71822-3

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NO. 71822-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ERIC SCHNEIDER,

Appellant.

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

The Honorable Timothy Bradshaw, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to permit the jury to be unanimous as to an individual act of sexual intercourse for any of the charged counts.

2. Appellant is denied his constitutional right to an appeal and to an adequate record for appeal where the court did not preserve the record and it cannot be reconstructed.

3. The court erred in admitting evidence under ER 404(b).

4. Appellant assigns error to Finding No. 1.[1]

5. Appellant assigns error to Finding No. 2.

6. Appellant assigns error to Finding No. 3.

7. Appellant assigns error to Finding No. 4.

8. Appellant assigns error to Finding No. 5.

9. The court denied appellant due process, confrontation, and the right to present a defense when the court excluded evidence of the complaining witness's reports of prior abuse.

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[1] The court's Findings of Fact and Conclusions of Law re: ER 404(b), CP 93-96, are attached as Appendix A to this brief. Each challenged finding is quoted in full below.

10. Appellant was denied due process and the right to present a defense when the court excluded evidence that the complaining witness knew of the other witness's allegations against the defendant, and the prosecutor argued the jury should believe her because she and the other witness did not know each other.

11. Appellant assigns error to the court's finding and order on financial obligations:

> Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed.

CP 58, ¶ 4.2.

Issues Pertaining to Assignments of Error

1. Where the State charged multiple crimes requiring acts committed when the child was in certain age ranges, and presented evidence that sexual intercourse occurred multiple times within each age range, but offered no evidence distinguishing any one incident of sexual intercourse, is the evidence sufficient to permit a jury to be unanimous to a single act of sexual intercourse for any one count?

2. If the evidence does not permit even the prosecutor to identify a single incident of sexual intercourse for any one charge, is the evidence insufficient to guarantee the constitutional right to a unanimous jury verdict?

3. Does a common scheme or plan for a sex offense under ER 404(b) require evidence of a plan to accomplish the crime, as opposed to modus operandi comparing similar traits of how the crime was committed to prove identity?

4. Did the trial court conflate the analyses for common scheme or plan and modus operandi?

5. Did the record support the trial court's findings of fact re ER 404(b)?

6. Did the court deny appellant's rights to due process, to present a defense, and to confrontation by excluding evidence of the complaining witness's reports of earlier abuse?

7. Did the court deny appellant's rights to due process and to present a defense when it excluded evidence that the complaining witness knew of the other witness's allegations?

8. Was appellant denied due process when the prosecutor argued the jury should believe the

complaining witness because she and the other witness did not know each other -- when the prosecutor knew the two witnesses knew of each other's allegations?

9. Did the court err by imposing costs without inquiring into appellant's means to pay?

B. STATEMENT OF THE CASE

1. BACKGROUND OF CHARGES

a. *Jesci in Washington*

Jesci Shelton[2] was born March 1, 1995, to 17-year-old Elizabeth Garcia. At age 19, Elizabeth left her two-year-old daughter with her mother in Montana. She later brought Jesci to live with her in Seattle. She had two more children with John Burke. RP 585-89, 712-13. Elizabeth worked as an exotic dancer, but told her children she was a bookkeeper. RP 629-30.

Elizabeth and Eric Schneider married in December, 2005. RP 593-95. Eric worked as a plumber and laborer. Elizabeth often worked nights while Eric cared for the children. RP 596-600.

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[2] The court approved using full names as both complainants were adults by trial. RP 121.

Eric was the first father Jesci ever had. They attended a father-daughter dance. In her teenaged years, due to too much "drama," Eric insisted she come home from school rather than hang out with her friends. RP 1164, 1291-92; Ex. 43.

b. *Custody Issues in Oregon*

Eric had three children from a previous marriage with Jessica White. They separated in 2001. In 2003, he and Jessica disputed custody. Jessica discussed her situation with her sisters Monica and Alicia[3] Swanson of Riverside, California. Alicia said Eric raped her during two visits in Spokane and Oregon years earlier. At age 16 in 2003, Alicia gave a video interview at the Riverside Police Department, which passed the information on to the Spokane police. Exs. 1-B, 2-A.

In 2010, Eric petitioned the Oregon court for visitation with his children. Ex. 45. To prevent visitation, Alicia contacted the Boardman Oregon police to report Eric Schneider had raped her there years earlier. Ex. 1-A at 4-5.

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[3] The trial transcripts, prepared from audio recordings, spell the name "Alisha," but the earlier interviews establish it is "Alicia."

c. *Custody Issues With Elizabeth*

In the later years of his marriage with Elizabeth, Eric had affairs. He brought women home. Jesci met some of them: Adrienne, Brittany, Ashley. He told her they were just friends. Jesci was upset about his affairs. RP 797-801. When Elizabeth discovered the affairs, she became physically ill. RP 798-801.

In the fall of 2011, Elizabeth and Eric separated. Their separation began agreeably. RP 600-01. They initially planned Jesci and one brother would live with Eric. RP 797-98. Once again, Elizabeth planned to let her daughter live with someone else. RP 634.

Jesci was very unhappy about the destruction of her family and the custody plans. She gave Elizabeth a letter for Eric, expressing her heartbreak, her anger at his lies and affairs, and a warning not to hurt her family again. Ex. 4.[4]

The next day, Jesci told her mother Eric had been sexually abusing her. RP 603.

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[4] A copy of Ex. 4 is attached as Appendix B.

2. EVIDENCE OFFERED UNDER ER 404(b)

The State offered Alicia Swanson's testimony under ER 404(b) to prove a common scheme or plan. Rather than have either woman[5] testify, it offered police reports, multiple transcripts, audio recordings, and a video interview. The materials included statements by both women. Defense counsel noted the video was important because it included responses that were labeled "no response heard" in the transcript of the interview. RP 188-90, 234.[6] The court later stated, in considering whether it found Alicia's allegations proven by a preponderance:

> I reviewed the videotape of Alisha Swanson because I think that's important. Not that this court has any clairvoyant powers to assess another person's truth telling ability. However, with these types of allegations, I think it relevant and proper to assess how an alleged victim presents herself, that is, is this a person that is acting and presents as appropriate with what is being alleged.

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[5] At the time of trial, Jesci was 19, CP 1; Alicia was 26, RP 926.

[6] Indeed, the transcript states "unintelligible" a total of 129 times, sometimes 10 time on a single page, and "no response heard" an additional six times. Ex. 1-B.

RP 238.[7]

The court and parties discussed the items at some length, never systematically identifying them and not marking anything as an exhibit. RP 167-96, 233-38. In an effort to recreate the record, some were later marked as Post-Trial Exhibits 1-A through 1-H. RP(12/9/14); CP 110-13.

However, no one located the video recording, nor one of the audio recordings. CP 110-13.

a. *Jesci Shelton's Allegations*

At age 16, Jesci said Eric first raped her when she was seven. Ex. 1-G at 3, 6, 9-10, 66. They were in the car. He told the boys to go play in the woods and took her into the backseat to sit on his lap. He wanted her to talk about what another man had done to her when she was five. "And so I did." He explained he was doing this so she could move on from what John did to her; that he loved her, and this was how he was expressing his love. He tried to penetrate her vaginally, but when she said that hurt, he penetrated her anally.

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[7] The court later assured the parties it had reviewed everything counsel gave to it -- it just wasn't sure what all it had received and reviewed. RP(12/9/14) 13-14.

He told her "all that matters is feeling good. You don't have to worry about anything else. Just...try and feel good." Ex. 1-G at 4-6. He again had anal sex in the truck with her after a father-daughter dance, when she was 7-8. Ex. 1-G 73. Her whole life, he told her they were doing this because he loved her. Ex. 1-F at 29.

Jesci reported Eric was gentle with her while she was young; in later years he got rough. He wanted her to say she loved him, that they were in a relationship. She wasn't to see any other boys. She wore a heart ring basically as a wedding ring. He spoke of divorcing her mom and marrying her. She thought they had a very close personal relationship. Ex. 1-G at 7-8, 16, 25-26, 43.

Eric would take her various places to have sex. Often it was in the vehicle. Ex. 1-G at 11, 13. He took her to empty houses under construction. Ex. 1-G at 7. He rented a motel room for a couple of hours. Ex. 1-G at 72. Over the years they also had sex at home, in Jesci's bedroom, in Eric and Elizabeth's bedroom, and once on the couch. Ex. 1-G at 11-12, 35-37. After sex, Eric bought her special things. Ex. 1-G at 72.

The sex began with anal penetration. He "was more of an anal person." Ex. 1-G at 7, 74. But he also used dildos and vibrators and performed multiple penetrations simultaneously. Ex. 1-G at 9. She said he'd carved his initials into her pubis with a knife; and he penetrated her vaginally with his handgun. Ex. 1-G at 44, 56-59.

He showed Jesci pornography and suggested things they saw that she could do to him. Ex. 1-G at 14, 35. He took videos of them, and he had her take videos and photos of herself to send to him on their phones. Ex. 1-G at 14, 35, 39-41. He often had her dress up in lingerie, stockings, and high heels. Ex. 1-G at 7, 11-12, 35-36.

