

NO. 67355-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DANTE VILLASENOR-ALCARAZ,

Appellant.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HELEN HALPERT

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. For evidence of a defendant's uncharged crime to be admissible pursuant to ER 404(b) there must be sufficient evidence to establish by a preponderance of the evidence that the prior acts occurred. In this child molestation prosecution, the trial court based its finding on the victim testifying that the defendant over a course of years touched her, kissed her, grabbed her, and made sexual advances towards her. Did the trial court properly admit the uncharged acts against the defendant?

2. The court must conduct a balancing test prior to admission of 404(b) evidence. In this case after reading briefing, listening to testimony from the victim, and hearing argument from the parties, the court admitted the lustful disposition evidence finding that the probative value far outweighs its prejudicial impact. Did the court properly conduct the balancing test, and if not, was the error harmless?

**B. STATEMENT OF CASE**

1. PROCEDURAL FACTS

Appellant Dante Villasenor-Alcaraz was charged by information with one count of child molestation in the second

degree, alleged to have been committed during a period of time intervening between March 1, 2011 and March 31, 2011. CP 1. Villasenor-Alcaraz proceeded to a bench trial under the juvenile jurisdiction before the Honorable Helen Halpert. CP 8. Villasenor-Alcaraz was convicted as charged. CP 15-18.

The court sentenced Villasenor-Alcaraz within the standard range. CP 11-13. Villasenor-Alcaraz timely appealed. CP 9-10.

## 2. SUBSTANTIVE FACTS

The victim was born on December 4, 1998, in Mexico and lived there with her family for a number of years prior to moving to the United States. RP 39-41. While in Mexico, the victim would spend time with Villasenor-Alcaraz, whom she refers to as her uncle. RP 42-47, 179-80. Villasenor-Alcaraz is actually the victim's mother's first cousin, however, the family refers to any older male figure as uncle. RP 17-18, 188. The victim's mother knew Villasenor-Alcaraz since birth and knew that his birthday was December 17. RP 18. The victim's mother was unsure of the year, but knew that he was 17 in March of 2011. RP 18-19. The victim has known Villasenor-Alcaraz her entire life. RP 43. Villasenor-

Alcaraz would attend birthday parties for the victim and she would attend his. Id.

When the victim and Villasenor-Alcaraz lived in Mexico, he would grab the victim's legs, kiss her, lick her, and touch her in her vaginal area. RP 45-47. The first time that Villasenor-Alcaraz touched the victim was when she was about seven years old. RP 45. This conduct continued until the victim moved to the United States. RP 47. The victim did not tell anyone what Villasenor-Alcaraz did to her in Mexico. Id.

The victim and her family moved to the United States in 2007 or 2008. RP 17. Villasenor-Alcaraz moved to the United States in August of 2010. RP 177. When Villasenor-Alcaraz came to the United States, he moved a short distance from the victim and her family. RP 20. The extended family would routinely see each other on the weekends. RP 20-21.

Shortly after Villasenor-Alcaraz moved to the United States he began inappropriately kissing, hugging, and touching the victim. RP 48-50. Villasenor-Alcaraz would tell the victim that it was okay because he was her uncle and he could do whatever he liked. RP 58.

In March of 2011, the victim and her family went over to the home Villasenor-Alcaraz shared with his mother, his aunt, and uncle. RP 20, 50. The aunt recently had a baby so the victim and her family came to see the new baby and the family. RP 27. When they arrived, the victim's mother went to her aunt to see if the aunt needed anything and to check on the baby. RP 27-28. The victim entered Villasenor-Alcaraz's room, where she sat on one bed in the room and began playing music. RP 51-52. When the victim first entered the room, she thought that it smelled like beer. RP 52. Villasenor-Alcaraz initially was on another bed, and then came over to her and began touching her legs and kissing her. RP 53. Villasenor-Alcaraz told the victim to take her pants down. Id. She told him no. Id. Villasenor-Alcaraz then got on top of the victim on all fours like an animal. RP 53-54. After the victim refused to pull her pants down, Villasenor-Alcaraz pulled them down to below her knees. RP 54. Villasenor-Alcaraz began to move up and down as if he was doing push-ups. RP 53. When he was going up and down, the victim felt the defendant's hard penis on her vagina. RP 56. Villasenor-Alcaraz still had his underwear on during the incident. RP 55. The victim's pants were down around her knees and she was still wearing underwear. Id. When Villasenor-Alcaraz

was on top of her, the victim was able to kick Villasenor-Alcaraz and run out the door to the bathroom. RP 55-56.

