SUPREME COURT NO. 99297-5
COURT OF APPEALS NO. 79269-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUAN MANUEL GARCÍA GONZÁLEZ,

Petitioner.

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

The Honorable Janet M. Helson, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Juan Manuel García González, the appellant below, seeks review of the Court of Appeals decision in State v. García González, noted at __ Wn. App. 2d __, 2020 WL 6036830 (Oct. 12, 2020) (Appendix A) following denial of his motion for reconsideration on November 5, 2020 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. Should State v. Kennealy, 151 Wn. App. 861, 887, 214 P.3d 200 (2009), which states that prior sexual misconduct should be "generally admit[ted]" in "child sexual abuse case" and which was relied on by the Court of Appeals and the trial court be overruled because is incorrect and harmful, necessitating review?

2. Did the trial court commit legal error by considering that the complainant's credibility would be at stake in determining that the purpose of the common scheme or plan basis for admitting evidence was met under ER 404, thereby essentially adopting credibility bolstering as a valid ER 404 purpose?

3. The complainant's accounts of abuse and the ER 404(b) witness's accounts of abuse disclosed no substantial similarities that would or could naturally be explained by the plan or design of Mr. García González. Does the Court of Appeals decision to the contrary conflict

with Washington Supreme Court and Court of Appeals precedent that requires substantial similarities in order to find a common scheme or plan?

4. Did defense counsel's relevancy objection suffice to preserve a claim on appeal that the prosecution improperly cross-examined a defense expert with materials she did not rely on in rendering her expert opinion?

C. STATEMENT OF THE CASE

In 2014 or 2015, a friend of Mr. García González's daughters, C.V., moved in with her daughter A.V., the complainant. 2RP[1] 1050. C.V. had lived with them a few times over the years, C.V. had otherwise been periodically homeless; after she moved in, she quickly became a caregiver to the numerous children in the house, allowing Mr. García's daughters to work outside the home. 2RP 848-49, 1050. C.V. was paid by the state as a caregiver. 2RP 1178.

The atmosphere of the house was highly sexualized. Adults and children alike would be heard saying "suck my dick," "eat my pussy," and having other sexual discussions, including A.V., who wanted to talk and act like the big girls. 2RP 766-68, 1072-73, 1333. Mr. García's daughters,

[1] García González references the verbatim reports of proceedings as follows:
1RP—consecutively paginated transcripts of August 8 and 30, 2018; September 10, 11, 12, 17, 18, 19, and 20, 2018; October 1, 11, 15, 16, 17, and 25, 2018; and November 30, 2018.
2RP—consecutively paginated transcripts of October 1, 2, 3, 4, 8, 9, 18, 22, 23, and 24, 2018.

Erika and Rosa, and C.V. would frequently have men over for sex and other men lived in the house, including a registered sex offender. 2RP 1332-33, 1336.

It was claimed that the sexualization present in the house went beyond talk for A.V. She was said to have many sexual experiences from a young age. When she was two, an older relative or family friend rubbed his penis on her genitals.[2] 1RP 511-12. When she was five or six, another relative did the same and also rubbed his penis on her vagina and anus and may have penetrated her vagina. 2RP 347, 514, 1179-80, 1337-41. In the house in question, A.V. and a slightly younger grandson of Mr. García were repeatedly caught touching each other's genitals. 2RP 515, 679-80, 687-89, 720, 772-73, 1164. A.V. was disciplined by adults in the home for sexual contacts with the grandson and the other relative. 2RP 683-84,

At the end of June 2016, A.V. told a family friend that García González had been touching her inappropriately, even in the last few days. 2RP 381. When this disclosure was made to A.V.'s mother, C.V., A.V. was examined at a hospital and underwent a forensic interview. 2RP 383; Pretrial Ex. 8; Pretrial Ex. 12. Her inconsistent stories of abuse began immediately, as did the state's inability to produce any evidence to corroborate her wildly inconsistent claims.

[2] This instance was not discussed in front of the jury.

She claimed at the forensic interview that Mr. García González 'tried to rape me" by putting his "boy part" in her "girl part" and her "back body part, once wiping his spitty fingers on her front and back parts, and licked her vagina. Pretrial Ex. 8 at 12, 15-17, 26. She said no when he asked her to "suck my boy part." Pretrial Ex. 8 at 25. She also said his "boy part" touched her bottom and moved around and inside her bottom. Pretrial Ex. 8 at 27, 31. At the end forensic interview, A.V. was asked directly if another person had ever done something similar to her and she lied, saying no. Pretrial Ex. 8 at 34.

The forensic exam contradicted her reports. Her medical examination was completely normal, and the doctor indicated one would expect to see signs of injury to a girl her age from being vaginally and anally penetrated with an adult penis in the last 48 hours. 2RP 235, 237, 270. Medical records noted that A.V. "denies vaginal penetration" and "[n]o dysuria or pain with bowel movements." Pretrial Ex. 12 at 6. She did not tell the doctors about any licking either. 2RP 1343.

At trial, she variously claimed that her vagina was licked more than once and no longer claimed penetration, just attempted penetration. 2RP 1281-84, 1291. She made inconsistent statements about whether touching occurred inside or outside or clothes and she forced to acknowledge that, contrary to what she had said earlier, a older male relative had touched and

rubbed his penis on her vagina and penetrated her anus. 2RP 1338-41, 1345, 1350.

