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NO. 67333-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

BRET GONZALEZ,

Appellant.

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

The Honorable Eric Lucas, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by granting the State's motion to admit evidence of B.C.'s allegations against Mr. Gonzales where this propensity evidence should have been excluded under ER 404(b).

2. The trial court erred by finding that the dissimilar allegations of B.C. were admissible as a common scheme or plan.

3. The trial court erred by admitting evidence of B.C.'s allegations under RCW 10.58.090, which has been held unconstitutional by the Supreme Court.

4. The trial court erred by failing to give a legally adequate limiting instruction for ER 404(b) evidence.

5. Gonzales was deprived of his due process right to effective assistance of counsel where his trial counsel failed to object to the admission of inadmissible ER 404(b) propensity evidence.

Issues Pertaining To Assignments of Error

1. Did the trial court commit reversible error when it found B.C.'s allegations admissible under ER 404(b) as evidence of a common scheme or plan where the allegations were dissimilar to the charged conduct in nearly every way?

2. Did the trial court commit reversible error when it admitted evidence of B.C.'s allegations under RCW 10.58.090 where that statute has been declared unconstitutional?

3. Did the trial court commit reversible error by failing to give the jury a legally incorrect limiting instruction for ER 404(b) evidence?

4. Was Gonzales deprived of effective assistance of counsel when his trial counsel failed to object to the State's Motion to admit evidence of B.C.'s allegations under ER 404(b) and RCW 10.58.090?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County Prosecutor's Office charged Bret Gonzales with four criminal offenses: three counts of Rape of a Child in the First Degree, and one count of Child Molestation in the First Degree. CP 49. The alleged victim in all the charged acts was Mr. Gonzales' niece, I.C. CP 49. The information alleged that the acts occurred within a five-year period, December 13, 2002 through December 13, 2007. CP 50.

The trial court permitted the prosecution to admit extensive evidence regarding allegations made by a different niece, B.C., about an incident with Mr. Gonzales that allegedly occurred in 2008, after the acts charged here. IRP 20. This evidence included B.C.'s testimony, the investigating officer's testimony about her investigation of B.C.'s

allegations, the mother's testimony about B.C.'s allegations, and a recording of the police interview with Mr. Gonzales regarding B.C.'s allegations, all of which amounted to more than half of the testimony at trial. Supp. CP, State's Memorandum of Authorities, pp. 3-8. The only other substantive witnesses were I.C. and the doctor who examined her.

A jury convicted Mr. Gonzales of all four counts. 5/19/11 RP.¹ The court sentenced him to the maximum of the standard range, 318 months on counts 1 through 3 and 198 months on count 4, concurrent. CP 3-5; 6/28/11 RP 13. Gonzales timely appealed. CP 1-2.

2. Ruling under ER 404(b)/RCW 10.58.090

The State moved in limine to offer testimony from several individuals about an incident that allegedly occurred between Mr. Gonzales and B.C., after the period for the charged conduct. The State argued that the evidence was admissible under ER 404(b) to demonstrate a common scheme or plan and under RCW 10.58.090. 1RP 2-3; Supp. CP ___, (sub no. ___, State's Memorandum of Authorities in Support of Admissibility of Evidence).

¹ This brief refers to the verbatim report of proceedings as follows: the 6 consecutively paginated volumes containing the trial proceedings are referred to by "RP" followed by page number. Volumes not consecutively numbered are identified by date."

The court ruled that the testimony about B.C.'s allegations was admissible under RCW 10.58.090 and under ER 404(b) as evidence of a common scheme or plan to "exploit children." 1RP 20-21, 25-26. The court also held that the evidence was more probative than prejudicial because "it's essential to show the crime occurred and without that you can't show it." 1RP 23.

3. Trial Evidence

Mr. Gonzales' sister, Beth Gonzales, has five children: a 17-year-old son; a six year old daughter; a four year old son; B.C., age 13; and I.C., age 14. 5RP 105-06. Ms. Gonzales had a very close relationship with her older brother Bret. 5RP 106.

