SUPREME COURT NO. 100681-1
COURT OF APPEALS NO. 82035-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

V.

LESLIE STACH

Appellant.

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

The Honorable Bruce I. Weiss, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHERS

A. IDENTITY OF PETITIONER

Petitioner Leslie Stach asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of State v. Leslie Stach, COA No. 82035-4-I, filed on January 24, 2022, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

In the state's prosecution against Stach for alleged rape of his 11-12 year-old niece (C.C.), the court admitted – over defense counsel's objection – evidence Stach allegedly raped a peer-aged, 22 year-old woman (Tashina Brown) several years earlier. Not only did the court admit the Brown allegation as relevant to whether Stach was acting pursuant to a common scheme or plan in allegedly raping C.C. but also as relevant to C.C.'s credibility. Division One found no error

1. Whether this Court should accept review because Division One's decision in this case extends the bounds of ER 404(b)'s common scheme or plan exception beyond its breaking point such as to constitute an issue of substantial public interest that should be reviewed by this Court? RAP 13.4(b)(4)?

2. Whether this Court should accept review because Division One's decision conflicts with this Court's precedent on ER 404(b)'s narrow credibility exception to such an extent it violates due process and amounts to an issue of substantial public interest that should be reviewed by this Court? RAP 13.4(b)(1), (3), (4)?

D. STATEMENT OF THE CASE

C.C. alleged that on three occasions in the summer of 2015 or 2016, when C.C. was 11 or 12 years old, her 31-year-old uncle Leslie Stach came into her room in the middle of the night and had vaginal intercourse with her. CP 102, 121. C.C. pretended to be asleep. CP 121-22.

Purportedly, when it was over, C.C. pretended to sleepwalk out of the room. CP 122-23.

C.C. did not make any allegations until several years later in 2019. CP 121. C.C. "said she did not want to tell anyone because she was worried about protecting her grandmother's in-home daycare and she was worried about Stach's children whom she loved dearly. CP 122-23. When the incidents allegedly occurred, C.C. lived with her grandmother Bobbi Easley at 9008 57th Drive NE In Marysville, as did Stach (Easley's son), Stach's wife Amanda Peterson and their three children. CP 122.

In advance of trial,[1] the state moved to admit evidence Stach was accused of rape in 2012 by Peterson's best friend at the time, 22-year-old Tashina Brown.[2] CP 103-201. The state claimed the Brown allegation was relevant under ER 404(b)'s common

[1] The state charged Stach with three counts of second degree rape of a child. CP 67-68.

scheme or plan exception. CP 113. The state also argued Brown's allegation was also admissible as relevant to C.C.'s credibility. 1RP 9-16.

According to Brown's police report:

> On 3/2/12, [Brown] reported that she had been raped by her best friend's boyfriend, Leslie Stach, on 2/27/12. [Brown's] best friend, Amanda Peterson, and Leslie live with Leslie's family at 9008 57th Ave NE in Marysville. [Brown] stays the night frequently at that residence. There is a room that is detached from the main house where [Brown] sometimes sleeps. On the evening of 2/25/12, Brown and Leslie stayed out in the detached room together drinking Whiskey. [Brown] reported getting extremely intoxicated and passing out. [Brown] said she woke up naked and Leslie was on top of her having sexual intercourse with her. [Brown] told Leslie to "stop" and "get off" several times. Leslie just started thrusting faster and told [Brown] she asked for it.

CP 166.

Brown told police she and Stach frequently drank together. CP 171. Nonetheless, Brown did not like Stach

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[2] The state sought to admit other 404(b) evidence but only the Brown allegation was admitted.

"because he drinks too much, yells at the kids, doesn't work, and plays video games all the time." CP 170.

Brown told Peterson about the alleged incident the morning after it allegedly happened, but Peterson did not believe her. CP 168. In later emails, Peterson accused Brown of lying because of her dislike of Stach. CP 185.

When investigated in 2012, Stach denied the allegation. CP 106. The incident was never prosecuted. CP 106.

Defense counsel responded the Brown allegation could not be proved by a preponderance of the evidence and that it was in no way similar to the allegations brought by C.C. to qualify as common scheme or plan evidence. CP 83-85; 1RP 19. Defense counsel also disagreed the evidence could be admitted as relevant to C.C.'s credibility:

> What the state has done with several of the cases – and your Honor has commented

> on it already[3] – is that they've taken the same victim and said you can talk about uncharged counts and charged counts to do away with the credibility issue. This is not the same. It's not the same person. There is no continuation of physical abuse that would allow for the other evidence to be admissible to show common scheme or plan or to bolster the witness's credibility.
>
> All the cases cited that I've read that talk about same victim, uncharged incidents were admitted to show the victim's credibility. No case says you get to introduce all these prior acts for propensity evidence; therefore, the victim has more credibility. In fact, they say just the opposite. When you're talking about using it for propensity – which she is – that's when it's barred.

