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NO. 65455-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRYAN ROSS,

Appellant.

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

The Honorable Alan R. Hancock, Judge
Superior Court Cause No. 09-1-00103-1

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES

A. Whether RCW 10.58.090 is unconstitutional.

B. Whether the trial court properly analyzed the prior instances of sexual misconduct pursuant to RCW 10.58.090.

C. Whether the Trial Court abused its discretion when it ruled that similar prior acts of sexual violence against other victims are admissible to prove a common scheme or plan.

D. Whether the probative value of the evidence of Mr. Ross's prior sexual assault outweighs the prejudicial effect.

E. Whether the Trial Court relied on improper evidence in fashioning its standard range sentence.

II. STATEMENT OF THE CASE

A. Procedural facts

Bryan Ross brings this appeal of right after being convicted on March 15, 2009 by jury of Rape in the Second Degree. He was sentenced within the standard range on April 29, 2009.

B. Facts

On March 3, 2009, Kathleen Shaffer left the Fred Meyer store in Marysville after picking up her prescriptions. As she exited, slowly, because she had difficulty walking, she heard someone calling, "ma'am" repeatedly. She did not look back, and assumed it was someone asking for money. She reached her vehicle, unlocked the door, opened it, and felt a presence directly behind her. She turned around to find herself trapped between Bryan Ross and her car. She was afraid. He said, "I didn't mean to startle you," and then began giving her personal information. RP 266-268. He insisted they exchange phone numbers, so she wrote hers on a receipt and then threw it on the car seat. RP 270. Shaffer insisted she needed to leave and he insisted she give him her phone number. She did that. Id.

Shaffer returned home about an hour and a half later. Already there were two messages from Ross on her answering machine. She remembered statements to the effect that he thought she was beautiful, that he was really glad to meet her, and that he wanted her to call him. The messages were less than an hour apart and substantially the same. RP 274-75. She was angry with herself for giving out her phone number. Id.

Between March 3 and March 27, 2009, there were approximately ten phone messages from Ross to Shaffer, plus several hang-ups. These

messages included statements to the effect, "I don't understand why you're not returning my calls. I thought we hit it off. You know, you're beautiful. I know that you're the love of my life. My – you know, my soul mate. You know, please call me back. I don't understand." RP 277.

Shaffer had been being pressured by friends to date because her husband had passed some time ago. Shaffer called Ross at 11:30 a.m. on Easter Sunday, April 12, 2009, hoping he wouldn't answer the phone so she could just leave a message. He answered. She explained that she was coming to Camano Island "one time only" to visit her daughter and family for Easter. They agreed to meet at his house at 6:00 p.m. RP 279.

After dinner, Shaffer's daughter and son-in-law, Sandi and Ryan Johnson, agreed to accompany Shaffer to Ross' house. They obtained directions and led the way with Shaffer following. When they arrived at the residence, 606 Michelle, what Shaffer first noticed was a two story green house with stairs. RP 280-283.

Stairs were a problem for Shaffer. She had had a spinal cord implant after a boating accident. The spinal cord implant was removed and she had had problems ever since. On March 3, 2009, she was walking slowly. RP 272.

Ryan tried unsuccessfully to find another entrance to the house, so they climbed the stairs to the front door, where there was a deck and

windows. Inside the house she could see Ross sleeping on a sofa, wearing a polo shirt, shorts and socks. RP 283-85.

Shaffer wanted to leave because of the stairs and not being "mobile", but Ross answered the door. He was surprised and said, "I didn't think you would actually come," and he "Kind of scoffed and made fun of the fact that Shaffer brought people with me." Shaffer remembers him saying "Wow. . . come on in. Look in the toilets, the cupboards, . . . underneath the sink. . . . I don't have anything to hide." RP 286-87.

And then he gave them a tour of the house, upstairs, downstairs, and outside. RP 288-92. Shaffer was at this point leaning against the garage under the eave, trying not to get wet from the rain. RP 292. More than an hour had passed and the Johnsons needed to go home. Shaffer accepted the invitation to watch a movie. To do so, she had to walk back up the stairs again. RP 294. She was sorry she stayed. Id.

