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COURT OF APPEALS
DIVISION II

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No. 37123-5-II

STATE OF WASHINGTON

BY CM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAMES JONES

Appellant.

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

The Honorable Gary R. Tabor, Judge
Cause No. 07-1-00426-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion when it admitted evidence under ER 404(b) of the defendant's sexual conduct toward the victims as evidence of his sexual conduct pattern, lustful disposition, and absence of mistake or accident.

2. Whether sufficient evidence supports the defendant's second degree child molestation conviction on count III.

3. Whether sufficient evidence supports the lesser included alternative on count III of third degree child molestation that was submitted to the jury.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case, while noting the following:

In his motion in limine, the defendant argued that the trial court should exclude the numerous occasions of sexual misconduct between the defendant and his two victims, NKS and SRJ, that did not result in criminal charges as unfairly prejudicial. Report of Proceedings (RP) (October 22, 2007) at 6-7. This sexual misconduct included the defendant frequently touching the victims' butts, making the victims sit in his lap, ordering the victims to kiss him on the lips, talking about the victims' breast sizes in front of them, and forcing them to model their undergarments for him. RP (October 22, 2007) at 6-8, 11-12.

The State responded that the numerous occasions of sexual misconduct (1) rebutted defendant's defense that the touching was an accident or mistake, (2) reflected defendant's lustful disposition, (3) proved defendant's motive of sexual gratification, (4) showed a common plan of grooming the victims for sexual touching, and (5) established his opportunity to commit the crimes. RP (October 22, 2007) at 12-15.

The trial court ruled that the defendant's sexual misconduct with his victims was admissible as evidence of his sexual pattern, lustful disposition, and absence of mistake or accident. RP (October 22, 2007) at 22. The trial court also ruled that the probative value of this evidence exceeded any prejudicial effect. RP (October 22, 2007) at 22.

The trial court instructed the jury on count III for both second degree child molestation and the lesser, alternative, charge of third degree child molestation. RP (October 24, 2007) at 186, 189-90. The jury found the defendant guilty on two counts of first degree child molestation, and one count second degree child molestation. RP (October 24, 2007) at 244-249.

C. ARGUMENT.

1. The trial court properly admitted evidence of the defendant forcing the victims to model underwear for him under ER 404(b) as evidence of his sexual conduct pattern, lustful disposition, and absence of mistake or accident.

This court reviews a trial court's decision to admit evidence for abuse of discretion. State v. Sexsmith, 138 Wn. App. 497, 504, 157 P.3d 901 (2007). Although a prior or subsequent bad act is generally inadmissible, it may be admissible for other purposes. Sexsmith, 138 Wn. App. at 504 (citing ER 404(b)). ER 404(b) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Contrary to the defendant's argument that the trial court admitted evidence of the defendant forcing both of his victims to model their underwear for him as evidence of only the defendant's lustful disposition, the trial court ruled that it was evidence of the defendants (1) sexual conduct pattern; (2) lustful disposition; and (3) absence of mistake or accident. RP (October 22, 2007) at 22.

a. Forcing SRJ to model underwear should be viewed in context of defendant's sexual conduct pattern and common scheme for which the evidence was admitted.

Because this evidence was admitted to show the defendant's sexual conduct pattern and absence of mistake or accident, its admission should be reviewed in context with the other evidence admitted for the same purpose. Thus, this conduct was part of a much larger pattern of the defendant's sexual overtures to his victims that was presented to the jury, which included forcing his victims to kiss him on the lips, frequently touching their bottoms, forcing his victims to sit on his lap directly on his genitalia, commenting on his victim's breast size in front of them, not allowing the victims to wear bras inside his home, and not allowing the victims to place pillows over their breasts or lap when they were sitting on his couch. RP (October 22, 2007) at 46-59; RP (October 23, 2007) at 80-86.

In the recent case of Sexsmith, Division Three affirmed the admission of the defendant's prior bad acts where he molested two different girls and used the same pattern of isolating his victims, taking them to a basement, and forcing them to take nude photographs. State v. Sexsmith, 138 Wn. App. at 505. The court also held that the evidence's probative value outweighed any unfair

prejudice, noting that with “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, 506 (quoting State v. DeVincentis, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2000)).

Here, as in Sexsmith, the defendant’s pattern toward both his victims, including forcing both of them to model their underwear, shows “a common plan rather than coincidence” and is more probative than prejudicial. Sexsmith, 138 Wn. App. at 505.

b. ER 404(b) applies to evidence regardless of when it occurred in relation to the charged crime and the challenged underwear modeling incident was admissible as part of the defendant’s sexual conduct pattern that occurred over several years toward SRJ and mirrored his grooming techniques with the other victim.

The defendant attempts to argue that the incident where he forced SRJ to model her underwear for him is inadmissible because it took place “years after the alleged crime” and shows only the defendant’s “general sexual proclivities....” Brief of Appellant at 6. However, the defendant concedes that ER 404(b) applies to both prior and subsequent acts. See Brief of Appellant at 6.

In Washington, “ER 404(b) applies to evidence of other crimes or acts regardless of whether they occurred before or after

the alleged crime for which the defendant is being tried.” State v. Bradford, 56 Wn. App. 464, 467, 783 P.2d 1133 (1989) (citing State v. Laureano, 101 Wn.2d 745, 764, 682 P.2d 889 (1984), *overruled on other grounds in State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988); 5 K. Tegland, Wash. Prac., *Evidence* § 114, at 386 (1989)).

