 16 (Finding generally, "the court…went

through a thorough explanation of why the probative value outweighed the prejudicial effect.").

There is no question that the trial court is required to balance the prejudicial nature of ER 404(b) evidence on the record. *State v. Carleton*, 82 Wn. App. 680, 686, 919 P.2d 128 (1996) (quoting *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984) ("We cannot overemphasize the importance of making such a record.")). The balancing 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.

Carleton cites to *State v. Powell* as an instance where the trial court did not explicitly weigh the probative value against prejudice of each of the defendant's prior acts, but because the record reflected that the court "admitted some acts of prior misconduct while excluding the acts which were most inflammatory, the record as a whole showed the court had fulfilled the requirements of the rule." *Carleton*, 82 Wn. App. at 685 (citing *State v. Powell*, 126 Wn.2d 244, 264-265, 893 P.2d 615 (1995)). In *Carleton*, there was also evidence that the court "carefully sorted through the State's proffered evidence, and did not admit all of it." *Carleton*, 82 Wn. App. at 685. However, in *Carleton*, it was still error where the court did not fully consider the prejudice of the separate acts on the record: "we

simply cannot be sure that the trial court thoughtfully evaluated the prejudicial impact that B's testimony was inevitably going to bring to the trial." *Carleton*, 82 Wn. App. at 686.

Though the trial court in Mr. Larson's case acknowledged its obligation to "weigh on the record the prejudice versus probative value," it failed to "carefully sift" through the prejudice of each act separately. RP 333; *Carleton*, 82 Wn. App. at 685. Rather, the trial court generically concluded that "these other incidences are prejudicial because they are incidents of alleged touching of minor girls, so there is a danger that the jury use the evidence as propensity evidence." RP 333-334. However, the trial court should have gone a step further and held that the danger of unfair prejudice of some acts differed in relation to their relative probative value. Simply ruling that the probative value of the evidence outweighed any prejudicial effect, as the trial court did here, was not enough. RP 334-35. The Court of Appeals found that this general finding of prejudice as to the five separate acts was adequate. Opinion at 16. This is error. "Without such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted." *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981).

The Court of Appeals noted that a failure to articulate the balance between probative value and prejudice does not necessarily require

reversal if the record is sufficient to determine that the court would have admitted the evidence had it considered the relative wright of probative value and prejudice. Opinion at 16, n. 3 (citing *Carleton*, 82 Wn. App. at 686). Such is not the case here, where the L.C. allegations were stale, the S.A. allegations were pending, and the C.S. allegations had been rejected by a jury.

L.C.'s testimony was from over 20 years prior but also especially prejudicial because it sent a damning message about Mr. Larson: not only did he victimize her twice, but he went unpunished. The S.A. allegation, specifically the claim that Mr. Larson orally raped her in front of his own minor child, painted Mr. Larson as willing to victimize children no matter what gender. And S.C.'s fort allegation certainly had less probative value, but cumulatively added undue prejudice through sheer repetition of an additional allegation.

With C.S., just as with L.C., the State made it known to the jury that Mr. Larson had not only victimized yet another child, but that he went unpunished. RP 2096-2097 (prosecutor undermining weight of Clallam County acquittal by cross-examining Mr. Larson about the fact that L.C., S.A., or E.V. allegations were not admitted as ER 404(b) evidence in that forum). And the allegation of an offense against a stranger, C.S., had a heightened level of prejudice having been alleged in a public setting,

suggesting that Mr. Larson had become predatory and/or extraordinarily impulsive since coming under suspicion for offending against E.V. This alone was reason to exclude the C.S. allegation. The Court of Appeals erred in finding the trial court's general finding of prejudice to be sufficient.

E. CONCLUSION

This Court should accept review to correct the Court of Appeals' erroneous adoption of the trial court's confusion of "intent" and "motive" with "touching for the purpose of sexual gratification," which is not a valid non-propensity purpose for other bad acts evidence. This Court should also accept review to consider whether "common scheme or plan" can be established from such distinct acts, and whether an individualized weighing of the probative value versus prejudice is required when the State seeks admission of five other acts of misconduct in a child molestation case, where there is the greatest potential for prejudice from the admission of other acts evidence.

