71134-2

71134-2

NO. 71134-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KEVIN LEE GARRISON,

Appellant.

RECEIVED
COURT OF APPEALS
DIVISION ONE

DEC 4 - 2014

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL A. SCHAPIRA

CORRECTED BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHANIE FINN GUTHRIE
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. CROSS-ASSIGNMENT OF ERROR[1]

1. The trial court erred in concluding that the defendant's Texas conviction for voluntary manslaughter is not comparable to a Washington conviction for assault in the second degree.

B. ISSUES PRESENTED

1. Before a trial court admits evidence of prior misconduct for a purpose such as establishing a common scheme or plan, the court must balance on the record the probative value of the evidence against its prejudicial effect. The record shows the trial court considered the prejudicial effect and probative value of the proposed prior misconduct testimony in determining which portions would be admissible, and the trial court's finding that certain portions were admissible to establish a common scheme or plan is unchallenged on appeal. Did the trial court satisfy the requirement of an on-the-record balancing of probative value against prejudicial effect, and was any error in also admitting the evidence to establish a lack of accident or mistake harmless?

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[1] The State did not cross-appeal the trial court's ruling regarding the comparability of the Texas conviction to Washington's assault in the second degree because the State was not seeking affirmative relief. State v. Kindsvogel, 149 Wn.2d 477, 481, 69 P.3d 870 (2003). However, the State assigns error to that part of the trial court's ruling in urging additional grounds for affirmance. Id.; State v. Sims, 171 Wn.2d 436, 442-43, 256 P.3d 285 (2011).

2. An ER 404(b) limiting instruction must set out the proper purposes for which a jury may consider evidence of prior misconduct. Here, the trial court properly admitted evidence of prior misconduct for the purpose of establishing a common scheme or plan, and its failure to explicitly articulate the purposes for which the evidence was admitted until after its initial pretrial ruling was harmless. Furthermore, the use a juror would make of the prior misconduct in evaluating a common scheme or plan was virtually identical to the use a juror would make of it in evaluating the absence of mistake. Did the trial court properly instruct the jury on the purpose of "common scheme or plan," and was any error in also instructing them on the co-extensive purpose of "absence of accident or mistake" harmless?

3. An out-of-state offense is comparable to a particular Washington offense if the elements of the foreign offense are the same as or narrower than the Washington offense, or if the conduct admitted by the defendant or found by a jury would violate the Washington statute. The conduct the defendant admitted to when he pled guilty to voluntary manslaughter in Texas would violate Washington's manslaughter in the first degree and assault in the second degree statutes, and the elements of the Texas offense are

narrower than the elements of assault in the second degree. Did the trial court properly find that the Texas offense is comparable to manslaughter in the first degree, and did the trial court err when it found that the Texas offense is not comparable to assault in the second degree?

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Kevin Lee Garrison, with child molestation in the second degree. CP 1. A jury found Garrison guilty as charged. CP 37. At sentencing, the trial court found Garrison to be a persistent offender and sentenced him to life in prison without the possibility of release. CP 120, 133. Garrison timely appealed. CP 134, 144.

2. SUBSTANTIVE FACTS.

A.W. was twelve years old and in sixth grade in December of 2011. 3RP[2] 81, 83. She was physically mature for her age. 3RP 90. A.W. spent large amounts of time at the home of her best

[2] The State adopts Garrison's system of reference to the ten volumes of the report of proceedings: 1RP (3/11/13), 2RP (3/12/13), 3RP (3/13/14), 4RP (3/14/13), 5RP (3/18/13), 6RP (3/28/13), 7RP (9/6/13), 8RP (9/10/13), 9RP (10/4/13), and 10RP (11/1/13).

friend, Sincerity, including spending the night there three or four times a week. 3RP 123-24. The defendant, Kevin Lee Garrison, was Sincerity's stepfather. 3RP 121. He was 53 years old at the time. 4RP 151. A.W. considered Garrison and Sincerity's mother, Rosie Garrison, to be family, and called them "Uncle Kevin" and "Aunt Rosie." 3RP 84. Garrison, in turn, bought A.W. gifts and was kind to her. 3RP 84, 128.

Normally, when A.W. wanted to spend the night at the Garrisons' house, she would call her mother to ask permission. 3RP 85. One night in December of 2011, however, it was Garrison who called A.W.'s mother to ask if A.W. could spend the night. 3RP 85. A.W.'s mother gave permission, and spent part of the evening at the Garrisons' home herself, socializing with Garrison and Rosie. 3RP 85-86.

When A.W. would spend the night at the Garrisons' house, she frequently shared Sincerity's bed, but sometimes slept on the family's couch, which was in the living room. 3RP 129-30. After A.W.'s mother went home that night, Garrison and Rosie went to bed and A.W. went to sleep on the couch. 3RP 144-45. A.W. was wearing her shirt, bra, zip-up hooded sweatshirt, and jeans.

3RP 144. Before going to sleep, A.W. zipped her sweatshirt all the way up. 3RP 145.