A.V.'s anal and vulvar swabs were negative for seminal fluid. 2RP 506-07, 533-34, 577-78. Ten sperm cells were found on her underwear and four DNA contributors were found on the underwear, including A.V. and Mr. García. 2RP 520, 527, 551. Nothing was conclusive as to how various male sperm ended up on the underwear and Mr. García offered the expert testimony of Dr. Elizabeth Johnson was that sperm cells could have likely been transferred in the laundry, citing a study where such transfer had occurred. 2RP 587, 609-10, 613.

As common plan or scheme evidence under ER 404(b), the trial court admitted the testimony of H.K., a girl who lived in the house in question in 2011. H.K. stated that Mr. García González touched or squeezed her vagina and breasts with his hands. 2RP 103; Pretrial Ex. 1, H.K. Forensic Interview at 14. She also stated he would "make out with [her] ear" on the earlobe" for about 90 seconds at a time. 2RP 106; Pretrial Ex. 1, H.K. Jun. 7, 2018 Interview at 15. She also described García González resting his hand on her breast and pushing her head toward his lap when they were on the couch under blankets; García was fully clothed. 2RP 110, 13; Pretrial Ex. 1, H.K. Jun. 7, 2018 Interview at 50-51. H.K. was uncertain whether there was ever penile contact, describing that she felt something soft on the

back of her leg at one time, which she thought might be a belt buckle. 2RP 106; Pretrial Ex. 1, H.K. Forensic Interview at 20-22. H.K. said García's breast touching and pushing her head toward his lap occurred in the living room while others were present watching television. 2RP 110, 113, 127. All the other claimed abuse occurred in the bedroom down the hall where Mr. García González's granddaughter slept. Pretrial Ex. 1, H.K. Forensic Interview at 12-13; 2RP 103, 106, 123-24.

H.K.'s and A.V.'s accounts of alleged abuse varied widely, occurring in different places in the house, under different circumstances, and consisting of different sexual acts. There were no substantial similarities in any aspect of H.K.'s and A.V.'s descriptions, including supposed grooming or special treatment, that could support the notion that García González used the same plan to perpetrate the alleged abuse against both girls separated by five years. Nonetheless, the trial court admitted H.K.'s testimony, including her descriptions of abuse by García González, under the common scheme or plan purpose of ER 404. CP 352-60. The court determined that the evidence was "highly probative" not because of the substantial similarities between the girls' claimed experiences, but because A.V.'s credibility would be a central issue at trial. CP 358-59; 1RP 133. In other words, the court admitted H.K.'s testimony with the express purpose of bolstering A.V.'s credibility, i.e., for propensity. CP 359; 1RP 133.

The jury returned guilty verdicts on each count of first degree child molestation. CP 345, 347, 349. The trial court sentenced Mr. García González to an indeterminate sentence of 120 months to life. CP 389.

Mr. García González appealed. CP 404-05. He challenged the admission of the ER 404(b) evidence pertaining to H.K. on various grounds and also contended that the prosecutor's cross-examination of his expert witness was improper, attempting to undermine her credibility by irrelevantly drawing attention to what the expert had not relied upon in rendering her opinion.

D. ARGUMENT IN SUPPORT OF REVIEW

1. **Review should be granted to overrule State v. Kennealy, on which the Court of Appeals decision relies because Kennealy conflicts with precedent**

State v. Kennealy states, "[S]ubstantial similarity between the acts does not require uniqueness, and courts generally admit evidence of prior sexual misconduct in child sexual abuse cases." 151 Wn. App. at 887 (alteration in original). Both the Court of Appeals and the trial court decisions relied on Kennealy as a basis for admitting common plan or scheme evidence. Slip op., 8; CP 357.

Kennealy's "generally admit" statement is incorrect and in conflict with Washington Supreme Court and Court of Appeals precedent. It creates

a special, ER 404(b)-lite rule in child sex cases, which should be categorically disavowed. RAP 13.4(b)(1), (2), and (4) review is appropriate.

The Washington Supreme Court has emphasized that the prosecution faces a "substantial burden" when attempting to introduce common scheme or plan evidence and that the degree of similarity for admission "must be substantial." State v. DeVincentis, 150 Wn.2d 11, 17, 19, 74 P.3d 119 (2003); accord State v. Slocum, 183 Wn. App. 438, 451, 333 P.3d 451 (2014) (admission of ER 404 evidence requires more than random similarities or similar results, the degree of similarities must be substantial). The Washington Supreme Court has also recognized that due care is appropriate when admitting ER 404(b) evidence in child sex cases because the potential for undue prejudice is at its highest. State v. Gower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014); State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). Kennealy's "generally admit" approach for child sex cases runs counter to established precedent and to basic legal norms.

Kennealy should be disavowed as an incorrect and harmful aberration. See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (stare decisis requires clear showing that an "established rule is incorrect and harmful before it is abandoned"). Kennealy's statement that highly prejudicial evidence should be

"generally admit[ted]" in a particular class of cases is incorrect. It really should go without saying that the courts must make an individualized determination in each individual case as to what evidence is admissible irrespective of the type of charge involved. Kennealy is also harmful because it undermines the important role of the courts to apply the law evenhandedly without favoritism in any case or class of cases. Kennealy states that strict compliance with ER 404 does not matter as much in child sex cases, and the Court of Appeals and trial court decisions repeat this as some kind of maxim that the admission of such evidence should generally be approved. Review should be granted under RAP 13.4(b)(4) to overruled Kennealy's incorrect and harmful misstatement of the law.