Respectfully submitted this the 6th day of March 2018.

s/ Kate Benward, Attorney for Petitioner (# 43651)
Washington Appellate Project - 91052
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSHUA DAVID LARSON, Appellant.	No. 74998-6-I DIVISION ONE UNPUBLISHED OPINION FILED: February 5, 2018

APPELWICK, J. — Larson was convicted of molesting his three year old niece. Larson argues that the trial court abused its discretion when it admitted evidence that on five prior occasions he had molested other young girls. We affirm.

FACTS

On Thanksgiving Day in 2013, Joshua Larson attended a gathering of relatives at his parents-in-law's home in Stanwood, Washington. That afternoon, Larson's three year old niece, E.V., told her mother " 'I wish Uncle Josh would stop touching my bottom.' " E.V.'s mother, Larson's sister-in-law, asked Larson why E.V. would say that she was touched. Larson initially indicated that he did not know what E.V. was talking about, but told E.V. that he was sorry if he had hurt her or made her feel uncomfortable.

The next morning E.V.'s parents asked E.V. further about what she had reported. When they asked where Larson had touched her, E.V. replied, " 'where my pee pee comes out.' " When asked to show her mother with a doll where

Larson had touched her, E.V. pointed to the doll in the front vaginal area. E.V. said that it happened on the bed in the sewing room, with the door open, and when she was alone with Larson.

Later, Larson told his wife, parents-in-law, and E.V.'s parents his version of what happened. He said that on Thanksgiving Day, E.V. had gotten her leg stuck in the cot in the sewing room, and when he reached to pick her up he must have touched her bottom.

On December 6, Marissa Hughes of Oregon's Department of Human Services interviewed E.V. at E.V.'s home in Oregon City, Oregon. Hughes later testified that E.V. told her that Larson had touched E.V. underneath her clothes while she was on the bed, when they were alone. Hughes also testified that E.V. told her that Larson kept saying sorry while he touched her.

On December 9, E.V was taken to the Children's Center, a clinic that sees children of suspected abuse, in Oregon City. Family Nurse Practitioner Christine Smith examined E.V. Child Forensic Interviewer Susan Lewis also interviewed E.V. at the Children's Center. The State described these interviews, as well as previous sex offense allegations against Larson, in its affidavit for probable cause to support an arrest warrant.

Larson was charged with one count of first degree child molestation. Before trial, the State sought to introduce evidence under ER 404(b) that Larson had sexually abused other young girls. The State asked the court to admit the evidence as proof of a common scheme or plan, and as proof of absence of mistake by the

defendant. The State also asked the court to admit the acts to show that Larson touched E.V. for his sexual gratification. Larson objected. The trial court ordered an evidentiary hearing. The court heard testimony from S.A., L.C., and C.S., three witnesses whom the State planned to have testify at trial on the alleged prior incidents.

S.A. testified that she was nine years old at the hearing. S.A.'s family and Larson's family had been friends. S.A. testified that one time she told Larson about a rash that she had on her private part and Larson took her into his bedroom, pulled down her pants, and orally raped her. She also testified that another time when she was spending the night at Larson's home, Larson touched her over her pajamas, on top of her "jammy pants."

L.C. testified that she was 29 years old at the hearing. When L.C. was around what she believed to be between the ages of six and eight, her sister dated Larson. During this time, L.C. slept over at the home where Larson and L.C.'s sister lived. L.C. was lying on the couch when she saw Larson leave his bedroom naked, put on L.C.'s sister's robe, and then stand by the couch with his robe open. L.C. testified that Larson then touched her vagina, over her clothes, while he touched himself. L.C. also testified about another time that she stayed with her sister and Larson. L.C.'s sister asked L.C. to sleep in the bed with her and Larson. L.C. testified that Larson touched her vagina over her clothes, while her sister was sleeping.

C.S. testified that she was 10 years old at the time of the hearing. She described an incident that occurred in a swimming pool in Port Angeles. C.S. was at the pool with her dad, sister, and brother. She testified that while she was in the pool she started playing ring toss with a man. Each time C.S. returned a ring to the man, he touched her lower private area over her swimsuit, with his finger. The man was identified as Larson.

After the hearing, the trial court granted the State's motion to admit the evidence under 404(b). The court found that the State had established each alleged prior incident by a preponderance of the evidence. It found that the evidence established a common scheme or plan: "it establishes the Defendant committed markedly similar acts of misconduct against similar victims under similar circumstances and the nature of the similarities are such as to demonstrate a common scheme or plan." It concluded that the common scheme or plan was relevant in this particular case because of Larson's general denial that the act occurred. The court noted that Larson was alleged to have touched E.V.'s vagina for sexual purposes. Therefore, it found that evidence of his six sexual acts with four young girls "ha[s] a tendency to prove in this case that the touching was not by accident or mistake and that the purpose or intent was for sexual gratification." Finally, the court noted that these other incidents are prejudicial, but found that the probative value outweighed the prejudicial value.