Shortly before five o'clock in the morning, A.W. was awakened by the feeling of a hand rubbing and squeezing her breast underneath her clothes and bra. 3RP 153, 157, 167. She quickly opened her eyes, and saw Garrison withdraw his hand from her chest and walk quickly back to his bedroom a few feet away. 3RP 155, 160. A.W.'s heart pounded as she tried to process what had just happened. 3RP 160-61. She looked down, and discovered that her sweatshirt was unzipped, the neckline of her shirt was pulled down below her bra, and the cup of her bra was folded inwards, exposing part of her breast and nipple. 3RP 161-64.

A.W. fixed her clothes and turned to face the back of the couch, with her back towards Garrison's open bedroom doorway, in the hopes that Garrison would think she was still sleeping. 3RP 165. After a minute or two, Garrison came out of his bedroom again and went to the kitchen. 3RP 165. Scared of what he might do if he thought she was still asleep, A.W. waited in fear until Garrison returned to his bedroom. 3RP 166. After waiting a few

more minutes in the hope that Garrison would fall asleep, A.W. fled to Sincerity's room. 3RP 166.

After struggling to wake Sincerity enough to get some blankets, A.W. climbed into the far side of Sincerity's bed, so that Sincerity would be between her and the doorway. 3RP 167-68. She didn't wake Sincerity up to tell her what had happened, because she feared Sincerity wouldn't believe her. 3RP 168. A.W. forced herself to go back to sleep, and the next morning she tried to pretend that nothing had happened until she could talk to her mom and tell her what had happened. 3RP 169-70.

Fearing Garrison would be suspicious if she acted unusually, A.W. accepted a ride home from him as was customary, despite her reluctance to get in the car with him. 3RP 170. Garrison said nothing during the short ride, and A.W. arrived home to find her mother already at work and her aunt still sleeping. 3RP 171-72. A.W. went to school, but tried to reach her mother by text during the day. 3RP 173. When A.W.'s mother arrived home that night, A.W. met her in the driveway before she even came inside, and in tears told her what had happened. 3RP 93-94, 173-75. The next day, A.W.'s mother took her to the police station to report the molestation. 3RP 95, 176.

D. ARGUMENT

1. THE TRIAL COURT PROPERLY ANALYZED AND ADMITTED EVIDENCE OF PRIOR MISCONDUCT UNDER ER 404(b), AND GAVE A PROPER LIMITING INSTRUCTION.

Garrison contends that the trial court erred by (1) failing to balance on the record the probative value of prior misconduct evidence against the danger of unfair prejudice when making its ER 404(b) ruling, (2) improperly admitting evidence of prior misconduct to establish the absence of mistake, and (3) giving an improper limiting instruction. These claims should be rejected. The record shows that the trial court weighed the probative value of the evidence against the danger of unfair prejudice in making its ruling, any error in admitting the testimony to establish the absence of mistake was harmless where the testimony was also properly admitted as evidence of a common scheme or plan, and that the limiting instruction was proper.

a. Relevant Facts.

During pretrial motions, the State requested a ruling on the admissibility of evidence of prior sexual misconduct by Garrison against A.W. and a former victim, A.F. 1RP 105; CP 165. Some of

the evidence proffered by the State was that, while sleeping on the Garrisons' couch a month or two before the charged incident, A.W. had awoken to Garrison rubbing her upper thigh over her clothes. CP 148; 3RP 177-80. When she moved her leg, Garrison stopped. 3RP 180. Because she trusted Garrison not to do anything inappropriate, A.W. didn't think it was serious and went back to sleep. 3RP 177, 180.

The State also sought to admit testimony by A.W. that, on multiple occasions prior to December of 2011, she had awoken on the Garrisons' couch with her shirt and bra in disarray, and did not know how they had gotten that way. 1RP 108; CP 149. This only happened when A.W. slept on the couch, and never when she slept in Sincerity's bed. 1RP 108; CP 149.

The State also sought to admit evidence regarding Garrison's molestation of a prior victim, A.F. During the summer of 2000, A.F. was twelve years old and had just finished sixth grade. CP 337; 4RP 21. Her mother was dating Garrison, who lived next door. 4RP 22. Garrison was kind to A.F., buying her cigarettes and taking her side when she got in trouble with her mother.

4RP 23-24. Garrison became a father or uncle figure to A.F. 4RP 23.

Like A.W., A.F. was more physically developed than most girls her age. 4RP 25. One night, A.F. was awakened by Garrison rubbing her head and shoulders. 4RP 26. A.F. found it awkward, but didn't want to think anything of it, so she didn't say anything. 4RP 27. The next time it happened, A.F. woke to Garrison touching her back with his hands under her clothes. 4RP 27-28. His hands then moved to fondle her breasts and then her vaginal area. 4RP 27-28, 31. A.F. tried to pretend that she was still sleeping. 4RP 28.

A.F. didn't immediately report the molestation because she didn't want to hurt her mom and because she feared she wouldn't be believed. 4RP 29, 32. In the ensuing months, A.F. was awoken more than twenty times by Garrison fondling her. 4RP 30. The molestation escalated to more serious abuse that occurred while A.F. was awake, including incidents of vaginal penetration with Garrison's fingers and with a dildo. CP 149-50, 337-38. A.F. eventually disclosed the abuse, and Garrison was charged with rape of a child and child molestation in 2004, but pursuant to a plea

agreement was allowed to enter an Alford[3] plea to assault in the second degree. CP 333, 344-45.