Shaffer had left her purse in her car, but brought her cell phone and keys. Those she placed on the kitchen counter. RP 295. She sat down at the long end of the L-shaped sofa, with her coat still on. RP 296. Ross started the movie, talking all the while. Shaffer did not pay attention to the movie but did notice that the clock said ten minutes after seven. RP 298. Ross was walking back and forth and talking. Id. He offered her food – she remembered it was Johnsonville sausages. She refused. He

kept telling her not to talk for the first fifteen minutes, but he kept talking and pausing the movie. RP 298-99.

He offered her white or red wine. She didn't answer because she did not drink wine. He became more agitated, so she acquiesced by saying whatever you're having. He took out a TV tray, placed it directly in front of her, and put a large glass of white wine on it. RP 300. Ross noticed Shaffer not drinking the wine. She asked for water. He got a similar glass with water and sat that down directly in front of her. He did not join her, but stayed in the kitchen, talking still and just pacing. RP 301-2.

Shaffer remained on the sofa, huddled, with her leg tucked under her to reduce pain. Ross asked her if she was cold. She said she was, so he turned up the heat. He was watching her and she had her eyes focused on the clock. Id. "It was kind of like a shark looking at a lamb." RP 303.

He came behind her and removed her coat. Then he sat beside her and told her "from the moment I saw you, . . . I knew you were the love of my life, my soul mate. I . . . want to marry you. I want to spend the rest of my life with you. I told my parents all about you." Shaffer asked Ross how he could know something like this from a chance meeting. His reply was, "I didn't want you to think I was a stalker, but I've been watching and following you." Then she was afraid. RP 304.

Ross pulled Shaffer directly over to him, continuing with "I'm not trying to hurt you. You know that. I'm the love of your life." In her mind, Shaffer was thinking, I can't get away and he knows that. He's been watching me. RP 305. So she tried talking to him, telling him stories about her, one true, one not. To these stories, Ross kept repeating the past is the past and you just need to move forward. You have to just go for it. RP 307.

Then Ross pulled Shaffer closer to him, touched her chin, looked into her eyes and said, "the past is the past. I don't care about your past. I don't care about your history. You just have to live in the now, in the present. Move forward. You just have to go for it." RP 310.

Shaffer did not understand what "go for it" meant until it was too late. RP 311.

Ross pulled her onto his lap and kissed her. She did not back away, but she pushed him away and said, 'Wait a minute. Do you understand where I come from? It has taken me this long just to contact you, just to call you." Ross did not respond. Id.

Instead, Ross just kept on saying, "You need to relax. I'm not going to hurt you. You're the love of my life. You're my soul mate. I want to spend the rest of my life with you." Id.

After an unsuccessful attempt at another kiss, he picked her up with her legs dangling over his arms and ran down the hall and into the bedroom. During the course of this, he banged her backside against the wall. She screamed, saying you are hurting me, please stop. RP 312-13.

He threw her on the bed. She felt numb. He lifted her to take her shirt off, forcefully, complaining how tight it was. He removed her pink sports bra,[1] threw her back down on the bed and began biting her nipples while holding her arms above her head. She fought attempted kisses. One hand was freed so she tried to push at his head and his eyes. Ross' eyes were closed and his face and neck completely red. RP 314-16.

Ross let go of her. She grabbed her pants to try to stop him from taking them off. He pulled so hard she almost came off the bed. After removing her jeans, he pushed her back onto the bed and lay on top of her. In an attempt to guide himself inside, he penetrated Shaffer's vagina with his finger and thrusted forcefully with his penis. It is unclear whether his penis penetrated her vagina. She sustained a rip similar to an episiotomy. RP 316-21.

In an attempt to get him Ross to stop, Shaffer faked a seizure and cried for him to call 911. At first Ross completely ignored her and

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[1] At some point Ross threw the pink sports bra in the closet. It was not found during the service of the subsequent search warrant.

continued thrusting. She started calling out names, still shaking, and then he stopped. RP 323.