Jesci didn't tell for many reasons. She thought he loved her. In later years, he threatened to hurt her or divorce her mother and marry her, but the threats didn't influence her as much as feeling bad about herself, thinking her mother would be disappointed in her. Ex. 1-G at 17-18.

At age 15, Jesci learned Eric was having affairs with other women. She said she wanted a

break from having sex with him. Then he struck her and had sex with her forcibly. Ex. 1-G at 18.

b. *Alicia Swanson's Allegations*

Alicia Swanson was born November 30, 1987. She lived in Riverside, California with her mother. Ex. 1-B at 1, 47.

Alicia visited Jessica and Eric in Spokane, Washington, in November-December, 2000. Jessica was expecting their third daughter. Alicia planned to be present for the birth. Alicia said on November 30, her 12th birthday, she was asleep on the couch at Jessica's home. Jessica had gone to a doctor's appointment that morning. Eric came to the couch, lifted the covers off, lay on top of her, pulled down her pants and had sex with her. Alicia cried and tried to stop it. He had one hand over her mouth and held her hand above her head. Ex. 1-B at 58-61.

Alicia variously reported if she told, Eric threatened to hurt the girls or her sister, hurt her sister and make sure she never saw the girls again, kill her and her sister, and kill the girls too. Ex. 1-B at 58, 62, 70, 74; Ex. 1-A at 5, 24; Ex. 1-E at 6-7; Ex. 1-C at 5.

During the month Alicia was in Spokane, Eric raped her two or three times. Ex. 1-B at 63 (three times in three different rooms); Ex. 1-C at 9 (twice in two different rooms). The second time she was sleeping on the floor in the kids' bedroom. He penetrated her quickly; it lasted 10-30 seconds, then he walked away. Ex. 1-B at 64-67.

The third time was in Eric's and Jessica's bedroom. He ordered her into the bedroom. When she said no, he ordered her to do what he said. He told her to get undressed, she cried and said no. He got angry, said she was going to make this worse on herself. Then he raped her, the same as the two other times. Ex. 1-B at 68-69.

He never hit her with a fist or slapped her; he grabbed her hair, held her down, and lay on top of her so she couldn't get up. Ex. 1-A at 24.

In April, when their youngest child was only a few months old, Jessica and Eric separated. Jessica lived in Boardman, Oregon. Alicia went to visit her, understanding Eric would not be there. But Eric and Jessica reunited while she was there. Ex. 1-C at 11, Ex. 1-A at 12. Alicia said he raped her more than once at that apartment, but she only

remembered one time. After horseback riding, they were going to a barbecue at Eric's parents' home. Alicia got horse manure on her and wanted to shower and change clothes. Eric was returning to the apartment for something. Jessica told her to go with Eric. Alicia tried to resist, but Jessica insisted. At the apartment, Eric pushed her down on the living room floor and raped her. Ex. 1-A at 10-11, 1-B at 72-73, 1-C at 16.

In her first three interviews, Alicia reported all the rapes were only vaginal. Exs. 1-A at 21, 1-B at 69, 1-C at 6, 16.

In 2014, in preparation for this trial, Alicia reported he put his hand around her neck almost the entire time, making it hard for her to breath. Ex. 1-C at 6. She now claimed he raped her vaginally, orally and anally. Ex. 1-C at 10. She now believed he had videotaped the rape in their bedroom in Spokane, because Jessica said she once saw a video of herself, and also saw a video of a young girl -- although she didn't identify it as Alicia. Ex. 1-C at 9. Alicia now claimed he told her he had recorded the rape. Ex. 1-C at 17. She reported for the first time that he asked her to

put on Jessica's Spanx, but she refused. She "saw" high heels. Ex. 1-C at 10, 29.

She noted Eric was circumcised and he said he was "fixed" so she couldn't get pregnant. Ex. 1-C at 7-8; Ex. 1-A at 19.

c. *Court's Findings re ER 404(b)*

The court admitted Alicia Swanson's testimony under ER 404(b) to prove a common scheme or plan. RP 239-51. It concluded the evidence manifested "a general plan, a design to fulfill his sexual compulsions." RP 249. It entered written Findings of Fact re ER 404(b), specifically relying on "the four part balancing test approved by the Washington State Supreme Court in *State v. Foxhoven*, 161 Wn.2d 168 (2007)."[8] CP 93-96 (*see* Appendix A).

3. OTHER PROCEDURAL FACTS

a. *Competency Issue*

Before trial, Mr. Schneider experienced a head injury in a workplace accident, causing problems

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[8] While the court cited the proper language of the test, *Foxhoven* involved evidence of prior graffiti to prove the identity of graffiti artists by *modus operandi*. In *Foxhoven*, the Court explicitly found the evidence was not admissible to prove "common scheme or plan." *Id.* at 179.

The confusion of these two concepts is at the core of this appeal.

with short-term memory and necessary medications. After an evaluation, the court eventually found him competent. Supp. CP [Subnos. 34, 36, 51].

b. *Reports of Jesci's Previous Abuse*

Early in her relationship with Eric, Elizabeth told him that John Burke had molested Jesci when she was five. CP 68; RP 291. Jesci acknowledged she talked to Eric about John Burke abusing her. Ex. 1-G at 4-6. In the fall of 2011, Jesci asked to see a counselor about this abuse. Eric took her for an appointment with Torr Lindberg. RP 125-26. Lindberg's notes indicate:

> Client describes regular sexual abuse around age 5; stepdad would put younger sibs to bed and ask her to stay up with him and touch him. Moved out when mom discovered. No abuse reported after that time.

CP 68-69; RP 121-36. Counsel argued the evidence of earlier abuse was relevant because it showed she knew about sexual molestation from a prior experience and she knew "the process;" when her mom discovered the abuse, she got rid of the abuser. This report also provided the context for telling Mr. Lindberg she had not been abused "after that time" -- a direct denial that Eric abused her. RP 123-26.

The court ruled Jesci's statements to Nurse Mettler that Eric sexually abused her were admissible for purposes of medical diagnosis. RP 106-12. Jesci also reported the earlier abuse to nurse Mettler as part of her history for medical diagnosis, which the defense intended to offer. RP 278-79. The State moved to exclude Jesci's report that John Burke sexually abused her. Her descriptions of Mr. Burke's abuse mirrored her allegations against Mr. Schneider: he made her watch porn before having sex, it happened on the couch, he went as far as he could, and he made the same threats. RP 285-89, 875-81; Ex. 25.

In an interview with defense counsel, Jesci denied any abuse occurred with John Burke. She claimed Eric planted in her head that she had been abused. Her mother told her she didn't think Mr. Burke was the kind of guy who could have done those things.[9] Counsel argued Jesci's prior statements that the abuse occurred indicated her ability to make allegations and to change them based on conversations with her mother. RP 129-30. It

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[9] She did admit he was physically abusive and a meth user. RP 289.

didn't matter whether the abuse occurred or didn't, only that she reported it to others. RP 132-33. Jesci reported the same details of the prior abuse to Torr Lindberg and Nurse Mettler, for purposes of diagnosis and treatment. RP 290-91; Ex. 25.

The court ruled in limine the evidence of the prior abuse was inadmissible for purposes of opening statement under ER 403. RP 292-93.

During cross-examination of Jesci, the defense asked her if Eric had discussed another topic with her during that first incident in the car. The State objected. RP 751-52. The defense offered that Jesci told the detective: "He wanted me to talk about what another man had done to me when I was 5 and so I did." Later she said that over the years, Eric said he was "only doing this so I can move on from what John did to me." RP 751-59.

The court concluded this was "other suspect" evidence, which would require the prosecutor to inquire more about the assault by John, whether it was investigated, and what happened. Then it would require revisiting the court's ruling in limine about her statements to Mr. Lindberg because then they would be offered for a different purpose. The

court excluded the evidence under ER 403. RP 760-61.[10]

The defense renewed the motion before Nurse Mettler testified. Jesci made the same allegations against Mr. Burke as she was now making against Eric Schneider. The similarities explained how she could make up such allegations -- she'd already made them against another person. It didn't matter if they were true or not. RP 875-80.

The court declined the invitation to revisit its pretrial ruling. RP 881.

c. *State's Opening*

The State told the jury that Jesci and Alicia don't know each other, they've never met, they've never spoken to each other. RP 549.

d. *Jesci's Trial Testimony*

Eric first "was intimate" with Jesci in the car. Jesci sat on Eric's lap. He asked if she loved him, she said she did. He then asked her to do something to make him really happy. RP 717-18. He tried to penetrate her vaginally, but she said it hurt. He said that was okay, they could use the

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[10] Defense counsel noted he had not raised it as "other suspect" evidence. The court agreed it characterized it that way on its own. RP 761.

other entry. He penetrated her anally. She testified it hurt, but not as much. He kept telling her how he loved her, and this is what loving people do. RP 718-19.

