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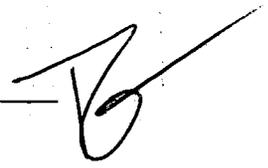
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NO. 65776-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
DAMION THOMAS,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE HELEN HALPERT



BRIEF OF RESPONDENT

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A. ISSUES PRESENTED.

1. Evidence of prior acts are admissible to show a common scheme or plan pursuant to ER 404(b) when there are marked similarities between the defendant's charged acts of sexual misconduct toward children and prior acts of sexual misconduct toward children. Did the trial court properly exercise its discretion in admitting evidence of two prior instances of sexual misconduct involving young family members based on marked similarities between those events and the charged acts?

2. It is not misconduct for the prosecutor to argue reasonable inferences from the facts presented at trial. Where the prosecutor's entire argument contained reasonable inferences from the facts presented at trial, and did not draw an adverse inference from the defendant's exercise of his right to testify, was the argument misconduct?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Damion Thomas was charged with rape of a child in the first degree (Count II), child molestation in the first degree (Count II), tampering with a witness (Count III), and two counts of

misdemeanor violation of a sexual assault protection order (Counts IV and V). CP 7-8. He pled guilty to Counts IV and V. CP 9-16. A jury found him guilty as charged of Counts I, II and III. CP 41-43. Thomas received an indeterminate sentence of 318 months to life. CP 53.

2. FACTS OF THE CRIME.

a. Overview.

Nine-year-old D.G. testified at trial that her stepfather, Damion Thomas, repeatedly sexually assaulted her. D.G. had made consistent statements to family members, two police officers, and two medical professionals. Thomas's¹ defense at trial was that D.G. was lying and had been pressured to lie, first by her 11-year-old stepsister and then by her father.

b. D.G.'s Initial Disclosures To Family Members On April 24 And 25, 2009.

On April 24, 2009, Damion Thomas lived at 6727 Rainier Avenue with his wife, Sarah Thomas, and her three children,

¹ Herein "Thomas" refers to Damion Thomas. Sarah Thomas is referred to as "Sarah" or "Sarah Thomas."

13-year-old A.G., eight-year-old D.G. and their older brother.

3RP 17, 52, 53. On that day, the family was preparing for a birthday party the next day. 4RP 144.

Eleven-year-old L.J. visited and spent the night with the family, as she had done before. 4RP 144. L.J. is the half-sister of Thomas's daughter, nine-year-old D.T. 4RP 113-14. L.J. and D.T. live with their mother. 4RP 113. D.T. usually stayed with Thomas every weekend, and L.J. often went with her. 4RP 116; 9RP 18, 20-21. The girls all considered themselves stepsisters.² 4RP 92, 114, 117; 5RP 4-5; 6RP 37, 100.

At bedtime, D.G. began crying and told L.J. that Thomas "put his thing in her bottom" every night. 4RP 146-47. L.J. asked if D.G. had tried calling the police, but D.G. said she was scared to do that. 4RP 148.

The next day, during the birthday party, most of the children were playing in D.G. and A.G.'s bedroom. 4RP 150. D.G. started crying and L.J. asked her what was wrong. 4RP 151. D.G. told everyone in the room that Thomas "put his thing inside her" every

² The families in this case consist of several blended families, and the girls, D.G., A.G., D.T. and L.J., all testified that they considered each other sisters or stepsisters although they are not all biologically related to each other. 4RP 92, 114, 117; 5RP 4-5; 6RP 37, 100.

night. 4RP 151-52. C.T., Thomas's 13-year-old niece, was in the room at the time. 4RP 78-80, 88. She heard L.J. tell D.G., "Tell them what Damion did to you." 4RP 89-90. D.G. became sad and started crying, and told everyone that Thomas put his "peepee in her butt." 3RP 90. D.T., Thomas's daughter, was in the room, too. 4RP 90, 93, 98. She heard D.G. tell everyone in the room about "something" that happened to her "when she sleeps," and D.G. looked sad. 4RP 98. What D.G. said made D.T. feel sad, too. 4RP 99.

c. D.G.'s Disclosures To Law Enforcement And Medical Professionals On April 25 And 26, 2009.

During the birthday party, a disturbance occurred and Seattle police were called to the home. 3RP 17, 52-53. The officers went to another home a few doors down where another family member lived to contact witnesses. 3RP 23-24, 54. While Officer Shaub was investigating the disturbance call at that location, D.G. approached him and quietly stated, "I have something to tell you." 3RP 55. Officer Shaub asked, "What's that?" and D.G. responded, very quietly, "He raped me." 3RP 57. Upon further inquiry, she clarified that "he" was her stepfather, Damion. 3RP 59.

