

66926-5  
FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 JAN 17 PM 3:12

66926-5  
NO. 66926-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JERRY DEAN SHIRK,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE JOHN ERLICK

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Whether error in admitting the evidence of Shirk's prior sexual abuse of SS pursuant to RCW 10.58.090 is not reversible, where the trial court ruled that the same evidence was admissible pursuant to ER 404(b) and Shirk has not challenged the trial court's ruling that the evidence was admissible under ER 404(b).

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS

Defendant Jerry Shirk was charged by amended information with two counts of child molestation in the first degree, by having sexual contact for purposes of sexual gratification with victim K<sup>1</sup> when K was less than 12 years old and Shirk was at least 36 months older than K, during a period of time between October 27, 2004, and June 28, 2008. CP 74-75. Judge John Erlick presided over pretrial motions beginning in April of 2010, and the jury trial that began in January of 2011. 4/15/10RP 1; 1/24/11RP 1. On February 10, 2011, a jury found Shirk guilty as charged. CP 180-

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<sup>1</sup> Each sexual abuse victim is referred to by a single initial and family members are referred to by relationship, in an effort to protect the privacy of the victims.

83. The court sentenced Shirk to a standard range indeterminate sentence of 80 months to life in prison. CP 191-96.

## 2. SHIRK'S MOLESTATION OF K.

K was born on October 27, 1999. 2/1/11RP 75. Shirk is the paternal grandfather of K. 2/1/11RP 72. During times relevant to the charges, he and his wife Beverly Brown lived in Federal Way, Washington. 2/1/11RP 74.

When K was growing up, she frequently spent time with her grandparents and often spent the night at their house. 2/1/11RP 73-75. She often slept in the same bed as her grandparents. 2/3/11RP 19, 111. In the summer of 2008, when K was 8 years old, she disclosed that the previous year Shirk touched his private area to her private area; that Shirk put his privates between her legs. 2/1/11RP 83, 90, 148; 2/2/11RP 25, 30. K's father understood that K was reporting that Shirk put his penis to her crotch. 2/2/11RP 75. K also disclosed that Shirk had touched her butt inappropriately on another occasion. 2/1/11RP 81.

At the time of trial, K was 11 years old. 2/3/11RP 103. She described one morning when she was in her grandparents' bed and when she awakened her grandmother had already gotten up.

2/3/11RP 113. Shirk was there, though, and he asked K to take her pants off, which she did. 2/3/11RP 113-14. Shirk was in his underwear, and took that off, and K saw his private parts.

2/3/11RP 114, 151. Shirk touched his "front private part" to K's private part, between her legs, skin to skin. 2/3/11RP 114-17, 152.

Shirk told K that "this is our little secret." 2/3/11RP 114.

K also testified about another incident, when K was in her bathing suit and Shirk grabbed and shook her bottom. 2/3/11RP 118. K was confused - no one had ever grabbed her bottom like that before. 2/3/11RP 118-19.

### 3. SHIRK'S PRIOR MOLESTATION OF S.

S is Shirk's now adult daughter. 2/7/11RP 40, 42. S testified that from the time that she was in kindergarten until she was in the seventh grade, Shirk repeatedly sexually molested her. 2/7/11RP 58, 67. S lived with Shirk in Ohio at the time, . 2/7/11RP 45-46.

Shirk regularly came into S's bedroom, to her bedside, lifted her nightgown and rubbed her chest and the outside of her vagina. 2/7/11RP 55-57. Sometimes, Shirk pulled his pants down around his knees so he was partially naked when he touched her. 2/7/11RP 56-57.

Shirk told S that this "was our secret." 2/7/11RP 59. After one occasion during which Shirk rubbed his penis on her vagina, skin to skin, S told her mother about the abuse. 2/7/11RP 57-63. S's mother protected her from Shirk for a few months but then left S in Shirk's care again, and the abuse continued. 2/7/11RP 65-67.

When S was in seventh grade, she told a friend about the abuse and a school counselor found out and informed Child Services in Ohio. 2/7/11RP 68. This was the end of the abuse. 2/7/11RP 67.

Shirk's molestation of S resulted in Shirk pleading nolo contendere to sexual battery in an Ohio criminal proceeding. 4/15/10RP 9; 4/20/10RP 34. The jury was not informed of that criminal proceeding in Ohio.

4. TRIAL COURT'S RULING AS TO ADMISSIBILITY OF PRIOR MOLESTATION BY SHIRK.

The State advised the trial court that it intended to present testimony of S about Shirk's molestation of S in Ohio. 4/20/10RP 8. The State asserted that the evidence was admissible under RCW 10.58.090 and pursuant to ER 404(b) as evidence of a common scheme and plan. 4/20/10RP 8, 28.