Contrary to the defendant’s assertion, the record does not give an exact time frame of when the defendant forced SRJ to model her underwear. SRJ testified that between the 2nd and 4th school grades the defendant would slap her butt “a lot,” force her to sit in his lap on his genitalia area, make her kiss him on the lips, put his hand on her genitalia area when she was 9 or 10 years old, and “[w]hen [she] got older and began to wear more revealing underwear and bras” would force her to model her underwear in front of him. RP (October 22, 2007) at 46-51.

Thus, the record does not establish whether the defendant forced SRJ to model her underwear for him “years later” as the defendant claims, or merely months later. Additionally, “the lapse of time is not a determinative factor in [404(b)] analysis.” Sexsmith, 138 Wn. App. at 505 (citing State v. Baker, 89 Wn. App. 726, 733-34, 950 P.2d 486 (1997)). Rather than looking at the lapse of time, courts properly focus on whether the evidence, when viewed with

the other acts, show that the defendant had a pattern or common scheme. See Sexsmith, 138 Wn. App. at 505-506.

The record clearly shows that the defendant's prior and subsequent sexual acts toward his victims were part of a pattern and common scheme. The defendant forced *both* of his victims to model their underwear in front of him. He forced NKS to model her underwear before he molested her. RP (October 23, 2007) at 80-81, 86-87.

Although forcing SRJ to model her underwear by itself may not seem significant, the similarity in forcing both of his victims to do this and other sexual conduct shows his pattern and common scheme. See Sexsmith, 138 Wn. App. at 505 ("While the individual features of the prior and charged acts of abuse are not in themselves unique, the cumulative similarity between the two suggests a common plan rather than coincidence"). The defendant used the same grooming techniques, one of which was forcing the victims to model their underwear, to create an environment where he could sexually touch his daughter and stepdaughter.

Accordingly, the trial court did not abuse its discretion when it admitted evidence of the defendant forcing SRJ to model her underwear where this was (1) part of a much larger pattern and

common scheme of sexual conduct towards both of his victims, (2) evidence of the defendant's lustful disposition toward his victims, and (3) evidence that the defendant's touching of the victims was not an accident or mistake.

2. Sufficient evidence supports the defendant's second degree child molestation conviction on count III.

A person is guilty of second degree child molestation if he or she knowingly has sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim. RCW 9A.44.086. On appeal, the only second degree child molestation element that the defendant challenges is the victim's age. See Br. of Appellant at 1, 8.

The defendant's claim of insufficient evidence admits the truth of all of the State's evidence and all inferences that can be reasonably drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is not considered any less reliable than direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here, NKS testified that she was either 13 or 14 years old when the defendant put his hand under her pajamas and felt her

breast. RP (October 23, 2007) at 86. NKS's mother confirmed that NKS told her that same day about the defendant touching her breast and that NKS was either 13 or 14 at that time. RP (October 23, 2007) at 107. The defendant also admitted to an officer that NKS's mother confronted him about touching NKS's breast when NKS was either 13 or 14. RP (October 23, 2007) at 134. Given all of this evidence and viewing this evidence in the light most favorable to the State, there is a reasonable inference that NKS was 13 years old when the defendant molested her.

3. In the alternative, this court should hold that sufficient evidence supports the defendant's third degree child molestation conviction on count III, the lesser included alternative that was presented to the jury.

If this court holds that insufficient evidence supports the defendant's second degree child molestation conviction, the appropriate remedy is to remand the matter for entry of judgment and sentence on the lesser included alternative third degree child molestation charge. State v. Green, 94 Wn.2d 216, 234-25, 616 P.2d 628 (1980). Where the jury has been instructed on the lesser included offense, "the jury necessarily had to have disposed of the elements of the lesser included offense to have reached the verdict on the greater offense." Green, 94 Wn.2d at 234.

Here, the trial court instructed the jury on the lesser included offense of third degree child molestation.¹ RP (October 24, 2007) at 186, 189-90. Clearly, third degree child molestation is an “inferior” degree of second degree child molestation. See RCW 10.61.003. Additionally, the State proved each of the third degree child molestation elements at trial. Both NKS and her mother testified that the defendant touched NKS’s breast under her pajamas when she was either 13 or 14. Because NKS was less than 16 years old and the defendant knowingly had sexual contact with her, as evidenced by this incident and his other sexual conduct toward NKS, the State presented sufficient evidence to support a third degree child molestation conviction on count III. See RCW 9A.44.089.

Even if this court decides not to remand for entry of judgment and sentence on third degree child molestation, the remedy would be to remand for a new trial on count III, rather than the defendant’s proposal to dismiss the conviction. See Green, 94 Wn.2d at 235 (remanding aggravated murder charge for retrial

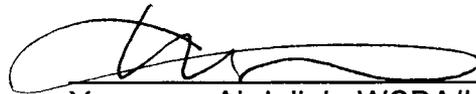
¹ The State also provided the defendant notice that it would pursue the lesser included offense of third degree child molestation for count III in its first amended information. CP at 15-16.

where the trial court did not instruct the jury on the lesser included offense).

E. CONCLUSION.

This court should affirm the trial court's admission of evidence showing the defendant's sexual conduct pattern towards his victims, his lustful disposition, and the absence of mistake or accident. Sufficient evidence supports the defendant's second degree child molestation conviction. In the alternative, this court should remand count III for entry of a judgment and sentence for third degree child molestation. The State respectfully asks this court to affirm the defendant's child molestation convictions.

Respectfully submitted this 23 of July, 2008.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, No. 37123-5-II,
on all parties or their counsel of record on the date below as follows:

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DEPUTY

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

Dated this 25th day of July, 2008, at Olympia, Washington.

[Signature]
TONYA MAIAVA