

NO. 42725-7

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

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT GARCIA, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 11-1-00160-3

RESPONDENT'S BRIEF

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly admit evidence of defendant's prior misconduct after conducting analysis under 404(b)?

B. STATEMENT OF THE CASE.

1. Procedure

On January 10, 2011, the State charged defendant Robert Garcia Jr. with one count of rape of a child in the first degree, and two counts of child molestation in the first degree. CP 1-2. All three counts were crimes of domestic violence. CP 1-2. The victim of all three counts was L.G¹. CP 1-2.

On April 8, 2011, the State filed an amended information which added the aggravator that defendant was in a position of trust over the victim. CP 11-12. On August 1, 2011, the case was called for trial in front of the Honorable Vicki Hogan. RP 3. The court heard argument on the State's motion to admit evidence of other sex offense evidence. RP 24-48, CP 16-34. The court granted the State's motion and found the evidence to be admissible. RP 46-48, CP 228-229. On August 1, 2011, the State filed a second amended information. CP 67-68. On August 3,

¹ As this is a case concerning sex offenses, the State will use initials to identify the victim in this matter.

2011, the State moved to amend count I to child molestation in the first degree after clarifying a statement made by the victim. RP 56, CP 115-116. On April 8, 2011, the jury found defendant guilty of all three counts of child molestation in the first degree. RP 369-370, CP 172-174. The jury also found that defendant and the victim were members of the same family or household and that defendant abused a position of trust. RP 370-371, CP 175-178.

Sentencing was held on October 7, 2011. RP 380. Defendant had an offender score of six, and the sentencing range was 98-130 months on each count. CP 40-51. The court sentenced defendant to an exceptional sentence of 240 months on each count to run concurrent. RP 386, CP 183-200, 179-182.

Defendant filed this timely appeal. CP 241-261.

2. Facts

L.G. is defendant's granddaughter. RP 73, 250. Growing up, L.G. would frequently go with her family to visit defendant. RP 74. Defendant lived alone. PR 74. L.G. and her brothers would visit defendant and sometimes spend the night. RP 74-75. L.G. testified that defendant was fun to spend time with and that she liked spending time with him. RP 75-76. L.G. also testified about a time when defendant made her come into his bedroom while her two brothers were asleep in the living room. RP 76, 78. L.G. was four or five when it happened. RP 76. Defendant forced L.G. to grab his penis over his pajamas. RP 76. His penis was hard. RP

86. L.G. was uncomfortable touching defendant's penis. RP 79. She then slept in the bed with defendant and woke up to him spooning her. RP 80. She was afraid to tell anyone about the incident. RP 81.

On another occasion, L.G. was lying down in the movie room at her house and defendant was lying down next to her. RP 76, 82. Defendant stuck his hands down her pants and touched her vagina under her underwear. RP 76, 82-84. It made her feel uncomfortable. RP 84. L.G. was scared to tell anyone because she did not want defendant to get into trouble. RP 85.

Several other incidents happened over the years. On one occasion, defendant bought her some underwear then made her take off her pants and show him her underwear. RP 77. Defendant would also force his tongue into L.G.'s mouth when he kissed her. RP 85. This happened every time she saw defendant. RP 87. Defendant also told her that she was beautiful and that she should put her tongue in his mouth too. RP 88. He also touched her breasts over her clothes. RP 85-86, 91. This happened when she was ten years old and older. RP 88. When she was ten or eleven, she was in the shower and defendant told her to take off her towel and then he just stared at her. RP 104.

The incidents started when she was about four or five years old. RP 76. All sexual contact stopped when she started high school. RP 87. L.G. first disclosed the incidents right before she graduated from high school. RP 96. She also disclosed to her mom and her aunt. RP 97-98,

100. She waited to tell because she was afraid. RP 96. She did not tell the police because she did not want defendant to get into trouble. RP 99. L.G. felt that defendant really did care about her but she was still uncomfortable being alone with him. RP 107.

Naheida Garcia is the victim's aunt. RP 61. L.G. did not want to talk about what defendant had done to her but eventually told Ms. Garcia. RP 63. L.G. was crying and very upset. RP 63. Ms. Garcia talked to L.G. over a period of weeks. RP 64. Ms. Garcia contacted the police and told them everything L.G. had told her about what defendant had done to her. RP 62, 65.