She told Officer Shaub that it happened in her bedroom at night.

3RP 60-62.

Another officer, Officer Shepperd, took D.G. aside. 3RP 28, 63. D.G. told Officer Shepperd that her stepfather had "put his thing in my butt" four times, and that each time it had happened in her bedroom. 3RP 29-30. She explained that by "thing" she meant his "private part." 3RP 31. She said it happened most recently just four days before. 3RP 31. She said that her stepfather had warned her not tell anyone, but that she had told her stepsister, L.J. 3RP 31; 4RP 112, 114-17. She was shivering and crying as she described the abuse. 3RP 28.

D.G.'s mother, Sarah Thomas, arrived on the scene and Officer Shepperd told her what D.G. had said. 3RP 33-34. Sarah Thomas did not say anything, or react in any way. 3RP 35-36. Officer Shepperd cautioned her that "her child needs to come first." 3RP 35. Officer Shepperd transported D.G. and her mother to Harborview Medical Center. 3RP 36. D.G. continued to cry on the way to the hospital. 3RP 39.

At Harborview, a social worker interviewed D.G. 7RP 12-14. D.G. told the social worker that her stepfather had raped her four times. 7RP 16. She reported that it happened in her bed, and that

the last time was four days ago. 7RP 16. She stated that "he put his thing in my butt." 7RP 16. The social worker also interviewed Sarah Thomas, who was sad and tearful and stated that her husband "has done things in the past when drinking heavily which he does not remember afterward." 7RP 18.

A pediatrician examined D.G. after she was interviewed by the social worker. 5RP 45, 48. D.G. told the doctor that that her stepfather had put his penis in her butt while she was sleeping in bed. 5RP 60-61. She said it had happened four times, most recently four days ago. 5RP 60-61. The doctor testified that D.G. seemed guarded and shy, but answered the questions put to her appropriately for her age. 5RP 61. The doctor conducted a physical examination of D.G. and found that everything appeared normal. 5RP 68-72. The doctor explained that the anus is a very elastic structure that heals quickly; she was not surprised to find no injuries from a penetration occurring several days before the examination. 5RP 72-74. The doctor scheduled a follow-up appointment for D.G. at the Harborview sexual assault clinic. 5RP 75.

d. Custodial Arrangements And Evidence Of Witness Tampering.

At the time that D.G. first disclosed the allegations of abuse to police, Sarah Thomas and Frederick Grant shared custody of their daughters, D.G. and A.G., with each having custody of the children every other week. 3RP 107-08, 112. On April 26, 2009, Grant went to pick up his daughters from Sarah Thomas for their visit with him. 3RP 115. When he arrived, Thomas's uncle informed Grant that D.G. had accused Thomas of sexually assaulting her. 3RP 115-17. Grant spoke briefly to D.G. and asked her to tell him what had happened. 3RP 118. She told him that Thomas had touched her private area. 3RP 119. Grant angrily confronted his ex-wife about why she did not protect their children. 3RP 114-16, 121. Sarah Thomas responded, "You know how kids make up stories," and also referred to Thomas's drinking, asserting that he did not remember what happened. 3RP 121-22. Sarah did not allow Grant to take the girls with him at that time. 3RP 122.

Detectives obtained recordings of numerous telephone calls made by Damion Thomas, from jail, to Sarah Thomas. 9RP 73. These calls were all recorded pursuant to jail policy. 5RP 137-38. In all, there were more than a thousand calls totaling approximately

250 hours. 9RP 74. Several recorded calls occurred on August 26th before D.G.'s follow-up appointment at the Harborview sexual assault clinic. Ex. 19, Tracks 1-8. In these calls, Sarah Thomas told Thomas that she talked to D.G. "for hours," and that D.G. continued to make the same statements "over and over." Ex. 19, Track 1. She asked, "Why would she lie?" Ex. 19, Track 1. In response, Thomas threatened to leave the family and Sarah tearfully assured him that "there's nothing I wouldn't do." Ex. 19, Track 2. Thomas repeatedly asked Sarah to put D.G. on the phone. Ex. 19, Tracks 1, 4 and 5. D.G. got on the line and Thomas asked her, "Why are you lying?" Ex. 19, Track 5. D.G. responded, "I didn't." Id. Thomas berated the child, saying "you did, you know damn well I didn't try to do nothing to your butt." Id. He then told her that what she had done was wrong, and that he was in trouble because of her. Id. He told her that he would not be able to come home, and D.G. began to cry. Id. He told her to tell the truth, and then asked if someone else told her to make the allegations. Id. She responded, "[L.J.]" Id.