The State argued that the prior misconduct with A.W. was admissible for the purposes of demonstrating lustful disposition, res gestae, and absence of mistake, and that the prior misconduct with A.F. was admissible for the purposes of demonstrating a common scheme or plan and the absence of mistake. CP 165; 1RP 110. The State indicated that it believed lustful disposition and common scheme or plan were essentially the same concept when considering prior misconduct against the victim of the current offense. 1RP 109-10, 136; CP 165. The State's argument regarding the absence of mistake was that, because evidence of a common scheme or plan was relevant to prove that the charged act had in fact occurred, the evidence would contradict the defendant's expected claim that A.W. was mistaken in her belief that Garrison had touched her and had instead simply dreamed about it. CP 176.

The trial court ruled that testimony about the thigh-touching incident with A.W. and the incidents of touching while A.F. was asleep were admissible. 1RP 130, 168. The court found that the incidents involving A.W. awaking with her clothing in disarray were

[3] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

insufficiently connected to any action by Garrison for their relevance to outweigh their prejudice, and excluded those incidents as a result. 1RP 131-33.

The court also found that the incidents of more serious molestation of A.F., after the defendant had progressed from fondling A.F. while she was asleep to molesting her while she was awake, were not admissible. 1RP 168, 173. The trial court ruled that those more serious incidents were highly prejudicial and not as helpful to the jury because they were less similar to the conduct alleged by A.W. than were the incidents that occurred when A.F. was asleep. 1RP 168-69, 173.

The court did not explicitly state for what purposes the thigh-touching incident with A.W. was admissible, but did state that the incidents of molestation while A.F. was asleep were admissible as evidence of a common scheme or plan and the absence of mistake. 1RP 130-33, 173. Neither party asked the court to clarify whether it was admitting the thigh-touching incident with A.W. for the same purposes as the evidence regarding A.F. 1RP 130-34.

The parties later submitted proposed limiting instructions that set out "common scheme or plan" and "absence of mistake or accident" as permissible purposes for A.F.'s testimony in

accordance with the court's ruling. CP 64, 397. The State's proposed instruction set out "lustful disposition" and "absence of mistake" as permissible purposes for A.W.'s testimony, under the mistaken belief that the trial court had specifically cited those purposes in its pretrial ruling regarding A.W.'s testimony. CP 397; 5RP 5. Garrison's proposed instruction listed "absence of mistake or accident" as the only permissible purpose for A.W.'s testimony about prior misconduct. CP 64.

The trial court agreed with Garrison's counsel that the term "lustful disposition" was unduly prejudicial, and clarified that its pretrial ruling had admitted the prior misconduct with A.W. as evidence of a common scheme or plan and lack of accident, just like the prior misconduct with A.F. 5RP 10-11. The trial court crafted and gave to the jury its own limiting instruction, which did not differentiate between the prior misconduct with A.W. and A.F., but instead simply stated that the alleged prior sexual misconduct could be considered in evaluating whether the evidence demonstrated a common scheme or plan or the absence of mistake or accident. CP 50.

b. The Trial Court Properly Conducted An On-The-Record Balancing Of The Probative Value Of The Prior Misconduct Against Its Prejudicial Effect.

Although evidence of prior bad acts is generally inadmissible to prove the character of a person in order to show conformity therewith, such evidence may 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); State v. Lough, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995). To admit evidence of prior bad acts, the trial court must: (1) find by a preponderance of the evidence that the acts occurred, (2) identify the purpose for which the evidence is admitted, (3) find that the evidence is related to that purpose, and (4) determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. State v. Kilgore, 147 Wn.2d 288, 292, 5 P.3d 974 (2002); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

An appellate court reviews a trial court's interpretation of an evidentiary rule, such as ER 404(b), de novo. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). However, once the rule is correctly interpreted, a trial court's decision to admit or exclude

evidence is reviewed for abuse of discretion. Id. The erroneous admission of ER 404(b) evidence is a non-constitutional error and is therefore harmless unless there is a reasonable probability that the result of the trial would have been different had the error not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

In order to comply with the fourth step of the ER 404(b) analysis, a trial court need not recite word for word that "the probative value is not outweighed by the danger of unfair prejudice." See State v. Carleton, 82 Wn. App. 680, 685, 919 P.2d 128 (1996). Instead, the record as a whole need only show that the trial court considered the consequences of admitting or excluding the evidence in making its ruling. Id. (citing State v. Powell, 126 Wn.2d 244, 264-65, 893 P.2d 615 (1995), and State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)).

Here, the trial court explicitly considered the probative value and prejudicial effect of the testimony the State sought to admit in making its ruling. In explaining why it was admitting evidence of the prior incident where A.W. awoke to see Garrison touching her thigh, but was excluding the prior incidents of A.W. waking up with her clothing in disarray for no apparent reason, the trial court stated

that the clothing incidents were "too indefinite" compared to the thigh-touching incident. 1RP 131. The court explained that the clothing incidents were "highly prejudicial" and there was insufficient "basis to conclude it's related to [the charged event]." 1RP 133.