1RP 20-21.

The court ruled the Brown allegation was admissible under ER 404(b)'s common scheme or plan exception. 1RP 136-37. The court ruled the Brown allegation was also relevant to C.C.'s credibility. RP 140-41.

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[3] During the state's presentation, the court remarked that the cases that allowed prior bad acts to be admitted as relevant to the victim's credibility involved the victim him or herself. Not a completely different person. 1RP 10.

At trial, C.C. and Brown both testified as anticipated. RP 426-34, 439-46, 450-59 (C.C.); RP 759, 761-68 (Brown). Over defense counsel's objection (RP 745; 2RP 13, 15, 17), the court instructed the jury as follows:

> Certain evidence has been admitted in this case for only a limited purpose. You may have heard evidence from T.B. concerning alleged misconduct by the defendant on dates other than that of the charged incidents. This evidence may be considered by you only to the extent you find it relevant to issues of whether the defendant was acting pursuant to a common scheme or plan and regarding the credibility of witnesses. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 56 (Instruction 6).

The jury convicted Stach of three counts of second degree rape of a child. CP 67-68.

On appeal, Stach argued the court erred in admitting the inadmissible propensity evidence under ER 404(b)'s common scheme or plan exception. Brief of Appellant (BOA) at 12-23. Stach also argued the court

erred in admitting the prejudicial propensity evidence under ER 404(b)'s credibility exception. BOA at 23-32. The state essentially conceded on this latter point but argued the issue was moot because the evidence was still relevant under the common scheme or plan exception. Brief of Respondent (BOR) at 53. But Stach pointed out the "limiting" instruction allowed the evidence to be considered for C.C.'s and other witnesses' credibility. Reply Brief of Appellant (RB) at 18. That alone necessitated reversal. Id.

The Court of Appeals disagreed on both counts. First, the court found the Brown allegation admissible to establish a common scheme or plan:

> The trial court did not err by so reasoning. The incident involving T.B. and the incidents involving C.C. occurred in the same residence. With both T.B. and C.C. Stach had consumed alcohol prior to engaging in sexual intercourse with them. C.C. had either been asleep or preparing to fall asleep on all three occasions. Likewise, T.B. had fallen asleep after consuming alcohol. Stach also removed

> the clothing of both T.B. and C.C. before engaging in sexual intercourse with them. Moreover, both the incident with T.B. and the incidents with C.C. involved the same sexual act, namely vaginal penetration with Stach's penis. No other sexual act was committed in any of the instances. Finally both T.B. and C.C. had close relationships to Stach: Stach was C.C.'s uncle and C.C. was close to Stach's three children, whereas Stach's girlfriend, Peterson, had been the best friend to T.B. since elementary school. These relationships were of a type that might cause the victim to choose not to report the sexual misconduct.
>
> These significant similarities are naturally explained by Stach having a general plan.

Appendix at 8.

And because the trial court – in determining admissibility of the proffered 404(b) evidence – may consider such evidence as it relates to the credibility of the complainant, the appellate court reasoned the trial court did not err in instructing the jury it could consider the evidence as relevant to credibility as well. Appendix at 9.

According to the court:

As already explained, when determining whether evidence of a prior bad act is admissible, the trial court must, among other things, "weigh the probative value against the prejudicial effect." [State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)]. When a trial court, under the common scheme or plan exception to ER 404(b), balances the probative value and prejudicial effect of evidence of a sexual assault regarding a *prior* victim, the trial court may properly consider such evidence as it relates to the credibility of the *complaining victim*. See e.g. [State v. DeVincentis, 150 Wn.2d 11, 23-24, 74 P.3d 119 (2003)]; State v. Scherner, 153 Wn. App. 621, 658, 225 P.3d 248 (2009); State v. Sexsmith, 138 Wn. App. 497, 506, 157 P.3d 901 (2007).

In ruling that the probative value of the allegation of Stach's rape of T.B. outweighed its prejudicial effect, the trial court reasoned that the evidence was, among other things, relevant to the jury's ability to evaluate C.C.'s credibility:

> [T]his type of evidence is strongly probative because of the issues surrounding child sex abuse, victim vulnerability, the frequent acts and the physical evidence of sexual abuse, the program connected to such accusations and victims of willingness to testify, *and a lack of confidence in a jury's ability to determine a child witness's credibility*.

