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COURT OF APPEALS
STATE OF WASHINGTON
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NO. 70820-1-1

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

STATE OF WASHINGTON, Respondent

v.

Jose Maldonado, Appellant

Appeal from the Superior Court of King County
The Honorable Douglass A. North, Department No. 30
Pierce County Superior Court Cause No. 11-1-00480-1-SEA

OPENING BRIEF OF APPELLANT

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A. **ASSIGNMENTS OF ERROR:**

1. The trial court abused its discretion when it admitted evidence pursuant to *ER 404(b)* that Mr. Maldonado had sexually touched another daughter in 1993-1994 to show common scheme or plan; evidence of intent; and evidence that the conduct was done for sexual gratification.
2. The trial court's decision to admit the *ER 404(b)* evidence was based on admittedly tenuous evidence from a recovered memory that did not reach the preponderance of evidence of standard and therefore was at the highest possible prejudice to Mr. Maldonado in this credibility case.
3. The erroneous admission of *ER 404(b)* evidence requires reversal of this conviction and a new trial because there is a reasonable probability that the outcome of the trial would have been different without the inadmissible evidence.
4. Trial counsel was ineffective for failing to request a limiting instruction regarding the State's evidence that Mr. Maldonado had sexually assaulted his step-daughter 13 years prior to the instant offense where that evidence in fact became the focus of the trial rather than the alleged victim's allegations.

5. The State failed to prove beyond a reasonable doubt that Mr. Maldonado committed the crime of first degree child molestation.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. A criminal defendant must be tried on the issues charged rather than collateral evidence.
2. A criminal defendant's constitutional right to effective assistance of counsel is denied when trial counsel fails to request a limiting instruction when the State's case consists chiefly of inadmissible *ER 404(b)* evidence.
3. The State failed to prove beyond a reasonable doubt that Mr. Maldonado committed the crime of first degree child molestation.

C. STATEMENT OF THE CASE:

(1) *Procedural History:*

The State charged Jose Maldonado in King County Superior Court No. 11-1-004480-1 SEA with first degree child molestation. RP1 4; CP 1-8. The case was tried before the Honorable Douglass North. CP 160. This was a retrial after the mistrial on November 19, 2012. CP 89. Trial began on June 27, 2013. CP 160.

The alleged victim in this case was GM, daughter of Maria and Jose Maldonado, who had married in 1992. RP2 9-10. At that time, her daughter, BV, was 5 years old. RP2 11. At time of trial, GM was 8 years old. RP2 10. BV was 21 years old at time of trial. RP2 11. BV is not the biological daughter of Mr. Maldonado. RP2 10.

(a) Hearing re: admission of ER 404(b) evidence.

The central issue at trial was the admission of **ER 404(b)** evidence concerning Mr. Maldonado's alleged abuse of his step-daughter BV. RP1 13, 14 .

The trial court held an evidentiary hearing to determine whether the State had established by a preponderance of the evidence that Mr. Maldonado had sexually assaulted BV. RP1 13, 14.

Jose and Maria Maldonado were married from 1993 to 2013. RP 7/15/13 47, RP2 18. They lived together before they were married. RP2 12-13. Maria brought her daughter BV into the relationship. *Id.*

In 1991, Mr. and Mrs. Maldonado and BV moved to Forks, Washington, where sometime thereafter BV told her mother that Mr. Maldonado had touched her inappropriately. RP2 12-13. Maria saw blood in BV's underwear. RP2 13. Maria reported the matter to police, who spoke to BV. RP2 13-14. She told police that the blood was from a bladder infection. RP2 44. Maria decided not to press charges, later claiming that

her decision was based on Mr. Maldonado's had threaten to take away their daughter IM because Maria was an illegal alien. RP2 15, 17. Mr. Maldonado denied BV's allegations. RP2 17. The Maldonados divorced in 2013. RP2 18.