2. **Review should be granted because the Court of Appeals decision misapplies precedent and allows common plan or scheme evidence for the improper propensity purpose of bolstering witness credibility**

Mr. García González asserted the trial court misapplied the evidence rules when it admitted the testimony of H.K. "because it tends to show that the criminal act [against A.V.] did in fact occur and was part of a broader plan by the defendant. Moreover, the evidence goes to A.V.'s credibility, which will be at issue in this case." CP 358.

The trial court misunderstood the analysis under ER 404 to admit common scheme or plan evidence. Admitting such evidence because it

makes it more likely "the criminal act did in fact occur" is admitting such evidence for the improper purpose of propensity. And, there is no purpose other than propensity for admitting evidence because it goes to the complainant's credibility. The trial court expressly determined that because the prosecution's case and the credibility of the complainant will be bolstered, the "purpose" of the common scheme or plan aspect of ER 404 was fulfilled.

This was incorrect and the Court of Appeals decision conflicts with precedent in upholding the trial court's incorrect legal analysis. Credibility will always be at issue in a child sex trial. Certainly, a common scheme or plan, properly found on its own substantial similarities, effectively does bolster the complainant's credibility by showing that something substantially similar happened to someone else previously. It is not the law that the courts should find common schemes and plans more highly probative simply because credibility is a central issue at trial, as the trial court did and as the Court of Appeals approves. See DeVincentis, 150 Wn.2d at 20-21; Slocum, 183 Wn. App. at 448 (requiring substantial similarities to admit common scheme or plan evidence).

The Court of Appeals decision treated Mr. García González's claim as a mere complaint about the trial court's ER 403 analysis, weighing the probative value against its prejudicial effect. Slip op., 13-14. But this was

not his argument or what the trial court concluded, as discussed. The Court of Appeals correctly recited the pertinent steps in the ER 404(b) analysis, acknowledging that the second step—"'identify the purpose for which the evidence is sought to be introduced"'—differs from the fourth step "'weigh the probative value against the prejudicial effect.'" Slip op., 8 (quoting State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). Yet the Court of Appeals fails to acknowledge that the record establishes the trial court identified the purpose as common scheme or plan in part because the complainant's credibility and the success of the prosecution was at stake. These are not proper considerations under step 2 of the analysis. Because the Court of Appeals decision permits an improper application of ER 404 in conflict with precedent, review under RAP 13.4(b)(1) and (2) is warranted.

3. **The Court of Appeals decision conflicts with precedent that requires substantial similarities to admit common scheme or plan evidence**

Perhaps because of their erroneous belief that ER 404(b) evidence is "generally admitted" in cases like this, the Court of Appeals and trial court's analyses of the common scheme and plan evidence is incorrect on its merits. There was no showing of substantial similarity to warrant the admission of the very different alleged experiences of both girls. The Court of Appeals decision conflicts with DeVicentis, Slocum, State v. Lough, 125 Wn.2d 847,

889 P.2d 487 (1995), and other decisions that require a substantial similarity between two supposed manifestations of the same plan.

The Court of Appeals first uses the fact that both girls were similar in age and were the only children in the house who were unrelated to Mr. García, both had single, somewhat absentee mothers, and both called Mr. García "grandpa" like the other many children in the house. Slip op., 9. This is not evidence of anything more than mere opportunity to nonincestually molest, particularly in light of the five years separating the incidents and the fact that Mr. García had no control over when or whether the girls would be living with him. Citing State v. Burkins, 94 Wn. App. 677, 689, 973 P.2d 15 (1999), the Court of Appeals claims acts that themselves carry no suggestion of design or plan may, when multiplied or compared to other acts or circumstances, suggest a common plan as the explanation. Slip op., 9. But the court undertook no analysis about what exactly suggests a common plan as the explanation between the very different circumstances under which A.V. and H.K. arrived at Mr. García's house. Br. of Appellant, 20-24. A manifestation of a common plan is not a reasonable suggestion in this case based on the record.

As for the girls being singled out for gifts and special treatment, the evidence is highly contradictory as the Court of Appeals and trial court both acknowledged. Slip op., 10. The trial court ultimately concluded that there

was credible evidence that A.V. and H.K. were singled out for some privileges and the Court of Appeals stated this credibility finding could not be reviewed. Slip op., 10. But finding credible evidence and determining that the credible evidence qualifies as substantial similarities that could only be explained as manifestations of a common plan are two different questions, one is factual and one is legal. In other words, just because the trial court found there was some credible evidence does not absolve the Court of Appeals from addressing whether that evidence really is substantial enough to support the conclusion it was part of a common plan, particularly in light of the various differences in the girls' actual treatment. See Br. of Appellant 24-29. Also, it is unfortunate that the Court of Appeals deemed it unnecessary to address that Mr. García was alleged to have showed favoritism to A.V. by purchasing for her highly sexualized, age-inappropriate clothing such as tub-tops, underwear, skinny jeans, two-piece bathing suits, and the like, but there was nothing of the sort when it came to H.K. 2RP 725-26, 1085-86, 1198, Pretrial Ex. 1, Chris Carpenter Aug. 6, 2018 Interview at 67.

