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No. 68468-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

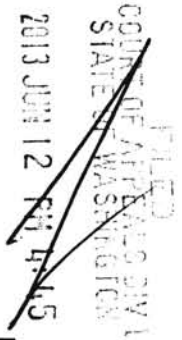
STATE OF WASHINGTON,

Respondent,

v.

KEVIN G. LARSON, SR.,

Appellant.



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

The Honorable Richard D. Eadie

REPLY BRIEF OF APPELLANT

SARAH M. HROBSKY
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT

1. The allegations of prior sexual misconduct did not establish a common scheme or plan and were highly inflammatory.

Evidence of prior bad acts is presumptively inadmissible, and the State bears a "substantial burden" to demonstrate admissibility pursuant to ER 404(b). State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Here, because the allegations of prior sexual misconduct did not establish a common scheme or plan, but were much more prejudicial than probative, the State did not meet its burden, and the admission of testimony regarding prior misconduct was in error.

a. Common scheme or plan.

To establish a common scheme or plan, the evidence of prior conduct must involve "markedly similar acts against similar victims in similar circumstances," not simply similar results. State v. Lough, 125 Wn.2d 847, 852, 860, 889 P.2d 487 (1995). No single allegation here meets these criteria, the only commonality being a familial relationship. The complaining witness, nine-year-old A.O., alleged that she was awakened when she felt "something" wet, her pajama bottoms were rolled up to her thigh, and Mr. Larson was licking her toes and legs, and touching her genital area and chest over her pajamas. 11/17/11 RP 101-02, 105-06, 107, 110, 112. By contrast, thirty-one-year-old Lyndsay

Wilhelm testified that, when she was eleven to thirteen years old, Mr. Larson twice rubbed his erection on her back, eighteen to twenty years previously. 11/16/11 RP 55; 11/17/11 RP 18, 21, 25. Thirty-three-year-old Shannon Smith testified that, when she was five years old, she awoke to Mr. Larson on top of her rhythmically rubbing on her leg, and, eight or so years later when she was eleven to thirteen years old, she awoke to Mr. Larson holding one of her breasts under her shirt, twenty-eight and twenty years previously respectively. 11/17/11 RP 64-65, 67, 69. The incidents described by Ms. Wilhelm and Ms. Smith were extremely remote in time, allegedly occurred when they were either very young or adolescent, significantly different stages of development from nine years of age, and involved markedly dissimilar acts from those alleged by A.O. Also by contrast, Ms. Owens testified that, when she was twenty-six years old, she awoke to Mr. Larson licking her genital area, over four years previously. 11/17/11 RP 132-33. Although the alleged conduct is similar to A.O.'s allegations, Ms. Owens was not a similar victim. The State's argument that there were "markedly similarities" between the allegations by A.O., Ms. Wilhelm, and Ms. Smith is simply incorrect. Br. of Resp. at 19.

The State dismisses the significant passage of time since Mr. Larson allegedly molested Ms. Wilhelm and Ms. Smith, citing State v. Sexsmith, 138 Wn. App. 497, 505, 157 P.3d 901 (2001). Br. of Resp. at

20 n.6. In Sexsmith, a witness testified that the defendant molested her thirteen years previously in a virtually identical manner and under virtually identical circumstances as in the pending charges; she was the same age as the complaining witness, the defendant allegedly showed pornographic videos to each, he asked each to touch his penis, and he took nude photographs of each of them. 138 Wn. App. at 505. Here, however, the passage of time is much longer and the manner and circumstances of the past allegations are similar in result only.

The State selects a few facts and ignores others alleged by each witness to create a composite of supposed similarity. Br. of Resp. at 18-19. There is no authority for this analysis. The proper analysis requires a comparison of each prior act, individually, to the case at bar act, to determine whether the acts shared sufficient features to support a finding of markedly similar acts, victims, and circumstances. See, e.g., Lough, 125 Wn.2d at 850-81 (at trial for indecent liberties and attempted rape based on allegations that the defendant sexually assaulted the victim after providing her a drugged drink, court properly admitted ER 404(b) evidence from four witnesses, each of whom testified that they were sexually assaulted by the defendant after he gave them a drugged drink); State v. Gresham, 173 Wn.2d 405, 414-15, 269 P.3d 207 (2012) (at trial for child molestation based on allegations the defendant abused the victim

beginning when she was five years old by stroking her genital area both over and under her clothes while she was in bed, court properly admitted ER 404(b) evidence from four witnesses, each of whom testified the defendant abused them when they were prepubescent by rubbing their genital area or performing oral sex while they were in bed). The State's composite analysis should be rejected.

b. Prejudice versus probative value.

The allegations of prior sexual misconduct were highly inflammatory and unfairly prejudicial. The potential for unfair prejudice is "at its highest" in sex abuse cases. State v. Salarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). In a close case, the evidence should be excluded. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

In Lough, the Court identified three factors to consider when deciding whether evidence of prior acts of sexual misconduct was more probative than prejudicial: 1) whether the evidence followed the same design or plan; 2) whether the evidence was necessary because the victim could not clearly remember the alleged incident; and 3) whether the court gave a limiting instruction to ensure the evidence was not used to prove the defendant's bad character. 125 Wn.2d at 864; see also State v. Krause, 82 Wn. App. 688, 696-97, 919 P.2d 123 (1996). None of these factors is present here; the evidence did not follow the same design or plan, A.O.

was able to provide detailed testimony, and the court did not give a properly limiting instruction. The State argues the evidence established a common scheme or plan, but fails to address the other two factors identified in Lough.