The family subsequently moved to Aberdeen, Washington and Maria testified that she wanted to find out if her husband still was going in BV's bedroom during the night. RP2 21. In order to do so, she put a garbage can inside the door to her daughter's bedroom so that it would fall over if anyone entered her room in the night. RP2 22. She found the garbage can knocked over on several occasions. RP2 22. She never saw Mr. Maldonado go into BV's bedroom. *Id.* She later put a lock on the inside of that door. RP2 23.

The family moved to a second apartment in Aberdeen where BV had another bedroom by herself. R2 23-24. Maria continued to have suspicions about Mr. Maldonado so she sprinkled baby powder around BV's bed so that she could check for footprints in the morning. RP 24-25. She claimed to have found the baby powder disrupted on "a lot" of occasions. RP2 22-25. She never saw Mr. Maldonado in BV's bedroom. RP2 27. She never saw Mr. Maldonado in BV's bedroom. RP2 27.

During the time that the family lived in Aberdeen, including almost a year-long period when Mr. Maldonado worked in Alaska, BV did not tell Maria that Mr. Maldonado had had sexually touched her. RP2 34.

BV also testified at the hearing to determine the admissibility of this evidence. RP2 45. She testified that she only “somewhat” remembered Mr. Maldonado touching her when the family lived in Aberdeen. RP2 48. She remembered being afraid of him and that her mother would do things to prevent him from coming in at night. RP2 48. She remembers telling her mom about him coming into her room at night and also in the early morning. RP2 48.

BV said that Mr. Maldonado touched her the same way he had in Forks. RP2 49. He removed her blankets and whatever she was wearing, removed her undergarments, and then put his hands underneath her underwear, applied pressure and rubbed. RP2 49. She claimed he put his fingers against her vagina. RP2 49.

However, BV said that Mr. Maldonado never touched her in Aberdeen. RP2 54. She reported it to police in 2006 after she became enraged that Mr. Maldonado had taken her dog to PAWS where the dog had been put down. RP2 54; RP4 102-106. She did not know when she remembered the touching. RP2 54.

BV stated in the defense interview on April 40, 2012, that she hates Mr. Maldonado. RP2 55.

She confirmed that when she talked to police in Aberdeen in 2006 she did not tell them that any touching had happened in Aberdeen. RP2 59.

This is because she did not remember this in 2006. RP2 659.

Maria spoke to Child Protective Services (CPS) in 2000 about an incident when Isabel had been spanked. RP2 41. She also spoke to them again in 2006. RP2 41. The second event was sometime after the family dog had been taken to PAWS. RP2 42. On neither of these occasions did Maria mention her suspicions that Mr. Maldonado had inappropriately touched BV. RP2 42.

After argument, the court agreed with the defense that the State had failed to meet its burden to prove by a preponderance that anything had happened in Aberdeen. RP2 69. The court relied on BV's statement that nothing happened in Aberdeen. RP2 69.

The court subsequently reconsidered its ruling, apparently persuaded by the State's argument that Maria was so concerned about possible sexual abuse that she put baby powder around BV's bed so that she could see if there were footprints left there in the night. RP2 72. BV later said that her memory was later "triggered" when she remembered the

baby powder and the footprints. *Id.* However, BV never testified regarding any acts of actual touching.

Despite its initial concern about BV's "recovered memory", the court reconsidered and found that the State had proved the prior abuse of BV by a preponderance of the evidence. RP2 72-73;74. The court acknowledged that BV's memory was "tenuous." RP2 73.

Before admitting evidence of Mr. Maldonado's prior sexual misconduct, the trial court found that there was a common scheme or plan in terms of the manner of touching, that is, being done with a hand under the underwear in the child's bedroom which the mother is at work or making a meal, that it is done while the children are about the same age, and the children were daughters, GM the biological daughter and BV in the position of a daughter. RP1 11.

The court also ruled admissible evidence regarding Ms. Gomez's reasons for not reporting the touching while living in Forks, that is, she feared deportation. RP2 81.