His response was "I'm not going to hurt you." She continued to plead for him to call 911. He told her he was experienced in these things, that he knew what to do in an emergency. She got him to leave by asking him to get her medication from her car. When he was gone, she wished she could run. RP 326.

The package Ross retrieved was a case of pills that had belonged to Shaffer's dead husband. She had kept that box with her for five years. As part of the ruse, she chose from the box a pill that had a thick coating. Ross asked her could she take another one, so she randomly picked another. She parked the pills under her tongue and tried to keep them dry. RP 327.

Shaffer asked Ross to get her water. She swallowed some of the water but not the pills. To try to get rid of the pills she told him she had to go to the bathroom. He got her socks, underwear and jeans on her and then helped her to the bathroom. She sat directly on the toilet. The pills were still in her mouth. To get him away, she told him she needed more water. While he was gone, she got the pills from her mouth to a piece of toilet paper. He returned with the water and was watching her. She

"wiped" with toilet paper containing the pills and dropped it in the toiled. RP 327-29.

Ross was still standing directly in front of her, with Shaffer repeating that she wanted her clothes. She wanted her shirt and the sports bra that he had put in the closet. Instead, he got a sweatshirt of his and put it on her. He helped her to the sofa. It was 8:30. Shaffer was still faking a seizure. Ross asked whether they could call her daughter, and she replied affirmatively. Ross retrieved Shaffer's cell phone, held the cell phone in front of Shaffer and scrolled down to Sandi's number. After Shaffer confirmed that was her daughter's number, he went with the cell phone to the kitchen and called the number from the house phone. Shaffer could hear a conversation, but not specifics. RP 329-33.

Help arrived at 9:00. Shaffer knew the time because she had been watching the clock. Before the Johnsons, with their four year old son, arrived, Ross managed to get Shaffer's shirt back on her, but not the sports bra. RP 334.

Sandi testified that her mother was not wearing a bra when she and her husband arrived, that her mother was sitting on the sofa shaking and shaking, and that Ross' face was red. RP 509.

Ryan testified that his mother-in-law was seated on the couch with a blanket, kind of "messed up" with her hair frizzy and not well dressed.

That stuck in his mind because she's "always well dressed, hair's done, makeup done." RP 542.

Ryan got Shaffer downstairs and into his pickup truck. Sandi drove the pickup and Ryan drove Shaffer's car. They met up at the IGA parking lot. Shaffer disclosed the rape, called 911, and then all three drove just down the street to the sheriff precinct house where Shaffer made an initial report. RP 542-545.

At the time, Shaffer weighed 95 pounds. RP 310.

In November 2000, Ross approached Desiree Husby, then Johnson, at the Smoky Point Food Pavilion, when she was taking her groceries to her car in the parking lot. RP 738. He came to her car and they talked. The conversation from him was about dating, and that he usually didn't approach people this way. RP 740. Ross tore a deposit slip from his checkbook and gave her his phone number. She did not give him her phone number because she was married. Id.

Some time later, Husby called Ross to apologize for not telling him she was married. The conversation progressed to a discussion of just how bad the marriage was. RP 740-41. He told her he used to be a cop and he gave her advice about getting out of a dangerous situation. She thought it good advice because her sister had said the same things to her. RP 742.

Over the course of time, they had maybe half a dozen phone conversations, and they met in person again within a month of that first phone conversation. RP 743. She had told him that she was going to the mall to put in some job applications. He told her he was taking his daughter to the mall and they could meet. She felt safe because his daughter would be there. RP 744. They did meet at a restaurant. Id. His daughter was not present for any of the conversation. RP 745.

At some point, either during the restaurant conversation or one of the telephone conversations, he told her he had a spare room that he could let her stay in and when she got on her feet she could pay rent. Id.

When Husby got home that night, her husband was drunk. He was a violent person. Id. The next day or soon thereafter she called Ross and had decided to take a look at that spare room. It was late November or December, 2000. RP 747.

