

84307-4

NO. 38233-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ARTHUR RUSSELL,

Appellant.

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DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 08-1-00223-1

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

Whether the trial court properly admitted evidence of Russell's sexual acts with the victim in this case that occurred in other states as evidence of his lustful disposition toward her?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Arthur Russell was charged by amended information filed in Kitsap County Superior Court with first-degree rape of a child (domestic violence) of his step-daughter, CR. CP 6.

Before trial, the State sought to admit evidence of acts of abuse Russell committed against CR in Japan and Hawaii before the family moved to Washington, and of acts committed in Florida and Indiana after they left Washington State. 1RP 15. The State alleged that Russell began abusing CR when she was 3 years old, while he was stationed in Japan. 1RP 16. The abuse continued as family moved to each new location. 1RP 16. CR had no independent recollection of the abuse in Japan. 1RP 16. CR recalled the abuse beginning in Hawaii. 1RP 16. CR also recalled it happening in Washington and continuing in Florida, where there was an allegation of penile-vaginal penetration. 1RP 16. CR also recalled abuse in Indiana, where CR reported it to her mother, and thereafter it stopped. 1RP 16.

Russell agreed that some of the evidence was admissible. 1RP 17. He did not believe that the acts in Washington could be divorced from those in Florida and Indiana: "I don't know how we don't talk about Indiana." 1RP 17-18. Russell had more concern about earlier incidents in Japan and Hawaii. He objected that CR had no independent recollection of the events on Japan: He also expressed concern about whether CR, who was between four and seven, in Hawaii was competent to testify about what happened then. 1RP 18. Russell therefore asked that the evidence of what occurred in Japan and Hawaii be excluded. 1RP 19.

Russell admitted that the evidence of penile penetration in Florida was relevant: "I concede it is somewhat probative." 1RP 19, 21. He nevertheless argued that it should be excluded because it was more prejudicial than probative. 1RP 19.

Russell also agreed that "both sides need to discuss what happened in Indiana."

The State responded that it would be focusing on the events in Washington. 1RP 21. Nevertheless it pointed out that the evidence was relevant for a number of reasons. It showed progression and grooming behavior. 1RP 22. Russell went from just touching and caressing, in Hawaii, progressed to oral sex in Washington and to full intercourse in Florida. 1RP

22. The evidence also showed Russell's lustful disposition toward CR. 1RP 23.

The trial court excluded the evidence regarding Japan. 1RP 23. It acknowledged Russell's concerns about competency vis-à-vis the Hawaii evidence, but concluded that they would be a matter for cross-examination, not of admissibility. 1RP 23. The court also found the Florida evidence relevant, and not more prejudicial than probative, in view of the other testimony and what happened in Indiana. 1RP 23-24. The court also felt the Florida evidence was needed to avoid false impression that intercourse began in Indiana. 1RP 24. The court cautioned the State that it would be held to its statement that the evidence would be presented in as non-inflammatory a way as possible. 1RP 24.

After a trial, the jury found Russell guilty as charged. CP 32-33.

B. FACTS

CR was born May 22, 1992, the youngest of Marilou Russell's five children. 2RP 244-45. CR met Russell in the Philippines, her birthplace, when she was about two or three years old. 2RP 245. Her mother eventually married Russell, and she came to think of him as her father. 2RP 245. CR she did not know her biological father. 2RP 245.

When CR was growing up, they moved a lot because Russell was in

the Navy. 2RP 248. CR's mother worked and Russell would be at sea for six months at a time. 2RP 249.

CR got along with Russell. 2RP 249. CR was much closer to Russell than were her siblings. 2RP 251. They spent more time together. 2RP 251. Her relationship with her mother, on the other hand, was difficult at times. 2RP 249. CR's mother had been emotionally and physically abusive with her and played favorites between her and her brother AJ. 2RP 271. Russell and her mother argued a lot, too. 2RP 249.