The Court of Appeals decision also repeatedly relies merely on allegations that Mr. García "touched both girls' genitals with his hands, rubbed his crotch against them, licked their bodies, and pushed their heads towards his crotch" for its common plan finding. Slip op., 9, 11. The Court

of Appeals also notes that Mr. García "normalized physical contact" with both girls when watching television under a blanket on the living room couch when others were nearby.

This cursory analysis is not accurate and improperly sweeps under the rug exactly how different the circumstances for the girls were. Touching of genitals with hands is not a feature of a plan—it happens in virtually every sexual encounter. The touching was quite different. H.K. said Mr. García squeezed her breasts and vagina, doing nothing aside from touching. 2RP 103-04; Pretrial Ex. 1, H.K. Forensic Interview at 14. Mr. García was fully clothed. H.K. said Mr. García would "make out with" her ear for "[m]aybe a minute and a half" at a time. 2RP 106. H.K. could not testify she ever contact with Mr. García's penis, stating it could have his belt buckle she felt on the back of her leg which was "soft, I guess, but it wasn't hard." 2RP 106. Mr. García never spoke during these alleged encounters. 2RP 113. Almost all of these encounters occurred in a bedroom and the only thing that would happen under blankets on the living room couch was touching and pushing her head towards his "privates" while she and others were watching TV. Pretrial Ex. 1, H.K. Foresnic Interview at 12-13; Pretrial Ex. 2, Chris Carpenter Jun. 3, 2013 Interview at 32-33; 2RP 103, 110, 123-24.

There was no breast and vagina squeezing in the bedroom for A.V. A.V. testified variously that Mr. García González moved his fingers around

her vagina and had used saliva one time to touch her vagina and anus. 2RP 1233-43; Pretrial Ex. 8 at 15-17, 26. A.V. said Mr. García licked her vulva, never her ear. 2RP 1281-82. A.V., unlike H.K., said Mr. García rubbed his penis against her vagina and anus and penetrated her vagina and anus with his penis, but she also denied penetration. 2RP 664, 1288, 1291, 1300-01, 1340, 1343-44. A.V. was threatened not to tell anyone. 2RP 1239. A.V. also claimed that all the abuse happened in the living room sometimes during "sleepovers" Mr. García would have with her and the other children, but denied that a blanket was used during any incident. 2RP 1225, 1229-30, 1287, 1299-1300.

While it is true that *some* molestation was alleged to occur on the same couch for both H.K. and A.V., the circumstances were very different, as discussed. In Slocum, the Court of Appeals approved admitting similar incidents that occurred on the same recliner, but excluded significant other evidence. Slocum would invite W.N. and her mother (when she was a child) to sit with him in this recliner and use rocking back and forth to escalate more sexual contact, including moving his hands towards and rubbing their girls' vaginal areas as part of the rocking. Slocum, 183 Wn. App. at 444-45, 455. Because of these substantial similarities in how the sexual contact occurred, only the recliner evidence was admissible.

Here, by contrast, A.V. and Mr. García would sleep on the couch together and, according to A.V., Mr. García would rub his penis against her vagina, lick her vagina, or penetrate her vagina or anus on or near the couch. All that happened on the couch with respect to H.K. was breast touching and resting or pushing H.K's head onto Mr. García's lap. Unlike Slocum, the possibility that some of the very different kinds of abuse might have occurred on the couch for both girls, particularly when most of the incidents occurred in completely different places, cannot amount to a design or plan on the part of Mr. García any more than taking advantage of an opportunity.

The most similar aspect is that Mr. García allegedly moved both girls' heads toward his crotch. But for H.K., this happened under blankets on the couch. For A.V., this would happen after Mr. García allegedly asked her to suck his penis and she said no; A.V. inconsistently testified that "[h]e did nothing" when she told Mr. García no to the fellatio request. 2RP 1293-94; Pretrial Ex. 8 at 25. This is not similar under Slocum to support an inference of a common plan.

In sum, as far as similarities between the girls' experiences, they begin and end with the fact that the alleged abuse occurred in the same house by the same person. The allegations described different types of touching in different locations within the house at different times. The circumstances that brought the girls into the house were different and so was any credible

evidence that Mr. García González showed the girls favoritism. This was not indicative of a plan of molestation but simply demonstrates opportunities to molest based on the circumstances. Cf. Slocum, 183 Wn. App. at 455 ("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").

The Court of Appeals and the trial court misapplied the law. Because the Court of Appeals decision conflicts with the all the cases that clearly require a substantial similarity to admit common scheme or plan evidence, review should be granted pursuant to RAP 13.4(b)(1) and (2).

4. **The Court of Appeals decision conflicts with precedent that prohibits cross-examining an expert witness with materials or theories that she did not rely upon in reaching her opinion because such evidence is irrelevant**

The Court of Appeals determined that Mr. García González failed to preserve his claim that the prosecutor improperly cross-examined his expert because he objected only on relevancy grounds to the prosecutor's elicitation of materials she did *not* rely on in rendering her opinion.[3] Slip op., 16; see 2RP 598-601.

This determination conflicts with Washington Irrigation and Development Company v. Sherman, 106 Wn.2d 685, 688, 724 P.2d 997

[3] The expert's opinion pertained to the potential transfer of sperm cells in the laundry, given that A.V.'s underwear contained sperm cells of three different men.

(1986), and State v. Hamilton, 196 Wn. App. 461, 383 P.3d 1062 (2016). Those cases establish that if the sole purpose of cross examination is impeach the expert with what she did not rely on, then the evidence "fails 'to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Hamilton, 196 Wn. App. at 484 (quoting ER 401); accord Wash. Irr., 106 Wn.2d at 688 (improper to question expert on what she did not rely on to formulate opinion under ER 703 and 705).