"It" happened again, but the first time is the only time she remembered. The rest blur. At first it was once a week, then at least three times a week. RP 720.

She remembered another time when she and Eric went to a father-daughter dance. On the way home from the dance, they had vaginal intercourse in the truck or car. It was the first time they had vaginal intercourse; it didn't hurt so much anymore. RP 721-22.

As she got older, he liked her to wear her mom's high heels and stockings. RP 721-23. He liked to hit her. He put a belt around her throat, partially choking her while raping her. They used her mom's adult toys, a vibrator, and a dildo to achieve a double penetration. RP 722-24, 766.

Eric inserted a gun in her vagina more than once. RP 724, 776. She bled regularly, both vaginally and anally. RP 774-76.

Eric carved his initials into her pubis with a pocket knife. Ex. 21 was her drawing of how big the letters were and what they looked like. The letters covered almost the entire area. They left a scar. She didn't know if it was still there. RP 777-79. She didn't know how old she was when he carved the initials. RP 845-46.

Eric slapped her in the face, punched her in the stomach and the ribs, and spanked her hard enough to leave bruises. She regularly had bruises on her ribs. The belt around her neck never left marks. No one ever saw bruises or marks on any part of her body. She never told anyone about them. RP 783-86; 850-52.

Jesci didn't tell because (1) she was afraid Eric would hurt her; and (2) when she was older and wanted to stop, he said if she ever told he'd kill her. RP 724-26. Later she said they never talked in depth about it, but he made it very clear if someone asked her, she should lie and say no, it wasn't happening. RP 732.

Eric and Jesci texted each other a lot. He would text her to meet in his room and "let's have intercourse." Or he'd be out of the house and ask

her to send him a photo or video of her in lingerie doing sexual things. She complied with these requests. Eric made sure she always deleted the images right after she sent them. RP 728-31. He also made video images of her on his iPhone. RP 788-89.

Eric's computer and cell phones contained no sexually explicit images of Jesci, no images of Jesci in sexual clothing, performing sex acts, or in any sort of sexual video. RP 1118-20, 1126-28, 1170-71.

Jesci testified they had sex about three times a week when she was 12-13; 3-4 times a week when she was 14-15; and less frequently after she was 16. She did not describe any other specific incidents. She said it all stopped two weeks before she told her mother. RP 742. She did not give a year or an age when any specific act occurred.

Jesci testified she began keeping a diary when she was about 13. She wrote about things that upset her, like Eric's affairs. She never wrote about her relationship with Eric, having sex with him, or being raped. RP 793-97.

e. *Medical Examination*

Jesci told Nurse Mettler Eric raped her. She said he moved in when she was 7, so by age 16, the abuse had been going on for 9 years. RP 792, 892-93. The physical examination with a colposcope showed Jesci's hymen was very thick, very wavy, redundant, completely covering the opening to her vagina. RP 898-99; Ex. 25 at 5. The nurse found no scarring or initials on the skin above her vagina, although the area was shaved. Jesci did not tell her she'd been cut there with a knife. RP 900-15.

f. *Jesci Told Her Therapist Eric Did Not Abuse Her.*

Mr. Lindberg understood Jesci wanted to see him about sexual abuse she experienced from John Burke when she was five. But the court prohibited the defense from presenting this evidence to the jury; it only allowed testimony that the issue was not about Eric. RP 277-79.

Mr. Lindberg testified that he sought to determine if any sexual abuse had occurred while Jesci knew Eric. Jesci said Eric had not molested her. Eric was outside in the car. Jesci did not express any fear or concern about him. She was

very clear to Mr. Lindberg. He had nothing to report as a mandatory reporter. RP 1211-23.

g. *Jesci Told Anneta Spicer Eric Did Not Abuse Her.*

Anneta Spicer, Eric's child custody lawyer in Oregon, was a Justice of the Peace at the time of this trial. She had been a prosecutor and an attorney in private practice. She had special training about sexual assault. As an Oregon attorney, she also was a mandatory reporter. She had reported sexual abuse to authorities, even against her own client. RP 1224-27.

Ms. Spicer told Jesci of Alicia Swanson's allegations against Eric in the custody dispute. The court sustained the State's objection to this question and answer and directed the jury to disregard it. No reason was given for the objection or the ruling. RP 1232-33.[11]

Ms. Spicer interviewed Jesci because she has

> a real issue with child sex abuse. I will not represent any person who has ever given any indication or that I have any real indication has ever been

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[11] *See also*: Ex. 1-G at 28 (Jesci told detective she learned when they went to court in Oregon the previous year that Eric had raped "Alexa" and videotaped it); RP 199 (Jesci learned from Ms. Spicer of Alicia's allegations).

> sexually abusive to a child. It just, it turns my stomach and I can't deal with it. And I will kick people out of my office and refuse to represent them because of those kinds of things.

RP 1233-36.

Jesci and Elizabeth came to Ms. Spicer's office in Hermiston, Oregon. Eric was not there. Jesci was 15. Ms. Spicer is trained to look for many things when she interviews a child, e.g., whether the child looks to someone else for answers or approval. If a child has been sexually abused, frequently she demonstrates discomfort talking about the topic. Ms. Spicer asked Jesci very specific questions about whether Eric had touched her in private places, whether he had sexually abused her, or even touched her in a way that made her feel uncomfortable. Jesci told Ms. Spicer nothing had ever happened to her, she had no issues with Eric. Jesci was "very clear that no, nothing had ever happened." RP 1229-31.

h. *Alicia's Trial Testimony*

Alicia's sister Jessica White, 9-10 years older, married Eric when Alicia was about seven or nine. RP 928-30; 993. Alicia testified to the rapes in Spokane and Boardman, essentially as

presented above. RP 934-945. She reported the rapes when Jessica was fighting for custody with Eric. RP 965.

Alicia's sister had reviewed documents about this prosecution online. Her sister told her about the charges against Eric. RP 978-80. Alicia claimed not to know Jesci Shelton. On re-direct, the prosecutor again had her state she did not know Jesci Shelton, had never spoken with her, and had not "read" her allegations against Eric. RP 991. But she told Det. Ferguson she had reviewed the legal documents about the case. RP 1050-51.[12]

i. *Motion to Dismiss for Insufficient Evidence of a Specific Act for Each Count.*

When the State rested, the defense moved to dismiss because there was insufficient evidence of any specific act to permit jury unanimity. While Jesci described two specific incidents -- the first in the car, one after the father/daughter dance -- she gave no timeframe for either act to determine

[12] The Certificate of Probable Cause contained extensive details of Jesci's allegations, although not her name. CP 5-11.

what crime or what count applied.[13] The court denied the motion. RP 1179-88.

The defense raised this issue again regarding jury instructions: the evidence was not sufficient to permit jury unanimity as to one particular act for each crime. The prosecutor declined to elect any specific act to support any count. RP 1249-52.

j. *Closing Arguments*

The prosecutor argued there was evidence of multiple acts: Jesci said it happened three times a week when she was 12-13, more than once a week when she was 14-15, and less often after age 16. RP 1267-70. He failed to identify any one particular act on which the jury could be unanimous for any one count.

The prosecutor argued the instruction on common scheme or plan, CP 23, referred to Mr. Schneider telling Alicia and Jesci he was "fixed" and the fact that he was circumcised. But he

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[13] Jesci initially reported the first incident was at age 7 (Ex. 1-G at 3, 6, 9-10, 66), and the father-daughter dance at age 7-8 (Ex. 1-G at 73). Her mother testified she married Eric in 2005 when Jesci was 10. RP 593. The State did not charge any offense before she was age 12. CP 1-3.

acknowledged the topic didn't arise for Jesci until she got older. RP 1274.

The defense emphasized Jesci's letter to Eric, her heartbreak and feeling of betrayal, and her veiled threat if he continued with the plan to take custody of her in the divorce. RP 1279-80. Counsel noted Judge Spicer made Jesci aware of Alicia's allegations in 2010-11. RP 1294.

In rebuttal, the prosecutor argued again, at length, that Jesci and Alicia had never met each other, there was "simply no evidence that Jesci knew anything about Alicia or that Alicia knew anything about Jesci." Over objection, he reminded the jury Ms. Spicer's answer was stricken; and both women said they'd never "heard of" or "spoken" to each other. RP 1300-01.

k. *Verdict, Judgment & Sentence*

The jury convicted as charged. CP 114-17. The court sentenced Mr. Schneider to serve life in prison with a minimum term of 280 months. CP 56-66. Boilerplate language provided:

> 4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or

likely future ability to pay the financial obligations imposed.

The court imposed $1,487.50 total financial obligations. CP 58. The court also found Mr. Schneider was indigent. Supp. CP [Subno. 121].

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A UNANIMOUS VERDICT ON SEPARATE INCIDENTS FOR SEPARATE CRIMES.