After Russell and CR's mother married, the family moved to Japan from the Philippines. 2RP 245. After two or three years there, they moved to Hawaii. 2RP 246. They stayed in Hawaii for about three years. 2RP 246. She was in kindergarten to second grade. 2RP 246. She would have been six years old through eight or nine. 2RP 246.

"Things that shouldn't have happened" between Russell and CR began when they lived in Hawaii. 2RP 253. He began to caress her body all over with his hands. 2RP 253. It happened in their house, mostly in his room. 2RP 254. He did it more than 10 times while they lived in Hawaii. 2RP 254.

From Hawaii, the Russells moved to Bremerton. 2RP 246, 248. They moved to Washington just as she was starting third grade, and stayed until

she was in fifth grade. 2RP 247-48. She would have been about nine. 2RP 247.

After they moved, Russell continued to touch her, and started to touch her orally. 2RP 254. He also put his penis in her mouth and made her perform oral sex on him. 2RP 255. Russell also touched her vagina with his hands and mouth. 2RP 257. It happened multiple times. 2RP 257. She did not know how many times it happened. 2RP 255. It was more than once. 2RP 255. He told her that it was their secret; she told him that she would not tell. 2RP 255. He also told her that it was common for stepdads to this to their daughters. 2RP 255. She believed him. 2RP 256.

They stayed in Washington for about three years, and then they moved to Florida. 2RP 247. After they moved to Florida, the abuse continued. 2RP 258. It escalated to penile-vaginal intercourse there. 2RP 269. It happened several times. 2RP 270.

After two years there, the family moved to Indiana. 2RP 247. The intercourse continued after they moved to Indiana. 2RP 259, 270. She did not report it because she did not want anything to happen to Russell. 2RP 259. He told her that he would go to jail if she reported him. 2RP 259.

CR nevertheless eventually told her mother about the abuse while they were living in Indiana. 2RP 259. Her mother caught her with a boy in

her room when she was 13 or 14. 2RP 260, 3RP 309. After her mother accused her of having sex with different people, CR told her mother what Russell had been doing with her. 3RP 311. The revelation precipitated a violent argument between Russell and CR's mother. 2RP 260.

CR asked her mother not to call the police because she did not want Russell to get into trouble. 2RP 261. After she told her mother, CR's relationship with Russell became awkward, although the abuse stopped. 2RP 261-62. Her mother never reported it. 2RP 262. Russell never asked her why she had made up the allegation: he knew they were true. 3RP 312.

CR first recalled her parents first mentioning the possibility of divorce in Washington or Florida. 2RP 250. It was mostly Russell who talked to CR about wanting to get divorced. 2RP 250. CR probably told him in Indiana that he should go ahead and do it. 2RP 251. She told him to get divorced so he could be happy because he did not seem happy in the marriage. 2RP 251.

Around 2006, the family moved from Indiana to Las Vegas. 2RP 244, 247. CR had again told Russell that he should leave after they moved to Nevada, because he was unhappy in the marriage. 2RP 280. She was hoping he would take her with him if he did. 2RP 280. Russell moved out in the spring of 2007, and returned to Washington State. 2RP 263, 274. Russell and CR's mother began divorce proceedings. 2RP 263.

CR continued to have a relationship with Russell after he returned to Washington. 2RP 264. They talked a lot on the phone. 2RP 265. She still felt very close to him and loved and trusted him. 2RP 265. They seldom talked about the abuse, but when they did, he would say that if they all stuck together, everything would be okay. 2RP 265.

Because of the divorce, CR's mother pressured her to report the abuse. 2RP 263. Her mother threatened to send her to the Philippines to live with her biological father, whom she did not know. 3RP 301. It scared her. 3RP 301. CR felt like her mother was using her to gain an advantage in the divorce proceedings. 2RP 263. Eventually the pressure became too much, and in September 2007, CR went to stay at a friend's house. 2RP 264, 275. She did not tell her mother where she was for a week. 2RP 264.

CR had mostly stopped talking to Russell at the end of the summer. 2RP 266. They stopped talking because she no longer had a cell phone. 2RP 267. After she was placed in foster care, CR left a voice mail on Russell's phone saying that everything was okay because she was away from her mother. 3RP 309.