After speaking with D.G., Thomas reported to Sarah that L.J. told D.G. to make the allegations. Id. Sarah told Thomas that she would be talking to D.G. all day so that when she had the follow-up

appointment at Harborview the next day "it's going to be different." Ex. 19, Track 7. In another call on the morning of April 27th, Sarah told Thomas that she told D.G. to emphasize the fact that someone else told her what to say. Ex. 19, Track 10. Sarah stated that she would talk to D.G. right before her appointment to make sure "it's fresh in her mind." Id.

e. D.G.'s Subsequent Reluctance To Repeat Allegations And Letter Recanting Allegations.

Sarah Thomas and Frederick Grant took D.G. for the follow-up appointment with Dr. Weister at the Harborview sexual assault clinic on April 27, 2009. 7RP 75-78. Dr. Weister found D.G. to be developmentally appropriate. 7RP 82. She asked D.G. if she wanted to tell her about things that had happened that "are not okay." 7RP 83. D.G. responded, "I want my mama." 7RP 83. When asked if anyone had done anything to her that was "not okay," D.G. shook her head. 7RP 84. She then said that her stepsister L.J. had told her to say that something happened. 7RP 84. She denied that anyone had touched her inappropriately, and claimed that she could not remember anything that happened during her emergency room visit. 7RP 86-88. Dr. Weister found it

unusual and concerning that D.G. professed to have no memory of the emergency room visit that had occurred less than two days before. 7RP 87-88.

A child interview specialist from the prosecutor's office interviewed D.G. at her school on April 28, 2009. 5RP 80, 123-27. D.G. told the interviewer that her stepfather touched her private area but gave no further details that corroborated her prior disclosures. Ex. 24, at 13. She said L.J. told her to tell the police that Thomas had touched her. Ex. 24, at 28. She spoke repeatedly of her mother crying because Thomas was in jail. Ex. 24, at 11, 14, 25, 26, 29. She said that she felt safe with her father and "not that safe" with Thomas. Ex. 24, at 31.

In a recorded jail call on May 28, 2009, Thomas instructed Sarah to have D.G. write a letter in her own handwriting. Ex. 35, Track 2. D.G. then wrote a letter to the judge stating, "The things that I said wasn't true because my stepsister told me a big lie of Damion touching me sometime." Ex. 10. This letter was received by Thomas's attorney on June 16, 2009. Ex. 10.

f. Dispute Over Counseling.

D.G. began counseling with Claudia Kirkland at the Harborview sexual assault clinic in May of 2009 and continued to see her through July of 2009. 7RP 29. Frederick Grant was the only person that brought her to the counseling sessions. 7RP 29-54. Sarah Thomas never brought her. 7RP 50. D.G. never told the counselor that the abuse did not happen. 7RP 46. D.G. reported being worried about her mother, and being worried about her stepfather being in jail and being mad at her. 7RP 40, 48.

In August, Sarah Thomas went to the counselor's office to request a copy of D.G.'s records. 7RP 51-52. The counselor refused to provide the records to her, but encouraged her to make an appointment. 7RP 52. Sarah Thomas left a voice mail message at the clinic threatening to sue the clinic if the counselor continued to see D.G. 7RP 63. The counseling sessions stopped. 7RP 55.

Grant subsequently learned from D.G. that she had been speaking with Thomas by telephone and had visited him in jail while staying with her mother. 4RP 62. Grant was granted full custody of the girls in March, 2010. 4RP 64. Sarah Thomas was charged with witness tampering on March 5, 2010, and arrested on March 8, 2010. 9RP 54-55.

g. D.G.'s Testimony At Trial.

D.G. testified that when she was eight years old she lived with her mother and Thomas and a bad thing happened in her room while she was sleeping. 6RP 34, 40-43. Her stepfather woke her up by shaking her and touched her private area, where it is covered by underwear. 6RP 44-45. He touched her private area with his "boy private." 6RP 49. This made her feel sad and mad. 6RP 50-51. Her sister, A.G., was asleep in the other bed in the room at the time. 6RP 51. This happened four times. 6RP 52. She gave detailed testimony describing both sexual contact and anal penetration. 6RP 52-56.