A criminal conviction meets the requirements of due process only if there is sufficient evidence to permit a reasonable person to find the State has proved every element of the charged offense beyond a reasonable doubt.[14]

Here the jury instructions defined the elements. For Counts I and II, rape of a child in the second degree, the State had to prove sexual intercourse occurred when Jesci was "at least twelve years old but younger than fourteen years old." CP 27, 30; RCW 9A.44.076. For Count III, rape of a child in the third degree, it had to

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[14] *State v. Jensen*, 125 Wn. App. 319, 325-26, 104 P.3d 717, *review denied*, 154 Wn.2d 1011 (2005); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); U.S. Const., amend. 14; Const., art. I, § 3. Constitutional provisions are quoted in App. C.

prove sexual intercourse when she was "at least fourteen years old but was less than sixteen years old." CP 33; RCW 9A.44.079. For Count IV, incest, it had to prove sexual intercourse March 1 to October 15, 2011, when she was sixteen. CP 36.

Jesci testified, and the State argued, she and Eric had sexual intercourse three times a week when she was 12-13, more than once a week when 14-15, and less often after age 16. RP 742, 1267-70.

The constitutional right to a jury trial requires the jury to be unanimous as to the specific act the defendant committed for each crime.[15]

In cases of child sexual abuse, the State frequently presents evidence of multiple acts to support each charge.

> To convict a criminal defendant, a unanimous jury must conclude that the criminal act charged has been committed. In cases where several acts are alleged, any one of which could constitute the crime charged, the jury must unanimously agree on the act or incident that constitutes the crime. In such "multiple acts" cases, Washington law applies the "either or" rule:

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[15] U.S. Const., amends. 6, 14; Const., art. I, §§ 21, 22; *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

> either the State [must] elect the particular criminal act upon which it will rely for conviction, or...the trial court [must] instruct the jury that all of them must agree that the same underlying criminal act has been proven beyond a reasonable doubt.
>
> In sexual abuse cases where multiple counts are alleged to have occurred within the same charging period, the State need not elect particular acts associated with each count **so long as the evidence "clearly delineate[s] specific and distinct incidents of sexual abuse" during the charging periods.** The trial court must also instruct the jury that **they must be unanimous as to which act constitutes the count charged** and that they are to find "separate and distinct acts" for each count when the counts are identically charged.[16]

Here the "to convict" instructions contained the "separate and distinct" language for Counts I and II. CP 27, 30. In addition, the court gave *Petrich* unanimity instructions. CP 29, 32, 35.

However due process also requires the State to prove the alleged crimes with **evidence** that is sufficiently specific for the jury to be unanimous as to the separate and distinct acts charged. The law requires not merely a general statement that

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[16] *State v. Hayes*, 81 Wn. App. 425, 430-31, 914 P.2d 788, *review denied*, 130 Wn.2d 1013 (1996) (emphases added; citations omitted); *State v. Noltie*, 116 Wn.2d 831, 843, 809 P.2d 190 (1991).

the crime occurred, even many times, but a specific description of the individual incident that is each alleged crime.

In *State v. Hayes*, *supra*, the Court adopted a test to determine whether "generic" evidence of multiple offenses was sufficient to support multiple charged counts, especially where the complaining witness is a young child.

> The challenge is to fairly balance the due process rights of the accused against the inability of the young accuser to give extensive details regarding multiple alleged assaults. We believe the proper balance is struck by **requiring, at a minimum, three things**. First the alleged victim must describe the kind of act or acts with sufficient specificity to allow the trier of fact to determine what offense, if any, has been committed. Second, the alleged victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged by the prosecution. Third, the alleged victim must be able to describe the general time period in which the acts occurred.

Hayes, 81 Wn. App. at 438.

State v. Edwards, 169 Wn. App. 561, 280 P.3d 1152 (2012), controls this case. There the child testified the defendant touched her "front private," describing one incident with detail and saying the same thing happened a total of 10 to 15 times. The Court of Appeals held the evidence did

not "clearly delineate between specific and distinct incidents of sexual abuse during the charging period." The one incident supported one count; but the evidence was insufficient to support a second count of child molestation. In this case, however, Jesci did not describe even a single specific incident at any given age to support any one charge.

In *State v. Jensen*, *supra*, 125 Wn. App. at 323-24, the State charged four counts of first degree child molestation and two counts of indecent exposure. All counts were charged to have occurred August 1, 2001, to February 19, 2002. All allegations involved A.S., age 10 at the time of the charged events and age 11 at trial. A jury convicted of three counts of molestation and one count of exposure.

The Court of Appeals carefully reviewed the sufficiency of the evidence for three separate counts of molestation:

> A.S. testified to one incident in which Jensen entered her room at night and touched her in her "private spot" between her legs. ... According to A.S., Jensen also entered her room at night two other times; but A.S. did not testify to sexual contact during these visits. A.S. also testified directly

> about the incident in which Jensen came into her room while she was reading in bed, began tickling her, put his hand under her shirt, and touched her breast. Stines testified that A.S. said Jensen touched her private area "[a] few times." ... Although this evidence supports two counts of first degree child molestation, the question remains whether it supports a third count.
>
> In cases involving a resident child molester, the alleged victim's generic testimony can be used to support multiple counts. ... At a minimum, the alleged victim must be able to describe (1) the kind of act or acts with sufficient specificity for the jury to determine which offense, if any, has been committed; (2) the number of acts committed with sufficient certainty to support each count alleged by the prosecution; and (3) the general time period in which the acts occurred.
>
> ... Here, A.S. testified only that Jensen entered her room at night on two other occasions. Although Stines testified that A.S. told her that Jensen touched her private area "[a] few times," she never mentioned that sexual contact took place during the two other times Jensen entered her room at night. ... Because A.S.'s testimony does not describe the acts with sufficient specificity for the jury to determine which offenses, if any, Jensen committed when he entered her bedroom on the two additional occasions, we must reverse one of Jensen's first degree child molestation convictions.

Jensen, 125 Wn. App. at 327-38 (citations omitted).

In *State v. Brown*, 55 Wn. App. 738, 780 P.2d 880 (1989), *review denied*, 114 Wn.2d 1014 (1990), the Court affirmed the convictions, describing the

detailed testimony of specific incidents to support two counts of indecent liberties and four counts of statutory rape in the first degree, all occurring within two years when the child was 9 and 10. She was 11 at trial. *Id.* at 741.

> Tammy described the defendant's conduct in clinical detail, including the time of day and room in which it usually occurred, and the physical positions assumed by each. Her testimony sufficiently described a single episode for each offense, which was repeated as part of a pattern of abuse.

Brown, 55 Wn. App. at 748-49.

In *State v. Corbett*, 158 Wn. App. 576, 242 P.3d 52 (2010), the State charged four counts of rape of a child in the first degree, all occurring January - August, 2005. All incidents involved the same child, age 6-7 at the time of offense, age 10 at trial. The Court of Appeals carefully reviewed the evidence, noting the child testified to four separate incidents with considerable detail.

> [T]he entire trial focused on evidence and distinguishing characteristics of four separate and distinct instances of abuse. Each incident was given a separate descriptive identifying name that both counsel used in referring to the event. During closing arguments, the State clearly connected the trial evidence of four separate incidents to the four separate "to-convict" instructions. The jury instructions in

> the context of this case clearly conveyed to the jury that there were four counts related to four specific incidents of abuse that they were to consider.

Corbett, 158 Wn. App. at 592-93 (emphasis added). *Compare: State v. Gresham*, 173 Wn.2d 405, 414-15 and 417-18, 269 P.3d 207 (2012) (describing multiple distinct individual incidents of molestation and penetration).

In all these cases, the charged offenses occurred while the child was under age 12. Here the State had to prove acts when Jesci was within a specific age range: 12-13, 14-15, or over 16.

Even the young children in these cases were able to describe individual incidents. But here, the adult Jesci described two specific incidents: the first time in the car, and the time after the father-daughter dance. The State could not rely on either of these specific incidents for any count: there was no evidence they occurred after Jesci was 12, and the State knew she previously said they happened when she was 7-8. Ex. 1-G at 3, 6, 9-10, 66, 73.[17]

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[17] The State conceded no abuse occurred until after Jesci was ten. RP 1303, 1306.

The State argued the jury should rely on Jesci's testimony that "it" happened three times a week when she was 12-13, and more than weekly when she was 14-15, and "less often" when she was 16. RP 1268-70.[18] Thus even the State could not identify a particular incident with sufficient detail to connect it to any one count charged.

If the learned prosecutor could not identify at least one distinct act for each count, it was equally impossible for the jury to identify a particular act. If they could not identify a particular act, twelve jurors could not unanimously agree that any one particular act occurred -- despite all the jury instructions telling them they must do so.

This failure of the evidence requires all four counts be reversed and dismissed. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 21, 22.

2. APPELLANT IS DENIED HIS CONSTITUTIONAL RIGHT TO APPEAL AND TO DUE PROCESS BY THE COURT'S FAILURE TO PRESERVE THE RECORD.

The Constitution guarantees appellant a right to appeal. Const., art. I, § 22.

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[18] *See also* RP 1307 (prosecutor agreed could not identify a particular incident of oral sex).