The court also found that there was evidence of a common scheme of plan in terms of the manner of touching, being done with a hand, under the underwear, when the mother was either at work or making a meal, when the children are about the same age. RP 11. The court further found that although BV was not the biological daughter of Mr. Maldonado, she

was in the position of being a daughter, as is the victim GM in the instance case. RP1 11. The court thus also held this evidence admissible at trial.

RP1 11.

Prior to her trial testimony while she waited to be called as a witness, the prosecutor gave BV pretrial transcripts as well as a copy of her interview with Det. Ishimitsu to review. RP5 23. '

During trial, after cross-examination, and immediately before BV resumed the witness stand, the prosecutor gave her the pretrial transcript of her testimony to review to assist her in responding to the impeachment questions of defense counsel. RP5 22. She reviewed the transcripts because the prosecutor told her that she would go over them in court that day. RP5 33. The prosecutor wanted her to do this because the defense asked her questions that confused her. RP5 34.

On July 16, 2013, the jury convicted Mr. Maldonado as charged. RP 7/16/13 193-194; CP 129A.

The parties appeared before the court for sentencing on August 23, 2013¹. Mr. Maldonado had an offender score of zero and so the applicable standard range was 51 to 68 months. RP 6. The State sought the high end of the standard range because of the father-daughter relationship, the

¹ The sentencing report of proceedings is a single volume from taped proceedings on August 23, 2013. The appellant cites to it by page numbers only as it all occurred on one day.

breach of trust between the daughter and her father, and also because it is “the ultimate breach of trust that a husband can do to a wife.” RP 7. The State also recommended the high end because Mr. Maldonado “is essentially an untreated sex offender.” RP 9.

The court permitted the interpreter to read a victim impact letter from Maria that spoke to her allegations of Mr. Maldonado’s physical and verbal of her and its profound effect, the effect on her of learning that he had molested her daughter BV, the effect on her daughter IM, and GM’s fears that she would be kidnapped by her father. RP 10-14.

IM, not the charged victim in this case, also addressed the court. She described how she was affected by the case and how she has thought about suicide because she cannot forget it. RP 18-19.

Mr. Maldonado exercised his right to allocution. RP 20. He told the court that he had always loved and cared for his family. He denied committing the charged crime. *Id.*

The court imposed the high end of the standard range with the maximum term to be determined by the Indeterminate Sentencing Review Board. RP 21. The court also imposed the other standard conditions and legal/financial conditions. *Id.*, CP 267-277. The court granted a sexual assault protection order prohibiting contact with GM with an expiration date of 2099. RP 21; CP 279-280.

Mr. Maldonado timely filed this appeal. CP 301-301.

(2) Testimony:

On January 10, 2011, at the request of Seattle Police Department [SPD] Detective Ishimitsu, set up an interview with GM. RP4 20, 25, 26. BV, GM's older half sister, had reported the alleged abuse of GM to police by walking into the police station shortly before this date. RP4 19-20, 59, 60-61. BV was the complainant. RP4 61-62. BV had been taking care of GM since December 27, 2010, and the alleged disclosure reportedly was made to BV on December 27, 2010. RP4 61.

Claudia Azar, a certified Spanish interpreter, assisted with that interview. RP4 35, 45. She determined that GM used the Spanish word "colita" for her bottom. RP4 52.

The detective never went to the residences in Renton or Seattle where the alleged touching occurred. RP4 68

BV testified that when she lived in Forks with her mother, Mr. Maldonado, and her sister IM, Mr. Maldonado on numerous occasions came into her bedroom and touched her vagina. RP4 89, 90. Mr. Maldonado went to Alaska for a year and when he returned, he lived with his family in Aberdeen. RP4 92. BV claimed that there was no touching at first in Aberdeen but that later there was intermittent touching, depending on where the family lived. RP4 93, 94, 96, 97, 98, 99.

However, BV told Det. Ishimitsu that after Mr. Maldonado returned from Alaska she always had locks on her door and that there was no sexual touching. RP4 145.