D.G. testified that she sometimes talked to Thomas on the phone while he was in jail because her mother wanted her to talk to him. 6RP 65. She also visited him twice in jail because her mother took her there. 6RP 66. It made her sad. 6RP 67. She testified that her mother told her to lie, and "say no" to the prosecutor. 6RP 78. She testified that her stepsister, L.J., did not tell her to say anything, but that her mother told her to say the L.J. likes to lie. 6RP 84. D.G. remembered writing a letter to the judge, but stated that the part about L.J. telling her to lie was what her mother wanted her to write. 6RP 94. She testified that in her defense

interview she denied that Thomas had touched her because that was what her mother told her to say. 6RP 96. She testified that she was telling the truth in court when she said that Thomas touched her four times. 6RP 96.

h. ER 404(b) Evidence.

The court admitted evidence of two prior acts that occurred when other children were spending the night with Thomas and his family. L.J. testified that one night she was staying with the family at Thomas's father's apartment. 4RP 130-32. She was sleeping on the floor of the living room with Thomas and his wife, and the other children were sleeping on a mattress in the same room. 4RP 132-33. In the middle of the night, she felt something touch her "bottom" between her cheeks. 4RP 137. She looked up and saw Thomas moving quickly to the side of her. 4RP 138. She was scared, but did not say anything. 4RP 140. The next morning she told her aunt, Kelli Strothers, what happened. 4RP 141. Kelli Strothers corroborated that L.J. had told her that Thomas had sexually touched her while she was staying at his father's house. 9RP 11.

A.L. was a 13-year-old friend of A.G., D.G.'s older sister, who spent the night at Thomas's home for A.G.'s birthday. 8RP 7-11. She slept in A.G. and D.G.'s bedroom with the other girls. 8RP 13. A.L. had trouble sleeping and remained awake after the other girls were asleep. 8RP 15. She heard footsteps in the room, and felt something pressing down on the mattress. 8RP 16. She looked up and saw Thomas standing in the room with no shirt on, pulling his underwear up from around his knees. RP 16, 20. The pressure on the mattress was near where D.G. was sleeping. 8RP 17. She tried to send a text message to her mother from bed, but her phone battery went dead. 8RP 20. The next morning A.L. told Sarah Thomas what had happened. 8RP 22-23. Sarah responded by calling Thomas into the room and making the girl repeat her accusation to Thomas. 8RP 24. Thomas first chuckled, then became angry and called the girl a liar. 8RP 24-28. A.L.'s mother picked her up and she told her mother what had happened. 8RP 28.

In addition, the jury heard evidence about instances in which Thomas imposed physical punishment on the girls. L.J. testified that she once witnessed Thomas whipping D.T. with a belt for not reading a book. 4RP 120-23.

i. The Defense Witnesses.

Sarah Thomas testified for the defense at trial and stated that she believed Thomas was innocent. 10RP 11, 37. She testified that she doubted D.G.'s allegations because they did not make sense to her. 10RP 27. This was partly because D.G. continued to do well in school and did not cry a lot. 10RP 33. She admitted that she was in frequent daily contact with Thomas while he was in jail, sometimes for hours a day, and that it was clear to the children that she wanted Thomas to come home. 10RP 59, 85. She admitted that she allowed D.G. to speak to Thomas on the telephone and took her to the jail to wave at him from across the street. 10RP 35, 59. She admitted that she and Thomas had discussed the idea of D.G. writing a letter to the judge, and that the letter was not D.G.'s idea. 10RP 81-84. She testified that her life was much harder with Thomas in jail. 10RP 37-38. She confirmed that A.L. had reported Thomas's actions when she spent the night, and that Thomas responded to A.L.'s allegations by calling the girl a liar. 10RP 66-68. She also confirmed that Thomas had whipped the children for failing to finish their homework. 10RP 70.

Thomas testified at trial as well. 10RP 117. He denied ever touching D.G. or L.J. in a sexual way. 10RP 130-33. On

cross-examination, he admitted that he had previously been convicted of two crimes of dishonesty for which he served 130 months in prison. 10RP 137.³ He testified that he was the disciplinarian in the household and that he expected the children to follow his instructions. 10RP 142. He admitted that he had whipped the children in order to enforce his discipline. 10RP 143. In his words, he had “the final say” in the household. 10RP 148.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE OF PRIOR ACTS OF SEXUAL MISCONDUCT INVOLVING YOUNG GIRLS AT THE FAMILY HOME AT NIGHT TO SHOW COMMON SCHEME AND PLAN PURSUANT TO ER 404(b).