In explaining why it was admitting evidence of Garrison touching A.F. while she slept but excluding evidence of the more serious abuse that occurred once Garrison started molesting A.F. while she was awake, the court acknowledged that "it is highly prejudicial to have any mention of sexual impropriety with a young person." 1RP 168-69. The court observed that the incidents while A.F. was asleep were nonetheless very similar to the current allegations involving A.W., while the incidents that occurred after Garrison progressed beyond touching A.F. in her sleep were less "helpful to the jury in deciding" whether Garrison was guilty of the charged crime. 1RP 169, 173.

At the end of the trial court's oral ruling, the prosecutor asked the court whether it was finding that the probative value of the evidence the court found admissible was not outweighed by its unfair prejudice; the court confirmed, "That's correct." 1RP 174. Although the trial court's oral ruling may not be as organized and

neatly set out as Garrison might wish, the record is clear that the trial court did indeed consider the probative value and prejudicial effect of the evidence the State sought to admit in making its rulings. See Powell, 126 Wn.2d at 264-65 (holding trial court sufficiently weighed prejudice against probative value where court excluded substantial portion of proposed testimony to balance out the overall prejudicial effect and noted that evidence admitted was highly probative and less inflammatory than excluded evidence). Because the trial court balanced the probative value of the proffered testimony against its prejudice on the record, and only admitted those portions for which the probative value was not outweighed by the danger of unfair prejudice, the trial court properly exercised its discretion in admitting portions of the prior misconduct evidence offered by the State.

Even if this Court were to find that the trial court should have been more explicit in its balancing as to each individual piece of evidence, any error was harmless. The failure to balance probative value against prejudice on the record is harmless if the record is sufficient for the reviewing court to determine that the trial court would still have admitted the evidence had it considered the relative weight of probative value and prejudice. Carleton, 82 Wn. App.

at 686. Here, it is clear from the record that, had the trial court more explicitly articulated its weighing of probative value against prejudice for each instance of prior misconduct, it would still have admitted and excluded the same portions of the proffered evidence. 1RP 130-33, 167-74.

c. The Trial Court Properly Admitted The Prior Misconduct For The Purpose Of Establishing The Absence Of Mistake Or Accident.

Garrison alleges that the trial court erred in admitting the prior misconduct evidence for the purpose of establishing the absence of mistake or accident where he did not claim at trial that the touching had occurred by accident or mistake. Brief of Appellant at 17-18. Although most cases addressing the admission of ER 404(b) evidence to prove a lack of accident or mistake have involved situations where the defendant admitted that the harm occurred but claimed it occurred by accident, this Court has also upheld the admission of ER 404(b) evidence to disprove accident or mistake even where the defendant did not specifically raise that defense. State v. Maesse, 29 Wn. App. 642, 649, 629 P.2d 1349 (1981).

Furthermore, the State's arguments regarding this basis for admission make clear that the State, and as a result the trial court, was using the term "absence of mistake or accident" to express the idea that, because the prior misconduct established a common scheme or plan that made it more likely that the charged misconduct in fact occurred, the prior misconduct helped disprove Garrison's claim that A.W. was mistaken in her belief that he had molested her. CP 176. This framing of "absence of mistake or accident" rendered it functionally identical to "common scheme or plan," and as such the trial court did not abuse its discretion in admitting the prior misconduct for that purpose.

Even if this Court concludes that the trial court erred in admitting the evidence for the purpose of establishing the absence of mistake or accident, the error was harmless. The admission of ER 404(b) evidence for an improper purpose is harmless if the evidence was also admitted for a proper purpose. See Powell, 126 Wn.2d at 264-65 (trial court's decision to admit prior misconduct under ER 404(b) will be upheld if one of the bases is justified).

Here, the trial court also admitted the prior misconduct as evidence of a common scheme or plan, and Garrison concedes that the evidence was indeed admissible for that purpose. 5RP 11;

Brief of Appellant at 25 ("Notwithstanding the admissibility of this evidence for the purpose of showing common scheme under ER 404(b), ..."). Any error in the trial court's decision to admit the prior misconduct as evidence of the absence of mistake or accident was therefore harmless.

d. The Trial Court Gave A Proper Limiting Instruction.

Garrison contends that the trial court committed reversible error when it instructed the jury that it could consider all the admitted evidence of prior misconduct as evidence of a common scheme or plan despite the trial court's failure to explicitly identify during its pretrial ruling the purposes for which A.W.'s testimony was being admitted. Garrison also contends that the trial court committed reversible error when it included "absence of mistake or accident" as an additional permissible purpose in the limiting instruction. These claims should be rejected. The trial court's delay in explicitly stating the purposes for which A.W.'s testimony was admitted did not render it improper to instruct the jury on those purposes, and it was proper to instruct the jury on "absence of

mistake or accident" where the evidence was properly admitted for that purpose.

When evidence of prior misconduct is admitted pursuant to ER 404(b), the defendant is entitled, upon request, to have the jury instructed on the purpose for which the evidence may be used, and that it may not be used for any other purpose. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Error in an ER 404(b) limiting instruction is not of constitutional magnitude, and therefore is harmless unless the outcome of the trial would have been different had the error not occurred. Id. at 425.

i. The trial court properly instructed the jury that it could consider prior misconduct involving both A.W. and A.F. as evidence of a common scheme or plan.