GM was born in 2005. RP4 101. BV was 19 years old. RP4 100.

In 2006 BV reported to police that Mr. Maldonado had sexually touched her when she was a child. RP4 102. She made the report after they had a quarrel about the dog. RP4 102.

BV's dog previously had run away and twice picked up by Animal Control RP 4 165. The dog was a problem in the neighborhood, getting loose, chasing cars, chasing people. RP4 166. BV had responsibility for the dog and she did not appear to be taking it seriously. RP4 166-167.

Mr. Maldonado in fact did take the dog to PAWS. RP4 167. She was enraged because she believed that Mr. Maldonado was responsible for having her dog put to sleep at PAWS and so she reported to police that he had sexually touched her as a child. RP4 102-106.

After that quarrel she went to the Forks Police Department to make a report about the alleged touching. RP4 141. That police department told they did not have a viable case. RP4 141. So then BV went to the Aberdeen police. RP 141.

After that quarrel, Mr. Maldonado did not allow BV to be around him. RP4 146.

Four years later BV walked into SPD, as noted at the beginning of the section, and alleged the Mr. Maldonado had sexually touched GM. RP4 128. BV later told GM that Mr. Maldonado had touched her. RP4 134 . She could have told her about this before GM ever talked to Det. Ishimitsu, the child interviewer, or the medical staff at Harborview. RP4 145. BV did not know when this conversation happened. RP4 136.

BV never discussed GM's allegations with her mother. RP4 159. After GM told BV about the touching, she stayed with BV. RP4 160.

GM testified that Mr. Maldonado touched her privates or "colita" when they lived in Seattle. RP5 47, 54. She said she did not remember what he used to touch her private part. RP5 50. She said it felt "a little bit weird." RP 50. GM said her dad fell asleep after he did this. RP5 50.

GM told her mother that these things happened in Seattle. RP5 105. When she told her mother, one of her other daughters, BV or IM, was in the car with them. RP5 112-113. Maria may have told GM that BV said that Mr. Maldonado had touched her private parts. RP5 108, 112-113.

She would have said this to explain why BV was not allowed to visit their house. RP5 108.

GM told her sisters BV and IM At BV's house. RP5 51. She did not tell her mom because, for some reason she did not know, she did not think her mother would believe her. RP5 51. GM also said that she told

her mother about it after GM went to Aberdeen at Christmas in 2010. RP5 108-109.

IM testified that while at BV's house GM told her that Mr. Maldonado squeezed her leg really hard and also touched her under her underwear. KP5 145-146. GM said this happened one time. RP5 17. GM said this happened while they watched television. RP5 148.

GM denied talking to a doctor about what she said happened. RP5 53. She remembered talking to a woman during an interview that was video recorded. RP5 53.

During the forensic interview, GM stated that BV had told her "not to tell nobody." RP 7/10/13 67. The interviewer did not follow up on GM's statement: "I know what she was telling me right there was BV had told her not to tell anybody that he had hurt her." RP 7/10/13 90. The detective who watched the interview did not follow up on what BV had said. *Passim*.

The forensic interviewer did not ask which came first – that BV told GM that Mr. Maldonado had touched her "colita" or that GM told BV that her dad had touched her "colita"? RP 7/11/13 191. The forensic interviewer admitted "it was information that I would have like to have, yes." RP 7/11/13 191.

When GM had testified at the first trial, she denied that Mr. Maldonado had touched her privates or “colita.” RP5 57. She had said only that he squeezed her leg and pinched her. RP5 57.

IM contended that when she was 12 years old, she heard her father admit to her mother that he had touched BV one time.’ RP5 154.

IM has never alleged that Mr. Maldonado touched her inappropriately. RP5 159.