The victim told a friend that she was raped and that she thought that she might be pregnant, as she had missed her period. RP 59-61, 155-56. The two girls then went to their teacher, Keri Rotton. RP 128. The girls told their teacher that they had a friend who had been raped by her uncle and that their friend was worried that she might be pregnant. RP 129-30. The victim reported back to her teacher the next day, and subsequently the authorities were called. RP 132-33. The police helped the victim tell her mother that she was the one that had been assaulted. RP 62-63.

Around the time of the incident, the victim's mother noticed a significant change in the victim. RP 28. She refused to go to the Villasenor-Alcaraz house, and did not want to be with her family. Id. The victim became more withdrawn and did not want to talk to her mother about what was going on. Id. Her mother realized that she was a teenager but her behavior was something markedly different. RP 28-29.

After the police were notified, the victim was taken by her mother to Harborview Medical Center for a sexual assault exam. RP 80. The victim was seen by a nurse and Dr. Sugar. RP 80-81.

The victim told the medical personnel that her uncle Dante had assaulted her. RP 81. Villasenor-Alcaraz's first name is Dante. CP 1.

Prior to trial, the State sought a ruling on the admissibility of uncharged prior acts by Villasenor-Alcaraz towards the victim when the family lived in Mexico, and after the move to the United States. RP 66. The deputy prosecutor argued that these incidents were admissible under two grounds: the lustful disposition towards the victim and the res gestae exception to Evidence Rule 404(b). Id. Villasenor-Alcaraz objected on the grounds that the acts were not misconduct and some were accidental. RP 67-68.

After hearing the arguments of the parties, reading the briefs, and listening to the victim's testimony, the court made the following ruling:

All right. 404(b) refers to other crimes, wrongs or acts. It doesn't mean necessarily being criminal behavior. It is behavior--here, we have behavior that could be seen as grooming behavior, that is prior physical contact between an older child and a younger child. I'd find by a preponderance that it did occur. I am satisfied that it is relevant on the two to show a fairly long-standing sexual interest on the part of the respondent towards his cousin or his niece and that it is admissible as its probative value far outweighs its prejudicial testimony.

RP 68-69. The evidence was admitted at trial through the testimony of the victim.

**C. ARGUMENT**

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ADMITTED EVIDENCE OF THE PRIOR SEXUAL CONTACTS.

Villasenor-Alcaraz asserts that the trial court abused its discretion when it admitted evidence of prior sexual contacts under the lustful disposition exception to ER 404(b). He argues the contact does not show a long-standing sexual interest in the victim. His claim should be rejected. The evidence was more than sufficient to establish by a preponderance of the evidence that the kissing, touching, grabbing, and touching the victim's vaginal areas over the course of many years showed a long-standing sexual interest in the victim.

Although evidence of other crimes, wrongs, and acts is inadmissible to prove the character of a witness, such evidence is admissible for other purposes, such as to prove motive, opportunity, intent, preparation, knowledge, or absence of mistake. ER 404(b) codifies pre-rule law that allowed courts to admit evidence of other crimes “essential to the establishment of the

State's case" when the probative value of the evidence outweighed its potential prejudicial effect. State v. Goebel, 36 Wn.2d 367, 218 P.2d 300 (1950), rev'd on other grounds, 40 Wn.2d 18, 240 P.2d 251 (1952). The admissibility of a defendant's prior "bad act" is within the sound discretion of the trial court and will not be reversed unless it is an abuse of discretion. State v. Suttle, 61 Wn. App. 703, 710, 812 P.2d 119 (1991).

In sex offense prosecutions, it is well established that a defendant's prior sexual contacts with the victim are admissible. State v. Guzman, 119 Wn. App. 176, 79 P.3d 990 (2003); State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). In State v. Ferguson, the Washington Supreme Court emphasized that "[s]uch evidence is admitted for the purpose of showing the lustful inclination of the defendant toward the offended female, which in turn makes it more probable that the defendant committed the offense charged." 100 Wn.2d 131, 134, 667 P.2d 68 (1983) (internal citations and quotations omitted). The collateral sexual misconduct is admissible even if it cannot be corroborated by other evidence. Ray, 116 Wn.2d at 547.

