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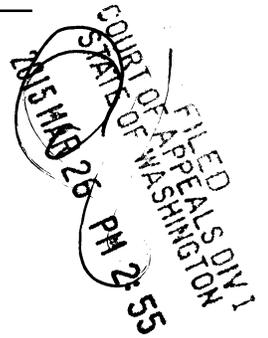
NO. 70820-1-I

**COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON**

STATE OF WASHINGTON, Respondent

v.

Jose Maldonado, Appellant



Appeal from the Superior Court of King County
The Honorable Douglass A. North, Department No. 30
Pierce County Superior Court Cause No. 11-1-00480-1-SEA

REPLY BRIEF OF APPELLANT

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ORIGINAL

TABLE OF CONTENTS

I.	ARGUMENT	1-8
II.	CONCLUSION.....	8

TABLE OF AUTHORITIES

Cases

<i>State v. DeVincentis</i> , 112 Wn.App. 152, 160-161, 47 P.3d 890 (2003); aff'd 148 Wn.2d 11, 74 P.3d 119 (2003)	5
<i>State v. Fisher</i> , 165 Wn.2d 727, 745, 202 P.3d 937 [2009].....	1
<i>State v. Foxhaven</i> , 161 Wn.2d 168, 174,163 P.3d 786 [2007]	1
<i>State v. Lough</i> , 125 Wn.2d 847, 860, 889 P.2d 487 (1995).....	5
<i>State v. Wermerskirchen</i> , 497 N.W.2d 235, 242 (1993).....	5

Statutes

RCW 9A.44.010.....	7
RCW 9A.44.083.....	6

I. ARGUMENT

(a). The admission of so-called ER 404[b] evidence that occurred 13-16 years prior to the charged offense was unfairly prejudicial where the evidence was based on a delayed and “tenuous” memory refreshed during the interview process of the alleged victim in the instant case.

The trial court erred when it admitted the ER 404[b] evidence where the evidence failed to meet the requirements of that rule. As set forth in appellant’s opening brief, prior to the admission of ER 404[b] evidence, the trial court must [1] find by a preponderance of the evidence the misconduct actually occurred; [2] identify the purposes for which the evidence was admitted; [3] determine the relevance of the evidence to prove an element of the crime; and [4] weigh the probative value against the prejudicial effect of the evidence. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 [2009].

The appellate court reviews the trial court’s interpretation of the ER 404[b] de novo as a matter of law. *Fisher*, supra, citing *State v. Foxhaven*, 161 Wn.2d 168, 174, 163 P.3d 786 [2007].

Review of trial court decisions in this area are intensely fact specific. Certainly there is abundant case law in the case. This has been set forth in the opening brief. However, the trial court’s reversible error resides in the application of that law to the facts of this case.

In this case, the trial court erred when it found that the prior misconduct had been proved by a preponderance of the evidence. The trial court acknowledged that the victim BV's memory was "tenuous." RP 2 73.

The trial court considered the other factors and the record and initially concluded that the State had failed to meet its burden to prove that any sexual misconduct had occurred in Aberdeen. RP2 69. The court then changed its mind after BV asserted that she recalled that her mother sprinkled baby powder around her bed at night to catch her father in her bedroom. RP2 72.

She stated she could not pinpoint when she remembered the touching. RP2 54.

She said that she reported it in 2006 after Mr. Maldonado took her dog to PAWS. RP2 54; RP4 102-106.

However, BV made that statement [1] without disclosing any touching whatsoever, and [2] after she claimed it was "triggered" during her sister's [the charged victim in the instant case] forensic interview. RP2 72.

Where BV made her "disclosure" some 13-16 years after the alleged misconduct in Aberdeen, she did not include any disclosure of actual touching in that disclosure, had had multiple contacts with law

enforcement over the years when she could have reported the alleged misconduct, she did not provide evidence even approaching a preponderance upon which the trial court could find the State had met its burden. RP2 59.

She said this was because she did not remember any of it in 2006. RP2 59.

Further, BV's recollection of these incidents was odd, to put it charitably. She did not recall these events until she was at her sister's forensic interview for the instant King County prosecution more than a dozen years later.

BV told GM [the victim in the instant case] that she should not tell anyone who hurt her. It was not clear whether BV had instructed GM that Mr. Maldonado had touched her "colita" or that GM told BV that her dad had touched her "colita." RP 7/11/13 191. This important point should have, but was not, addressed. Obviously had BV implanted in GV's mind the notion that Mr. Maldonado touched her, then the trial court would not have been able to find that the State had satisfied its burden by a preponderance. Given this major unanswered issue, the trial court compounded its error when it held that the state had proven the misconduct by a preponderance.