A jury convicted Larson of child molestation in the first degree. He was sentenced to 68 months of imprisonment. Larson appeals.[1]

DISCUSSION

Larson argues that the trial court abused its discretion by admitting into evidence five other sex offense allegations, violating his right to a fair trial. Larson asserts that, because of the trial court's erroneous ER 404(b) ruling, this court should reverse and remand the case with instructions to exclude the evidence of prior misconduct.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity with that character. ER 404(b); State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Evidence of prior misconduct may be used to show a common scheme or plan. Gresham, 173 Wn.2d. at 421. A common scheme or plan may be established by evidence that shows the defendant committed markedly similar acts of misconduct against similar victims under similar circumstances. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). The similarity between the prior acts and the charged crime need to be substantial, but there is no requirement that they are unique. State v. DeVincentis, 150 Wn.2d 11, 19, 74 P.3d 119 (2003). Evidence 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

[1] The State also filed a cross appeal. However, in its brief it does not assign any errors to the trial court, and asks this court to affirm Larson's conviction.

plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial. Lough, 125 Wn.2d at 852.

Provided the trial court has interpreted an evidentiary rule correctly, we review the trial court's determination to admit or exclude evidence for an abuse of discretion. Gresham, 173 Wn.2d at 419. Here, in its oral ruling, the trial court properly interpreted each of the four factors from Lough. We take each of Larson's challenges in turn.

I. Preponderance of the Evidence

First, Larson contends that the State did not establish the prior acts by a preponderance of the evidence. And, Larson argues the trial court abused its discretion in ruling that conduct for which Larson was acquitted, to which C.S. testified, could be used against him.

The party offering the evidence of prior misconduct has the burden of proving by a preponderance of the evidence that the misconduct actually occurred. Lough, 125 Wn.2d at 853. A court's preponderance determination will be upheld if it is supported by substantial evidence. State v. Baker, 89 Wn. App. 726, 732, 950 P.2d 486 (1997).

Here, the trial court heard testimony from each of the complaining witnesses of the prior bad acts. It found that each witness was able to testify clearly and coherently about each of the alleged incidents. The State also produced each complaining witness's prior interviews, which were done closer to the time of the alleged acts. The trial court found that the witnesses were "remarkably consistent

between their prior renditions and those here in this courtroom." And, the State produced police reports and discovery, which indicated that other witnesses or family members verified that each of the complaining witnesses was with Larson at the time the alleged touching occurred. The discovery also showed that each witness had made a prior complaint to family members or authorities.

Larson argues that the trial court erred in admitting evidence for which Larson was acquitted. But, evidence is not barred simply because it relates to alleged criminal conduct for which a defendant has been acquitted. State v. Stein, 140 Wn. App. 43, 62, 165 P.3d 16 (2007) (similar act evidence is admissible under ER 404(b) where the State does not have to prove the evidence beyond a reasonable doubt).

We conclude that there was substantial evidence before the trial court that established each alleged incident.

II. Common Scheme or Plan

Larson also contends that the six alleged acts did not constitute a common scheme or plan. He argues that the trial court saw similarities where there were none and ignored meaningful differences. First, he argues that these were not markedly similar acts. He highlights that one of the incidents with S.A. involved oral rape, and argues that this is "significantly different from the passing touching" that was alleged to happen with E.V. He argues that the amount of time between each act was different, ranging from a few seconds to approximately five minutes. Second, he argues that these were not similar victims, because (1) Larson's son

was present during the alleged oral rape of S.A., (2) the victims ranged in ages from three to nine, and (3) C.S. was a stranger, not a family member or someone with whom Larson had any prior relationship. Third, he argues that these were not similar circumstances. The incident with C.S. took place in a public pool, while the others happened in a residence. And, he argues that the nearby presence of adults does not indicate a design by Larson.

The similarities between the prior acts and the charged crime need to be substantial, but the acts do not need to be identical. DeVincentis, 150 Wn.2d at 20-21; State v. Kennealy, 151 Wn. App. 861, 887, 214 P.3d 200 (2009). The prior misconduct and the charged crime should share common features such that the acts are naturally explained as caused by a general plan of which each act is simply an individual manifestation. Gresham, 173 Wn.2d at 423. It is helpful to consider other cases in which ER 404(b) evidence was properly admitted due to a common scheme or plan.