CR eventually reported the abuse to a school counselor because her mother kept reminding her what Russell did, and she was tired of the burden carrying it around. 2RP 262. CR did not tell her mother that she was going

to speak to the school counselor. 3RP 312. She was interviewed at her high school by social worker Teresa Cragon on November 8, 2007. 2RP 276-77. On November 13, 2007, she had a gynecological examination. 2RP 277-78. She had been in counseling as a result of the abuse since then. 2RP 270.

CR was placed in foster care at the end of November. 2RP 279. It was better than living with her mother. 2RP 279. She had not spoken with her mother since then. 2RP 250.

CR never talked to her siblings about the abuse. 2RP 267. She also denied the allegations to Shanna, who was Russell's daughter from a prior marriage. 2RP 267. CR told Shanna the allegations were untrue because she did not want anyone else to know about them, to protect both Russell, and herself. 2RP 267. CR may also have told her step-sister Shanna in September that her mother was putting pressure on her to accuse Russell of molesting her, and that it was not true. 3RP 308.

The same was true of her conversations with her sister-in-law Kristine. 2RP 267-68. Before CR ran away she told her sister-in-law, Kristine, that her mother was pressuring her to say that Russell had molested her, and also that it was not true. 3RP 303.

Kristal Russell, CR's 21-year-old sister, helped clarify the timeline. 3RP 317. They moved to Hawaii around 1997. 3RP 319. In the summer of

2000, they moved to Washington. 3RP 319. They lived in Washington for three years, and then moved to Florida. 3RP 320. After a year they moved to Indiana, and then after another year they moved to Las Vegas. 3RP 320.

Kristal last spoke with Russell during the divorce in 2006 or 2007. 3RP 321. She last saw CR seven months before trial. 3RP 321. They had occasionally exchanged messages online, but had not spoken in that time. 3RP 321.

Kristal and CR got along growing up. 3RP 322. Kristal felt that Russell favored CR when they were children. 3RP 322. They spent a lot of time together. 3RP 322.

Kristal never actually saw Russell sexually abuse CR. 3RP 324. However, until they moved to Las Vegas, CR and Kristal shared a room. 3RP 324. On occasion, Kristal would wake up and CR would not be there. 3RP 324. Her mother would be at work, and she would find CR and Russell in their parents' room with the door locked. 3RP 324. When she would knock on the door, they would ask her to give them a second. 3RP 324. This happened often. 3RP 325. It happened in Hawaii, Washington, Florida, and Indiana. 3RP 325. Russell was never in the bedroom with the door locked with any of the other children. 3RP 325.

Russell moved out a couple of months after they moved to Las Vegas.

3RP 326. During the summer of 2007, there were a lot of arguments between CR and her mother. 3RP 326. Their mother would threaten to send CR back to the Philippines. 3RP 327. CR told Kristal that she was not worried about that because Russell would come and get her. 3RP 327. CR stated that when she became of age she was going to go and live with him. 3RP 328.

Russell's biological daughter, Shanna LeMar, testified on his behalf. 3RP 330. Russell and LeMar's mother had divorced in 1988. 3RP 331. LeMar lived with her mother after the divorce; she was not around Russell much after her parents divorced. 3RP 331-37. She nevertheless maintained a relationship with Russell, as much as his military career allowed. 3RP 331. LeMar was 16 when she met CR, who was four at the time. 3RP 332. LeMar lived in Indiana from 1987 until September 2006. 3RP 332. Russell lived in Indiana from around July 2004 through October 2005. 3RP 332. LeMar had more contact with Russell during that period. 3RP 332.

Le Mar did not see Russell as showing favoritism toward CR. 3RP 333. She believed Russell and CR had a closer bond because of CR's illness, a form of lupus, and Russell was the one who mostly took her to her doctor's appointments. 3RP 333. LeMar never saw Russell touch CR inappropriately. 3RP 334.