Thomas contends that the trial court abused its discretion in admitting the testimony of L.J. and A.L. regarding prior acts of sexual misconduct. This claim should be rejected. There were sufficient similarities between the prior acts and the charged acts to make the evidence admissible to show a common plan. The evidence was extremely probative given D.G.'s age, the lack of

³ The convictions were for robbery in the first degree and burglary in the first degree, but the trial court ruled that the State could only refer to them as crimes of dishonesty. 10RP 136.

physical evidence and the attempts by Thomas to influence D.G.'s testimony. Its probative value was not substantially outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion in finding that the evidence was admissible under ER 404(b).

A trial court's decision to admit evidence under ER 404(b) is reviewed for abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Id.

ER 404(b) provides in pertinent part that "[e]vidence 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." The purpose of ER 404(b) is to prevent the State from suggesting that a defendant is guilty of a crime simply because he is a "criminal-type person," not to exclude relevant evidence. Foxhoven, 161 Wn.2d at 175.

Evidence of a defendant's past acts of molestation may be admissible under ER 404(b) to show a common scheme or plan

where the prior acts demonstrate a single plan used repeatedly to commit separate but very similar crimes. State v. Scherner, 153 Wn. App. 621, 657, 225 P.3d 248 (2009), review granted, 168 Wn.2d 1036 (2010); State v. Sexsmith, 138 Wn. App. 497, 504, 157 P.3d 901 (2007). The prior acts must be "(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial." State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

"Where a defendant is charged with child rape or 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 (quoting State v. DeVincentis, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003)). Evidence of a common scheme or plan may be used to show that the charged incidents actually occurred, and that the victim is not fabricating or mistaken. Lough, 125 Wn.2d at 862. Such evidence is especially relevant when the credibility of the victim is difficult to assess. Id. The degree of similarity must be substantial, but the similarities need not constitute a unique method of committing the

crime. DeVincentis, 150 Wn.2d at 20-21. "[T]he trial court need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it." Id. at 13. The behavior in each instance need not be identical to indicate a common plan. State v. Kennealy, 151 Wn. App. 861, 888, 214 P.3d 200 (2009), review denied, 168 Wn.2d 1012 (2010).

State v. Sexsmith, State v. Scherner, and State v. Kennealy, are particularly instructive. In Sexsmith, the acts of molestation occurred against the defendant's girlfriend's daughter, from the time she was 11 years old until she was 18 years old. 138 Wn. App. at 502. The Court of Appeals affirmed the trial court's admission of prior acts against the defendant's 13-year-old daughter to show a common plan. Id. at 506. The appellate court found sufficient similarities where both girls were relatives, they were close in age, the defendant showed both girls pornographic videos and took naked photos of them, the defendant fondled both girls, and many, but not all, of the acts occurred in the defendant's mother's basement. Id. at 505.

In Scherner, the acts of molestation occurred against the defendant's granddaughter from the time she was five years old until she was eight years old. 153 Wn. App. at 631. This Court

affirmed the trial court's admission of prior acts against three other relatives and a family friend to show a common plan. Id. at 658. This Court found sufficient similarities where the girls were of similar prepubescent age (from five years old to 13 years old), where each of the girls was either a relative or a family friend, where all the incidents occurred in bed while the girls were staying with the defendant, and all the incidents involved the defendant rubbing the girls' genitals. Id. at 657.

Finally, in Kennealy, the acts of molestation occurred against three young children who lived in the same apartment complex as the defendant. 151 Wn. App. at 868. The court affirmed the trial court's admission of prior acts against four other children to show a common plan. Id. at 889. The appellate court found sufficient similarities where the defendant committed the acts out of view of other adults, against children between the ages of five to 12, committed the acts against children that were either related to him or lived or played close to him, committed the acts after he became acquainted with the children, and touched the girls both under and outside their clothing on their vaginas. Id. The court held that the common features showed a plan to gain access to young children in order to sexually abuse them. Id.

In the present case, the court found that both L.J. and A.L. were credible and the prior acts had been established by a preponderance of the evidence. 1RP 40. The court found that there were sufficient similarities in the circumstances of these incidents to make them probative of a common plan. 1RP 41. The court concluded that the prior acts were highly probative because D.G. was the only witness to the acts that formed the basis of the charges, and that her credibility was a crucial issue made more problematic by the way in which the defendant and Sarah Thomas tried to improperly influence her statements. 1RP 42.

The trial court did not abuse its discretion in finding sufficient similarities between the defendant's abuse of D.G. and the incident with L.J. to show a common plan. The two girls were of similar age, the girls were children that were within the family circle, each incident occurred while Thomas was one of the adults watching after the children, each incident occurred while the girls were sleeping, and each incident involved the defendant touching the child's buttocks or anus with his penis. In each incident, the defendant reacted to the allegations by accusing the girls of lying, rather than claiming that his actions were accidental or misconstrued.