The trial court concluded that testimony about the prior molestation was admissible pursuant to both RCW 10.58.090 and ER 404(b). 4/20/10RP 31-35. The court entered written findings to that effect. CP 201-04.

The defense proposed a limiting instruction with respect to the prior molestation. CP 68. That instruction was read to the jury before the testimony of S and was provided as part of the written jury instructions at the end of the trial. CP 98; 2/7/11RP 39, 138. The defense refused any additional limiting instruction. 2/7/11RP 141-44.

**C. ARGUMENT**

Shirk has assigned error to the trial court's conclusions relating to the admissibility of the prior molestation pursuant to RCW 10.58.090. After his brief was filed, the Washington Supreme Court held that RCW 10.58.090 is an unconstitutional violation of the separation of government powers. State v. Gresham, No. 84148-9, 2012 WL 19664 (Wash. S. Ct. App. Jan. 5, 2012). The State therefore concedes that the evidence was not properly

admitted pursuant to that statute. However, because the evidence was properly admitted pursuant to ER 404(b), and Shirk has not challenged the trial court's ruling to that effect, Shirk's convictions should be affirmed on that alternative basis.

**1. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF SHIRK'S PRIOR ACTS OF MOLESTATION.**

The trial court admitted the evidence of Shirk's prior acts of molestation pursuant to both RCW 10.58.090 and ER 404(b). Shirk has not challenged the court's ER 404(b) ruling or findings. Thus, Shirk's convictions should be affirmed because the evidence was properly admitted under ER 404(b).

Evidence of a defendant's past acts of molestation may be admissible under ER 404(b) to show a common scheme or plan where the prior acts demonstrate a single plan used repeatedly to commit separate but very similar crimes. State v. Sexsmith, 138 Wn. App. 497, 504, 157 P.3d 901 (2007). The prior acts must be "(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and

(4) more probative than prejudicial.” State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

“Where a defendant is charged with child rape or child molestation, the existence of ‘a design to fulfill sexual compulsions evidenced by a pattern of past behavior’ is probative of the defendant's guilt.” Sexsmith, 138 Wn. App. at 504 (quoting State v. DeVincentis, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003)). The degree of similarity must be substantial, but the level of similarity does not require the evidence of common features to show a unique method of committing the crime. DeVincentis, 150 Wn.2d at 20-21. “[T]he trial court need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it.” Id. at 13.

Gresham has reaffirmed the admissibility of prior sexual misconduct as evidence of a common scheme or plan. Gresham, slip op. at 10-15.

Here, the trial court made extensive oral and written findings of fact relating to the admissibility of the prior abuse. CP 201-03; 4/20/10 31-35. It concluded that the prior molestation incidents were “admissible under ER 404(b) as part of the Defendant's common scheme and plan to sexually abuse young girls under his

care." CP 203. The court found that the abuse suffered by the two victims was "markedly similar acts of misconduct against similar victims under similar circumstances." CP 203. The court concluded that the probative value of the evidence outweighed its prejudicial effect and concluded by a preponderance of the evidence that the molestation of S actually occurred. CP 203.

Shirk does not assign error to or challenge the court's determination that the evidence was admissible under ER 404(b). He does not provide any argument concerning ER 404(b). A ruling of the trial court to which no error has been assigned is not subject to review. Allied Daily Newspapers of Washington v. Eikenberry, 121 Wn.2d 205, 214, 848 P.2d 1258 (1993).

This Court can affirm on the basis that the evidence was properly admitted under ER 404(b), regardless of its admissibility under RCW 10.58.090. Gresham, slip opin. at 10. Given that the trial court provided an alternative basis for admitting the evidence of prior sexual abuse by Shirk, and that the alternative basis for admitting the evidence is unchallenged, Shirk's convictions should be affirmed on that basis.

D. CONCLUSION.

For the foregoing reasons, the State respectfully asks this Court to affirm Shirk's conviction and sentence.

DATED this 17<sup>th</sup> day of January, 2012.

Respectfully Submitted,

DAN SATTERBERG  
King County Prosecuting Attorney

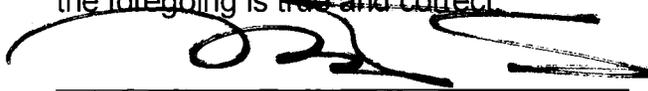
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JERRY DEAN SHIRK, Cause No. 66926-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name  
Done in Seattle, Washington



Date