Garrison contends that, because the trial court did not explicitly identify the purposes for which the thigh-touching incident involving A.W. was admissible in its pretrial ruling, it was improper to instruct the jury that it could consider that incident as evidence of a common scheme or plan. Brief of Appellant at 31. If this contention were correct, it would have been improper to instruct the jury that it could consider the prior misconduct with A.W. for any

purpose, because the trial court did not initially explicitly identify the purposes for which the evidence was admissible during its pretrial ruling. 1RP 130-33. Garrison's claim is unsupported by any citation to authority. Brief of Appellant at 31.

If the trial court erred at all, it was in failing to explicitly state during its initial pretrial ruling the purposes for which the thigh-touching incident with A.W. was being admitted, not in including the otherwise proper purposes in the limiting instruction. But the parties expressed no confusion or need for clarification at the time of the pretrial ruling as to the purposes for which the evidence was admitted, and the court later explicitly stated that the evidence was admitted for the purposes of common scheme or plan and absence of mistake or accident. 1RP 130-34; 5RP 11. There is no indication anywhere in the record that any aspect of the trial would have been different had the trial court identified the purposes during its pretrial ruling rather than later. The trial court's failure to explicitly identify in its initial ruling the purposes for which the prior misconduct with A.W. was being admitted was therefore harmless. See Jackson, 102 Wn.2d at 695.

Had the trial court timely identified the purpose for which it was properly admitting the prior misconduct involving A.W., it would

have been unquestionably proper to instruct the jury on that purpose. See Gresham, 173 Wn.2d at 420. Because the trial court properly admitted the thigh-touching incident with A.W. as evidence of a common scheme or plan, and because the failure to identify that purpose at the time of the pretrial ruling was harmless, the trial court properly exercised its discretion in instructing the jury on that purpose.

ii. The trial court properly instructed the jury on the additional purpose of "absence of mistake or accident."

As discussed earlier, the trial court properly exercised its discretion in admitting the prior misconduct for the purpose of establishing the absence of mistake or accident. Supra, section D.1.c. It was therefore proper to include that purpose in the limiting instruction. State v. Gresham, 173 Wn.2d 405, 423, 269 P.3d 207 (2012) (limiting instruction should inform jury of purposes for which evidence was admitted). If this Court concludes that the trial court erred in admitting the prior misconduct for that purpose, then it was also error to instruct the jury on that purpose. See id.

However, any such error was harmless. The trial court properly instructed the jury that it could consider the prior

misconduct as evidence of a common scheme or plan; pursuant to that instruction, if the jury found that there was a common scheme or plan, the jury could use the prior misconduct as evidence that the charged molestation actually occurred. See DeVincentis, 150 Wn.2d at 17-18 (evidence of common scheme or plan is relevant because it is probative of the fact that the charged crime occurred). As discussed earlier, the prosecutor used the term "absence of mistake or accident" to express the idea that, because the prior misconduct established a common scheme or plan that made it more likely that the charged misconduct in fact occurred, the prior misconduct helped disprove Garrison's claim that A.W. was mistaken in her belief that he had molested her. CP 176.

In that context, using prior misconduct as evidence of an absence of mistake or accident was indistinguishable from using the prior misconduct as evidence of a common scheme or plan. Any juror who concluded that there was a common scheme or plan and that the charged misconduct did in fact occur would necessarily also conclude that A.W. was not mistaken about the charged misconduct. There is not a reasonable probability that the jury's

verdict would have been different had it only been instructed on the purpose of "common scheme or plan," and not "absence of mistake or accident." Therefore, any error in the limiting instruction was harmless. See Jackson, 102 Wn.2d at 695.

2. THE TRIAL COURT PROPERLY INCLUDED GARRISON'S TEXAS VOLUNTARY MANSLAUGHTER CONVICTION IN HIS OFFENDER SCORE AS A MOST SERIOUS OFFENSE.

Garrison contends that the trial court erred when it included his Texas involuntary manslaughter conviction in his offender score as a most serious offense, under the theory that the Texas conviction is not comparable to a Washington class B most serious offense and the comparable class C most serious offense had washed out. This claim should be rejected. Garrison's Texas conviction is factually comparable to Washington's manslaughter in the first degree and is legally and factually comparable to Washington's assault in the second degree. Both are class B most serious offenses, which the trial court properly concluded had not washed out of Garrison's offender score.

a. Relevant Facts.

Garrison was charged with voluntary manslaughter in Texas in 1981 for beating his four-year-old step-daughter to death earlier that year. CP 151, 260-64. The information alleged that

> Kevin Lee Garrison did . . . while under the immediate influence of sudden passion arising from an adequate cause, and intending to cause serious bodily injury to an individual, namely: Tricia Marie Crump, intentionally and knowingly commit an act clearly dangerous to human life, to wit: striking the head and body of the said Tricia Marie Crump, thereby causing the death of an individual, namely: Tricia Marie Crump.

CP 260. Garrison pled "guilty to the charge of voluntary manslaughter as alleged in the information." CP 262.

In 1981, the prong of Texas's voluntary manslaughter statute under which Garrison was charged stated, in relevant part, that a person commits the offense if he "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual," but acts "under the immediate influence of sudden passion arising from adequate cause." CP 260; former Tex. Penal Code Ann. §§ 19.02(a)(2), 19.04 (Vernon 1973).