Mr. Maldonado's Testimony

Mr. Maldonado testified at his trial. RP 7/15/13 46. Mr. Maldonado married Maria in 1993. RP 7/15/13 47. This was his only marriage. *Id.* He and Maria have two daughters, IM and GM, in addition to BV, whom Maria brought into the marriage. *Id.*

In 1993, Mr. Maldonado used drugs and alcohol to the extent that he sometimes experienced blackouts. RP 7/15/13 50-51. On one occasion he went into BV’s bedroom and inappropriately touched her. RP 7/15/13 51. He touched her on top of her clothes. RP 7/15/13 51.

Difficult as it was, he admitted his conduct to Maria. RP 7/15/13 52. He also admitted this to the local police. *Id.* They did not charge him with a crime. RP 7/15/13 53.

The Maldonados went to CPS in Vancouver, Washington. *Id.* They underwent an evaluation where Mr. Maldonado acknowledged what he had done. *Id.* CPS allowed the family to stay together. *Id.*

Shortly thereafter Mr. Maldonado took a higher paying job in Alaska. *Id.*

When he returned, he joined the Jehovah Witnesses with his wife and family. RP 7/15/13 54. He then completely stopped using alcohol and drugs. RP 7/15/13 55. He learned to treat everyone with love and respect. RP 7/15/13 56. He became a better father. *Id.* He recalled the incident with BV in Forks and asked for her forgiveness. She was about 16 at that time. RP 7/15/13 57.

In 2006 Mr. Maldonado took BV's dog to PAWS because the dog caused chronic problems in the neighborhood and BV would not take appropriate care of it. RP 7/15/13 61-62. The City of Aberdeen Animal Control came to the house and issued a warning that the dog needed to be tied up. RP 7/15/13 62-63. Mr. Maldonado discussed this warning with Maria and BV who agreed to take better care of the dog but, in fact, did so only for a short time. RP 7/15/13 64. Mr. Maldonado told them that the dog would have to be tied up all the time or be taken to the pound. RP 7/15/13 64-65.

On January 6, 2006, Mr. Maldonado could not afford to pay the fine for the dog running loose and so he took the dog to PAWS. RP 7/15/14 65-66. BV figured out what had happened that afternoon and Mr. Maldonado confirmed what he had done. RP 7/15/13 66.

Both BV and Maria became very upset. *Id.* They went to the pound the next day. RP 7/15/13 66.

Mr. Maldonado was preparing to go to a meeting when Maria, BV, and her boyfriend Christian entered the house. RP 7/15/13 67. They were all upset. *Id.* Christian grabbed Mr. Maldonado's tie and pulled him into the living room where a physical struggle ensued. *Id.* BV joined in. *Id.*

They told Mr. Maldonado he could not leave until the police got there because he needed to tell them why he had taken the dog to the pound. RP 7/15/13 67.

Mr. Maldonado broke free and ran out of the house to his neighbor's residence. RP 7/15/13 68. Shortly thereafter he went home because he saw police in front of his home. RP 7/15/13 68.

The rest of his family then left the residence and Mr. Maldonado did not know what was going on. RP 7/15/13 69. Mr. Maldonado learned that something was happening with CPS and he called them several times. *Id.* Mr. Maldonado told the CPS caseworker that he had touched BV one time back in 1992. RP 7/10/13 56; RP 7/15/13 70.

After the family reunited they moved to Seattle in 2006. RP 7/15/2006. RP 7/15/13 71. Mr. and Mrs. Maldonado and GM lived together first in a house. RP 7/15/13 74. They then moved to very small apartment while they saved money for a house of their own. RP 7/15/13 74, 89-91.

During that time GM suffered from some pain in her calf. RP 7/15/13 91-92. Mr. Maldonado on two or three occasions massaged her leg with baby oil to help alleviate the pain. *Id.* Maria had suggested this treatment. *Id.*

Mr. Maldonado never touched GM's private parts, either purposefully or accidentally. RP 7/15/13 92.