To admit evidence of other crimes or wrongs against a defendant under ER 404(b), the trial court must: (1) find by a

preponderance of the evidence that the uncharged acts probably occurred and that the defendant committed them; (2) identify the purpose for which the evidence will be admitted; (3) find the evidence materially relevant to that purpose; and (4) balance the probative value of the evidence against any unfair prejudicial effect it may have upon the fact-finder. State v. Lillard, 122 Wn. App. 422, 93 P.3d 969 (2004) (citing State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002)).

Whether the proffered evidence meets the above criteria is a discretionary determination made by the trial court; its decision will not be overturned absent a manifest abuse of discretion. State v. Sexsmith, 138 Wn. App. 497, 504, 157 P.3d 901 (2007); State v. Lane, 125 Wn.2d 825, 835, 889 P.2d 929 (1995). “A trial judge, not an appellate court, is in the best position to evaluate the dynamics of a jury trial and therefore the prejudicial effect of a piece of evidence.” State v. Harris, 97 Wn. App. 865, 869, 989 P.2d 553 (1999) (citing State v. Taylor, 60 Wn.2d 32, 40, 371 P.2d 617 (1962)).

The party offering the evidence of prior misconduct bears the burden of proving that the misconduct occurred by a preponderance of the evidence. State v. Benn, 120 Wn.2d 631,

845 P.2d 289 (1993). The trial court may make preliminary decisions on the admissibility of such evidence based solely on the State's offer of proof. State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002). The process of determining whether evidence is admissible under ER 404(b) should occur on the record to ensure thoughtful consideration of the issue and to facilitate appellate review. See, e.g., Suttle, 61 Wn. App. at 710; State v. Gogolin, 45 Wn. App. 640, 727 P.2d 683 (1986).

The list of purposes set forth in the rule is not exclusive, and Washington courts have also recognized a res gestae exception. State v. Brown, 132 Wn.2d 529, 570-71, 940 P.2d 546 (1997). While Villasenor-Alcaraz doesn't address the res gestae doctrine, the State did raise this at the trial court level as another basis for allowing the evidence to be presented. Under the res gestae doctrine, ER 404(b) evidence is admissible "[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place." State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), affirmed, 96 Wn.2d 591, 637 P.2d 961 (1981). To be admissible as res gestae, each incident must be "a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury." Tharp, 96 Wn.2d at 594.

Moreover, as this Court has previously noted, "a defendant cannot insulate himself by committing a string of connected offenses and then argue that the evidence of the other uncharged crimes is inadmissible because it shows the defendant's bad character, thus forcing the State to present a fragmented version of events."

State v. Lillard, 122 Wn. App. at 431 (2004).

Here, the evidence was more than sufficient to establish by a preponderance of the evidence that Villasenor-Alcaraz committed the prior acts and he did so with a lustful disposition. The victim testified that while in Mexico, starting at the age seven, the defendant began to touch her on her legs, kiss her, lick her, and touch her. RP 45-48. Villasenor-Alcaraz continued to touch the victim, kiss her, and grab her after Villasenor-Alcaraz moved to the United States. RP 48-50. Villasenor-Alcaraz was considered the victim's uncle and she did not feel that she could tell anyone because he told her that he could do whatever he wanted because he was her uncle. RP 58.

The court found that the evidence was admissible to show the grooming behavior, that is, prior physical contact between an older child and a younger child, and that the evidence was relevant

to show a fairly long-standing sexual interest on the part of Villasenor-Alcaraz toward the victim. RP 69.

The court balanced the prejudicial effect of the evidence against its probative value, and found that it was more probative than prejudicial. RP 69. The court ruled that the probative value of the evidence far outweighed its prejudicial impact clearly showing that the court was considering and weighing the probative value, versus the prejudicial impact. In trial of action to court sitting without jury, a liberal practice in admission of evidence is followed, supported, as it is, with presumption on appeal that trial judge, knowing applicable rules of evidence, will not consider matters which are inadmissible when making his findings. State v. Miles, 77 Wn.2d 593, 464 P.2d 723 (1970). In nonjury proceedings a new trial ordinarily will not be granted for error in admission of evidence, if there remains substantial admissible evidence to otherwise support trial court's findings. Id. at 600.