After Ms. Gonzales' divorce, in 2003, her brother moved in with her family to help her with her three older children. 5RP 106-07. They lived in a house in Lake Stevens until January, 2005, when Ms. Gonzales moved in with her boyfriend, Scott Camp, and Mr. Gonzales went to live at Mr. Camp's house in Stanwood. 5RP 109. In August of 2005, Ms. Gonzales, Mr. Camp, and the kids moved to the house in Stanwood and Mr. Gonzales lived in an apartment in Mr. Camp's business/shop building in Everett. 5RP 110.

According to Ms. Gonzales, her daughter, I.C., had always had the closest relationship with Mr. Gonzales of all of the children. 5RP 112.

I.C. and Mr. Gonzales often spent time together, both when Mr. Gonzales lived with the family and after he moved out. 5RP 113. I.C. seemed to really enjoy being with her uncle. 5RP 114. I.C. often called Mr. Gonzales to talk. 5RP 115. They would go places together, out to eat or shopping. 5RP 114.

After Mr. Gonzales moved out, he continued his close relationship with the family. 5RP 116. Mr. Gonzales also often visited the whole family. 5RP 134. I.C. and Mr. Gonzales often went out for an activity where I.C. did not spend the night. 5RP 135. In addition, I.C. stayed over with Mr. Gonzales one weekend a month. 5RP 134.

Because of their close bond, Mr. Gonzales spent a lot more time with I.C. than he spent with the other kids. 5RP 135. Ms. Gonzales encouraged Mr. Gonzales to take I.C. out because it was a help to her. 5RP 138. I.C. also called Mr. Gonzales frequently to ask for visits. 5RP 136.

The other children were jealous of the attention and gifts I.C. was getting and this prompted Ms. Gonzales and Mr. Camp to ask Mr. Gonzales to take turns with the kids to even it out. 5RP 94, 136. They also told the other kids to reach out to their uncle more and call to arrange activities, as I.C. would do. 5RP 136-07. Mr. Gonzales began to spend

more time with the other kids, taking his nephews out and arranging for B.C. to visit him. 5RP 137.

In 2008, B.C. had one overnight visit with Mr. Gonzales. 5RP 14, 135. One month after this visit, B.C. made allegations to her mother about Mr. Gonzales that prompted Ms. Gonzales to make a report to King County Police. 5RP 139.

After B.C.'s allegation, Ms. Gonzales asked I.C. if anything inappropriate had ever happened with Mr. Gonzales. 5RP 145. I.C. told her nothing like that had ever happened to her. 5RP 145.

When Ms. Gonzales talked to her brother about B.C.'s allegation, Mr. Gonzales told her that during the visit, B.C. had asked if she could go skinny-dipping; that he told her he would not but she could; and that B.C. was repeatedly asking him questions about sex. 5RP 148. Mr. Gonzales told his sister that he worried that something might have happened sexually between B.C. and a friend because B.C. had mentioned her friend Connor. 5RP 148.

One year later, in 2009, Ms. Gonzales made a second report to police when I.C. told her she had lied to her mother and police during the earlier investigation. 5RP 152. When asked if Mr. Gonzales "had sex" with her, I.C. said, "yes." 5RP 152.

B.C. testified that when she was 9 or 10, during her 4th Grade year, she spent the night with her uncle at a house where was “cat sitting.”² 4RP 22-23. The house had a hot tub and they decided to go in. 4RP 27. B.C. said she asked Mr. Gonzales if they could go “skinny-dipping.” 4RP 30. Mr. Gonzales said that would be inappropriate for him, but she could do that if she wanted. 4RP 30. B.C. then took off her bikini bottoms and got back in the hot tub. 4RP 30.

After a while, B.C. said that Mr. Gonzales told her to get out of the hot tub—that he wanted to show her something. 4RP 33. Mr. Gonzales told her to get dressed. 4RP 34. She put on her nightshirt and underwear. 4RP 34.

B.C. testified that when Mr. Gonzales came back into the room, he told her to take off her underwear and get on the bed. 4RP 35. She said he then put her in “the birthing position” with her legs bent back. 4RP 37. He explained something to her that involved putting his finger through his other circled fingers, but she said she did not remember what that was about. 4RP 40. B.C. said she told Mr. Gonzales she did not want to look and he then put a towel over her eyes. 4RP 37. Mr. Gonzales stood in front of her with his hands on her thighs for a short time. 4RP 38. Then,

² The “cat sitting house” was located in Kirkland. 4RP 190.