D. LAW AND ARGUMENT:

1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED EVIDENCE PURSUANT TO ER 404(B) THAT MR. MALDONADO HAD SEXUALLY TOUCHED ANOTHER DAUGHTER IN 1993 TO SHOW COMMON SCHEME OR PLAN; EVIDENCE OF INTENT, AND EVIDENCE THAT THE CONDUCT WAS DONE FOR SEXUAL GRATIFICATION.

Although the appellate court reviews the admission of *ER 404(b)* for abuse of discretion, a trial court must always begin with the presumption that evidence of prior bad acts is inadmissible. *ER 404(b)*

prohibits admission of evidence to prove a defendant has a criminal propensity. *State v. DeVincentis*, 150 Wn.2d 11, 16, 74 P.3d 119 (2003).

Erroneous admission of evidence in violation *ER 404(b)* of is analyzed under the nonconstitutional harmless error standard—that is, whether there is a reasonable probability that, without the error, “the outcome of the trial would have been materially affected.” *State v. Gower*, 179 Wn.2d 851, 854; 321 P.3d 1178 (2014), quoting *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

Courts must exercise particular caution in sex cases because the potential for prejudice from admitting prior acts is “at its highest” in sex offense cases. *Gower*, 179 at 857 citing *State v. Gresham*, 173 Wn.2d 405, 413, 269 P.3d 207 (2012), quoting *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). Moreover, the analysis does not turn on whether there is sufficient evidence to convict without the inadmissible evidence. *Id.* Rather, the question is whether there is a reasonable probability that the outcome of the trial would have been different without the inadmissible evidence. *Gower*, at 433-434.

ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be

admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence of prior misconduct may be admitted where “the prior acts are (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 at 852.

In this case, the trial court erred when it held that the State had proved by a preponderance of the evidence that the prior acts occurred.

A common scheme or plan “may be established by evidence that the defendant committed markedly similar acts of misconduct against similar victims under similar circumstances.” *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). In such circumstances, the evidence is admissible “because it is not an effort to prove the *character* of the defendant”; rather, “it is offered to show that the defendant has developed a plan and has again put that particular plan into action.” *Gresham*, 173 Wn.2d at 422. Although “the prior act and charged crime must be markedly and substantially similar, the commonality need not be ‘a unique method of committing the crime.’” *Gresham*, 173 Wn.2d at 422 (quoting *DeVincentis*, 150 Wn.2d at 21).

Evidence of a single plan that is used “repeatedly to commit separate, but very similar, crimes,” is admissible to show a common scheme or plan if it contains common features and a substantial degree of similarity such that the acts can be “explained as caused by a general plan of which [the charged crime and the prior misconduct] are the individual manifestations.” *DeVincentis*, 150 Wn.2d at 19-20 (internal quotation marks omitted) (quoting *Lough*, 125 Wn.2d at 856). In such a case, “the similarity is not merely coincidental, but indicates that the conduct was directed by design.” *Lough*, 125 Wn.2d at 860. There is no evidence of such a common scheme or plan in this case.

Before admitting evidence of Mr. Maldonado’s prior sexual misconduct, the trial court found that there was a common scheme or plan in terms of the manner of touching, that is, being done with a hand under the underwear in the child’s bedroom which the mother is at work or making a meal, that it was done while the children were about the same age, and children were daughters, GM the biological daughter and BV in the position of a daughter. RP1 11.

Of course, the trial court’s findings here were not supported by the record. The alleged touching of GM did not occur in the child’s bedroom as she had no bedroom. RP5 60; 102-103. When GM watched television,

they were in the bed. RP5 46. They liked to watch “Los Peluches”, a funny show. RP 5 46-47. GM said that on 3-5 occasions, her dad would touch her private part and it “felt a little weird.” RP5 50. At trial, she did not know whether the touching was over the clothes or under the clothes. RP 42. Afterwards her dad feel asleep. RP 48-49. GM was 5 at the time of the alleged abuse. CP 1-8, 87-88; RP5 41.