In regard to the incident that A.L. testified about, it is unclear who the intended victim was. It is possible that this testimony was not actually evidence of other acts, but evidence of one of the charged crimes. A.L. testified that she saw the defendant pulling up his shorts after she felt pressure on the mattress near where D.G. was sleeping. 7RP 16-18. This suggests that A.L. witnessed an attempt to molest D.G., and was evidence of the charged crimes. Assuming that what A.L. saw was an attempt to molest one of the other girls in the room, the same marked similarities exist. The girls were of similar age, the incidents occurred while Thomas was one of the adults watching after the children, the incidents occurred while the girls were sleeping. As with D.G. and L.J., the defendant reacted to the allegation by accusing A.L. of lying, rather than claiming that his actions were accidental or misconstrued. As in Scherner, Sexsmith and Kennealy, these prior acts were not admitted to show the defendant's general criminal propensity, but to show the defendant's common plan to have similar sexual contact with young girls sleeping in his home at night.

Evidence of prior similar acts of sexual abuse of children are highly probative because of the secrecy surrounding child sexual abuse, the vulnerability of child victims, the frequent absence of

physical evidence, and the difficulty that a jury has in determining a child witness's credibility. DeVincentis, 150 Wn.2d at 23. These factors existed in this case, particularly in light of the defendant's attempts to tamper with D.G.'s testimony. The trial court did not abuse its discretion in concluding that the prior acts were highly probative and that their probative value was not substantially outweighed by the danger of unfair prejudice. The trial court properly gave a limiting instruction to the jury to minimize the danger of unfair prejudice. 4RP 130; CP 35. See Scherner, 153 Wn. App. at 659.

Moreover, any error in admitting evidence of the incidents involving L.J. and A.L. would have been harmless, as these incidents were not particularly prejudicial. An error in the admission of propensity evidence is not a constitutional error and is subject to harmless error analysis. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). Such an error requires reversal only if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Id. The incident with A.L. involved no touching, and L.J. testified on cross-examination that the living room was crowded at the time she was touched, and thus it was possible that someone else might

have touched her buttocks. 5RP 14. Neither of the incidents involved penetration. Given the number of consistent disclosures that D.G. gave to police and medical professionals, her unequivocal testimony at trial that the incidents happened, and the jail calls showing that the defendant tampered with D.G.'s testimony, indicating his guilt, there is no reasonable probability that the outcome of the trial would have been different if the prior incidents involving L.J. and A.L. had not been admitted. Any error in admitting the prior incidents was harmless.

2. THE PROSECUTOR DID NOT DRAW AN ADVERSE INFERENCE FROM THE EXERCISE OF A CONSTITUTIONAL RIGHT OR COMMIT MISCONDUCT IN CLOSING ARGUMENT.

Thomas contends that the prosecutor committed misconduct in closing argument in a number of respects. First, he argues that the prosecutor committed misconduct by inviting the jury to draw an inference of guilt from the fact that the defendant exercised his constitutional right to testify. Thomas misconstrues the prosecutor's argument. The references to "the last word" in the prosecutor's argument were not references to Thomas's exercise of his right to testify, but were references to Thomas's testimony that

he had "the final say" in his household. The prosecutor drew reasonable inferences from the evidence that Thomas's position of authority in the household contributed to the pressure that D.G. felt to recant the allegations. Thomas also argues that the prosecutor improperly used the ER 404(b) evidence in argument, misstated the testimony, injected her personal beliefs and appealed to the jury's prejudice. Viewed in context, the prosecutor's argument did not constitute misconduct. The prosecutor's argument was properly confined to facts supported by the record and reasonable inferences drawn from those facts.

The appellate court reviews a prosecutor's allegedly improper remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). In determining whether prosecutorial misconduct occurred, the court first evaluates whether the prosecutor's comments were improper. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A defendant bears the burden of establishing that the prosecutor's conduct was both improper and prejudicial. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). Even if misconduct is properly objected to, it does not

constitute prejudicial error requiring reversal unless the appellate court finds there is a substantial likelihood that the misconduct affected the verdict. Id. A claim of misconduct is waived if no objection is made or curative instruction requested, unless the misconduct is so flagrant and ill-intentioned that no curative instruction could have alleviated the prejudice. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

a. References To "The Last Word."