B.C. said he took the towel off her eyes and asked her to “pinky promise” not to tell anyone because he could go to jail. 4RP 40.

B.C. said that after the bed incident, she told her uncle she wanted to know what a man’s penis looked like. 4RP 41. She said Mr. Gonzales told her she could look at him in the shower and he would pretend not to notice. 4RP 41. Then, B.C. entered the bathroom while Mr. Gonzales was showering and pulled back the curtain to look at him. 4RP 42. B.C. said that she got nervous when Mr. Gonzales explained the male parts to her, without looking at her, using his finger to point out the parts. 4RP 42, 45. B.C. said she left the bathroom feeling uncomfortable. 4RP 46.

B.C. then watched a movie with Mr. Gonzales and slept over as planned. 4RP 47. The next day, he got her ice cream and took her home. 4RP 47.

Officer Sarah Finkel testified to her 2008 investigation of B.C.’s allegations. 5RP 14. Finkel testified that she had interviewed Mr. Gonzales about B.C.’s allegations. Mr. Gonzales told her that during the overnight visit, B.C. had instigated a conversation with him about sex, had been insistent about it, and had walked in on him while he was taking a shower. 5RP 37. The tape recorded police interview regarding B.C.’s allegations was played for the jury. 5RP 32. Officer Finkel spoke with I.C. in 2008. 5RP 39. I.C. told her that no one had ever touched her in the

She also testified that on another occasion at the Lake Stevens house, Mr. Gonzales rubbed his penis on the outside of her vagina. 4RP 83. She said he then gave her a bath and checked for hairs. 4RP 85.

I.C. also testified that when she stayed with Mr. Gonzales overnight at the Everett shop, he rubbed his penis on the outside of her bottom and sperm came out. 4RP 90. I.C. said on another occasion at the Everett shop, Mr. Gonzales had her suck on his penis and something came out that was “disgusting.” 4RP 92. I.C. also said that on a third occasion at the shop, Mr. Gonzales licked her vagina. 4RP 95. On re-cross, I.C. further alleged another incident where she said Mr. Gonzales had licked her vagina. 5RP 7.

According to I.C., she had only visited Mr. Gonzales at the cat sitting house twice. 4RP 99. She said on one occasion, he told her if she could suck his penis to a certain length, he would give her \$100. 4RP 97. On the other occasion, she said he rubbed his penis on her vagina while she was in the bed. 4RP 99. She thought she might have gone in the hot tub on one of these visits. 4RP 100.

I.C. testified that she remembered Mr. Gonzales telling her when she was living at the Lake Stevens house, that if she told anyone about it he would go to jail. 4RP 96. Later, I.C. testified that Mr. Gonzales had

threatened to kill her if she told. 4RP 99, 207. The first time I.C. reported this alleged threat was two months before trial. 4RP 207.

I.C. said that she had initially lied to her mom and the police when she told them nothing had ever happened. 4RP 104. She said her mom told her after she spoke with the police that B.C. had made allegations of sexual contact with Mr. Gonzales. 4RP 105. But she denied that she had ever spoken to her sister about what happened. 4RP 105. I.C. had two interviews with the Pierce County child interviewer, one year apart. 4RP 105-6. She admitted that her story had expanded considerably between these interviews. 4RP 105-6.

Dr. Naomi Sugar testified that when she examined I.C. in March of 2009, the exam was completely normal—there were no scars, lacerations or notches in I.C.’s intact hymen. 4RP 129, 141. Nor was there any injury to the anus. 4RP 163. I.C. never reported to Dr. Sugar that she felt any pain during the sexual incidents. 4RP 146. According to Dr. Sugar, if a child of ten or younger was fully penetrated by an adult male, there would be “acute injury.” 4RP 149. Therefore, if a child told her there was no pain, Dr. Sugar assumes that there was not actual penetration. 4RP 149. Furthermore, although there have been reports of the hymen healing, the younger the child, the less likely this would have happened without

medical evidence. 4RP 159. I.C. also never reported that Mr. Gonzales had ejaculated and did not report any digital touching. 4RP 164.