L.V.G. is L.G.'s mom.² RP 72. She is defendant's daughter. RP 128, 250. When L.V.G. was four, defendant would touch her whenever her mother left. RP 130. Defendant made L.V.G. put her mouth on him with her head under the sheets. RP 131. Defendant also put her on the dresser and performed oral sex on her. RP 131. Once when they were on a road trip, defendant sat in the backseat with her and touched her vagina. RP 134. Defendant also made her kiss him but she bit his tongue and then told her mom and defendant then threatened her. RP 135. Defendant would touch L.V.G. anytime he was alone with her. RP 135. The touching stopped when she was fourteen years old. RP 135.

² In order to avoid identifying the victim in this case, the State will refer to her mother by initials as well.

L.V.G. described her family as a close family. RP 141, 152. L.V.G. thought defendant had changed which is why she allowed defendant to see her kids. RP 137, 153. She thought she would know what to look for. RP 141, 153. When her daughter, L.G. told her what defendant had done to her, L.V.G. sent a text message to defendant that said, "I let you get away with it with me, but how dare you hurt my daughter." RP 148. Defendant called and apologized and said it was the "fucking alcohol." RP 148. L.V.G. testified that defendant gets violent when he is drunk. RP 155-56, 169-70. L.V.G. thought defendant had started a new life and thought everything would be ok. RP 171.

Defendant denied everything. RP 257-58, 266. Defendant denied that he ever slept in the same bed as L.G. except for one night when there was a storm. RP 253. Defendant denied that he ever made L.G. touch his penis. RP 254. He denied ever kissing L.G.. RP 255. He denied ever touching L.G. RP 256. Defendant claimed that he never laid a hand on a woman. RP 258. Defendant agreed that his daughter called him but denied that he admitted any abuse. RP 264. Defendant denied drinking around his grandkids. RP 265. Defendant admitted that he would tell his daughter that she was beautiful and his granddaughter that she was pretty. RP 280. Defendant claimed that in ten years, he had never been alone in a room with Lorena. RP 278.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF THE DEFENDANT'S PRIOR MISCONDUCT, UNDER ER 404(b).

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 843 P.2d 651 (1992). The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Id.* at 162.

ER 404(b) provides that evidence of "other crimes, wrongs, or acts" is inadmissible to prove "action in conformity therewith" on a particular occasion. However, that rule also provides a non-exhaustive list of purposes for which such evidence can be admissible: "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). While a trial court's interpretation of ER 404(b) is reviewed de novo, once that trial court correctly interprets the rule, the trial court's decision to admit or exclude the evidence is reviewed for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009). The appellate court may, "consider bases mentioned by the trial court as well as other proper bases on which the trial court's

admission of evidence may be sustained.” *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). The court may affirm on any ground adequately supported by the record, even if the trial court did not consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

In the instant case, the trial court followed the procedure laid out in case law for the entry of evidence under ER 404(b). While defendant is correct that the trial court also found the same evidence admissible under RCW 10.58.090, the court also made it clear that they were admitting the evidence under ER 404(b). RP 46-48, CP 228-229. The trial court followed the procedure that is laid out in *State v. Gresham*, 173 Wn.2d 405, 419-423, 269 P.3d 207 (2012). The fact that the court also admitted the evidence under RCW 10.58.090, does not make it per se inadmissible. In fact, the court in *Gresham* found that the evidence in defendant Scherner’s case was properly admitted under ER 404(b). *Gresham*, 173 Wn.2d at 419-20. The trial court properly analyzed the evidence under ER 404(b) and the appropriate test as laid out in case law. The trial court did not err.

The test for admitting evidence under ER 404(b) is laid out in case law. Before admitting evidence of other crimes or wrongs under ER 404(b), a trial court must: (1) establish by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine the evidence is relevant; and (4) find that its probative value outweighs its prejudicial

effect. *State v. Hernandez*, 99 Wn. App. 312, 321-322, 997 P.2d 923 (1999), *review denied*, 140 Wn.2d 1015 (2000), citing *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995).

First, the State must prove these acts by a preponderance of the evidence. *See Lough*, 125 Wn.2d at 889; *State v. Griswold*, 98 Wn. App. 817, 991 P.2d 657 (2000). When defendant has not been convicted of the other sex offenses, the trial court has the discretion to hold an evidentiary hearing or rely upon the State's offer of proof. *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). On appeal, if any substantial evidence in the record supports a finding that the prior act occurred, the evidence has met the standard of proof. *State v. Roth*, 75 Wn. App. 808, 816, 881 P.2d 268 (1994).