(Emphasis added).

> As the cited authority demonstrates, the trial court did not err by so reasoning. See DeVincentis, 150 Wn.2d at 23; Scherner, 153 Wn. App. at 658; Sexsmith, 138 Wn. App. at 506.
>
> Nor did the trial court err by instructing the jury it could consider T.B.'s allegation with regard to C.C.'s credibility. Here's C.C.'s veracity was the central issue in the case. One task before the jury was to evaluate the credibility of both T.B. and C.C. In so doing, the jury would naturally compare T.B.'s account of being raped to C.C.'s accounts of being raped. Then, the jury would naturally consider C.C.'s testimony against the requirements of the to-convict instructions given. In making its judgments, the jury could properly consider its view of T.B.'s allegation in evaluating C.C.'s credibility. See Scherner, 153 Wn. App. at 658.

Appendix at 9-10.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. THE COURT OF APPEALS DECISION EXTENDS THE BOUNDS OF ER 404(b)'s COMMON SCHEME OR PLAN EXCEPTION BEYOND ITS BREAKING POINT.

ER 404(b)'s common scheme or plan exception may arise in two instances. First, "where several crimes

constitute constituent parts of a plan in which each crime is but a piece of a larger plan." State v. Lough, 125 Wn.2d 847, 855, 889 P.2d 487 (1995). For instance, committing a burglary to steal a gun to use in a robbery. Id. This instance is not applicable here. BOA at 13-14; Brief of Respondent (BOR) at 47-48.

The second instance is where an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes. Lough, 125 Wn.2d at 855. Under this instance, for allegations of misconduct to be admissible, the different acts must have a high degree of similarity. DeVincentis, 150 Wn.2d at 19. "[T]he evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations." Id. In sum, admission of common scheme or plan evidence

under ER 404(b) requires more than random similarities or similar results, "the degree of similarity . . . must be substantial." DeVincentis, 150 Wn.2d at 20.

Here, the only similarities between Brown's accusation and C.C.'s are completely random. In finding similarity, the appellate court relied on the fact both sets of accusations occurred at the same Marysville home. Appendix at 8. However, that is where Stach lived, as did C.C. And Brown spent a lot of time there. There was no evidence Stach purposely picked this location. It just happened to be where all involved spent a lot of time.

The appellate court also relied on the fact Stach had been drinking during the accusations. However, the evidence suggested Stach was a drinker. In her report to police, Brown reported she did not like Stach "because he drinks too much." CP 170. This is just how Stach is; it is not part of a plan.

The appellate court also relied on the fact C.C. was asleep or preparing to sleep and Brown was passed out. But this demonstrates dissimilarity. Stach and Brown were adults partying together. Stach did not seek out Brown. She was in the recreation room with Stach by choice waiting for Peterson. In contrast, Stach purportedly sought out C.C. in her bedroom.

The appellate court also relied on the fact the same sex act – vaginal penetration with a penis – was allegedly involved in both. But this is a mere similarity in result. As is the allegation Stach removed both C.C.'s and Brown's clothing. Such will most often be the case.

The last factor relied upon by the appellate court – Stach's relationship to Brown compared to his relationship to C.C. also shows dissimilarity rather than similarity. While Stach may have had relationships with both persons, Brown was a peer-aged acquaintance/friend; whereas C.C. is Stach's minor biological niece. Stach did

not have any position of authority or familial relationship with Brown.

The court of appeals decision opens the flood gates to admitting almost any alleged prior sexual misconduct in a child sex case. The court of appeals decision in this case strains credibility and should be checked. RAP 13.4(b)(4).

2. THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S PRECEDENT ON ER 404(b)'s NARROW CREDIBILITY EXCPETION TO SUCH AN EXTENT IT VIOLATES DUE PROCESS.

Over defense counsel's objection, the court admitted Brown's rape allegation as relevant not only to whether there was a common scheme or plan but to the credibility of the witnesses. CP 56. In no case has the appellate court ever admitted prior bad acts committed against someone *other than the complainant* as relevant

to the complainant's credibility. BOA at 23.[4] The reason being in that instance, the evidence is being admitted for its sheer propensity purpose, which is barred under ER 404(b). Such evidence is relevant only to show the defendant has an abnormal bent and therefore more likely to have committed the current charge.

Contrary to the Court of Appeals, this Court's decision in Scherner does not support the trial court's decision or instruction allowing the jury to consider the Brown allegation to the extent the jury may find it relevant to the credibility of the witnesses. In Scherner, this Court affirmed the admission of prior bad acts involving different victims under the common scheme or plan exception.