In admitting the acts of alleged sexual abuse of BV in Aberdeen, the trial court abused its discretion because it admitted acts that BV could not even remember. She had at best a recovered memory which the trial court described as “tenuous.” RP 2 73. Further, BV claimed that there was no touching at first in Aberdeen but that later there was intermittent touching, depending on where the family lived. RP4 93, 94, 96, 97, 98, 99. BV gave no testimony about where she lived when the touching occurred and only a vague recollection of what might have happened. This recollection had been triggered during the defense interview when counsel asked about “the place when I (she) talked about the baby powder.” RP2 55. Although BV previously had denied any touching after the family moved from Forks, after her recollection was refreshed she claimed to remember events with such frequency that there would have been 150-200 incidents. RP2 76.

Given this evidence, the trial court abused its discretion when it found that the State had proven by a preponderance that BV's molestation in Aberdeen occurred and that, even assuming those acts had been proved, the prior misconduct and the alleged molestation of GM were "markedly similar acts of misconduct against similar victims under similar circumstances." Thus, the trial court erred when it admitted the evidence as common scheme or plan.

Likewise, the trial court erred when it admitted the evidence for proof of intent as intent is not an issue in child molestation cases. This so because, for purposes of *ER 404(b)* analysis, criminal intent flows from the act of touching for sexual gratification itself. *State v. Ramirez*, 46 Wn. App. 223, 730 P.2d 98 (1986) (for purposes of *ER 404(b)* analysis, commenting that criminal intent flows from the act of touching for sexual gratification itself); *State v. Lough*, 70 Wn. App. 302, 326, 853 P.2d 920 (1993) ("[G]uilty knowledge and criminal intent would always be present in cases involving admitted touching of a child for purposes of sexual gratification."), *aff'd*, 125 Wn.2d 847, 889 P.2d 487 (1995).

Likewise, in this case, if the jury found that the State had proved the touching beyond a reasonable doubt, there was no claim of accident or caretaking. "Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching

was for the purpose of sexual gratification.” *State v. Powell*, 62 Wn. App. 914, 917, 815 P.2d 86 (1991). However, “we require additional proof of sexual purpose when clothes cover the intimate part touched.” *State v. Harstad*, 153 Wn. App. 10, 21, 218 P.3d 624 (2009). Rubbing of an intimate area is sufficient additional proof to establish a sexual purpose. *Harstad*, 153 Wn. App. at 22.

BV could not even remember the touching until years after the event and, ironically because of reminders received in the defense interview, even then she could recall specific details. Based on this poor, tenuous recollection, the trial court erred when it found by a preponderance that the State had proved that the prior abuse occurred. Further, even assuming that the trial court’s finding could be affirmed, the trial court’s admission of such evidence was an abuse of discretion.

2. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A LIMITING INSTRUCTION FOR THE ER 404[b] EVIDENCE.

To prevail on an ineffective assistance of counsel claim, the defendant must show both (1) that defense counsel's representation was “deficient,” and (2) that the deficient representation prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d

1260 (2011). The failure to show both prongs ends the inquiry. *Grier*, 171 Wn.2d at 33. Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have been different. *Grier*, 171 Wn.2d at 34.

The appellate courts give great deference to trial counsel's performance and begin with a strong presumption that counsel's performance was reasonable. *Grier*, 171 Wn.2d at 33. A claim that trial counsel provided ineffective assistance does not survive if trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *Grier*, 171 Wn.2d at 33. To rebut the strong presumption that counsel's performance was effective, "the defendant bears the burden of establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 42 (emphasis omitted) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

In this case, where the *ER 404(b)* played such a central role in the State's case, there is no conceivable legitimate tactic explaining counsel's performance. Although the trial court has no duty to give an *ER 404(b)* limiting instruction sua sponte the trial court *must* give one upon

the defendant's request. *Gresham*, at 424; *State v. Russell*, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011).

Such an instruction is essential to prevent against misuse of *ER 404(b)* evidence. Thus, 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. *Cf. Lough*, 125 Wn.2d at 864.