During Thomas's testimony, the prosecutor cross-examined him at length as to his position of authority in the household. 10RP 142-48. Thomas testified that he enforced the rules in the household and was the disciplinarian. 10RP 144. He testified that he believed that defending the charges against him should be Sarah Thomas's "number one priority," and that the children were less important. 10RP 146. When asked if he was the boss of the house, Thomas responded, "I -- put it like this. If it came down to one final say, then I'd have the final say." 10RP 148. The prosecutor followed up by asking, "But you had the last word, so to speak, the final say?" 10RP 148. Thomas responded, "Yeah."

10RP 148. He agreed that he and Sarah presented "a united front to the kids." 10RP 149.

In closing, the prosecutor used this testimony to illustrate the amount of pressure that D.G. was put under by Thomas and her mother, acting together, to make her recant the allegations. She argued:

And she told you how that made her feel inside, those mixed emotions that she had, and let's be clear, I mean, this man was a part of her life. She listened to him as he opined yesterday. He got the last word in, of course. He was the authority figure in the house. People listened to him. She listened to him. Kids listen to adults.

11RP 38. In rebuttal, the prosecutor elaborated on the notion of "the last word." She began her closing by stating, "Ladies and Gentlemen, as the representative of the people of the State of Washington, I get the last word." 11RP 78. She returned to Thomas's testimony, stating, "Remember he gets the last word; he gets the last word in the house." 11RP 81. She ended the argument by returning to this theme:

And it really was insightful when the defendant said he did get the last word in his household. Because everything about this process points to that very statement. He got the last word. He got the last word when he called these little girls liars. He gets the last word to his wife; she does what he says by the very

definition of getting the last word. He gets the last word he told you.

But not in this courtroom. All of that tampering he did of witness's testimony you get to consider that. His acts of sexual misconduct against these very young children, against [D.G.], or the pattern and practice it shows with respect to [L.J.] and [A.L.] that we talked about earlier, you get to consider all of that. And you, Ladies and Gentlemen, get the last word. And the last word I submit to you should be this, find this man guilty.

11RP 91.

In order to protect the integrity of constitutional rights, a prosecutor may not draw an adverse inference from the exercise of a constitutional right in argument to the jury. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984). For example, a prosecutor may not comment on a defendant's refusal to testify at trial, which is an exercise of the Fifth Amendment right to remain silent. Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). However, when a defendant chooses to testify at trial, the prosecutor is free to draw inferences about the defendant's credibility, just as counsel may draw inferences regarding the credibility of any other witness. Portuondo v. Agard, 529 U.S. 61, 69, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000). Courts distinguish between arguments that merely *touch* upon a defendant's constitutional right and arguments that draw an adverse inference

from the exercise of a right. State v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006). The relevant inquiry is whether the argument focused on the exercise of a constitutional right itself. Id. at 807. In Gregory, a rape and murder prosecution, the prosecutor commented on the fact that one of the rape victims did not relish testifying and being subject to cross-examination. Id. The state supreme court held that the argument focused on the victim's credibility, not the right to confront witnesses, and was not improper. Id.

In the present case, a fair and careful review of Thomas's testimony and the prosecutor's closing argument reveals that her references to "the last word" was not focused on Thomas's right to testify, but on Thomas's testimony that he had "the final say" and "the last word" in the household. This argument focused on the fact that D.G. had been pressured by Thomas and her mother, acting in concert, to recant her allegations. This pressure to recant was highly relevant to evaluating the inconsistencies in D.G.'s prior statements, which in turn was highly relevant to evaluating the credibility of D.G.'s trial testimony. There was nothing improper about the argument, which drew a reasonable inference from Thomas's testimony and focused on the victim's credibility. The

argument in no way drew an adverse inference from the exercise of a constitutional right.

Counsel for appellant appears to interpret the statement, "she listened to him as he opined yesterday," as referring to D.G. being present in court and listening to the defendant's testimony. However, there is no evidence to support this claim. Witnesses had been excluded from trial and D.G. was not present in court when Thomas testified. 2RP 121-22. The only proper interpretation of this statement is that the prosecutor stated, "She listened to him, as he opined yesterday." This statement is consistent with Thomas's testimony that the children in the household listened to him because he was the disciplinarian in the house. 10RP 150-51.

Significantly, defense counsel did not object to these statements at trial. Here, the argument was not improper, let alone flagrant or ill-intentioned. Thomas waived his claim of misconduct by not objecting below.

b. Evidence Of A Common Plan.