Jurors were not told that the evidence relating to B.C.'s allegations could only be considered for a limited purpose. Instead, the jury was instructed:

Evidence of a prior offense on its own is not sufficient to prove the defendant guilty of any crime charged in the Information. Bear in mind as you consider this evidence that at all times the State has the burden of proving that the defendant committed each of the elements of each offense charged in the Information. The defendant is not on trial for any act, conduct, or offense not charged in the information.

CP 31.

During closing argument, the prosecutor repeatedly focused on B.C.'s allegations to argue to the jury that this evidence bolstered I.C.'s credibility because it somehow showed that Mr. Gonzales had a "common scheme or plan, to talk to children about sex, to get them to be familiar with this subject of sex, so that he could go ahead and perpetrate this horrendous crime on them." 6RP 25. The prosecutor returned to this theme again and again:

But we put in the evidence of [B.C.] for you, so you could see this common scheme or plan at work. So when [I.C.] says to you when I was 6 years old he talked to me about sex . . . you can also relate that to the testimony you heard from [B.C.] and the defendant's own words.

6RP 26. The prosecutor said this evidence shows the type of man Mr. Gonzales is, “a man who talked to his nieces about sex.” 6RP 26.

Although the prosecutor told the jury to focus on the allegations made by I.C. that occurred in Snohomish County (the Lake Stevens house and the Everett shop), the prosecutor also argued that the jury should look at the allegations in King County at the cat sitting house to know “the extent.” 6RP 28. To sum it up for the jury, the prosecutor argued:

You were allowed to hear the evidence of [B.C.], which was 70% of this trial, for one reason and one reason alone, and the State lawfully can show you that. If the State wasn't able to show you that, the State would not have, because the judge would not have allowed you to hear it . . . It was to show you a common scheme or plan by the defendant. And if that common scheme or plan makes [I.C.]'s testimony more credible, so be it.

6RP 80-81.

The defense was a general denial and focused specifically on I.C.'s changing story and the lack of medical evidence. 6RP 51-55.

Mr. Gonzales now appeals.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT FOUND B.C.'S ALLEGATIONS ADMISSIBLE UNDER ER 404(B) AS EVIDENCE OF A COMMON SCHEME OR PLAN.

A defendant must only be tried for those offenses actually charged.

Therefore, evidence of other crimes must be excluded unless shown to be relevant to a material issue and to be more probative than prejudicial.

State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

The prosecution's attempts to use evidence of other crimes must be evaluated under ER 404(b), which reads:

(b) Other Crimes, Wrongs, or Acts. 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, absence of mistake or accident.

Admission of evidence under this rule is reviewed for an abuse of discretion. State v. Tharp, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980), aff'd, 96 Wn.2d 591, 637 P.2d 961 (1981). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The court abused its discretion in this case.

Although evidence of a "common scheme or plan" is a recognized exception to ER 404(b)'s ban on propensity evidence, before evidence can be admitted under this exception, it must satisfy four requirements: the prior acts must be (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common scheme or plan, (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). The State's burden to demonstrate admissibility is "substantial." State v. DeVincentis, 150 Wn.2d 11, 17, 20, 74 P.3d 119 (2003).

The testimony about B.C.'s allegations fails to satisfy the second and fourth prongs of the test.

- a. B.C.'s allegations did not demonstrate a common scheme or plan because they are dissimilar to I.C.'s story.

To prove a common scheme or plan, the other crime evidence must demonstrate "that the person 'committed markedly similar acts of misconduct against similar victims under similar circumstances.'" State v. Carleton, 82 Wn. App. 680, 683, 919 P.2d 128 (1996) (quoting Lough, 125 Wn.2d at 852). Stated another way, the "prior misconduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations." Id. at 684 (quoting Lough, 125 Wn.2d at 860).