The evidence rules and precedent are clear. If the expert did not rely on information to render an opinion, then questioning the expert about information she did not rely on is improper because it is irrelevant to her opinion. Defense counsel's relevancy objection therefore adequately preserved the issue, contrary to the Court of Appeals opinion, which misapprehends the law and should be reviewed under RAP 13.4(b)(1) and (2).

E. CONCLUSION

Because Mr. García González satisfies RAP 13.4(b)(1), (2), and (4) criteria, review should be granted.

DATED this 7th day of December, 2020.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JUAN GARCÍA GONZÁLEZ, Appellant.	No. 79269-5-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — Juan García González appeals his jury conviction for three counts of child molestation. He claims the trial court erred by (1) admitting evidence of his prior sexual abuse of a different child in the same household to prove a common scheme or plan and (2) permitting the prosecutor to cross-examine the defense expert witness regarding facts she did not rely on in forming her opinion. He also claims that cumulative error warrants a new trial. We affirm.

I. BACKGROUND

García González lived in a two-story house in Kent with his wife Theresa, his stepson Chris Carpenter, his two daughters, and his seven grandchildren. In November 2014, seven-year-old A.V. and her mother moved into the house. At that time, A.V. was the only child in the house that was not García González's biological grandchild. But A.V. referred to García González as "grandpa" and

treated his grandchildren as her cousins. García González invited A.V. with him on errands and often bought her clothing, gifts, and candy or fast food.

In the spring of 2016, García González stopped sleeping with his wife in the master bedroom and started sleeping on a couch in the living room. He invited the children to have "sleep-overs" with him in the living room where they would watch television. On at least two occasions, A.V. and García González were the only ones in the room and spent the night on the same couch together. García González's stepson Chris Carpenter saw him and A.V. "cuddling" and "spooning" on the couch while under a blanket.

Around that time, A.V. began exhibiting behavioral changes such as difficulty sleeping and refusing to bathe or change her clothes. In late 2016, A.V. told an adult family friend that she was "being touched." At Mary Bridge Children's Hospital in Tacoma, A.V. told Dr. Yolanda Duralde, the medical director of the Child Abuse Intervention Department, that "grandpa" had touched her more than once. A.V. stated that the most recent incident occurred two nights prior while she was in the living room watching television with García González. She said he pulled down his shorts and her underwear and then rubbed "his private on my private and was moving around." García González told A.V. that he would spank her if she told anyone.

About two weeks later, A.V. told child interview specialist Alyssa Layne that during the most recent occurrence, García González got on top of her, pulled down both of their pants, and "put his boy part, trying to hurt me in my girl part."

Next, he put "his boy part up my back, my back body part," spit on his fingers, and wiped his saliva on her "back body part" before he "put it in." He also pushed her onto her "tummy," spit on his fingers, and wiped them on her "girl part." A.V. further disclosed that García González had done "inappropriate stuff" to her on other occasions. She said he licked her "down there" when they were on the living room couch under a blanket while other people were sleeping in the same room.

A.V.'s genital exam was normal. A forensic analysis of evidence collected during the sexual assault exam revealed the presence of a major DNA profile matching García González on the crotch area of A.V.'s underwear. There was also a trace amount of DNA from two other individuals. In the same area of A.V.'s underwear, the forensic tests detected a very small number of sperm cells, acid phosphate, and amylase. Acid phosphate is an enzyme found in elevated levels in semen, and amylase may indicate the presence of saliva. But the tests were not conclusive for the presence of these substances.

The State charged García González in an amended information with three counts of child molestation in the first degree. At trial, A.V. testified that García González touched her "private parts . . . a lot." The first time it happened, she was watching television with García González on the living room couch. He pulled down her underwear, put his hand on her "vagina," and moved his fingers around. A.V. testified that on other occasions, he "licked my private" in the living room while watching television or in the master bedroom. In another instance,

while A.V. was sleeping on the floor of the master bedroom, García González put "his boy part" in A.V.'s vagina and tried "to make it go inside." One time when they were alone in a downstairs bedroom, he pulled his pants down and told A.V. to "suck his private" while forcibly moving her head until her mouth touched his penis. On the night of the final incident, during a "sleep-over" in the living room after the other children went to sleep, García González pulled down A.V.'s pants and tried to "stick his private into mine again."

The State sought to introduce evidence of García González's prior sexual abuse of H.K., an eight-year-old girl who lived in García González's house in 2011, as part of a "common scheme or plan" under ER 404(b). H.K. moved into the house because her single mother suffered from substance abuse and could no longer care for her. H.K. called García González "grandpa." He took her on errands and bought her candy, food, clothing, and gifts.

H.K. testified that García González touched her "about five times." Some of the abuse took place in a bedroom where H.K. sometimes slept with García González's two-year-old granddaughter. García González laid in bed behind H.K. and "squeezed" her breasts and "vagina" while the granddaughter slept nearby. She felt something rubbing against the back of her leg, but she wasn't sure if it was his penis or his belt buckle. García González also licked and "[made] out with" H.K.'s ear. On other occasions, the abuse took place in the living room while they were watching television. He touched H.K.'s chest under a blanket while other people were in the room. In one incident, while hidden by a

blanket, García González pushed H.K.'s head down towards his "private parts." H.K. eventually disclosed the abuse because she wanted it to end. In 2012, García González was charged with first degree child molestation of H.K. and later pleaded guilty to fourth degree assault – domestic violence. He began abusing A.V. two years later.