Husby drove, during the day, to the IGA on Camano Island, met Ross there and they drove to his house. RP 749. They entered the residence. Husby sat down on the sofa; Ross went to the bathroom. Id. He returned to her and stood, talking, about Christmas and his daughter and stuff. RP 751. Ross went to his bedroom and was still talking with Husby. She followed to the doorway, and he was folding laundry on his

bed. The conversation was still innocuous. She helped him with his laundry. Id.

After the laundry had been folded, Ross became "affectionate." Husby tried to communicate that that was not what she wanted. He began undressing her. She kept saying no. She had hold of her pants; he was undoing her belt. He got her clothes off her. He got her on the bed. She believed she had not choice about going to the bed. He wasn't violent, just persistent. At the time, she was 5"5", and weighed 118. RP 752-54.

He was unclothed and on top of her, diagonally on the bed. She repeated that she didn't want to do this to her husband. She did not fight back. There was no appreciable difference between Ross' weight as Husby testified and as Husby was being raped. RP 756.

Ross penetrated Husby vaginally with his penis. He did not ejaculate. Husby could not say how long this went on.

There was a knock on the door. Ross dressed and answered the door. Husby managed to get her shirt on before he returned. She did not yell because she was afraid if the person at the door hadn't heard her, she might be in a worse situation that the one she currently found herself in. RP 758.

He returned. She was back on the bed "because that was what he wanted." Id. He tried to reenter, she tried to pull away. Her collar was

pushing into her throat during this struggle so she told Ross he was choking her. Ross' response was to stop pulling away then.

She got herself out of there around 2:00 or 2:30. The phone had rung and Ross was speaking to someone. They were on the bed. She got off the bed and started getting dressed. She told him she had to get going. RP 761.

Husby found herself soon after in Mount Vernon in the women's shelter. A person there told her she needed to report what Ross had done. She did not want to report the rape "because there was no proof." RP 764. However, she had a phone conversation with Sue Quandt, a police officer.

Some time later, Husby returned to Stanwood. She got a job at Haggen's in the deli. RP 765. She could keep the job only for a couple weeks because she was too frightened she would run into Ross in the grocery store in his neighborhood. RP 766.

To alleviate her fear, she called Ross to tell him that she was "dropping charges." His response was that was good because it wasn't going anywhere because he and the lady police officer thought it all was just a joke. RP 767.

Kimberly Armstrong testified that in January 1996, she was approached by Bryan Ross in a parking lot at the Everett Mall. She and her children had just returned from a bus ski trip and were loading their

gear into her car. There was some discussion about skiing with his children. The conversation was very brief. RP 782. She and the children went into the mall. Ross followed, and began conversation again. Armstrong responded. Ross asked for her phone number considering he had children also and maybe they could meet up on the slopes. Id. She testified that at that time, he weighed about 200 pounds.

At trial, Armstrong was unable to identify Bryan Ross. Because she did not wish to pursue prosecution, no prior identification of Ross had been made by her. Id. The state conceded that it could not proceed with Armstrong's testimony.

On January 29, 1996, in Skagit County, Ms. Armstrong, then Speck, reported to police that she had been raped by Ross on January 27, 1996. Several dates occurred prior to the rape. Ross was invited to Armstrong's house in Burlington on the night of January 27, 1996 for dinner and a movie. While seated on the couch, Ross began kissing Armstrong. He then took her to the floor and physically removed her pants. Despite her repeated refusals, he used his large size to overpower her, force her knees apart, and effected penile-vaginal penetration. Armstrong specifically remembers Ross stating that "when we are married we will have sex every day and it will be good." Ms. Armstrong

ultimately decided not to pursue charges, so Ross was never convicted. Clerk's Papers 80.