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[4] See e.g. State v. Grant, 93 Wn. App. 98, 920 P.2d 609 (1996) (defendant's prior assaults of complainant relevant to complainant's credibility where she gave inconsistent statements minimizing Grant's violence towards her); State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008) (adopting Grant); State v. Gunderson, 181 Wn.2d 916, 337 P.3d 1090 (2014) (prior acts of domestic violence between defendant and the complainant admissible when the complainant recants).

Scherner, 173 Wn.2d at 423. There was no instruction the jury could consider the prior bad acts evidence for determining the credibility of the current complainant. Id. at 424. The same is true of Sexsmith, 138 Wn. App. 497, where prior bad acts involving a different victim were admitted to show a common scheme or plan, not credibility.

There is no case that stands for the proposition that once the evidence is determined admissible to show a common scheme or plan it is also admissible for the complainant's credibility. The appellate court decision makes a gigantic leap that is unsupported by this Court's precedent. RAP 13.4(b)(1).

This Court should also accept review because the appellate court's unprecedented leap also violates due process. RAP 13.4(b)(3). Under the United States Constitution, the Sixth and Fourteenth Amendments guarantee persons accused of a crime

the right to a fair trial. State v. Davis, 141 Wn.2d 798, 824–25, 10 P.3d 977 (2000). The Washington Constitution provides similar safeguard. CONST. ART. I, §§ 3, 22.

The Supreme Court has not held that admission of prior acts evidence to show propensity would necessarily violate a defendant's right to a fair trial. The relevant opinions do, however, "stand[ ] for the proposition that a trial is fundamentally fair, and thus consistent with due process, when uncharged misconduct evidence is admitted for a *non-character* or sentencing purpose." M. Sheft, Federal Rule of Evidence 413: A Dangerous New Frontier, 33 Am.Crim. L.Rev. 57, 79 (1995) (emphasis added); see Estelle v. McGuire, 502 U.S. 62, 69 & 75 n. 5, 112 S. Ct. 475, 480–81 & 484 n. 5, 116 L.Ed.2d 385 (1991) (in habeas corpus case, upholding admission of evidence that victim suffered from "battered child syndrome" to establish intent, expressly reserving

"whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime").

In Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967), the Supreme Court rejected a due process challenge to Texas habitual criminal statutes that permitted introduction during trial of a defendant's convictions for the same or similar offense, with a limiting instruction to the jury. A partially dissenting opinion in that case did state that "our decisions ... suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause." Id. at 574, 87 S. Ct. at 659 (Warren, C.J., dissenting in part, concurring in part).

In essence, this is what the Court of Appeals decision allows in this case – admission of prior crimes for

no purpose other than to show criminal disposition. This violates due process and also conflicts with this Court's precedent. RAP 13.4(b)(1), (3), (4).

F. CONCLUSION

For the reasons stated above, this Court should accept review. RAP 13.4(b)(1), (3), (4).

This document contains 3,074 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 23rd day of February, 2022.

Respectfully submitted,

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APPENDIX

FILED
1/24/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LESLIE WILLIAM STACH, Appellant.	DIVISION ONE No. 82035-4-I UNPUBLISHED OPINION

DWYER, J. — Leslie Stach appeals from his convictions of three counts of rape of a child in the second degree. Stach contends that the trial court erred by admitting certain evidence under the common scheme or plan exception to ER 404(b). Additionally, Stach asserts that the trial court erred both by ruling that the ER 404(b) evidence was relevant to the credibility of the complaining witness and by instructing the jury that it could consider the evidence when evaluating that witness's credibility. Furthermore, in his statement of additional grounds, Stach avers that (1) the trial court erred by allowing the State to file a second amended information during the trial proceeding, (2) his trial counsel's representation was constitutionally inadequate, and (3) he was not informed of the Miranda[1] rights on several occasions both before and after he was arrested. Because Stach fails to establish an entitlement to relief on any of these claims, we affirm the convictions.

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

However, Stach also contends that the trial court mistakenly ordered him to pay supervision fees as determined by the Department of Corrections (DOC). Because the record indicates that the trial court waived the requirement that he pay supervision fees, we remand for the trial court to strike this requirement from the judgment.

I

During the summer before her sixth grade year, C.C. lived in a house owned by her grandmother. C.C. was 11 years old. Also during this time period, C.C.'s uncle, Leslie Stach, resided in the garage of the house with his girlfriend, Amanda Peterson, and his three children. C.C. testified that, during that summer, Stach raped her on three occasions.