> A criminal defendant is constitutionally entitled to a record of sufficient completeness to permit effective appellate review of his or her claims.[19]
>
> The usual remedy for a defective record is to supplement the record with appropriate affidavits and have discrepancies resolved by the judge who heard the case. RAP 9.3, 9.4, 9.5.

Tilton, 159 Wn.2d at 783. An appellant's failure to attempt to reconstruct the record may constitute waiver of his right to do so. *State v. Miller*, 40 Wn. App. 483, 698 P.2d 1123 (1985).

> [W]here the record both at trial and on appeal consists entirely of written and graphic material -- documents, reports, maps, charges, official data and the like -- and the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence, then on appeal a court of review stands in the same position as the trial court in looking at the facts of the case and should review the record do novo.

Smith v. Skagit County, 75 Wn.2d 715, 718, 453 P.2d 832 (1969); *Jenkins v. Snohomish County PUD*, 105 Wn.2d 99, 102, 713 P.2d 79 (1986). As in *Smith*,

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[19] *State v. Tilton*, 159 Wn.2d 775, 781, 72 P.3d 735 (2003); *Coppedge v. United States*, 369 U.S. 438, 446, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962); *Draper v. Washington*, 372 U.S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1962).

for purposes of the ER 404(b) ruling, the trial court examined only documentary, audio, and visual records. No live witnesses testified. Thus appellant is entitled to have this Court review this same record de novo to decide whether the record supports the court's findings.

But the trial court failed to have a single item made an exhibit or admitted into evidence at the time. It did not even clearly identify the items it reviewed. Appellant made every effort to recreate this record, with some but insufficient success. Supp. CP [Subnos. 137, 138, 148, 149, 152]; CP 150; RP(12/9/14).[20]

Still missing are a video recording of the first interview of Alicia Swanson and an audio recording of a later interview with defense counsel. The trial court specifically noted this video recording "was important" in reaching its decision. RP 238. Trial counsel noted on the record that he heard items in the recording that were labeled "no response heard" on the transcript, but the response was perceived on the video. RP

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[20] *See also* efforts described in appellant's Motions to Continue filed in this Court.

188-90, 234. Indeed, the transcript's 135 notations of "unintelligible" or "no response heard," Ex. 1-B, demonstrate the importance of the video to supply those portions.

Without the video and the audio recordings, appellant is unable to review the record to determine what issues and arguments it might support. Counsel and this Court are unable to determine whether the child's demeanor in the interview, so important to the trial court, was indeed consistent and appropriate with what was being alleged. This was the first recording of the first report Alicia made. It was crucial to the court's credibility determination. Similarly, neither counsel nor this Court can review the audio recordings of Jesci's interview with defense counsel. This interview included her new-found belief that John Burke had never abused her, despite her many reports to the contrary. Her vocal demeanor is just as vital to a credibility determination as the trial court stated the video evidence was, and relevant to excluding her reports of prior abuse.

This Court is unable to fully review de novo the materials the trial court had before it to decide the issues under ER 404(b). Appellant is therefore denied his constitutional right to appeal of this issue. This Court should reverse the convictions and remand for a new trial.

3. THE COURT ERRED BY ADMITTING EVIDENCE OF ACCUSATIONS OF PRIOR SEXUAL OFFENSES UNDER ER 404(b).

> **(b) Other Crimes, Wrongs, or Acts.** 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.

ER 404(b).

> Evidence of a criminal defendant's prior bad acts "is objectionable not because it has no appreciable probative value but because it has too much." 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58.2, at 1212 (Peter Tillers rev. ed. 1983). It presents a danger that the defendant will be found guilty not on the strength of evidence supporting the current charge, but because of the jury's overreliance on past acts as evidence of his character and propensities. This potential for prejudice from admitting prior acts is "'at its highest'" in sex offense cases.

State v. Slocum, 183 Wn. App. 438, 442, 333 P.3d 541, 543 (2014); *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012).

To guard against this heightened prejudicial effect, the Supreme Court limits the admissibility of prior acts

> to cases **where the State has established their overriding probative value**, such as to explain a witness's otherwise inexplicable recantation or conflicting account of events. ... Otherwise, the jury may well put too great a weight on a past conviction and use the evidence for an improper purpose.

State v. Gunderson, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014) (emphasis added).

A trial court must initially presume that any evidence of prior bad acts is inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

> The burden of demonstrating a proper purpose for admitting evidence of a person's prior bad acts is on the proponent of the evidence. ... Before admitting evidence of bad acts, the trial court is required to "'(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.'" ... It must conduct this analysis on the record.

Slocum, 183 Wn. App. at 448.

"In doubtful cases, the scale should be tipped in favor of the defendant and exclusion of the evidence." *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986); *State v. Baker*, 89 Wn. App. 726, 950 P.2d 486 (1997), *review denied*, 135 Wn.2d 1011 (1998).

> [T]he question to be answered in applying ER 404(b) is not whether a defendant's prior bad acts are logically relevant--they are. Evidence that a criminal defendant is a "criminal type" is relevant. But ER 404(b) reflects the long-standing policy of Anglo-American law to exclude most character evidence because "it is said to weigh too much with the jury and to so overpersuade them . . . . The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

Slocum, 183 Wn. App. at 456, *quoting Michelson v. United States*, 335 U.S. 469, 476, 69 S. Ct. 213, 93 L. Ed. 168 (1948).

> To review an evidentiary decision, we determine what evidentiary rules apply and then determine whether the trial judge acted within the discretion accorded by those rules. We review the interpretation of an evidentiary rule de novo as a question of law. ... The trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. ... But "[t]here is an abuse of discretion when the trial

> court's decision is manifestly unreasonable or based upon untenable grounds or reasons," such as the misconstruction of a rule. ... We also consider whether a reasonable judge would rule as the trial judge did.

Gunderson, 181 Wn.2d at 921-22.

a. *The Record Does Not Support the Findings of Fact.*

While the court need only find the facts proven by a preponderance of the evidence, in this case many of the findings have no support in, indeed are contradicted by, the record.

> Finding 1: "The defendant is charged with ... crimes committed between the years 2002 and 2011." CP 94.

The State charged Mr. Schneider with offenses committed from June 1, 2007, to 2011. CP 1-3, 56. No charges went back to 2002. There was no time overlap between Jesci's and Alicia's allegations; rather there were at least five years between the alleged prior acts and these alleged crimes.

> Finding 2: "The State offered evidence that the defendant previously raped Alisha [sic] Swanson in 2001 and 2002 on the issue of common scheme or plan pursuant to ER 404(b)." CP 94.

Alicia reported she was raped in November-December, 2000, and April, 2001 -- not 2002. She actually visited Spokane on her twelfth birthday,

November 30, 1999, with the follow-up visit to Oregon in April, 2000.[21]

> Finding 5.b: Both victims were between the ages of 11 and 13 when the defendant first sexually assaulted them. CP 94.

Jesci reported the sexual abuse began when she was seven. Ex. 1-G at 3, 6, 9-10, 66. As noted above, although Alicia reported the first rape was on her 11th or 12th birthday, the date she consistently gave was her 13th birthday.

> Finding 5.c: Amongst other places, the defendant sexually assaulted each victim in the bedroom he shared with his then current wife, providing him access. CP 94.

Jesci's earliest experiences were in vehicles, Ex. 1-G at 11, 13; empty houses under construction, Ex. 1-G at 7; and motel rooms, Ex. 1-G at 72. In their home, sex occurred in Jesci's bedroom, in Eric and Elizabeth's bedroom, and once on the

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[21] Alicia repeatedly referred to the first time being November 30, 2000, on her 12th birthday, Ex. 1-B at 52, 55; or her 11th birthday, Ex. 1-C at 8, 1-D at 12. But she was born Nov. 30, 1987, so her 12th birthday was Nov. 30, 1999. Ex. 1-B at 1. She seemed to refer back to her niece's date of birth to recall the year. Ex. 1-B at 72. Her sister later clarified that the baby was due in Dec. 1999, and born Jan. 5, 2000. RP 1003. By closing arguments, the State conceded it was November 30, 1999. RP 1265.

couch. The marital bedroom did not provide "access" to Jesci.

Alicia reported she was raped two or three times in Spokane, only once in the marital bedroom; and in Boardman on the living room floor. The bedroom did not provide "access" to the victim. Exs. 1-B at 63, 68-69; 1-C at 9.

> Finding 5.d: The defendant sought to obtain the silence of each victim with threats. CP 94.

Alicia reported Eric threatened to kill her and her sister if she told. Exs. 1-A at 5, 15, 24; 1-C at 5; 1-E at 6-7. In contrast, in the early years, Jesci was not threatened. She was comforted, cajoled, reassured, and felt she was in a special loving relationship. Exs. 1-F at 2-3, 5-6; 1-G at 5. Only years later did she report a threat: to divorce her mother, marry her, and keep her locked in a house. Ex. 1-G at 6-7.