LeMar moved to Washington after her father did, in September 2007.

3RP 334. Russell flew back to Indiana and they drove LeMar's car back.
3RP 335. During the three-day drive CR called often. 3RP 335. LeMar talked to CR at least four times and Russell talked to her six or seven times.
3RP 335. CR repeatedly said that she wanted to move to Washington with them, and even suggested that they make a detour to Nevada on the way and pick her up. 3RP 336. After they arrived in Washington on September 16, 2007, CR continued to call about once a day. 3RP 336. Every time LeMar spoke with CR on these occasions, CR would ask when they were going to come and get her. 3RP 337. LeMar last spoke with CR in mid to late October, after the allegations were made. 3RP 337.

Russell testified at trial and denied ever touching CR inappropriately.
3RP 340-41. According to Russell, he moved to Japan in July 1995. 3RP 343. CR's birthday was May 27, 1992. 3RP 343. CR moved to Japan the following April when she was almost four. 3RP 343.

They moved to Hawaii in February 1997. 3RP 343. He went to school in February 2000, and then he moved to Washington in April 2000. 3RP 344.

The family followed in June 2000. 3RP 344. They left Washington in June 2003. 3RP 344. Russell returned from a two-to-three month

deployment at sea the Friday before September 11, 2001. 3RP 345. On September 11, the crew was recalled to the ship and deployed for another three months. 3RP 345. He was away for three-quarters of the remaining time in Washington. 3RP 345.

They left Florida in June 2004. 3RP 345. They moved to Nevada in October 2006. 3RP 346.

Russell felt he and CR were close because of the way her mother treated her. 3RP 347. The mother was very harsh and demanding and had a bad temper. 3RP 347. Russell first heard about the abuse allegation from his wife when they were still in Indiana. 3RP 356. Russell arrived home and she was very upset because she had found a boy in CR's room. 3RP 357. She also confronted him with the abuse allegation, and he denied it. 3RP 357. Law enforcement was not called. 3RP 357. Russell never asked CR why she would make up the allegations. 3RP 364.

Russell's relationship with his wife was already strained at that time, so the incident did not really affect it. 3RP 357. His relationship with CR changed a bit, but not much. 3RP 357.

Russell moved out of the family home on February 19, 2007. 3RP 346. At the time he moved out, he discussed the decision with all the children. 3RP 357. CR had been encouraging him to leave for years because

of the way her mother treated him. 3RP 358. When he did leave there were repeated discussions of both CR and AJ going with him. 3RP 358.

In late August CR called him and told him that she had run away but was safe and staying at a friend's house. 3RP 358-59. She would not say with whom she was staying. 3RP 358. CR asked him to come get her when he was driving LeMar from Indiana to Washington. 3RP 360.

At some point he received a voice mail from the Nevada social worker informing him that because of the allegations, he was prohibited from having any contact with CR. 3RP 361. He ceased all contact at that point. 3RP 361. He cancelled CR's cell phone contract at that time as well. 361. Per the phone records the last call on CR's phone was on November 19, 2007. 3RP 361. CR left him a voice mail saying she was in CPS custody and was out of her mother's house, and was okay. 3RP 362.

III. ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF RUSSELL'S SEXUAL ACTS WITH THE VICTIM IN THIS CASE THAT OCCURRED IN OTHER STATES AS EVIDENCE OF HIS LUSTFUL DISPOSITION TOWARD HER.

Russell argues that the trial court abused its discretion in admitting brief evidence of his sexual activities with his stepdaughter that occurred in Hawaii and Florida. This claim is without merit for several reasons. With

regard to the Hawaii evidence, the State presented a sufficient offer of proof, the trial court correctly found the evidence was admissible for a proper purpose, and that it was more probative than prejudicial. Russell conceded that the incidents in Florida were sufficiently proved and relevant. He only asserted that they were more prejudicial than probative, a claim the trial court properly rejected. Finally, any error would be harmless in light of evidence of that the sexual activities also occurred in Indiana, which Russell conceded was both relevant and admissible.