On the first occasion, C.C. was "half asleep" in her bedroom. She heard the sound of a creak outside her bedroom door and then the sound of the doorknob move. C.C. then saw Stach enter the room. Shortly thereafter, Stach sat on the edge of C.C.'s bed and turned C.C., who was lying on her side, onto her stomach. C.C. smelled alcohol on Stach's breath. Stach then pulled C.C.'s shorts down to her ankles. Afterward, he "went on his knees and went over" C.C. Stach then put his penis inside C.C.'s vagina and started to move "[u]p and down." While Stach was moving up and down, his penis "was going in and out" of C.C.'s vagina. After approximately 15 minutes, Stach stopped and "laid against the wall." C.C. then stood up and walked to the bathroom. When she returned to her bedroom, Stach was no longer in the room.

On the next occasion, C.C. was in her bedroom, preparing to go to sleep. Again, Stach entered the bedroom and sat on the edge of C.C.'s bed. Stach then got into C.C.'s bed. C.C. was initially lying on her back, but Stach moved her onto her stomach. As on the first occasion, Stach smelled of alcohol. Stach then pulled C.C.'s leggings and underwear down to her ankles. Thereafter, Stach put his penis into C.C.'s vagina. C.C. pretended to be asleep. Stach then moved his penis in and out of C.C.'s vagina. He continued to do so for approximately 10 minutes. Afterward, C.C. again stood up and walked to the bathroom. When she returned to her bedroom, Stach was no longer in the room.

On the third occasion, C.C. was lying in bed. Stach entered C.C.'s room, removed his pants, and "climbed into bed with" her. Again, C.C. smelled alcohol on Stach. Stach then removed C.C.'s pants and grabbed her by the hips, pulling her hips upward. Stach then put his penis inside C.C.'s vagina. While Stach was positioned on his knees, he pulled C.C.'s body toward his body while moving his penis in and out of her vagina. After approximately 15 minutes, Stach laid down on the bed and fell asleep. C.C. then walked to the living room and watched television. Sometime later, Peterson entered the house and discovered Stach in C.C.'s bedroom. Peterson then apologized to C.C. and walked Stach out of the room.

Several years later, C.C. informed one of her friends that Stach had raped her. C.C. testified that she was initially hesitant to inform someone else about what her uncle had done. In particular, C.C. was worried that, by coming forward, her relationships with Stach's children and her grandmother would

suffer. A few weeks after telling her friend that Stach had raped her, C.C. informed her mother about what had occurred.

The State charged Stach with three counts of rape of a child in the second degree. Prior to trial, the State filed a motion seeking a preliminary ruling that certain evidence was admissible pursuant to ER 404(b). In this motion, the State asserted, among other things, that Stach had, on a prior occasion, raped another person, T.B. The State claimed that Stach's actions toward T.B. demonstrated that, when Stach raped C.C., he acted pursuant to a common scheme or plan.

Attached to the State's motion were various documents, which indicated that T.B. had reported to the police that Stach had raped her in 2012. An incident report that was attached to the motion stated that the rape occurred at the same residence where C.C. was alleged to have been raped. This report stated that, when T.B. was 21 years old, she and Stach were drinking alcohol at the residence. According to a supplemental report, Stach poured T.B. two drinks mixed with soda and whiskey. These drinks were "extremely strong" and caused T.B. to become intoxicated. After some time, T.B. "passed out." Prior to passing out, T.B. had been fully clothed, wearing jeans, a shirt, a sweatshirt, and tennis shoes.[2]

When T.B. awakened, according to the supplemental report, she was naked. Stach was on top of her and "his penis was inside her." T.B. then asked Stach what he was doing and told him to stop. Stach "began pounding on her really hard" and told T.B. "that she asked for it." Eventually, Stach stopped and

[2] T.B. suffered from learning disabilities. She was a frequent overnight guest of Peterson's.

"got off" of T.B. The supplemental report also stated that T.B. and Peterson had been best friends since elementary school.

Defense counsel submitted a brief in opposition to the admission of any evidence regarding T.B.'s allegation that Stach had raped her. Following a hearing on the motion, the trial court granted the State's motion insofar as it sought the admission of the evidence indicating that Stach had, on a prior occasion, raped T.B. The trial court reasoned that the incident involving T.B. was substantially similar to the incidents involving C.C. so as to indicate that, by raping C.C., Stach acted pursuant to a common scheme or plan.

The case proceeded to a jury trial. During the trial, T.B. testified with regard to her allegation that Stach had raped her. The jury found Stach guilty as charged. The trial court imposed an indeterminate sentence of 245 months of incarceration to life for each count, to run concurrently.