III. ARGUMENT

A. This Court has upheld RCW 10.58.090 against the proffered constitutional challenges.

RCW 10.58.090 reads:

> (1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.
>
> (2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
>
> (3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.
>
> 4) For purposes of this section, "sex offense" means:
>
> (a) Any offense defined as a sex offense by RCW 9.94A.030;
>
> (b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree); and

> (c) Any violation under RCW 9.68A.090(communication with a minor for immoral purposes).
>
> (5) For purposes of this section, uncharged conduct is included in the definition of "sex offense."
>
> (6) When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:
>
> (a) The similarity of the prior acts to the acts charged;
>
> (b) The closeness in time of the prior acts to the acts charged;
>
> (c) The frequency of the prior acts;
>
> (d) The presence or lack of intervening circumstances;
>
> (e) The necessity of the evidence beyond the testimonies already offered at trial;
>
> (f) Whether the prior act was a criminal conviction;
>
> (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
>
> (h) Other facts and circumstances.

Pursuant to *State v. Gresham*, 153 Wn. App. 659 (2009), *review granted,* 168 Wn.2d 1036, 233 P3d 888 (2010), this Court has ruled that RCW 10.58.090 does not violate separation of powers, nor is it an ex post facto law. Pursuant to *State v. Scherner*, 153 Wn. App. 621 (2009), *review granted*, 168 Wn.2d 1036, 233 P3d 888 (2010), this Court ruled that RCW 10.58.090 is not an ex post facto law, does not violate

separation of powers, does not violate the Equal Protection Clause of either the Unites States or Washington Constitutions, and does not deprive an accused person of due process under either the Unites States or Washington Constitutions.

B. The trial court properly analyzed the prior instances of sexual misconduct pursuant to RCW 10.58.090.

A trial court's evidentiary ruling will be reviewed for abuse of discretion. *State v. Lough*, 125 Wn2d 847, 856, 889 P2d 487 (1995). Under RCW 10.58.090, a judge must consider the following:

> (a) The similarity of the prior acts to the acts charged;
> (b) The closeness in time of the prior acts to the acts charged;
> (c) The frequency of the prior acts;
> (d) The presence or lack of intervening circumstances;
> (e) The necessity of the evidence beyond the testimonies already offered at trial;
> (f) Whether the prior act was a criminal conviction;
> (g) Whether the probative value is substantially outweighed b the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
> (h) Other facts and circumstances.

The trial court properly applied all factors to analyze whether the testimony of Desiree Husby and Kimberly Armstrong should be admitted at trial pursuant to the statute. It first determined that, by a preponderance of the evidence, the acts alleged actually occurred. RP 53

After that, it considered each of the factors listed above, one at a time, to determine whether or how each factor applied to Ross' case.

The trial court found the following similarities among all three incidents:

> Mr. Ross met the three women in parking lots, that he introduced himself as a really nice guy and left his phone number with the three women, that the three women were all of slight build and about the same ages as Mr. Ross; that he forced himself on the women, physically, overpowered them, in effect, ignored their struggles; that his so-called thrust was particularly forceful or hard; that he . . . used his physical stature to pin the women down or forcefully overcome their resistance, he being substantially larger than them and outweighing them very substantially, . . . and that he made mention of some sort of future for himself with the three women.

RP 53.

The court found that, considering closeness in time, the other acts were 14 and 9 years prior. RP 54

Concerning frequency, the court found that there were just the two incidents. Id.

Concerning the presence or lack of intervening circumstances, the court found that there was no indication of any intervening circumstances that would make it less likely that these prior incidents occurred. Id.

The court found that there was necessity for the evidence beyond the testimony already offered at trial. Specifically the court found that

there were no other witnesses to the incident involving the alleged victim in the present case. "It is a situation where it will be her word that will be the primary evidence that the state is presenting." RP 59

The court considered whether the prior incidents were reduced to conviction, and found they were not. Id.

Lastly, the court considered whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The court found no danger of confusion of the issues and the court understood that a limiting instruction would be required prior to the admission of evidence of the prior incidents. The court found that a limiting instruction would serve to prevent misleading of the jury. It also found that there were no issues of delay, waste of time or needless presentation of cumulative evidence. RP 60-61.