Over García González's objection, the trial court granted in part and denied in part the State's ER 404(b) motion. The court ruled that the State could present evidence of García González's abuse of H.K. through her live testimony, but nothing more, because "any other evidence would be cumulative and risk unfair prejudice to the defendant."[1] The court concluded, in pertinent part:

> [T] he purpose of this evidence is to show that the defendant employed a common plan or scheme in touching both children. The defendant used this plan repeatedly to perpetrate separate but very similar instances of abuse where he licked both girls' bodies, fondled their genitals as they slept, rubbed his penis against their bodies, and solicited oral intercourse. The Court is not persuaded by the defense argument that the commonalities that existed between the touching of both children would exist in most cases of molestation and that the defendant's touching was merely opportunistic. . . . Those similarities include the fact that the children were almost identical ages, identical in their personal situation, not biologically related to the defendant and viewed him as their grandfather. The defendant showed some favoritism and attempts to groom the children for abuse. While all the children received some amount of grandfatherly spoiling, there was credible evidence that A.V. and H.K. were singled out for some privileges. The Court gives considerable weight to the defendant's attempts to normalize gradually escalating physical touching by watching television with both girls, often beneath blankets, while their bodies were in physical contact. It was in this living room, under the guise of watching television, that much of the abuse of both children

[1] The State also sought to introduce evidence of H.K.'s abuse through García González's 2012 conviction, H.K.'s child forensic interview, testimony of the child forensic interview specialist regarding the interview, a detective's interview of García González regarding H.K., and testimony from H.K.'s mother and Chris Carpenter.

> occurred. The frequency of the touching is similar for both children, as was the licking of their bodies and the way in which the defendant solicited oral intercourse by placing his hands on the back of their heads and pushing them towards his genital area.

In determining that the "high probative value of this evidence outweighs the risk of unfair prejudice," the court noted that García González's defense was general denial, that the forensic evidence was "far from conclusive," and that "A.V.'s credibility will be central to the case and evidence of the defendant's common scheme or plan is highly probative of this evidence." Before H.K.'s testimony at trial and in the jury instructions, the court provided a limiting instruction stating that the evidence may be considered only to evaluate whether a common scheme or plan existed and not for any other purpose.

García González's expert witness, Dr. Elizabeth Johnson, opined that forensic testing did not establish that García González sexually assaulted A.V. She criticized the State's testing procedures and results. She also opined that García González's DNA could have been transferred to A.V.'s underwear in the laundry.

The trial court permitted García González to present "other suspect" evidence regarding Lucas Amansec, a registered sex offender who lived in the house during the same time period that A.V. was abused. A.V. testified that Amansec had never touched her inappropriately. Amansec was not living in the house when H.K. was abused.

García González testified at trial. He denied molesting A.V. Defense counsel argued that A.V. either fabricated the allegations for attention or that she was mistaken and that Amansec was the true perpetrator.

The jury convicted García González as charged. He appeals.

II. ANALYSIS

A. ER 404(b) Evidence of Prior Misconduct

Common Scheme or Plan

García González argues that the trial court erred by admitting H.K.'s testimony under ER 404(b) as part of a common scheme or plan. We review its decision to admit evidence under ER 404(b) for an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). "Discretion is abused if it is exercised on untenable grounds or for untenable reasons." State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

ER 404(b) provides:

> 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) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting a defendant is guilty because [they are] a criminal-type person who would be likely to commit the crime charged." Foxhoven, 161 Wn.2d at 175 (quoting State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

"One proper purpose for admission of evidence of prior misconduct is to show the existence of a common scheme or plan." State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). A common scheme or plan "may be established by evidence that the Defendant committed markedly similar acts of misconduct against similar victims under similar circumstances." Lough, 125 Wn.2d at 852. Such evidence is admissible if the prior misconduct and the charged crime show "such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the [two] are the individual manifestations." Lough, 125 Wn.2d at 860. In that event, the evidence is admissible "because it is not an effort to prove the character of the defendant" but "to show that the defendant has developed a plan and has again put that particular plan into action." Gresham, 173 Wn.2d at 422. "[S]ubstantial similarity between the acts does not require uniqueness, and courts generally admit evidence of prior sexual misconduct in child sexual abuse cases." State v. Kennealy, 151 Wn. App. 861, 887, 214 P.3d 200 (2009).

To admit such evidence, the court "must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." Thang, 145 Wn.2d at 642.

Contrary to García González's assertions, the incidents involving A.V. and H.K. are sufficiently similar to support a conclusion that they were manifestations

of a common scheme or plan. Both girls were similar in age and were the only children in the house who were unrelated to García González. Both came to live in his home because they have single mothers who struggled with the demands of parenting. Both girls came to view García González as their grandfather, and he took them on outings and bought them gifts and treats. He touched both girls' genitals with his hand, rubbed his crotch against them, licked them, and pushed the back of their heads towards his crotch. And notably, García González normalized physical contact with both girls by watching television with them on the living room couch, often under a blanket while others were nearby. These common features are supported by the record and are sufficient to demonstrate a common scheme or plan under ER 404(b). See Kennealy, 151 Wn. App. at 885-88; Gresham, 173 Wn.2d at 421-23; State v. Kipp, 171 Wn. App. 14, 20-22, 286 P.3d 68 (2012), reversed on different grounds, 179 Wn.2d 718 (2014).