This case does not bear the markers of similarity noted in other cases when validating a finding of "common scheme or plan." For

example, in State v. Scherner, 153 Wn. App. 621, 225 P.3d 248 (2009), affirmed by State v. Gresham, ___ P.3d ___, 2012 WL 19664 (2012), the court found sufficient evidence of a common scheme or plan because: 1) “the girls were of similar prepubescent age and size,” 2) “in each instance Scherner was a trusted relative or friend of the girl,” 3) “in each instance he molested the girl in bed, sometimes after she had gone to sleep,” and 4) “in each case the abuse involved rubbing the girl’s genital area or performing oral sex.” Scherner, 153 Wn. App. at 657.

By contrast, B.C.’s allegation of sexual interaction with Gonzales on one occasion does not satisfy the similarity requirement. There are many marked differences between her allegations and those of I.C. B.C.’s allegation was of one night in which she was displayed naked on the bed, but not touched, and in which she saw Gonzales naked in the shower, at her own instigation. B.C. testified that she was not penetrated or even touched sexually by Gonzales. She was allegedly 11 when this occurred.

By contrast, I.C. alleged repeated penetration by Gonzales over the course of years—from the age of 5 until the age of 11. I.C. alleged vaginal, anal, and oral intercourse. I.C. also alleged that she was given alcohol by Gonzales, while B.C. did not. I.C. testified that she and Gonzales were close for years and that he constantly bought her things and took her special places. B.C. did not have a close relationship with Mr.

Gonzales, only spent the night at his house once and never received special gifts. B.C.'s allegations bear little resemblance to I.C.'s allegations and this evidence does not show an overarching plan.

Moreover, no single incident described by I.C. in any way resembles the incident described by B.C. What the State has attempted to do in this case is to pick and choose random facts from I.C.'s statements to manufacture similarities where none exist. But the prosecutor's selective blindness has failed to produce evidence of a common scheme or plan in this case.

In fact, the allegations of B.C. and I.C. bear only superficial similarity. The prosecutor argued that B.C. and I.C. were the same age at the time of the alleged abuse. However, although B.C. was 11 at the time of the alleged event, which was within the five years of age alleged by I.C., unlike B.C., I.C. claimed the abuse stopped as soon as she was 11 and began when she was very young. The two were therefore not in the same stage of development at the time of the abuse. The only other similarity is that both girls are Mr. Gonzales' nieces. These are hardly the "marked similarities" to the charged offenses described by controlling caselaw. See State v. DeVincentis, 150 Wn.2d 11, 13, 74 P.3d 119 (2004) (while uniqueness is not required, "a unique method of committing the bad acts is a potential factor in determining similarity"). If the court allows the most

superficial of similarities to control in cases such as these, the exception to ER 404(b) will simply swallow the rule. There are not sufficient similarities here to establish a common scheme or plan and the evidence of B.C.'s allegations should not have been admitted. The trial court abused its discretion.

In nonetheless admitting the evidence, the trial court found that B.C.'s allegations were "evidence of a plan to sexually exploit children and a plan that basically had elements that collectively could be called grooming them in order to achieve that sexual exploitation." 1RP 21. Specifically, the court based its decision on several factual findings—use of the child's "curiosity about the body and sex," blindfolding, same location, and same general plan using sexual education and the hot tub. 1RP 21-22. The trial court's factual findings are in conflict with the record. The court abused its discretion in finding a common scheme or plan because its decision rested on these factual errors. See, e.g., Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 344-45, 858 P.2d 1054 (1993) (trial court abuses its discretion when its decision is based on facts unsupported by the evidence).

There is no evidence that Gonzales used "sexual education" to groom I.C. I.C. testified that when she was six, she remembered that

Gonzales explained sex to her on one occasion. 4RP 76. This occasion did not include any sexual contact. B.C., in contrast, described a conversation about sex where she asked questions and that later led to an actual physical demonstration.

Nor is there evidence to support the judge's finding that the sexual contact occurred in the same locations. B.C.'s allegation was of one night at the "cat sitting house." I.C. described multiple events over years with the charged events occurring at the Lake Stevens house and the Everett shop. I.C. described two uncharged sexual incidents at the "cat sitting house" among the many she alleged, once where she gave Mr. Gonzales oral sex and once where he did it to her.³ I.C.'s allegations span years at various locations, while B.C. describes one incident at one location. Therefore, the cat sitting house is not part of some plan—it is, at most, another incidental similarity.