As the state supreme court explained in DeVincendis, in a child sexual assault case when the issue is whether the crime

occurred, the existence a pattern of past behavior is probative of a plan to fulfill sexual compulsions. 150 Wn.2d at 17-18. As the limiting instruction given in this case, explained, the evidence of prior acts that A.L. and L.J. testified to could be considered "in determining whether or not it demonstrates a common scheme or plan on the part of the defendant." CP 35. In argument, the prosecutor properly utilized the evidence admitted pursuant to ER 404(b) to show that Thomas had a plan to have sexual contact with young girls that were sleeping in his home, and that his actions toward D.G. were consistent with that plan. She explained:

That testimony was presented to you for this reason. It is evidence of the Defendant's common scheme or plan. And as I said to you in opening statement, I don't mean writing in a book at night, being a master (inaudible) leading architect of some grand plan. But it's a plan.

11RP 41.

Thomas contends that the prosecutor improperly argued propensity evidence when she made the following statements:

But it's a plan. Plan to touch children, a plan and actions showing that plan, that show of sexual desire for children. (11RP 41)

[A.L.]'s got nothing to gain, she's got no ax to grind against him, she doesn't know about anything, she just knows what she saw. That's the common theme, the common plan, the common elements if you will.

And he's either the most unlucky guy in King County when it comes to little girls under the age of 12, or he's guilty. That's corroboration, folks, what happened to [A.L.], what happened to [L.J.]. (11RP 43)

. . . the phrase comes to mind, "Pick on someone your own size." Quit picking on little kids. The defendant is a bully. He's picking on little girls who are not going to stand up for themselves. He's pointing the finger of blame at a 12-year-old girl. And what he needs to do is look at himself in the mirror and take some responsibility. To, in his words, "man up." (11RP 89)

None of these statements were improper. In each instance, the prosecutor properly utilized the evidence of prior acts to show a common plan, the purpose for which the evidence was admitted. It was not improper for the prosecutor to point out that the purpose of the plan was to fulfill Thomas's sexual compulsions toward young girls. It was not improper for the prosecutor to point out that the testimony of A.L. and L.J. corroborated D.G.'s testimony. And it was not improper for the prosecutor to discuss the common feature that Thomas reacted to each allegation by accusing the girls of lying. The prosecutor's argument was not flagrant and ill-intentioned misconduct, and thus Thomas's claim of misconduct was waived below.

c. Misstating The Evidence.

Thomas contends that the prosecutor willfully misstated the evidence when she argued in closing that "in the case of [A.L.], entry into the room, that pressure *of pinning her to* the mattress before he realizes someone's awake and looking at him." 11RP 42 (uncorrected copy) (emphasis added). However, upon listening to the recording of the proceeding, counsel for respondent discovered that the above statement is clearly not what the prosecutor said. Rather, the prosecutor stated, "in the case of [A.L.], entry into the room, exposing himself, that pressure *on the corner of* the mattress before he realizes someone's awake and looking at him." 11RP 44 (corrected copy filed March 15, 2011) (emphasis added). This latter statement is entirely consistent with A.L.'s testimony and did not misstate the evidence. The transcriptionist has since filed a corrected report of proceedings that properly reflects what the prosecutor stated. The prosecutor did not misstate the evidence.

d. Statements Of Personal Belief.

It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). Misconduct occurs only when the statement

is a clear and unmistakable expression of a personal opinion, such as "I believe D.G." State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). The prosecutor may argue reasonable inferences from the facts concerning witness credibility. Warren, 165 Wn.2d at 30. None of the statements challenged by Thomas for the first time on appeal constitute a clear and unmistakable expression of the prosecutor's personal opinions.

e. Appeal To Prejudice.

Prosecutors have a duty to seek verdicts free from passion and prejudice. State v. Perez-Mejia, 134 Wn. App. 907, 915, 143 P.3d 838 (2006). A prosecutor's argument should not appeal to jurors' fear of criminal groups or invoke racial, ethnic or religious prejudice as a reason to convict. Id. at 916. Incitements to vengeance, exhortations to wage war against crime, or appeals to patriotism are also improper. Id.

Thomas contends that the prosecutor improperly appealed to the jury's prejudice when she argued that Thomas should "quit picking on little kids." 11RP 89. This brief argument, made during rebuttal, was an appropriate reply to the defense theory that all three girls who testified about Thomas's sexual misconduct were

liars and gossips motivated by their hatred of Thomas. 11RP 59, 61, 66. At any rate, it was not so flagrant or ill-intentioned that no curative instruction could have alleviated the prejudice. By not objecting to this argument below, Thomas waived his claim of misconduct.

D. CONCLUSION.

Thomas's convictions should be affirmed.

DATED this 31st day of March, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. DAMION THOMAS, Cause No. 65776-3-I, 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.

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Name
Done in Seattle, Washington

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