García González asserts that the court erred in finding that the girls' reason for living in the house and the "grandpa" relationship is part of a common scheme or plan because there is no evidence he lured the girls into the home or encouraged them to view him as a grandfather as part of a molestation plan. But the court did not find that García González orchestrated these events, nor was it required to. "[A]cts which in themselves or alone carry no . . . suggestion [of design or plan] may, when multiplied, or when compared with *other acts* or circumstances, suggest a common plan as the explanation[.]" State v. Burkins, 94 Wn. App. 677, 689, 973 P.2d 15 (1999) (alteration in original) (quoting 2 JOHN

H. WIGMORE, Evidence § 240, at 42 (1979)). These similarities, when considered in tandem with the others, support an inference of common scheme or plan.

García González next argues that the court erred in finding that he showed favoritism to A.V. and H.K. as part of a common scheme or plan. He points to evidence in the record showing that he treated A.V. and H.K. in a similar manner as he treated his grandchildren. But the court did not disregard this evidence. It found that "[t]he defendant gave both girls gifts and clothes and took them on trips, though there is conflicting testimony about to what extent the defendant's wife also participated and whether other grandkids received similar privileges." But ultimately, it concluded that "there was credible evidence that A.V. and H.K. were singled out for some privileges." And the trial court's credibility determinations are not reviewable on appeal. State v. Cross, 156 Wn. App. 568, 581, 234 P.3d 288 (2010).

Next, García González highlights dissimilarities between his abuse of H.K. and A.V. to challenge the court's finding that they were substantially similar enough to constitute a molestation plan. For example, he asserts that the court erred in finding that he solicited oral intercourse from both girls by placing his hand on the back of their heads because A.V. testified that he directly asked her to suck his penis whereas he did not speak to H.K. during the episode. On this basis, he contends that the trial court relied on an incorrect understanding of what "substantial similarity" means to reach its erroneous conclusions. García González is incorrect. A precise match between the prior acts and the charged

crime is not required to admit the evidence as part of a common scheme or plan. See Kennealy, 151 Wn. App. at 889 (evidence of defendant's prior sexual misconduct admissible as part of a common scheme or plan even though his behavior in each case was not identical); Kipp, 171 Wn. App. at 21 (no abuse of discretion where victims were of similar ages, both were the defendant's nieces, and both were sexually abused in the same locations but in different ways). García González touched both girls' genitals with his hands, rubbed his crotch against them, licked their bodies, and pushed their heads towards his crotch. These overarching similarities suffice to support the court's findings.

García González also argues that the location, initiation, and timing of the abuse of H.K. and A.V. were not significantly similar to support a finding of common scheme or plan. He contends that any commonalities show opportunity at best. We disagree. García González abused both girls on or near the living room couch while watching television, sometimes under a blanket and while others were present. He also abused both girls in bedrooms while other people were asleep in the same room. All of the abuse occurred in the evening. These similarities amply support a finding of sufficient similarity. And while García González asserts that the lapse of time between his abuse of H.K. and A.V. erodes any finding of similarity, this factor is not determinative. State v. Sexsmith, 138 Wn. App. 497, 505, 157 P.3d 901 (2007). The trial court did not abuse its discretion in admitting evidence of H.K.'s abuse as part of a common scheme or plan.

Absence of Mistake or Misidentification

After trial testimony began, the trial court permitted García González to present evidence that registered sex offender Lucas Amansec could have committed the sexual assaults A.V. described.[2] The prosecutor then argued that the prior acts evidence previously admitted under ER 404(b) was also admissible to show absence of mistake and identification. Thus, the court included the following language in its ruling:

> The Court notes that the defendant has also opted to pursue an "other suspect" defense claiming a registered sex offender living in the house, Lucas Amansec, may have been the true perpetrator and that A.V. misidentified her abuser. In response to this, the State offered a second basis for admitting the defendant's misconduct against H.K., namely that it goes to A.V.'s absence of mistake in naming the defendant as the true perpetrator.

García González argues that admitting H.K.'s testimony to rebut a claim of A.V.'s mistaken identification of García González as the perpetrator was not a valid application of the "absence of mistake" purpose under ER 404(b). On this basis, he contends that if the trial court based any aspect of its ER 404(b) ruling on absence of mistake, it was reversible error. But the State's argument is more like the "identity" purpose than the "absence of mistake" purpose. Such evidence is admissible under ER 404(b) to establish identity through a unique modus operandi. Foxhoven, 161 Wn.2d at 175. Moreover, as discussed above, the trial court properly admitted the prior acts evidence as part of a common scheme or plan. And there is nothing in the court's findings and conclusions to indicate that

[2] The trial court admitted this evidence as a sanction against the State for its late disclosure of Amansec's status as a sex offender. See Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

its decision to admit evidence of H.K.'s abuse was in any way dependent on the State's argument about A.V.'s identification of García González as her abuser. This argument does not provide a basis for reversal.

Probative Value

García González asserts that the court erred in concluding that the probative value of H.K.'s testimony outweighed its prejudicial effect. He contends that the court committed legal error by assigning high probative value to evidence of H.K.'s abuse not because of substantial similarities between H.K. and A.V.'s accounts, but because A.V.'s credibility was an issue in the case. He also contends that the highly prejudicial nature of this evidence deprived him of a fair trial. We disagree.