In the instant case, the trial court found that the evidence was admissible based on the offer of proof. RP 46. While it is true that the court did not use the words "by a preponderance of the evidence," the court was aware of the standard it had to follow, and properly relied on the State's offer of proof and found the prior sex offense to be evidence. *See* CP 16-34, 72-75. It would be contrary to case law and logic for the trial court to decline to find that the prior sex offense occurred, but still find that the evidence of the prior sex offense was admissible. It would be extremely prejudicial to admit testimony about prior sex offenses if the court deemed that they did not occur and as such, had no evidentiary value. There would be no point in the court continuing to analyze the

admissibility of the evidence if the trial court did not find that the acts occurred. The State properly submitted an offer of proof and the trial court properly found that based on that offer of proof, the prior sex offenses were evidence and were admissible. The record supports the trial court's finding. The trial court followed procedure and did not abuse its discretion.

Second, the trial court must identify the purpose for which the evidence is to be introduced. Prior bad acts are admissible if the evidence is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs the prejudicial effect. *State v. Boot*, 89 Wn. App. 780, 788, 950 P.2d 964 (1998), citing *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence is relevant and necessary if the purpose in admitting the evidence is of consequence to the action and makes the existence of the identified act more probable. *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990).

“The common scheme or plan exception applies when the defendant had devised a plan and used it repeatedly to perpetuate separate but similar crimes.” *State v. Burkins*, 94 Wn. App. 677, 973 P.2d 15 (1999), citing *State v. Krause*, 82 Wn. App. 688, 693-4, 919 P.2d 126 (1996), *review denied*, 131 Wn.2d 1007, 932 P.2d 644 (1997), *see also Lough*, 125 Wn.2d at 852. “When the very doing of the act charged is still to be proved, one of the facts which may be introduced into evidence is the person's design or plan to do it. If the evidence is offered for a

legitimate purpose, then the exclusion provision of rule 404(b) does not apply.” *Lough*, 125 Wn.2d at 853.

In *State v. DeVincentis*, 150 Wn.2d 11, 74 P. 3d 119 (2003), the Supreme Court held that the admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. *Id.* at 21. The focus is on the similarity between the prior acts and the charged crime, rather than the uniqueness of the individual acts. *Id.* at 13. Sufficient similarity is reached when the trial court determines that the “various acts are naturally to be explained as caused by a general plan . . .” *Lough*, 125 Wn.2d at 860. Such evidence is relevant when the existence of the crime is at issue. *DeVincentis*, 150 Wn.2d at 11.

In *DeVincentis*, the defendant was found to have created a “safe channel” or environment that allowed an apparent safe and isolated environment by gaining a position of trust with each of the victims; the defendant wore an unusual piece of clothing (bikini or G-string) in front of each of the victims; the defendant asked for and gave massages to each of the victims; and the acts themselves were similar in each instance. These similarities between the prior acts and those alleged in the charge before the court were sufficient to warrant the admission of other crimes or misconduct under ER 404(b). *Id.* at 21.

In *State v. Kennealy*, 151 Wn. App. 861, 214 P. 3d 200 (2009), the defendant was charged with child rape and molestation of neighborhood children. *Id.* at 869. At the trial, evidence that the defendant had molested his own children years before was admitted under the common scheme or plan exception of ER 404(b). Although the prior misconduct was not as similar as in *DeVincentis*, the Court held that it was properly admitted. *Kennealy*, 151 Wn. App. at 889.

In *Griswold*, the defendant was charged with child molestation in the third degree. He was alleged to have driven a student in his class to his house and asked her to play “truth or dare.” After molesting the girl he made remarks in an attempt to prevent her from disclosing what had occurred. At trial, two witnesses were permitted to testify that they were also molested by the defendant because the defendant played the same “truth or dare” game with them, and made similar remarks in an attempt to prevent the girls from disclosing. Again, the court held that the similarities in the position of trust the defendant held, the similarity of the “truth or dare” game, the similarity in the touching, and the similarity in his attempt to prevent their disclosure were sufficient to warrant the admission of these acts under ER 404(b). *Griswold* 98 Wn. App. at 826.

As in the cases above, the defendant’s conduct in the present case towards each victim was sufficiently similar to warrant admission under ER 404(b). The defendant held the same position of trust over both

victims. RP 47. He is L.V.G.'s father and L.G.'s grandfather. CP 72-75. He used this status to create the same "safe channel" discussed in *DeVincentis*, and committed all of these acts in his respective homes while entrusted with the care of first his daughter and then later his granddaughter. CP 72-75. The court also noted that the time period for the abuse of each girl was similar, the types of offenses in terms of touching, fondling and kissing were similar. RP 46-47, CP 72-75. The age that the offense started and stopped with each girl was similar. RP 46-47, CP 72-75. The frequency of the offense was similar as well. RP 47. As the Court held in both *DeVincentis* and *Griswold*, the defendant's similarity of abusive conduct warranted the admission of his prior conduct under ER 404(b), as his conduct manifested a common or general plan of abuse. The trial court did not abuse its discretion.