> Finding 5.j: The defendant video taped his sexual assaults with both victims. CP 95.

Alicia did not report a videotape until years after the event and years after the initial report, after she heard her sister had seen videos of herself and of an unidentified child. Exs. 1-A at

5, 1-E at 10. No videos of Alicia or Jesci were ever located.

b. *The Court Misinterpreted the Rule of What is Relevant to Prove a Common Scheme or Plan, Conflating it With Modus Operandi.*

"We review the interpretation of an evidentiary rule de novo as a question of law." *Gunderson, supra.*

ER 404(b) permits admission of prior acts to prove, inter alia, modus operandi or common scheme or plan. The two purposes are different. What may be relevant for one purpose is not relevant for the other. *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007).

In this case, the trial court misinterpreted the "common scheme or plan" exception to ER 404(b). It conflated this exception with modus operandi to prove identity. It relied on modus operandi aspects when identity was not at issue to support a theory of common scheme or plan.

i. *Modus operandi*

A modus operandi is a specific method of committing a crime so distinct that it constitutes the offender's signature. It is relevant to prove identity: if we know this defendant did the prior

crime in this way, he also must have committed this crime. *See, e.g., Foxhoven, supra* (defendants' distinct graffiti tags elsewhere were admissible to prove identity of taggers on subject property). Thus it turns on the specific details of how the defendant committed the crime: the methods used, the words used, and characteristics specific to the defendant.

ii. *Common scheme or plan*

> The common scheme or plan exception applies when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.

State v. Lough, 125 Wn.2d 847, 855, 889 P.2d 487 (1995). To establish a common scheme or plan under ER 404(b), the evidence of prior conduct must demonstrate

> 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.

Lough, 125 Wn.2d at 860. Random similarities are not enough. *DeVincentis*, 150 Wn.2d at 18. The similarity must be clearly more than coincidental; it must indicate conduct created by design. *Lough*, at 860 (defendant, an experienced EMT, repeatedly

drugged women he dated and raped them); *Gresham*, 173 Wn.2d at 422-23 (defendant took trips with young girls; at night, while other adults slept, he approached the girls and fondled them); *Baker*, 89 Wn. App. 726, 950 P.2d 486 (1997) (defendant arranged for stepdaughters to sleep in bed with him, feigned sleep, molested them as they slept).

In *DeVincentis*, the State offered testimony from several adolescent girls who accused DeVincentis of prior sexual misconduct, but the trial court admitted testimony of only one--"the one who had been groomed for sexual contact in multiple steps similar to the victim whose molestation was then on trial." *Slocum*, 183 Wn. App. at 451.

> The prior victim, like the victim in the case with which DeVincentis was presently charged, had met DeVincentis and been invited into his home through safe channels; he regularly appeared nearly naked in the presence of both girls and treated his appearance as normal, he later invited mutual massaging, he invited both into secluded spots in his home where he would ask them to undress and, later, masturbate him, and he warned both victims not to tell anyone or they would be in trouble.

Slocum, 183 Wn. App. at 451 n.1. The Court held the analysis of ER 404(b) "scrupulously applied"

permitted this single prior offense evidence to prove a common scheme or plan used more than once.

Thus evidence of prior sexual activity with a teenaged boy, "B," was admissible to prove a common scheme or plan to have sex with "A" in *State v. Carleton*, 82 Wn. App. 680, 919 P.2d 128 (1996).

> We agree with the trial court that Carleton engaged in markedly similar conduct with A and B. In each case, Carleton met a teenage boy through a youth organization, befriended him, and eventually had sex with him after describing himself as having a homosexual alternate personality. The unusual story about the alternative personality laid the groundwork for future sexual overtures, not unlike the defendant's use of drugs in *Lough* to overcome the resistance of his victims. Carleton's repetition of the device in similar contexts showed that he consciously recognized its seductive appeal to the curiosity of younger boys.

Carleton, 82 Wn. App. at 684. In contrast, the trial court in *Carleton* excluded testimony of C, another member of the youth organization, because these two acts were not "markedly distinct" enough. *Id.* at 682-83.

In *State v. Slocum*, *supra*, the defendant was charged with abusing his step-granddaughter W.N., from ages 3 to 11, when she would visit his home.

> [H]e would call her over to sit in his lap so he could talk to her. He

> always sits in his recliner. He would always rub her while he talked to her. He acted like it wasn't a big deal. ... She demonstrated how he would rub by placing her hand between her legs and rubbing up and down with her fingers in the vaginal area. He would do this for about 5 minutes each time.

Slocum, at 444. He touched her again when she was 14, on her clothed crotch and breast area, as she again sat on his lap. A few months later, he pushed her down on the couch, touched her vagina and breasts and put his fingers in her vagina.

The State offered testimony from W.N.'s mother that the defendant molested her when she was 12. One time he got on the floor where she was, took her shirt and bra off, and rubbed her breasts. The second time, he asked her to sit on his lap on the recliner, and his hand moved lower until it was rubbing her vagina on the outside of her shorts. *Id.* at 445.

W.N.'s aunt also testified to an incident of molestation when she was 12. Putting sunscreen on her before swimming, he explained she was most likely to burn near the edge of her swimsuit; as he reached under the edges of her swimsuit top, he put his hands on her breasts. *Id.* at 446.

The Court of Appeals reversed the convictions.

> **Only the evidence of the recliner incident involving W.N.'s mother could be admitted consistent with a correct view of the law.**
>
> . . . [T]he State overstates similarities between the prior acts and W.N.'s allegations. W.N. was much younger than her mother and aunt when the touching began and, unlike her mother's and aunt's complaints of isolated incidents of touching, she alleges molestation that was ongoing, over a period of years. The State argues conclusorily that Mr. Slocum stood in a similar position of authority to all three victims, but we find no testimony from any victim about Mr. Slocum's perceived authority. . . . The evidence establishes only that in the case of all three victims, they were young, Mr. Slocum was an adult, and there was a family relation by marriage.

Slocum, 183 Wn. App. at 454 (emphasis added).

> The facts of this case are therefore unlike cases where the defendant had a design for getting a victim physically isolated from possible witnesses. Mr. Slocum simply seized opportunities when no one was watching. The fact that a defendant molests victims when no one is close enough to see what is going on is too unlike a strategy for isolating a victim; it is not evidence of a plan.

Id. at 455.

These cases demonstrate that the "scheme or plan" describes how the defendant positions himself to be able to commit the crime, to lower barriers to sexual contact. The relevant "scheme or plan"

factors to compare thus are the aspects that serve to reduce these barriers and facilitate the crimes.

> The act of rape itself cannot be part of the "common plan," otherwise the courts would merely be stating that because an individual raped before they raped again. This is "propensity" reasoning that ER 404(b) prohibits.
>
> In *Lough*, the Court stressed that it was the method of obtaining sexual intercourse, i.e., drugging the women, that served as the basis for the finding that a common plan existed. ... The court noted the post-rape conduct of the defendant, that Lough had warned the women not to report the rapes because no one would believe them, only in the section of the opinion dealing with whether the state had proven the prior incidents by a preponderance of the evidence. ... **The post-rape conduct was not explicitly recognized as the basis of the common plan**, and some of the post-rape similarities, such as folding of the victim's clothing, were not even noted by the court other than in the recitation of the facts of each incident.

State v. Dewey, 93 Wn. App. 50, 55-56, nn. 2-3, 966 P.2d 414 (1998), *review denied*, 137 Wn. 2d 1024 (1999) (emphasis added).

iii. *The findings do not support a common scheme or plan.*

This case presents facts very like those in the evidence rejected in *Slocum*. Like W.N. there, here Jesci reported constant, ongoing, sexual abuse over a period of years from when she was quite

young -- seven. She claimed Mr. Schneider began with her in a car, expressing loving reasons for having intercourse with her, and persuaded her to participate in sexual activity with him many times a week. He later communicated with her secretly by text, and she dutifully deleted his communications, yet met him for rendezvous. She claimed she sent him images of herself. Their sexual activity occurred in the car, in houses under construction, in her room and in the parental bedroom. They used her mother's dildo. She wore a ring to demonstrate his love for her.

In contrast, Alicia described three or four individual brutal forcible rapes when she was a 12-year-old guest in Mr. Schneider's home on two different occasions. He simply grabbed her when no one else was around, forced himself on top of her, and penetrated her vaginally. He made no attempt to persuade her of anything. He offered no comforting or loving words. He simply took her by force when he found her alone. For the incidents in Spokane, he had no role in being alone with her.

Unlike *DeVincentis*, *Slocum*, and *Carleton*, the trial court's findings here do not support a common

scheme or plan for sexually assaulting children. Many of the "facts" the court found are not relevant to common scheme or plan.

> Finding 3: "The proffered evidence is relevant to the issue of whether the defendant had a common scheme or plan." CP 94.

As shown below, the bulk of the proffered evidence is not relevant to a common scheme or plan.

> Finding 4: "The abuse J.S. and Alicia Swanson suffered at the hands of the defendant are markedly similar acts of misconduct against similarly situated victims under similar circumstances." CP 94.