In Gresham, Scherner was charged with sexually molesting his granddaughter when she was seven or eight years old. 173 Wn.2d at 414. On three different nights, Scherner touched her vagina. Id. at 414-15. On the third night, he also placed her hand on his genitals. Id. at 415. The trial court admitted the testimony of four prior victims as evidence of a common scheme or plan. Id. Two of the prior victims were his nieces. Id. When the nieces visited his home, he fondled them and performed oral sex on them. Id. Scherner abused one niece for around 15 years, beginning when she was 4r or 5 years old. Id. He abused

the second niece when she was 13. Id. The third victim was a 13 year old daughter of a friend, and the fourth victim was another one of Scherner's granddaughters. Id. The Supreme Court affirmed the trial court's finding of a common scheme or plan. Id. at 422. It found that, despite some differences, such as the presence of oral sex and that the abuse took place in and out of Scherner's home, the differences did not dissuade a reasonable mind from finding that the instances were individual manifestations of the same plan. Id. at 423.

In Kennealy, the defendant raped and molested 3 children between the ages of 5 and 7 who lived in the same apartment complex. 151 Wn. App. at 868. The trial court admitted evidence of prior bad acts involving Kennealy's daughter and 3 of his nieces, who were between the ages of 7 and 13. Id. at 875-76. Kennealy told 1 of the victims from the charged crimes, and some of the previous victims, not to tell anyone about what happened. Id. at 889. Kennealy committed the prior and charged acts out of view of others or alone with the children. Id. He touched the girls on their vaginas both under and outside of their clothing. Id. This court held that, even though Kennealy's behavior in each case was not identical, the trial court did not abuse its discretion in finding that evidence of the prior acts was admissible as part of a common scheme or plan. Id. at 888.

This court has also held that evidence of prior misconduct was admissible to show a plan or scheme to molest in State v. Sexsmith, 138 Wn. App. 497, 157 P.3d 901 (2007). There, the court found a plan or design where each time

Sexsmith molested children, he isolated them, and he was in a position of authority as a father or caretaker. Id. at 505.

A. Similar Acts

In this case, Larson is correct that the extent of the abuse is different in the charged crime and among the prior acts. There is evidence that Larson touched E.V. But, there was an incident of oral rape with S.A. And, L.C. testified that Larson exposed himself while touching her. Even so, the trial court found marked similarities between each act:

> In each of the other incidences [sic], as well as the alleged charge, [Larson] is alleged to have sexually touched only one place on the child, the vagina or that area. In all but one instance, there was touching only with a finger. In that one instance where there was the use of something other than the finger, the victim had actually discussed the vagina and, therefore, there would have been a reasonable explanation for [Larson] looking in her vaginal area.
>
> . . . .
>
> In each incidence [sic], the touching was for a very short period of time. They ranged from a few seconds to approximately five minutes, short enough so as to not draw attention of those nearby. . . . [A]nd in each incident there was no penetration or any use of physical force that would leave a mark on the victim or any physical evidence.[2] . . .
>
> With each alleged victim, there was touching on either only one or two occasions, a very limited number of touchings [sic] per victim.

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[2] Larson argues that the trial court, in finding that none of the incidents involved force, ignored that L.C. described Larson's behavior as "aggressive" and that he "ripped" the blanket off her. The trial court, however, indicates here that Larson did not leave physical marks on any of the victims.

These acts were not sufficiently different so that a reasonable mind could not find similarities between the act involving E.V. and those involving the other three witnesses.

B. Similar Victims

Larson then argues that the victims are not similar as to show a common scheme or plan. In Gresham, the victim was 7 or 8, and the additional witnesses were between 4 and 13 when the abuse began. 173 Wn.2d at 414-15. In Kennealy, the victims were between 5 and 13. 151 Wn. App. at 868, 876.

The trial court here considered the age range. It found the victims were similar:

> They were all young enough so that it was likely that they may not understand sexual matters and young enough to be confused about what may have been happening should they be touched briefly in a sexual manner. They were also all of an age -- and this is between the ages of 3 and 9 -- when they would still likely be quite compliant with adult authority and still may not be outspoken against an adult who would confront and indicate a different story than their own.