In the instant case, trial counsel should have recognized that a limiting instruction was imperative. This is so because absent such an instruction, the jury could have considered BV's testimony for any purpose, including as improper propensity evidence, and there was no additional "overwhelming evidence." The only evidence here was GM's equivocal about what happened at the Bozeman Street apartment. And without a limiting instruction, it is unlikely that the jury would have understood that BV's testimony could be considered only for purposes allowed under *ER 404(b)*, such as common scheme or plan or intent.

Because this case hinged on GM's credibility, the fact there was little evidence other than her statements, and the potentially prejudicial nature of BV's testimony because it involved inappropriate physical contact with a child, trial counsel's failure to request a limiting instruction

was error that within reasonable probabilities affected the outcome of the trial. Had trial counsel proposed this instruction, the trial court would have been required to give it. This court cannot determine, within reasonable probabilities, that had the error not occurred the outcome of the trial would have been materially different. Thus, the failure to request to request a limiting instruction was not harmless error.

3. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. MALDONADO COMMITTED THE CRIME OF CHILD MOLESTATION IN THE FIRST DEGREE AND THIS COURT THEREFORE MUST DISMISS THIS CASE.

In evaluating the sufficiency of the evidence, the appellate court reviews the evidence and all reasonable inferences that can be drawn from it in the light most favorable to the State. *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010). The court determines whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Drum*, 168 Wn.2d at 34-35. Circumstantial and direct evidence are equally reliable, and we defer to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

An individual is guilty of first degree child molestation if he has “sexual contact with another who is less than twelve years old and not

married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.” ***RCW 9A.44.083(1)***.

GM reportedly first told BV about the touching. In fact, BV, GM’s older half sister, had reported the alleged abuse of GM to police by walking into the police station shortly before this date. RP4 19-20, 59, 60-61. BV was the complainant. RP4 61-62. BV had been taking care of GM since December 27, 2010, and the alleged disclosure reportedly was made to BV on December 27, 2010. RP4 61. BV did not like Mr. Maldonado for many reasons and, after he took her dog to PAWS where it was put down, reported sexual abuse against him. RP2 54, RP4 102-16.

GM testified that Mr. Maldonado touched her privates or “colita” when they lived in Seattle. RP5 47, 54. She did not remember what he used to touch her private part. RP5 50. She said it felt “a little bit weird.” RP 50. GM said her dad fell asleep after he did this. RP5 50.

IM testified that while at BV’s house GM told her that Mr. Maldonado squeezed her leg really hard and also touched her under her underwear. RP5 145-146. GM said this happened one time. RP5 17. GM said this happened while they watched television. RP5 148.

During the forensic interview, GM stated that BV had told her “not to tell nobody.” RP 7/10/13 67.

This testimony is consistent with the testimony at the first trial. When GM had testified at the first trial, she denied that Mr. Maldonado had touched her privates or “colita.” RP5 57. She had said only that he squeezed her leg and pinched her. RP5 57.

Based on this testimony, there was sufficient to find that Mr. Maldonado had “sexual contact” with GM. RCW 9A.44.010(2) defines “sexual contact” as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” This is so because it is by no means clear whether there was any touching, whether any such touching was on the leg or somewhere else, where the touching was a squeeze, a pinch or something else. Thus, the State failed to prove the element of “sexual contact.”

If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *Id.*

Therefore, Mr. Maldonado is entitled to reversal and dismissal with prejudice.

E. CONCLUSION:

For the foregoing reasons, Mr. Maldonado respectfully asks this court to grant the relief requested herein.

RESPECTFULLY SUBMITTED this 28th day of July, 2014.



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CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws Of the State of Washington that the following is a true and correct: That on this date, I delivered via ABC- Legal Messenger a copy of this Document to: King County Prosecutor's Office, Room W554, 516 Third Avenue Seattle, WA 98104 and to Jose Maldonado Washington Corrections Center, DOC#369097 P.O. Box 900, Shelton, WA 98584-0974

7-28-14



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