Stach appeals.

II

Stach first contends that the trial court erred by admitting evidence of his prior sexual misconduct regarding T.B. This is so, Stach asserts, because the prior bad act evidence was not sufficiently similar to the incidents involving C.C. as to demonstrate that Stach acted pursuant to a common scheme or plan. We disagree.

A

The correct interpretation of an evidentiary rule is reviewed de novo as a question of law. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

"Once the rule is correctly interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. DeVincentis, 150 Wn.2d at 17. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Taylor, 193 Wn.2d 691, 697, 444 P.3d 1194 (2019).

B

As a general rule, "[a]ll relevant evidence is admissible." ER 402. One exception to this general rule is provided by ER 404(b), which states:

> 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.

It is well established that evidence of other misconduct may be admitted to show that the defendant acted pursuant to a common scheme or plan. In sex offense cases, evidence of "the existence of a design to fulfill sexual compulsions evidenced by a pattern of past behavior" is relevant to whether the crime occurred. DeVincentis, 150 Wn.2d at 17-18. Admission of evidence for this purpose "requires substantial similarity between the prior bad acts and the charged crime." DeVincentis, 150 Wn.2d at 21. "Sufficient similarity is reached only when the trial court determines that the 'various acts are naturally to be explained as caused by a general plan.'" DeVincentis, 150 Wn.2d at 21 (quoting State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995)). Notably, however, there is no uniqueness requirement; the similarities need not "be atypical or

unique to the way the crime is usually committed." DeVincentis, 150 Wn.2d at 13.

In determining whether evidence of other misconduct is admissible under ER 404(b),

> the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

"This analysis must be conducted on the record, and if the evidence is admitted, a limiting instruction is required." State v. Arredondo, 188 Wn.2d 244, 257, 394 P.3d 348 (2017).

C

Turning to the evidentiary challenge at issue, the trial court explained its ruling that evidence regarding Stach's prior sexual assault of T.B. was admissible to establish a common scheme or plan:

> This incident involved the best friend of the defendant's girlfriend, Amanda. TB became intoxicated and passed out. TB was not able to consent to the sexual intercourse based on her intoxication.
>
> The defendant believed that CC was asleep, and therefore during the time of the alleged abuse in this case, she could not have consented. The defendant had also been consuming alcohol in both instances. Both assaults took place in the same residence. The residence – the same for TB and CC was in the defendant's residence. As indicated, CC also reported a smell of alcohol on the defendant's breath.
>
> The Court finds that these incidents are remarkedly and substantially similar to permit the testimony as to common scheme or plan and show an overarching plan by the defendant. Both of the victims were in a position where they could not consent to sexual intercourse. Both incidents involved persons with whom the defendant had a close relationship. Both incidents happened in the

> same residence, and both incidents involve the act of sexual intercourse.

The trial court did not err by so reasoning. The incident involving T.B. and the incidents involving C.C. occurred in the same residence. With both T.B. and C.C., Stach had consumed alcohol prior to engaging in sexual intercourse with them. C.C. had been either asleep or preparing to fall asleep on all three occasions. Likewise, T.B. had fallen asleep after consuming alcohol. Stach also removed the clothing of both T.B. and C.C. before engaging in sexual intercourse with them. Moreover, both the incident with T.B. and the incidents with C.C. involved the same sexual act, namely vaginal penetration with Stach's penis. No other sexual act was committed in any of the instances. Finally, both T.B. and C.C. had close relationships to Stach: Stach was C.C.'s uncle and C.C. was close to Stach's three children, whereas Stach's girlfriend, Peterson, had been the best friend to T.B. since elementary school. These relationships were of a type that might cause the victim to choose not to report the sexual misconduct.

These significant similarities are naturally explained by Stach having a general plan. The evidence was properly admitted to show this common scheme or plan. Accordingly, the trial court did not err by admitting the challenged evidence.

III

Stach next asserts that the trial court erred both by reasoning that T.B.'s allegation was probative as to C.C.'s credibility and by instructing the jury that it could consider the allegation with regard to C.C.'s credibility. Again, we disagree.

As already explained, when determining whether evidence of a prior bad act is admissible, the trial court must, among other things, "weigh the probative value against the prejudicial effect." Vy Thang, 145 Wn.2d at 642. When a trial court, under the common scheme or plan exception to ER 404(b), balances the probative value and prejudicial effect of evidence of a sexual assault regarding a *prior* victim, the trial court may properly consider such evidence as it relates to the credibility of the *complaining* victim. See, e.g., DeVincentis, 150 Wn.2d at 23-24; State v. Scherner, 153 Wn. App. 621, 658, 225 P.3d 248 (2009); State v. Sexsmith, 138 Wn. App. 497, 506, 157 P.3d 901 (2007).