There is also no evidence for the trial court's finding that the hot tub was used as part of a plan with both girls. There was a hot tub at the cat sitting house. B.C. testified that she asked to go skinny dipping in the

³ In addition, this conduct that I.C. described is itself ER 404(b) evidence, not the charged acts that are to be compared. The court's task in admitting evidence is to compare the other bad acts to the charged incidents. But the alleged incident I.C. describes at the "cat sitting house" is not a charged incident because the case was expressly limited to Snohomish County and the cat sitting house is in King County. Thus, these incidents should not be part of the trial court's analysis.

hot tub and then after they got out, they talked about sex. I.C. testified that she did go into the hot tub at the “cat sitting house,” but never related it to any sexual activity. Going in a hot tub is not an inherently sexual activity and nothing in I.C.’s testimony indicates that the hot tub was part of the sexual activity. There is no evidence that the hot tub was any significant part of any plan. Furthermore, again, the “cat sitting house” was not part of the charges involving I.C.

Thus, the court’s reliance on factual inaccuracies is also an abuse of discretion.

b. Admission of this highly inflammatory evidence unfairly prejudiced Gonzales.

Prior bad act evidence should be admitted only where “its probative value clearly outweighs its prejudicial effect.” Lough, 125 Wn.2d at 862. The trial court erred in this case when it found that the testimony about B.C.’s allegations met this standard. 1RP 23.

Gonzales was prejudiced because the jurors were presented with inflammatory and disturbing testimony of alleged sexual misconduct, which they would have been naturally inclined to treat as evidence of criminal propensity. The prejudice potential of prior bad acts evidence is at its highest in sex abuse cases. This is so because, as the Washington Supreme Court has recognized, “Once the accused has been characterized

as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise.” State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (citation omitted).

That is the prejudice here. Having been told that Gonzales had a bizarre sexual incident with one niece, the jurors were far more likely to convict him of the charged conduct with the other niece based on propensity. Moreover, in this case, the sheer volume of testimony regarding B.C.’s allegations overwhelmed the testimony of the charged conduct with I.C., making it very hard to keep the “other acts” evidence in perspective. Even the prosecution acknowledged this, admitting to the jury that B.C.’s allegations constituted 70% of the case presented. 6RP 80-81.

To compound the problem, this was a classic credibility case. I.C.’s testimony was the only evidence against Mr. Gonzales—the medical testimony showed no evidence of penetration or sexual abuse. The prosecutor argued to the jury this evidence shows what kind of man Mr. Gonzales is, that it shows the “extent” of his conduct, that it shows a plan and pattern of conduct, and that the jury should use the testimony about B.C.’s allegations to evaluate the credibility of I.C.’s allegations.

The prejudicial impact of the testimony about B.C.'s allegations must be weighed against the probative value of this evidence. The Supreme Court's decision in Lough is instructive on this point. In Lough, the defendant was charged with drugging and then raping his victim while she was unconscious. The State attempted to introduce evidence from four other women that over a ten-year period, Lough had raped them in a similar manner. The trial court allowed the women's testimony as evidence of a common scheme or plan to drug and rape women. Lough, 125 Wn.2d at 849-50.

On appeal, the Supreme Court considered three factors in deciding the probative value of the testimony clearly outweighed its prejudicial effect. These factors were discussed in State v. Krause, 82 Wn. App. 688, 919 P.2d 123 (1996), review denied, 131 Wn.2d 1007 (1997).

First, the court found the evidence highly probative because it showed the same design or plan on a number of occasions. Krause, 82 Wn. App. at 696. That is not true in Mr. Gonzales' case. As discussed above, the acts described by B.C. are very different from I.C.'s allegations and do not show a common design or plan. In Lough, there were five victims testifying to substantially similar acts, making the existence of a common scheme or plan significantly more likely. Here, there were only two alleged victims and very dissimilar acts alleged. Thus, unlike in

Lough, there is no common design or plan here to increase the probative value.