Larson's reliance on the girls' age difference, from ages 3 to 9, is not persuasive in light of Gresham and Kennealy.

Larson also notes that Larson's son was present during the oral rape of S.A. This is not fatal to the common scheme or plan because the nature of what Larson did to the testifying witnesses and E.V. is what unifies them as similar victims. If Larson's son was present during the act with S.A. it does not take away from the similarity of the other victims. Further, in Kennealy, two of the charges involved female victims, while another involved a male victim, and the court affirmed the trial court's admission of prior acts that solely involved girls. 151 Wn. App. at 889.

And, Larson states that C.S. stands out from the other victims as a stranger, and not someone Larson had previously known. In Kennealy, the victims in the charged crimes were either living in the defendant's apartment complex, or visiting the complex. 151 Wn. App. at 868. Kennealy contacted and abused the victims either on the playground, on the stairs outside of his apartment, or in his apartment. Id. at 872, 874. The victims in the prior acts evidence were his daughter and three of his nieces. Id. at 875. The court found that, despite the differences between the prior acts and the incidents charged, there were common features that showed a plan to sexually abuse young children. Id. at 888. Following the reasoning of Kennealy, here, the trial court did not abuse its discretion in finding that the victims were substantially similar.

C. Similar Circumstances

Larson next argues that these were not similar circumstances. In particular, he differentiates the public pool setting of the act with C.S. from the other acts.

Again, in Kennealy, some of the acts occurred on a playground, while some occurred inside in either Kennealy's apartment or the apartment of the victim. 151 Wn. App. at 874-76. In Gresham, the court affirmed that the charged acts and the prior acts demonstrated a common plan, even though Scherner abused some victims in his home and some in hotel rooms. 173 Wn.2d at 415, 423. Here, the fact that one of the incidents took place in public while the rest took place in homes does not destroy a common scheme or plan.

And, the trial court noted similarities between the acts that showed a common scheme or plan to avoid detection. First, it noted that in every one of the incidents, there were third-parties either present or nearby. Second, that with each of the other alleged 404(b) victims, after a touching, Larson had other contact with the victim where no touching occurred. Third, it found that following each incident with each of the alleged prior complaining victims, Larson acted like nothing had happened. Fourth, that each of the alleged 404(b) incidents happened in a geographically distinct area, which would decrease the chances that any victim or family member might become aware of any similar complaints against Larson. It summarized the common scheme or plan:

> In short, the evidence combined shows a carefully crafted plan for obtaining sexual gratification not by grooming an alleged victim, but by touching a number of young girls while minimizing the chances of any incident being disclosed or, if disclosed, being believed or increasing the chances of there being a plausible explanation for an innocent touching. . . .
>
> It is, in short, a plan that went this way: Be sure that there is a good, separate explanation for being in physical contact with the child or proximity to the child; only touch the child on one or two occasions; only touch briefly, never penetrate; never use force or engage in any action that would leave any physical evidence; make sure others are around or nearby so if there is a complaint, it can be argued that they would have noticed; have other contact or interactions with the child where there is no improper touching, again to argue, well, if it was improper, it would have happened more often; right after it happens, act as if nothing had happened so that the victim, who is young and vulnerable, may not understand what has happened.

The trial court considered the similarities between the alleged acts, victims, and circumstances of the crimes. We affirm the trial court's finding of a common scheme or plan.

III. Propensity

Larson contends that the trial court abused its discretion by allowing the prior bad act evidence to demonstrate propensity. He relies on State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982). He states that the same problem in Saltarelli exists below, because the trial court used the terms "intent" and "purpose" interchangeably. He contends that the trial court improperly admitted the evidence because one criminal offense cannot be used to establish a motivation to commit another similar offense, except by showing a propensity to commit that type of crime.

In Saltarelli, the defendant was convicted of second degree rape. 98 Wn.2d at 359. He did not deny having intercourse with the victim, but maintained that she consented. Id. Our Supreme Court held that evidence of a prior attempted rape was not properly admitted to show the defendant's motive or intent to rape. Id. Intent was not an issue in Saltarelli. Id. at 366. Since the State was not required to establish intent, the court held that the prior act evidence was not relevant, and therefore inadmissible. Id. at 366-67.