At sentencing in the current case, the State argued that the Texas conviction was comparable to Washington's manslaughter in

the first degree, manslaughter in the second degree, and assault in the second degree. 8RP 50; CP 207-11. The trial court found the Texas conviction comparable to manslaughter in the first degree, a "most serious offense" that was a class B felony in 1981, as well as to manslaughter in the second degree, a "most serious offense" that was a class C felony in 1981.[4] 8RP 72; 9RP 22; CP 132. The trial court declined to find the Texas conviction comparable to assault in the second degree. 8RP 76.

The trial court found that Garrison had not met the criteria for a class B felony to wash out of his offender score, and that both the Texas conviction and Garrison's 2005 Washington assault in the second degree conviction were therefore properly considered in determining Garrison's sentence. CP 132-33. As a result, the trial court sentenced Garrison as a persistent offender to life in prison without the possibility of release. CP 120, 133.

b. Comparability Analysis.

The Sentencing Reform Act (SRA) provides that, when a defendant has prior convictions in another state, the out-of-state

[4] Garrison does not contest the trial court's oral ruling that the Texas conviction is comparable to manslaughter in the second degree. Brief of Appellant at 47-50.

convictions are considered part of the defendant's criminal history and "shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3); RCW 9.94A.030(12). If the defendant does not agree that his out-of-state conviction is comparable to a Washington felony, the court applies a two-part test to determine comparability. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005).

First, the sentencing court compares the elements of the out-of-state offense with the elements of a Washington criminal statute in effect when the out-of-state offense was committed. Lavery, 154 Wn.2d at 255 (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). If the elements of the two crimes are "substantially similar," or if the foreign jurisdiction defines the crime more narrowly than Washington, the out-of-state conviction counts toward the defendant's offender score. Lavery, 154 Wn.2d at 255; State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999).

If the Washington statute defines the offense more narrowly than the foreign statute, the court proceeds to conduct a factual comparability analysis. Morley, 134 Wn.2d at 606. Factual comparability requires the sentencing court to determine whether

the defendant's conduct, as evidenced by the indictment or information, or the records of the foreign conviction, would have violated the comparable Washington statute. Lavery, 154 Wn.2d at 255.

The comparability of offenses is a question of law that appellate courts review de novo. State v. Jordan, 180 Wn.2d 456, 460-61, 325 P.3d 181 (2014). This Court may affirm the trial court's ruling on any basis supported by the record. State v. Poston, 138 Wn. App. 898, 904-05, 158 P.3d 1286 (2007), rev. denied, 163 Wn.2d 1016 (2008).

c. The Trial Court Correctly Concluded That Garrison's Texas Conviction Is Comparable To Manslaughter In The First Degree.

Garrison is correct that the prong of Texas's voluntary manslaughter statute under which he was convicted is not legally comparable to Washington's manslaughter in the first degree. But the trial court's conclusion that the Texas conviction is comparable to manslaughter in the first degree was correct, because Garrison's Texas conviction is factually comparable to manslaughter in the first degree.

A person commits the crime of manslaughter in the first degree in Washington if he or she "recklessly causes the death of another person." RCW 9A.32.060(1)(a).[5] "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c).[6] Thus, to prove manslaughter in the first degree, the State must prove that the defendant knew of and disregarded a substantial risk that a homicide may occur. State v. Gamble, 154 Wn.2d 457, 467, 114 P.3d 646 (2005).

Around the time of Garrison's Texas offense, there was uncertainty as to whether former §19.02(a)(2) of the Texas Penal Code required proof that the defendant knew that the act that caused a death was clearly dangerous to human life, or whether the intent to cause serious bodily injury was the only mens rea required. See Lugo-Lugo v. State, 650 S.W.2d 72, 74-75 (Tex. Crim. App. 1983) (op. on reh'g) (withdrawing panel opinion that

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[5] The relevant portion of this statute was the same at the time of Garrison's Texas offense. Former RCW 9A.32.060 (1975).

[6] This statute was substantively identical at the time of Garrison's Texas offense; the only amendments since then were to make the language gender-neutral. Laws of 2009, ch. 549, § 1002.

held State must allege and prove defendant intended or knew the act was clearly dangerous to human life).

After Garrison's conviction, Texas's highest criminal court clarified that § 19.02(a)(2) only required the State to prove that the act was objectively clearly dangerous to human life and was done with intent to cause serious bodily injury. Id. at 81-82. Because a defendant could commit voluntary manslaughter under former § 19.02(a)(2) without also satisfying the elements of Washington's manslaughter in the first degree, Garrison's Texas conviction is not legally comparable to manslaughter in the first degree.

Perhaps due to uncertainty about the required mens rea, or out of a belief that the State needed to prove that the defendant knew the act was clearly dangerous to human life, the information charging Garrison with voluntary manslaughter did not merely parrot the statutory language. CP 260. Instead, it alleged that Garrison "intending to cause serious bodily injury to [the victim], *intentionally and knowingly* commit[ted] an act clearly dangerous to human life, to wit: striking the head and body of [the victim], thereby causing the death of [the victim]." CP 260 (emphasis added).

When Garrison pled guilty, he admitted the truth of all material facts alleged in the information. Ex parte Williams, 703

S.W.2d 674, 682 (Tex. Crim. App. 1986). This included the fact that he intended and knew his conduct was clearly dangerous to human life.