Under the de novo standard of review, this court must reverse the trial court's ruling admitting the ER 404[b] evidence.

(b). The ER 404[b] evidence was not relevant to establish a common scheme or plan.

To be clear, the State is incorrect when it asserts that Mr. Maldonado “does not take issue with the trial court’s reasonable determination that his targeting of his own children when each reached the age of five while their mother was unlikely to interfere or intrude, and conducted in a similar fashion constitutes a common scheme of which the prior and charged acts are individual manifestations.” State’s Response Brief, page 14.

The State has misapprehended the issues in Mr. Maldonado’s appeal. From assignment of error no. 1 to the conclusion of the brief, Mr. Maldonado has argued that the admission of the evidence was improper for a number of reasons, including the State’s failure to prove by a preponderance that a common scheme or plan existed.

Evidence of a common scheme or plan requires substantially more similarity than that present in the instant case. In this case the events that were admitted as “common scheme or plan” events [BV] occurred long before any of the events alleged to have occurred against GM. Thus, lapse of time is a significant, albeit not entirely determinant, factor.

Washington cases have recognized that the lapse of time may slowly erode the commonality between acts and reduce the relevance of the prior acts. *State v. DeVincentis*, 112 Wn.App. 152, 160-161, 47 P.3d 890 (2003); *aff'd* 148 Wn.2d 11, 74 P.3d 119 (2003), citing *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995). But a lapse of time is not alone determinative. *State v. Baker*, 89 Wn.2d 726, 733-34, 950 P.2d 486 (1997). (misconduct 11 to 15 years earlier); *State v. Wermerskirchen*, 497 N.W.2d 235, 242 (1993) (holding that lapse of time mattered when of real significance). (prior misconduct was at least seven years earlier). In *Baker* and *Wermerskirchen*, although significant passages of time had lapsed, the courts found the time lapses to outweighed by other factors.

This case stands in marked contrast to those cases. The lapse in time is a significant, if not the, significant factor to consider regarding “common scheme or plan.” This is so because the passage of time is particularly relevant when assessing the credibility and memory of BV’s testimony. BV had no recollection of large period of claimed sexual abuse until she talked to GM, the complaining victim in this case, and, further, BV claimed that most of her recollection was triggered during her half-sister’s forensic interview.

Given the absence of memory of sexual abuse for 13-16 years and an intervening recent acrimonious incident regarding her dog with the defendant, BV's memory was suspect to say the least.

The trial court erred by failing to consider and appropriately weigh the devastating effect that the lengthy passage of time had on the admission of this ER 404(b) evidence. Its admission created unfair prejudice that denied Mr. Maldonado a fair trial.

[c]. The State failed to prove beyond a reasonable doubt that Mr. Maldonado committed the charged crime.

There was insufficient evidence to convict the defendant of first degree child molestation.

A reply brief addresses only matters raised in the response brief. To Mr. Maldonado's meritorious argument that he is entitled to dismissal for the State's failure to prove the case beyond a reasonable doubt, the State erroneously responds that the defense had made this into a case of intent.

This argument fails to consider the elements the State was required to prove and recasts them in a manner not intended by either the Legislature or the defense.

The defendant was convicted of first degree child molestation. Under RCW 9A.44.083, Child molestation in the first degree, "(1) A

person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.”

To prove child molestation, the State had to prove “sexual contact.” RCW 9A.44.010 (2) defines "Sexual contact" as any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party. Thus, the State had to prove, in order to prove the element of sexual contact beyond a reasonable doubt, that the touching was done for sexual gratification.

GM testified at the first trial that the defendant touched her on the legs and nowhere else. 5RP 56. This was significantly inconsistent with her trial testimony. At trial GM testified that the defendant touched her “colita” [privates] and it felt weird. RP 50. She had no other details about this.

At the first trial, GM stated that the defendant squeezed her leg and pinched her. RP5 57. GM denied that he ever touched her “colita” or privates. *Id.*

Even with the other ambiguous statements attributed to her by BV who also told GM not to tell anyone about them, GM's statements do not rise to the level of proof of sexual contact.

II. CONCLUSION

For the foregoing reasons, Mr. Maldonado respectfully asks this court to grant this appeal.

DATED this 23rd day of March, 2015.

BARBARA COREY, WSBA#11778
Attorney for Appellant Maldonado

CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws Of the State of Washington that the following is a true and correct: That on this date, I delivered via ABC- Legal Messenger a copy of this Document to: King County Prosecutor's Office, Room W554, 516 Third Avenue Seattle, WA 98104 and to Jose Maldonado Coyote Ridge Corrections Center, DOC#369097 PO Box 769, Connell, WA 99326

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