1. The trial court properly admitted evidence of Russell's ongoing sexual abuse of his step-daughter as evidence of his lustful disposition toward her.

The trial court's decision to admit evidence is reviewed for an abuse of discretion. *State v. Carleton*, 82 Wn. App. 680, 684, 919 P.2d 128 (1996).

ER 404(b) states:

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.

Before a court admits evidence under this rule, it must (1) identify the purpose for introducing the evidence, (2) determine relevancy to an element of the crime charged, (3) weigh the probative value against its prejudicial effect. *State v. Saltarelli*, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982); *State*

v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

The evidence here was admitted for a proper and relevant purpose. The trial court clearly accepted the State's argument that the evidence was admissible it for the purpose of showing Russell's lustful disposition toward CR. 1RP 23-24. *State v. Stein*, 140 Wn. App. 43, 66, 165 P.3d 16 (2007), *review denied*, 163 Wn.2d 1045 (2008) ("And where a trial court rules on the admissibility of ER 404(b) evidence immediately after both parties have argued the matter and the court clearly agrees with one side, an appellate court can excuse the trial court's lack of explicit findings. *See State v. Pirtle*, 127 Wn.2d 628, 650, 904 P.2d 245 (1995).").

The Supreme Court has consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the victim. *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). The critical factor is that the other misconduct is directly connected to the victim, and thus does not just reveal the defendant's general sexual proclivities:

Such evidence is admitted for the purpose of showing the lustful inclination of the defendant toward the offended female, which in turn makes it more probable that the defendant committed the offense charged.

... The important thing is whether it can be said that it evidences a sexual desire for the particular female.

The kind of conduct receivable to prove this desire at such ... subsequent time is whatever would naturally be

interpretable as the expression of sexual desire.

Ray, 116 Wn.2d at 547 (quoting *State v. Ferguson*, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983) (alterations the Court's)). The limits of time over which such evidence may range lies within the discretion of the trial court. *Ray*, 116 Wn.2d at 547-48 (holding incidents of incest occurring ten years before charged offense properly admitted). The testimony is admissible even if it is not corroborated by other evidence. *Id.*

State v. Guzman, 119 Wn. App. 176, 79 P.3d 990 (2003), review denied, 151 Wn.2d 1036 (2004), also involved a prior assault some six years earlier. There the defendant attempted to distinguish *Ray* on the grounds that in *Ray* the defendant did not have access to the victim in the intervening time because she was in foster care. The Court rejected this contention, citing to *Ray*'s holding that the temporal bounds of lustful disposition evidence is to be left to the trial court's discretion. *Guzman*, 119 Wn. App. at 184. It cannot be said that the trial court below abused its discretion in admitting this evidence.

2. *The State presented an adequate offer of proof, particularly since Russell in no way contested its adequacy.*

Russell argues that the State failed to present an adequate offer of proof to show that his out-of-state acts of abuse actually occurred. He concedes that a full evidentiary hearing is not required. Brief of Appellant, at

8 (citing *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002), and *State v. Stein*). He nevertheless argues that the cited cases are distinguishable because the offers of proof involved were more detailed than that given that below.

Russell, however, was clearly familiar with the State's evidence, and raised no objection to the sufficiency of the State's offer. As such he may not raise the issue for the first time on appeal. Moreover, the offer, though brief, was adequate.

RAP 2.5(a) provides that a party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *State v. Kirkpatrick*, 160 Wn.2d 873, ¶ 7, 161 P.3d 990 (2007) (citing *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988)). The Supreme Court has noted, moreover, that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.” *Id.* (quoting *Scott*, 110 Wn.2d at 687) (internal quotation marks omitted).

Whether RAP 2.5(a)(3) should allow the new argument on appeal is determined after a two-part analysis. *Kirkpatrick*, 160 Wn.2d at ¶ 8. First,

the Court determines whether the alleged error is truly constitutional. *Id.* Second, the Court determines whether the alleged error is “‘manifest,’ i.e., whether the error had ‘practical and identifiable consequences in the trial of the case.’” *Id.* (quoting *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)).