In ruling that the probative value of the allegation of Stach's rape of T.B. outweighed its prejudicial effect, the trial court reasoned that the evidence was, among other things, relevant to the jury's ability to evaluate C.C.'s credibility:

> [T]his type of evidence is strongly probative because of the issues surrounding child sex abuse, victim vulnerability, the frequent acts and the physical evidence of sexual abuse, the program connected to such accusations and victims of willingness to testify, *and a lack of confidence in a jury's ability to determine a child witness's credibility*.

(Emphasis added.)

As the cited authority demonstrates, the trial court did not err by so reasoning. See DeVincentis, 150 Wn.2d at 23; Scherner, 153 Wn. App. at 658; Sexsmith, 138 Wn. App. at 506.

Nor did the trial court err by instructing the jury that it could consider T.B's allegation with regard to C.C.'s credibility.[3] Here, C.C.'s veracity was the central

[3] The trial court's written instruction provided:

Certain evidence has been admitted in this case for only a limited purpose. You may have heard evidence from T.B. concerning alleged

issue in the case. One task before the jury was to evaluate the credibility of both T.B. and C.C. In so doing, the jury would naturally compare T.B.'s account of being raped to C.C.'s accounts of being raped. Then, the jury would naturally consider C.C.'s testimony against the requirements of the to-convict instructions given. In making its judgments, the jury could properly consider its view of T.B.'s allegation in evaluating C.C.'s credibility. See Scherner, 153 Wn. App. at 658.

Accordingly, Stach's assignment of error fails.

IV

In his statement of additional grounds, Stach raises several arguments as to why he is entitled to appellate relief. Because Stach fails to demonstrate that he was prejudiced in any manner at trial, we hold that Stach is not entitled to appellate relief on any of these claims.

A

The first claim that Stach raises in his statement of additional grounds is that the trial court erred by granting the State's motion to file a second amended information during the course of the trial proceeding. We disagree.

We review a decision to grant a motion to amend an information for abuse of discretion. State v. Brooks, 195 Wn.2d 91, 96, 455 P.3d 1151 (2020).

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misconduct by the defendant on dates other than that of the charged incidents. This evidence may be considered by you only to the extent you find it relevant to issues of whether the defendant was acting pursuant to a common scheme or plan and regarding the credibility of the witnesses. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Jury Instruction 6.

CrR 2.1(d) allows an amendment of the information "any time before verdict or finding if substantial rights of the defendant are not prejudiced." "Midtrial amendment of a criminal information has been allowed where the amendment merely specified a different manner of committing the crime originally charged . . . or charged a lower degree of the original crime charged." State v. Pelkey, 109 Wn.2d 484, 490-91, 745 P.2d 854 (1987) (citing State v. Gosser, 33 Wn. App. 428, 656 P.2d 514 (1982); State v. Brown, 74 Wn.2d 799, 447 P.2d 82 (1968)). Furthermore, our Supreme Court has explained that

> "[c]ases involving amendment of the charging date in an information have held that the date is usually not a material element of the crime. Therefore, amendment of the date is a matter of form rather than substance, and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant."

Brooks, 195 Wn.2d at 98-99 (quoting State v. DeBolt, 61 Wn. App. 58, 61-62, 808 P.2d 794 (1991)).

Indeed, in Brooks, the court affirmed a trial court's ruling that granted the State's motion to file, after both parties had presented all of their evidence, an amended information that changed the range of the charging date of the offense. 195 Wn.2d at 96, 98. In so doing, our Supreme Court reasoned that the date of the offense did not constitute an essential element of the crime charged. Brooks, 195 Wn.2d at 98.[4]

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[4] In Brooks, the defendant was charged with child molestation in the third degree, which provides, in part:

> A person is guilty of child molestation in the third degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and the perpetrator is at least forty-eight months older than the victim.

RCW 9A.44.089(1).

Here, the State moved to file a second amended information after trial testimony revealed that Stach had raped C.C. in the summer of 2015. The second amended information changed, for each count, the range of the charging dates from April 27, 2016 through October 1, 2016, to April 27, *2015* through October 1, 2016. Because the date of the offense was not an essential element of the crimes charged,[5] the second amended information did not change the essential elements of these crimes. Moreover, when the State filed its motion, defense counsel did not raise any objection to the amendment.