Garrison argues that, under Texas law in 1981,[7] allegations not essential to the offense were surplusage and could be disregarded. Brief of Appellant at 39 (citing Curry v. State, 30 S.W.3d 394, 399 (Tex. Crim. App. 2000)). Significantly, Curry dealt only with the State's ability to amend an indictment to remove unnecessary allegations, rather than with the effect of a guilty plea to an information containing unnecessary allegations. 30 S.W.3d at 396. More importantly, Curry noted that, under the surplusage doctrine, unnecessary language in a charging document cannot be disregarded when it is "descriptive" of an element of the offense. 30 S.W.3d at 399.

Unnecessary language "is 'descriptive' of an element of the offense if it 'define[s] the offense more narrowly, place[s] it in a specific setting, or describe[s] the method by which it was committed.'" Id. (quoting Upchurch v. State, 703 S.W.2d 638, 641 (Tex. Crim. App. 1985)). Language alleging that the defendant has

[7] The surplusage doctrine was overturned in 2001. Gollihar v. State, 46 S.W.3d 243, 256-57 (Tex. Crim. App. 2001).

a particular mens rea beyond that required is descriptive of an element of the offense, and "must be proven as alleged, even though needlessly stated." Upchurch, 703 S.W.2d at 640 (citing Franklin v. State, 659 S.W.2d 831 (Tex. Crim. App. 1983) (State required to prove unnecessary allegation that defendant charged with receiving stolen property knew the property was obtained from the complainant specifically)).

Thus, when Garrison pled guilty to voluntary manslaughter "as alleged in the information," he admitted that he intended to cause serious bodily injury when he struck the head and body of his victim, that he knew his conduct was clearly dangerous to human life, and that his conduct caused the death of the victim. CP 260-62.

A person who causes a death knowing that his conduct is clearly dangerous to human life has necessarily known of and disregarded a substantial risk that a homicide may occur. Furthermore, to commit an act, intending to cause serious bodily injury, and knowing that the act is clearly dangerous to human life, is necessarily a gross deviation from the conduct that a reasonable person would exercise in the same situation. The conduct to which Garrison admitted would thus necessarily constitute manslaughter

in the first degree in Washington, making Garrison's Texas conviction factually comparable to manslaughter in the first degree. The trial court's conclusion that Garrison's Texas conviction is comparable to Washington's manslaughter in the first degree was therefore correct.

d. Any Error In The Trial Court's Ruling Was Harmless, Because Garrison's Texas Conviction Is Also Comparable To Assault In The Second Degree.

Even if the Texas conviction were not comparable to manslaughter in the first degree, the trial court's ultimate finding that the Texas conviction was comparable to a class B "most serious offense" was correct, because the offense is also comparable to a current assault in the second degree.

The Persistent Offender Accountability Act (POAA), which defined "most serious offense" and mandated a sentence of life in prison upon conviction for a third most serious offense, was approved by the voters in 1993 and enacted by the legislature in 1994. Laws of 1994, ch. 1, § 2-3. When determining whether a pre-POAA offense is a most serious offense by virtue of comparability to assault in the second degree, courts must compare

the offense to the current assault in the second degree statute, which was the version in effect when the legislature first defined "most serious offense" in 1993.[8] RCW 9.94A.030(32)(u); see State v. Failey, 165 Wn.2d 673, 677, 201 P.3d 328 (2009) (a Washington State felony offense prior to December 2, 1993, is a most serious offense if it is comparable to a current most serious offense).

i. Garrison's Texas offense is legally comparable to assault in the second degree.

Under the current statute, a defendant commits assault in the second degree if he "[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm." RCW 9A.36.021(1)(a). The Texas statute under which Garrison pled guilty required that the defendant commit the act that caused death with intent to cause "serious bodily injury." Former Tex. Penal Code Ann. § 19.02(a)(2); Lugo-Lugo, 650 S.W.2d. at 81. Because

[8] Because the current assault in the second degree statute is narrower than the pre-1988 version, if Garrison's Texas offense is comparable to a current assault in the second degree, it is also comparable to a 1981 assault in the second degree. Compare RCW 9A.04.110(4)(b) ("'Substantial bodily harm' means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part") with State v. Salinas, 87 Wash.2d 112, 121, 549 P.2d 712 (1976) ("'Grievous bodily harm' include[s] a hurt or injury calculated to interfere with the health or comfort of the person injured; it need not necessarily be an injury of a permanent character. By 'grievous' is meant atrocious, aggravating, harmful, painful, hard to bear, serious in nature.").

the Texas statute requires an intentional assault,[9] the intent to inflict of serious bodily injury, and the infliction of death, while the Washington statute requires merely an intentional assault and the reckless infliction of substantial bodily harm, the Texas offense is narrower than assault in the second degree so long as Texas's definition of "serious bodily injury" is the same as or narrower than Washington's definition of "substantial bodily harm." RCW 9A.08.010(2) ("When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly.").

Washington defines "substantial bodily harm" as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b). At the time of Garrison's crime, Texas defined "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Tex. Penal Code Ann.

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[9] This author can think of no scenario in which a defendant could cause a death by an act intended to inflict serious bodily injury without the act constituting an assault.