Questions of the admissibility of evidence are not of constitutional magnitude and do not fall within RAP 2.5’s exceptions, and thus may not be raised for the first time on appeal. *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977 (2000); *see also State v. Clark*, 139 Wn.2d 152, 156-57, 985 P.2d 377 (1999). A party may only assign error in the appellate court on the *specific ground* of the evidentiary objection made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

Here, Russell never suggested that the evidence admitted was inadmissible because the factual underpinnings were inadequate. To the contrary, he contested only the factual basis for the acts occurring in Japan:

My concern is more the previous stuff, and by that, I’m talking about Japan and Hawaii. We’re talking about a young girl; in Japan she’s two or three years old. And by the State’s own admission she has no recollection of what happened in Japan and she’s relying upon hearsay statements from a brother. So I don’t know how the State intends to introduce what happened in Japan.

1RP 18. The trial court excluded the evidence regarding what occurred in Japan. 1RP 23.

Russell raised a related concern regarding the Hawaii evidence, questioning whether CR, who was four to seven years old at the time, could have an accurate recollection of what occurred at the age of 16. 1RP 18. The trial court, however, concluded that that was an issue of weight, not admissibility, which Russell could address on cross-examination. 1RP 23. Russell does not challenge that ruling on appeal.

Regardless, however, it clear that Russell was challenging the credibility of the witness, *not* whether the offer of proof presented by the State was sufficient to establish by a preponderance that the acts occurred. The standard, however, is one of sufficiency, not credibility. This is borne out by *Kilgore*'s holding that no evidentiary hearing is required. *Kilgore*, 147 Wn.2d at 294 (and agreeing with the Court of Appeals that even if a hearing were required, failure to hold one would be harmless error when evidence is admitted at trial to support a finding by a preponderance that the prior bad acts occurred). If the trial court were required to weigh the credibility of the State's allegations, an evidentiary hearing would plainly be required.

Further, Russell in no way challenged the sufficiency of the offer as to the acts occurring in Florida and Indiana. To the contrary, he conceded that they were clearly relevant. He even conceded that the Indiana acts were fully admissible. He only challenged the Florida acts under ER 403. 1RP 19-20.

Because Russell did not object below to the admission of the evidence on the grounds now argued, he may not raise the issue for the first time on appeal.

Moreover, even if the issue were preserved for review, the offer of proof was more than sufficient for the trial court to conclude that the acts occurred by a preponderance of the evidence. At the hearing, the State proffered the following:

Just to give the Court a little bit more background about the facts of this case, Mr. Russell met his now ex-wife, Marilou, in the early to mid-'90s in California. She was an immigrant from the Philippines, and they met, eventually got married. She had several biological children in the Philippines when they met. Shortly after they began dating, or shortly after they were married, they traveled to the Philippines and Mr. Russell met the children.

One of the biological children of Mary Lou is [CR], the victim in this case. I believe she was about two years old at the time that Mr. Russell first met her. Because of Mr. Russell's obligation to the Navy, there was quite a bit of travel and relocating of the family from the Philippines. I believe there was a two- or three-year stint in Japan with the entire family, from Japan I believe to Hawaii; from Hawaii to Washington; from Washington to Florida; from Florida to Indiana; and I think, ultimately, from Nevada, where the divorce really started to roll. And I believe Mr. Russell eventually ended up moving to Washington and Mary Lou still resides in Nevada with some of her children. [CR] is now in protective custody, CPS equivalent in Nevada.

The allegations in this case are that Mr. Russell began sexually abusing [CR] when she was in Japan, and that was about when she was three years old. The alleged abuse continued through each move the family made. [CR], it is my understanding, doesn't have any independent recollection of being abused in Japan. But she knows -- she believes it happened. That's when her father told her that's when it

began happening. She does have a recollection of it beginning in Hawaii; and, obviously, in Washington State, continuing in Florida, where there was allegations of penile-vaginal penetration intercourse. To Indiana -- ultimately being Indiana where the abuse was initially disclosed to the victim's mother, and where the abuse ultimately ended.