Accordingly, the trial court did not err by allowing the State to file the second amended information.

B

Next, Stach asserts that his trial counsel provided "inadequate representation."[6] This is so, according to Stach, because his trial counsel, prior to the commencement of trial, "instructed [him] not to contact" another attorney whom Stach asserts that he had already retained.[7] There are several reasons why Stach is not entitled to appellate relief on this claim.

First, Stach does not provide any citation to the record in support of this claim. See RAP 10.10(c). It appears that this claim (if it is a claim that he was denied the assistance of private counsel of choice) relies on facts that are not

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[5] In both the amended information and the second amended information, Stach was charged with three counts in violation of RCW 9A.44.076, which provides:

> (1) A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and the perpetrator is at least thirty-six months older than the victim.
>
> (2) Rape of a child in the second degree is a class A felony.

[6] Statement of Additional Grounds at 1.

[7] Statement of Additional Grounds at 2.

within our record. As such, the issue presented cannot be resolved on direct appeal. See State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Moreover, to establish a claim of ineffective assistance of counsel, the defendant bears the burden to prove that

> (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

McFarland, 127 Wn.2d at 334-35

Stach does not claim that his attorney's performance at trial fell below an objective standard of reasonableness. Nor does he demonstrate how he was prejudiced by his trial counsel's actions. On the record presented, Stach makes no actual claim that his attorney acted below this standard of care. For these reasons, Stach is not entitled to appellate relief on this claim.

C

Stach also contends that he was not read the Miranda rights when a police detective attempted to interview him on two occasions before he was arrested. Stach also asserts that he was not read the Miranda rights after he was arrested. Because Stach does not contend that any unwarned statements were impermissibly admitted at trial, his claim fails.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. To assure that an accused is accorded this privilege against compulsory self-incrimination, the United States Supreme Court in

Miranda set forth procedural safeguards to be employed during custodial interrogation. Specifically, an accused must be clearly informed of his or her right to remain silent and right to counsel, either retained or appointed, and that any statements made can and will be used against the individual in court. Miranda, 384 U.S. at 467-72. The remedy for the failure to be informed of these rights is the exclusion of unwarned statements. United States v. Patane, 542 U.S. 630, 641-42, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (2004) (plurality opinion); Patane, 542 U.S. at 644-45 (concurring opinion).

Stach does not assert that any statements were admitted at trial in violation of Miranda. Additionally, Stach does not provide any citation to the record in support of his claim. See RAP 10.10(c). Accordingly, this assignment of error fails.

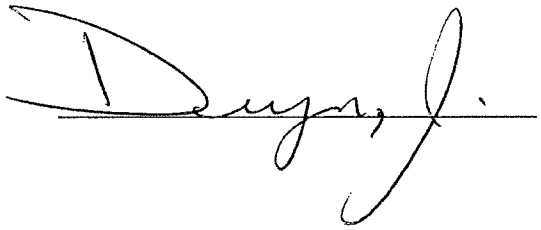
V

Finally, Stach contends that the trial court mistakenly ordered, as a condition of community custody, that he pay supervision fees as determined by the DOC. We agree.

RCW 9.94A.703(2)(d) provides that, "[u]nless waived by the court, as part of any term of community custody, the court shall order an offender to: . . . [p]ay supervision fees as determined by the department." Because the "'supervision fees are waivable by the trial court, they are discretionary [legal financial obligations].'" State v. Bowman, __ Wn.2d __, 498 P.3d 478, 489 (2021) (quoting State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199, review denied, 195 Wn.2d 1022 (2020)).

At sentencing, the trial court imposed a $500 victim assessment fee, "reserve[ed] the issue of restitution," and "waiv[ed] the other financial obligations in the case." However, the judgment and sentence signed by the judge required Stach to "pay supervision fees as determined by DOC." On remand, this requirement must be vacated. See Bowman, 498 P.3d at 489-90; Dillon, 12 Wn. App. 2d at 152.

The convictions are affirmed. The cause is remanded to the trial court to vacate the requirement of payment of supervision fees.



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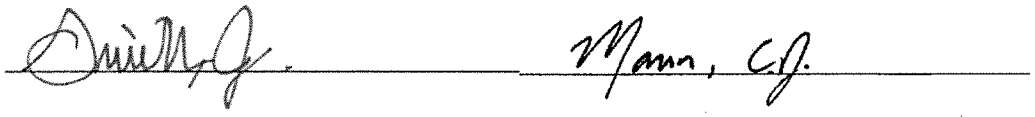

NIELSEN KOCH P.L.L.C.

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