The second factor identified by the Lough court was the need for the ER 404(b) testimony because the victim was drugged during the attack and not entirely capable of testifying to the defendant's actions. Lough, 125 Wn.2d at 859. Only by hearing from all of the witnesses would a clear picture of events emerge. Krause, 82 Wn. App. at 696. Again, this is not true in Gonzales' case. I.C. was able to provide detailed testimony. She was 13 at the time of trial and therefore not subject to the inherent problems often associated with younger victims, such as an inability to recall events or fear of testifying in court. Compare Kennealy, 151 Wn. App. at 890 (noting young age of alleged victims when they testified supported admission).

The third factor identified in Lough was the repeated use of a limiting instruction. Krause, 82 Wn. App. at 696. In this case, as set forth in detail below, the instruction given the jury was not a proper limiting instruction for ER 404(b) evidence and did not limit the purpose for which the jury could consider the evidence. Moreover, even if a proper instruction had been given, "[c]ourts have often held that the inference of predisposition is too prejudicial and too powerful to be contained by a limiting instruction." Krause, 82 Wn. App. at 696 (citing cases).

Thus, application of the Lough factors shows the evidence in this case was not more probative than prejudicial.

- c. The erroneous admission of the testimony about B.C.'s allegations requires reversal.

Where prior misconduct evidence is erroneously admitted, reversal is required if “within reasonable probabilities . . . the outcome of the trial would have been different if the error had not occurred.” Carleton, 82 Wn. App. at 686. Without B.C.’s allegations, the jury would have had only I.C.’s testimony and her prior statements. B.C.’s allegations, which by the prosecutor’s own admission comprised more than half of the evidence presented at trial, surely had a significant impact on the jury’s evaluation of the charges. As the trial court itself recognized when referring to the evidence, **“it’s essential to show the crime occurred and without that you can’t show it.” 1RP 23.** This improperly admitted evidence made it impossible for Mr. Gonzales to receive a fair trial. Reversal is required.

2. THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE OF B.C.’S ALLEGATIONS UNDER RCW 10.58.090.

The Supreme Court held in State v. Gresham, __ P.3d __, 2012 WL 19664 (January 5, 2012) that RCW 10.58.090 is unconstitutional because it violates the separation of powers doctrine. Gresham, at 8-11.

Therefore, RCW 10.58.090 cannot be used in this case to justify the admission of the testimony about the B.C. incident.

3. THE TRIAL COURT ERRED BY FAILING TO GIVE THE JURY A LEGALLY CORRECT LIMITING INSTRUCTION FOR ER 404(B) EVIDENCE.

The prosecution proposed and the court gave the same flawed jury instruction for the evidence of B.C.'s allegations that was given in State v. Scherner, the companion case to State v. Gresham. CP 31; Gresham, at 7.

The instruction given to the jury in this case stated:

Evidence of a prior offense on its own is not sufficient to prove the defendant guilty of any crime charged in the Information. Bear in mind as you consider the evidence that at all times the State has the burden of proving that the defendant committed each of the elements of each offense charged in the Information. The defendant is not on trial for any act conduct, of offense not charged in the information.

CP 30.

In holding that this instruction was inadequate, the Supreme Court reasoned:

An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character.

Gresham, at 7. The instruction given in this case is legally insufficient because it did not tell the jury the limited purpose of the ER 404(b) evidence and did not inform them that it could not be used to show that the

defendant acted in conformity. Although the defense did not object to the State's flawed instruction, Gresham held that "the trial court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction." Gresham, at 7.

The error in this case was not harmless. Failure to give an ER 404(b) limiting instruction is harmless "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Gresham, at 8, citing State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). In Scherner's case, the Court held that the error was harmless because the remaining evidence, including the victim's detailed testimony and a recorded phone conversation of the defendant admitting the charged molestation, persuaded the court that the result was not materially affected. Gresham, at 8. That is not true in this case. Other than B.C.'s testimony and the testimony about her allegations, the only other evidence at trial is I.C.'s testimony. The medical evidence could not confirm sexual intercourse. Therefore, it cannot be said in this case that the failure to give the required limiting instruction was harmless, because it likely did have an impact on the verdict in this case. Thus, this error also requires the reversal of the convictions in this case.