The evidence that the State seeks to admit is 404(b) evidence of prior sexual contacts the defendant had with the victim, and also subsequent sexual contacts that the defendant had with the victim.

1RP 15-16. Although brief, the offer clearly indicated that the victim of the crime was going to testify as to acts of sexual abuse committed upon her by Russell. Moreover, as CR testified specifically, if briefly, to the acts performed, any error would be harmless. 2RP 253-59, 269; *Kilgore*.

3. *Russell misperceives the test of relevancy.*

Russell next argues that the evidence was not relevant because “lustful disposition” is not an element of the crime of first-degree rape of a child. As noted above, Russell never objected to the evidence on grounds of relevance. He therefore may not raise the issue for the first time on appeal.

Even were the claim preserved for review, however, Russell misperceives the standard for relevancy. Evidence does not have to directly prove an element to be relevant. Rather under ER 401, the test is only whether the evidence tends to make a fact of consequence more probable:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

than it would be without the evidence.

Thus in *Ray*, the Supreme Court concluded that prior sexual contact acts against the same victim was relevant because “the lustful inclination of the defendant toward the offended female ... makes it more probable that the defendant committed the offense charged.” *Ray*, 116 Wn.2d at 547. Notably, the offense in that case was incest, which also lacks “lustful disposition” as an element. This contention, even were it properly before the court, is without merit.

4. *The trial court properly concluded that the probative value of the evidence outweighed its prejudicial effect.*

A trial court has wide discretion in balancing probative value versus prejudicial effect under ER 403. *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997). Generally, courts will find that probative value is substantial in cases where there is very little proof that sexual abuse has occurred. *State v. Sexsmith*, 138 Wn. App. 497, 506, 157 P.3d 901 (2007). This court reviews the trial court’s balancing of probative value against prejudicial effect for abuse of discretion. *Id.*

Here the trial court concluded that the evidence was probative in that it showed a progression, and Russell’s lustful disposition, but concluded that, particularly in light of the other evidence from Indiana and Washington, was not overly prejudicial. 1RP 23-24. Although Russell argues that the

evidence was more prejudicial than probative, his sole argument is the same as that regarding relevance, which as noted, was rejected by the Supreme Court in *Ray*. Russell fails to show the trial court abused its discretion in weighing the probative value of the evidence.

5. *Russell was not denied a fair trial.*

Russell's final contention is that the admission of the evidence denied him a fair trial. This contention is also without merit, because as discussed above, the evidence was properly admitted, and even if admitted in error, the evidence was cumulative and the error would be harmless, as discussed, *infra*.

As part of his fair trial argument, Russell also faults the trial court for not giving a limiting instruction. Brief of Appellant, at 19. As he also concedes, however, he did not request one. Where no limiting instruction is requested the trial court does not err in not giving one. *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

6. *Any purported error would be harmless.*

The erroneous admission of ER 404(b) evidence does not raise a constitutional claim. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). The applicable test, therefore, for harmless error is whether, within reasonable probabilities, the outcome of the trial would have been materially

affected had the error not occurred. *State v. Robtoy*, 98 Wn.2d 30, 44, 653 P.2d 284 (1982).

Here, Russell did not contest the admission of the evidence that he and CR had ongoing penile-vaginal intercourse in Indiana when she was 13 or 14. That this act first also occurred in Florida after he had molested her in Washington by performing oral sex on her and making her perform oral sex on him on multiple occasions could not seriously further detract from the jury's perception of him. The same is true of the 10 times he manually molested her in Hawaii, before they moved to Washington.

Moreover, the actual evidence admitted, in the context of two days of witness testimony was brief. The following is all that CR mentioned of Hawaii:

Q. Okay. What happened between you and Curt?

A. Things that shouldn't have happened.

Q. Do you remember the first time that these things happened?

A. When I lived in Hawaii.

* * *

Q. [By Mr. Cure] [CR], we were talking -- [CR], we were talking about the time when you lived in Hawaii. Can you tell us what happened between you and your dad when you were in Hawaii?