Concerning unfair prejudice, the court first notice that any evidence offered against the defendant would be prejudicial. The question regarding unfair prejudice is

> whether or not the other evidence would tend to invoke a strong emotional response or merely and emotional response on the part of the jury as opposed to a response which would be a proper rational and reasonable response to the evidence to

> balance and weigh it in connection of all the other evidence in the case to determine guilt or innocence, whether the state has borne its burden of proof of each element of the crime beyond a reasonable doubt.

RP 61-62.

The court specifically found that "[t]hese prior incidents . . . do not just tend to show that Mr. Ross is a bad person generally but that he is a person who committed this particular act against this particular alleged victim, and that has to do with the similarities between the prior acts and the acts alleged in the present case." RP 63.

Lastly, the court considered and determined that there were no known "other facts and circumstances" presented in the case.

After consideration of all the factors and a balancing of same, the court ruled that the proffered testimony of Armstrong and Husby would be admitted. RP 64.

Even if, somehow, the court erred in its analysis, the evidence is still admissible under ER 404(b).

C. The Trial Court Did Not Abuse its Discretion when it Ruled that Similar Prior Acts Of Sexual Violence Against Other Victims Are Admissible To Prove A Common Scheme Or Plan.

"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). This is not an exclusive list.

This court's decision to admit such evidence will be reviewed for abuse of discretion. *State v. Griswold*, 98 Wn.App. 817, 823, 991 P.2d 657 (2000).

To admit evidence under ER 404(b), the trial court must (1) identify the purpose for which the evidence is sought to be introduced; (2) determine the evidence is relevant to prove an element of the crime charged; (3) find, by a preponderance of the evidence, that the act actually occurred; and (4) find that the evidence is more probative than prejudicial. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); *State v. Lough*, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995). The court should make a complete record of the rationale for its decision, and the purposes for which the evidence may be used. *Id.*

Here, *Lough* and *DeVincentis* are directly on point. In both cases the Supreme Court upheld the admission of evidence that the defendant had committed similar acts of sexual violence against other victims because such acts were part of a common scheme or plan. Both cases recognized that there are two different types of "plans" that are within the ambit of ER 404(b). One involves multiple crimes that constitute parts of

a larger, overarching criminal enterprise, in which the prior acts are causally related to the crime charged. *Lough*, 125 Wn.2d at 855. The second type of common scheme or plan, the type relevant to this case, involves prior acts as evidence to use a single plan repeatedly to commit separate, but very similar crimes. *DeVincentis*, 150 Wn.2d at 18-19.

The Supreme Court recognized that a trial court's discretionary decisions regarding this type of evidence will be very fact-specific. *Lough*, 125 Wn.2d at 856. The Court went so far as to examine the facts of cases from other jurisdictions in deciding *Lough* and *DeVincentis*.

The *DeVincentis* court clarified emphatically that it is not necessary that the prior crimes be identical, or that the similarities between the crimes be unique to the crime, or even uncommon. *Id.* The defendant in *DeVincentis* was charged with second degree rape of a child and second degree child molestation. In 1998, he had enticed a 12-year-old girl, K.S., who was friends with DeVincentis' neighbor, to mow his lawn and clean his house for money. When she showed up to clean his house, DeVincentis would remain in the house, wearing nothing but bikini underwear, or a g-string. Eventually, he convinced the victim to give him a massage, followed by him massaging her unclothed body. This led to sexual activity on more than one occasion where K.S. masturbated the

defendant, and DeVincentis digitally penetrated her vagina, and rubbed her breasts.

At trial, the State sought to admit evidence that, in 1983, DeVincentis had made it a practice to wear nothing but bikini underwear or g-string when his daughter's 10-year-old friend, V.C., was visiting, which she did several nights a week. V.C. testified that she became used to DeVincentis' appearance in bikini underwear. Eventually, DeVincentis started showing her pornographic images. On one occasion, DeVincentis massaged this girl while she was sitting between his legs on a rowing machine. V.C. testified that she felt DeVincentis' erect penis against her back, and that he put his hand in her "private areas."