4. GONZALES WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL FAILED TO OBJECT TO THE STATE'S MOTION TO ADMIT EVIDENCE OF B.C.'S ALLEGATIONS.

The Sixth Amendment right of a criminal defendant to have a reasonably competent counsel is fundamental and helps ensure the fairness of our adversary process. Gideon v. Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). This fundamental right to effective counsel ensures that a defendant's conviction will not stand if it was brought about as a result of legal representation that fell below an objective standard of reasonableness. Roe v. Flores-Ortega, 528 U.S. 470, 476, 120 S. Ct. 1029, 1034, 145 L. Ed. 2d 985 (2000).

To prevail, the defendant must show that his attorney was "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that the errors were so serious as to deprive him of a fair trial. In re Personal Restraint of Pirtle, 136 Wn.2d 467,487, 965 P.2d 593 (1998) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The first element is met by showing counsel's conduct fell below an objective standard of reasonableness. The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the case would have been different. Pirtle, 136

Wn.2d at 487 (citing In re Personal Restraint of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992)).

In this case, the State proposed the admission of evidence relating to B.C.'s allegations—evidence that comprised more than seventy percent of the trial testimony. Yet, defense counsel failed to object to this testimony, telling the court only that: “I am deferring to the court’s assessment of the evidentiary admissibility of the evidence under 404(b) and the balancing under 403.” 5/9/11 RP 3. Failure to object to improper testimony critical to the State's case may constitute ineffective assistance of counsel. See State v. Hendrickson, 138 Wn. App. 827, 831-33, 158 P.3d 1257 (2007) (failure to object to testimony that was inadmissible hearsay and violated the confrontation clause was ineffective assistance), aff'd, 165 Wn.2d 474, 198 P.3d 1029 (2009). Defense counsel failed here to object to critical testimony.

The testimony about B.C.'s allegations was extremely prejudicial to Gonzales' case, as argued extensively above. This evidence was not properly admitted under ER 404(b) or under RCW 10.58.090. There is no conceivable strategic reason for counsel's failure to object and make an argument to the trial court why this evidence was inadmissible under the rules of evidence and the statute. Thus, counsel's conduct falls below an objective standard of reasonableness.

If counsel had objected and argued against the admission of evidence, there is a reasonable probability that he could have persuaded the court to keep B.C.'s allegations out of the trial. At the very least, counsel would have preserved his challenges to the evidence and the inadequate limiting instruction without the necessity of an ineffective assistance claim. Without the evidence concerning B.C., the jury likely would have reached a different result. Therefore, the ineffective assistance of counsel in failing to object effectively deprived Mr. Gonzales of his right to counsel and requires the reversal of his convictions.

D. CONCLUSION

The trial court in this case erred by permitting the admission of unfairly prejudicial evidence of an unrelated incident with B.C. This evidence was improperly admitted under RCW 10.58.090, which has been held to be unconstitutional. And, this evidence did not meet the requirements of the ER 404(b) exception for a common scheme or plan and was therefore subject to the general exclusion of propensity evidence.

Furthermore, even if the court holds that the evidence may have been admissible as a common scheme or plan, the trial court erred by failing to properly instruct the jury on the limited purpose of this evidence, which prejudiced the verdicts.

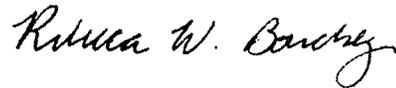
Finally, Mr. Gonzales was deprived of effective assistance of counsel at trial when his counsel failed to object to the evidence of B.C.'s allegations.

For all of these reasons, Mr. Gonzales respectfully asks the Court to reverse his convictions and remand for a new trial.

DATED: 2/15/2012

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 65468-3-1
)	
BRET GONZALES,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF FEBRUARY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

- [X] BRET GONZALES
DOC NO. 349579
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN , WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF FEBRUARY, 2012.

x *Patrick Mayovsky*

FILED
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STATE OF WASHINGTON
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