The allegations of prior sexual misconduct by Mr. Larson should have been excluded.

2. The instructional error was not harmless.

The trial court erroneously refused to give an instruction limiting the jury's consideration of the alleged prior bad acts to establish a common scheme or plan, as requested by the defense. When evidence is admissible for one purpose but not admissible for another purpose, the court must instruct the jury accordingly if requested to do so. ER 105; State v. Russell, 171 Wn.2d 118, 121, 249 P.3d 604 (2011). The rule is mandatory. State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990). Here, however, not only did the court decline to give a limiting instructed, as requested, the court erroneously instructed the jury it could use the evidence of prior misconduct "for its bearing on any matter to which it is relevant." CP 44 (Instruction No. 6).[1]

The State argues the error was harmless. Br. of Resp. at 23-28. An error is harmless only where it is "trivial, or formal, or merely

[1] This instruction comported with RCW 10.58.090, which was later ruled unconstitutional. Gresham, 173 Wn.2d at 426-32

academic, and in no way affected the outcome of the case." In re Detention of Pouncy, 168 Wn.2d 382, 391, 229 P.3d 678 (2010), quoting State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1978). The unfair prejudice of evidence of prior sexual misconduct cannot always be neutralized even with a proper limiting instruction. "Courts have often held that the inference of predisposition is too prejudicial and too powerful to be contained by a limiting instruction." Krause, 82 Wn. App. at 696.

Here, in closing argument, the prosecutor urged the jury to consider the evidence of prior sexual misconduct as proof that Mr. Larson was predisposed to commit child molestation, stating, "[T]his man molests children while they sleep." 11/22/11 RP 29. In rebuttal, the prosecutor repeated the incorrect instruction, and again argued Mr. Larson was predisposed to molest children.

> [T]he law allows victims of prior assaults to come in and testify about their experiences, and that you can use that testimony for any purpose that you deem relevant.
>
> ...
>
> Mr. Larson molests children. He has a physical, visceral response to having physical contact with children.

11/22/11/ RP 50-51.

The lack of a proper limiting instruction and the prosecutor's reliance on the incorrect instruction was not trivial or academic, and likely affected the verdict. Reversal is required.

3. The childhood photographs of Ms. Wilhelm and Ms. Smith were irrelevant and unfairly prejudicial.

The childhood photographs of Ms. Wilhelm and Ms. Smith were irrelevant to any fact of consequence, and therefore they were erroneously admitted pursuant to ER 402. At trial, the State offered the photographs to establish they were children and vulnerable at the time of their allegations. 11/17/11 RP 3-7. But the testimony that they were either five years old, or eleven to thirteen years old, in and of itself, established that they were children and inherently vulnerable. The photographs did not "make the existence of any fact that is of consequence to the determination of the action more or less probable." ER 401.

Even if marginally relevant, the photographs should have been excluded, on the grounds any probative value was substantially outweighed by undue prejudice and confusion of the issues. ER 403. Neither Ms. Wilhelm nor Ms. Smith was the alleged victim of the charged offense and vulnerability was neither an element of the charged offense nor an issue at trial. The photographs were merely an improper appeal to the sympathy and prejudice of the jury. See State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995) ("When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair

prejudice exists."). Admission of the photographs was an abuse of discretion.

The State now argues the photographs were properly admitted to show the physical "similarities" between A.O., Ms. Wilhelm, and Ms. Smith, at the time they were allegedly abused. Br. of Resp. at 31-32. However, the State did not offer a photograph of Ms. Smith when she was five years old, her age when she was purportedly first abused by Mr. Larson, the prosecutor did not argue the alleged victims were physically similar, and the record does not indicate any similarity. Accordingly, the State's rationale both at trial and on appeal is at odds with the evidence and does not establish the relevance of the photographs to any fact of consequence. The photographs were erroneously admitted.

B. CONCLUSION

The testimony of prior acts of sexual misconduct was improperly admitted because the allegations did not demonstrate a common scheme or plan, but was highly inflammatory. The failure to give a proper limiting instruction, as requested by the defense, was not harmless error. The childhood photographs of two State witnesses were improperly admitted because they were irrelevant in that they did not make any fact of consequence any more or less probable. For the foregoing reasons, and for the reasons set forth in the Brief of Appellant, Mr. Larson respectfully

requests this Court reverse his conviction for child molestation in the first degree.

DATED this 12th day of June 2013.

Respectfully submitted,

SARAH M. HROBSKY (12352)
Washington Appellate Project (91052)
Attorneys for Appellant

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DIVISION ONE

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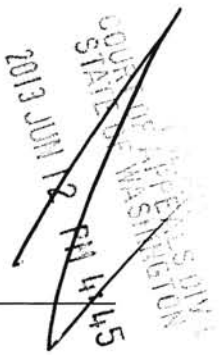

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF JUNE, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] AMY MECKLING, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF JUNE, 2013.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710