Third, the Court must find that this evidence is relevant to prove an element of the crime charged or to rebut a defense before balancing its probative value against any prejudicial effect should it be presented to the jury. Generally, courts will find that probative value is substantial in cases where there is very little proof that sexual abuse has occurred, particularly where the defendant asserts a defense of general denial. *State v. Sexsmith*, 138 Wn. App. 497, 506, 157 P.3d 901 (2007). Where general denial is asserted, and every element of the offense is at issue, credibility is central to the outcome of the case and supports the admission of common scheme or plan evidence. *Id.*

In the instant case, defendant asserted a general denial defense, and as such, the evidence of prior sex offenses was relevant to rebut this defense. CP 13-15. Defendant, without authority, asserts that the State must show what part of the defense they are combating. *See* Brief of Appellant, page 14. However, as the case law above shows, when defendant makes a general denial, every element of the crime is at issue, credibility is an issue and the nature of this case supports the admission of the prior sex offenses. The trial court did not abuse its discretion.

Defendant cites to *State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009) as being directly on point and holding that evidence of prior sex offenses should not be admitted. However, nothing in *Sutherby* is related to the current case before the court. In *Sutherby*, the court was analyzing the issue of severance of child rape and child molestation charges from separate child pornography charges. *Id.* at 883. The State sought to use the pornography charges to show defendant's propensity to molest children. *Id.* at 884. The court found that the evidence of child pornography would likely not have been admissible in a separate trial for rape and molestation. *Id.* at 887. The court noted that evidence of other bad acts should not be admitted unless it met one of the issues such as motive, intent, absence of accident, or mistake, common scheme or plan or identity. *Id.* The court's holding in *Sutherby* does not apply to the present

case as this was not a case where defendant was on trial for varying charges and where severance of those very different charges with very different evidence was sought. The instant case was on child molestation and the evidence sought to be admitted was of previous child molestation. This was also not a case where the State sought to bring in evidence for the sole purpose of propensity. The instant case complies with the court's notation that evidence of prior sex offenses can be deemed admissible if it is identified for a proper purpose. The evidence here was identified for a proper purpose of, among other, common scheme or plan. *Sutherby* is not on point and does not apply.

The trial court also weighed the probative value versus prejudicial effect. The court in *Krause*, held that the probative value outweighs the prejudice where: 1) the evidence is highly probative because it tends to show a common design or plan, 2) the need for evidence is great given the nature of the allegations, and 3) the trial court gives the appropriate limiting instruction to the jury. *Krause*, 82 Wn. App. at 696-97. Where a common plan is shown, corroborating evidence is highly probative in these cases as they are otherwise a credibility contest between an adult and a child. *Griswold* at 827.

In each of the cases cited above, the Court considered several factors before admitting these prior acts. These include: the age of the victim, the need for evidence, the secrecy surrounding sex abuse offenses, the absence of physical proof of the crime, the degree of public opprobrium associated with the accusation, and the availability of less inflammatory documentation or corroboration that the crime occurred was available. See *DeVincentis* 150 Wn.2d at 23, *Griswold* at 827, and *Krause* at 696.

In the instant case, the court found that the prior acts and the current acts were substantially similar. RP 46-47. As such, the record supports the trial court's finding that the acts were common design or plan.³ CP 228-229. The court also noted that the nature of the allegations warranted the admission of the 404(b) evidence. RP 47-48. The court considered the factors discussed above. RP 46-48, CP 228-229. The court balanced the probative value with the prejudicial effect. RP 47-48, CP 228-229. The court gave a limiting instruction in the instructions at the close of the case. CP 147-171. The court did not err in admitting the evidence.

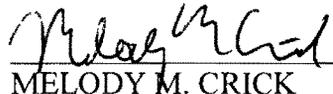
³ Defendant does not assign error to any of the court's findings. Unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

D. CONCLUSION.

The State respectfully requests this Court uphold the trial court's ruling and affirm defendant's convictions and sentence.

DATED: June 28, 2012

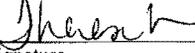
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