Contrary to Villasenor-Alcaraz's position, a failure to further articulate the balance between probative value and prejudice does not necessarily require reversal. Any error in the admission of prior misconduct evidence is harmless unless the reviewing court finds that "within reasonable probabilities...the outcome of the trial would

have been different.” State v. Jackson, 102 Wn.2d 689, 689 P.2d 76 (1984).

The failure to adequately weigh prejudice on the record under ER 404(b) is harmless error. State v. Carleton, 82 Wn. App. 680, 919 P.2d 128 (1996). Here, the error is harmless if the record is sufficient for the reviewing court to determine that the trial court, if it had considered the relative weight of probative value and prejudice, would have still admitted the evidence. State v. Gogolin, 45 Wn. App. at 643 (1986). Here, the court explicitly stated that it had weighed the probative value and the prejudicial impact. The court read briefing on the issue, listened to argument, and to live testimony regarding the prior contacts between Villasenor-Alcaraz and the victim. The court lists clearly that the acts show that there was grooming behavior and a long-standing sexual interest that Villasenor-Alcaraz showed towards the victim, and probative value "far" outweighed its prejudicial impact. RP 69. The record is also supplemented by the written findings of fact and conclusions of law in this case. CP 24-30. The court adopted as law that

"The court permitted testimony from the victim, regarding prior bad acts of sexual contact from the victim, under ER 404. After hearing testimony from the victim, the Court found by a preponderance of the evidence that these acts occurred. The court found

that these prior acts to be relevant to show a long-standing sexual interest, or lustful disposition, of the respondent to his cousin/niece, the victim. The court further found that this evidence's probative value substantially outweighed any unfair prejudice".

CP 28: Conclusion of Law II.

The error can also be harmless when, considering the untainted evidence, the appellate court concludes the result would have been the same even if the trial court had not admitted the evidence. State v. Jackson, 102 Wn.2d at 696; State v. Thamert, 45 Wn. App. 143, 151-52, 723 P.2d 1204, review denied, 107 Wn.2d 1014 (1986). Given the testimony from the victim about the March 2011 incident, testimony which the trial court found credible, from the victim's mother regarding the victim's change in behavior closely after the incident occurred, including a desire not to go to Villasenor-Alcaraz's house, the victim's consistent statements to medical professionals, and Villasenor-Alcaraz's testimony that the victim did come to the house in March, there was overwhelming evidence of guilt. The outcome in this trial would have been the same.

The trial court properly exercised its discretion in admitting the prior acts of Villasenor-Alcaraz towards the victim. Any deficiency in the record regarding the balancing test is harmless.

D. **CONCLUSION**

For the reasons set forth above, the State respectfully requests that this Court affirm Villasenor-Alcaraz's conviction.

DATED this 7 day of March, 2012.

Respectfully submitted,

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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STATE OF WASHINGTON )  
 ) ss.  
 COUNTY OF KING )

The undersigned, being first duly sworn on oath, deposes and says:

On this day I deposited in the mails of the United States one properly addressed and stamped envelope containing a copy of Brief of Respondent.

Said envelope was directed to:

Eric Nielsen  
Nielsen Broman and Koch  
1908 East Madison Street  
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Holly Shemme

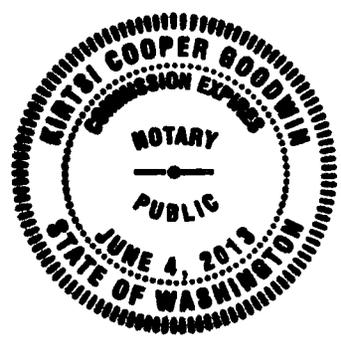
SUBSCRIBED AND SWORN to before me this 9<sup>th</sup> day of March, 2012.

Kirsti L. Cooper Goodwin

NOTARY PUBLIC in and for the State of

Washington, residing at Kent, WA.

My Commission Expires: 6/4/13.



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