The trial court ruled that the prior acts in 1983 were sufficiently similar to support a common scheme or plan. In particular, the court found that he wore bikini underwear to desensitize the girls to his nearly naked appearance, making it easier to move from nudity to skin-to-skin contact, to sexual activity. *Id.* at 16. The court found this evidence relevant to whether he had sexual contact with K.S. The Court of Appeals affirmed.

The Supreme Court affirmed the Court of Appeals, rejecting a decision from Division Two that suggested the common attributes of the crime also had to be unique to the particular defendant's method of

committing the crime. *Id.* at 21. Uniqueness is only relevant when identity is at issue. *Id.* The Supreme Court concluded:

> In sum, admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. Such evidence is relevant when the existence of the crime is at issue.

DeVincentis, 150 Wn.2d 11, 21 (citing *Lough*).

Here, it is the existence of the crime that is at issue. Like sex crimes against children, sexual assaults against adults are necessarily committed in the absence of witnesses. Moreover, they are far outside the common experience and understanding of ordinary people. And, as in *DeVincentis*, the similarities of Ross's prior acts are relevant to prove that he did in fact rape the victim.

In *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995), the defendant was charged with surreptitiously drugging and raping the victim, P.A. The Court affirmed a trial court ruling allowing the admission of testimony by four other women who said that, while they had been in relationships with the defendant, he had given them a drink, and shortly afterward they became unconscious. In each of these incidents, which occurred over a ten-year period, the victims reported that when they regained consciousness, they were suffering pain and bleeding in their anuses. The defendant denied drugging any of them, and denied having

sex with three of them. He admitted to having had consensual anal intercourse with one of them. None of the four women, or P.A. knew each other.

P.A., the victim in the charged crime, reported that she and the defendant had met at her house to watch a rented video together. She said that after she drank a drink he had mixed for her, she became disoriented and confused. She had vague memories of sexual contact. She awoke naked from the waist down, and found her pants and underpants folded on the arm of the sofa. The defendant claimed he had consensual sexual intercourse with P.A.

The Supreme Court ruled that "a common plan or scheme may be established by evidence that the Defendant committed markedly similar acts of misconduct against similar victims under similar circumstances." *State v. Lough,* 125 Wn.2d 847, 852 (1995). The court identified the common plan as "[t]he control of women by rendering them unconscious by the surreptitious use of drugs for the purpose of abusing them sexually." *Id.* at 854.

Recognizing the fact-specific nature of the inquiry, the *Lough* court looked to other jurisdictions for guidance in fashioning its holding. In particular, the Court relied on the California Supreme Court's ruling in *People v. Ewoldt,* 7 Cal.4th 380, 867 P.2d 757, 27 Cal.Rptr.2d 646 (1994).

"That court rejected the premise that to be admissible all the acts must be part of a single continuing conception or plot. The court held that a common design or plan can be established by evidence reflecting that the defendant committed 'markedly similar acts of misconduct against similar victims under similar circumstances.' *Lough*, 125 Wn.2d at 855-56.

Lough also relied upon *People v. Balcom*, 7 Cal.4th 414, 867 P.2d 777 (1994). In that case, the defendant had shown up at the victim's house, threatened her with a gun to gain entry, and then took her money and ATM card. He demanded her PIN number for her card, and then raped her, before leaving in her car. The court approved testimony from another victim from another state who encountered the defendant while driving her car. He car-jacked her at gunpoint, and then demanded that she give him her ATM card and her PIN number. After she did, he raped her, and then forced her out of the car, and he left in her car.

The trial court in this case did not abuse its discretion when it found that Ross had a common scheme or plan to rape slightly built women of his age range by first approaching them in parking lots and then referring to a future together.