§ 1.07(a)(34) (Vernon 1979). Because Texas's serious bodily injury required at minimum a protracted loss or impairment of the function of any body part or organ, while Washington's substantial bodily harm encompasses temporary losses or impairments in such function, "serious bodily injury" is narrower than "substantial bodily harm."

Thus, the elements of the Texas voluntary manslaughter statute under which Garrison pled guilty are narrower than the elements of Washington's current assault in the second degree. Garrison's Texas conviction is therefore legally comparable to assault in the second degree, a class B most serious offense. See Lavery, 154 Wn.2d at 255.

ii. Garrison's Texas offense is factually comparable to assault in the second degree.

Even if Garrison's Texas offense were not legally comparable to Washington's assault in the second degree, such as if there were a way to cause death by an act intended to inflict serious bodily injury without it constituting an "assault" under Washington law, the conduct to which Garrison admitted when he pled guilty would make him guilty of assault in the second degree.

By pleading guilty, Garrison admitted that he caused the victim's death by "intentionally and knowingly . . . striking [her] head and body" with intent to cause serious bodily injury. CP 260-62; see Curry v. State, 30 S.W.3d 394, 399 (Tex. Crim. App. 2000) (factual allegations in charging document that place offense in a specific setting or describe method by which offense was committed must be proved as alleged, even if their inclusion in the charge was legally unnecessary).

It is indisputable a person who, intending to cause a harm defined more narrowly than substantial bodily harm, strikes the head and body of their victim and thereby causes the victim's death, has necessarily intentionally assaulted the victim and recklessly inflicted substantial bodily harm. Garrison's Texas voluntary manslaughter conviction is therefore factually comparable to Washington's assault in the second degree. See Lavery, 154 Wn.2d at 255.

Washington's manslaughter in the first degree was a class B felony at the time of Garrison's Texas offense. Former RCW 9A.32.060(2) (1975). Assault in the second degree was then, and is now, also a class B felony. RCW 9A.36.021(2)(a); former RCW 9A.36.020 (1979). Both crimes are "most serious offenses."

RCW 9.94A.030. Thus, for purposes of determining whether Garrison's Texas voluntary manslaughter conviction should be included in his offender score as a most serious offense, comparability to assault in the second degree is equivalent to comparability to manslaughter in the first degree. Because Garrison's Texas conviction is legally and factually comparable to assault in the second degree, any error in the trial court's ruling regarding comparability to manslaughter in the first degree was harmless. See State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980) (non-constitutional error is harmless if there is not a reasonable probability that the result would have been materially affected had the error not occurred).

e. The Trial Court Properly Ruled That Garrison's Texas Conviction Has Not "Washed Out" Of Garrison's Offender Score.

Garrison contends that the trial court erred in ruling that Garrison's Texas conviction has not "washed out" of Garrison's offender score for purposes of determining whether he is a persistent offender. This claim should be rejected. Because the trial court properly found that the Texas conviction was comparable

to a Washington class B offense, the trial court's ruling that the Texas conviction does not wash out was correct.

The SRA states that

> Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(b). This is commonly known as a "wash-out" provision. E.g., State v. Ervin, 169 Wn.2d 815, 826, 239 P.3d 354 (2010). A similar provision sets a five-year wash-out period for prior class C felony convictions. RCW 9.94A.525(2)(c). A conviction that has washed out of a defendant's offender score does not count as a prior most serious offense for purposes of sentencing as a persistent offender. Failey, 165 Wn.2d at 678.

Garrison's claim that the trial court erred in its wash-out analysis is based entirely on his assertion that his Texas conviction is not comparable to a class B most serious offense. Brief of Appellant at 46-50. He does not assign error to the trial court's finding that, in the time since his Texas conviction, Garrison has not met the requirements for a class B felony conviction to wash out.

Brief of Appellant at 1-2; CP 132. Garrison simply argues that his Texas conviction is only comparable to a class C felony, and that he has met the requirements for a class C felony conviction to wash out.

For the reasons addressed above, the trial court correctly ruled that the Texas conviction is comparable to a class B most serious offense. Supra, section D.3. Because the trial court so ruled, the State did not need to present evidence that the defendant did not meet the wash-out requirements for a class C felony.[10] If this Court should find that the Texas conviction is comparable only to a class C felony, the parties should be allowed to present additional evidence at the resentencing hearing to address whether the Texas conviction washes out in that case. See State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999) (permitting State to introduce additional evidence at resentencing where issue not fully litigated before the sentencing court).

[10] Although the trial prosecutor did speculate at sentencing that the Texas conviction would wash out if it was only comparable to a class C felony, this statement should not be considered a binding concession, as the court's final ruling removed any need for the parties to fully investigate or litigate whether a class C felony would wash out.

E. CONCLUSION

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

DATED this 3rd day of December, 2014.[11]

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
STEPHANIE FINN GUTHRIE, WSBA #43033
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

[11] The original Brief of Respondent was submitted on October 10, 2014. This Corrected Brief of Respondent is submitted to correct an improper citation on page 34 that was pointed out in the appellant's Reply Brief.

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Casey Grannis, the attorney for the appellant, at Grannisc@nwattorney.net, containing a copy of the CORRECTED BRIEF OF RESPONDENT, in State v. Kevin Lee Garrison, Cause No. 71134-2, 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.

Dated this 2 day of December, 2014.

Name:
Done in Seattle, Washington