A. He would touch me in inappropriate ways.

Q. And how old were you when the first time -- that you remember the first time it happening and why?

- A. I don't know.
- Q. How would he touch you in inappropriate ways?
- A. By caressing my body.
- Q. And what would he caress your body with?
- A. With his hands.
- Q. And what part of your body did he touch?
- A. Any part.
- Q. Any part. All parts?
- A. Yes.
- Q. Where did this happen?
- A. In the house.
- Q. Where in the house?
- A. In his room.
- Q. Always in his room?
- A. No.
- Q. How often did it happen?
- A. I don't know.
- Q. More than once?
- A. Yes.
- Q. More than 10 times?
- A. Yes.

2RP 252-54. The Florida testimony was substantively even shorter:

- Q. And what happened in Florida?
- A. It continued.
- Q. Did it get worse?
- A. Yes.
- Q. How? Did he touch you in ways that were different in the way he touched you in previous days?
- A. Yes.

Q. And what were those ways?

A. [No response.]

MR. CURE: Your Honor, I ask permission to ask a few leading questions.

THE COURT: Ask the question, before – go slowly.

MR. CURE: Okay. Thank you.

Q. [By Mr. Cure] When you were in Florida, did you engage in vaginal-penile intercourse?

MR. WEAVER: Objection.

THE COURT: Sustained.

Q. [By Mr. Cure] [CR], can you tell us what happened between you and your dad in Florida?

A. [No response.]

Q. [CR], I'm going to move on and we'll come back to Florida in a little bit.

2RP 258. Eventually, the prosecutor returned to the subject and elicited the following testimony:

Q. I want to go back to Florida. Can you tell us what was different about the touching in Florida than it was different in the previous states? Do you remember?

A. Yes.

Q. What happened, [CR]?

A. [No response.]

Q. [CR], can you tell us -- [CR], would you be able to answer that question after a break?

A. Yes.

* * *

Q. [By Mr. Cure] All right. [CR], can you tell us what happened between you and Curt in Florida?

A. He had intercourse.

Q. His penis in your vagina?

A. Yes.

Q. Had that happened more than once?

A. Yes.

Q. It happened several times?

A. Yes.

2RP 268-70.

Nor did the State emphasize the evidence in its closing argument. Indeed in an argument that consumed nine pages of transcript it mentioned the out-of-state acts only once, and even then only to place Russell's conduct in a timeline context:

And the behavior escalated from touching in Hawaii to oral sex in Washington to intercourse in Florida. ...

Moved to Hawaii, where the abuse began. [CR] testified, but he would touch her inappropriately with his hands, would touch her vagina and her breasts. From Hawaii they moved to Washington. ...

The abuse continued to Florida, vaginal-penile intercourse.

3RP 388. The State did not mention it at all in its rebuttal argument. 3RP 414-16.

The defense specifically reminded the jurors that they could not "convict Mr. Russell for what happened in Hawaii, ... for what happened in Indiana or Florida, [but could] only convict him for testimony based upon what happened in Washington." 3RP 405. Russell also repeatedly referred to the alleged "years of abuse" to question CR's credibility, arguing that she

would have reported it or someone would have noticed, if it had actually occurred. 3RP 404-05, 405-06. Beyond these brief references, there was no further mention of the other abuse in Russell's 18-page closing argument.

Thus, even if the trial court erred in admitting the evidence of Russell's acts in Hawaii or Florida, the error would be harmless. Russell's conviction should be affirmed.

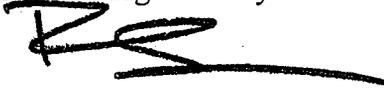
IV. CONCLUSION

For the foregoing reasons, Russell's conviction and sentence should be affirmed.

DATED June 16, 2009.

Respectfully submitted,

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