Under ER 403, relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. Prior similar acts of sexual abuse are "strongly probative because of the secrecy surrounding child sex abuse, victim vulnerability, the frequent absence of physical evidence of sexual abuse, the public opprobrium connected to such an accusation, a victim's unwillingness to testify, and a lack of confidence in a jury's ability to determine a child witness's credibility." Kennealy, 151 Wn.2d at 890. Trial courts should give particular consideration to the probative value of common scheme or plan evidence when corroborating evidence is unavailable. State v. DeVincentis, 150 Wn.2d 11, 25, 74 P.3d 119 (2003).

Here, the record shows that the court carefully considered the strongly prejudicial nature of the evidence and concluded that its high probative value outweighed the risk of prejudicial effect. In reaching this conclusion, the court noted that the forensic evidence was not conclusive and that the case turned largely on A.V.'s testimony. This was entirely appropriate. The court also minimized the risk of unfair prejudice by limiting the evidence to H.K.'s trial testimony and by giving a limiting instruction before her testimony and in the jury instructions. The court properly exercised its discretion in finding that the high probative value of the prior acts was not substantially outweighed by the danger of unfair prejudice.

B. ER 703

For the first time on appeal, García González contends that the prosecutor's cross-examination of Dr. Elizabeth Johnson violated ER 703 and ER 705, thereby prejudicially undermining her expert opinion on the DNA evidence. As a general rule, appellate courts will not consider an issue raised for the first time on appeal unless it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Fraser, 170 Wn. App. 13, 27, 282 P.3d 152 (2012). "We adopt a strict approach because trial counsel's failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial." State v. Powell, 166 Wn.2d 73, 83, 206 P.3d 321 (2009) (citing State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). For this reason, we "will not reverse the trial court's decision to admit evidence where the trial court rejected the specific

ground upon which the defendant objected to the evidence and then, on appeal, the defendant argues for reversal based on an evidentiary rule not raised at trial." Powell, 166 Wn.2d at 82.

Here, García González objected to the prosecutor's cross-examination of Dr. Johnson once based on relevance. That objection was overruled. Another objection based on the formulation of a question was sustained. Neither objection could have alerted the trial court to the claimed evidentiary error he now raises on appeal. Thus, García González failed to preserve it.

C. Ineffective Assistance of Counsel

García González asserts that his trial counsel's failure to object under ER 703 and ER 705 constituted ineffective assistance of counsel. To show ineffective assistance of counsel, the defendant must show that counsel's representation was deficient and that the deficient representation caused prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To establish deficient performance, the defendant must show that counsel's performance fell below an objective standard of reasonableness. McFarland, 127 Wn.2d at 335. Prejudice is shown only if there is a reasonable probability that the result of the proceeding would have been different absent counsel's unprofessional errors. In re Pers. Restraint of Davis, 152 Wn.2d 647, 672-73, 101 P.3d 1 (2004).

ER 703 allows an expert to base an opinion on inadmissible facts or data as long as the evidence is "of a type reasonably relied upon by experts in the

particular field in forming opinions or inferences upon the subject." ER 705 provides that an "expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data." But the expert may be required to disclose the underlying facts or data on which that opinion is based during cross-examination. ER 705. Although ER 703 and ER 705 "permit the disclosure of otherwise hearsay evidence to illustrate the basis of the expert witnesses' opinion, they do not permit the unrelied upon opinions and conclusions of others to be introduced in cross-examination for impeachment purposes." Washington Irr. and Dev. Co. v. Sherman, 106 Wn.2d 685, 688, 724 P.2d 997 (1986) (emphasis omitted) (quoting Ferguson v. Cessna Aircraft Co., 132 Ariz. 47, 49, 643 P.2d 1017 (Ariz. Ct. App. 1981)). In addition, "[t]he law allows cross examination of a witness into matters that will affect credibility by showing bias, ill will, interest, or corruption." State v. Russell, 125 Wn.2d 24, 92, 882 P.2d 747 (1994).

García González asserts that the prosecutor improperly cross-examined Dr. Johnson regarding records created by others that she did not rely on in reaching her conclusions. He asserts that the repeated error undermined Dr. Johnson's credibility and prejudicially affected the outcome of the trial. But Dr. Johnson stated that she reviewed A.V.'s medical records and forensic child interview in preparing her report. The record shows that the prosecutor questioned Dr. Johnson regarding facts, not opinions, on which her opinion was based. This was not improper. Trial counsel was thus not ineffective for failing

to object on this basis. See State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011) (defense counsel not ineffective for failing to object to argument that was not improper or prejudicial).

D. Cumulative Error

García González argues that cumulative error denied him a fair trial. "The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial even where any one of the errors, taken individually, may not justify reversal." In re Det. of Coe, 175 Wn.2d 482, 515, 286 P.3d 29 (2012). Because García González's claims lack merit, no error occurred.

We affirm.

Chun, J.

WE CONCUR:

Leach, J.

APPENDIX B

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

STATE OF WASHINGTON, Respondent, v. JUAN GARCÍA GONZÁLEZ, Appellant.	No. 79269-5-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Juan García González moves for reconsideration of the opinion filed on October 12, 2020. A majority of the panel has considered the motion and has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Chun, J.

Judge

NIELSEN KOCH P.L.L.C.

December 07, 2020 - 3:25 PM

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