While the acts described bear some similarities over time, the similarities are not relevant to a common scheme or plan. They are more akin to what would prove modus operandi -- but identity was never at issue here. Thus the similarities are not relevant. ER 410, 402, 403, 404(b).

> Finding 5.a: The defendant gained access to each girl through his significant other: J.S. was the daughter of the defendant's wife Elizabeth, and Alicia Swanson was the younger sister of the defendant's previous wife Jessica. CP 94.

There was no common "access." Alicia visited her sister, not through any actions Mr. Schneider took to get her there. There was no suggestion Mr. Schneider married her sister to get access to her:

they had married years earlier, she lived in a different state. Her visits were merely coincidental, not part of a scheme or plan. *Compare*: *DiVincentis* (invited girls over, desensitized them by wearing string bikini underwear, acknowledged state of undress, gradually groomed them with massages); *Carleton* (befriended in youth group, arranged sleepovers, told of homosexual alternate personality); *Baker* (arranged for stepdaughters to sleep in bed with him); *Slocum* (invited to sit in recliner). The alleged rapes occurred when Alicia's sister left them alone, not through any means he concocted to isolate her.

The evidence established only that both victims were young, Mr. Schneider was an adult, and there was a family relationship by marriage. *Slocum*, 183 Wn. App. at 454. Mr. Schneider "simply seized opportunities when no one was watching ... it is not evidence of a plan." *Id.* at 455. As there, it was an abuse of discretion to admit Alicia's testimony to prove a common scheme or plan under ER 404(b).

> Finding 5.c: Amongst other places, the defendant sexually assaulted each victim in the bedroom he shared with his then current wife, providing him access. CP 94.

The bedroom he shared with his then-wife did not "provide him access" to Jesci or Alicia. Only one of the three rapes of Alicia occurred in the bedroom; the others on the couch and the floor. There seemed no "scheme or plan" for the locations of the rapes of Jesci, but they certainly began in the car and truck, away from their home.

> Finding 5.e: The defendant used force and violence at times on each victim; pain further excited the defendant. CP 94.

From the beginning with Jesci, he used persuasion, comforting words, and loving expressions to get her to do what he wanted. The fact that in later years he integrated acts of force or violence into the sexual acts, after she had been complying with him, does not demonstrate a common scheme or plan on how to commit the crime. *Dewey, supra; Lough, supra.*

> Finding 5.f: The defendant did not use condoms when vaginally raping either of the victims. CP 95.
>
> Finding 5.g: The defendant assured both victims they would not get pregnant because he had been "fixed". CP 95.
>
> Finding 5.h: Both victims noted that the defendant was circumcised. CP 95.
>
> Finding 5.i: The defendant asked both victims to wear his wife's lingerie and/or high heels for him. CP 95.

> Finding 5.j: The defendant video taped his sexual assaults with both victims. CP 95.

Being circumcised is not part of a scheme or plan. None of these factors was a "method of obtaining" sexual intercourse. *Dewey*, 93 Wn. App. at 56. While they may have incidentally occurred on occasion, they are at best similarities that, if sufficiently distinct, could go toward identity or modus operandi, but not to common scheme or plan.

> Finding 5.k: The Court considered the dissimilarities of the two victims as well, and finds them to be significantly outweighed by the similarities.

The court's balancing of the similarities was based on its misinterpretation of ER 404(b), confusing aspects of modus operandi with common scheme or plan. Thus this Court should review the weighing *do novo*, not for an abuse of discretion. *Gunderson*, *supra*.

> [T]he common features required by *Lough* to establish a plan must be features other than those common to most rapes. Otherwise, all evidence of other rapes would be admissible to show plan, and ER 404(b), which prohibits propensity evidence, would be meaningless.

Dewey, 93 Wn. App. at 57-58.

When the findings without support in the record and the findings that would be relevant only

for modus operandi are removed from the equation, the dissimilarities greatly outweigh the similarities relevant to a common scheme or plan.

c. *The Evidence Was More Prejudicial than Probative.*

The probative value of Alicia's testimony must be weighed against its purpose: to prove a common scheme or plan. ER 404(b), 403. As shown above, it was insufficient for that purpose. It therefore had no probative value, certainly not "overriding probative value." *Gunderson*, *supra*.

In contrast, its prejudicial effect was enormous. "[T]he 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); *Gresham*, 173 Wn.2d at 433; *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). It should have been excluded.

d. *The Error Was Not Harmless.*

> [The harmless error] analysis does not turn on whether there is sufficient evidence to convict without the inadmissible evidence. ... Rather, the question is whether there is a reasonable probability that the outcome of the trial would have been different without the inadmissible evidence.

Gower, 179 Wn.2d at 857 (citations omitted).

In *Gower*, the Court noted the State's need for the evidence of prior sexual offense accusations.

> [T]his was a credibility case; the only corroborating evidence was a witness who corroborated details of the aftermath of one incident rather than the incident itself. Just as in *Gresham*, "[t]here were not eyewitnesses to the alleged incidents of molestation." ... [T]he highly prejudicial evidence of prior sex offenses thus impermissibly bolstered the alleged victim's credibility. Because credibility was the main issue in this case, just as it was the main issue in *Gresham*, we cannot say admission of that evidence was harmless.

Gower, 179 Wn.2d at 858 (citations omitted).

For the same reasons, the error here was not harmless. This Court should reverse the convictions and remand for a new trial.

4. THE COURT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE AND TO CONFRONTATION AND ABUSED ITS DISCRETION BY EXCLUDING EVIDENCE OF JESCI'S EARLIER ABUSE.

> "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." ... A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. ... "The right to confront and cross-examine adverse witnesses is [also] guaranteed by both the federal and state constitutions."

State v. Jones, 168 Wn.2d 713, 720, 230 P.2d 576 (2010).[22] The right to confront includes the right to meaningfully cross-examine the State's witnesses to cast doubt on their credibility. *Darden, supra*, 145 Wn.2d at 620; *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Where a jury's decision to believe or not believe a single witness is particularly important to the outcome of the case, the witness's credibility "must be subject to close scrutiny." *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980).

> Evidence that a defendant seeks to introduce "must be of at least minimal relevance. ... "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial."

Jones, 168 Wn.2d at 720.

"Since [appellant] argues that his Sixth Amendment right to present a defense has been

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[22] Quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); *see also Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); Const., art. I, §§ 3, 22; U.S. Const., amends. 6, 14.

violated, we review his claim *de novo*." *Id.*, at 719.

Here the court violated appellant's Sixth Amendment rights to present a defense and to confrontation when it excluded the evidence that Jesci had reported John Burke abused her at age 5. The defense offered this evidence for several purposes. It showed she had reported the same kind of conduct before, which caused her mother to get rid of the man and keep Jesci with her -- and now her mother was going to give Eric custody of Jesci. If she told her mother he abused her as Mr. Burke had, she would get rid of Eric and keep Jesci. It showed a basis of knowledge to know about such conduct separate from being raped by Mr. Schneider. By the time of trial, it also showed her ability to change her version of events based not on what she actually experienced or remembered, but based on her mother's influence. All of these issues go directly to Jesci's credibility -- the key factor in this prosecution.

Her earlier reports of abuse also provided a crucial context for telling Torr Lindberg she had not experienced any sexual abuse "since that time."

Because the defense could not ask her about telling Mr. Lindberg she had been abused when she was five, Mr. Lindberg's testimony, out of context, conveyed that he suspected Mr. Schneider had sexually abused her. This was a perversion of her meeting with Mr. Lindberg, of her complete denial that Mr. Schneider abused her, and so highly prejudicial.

5. THE COURT ERRED BY EXCLUDING EVIDENCE THAT JESCI KNEW OF ALICIA'S ALLEGATIONS AGAINST ERIC, AND PROSECUTORIAL MISCONDUCT DENIED APPELLANT DUE PROCESS BY ARGUING CONTRARY TO FACTS THE STATE KNEW.

The State repeatedly claimed Jesci Shelton and Alicia Swanson did not know each other. RP 549, 991, 1300-01. It argued any similarities between their testimony supported Jesci's credibility.

Although the two women may not personally have met and discussed their allegations, nonetheless Anneta Spicer had told Jesci Shelton in 2010 what Alicia Swanson claimed Eric had done to her. The court sustained the State's objection to this statement and instructed the jury to disregard it. RP 1232-33.

This ruling was an abuse of discretion. Jesci's basis of knowledge clearly was relevant to her credibility. The State argued the similarities

supported Jesci's credibility in opening and again in closing. Despite knowing Ms. Spicer told Jesci of Alicia's allegations, the State persisted in arguing that the jury should believe Jesci because the two women had not met. RP 1300-01.

The Fourteenth Amendment to the United States Constitution cannot tolerate a state criminal conviction obtained by knowing use of false evidence or improper manipulation of material evidence.[23]

> [A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment ... .
>
> ...
>
> ... "A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. ..."

Napue, 360 U.S. at 269.