D. The Probative Value of the Evidence of Mr. Ross's Prior Sexual Assault Outweighs the Prejudicial Effect.

The trial court did balance the probative value versus the prejudicial effect of the proffered evidence on the record. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); *State v. Lough*, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995). The probative value is high. As in *Lough, DeVincentis*, and the cases examined by the Supreme Court therein, the crimes alleged necessarily occur outside the view of witnesses. The common thread of many of those cases, and this case, is that the State's evidence was primarily testimony of the victim herself. The Johnsons testified to her demeanor after the event. Scientific evidence neither proved nor disproved anything. The defense necessarily amounted to an attack on the victim's credibility, and defense of consent. Evidence that the defendant has utilized a similar scheme or plan to perpetrate the same offense meets those anticipated defenses, and is highly probative.

While there is some prejudicial effect, it is not unduly prejudicial. All evidence brought by the State against a defendant is prejudicial to the defendant's interest. The prospect of this evidence unfairly prejudicing the defendant is outweighed by the strength and relevance of the evidence, and the fact that the evidence is limited to specific instances that bear

marked similarities to the charged crimes. Here, the danger that a jury might improperly conclude that the defendant was a person with a generally criminal mindset, was ameliorated by the similarity of the offenses. If, for example, the evidence was merely that the defendant had committed an assault against another, absent the surrounding circumstances, the State would concede that such evidence was impermissible and unduly prejudicial. A rational balancing indicates that the probative value far outweighs the prejudicial effect.

E. The Trial Court Did Not Rely on Improper Evidence in Fashioning it Standard Range Sentence.

Mr. Ross contends that the court relied improperly on the statements of Debbie Jones and Kimberly Armstrong at the sentencing hearing. Mr. Ross objected to the court's admission of their statements at sentencing. 4/29/10 RP 16.

A trial judge is constrained generally to rely on facts proved at trial or at an evidentiary hearing to fashion a sentence for a convicted defendant. Pursuant to RCW 9.94A.530(2) "In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. . . ." Subsection 3 provides, ". . . . Facts that establish the elements of a more

serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(3)(d), (e), (g), and (h).

Generally, a defendant does not have any right to appeal a standard range sentence. RCW 9.94A.585. However, appeal is still available "for the correction of legal errors or abuses of discretion in the determination of what sentence applies." *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003).

Mr. Ross relies on *State v. Quiros*, 7t Wn. App. 134, 896 P.2d 91, *review denied*, 127 Wn.2d 1024 (1995) and *State v. Handley*, 115 Wn. 2d 275, 796 P.2d 1266 (1990). Those cases, however, both deal with what may be considered by the trial court in fashioning an exceptional sentence, not one within the standard range.

The trial court acknowledged, after defense objection to admission of statements from Armstrong and Jones, that constraint, saying "I'll disregard the specific facts and circumstances that I noted previously." 4/29/10 RP 17.

Trial counsel in her sentencing argument conceded that the court had recognized those things that could not be taken into consideration. 4/29/09 RP 49, 50.

What is pertinent to this discussion is the testimony of Desiree Husby. The court had found by a preponderance of the evidence that that incident occurred, after a hearing where defense did not request an evidentiary hearing. That same information was testified to at trial. It is this incident that makes Ross' action against Shaffer predatory, that makes him a repeat offender. The court did not need the statements of Armstrong and Jones to fashion a sentence within the standard range. The court had discretion to sentence Mr. Ross to the high end of the standard range even without the testimony of Husby.

F. The State Concedes that the Trial Court Improperly Imposed Certain Conditions of Community Custody.

Mr. Ross argues, and the state concedes, that the Court lacked the authority to prohibit Ross from accessing the internet, under the facts of this case. Likewise, under the facts of this case, there is insufficient evidence to support the court's order that forbade Ross from possession, consuming or acquiring alcohol, from entering an establishment where alcohol is the primary commodity sold, from possession of drug paraphernalia.

The state also concedes that the court's prohibition form possessing pornographic materials, as it is written, is improper. The state also concedes that the court's attempt at preventing Ross from resuming

his common scheme or plan of finding women to rape in parking lots to be too vague to follow.

IV. CONCLUSION

For all the forgoing reasons, Mr. Ross' conviction for rape in the second degree should be upheld, as well as his standard range sentence.

Respectfully submitted this 11 day of May, 2011.

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