Saltarelli differs from this case. In a child sexual assault case where the issue is whether the crime occurred, a pattern of past behavior is probative of a plan to fulfill sexual compulsions. DeVincentis, 150 Wn.2d at 17-18. Here, Larson was charged with first degree child molestation. Intent was an issue because the State had to prove that Larson's contact with E.V. was "done for the purpose of gratifying sexual desires." The evidence was properly admitted and commented

on to show a pattern of touching for the purpose of sexual gratification. The court gave a limiting instruction to the jury that the evidence could not be considered to prove the character of Larson in order to show that he acted in conformity with the prior allegations. We find that the trial court did not abuse its discretion in admitting the evidence for a non-propensity purpose.

IV. Prejudice Versus Probative Value

Finally, Larson argues that the trial court abused its discretion in admitting all of the prior acts without weighing the prejudicial effect of each act separately. He argues that the L.C. allegations were stale, the S.A. allegations were pending, and the C.S. allegations had been rejected by a jury. Then, he argues that it was unfairly prejudicial when the prosecutor invited the jury to find that Larson's criminal behavior was escalating, with the public assault of C.S.

Substantial probative value is needed to outweigh the prejudicial effect of ER 404(b) evidence. DeVincentis, 150 Wn.2d at 23. Legitimate factors to consider include the need for the evidence, the age of the victim, the secrecy surrounding sex abuse offenses, the vulnerability of the victims, the absence of physical proof, and the lack of confidence in the ability of a jury to assess the credibility of a child witness. Id.

Here, Larson does not initially cite to authority to support his assertion that the trial court erred in weighting the probative value of the prior acts together. A party must support the issues it presents for review with argument, citations to legal authority, and references to relevant parts of the record. RAP 10.3(a)(6).

Then, in his reply brief, Larson cites to State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996). In Carleton, this court found error when the trial court failed, on the record, to weigh the consequences of admitting ER 404(b) evidence and make a conscious determination to admit or exclude the evidence. Id. at 685-86.

In this case, the trial court weighed the consequences of the ER 404(b) evidence on the record. It noted that the prior incidents were prejudicial, and that there was danger the jury may use the evidence as propensity evidence. The court, however, went through a thorough explanation of why the probative value outweighed the prejudicial effect.[3] We find that the trial court weighed the prejudice against the probative value, and further, that the record supports that the probative value of the ER 404(b) evidence outweighs the prejudice.

Larson argues that L.C.'s allegations were stale. In Gresham, the court allowed evidence of past acts that occurred as far back as 32 years before the defendant's trial. 173 Wn.2d at 415. In Lough, the court found that when similar acts have been performed repeatedly over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan. 125 Wn.2d at 860. L.C. testified about acts that occurred in 1993 or 1994. The trial court did not abuse its discretion in finding that their probative value outweighed their prejudicial effect because of the common scheme.

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[3] Further, a failure to articulate the balance between probative value and prejudice does not necessarily require reversal. Carleton, 82 Wn. App. at 686. It is harmless error if the record is sufficient for this court to determine that, if the trial court had considered the relative weight of probative value and prejudice, it would still have admitted the evidence. Id.

Larson contends that it was error to admit the S.A. allegations, which were pending at the time of trial. Larson moved for reconsideration of the ER 404(b) ruling as to S.A.'s allegations, on the basis that the acts involved unresolved charges. The trial court, in denying that motion, noted that the charges had been dismissed without prejudice. It found that it was not error to admit the evidence under 404(b), as crimes that had not been yet charged or litigated. The trial court also found S.A.'s testimony especially probative because "it is probably the clearest indication of an intent to garner sexual gratification by the Defendant." The court also noted that the S.A. incident was closer to the time of the incident with E.V. than the incident with L.C., and that it involved many of the similarities with the charged crime that would indicate a common scheme.

As discussed above, the court was not barred from admitting C.S.'s allegations, for which Larson was acquitted.

Larson argues next that the evidence was unfairly prejudicial where it suggested that Larson's criminal behavior was escalating. In Kennealy, the defendant's criminal behavior also changed from involving close relatives to children he did not know in his apartment complex. 151 Wn. App. at 868. Here, the evidence was within the parameters of Kennealy.

The trial court found that the prior acts demonstrated a common scheme or plan. It found that the evidence was relevant to prove that the touching was for the purpose of sexual gratification. And, the trial court found that the probative value of the evidence outweighed the prejudice.

We find that the prior acts were properly admitted under ER 404(b) for demonstrating a common scheme or plan.

We affirm.

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. 74998-6-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 Mary Kathleen Webber
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Snohomish County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: March 6, 2018
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