> The prejudice to a defendant's right to a fair trial is even more palpable when the prosecutor has not only withheld

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[23] *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *Miller v. Pate*, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959); *Alcorta v. Texas*, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (1957); *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935).

> exculpatory evidence, but has knowingly introduced and argued false evidence. ... A new trial is required "if there is any reasonable likelihood that the false [evidence] could have affected the judgment of the jury."

Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991).

> The term "false evidence" includes the "introduction of specific misleading evidence important to the prosecution's case in chief [or] the nondisclosure of specific evidence valuable to the accused's defense."

Troedel v. Wainwright, 667 F. Supp. 1456, 1458 (S.D. Fla. 1986), quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 647, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

The court's exclusion of this evidence and the State's argument contrary to it violated Mr. Schneider's constitutional right to due process, to present a defense, and to confront witnesses. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 22.

6. THE COURT ERRED BY IMPOSING COSTS.

This court's authority to impose costs on a defendant is provided by RCW 10.06.160. That statute also provides:

> **The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.** In determining the amount and method of payment of costs, the court **shall** take account of the financial resources of the defendant and

> the nature of the burden that payment of costs will impose.

RCW 10.01.160(3) (emphases added).

The Supreme Court held the use of the word "shall" makes this statute's directive imperative. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

> Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors, ... such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Blazina, 344 P.3d at 685.

In *State v. Baldwin*, 63 Wn. App. 303, 818 P.2d 1116 (1991), the court concluded Mr. Baldwin was able-bodied and employable once he was released from his sentence for selling cocaine.

Mr. Schneider is sentenced to life in prison; he may possibly be released after serving over twenty years. In contrast to *Baldwin*, this record shows Mr. Schneider is not "able-bodied" and "employable," but suffered a major head injury on

the job while this case was pending, subjecting him to a lengthy assessment for competency.

When the court conducted an "individualized inquiry" into Mr. Schneider's finances it found him indigent. Supp. CP [Subno. 121]. That finding should control the cost assessment.

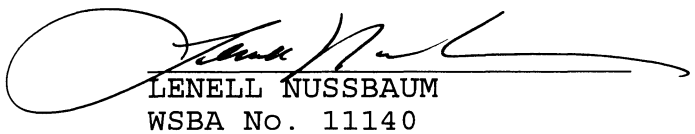
There is no evidence that Mr. Schneider is or will be able to pay any costs, nor that the trial court considered any evidence. This court therefore should vacate that portion of the judgment and sentence.

D. CONCLUSION

The insufficiency of evidence for a unanimous verdict requires this Court to reverse and dismiss all counts. The other errors require this Court to reverse and remand the case for a new trial, except the imposition of costs, which requires merely striking them from the judgment and sentence.

DATED this 26th day of May, 2015.

Respectfully submitted,



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APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. ERIC STEVEN SCHNEIDER, Defendant.	No. 11-1-08104-1 SEA FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: ER 404(b)

THE ABOVE-ENTITLED CAUSE having come on for trial from before the undersigned judge in the above-entitled court; the State of Washington having been represented by Senior Deputy Prosecuting Attorney Hugh Barber; the defendant appearing in person and having been represented by his attorneys Jeff Cohen and Noah Wiles; the court having read the briefing and heard the arguments of counsel and reviewed the following items of evidence: The certification for determination of probable cause related to the above encaptioned case, 3 taped interviews of victim J.S. in the above encaptioned case; 2 taped statements from Alicia Swanson as well as the taped defense interview of Alicia Swanson, police reports related to Alicia Swanson from Boardman, Oregon, Riverside, California and Spokane, Washington, and after fully considering the four part balancing test approved by the Washington State Supreme Court in State v.

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Foxhoven, 161 Wn.2d 168 (2007), the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The defendant is charged with two counts of Rape of a Child in the Second Degree, one count of Rape of a Child in the Third Degree and one count of Incest in the First Degree for crimes committed between the years 2002 and 2011.
2. The State offered evidence that the defendant previously raped Alisha Swanson in 2001 and 2002 on the issue of common scheme or plan pursuant to ER 404(b).
3. The proffered evidence is relevant to the issue of whether the defendant had a common scheme or plan.
4. The abuse J.S. and Alicia Swanson suffered at the hands of the defendant are markedly similar acts of misconduct against similarly situated victims under similar circumstances.
5. There are a number of similarities between the two crimes, which include:
   a. The defendant gained access to each girl through his significant other: J.S. was the daughter of the defendant's wife Elizabeth, and Alicia Swanson was the younger sister of the defendant's previous wife Jessica.
   b. Both victims were between the ages of 11 and 13 when the defendant first sexually assaulted them.
   c. Amongst other places, the defendant sexually assaulted each victim in the bedroom he shared with his then current wife, providing him access.
   d. The defendant sought to obtain the silence of each victim with threats.
   e. The defendant used force and violence at times on each victim, Pain further excited the defendant.

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f. The defendant did not use condoms when vaginally raping either of the victims.

g. The defendant assured both victims they would not get pregnant because he had been "fixed".

h. Both victims noted that the defendant was circumcised.

i. The defendant asked both victims to wear his wife's lingerie and/or high heels for him.

j. The defendant video taped his sexual assaults with both victims.

k. The Court considered the dissimilarities of the two victims as well, and finds them to be significantly outweighed by the similarities.

CONCLUSIONS OF LAW

1. The law, and this court, presumes such evidence inadmissible. JB

2. The Court finds by a preponderance of the evidence that the prior sexual misconduct by the defendant did occur.

3. The similarities between the two victims go well beyond those deemed sufficient by the court in State v. DeVincentis, 150 Wn.2d, 11 (2003), and as such, the evidence of the defendant's rapes of Alicia Swanson may be considered by the jury as evidence of a common scheme or plan, which is particularly relevant to proof of the charged crimes, and manifestation of a plan/design to fulfill sexual compulsions. 1

4. The probative value of the evidence of the defendant's rapes of Alicia Swanson is exceptionally strong because of all the commonalities between the events and the probative value is substantially outweighed by the prejudicial effect. Whatever prejudice the defendant might experience is not unfair prejudice. ER 403. 1

5. Further, the Court adopts and incorporates by reference its oral findings of fact and conclusions of law, and litany of materials delivered pursuant to stipulation of the parties. lengthy JB 1

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6. A proper limiting instruction was given to the jury.

HONORABLE TIMOTHY BRADSHAW

Presented by:

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Deputy Prosecuting Attorney

Jeff Cohen, WSBA #
Attorney for Mr. Schneider

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APPENDIX B

STATE EXHIBIT 4

11-[illegible]6758

ORIGINAL

Dear Eric,

I dont know where to start. You lied to me about everthing I wonder if you ever told me the truth. Did you ever really love me. You told me lies about Ashely, Brittany, ~~adrienne~~, and whoknows who. You told me they were just friends but you lied about that too. You hurt my brothers amy mom and me. You did things to them that makes me want to slap you across your face. You will never hurt them again or me. Ya lied to me about everything. I dont know if I can ever forgive you. Did you love me ever. did you ever tell me the truth. You lied about orgeon, you lied about hurting my brothers and ay mom. You are a horrible person and I dont know how you sleep at night. I remember when you had Ashely and Brittney over at night and I know what you did with them. I Really Hate you right now. I know you are violent and dangerous. I cant trust you ever again. Have a good life with all your girlfriends. Ya have lost Your Wife, your Family, and ~~other~~ me I hope it was worth it.

A very broken hearted

Jessi Skelton

PS. Dont ever try to call, text, or try to come near me and my family. We gave you a chance to tell the truth but you chose not too. Good bye.

If you ever come and try to hurt me or my brothers I will tell them / mom, the police what you did to me. what we did. I will never allow you to hurt me or my family again. You know what Im talking about too. I will never trust you again. I swear on my life!!! You might want to get a job too! Athole.

111-236958

Eric Schneider

from Jesci

APPENDIX C

APPENDIX C

CONSTITUTIONAL PROVISIONS

Jury trial for crimes, and procedural rights
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const., amend. 6.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law... .

U.S. Const., amend. 14, § 1.

Personal Rights. No person shall be deprived of life, liberty, or property, without due process of law.

Const., art. I, § 3.

Trial by Jury. The right of trial by jury shall remain inviolate... .

Const., art. I, § 21.

Rights of the Accused. In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel, ... to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in

> his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: ... .

Const., art. I, § 22.

CERTIFICATE OF SERVICE

I certify that on this date I mailed a copy of the Brief of Appellant, postage prepaid, to the following individual, postage prepaid, addressed as indicated:

King County Prosecutor's Office
Appellate Unit
W-554, King County Courthouse
516 Third Ave.
Seattle, WA 98104

Mr. Eric Schneider
374091
P.O. Box 769
Connell, WA 99326

I declare under penalty of perjury under the laws of the State of Washington that the above statement is true and correct to the best of my knowledge.

May 26, 2015 - SEATTLE, WA
Date and Place

ALEXANDRA FAST